

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 KRIEGER
DISTRICT COURT NO. 1:05-cr-00545-MSK

**NACCHIO'S RENEWED EMERGENCY APPLICATION FOR RELEASE
PENDING SUPREME COURT RESOLUTION OF A PETITION FOR
CERTIORARI AND MOTION FOR A STAY OF THE DISTRICT COURT'S
ORDER TO SURRENDER**

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Dated: April 8, 2009

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At this Court's invitation, Joseph P. Nacchio renews his request for an order continuing release pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), and Federal Rule of Appellate Procedure 9, pending the Supreme Court's disposition of Nacchio's petition for certiorari, which was filed with the Supreme Court on March 20, 2009. Yesterday, on April 7, 2009, the district court found that Nacchio is not a flight risk or danger, but denied Nacchio's application for bail on the grounds that: (1) Nacchio did not establish that his petition for certiorari is not for the purpose of delay; and (2) Nacchio's petition does not raise a substantial question likely to result in reversal or a new trial. The district court, by separate order, ordered Nacchio to surrender to the custody of the Bureau of Prisons by noon on Tuesday, April 14, 2009.

As explained in Nacchio's March 5 application filed with this Court and in his petition for certiorari (which speaks for itself), the petition raises several "substantial question[s]" that would likely result in a reversal of the conviction if Nacchio were to prevail on the merits. 18 U.S.C. §3143(b)(1)(B); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985). The district court's determination that there is no substantial question is not entitled to any weight. Nor is her holding that Nacchio failed to establish that his petition is not for the purpose of delay. That conclusion, which was never even advanced by the government, is necessarily intertwined with her mistaken view of the merits and rested on a misunderstanding of the undisputed facts.

As detailed below, the parties have now fully briefed the merits of Nacchio's bail application (*see* U.S. Response to Motion for Reconsideration, attached as Exhibit A and Nacchio Reply Brief in Support of Motion for Reconsideration, attached as Exhibit B).

Given that the parties have thoroughly briefed the issues, we respectfully request that this Court dispense with a briefing schedule and rule on the basis of this motion and the exhibits attached thereto.

We further request that this Court stay the district court's order requiring Nacchio to surrender by April 14 in order to permit this Court and, if necessary, the Supreme Court sufficient time to consider this motion. *See infra* 16-17. In the event this Court denies Nacchio's request for continued release pending the Supreme Court's disposition of his petition for certiorari, Nacchio will seek relief from Justice Breyer, the Circuit Justice for the Tenth Circuit, within 48 hours of any denial by this Court. We respectfully request that this Court grant a stay of Nacchio's surrender date until noon one week after any denial of bail by the Supreme Court.

I. PROCEDURAL HISTORY

The *en banc* court issued its decision on February 25, 2009. Only eight days later, on March 5, 2009, Nacchio filed a substantive motion in this Court pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), seeking bail pending Supreme Court action on a petition for certiorari.¹ On March 10, this Court issued an order denying the motion "without prejudice to renewal subject to initial submission of that application to the United States District Court for the District of Colorado."

In a matter of hours, Nacchio filed in the district court a motion, substantively

¹ Rule 23.3 of the Supreme Court's Rules states that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."

identical to the one filed in this Court, for an order continuing release under §3143(b) pending the resolution of a petition to the Supreme Court for a writ of certiorari. (Exhibit C, attached hereto.)

On March 11, the district court issued an order denying that motion as premature. (Exhibit D, attached hereto.) The district court held that “[b]y its express terms, 18 U.S.C. §3143(b) allows consideration of a bail request only after the petition for certiorari has been filed.... According to the Motion, no petition has yet been filed. Therefore the Motion must be denied as premature.” *Id.* at 1-2.

On March 13, Nacchio filed an Emergency Motion for Reconsideration (Exhibit E), urging the district court to consider his bail application on the merits and noting that the Supreme Court and courts of appeal have consistently ruled on the merits of applications for release pending action on a petition for certiorari under §3143(b) prior to the filing of a petition for certiorari. In addition, Nacchio requested that the district court stay its order of surrender pending its consideration of his application for release (and up to 14 days for any necessary appellate review by this Court and the Supreme Court) on the condition that Nacchio file his petition for certiorari on Friday, March 20. March 20 was approximately three weeks after this Court’s *en banc* decision rather than the *ninety days* permitted by Supreme Court Rule 13. Nacchio further assured the district court that he would seek appellate review in this Court of any denial of the bail application within 48 hours.

On March 13, the district court set a briefing schedule on the motion for reconsideration, giving the government until 5 P.M. on Monday, March 16 to file its

response and ordering Nacchio to file his reply by 5 P.M. on Tuesday, March 17. (Exhibit F, attached hereto.) The government timely filed its response (Exhibit A, attached hereto), which notably declined to defend the district court's initial conclusion that the language of §3143(b) precludes bail until a petition for certiorari has been filed. The government fully briefed the issues and expressly urged the district court to resolve the bail issue on the merits. Nacchio filed his reply brief in support of his emergency motion for reconsideration (Exhibit B, attached hereto) the next day, and again urged the district court to consider the merits of his bail application. He reiterated his request for a stay of the district court's surrender order to permit orderly resolution of the bail pending certiorari issue, including some opportunity for review by this Court and the Supreme Court, before his March 23 surrender date.

On March 19, the district court held a hearing on the pending motions and issued an order staying Nacchio's surrender date (Exhibit G, attached hereto) to give the court sufficient time to consider the bail application conditional upon Nacchio filing his petition for certiorari on the following day, March 20.

Nacchio filed his petition with the Supreme Court on March 20 (Exhibit H, attached hereto), mooted the court's concern that his application for bail was premature. On March 20, the district court entered an order stating that the condition of its March 19 order was satisfied and staying Nacchio's surrender date until further order of that court. (Exhibit I, attached hereto.)

On April 7, the district court denied Nacchio's request for bail, finding that he did not establish that his petition was not for the purpose of delay and that the petition does

not raise a “substantial question” under 18 U.S.C. §3143(b). (Exhibit J, attached hereto.)

Consistent with this Court’s instructions in its March 10 order, Nacchio hereby renews his request for an order continuing release pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), and Federal Rule of Appellate Procedure 9, pending the disposition of a petition for a writ of certiorari to the Supreme Court.

II. NACCHIO IS NOT A DANGER OR A FLIGHT RISK

The district court found that Nacchio is not a flight risk or danger and the government has never claimed otherwise.

III. NACCHIO’S PETITION FOR CERTIORARI IS NOT FOR THE PURPOSE OF DELAY

Although the government did not contend that Nacchio’s petition for certiorari is for the purpose of delay, the district court held that there was “some question” because it “is just part of a strategy designed to delay the time he must report to prison.” (Exhibit J at 7.) The court did not hold that Nacchio’s petition *is* for the purpose of delay, but instead that Nacchio did not establish that his petition is not for the purpose of delay because “the Defendant offers neither an affirmative statement that the appeal is not interposed for purposes of delay, nor any meaningful argument. All the Defendant says is that the Government did not contend that delay was the purpose of his appeal to the Tenth Circuit when he requested bail in 2007.” (*Id.* at 8-9.)

Under §3143(b), a defendant is entitled to bail if he is not a flight risk or danger and the appeal “is not for *the* purpose of delay and raises a substantial question” likely to result in reversal. Of course Mr. Nacchio does not want to submit to incarceration while

there is still a meaningful chance that his appeal will be successful. A purpose of every application for bail (and attendant appeal) is to “delay the time he must report to prison,” (Ex. J, at 7), so the district court’s reasoning means that no one is entitled to bail, ever. The statute requires a defendant to show that the appeal raises a substantial question and is not for the *sole* purpose of delay. Nacchio made such a showing.

First, the district court stated that Nacchio did not “offer[] ... an affirmative statement that the appeal is not interposed for purpose of delay,” and “[a]ll the Defendant says is that the Government did not contend that delay was the purpose of his appeal to the Tenth Circuit in 2007.” (*Id.*). That statement is demonstrably incorrect. Nacchio’s motion to the district court expressly stated that he was not a flight risk or danger; “Nor is Nacchio’s *petition* for the purposes of delay.” (Exhibit C at 2); *see also* (Exhibit B at 6 (“This Court should find that Nacchio’s petition for certiorari is not for purposes of delay.”).)

Second, the district court apparently believed that Nacchio did not provide “any meaningful argument” as to why his petition to the Supreme Court was not for the purpose of delay. (Exhibit J at 8.) That is also incorrect. Nacchio’s extensive explanation of the merits of his petition, in the motion papers and in the petition itself, demonstrates that his petition is not interposed for the purpose of delay—but rather to assert quite substantial grounds for a new trial or acquittal as a matter of law. In addition, a defendant has *90 days* within which to file a petition for certiorari with the Supreme Court. Nacchio explained to the district court that he was filing his petition in just over *3 weeks—for the express purpose of avoiding any delay*. Nacchio explained that he would

be filing his petition early “in order to ensure that the [Supreme] Court acts on the petition before its summer recess.” (Exhibit C at 2; Ex. B, at 3-4, 6, 23-25.). Nacchio calculated the dates for the district court to show that his petition would be acted on by the Supreme Court in May (or June if the government sought a 30-day extension for its response), instead of late September or early October 2009, if Nacchio were to file his petition at the end of the 90-day period. (*Id.*) Nacchio was entitled to wait 90 days to file his petition, and could have requested bail pending certiorari, which, due to the Supreme Court’s summer recess would have lasted until October 2009. His *actions* in filing nearly two months early plainly show that the petition is not for the purpose of delay, and he provided substantial and meaningful argument showing the district court why.² This Court should find that Nacchio’s petition for certiorari is not for the purpose of delay.

IV. SECTION 3143(b)(1)(B)’S “SUBSTANTIAL QUESTION” STANDARD REQUIRES NACCHIO TO DEMONSTRATE A REASONABLE CHANCE THAT HIS PETITION FOR CERTIORARI WILL BE GRANTED AND HE HAS DONE SO

Nacchio filed his petition for certiorari on March 20 to ensure that the Supreme Court has ample time to act on the petition prior to its summer recess. The government’s opposition to the petition is due on April 22—only *eight days* after Nacchio is presently required to surrender to the custody of the Bureau of Prisons. The delays sought here are quite minimal and do not warrant the risk that an innocent man who is not a danger or a

² The district court also references a motion Nacchio made to push back his surrender date two weeks (a date already passed) so he could finish medical treatment for a potentially cancerous growth on his leg. It is unclear how this motion, which the United States Probation Office did not oppose, indicates that Nacchio’s *petition* is somehow for the purpose of delay.

flight risk should have to report to prison before the appellate process has been completed. Unless the *government requests an extension*, it is likely that the Supreme Court will make a decision on the petition at its May 21 conference—only five weeks from his surrender date. And if the government does request a 30-day extension to file its opposition (which it should not need given that the Deputy Solicitor General argued the case before the *en banc* court and the government has been on notice of the issues raised in Nacchio’s petition since at least March 5), the Supreme Court will likely make its decision at its June 18 conference—which is only nine weeks from Nacchio’s surrender date. Given the short time frame before the Supreme Court acts, and the substantial questions raised by Nacchio’s petition, bail should be granted.

Section 3143(b)(1)(B) conditions bail on a finding that “the appeal ... raises a substantial question.” This Court has interpreted the term “substantial question” to mean “a ‘close’ question or one that very well could be decided the other way.” *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (*en banc*) (citation omitted). This Court has further explained that “bail pending appeal is appropriate if, assuming that the ‘substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial.’” *Id.* at 952-53 (citation omitted).

The inquiry at the certiorari stage is, of course, influenced by the discretionary nature of the Supreme Court’s certiorari jurisdiction, but this Court has clearly defined “substantial” to mean “close”—not a “likelihood of success.” Indeed, in post-Bail Reform Act cases, the Supreme Court has affirmed that “[t]he statutory standard for determining whether a convicted defendant is entitled to be released pending certiorari is

clearly set out in 18 U.S.C. §3143(b), and the only real issue in this application is whether [petitioner's] appeal 'raises a substantial question'” *Morison v. United States*, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers).

Further, pre-Bail Reform Act precedents confirm that at most Nacchio is required only to “demonstrate a *reasonable probability* that four Justices are likely to vote to grant certiorari.” *Julian v. United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers). The Supreme Court has expressly stated that in understanding what “reasonable probability” means, “the adjective is important” and a “reasonable probability” does *not* mean “more likely than not.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *id.* (“reasonable probability” does not require a showing of likelihood of different outcome); *see also John Doe I v. Miller*, 418 F.3d 950, 952 (8th Cir. 2005) (“A ‘reasonable probability’ is something less than ‘more likely than not’”).

Like the Bail Reform Act, Federal Rule of Appellate Procedure 41, governing a stay of a court of appeals’ mandate, requires a showing that “the certiorari petition would present a *substantial question*.” The advisory committee notes on the 1994 amendments explain that Rule 41(d)(2)(A) “is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., *Supreme Court Practice* § 17.19 (6th ed. 1986).” Section 17.19 of Stern, *Supreme Court Practice*, states that the standard adopted by the advisory committee requires a showing of “a *reasonable chance* that at least four Justices will vote for the Court to review the decision below and that, if the case is taken, a

majority of the Court will vote to reverse,” *not* a showing of a likelihood of success. Of course, when “likelihood of success” is the standard, courts say so. *See, e.g., Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (noting that a preliminary injunction requires a showing of “a likelihood of success on the merits”).³

The issues raised in Nacchio’s petition for certiorari filed with the Supreme Court on March 20, and as explained in Nacchio’s original March 5 application filed in this Court, meet this standard. There is a reasonable chance of Supreme Court review.

Nacchio has identified several issues of national importance on which the circuits are in conflict, as well as several respects in which this Court’s decision departed from the usual course of judicial proceedings in a manner calling for an exercise of the Supreme Court’s supervisory power.⁴ *Amicus curiae* briefs supporting certiorari are being prepared, and

³ Contrary to the government’s argument below, the petition is not subject to the standards governing certiorari before judgment. The fact that separate sentencing and forfeiture issues remain for this Court’s resolution has no bearing on the standard to be applied to Nacchio’s petition for certiorari. Rather, this case presents the routine circumstance where “a court of appeals [has] entered a nonfinal or interlocutory order at some point prior to rendition of the court’s final judgment.” Eugene Gressman et al., *Supreme Court Practice* 81 (9th ed. 2007). Such cases are governed by the ordinary Rule 10 standards, with due allowance for whether the interlocutory posture would affect the Court’s resolution of the issues or the appropriateness of its intervention. Nacchio is entitled to wait for this Court to resolve those issues before seeking certiorari, but the fact that he is not simply underscores that he has no interest in delay and does not impact the standard the Supreme Court will apply in determining whether to grant certiorari.

⁴ Nacchio’s March 5 application called this Court’s attention to what we believe are several straightforward factual errors in the panel’s analysis of the materiality issues. As this Court will see, the petition for certiorari seeks summary reversal concerning one of those errors: this Court’s holding that Nacchio’s appellate brief did not argue that the “risks” of which Nacchio was warned were too *uncertain*, as opposed to simply too small, to be material. Even though Nacchio has filed his petition for certiorari, this

will be filed, by the Chamber of Commerce of the United States of America, the Washington Legal Foundation, and the National Association of Criminal Defense Lawyers, further highlighting the substantial and important questions at issue. A positive outcome in the Supreme Court is also likely to produce either acquittal or, at least, a new trial because this Court has already rejected the government's additional arguments, and also found that to the extent it was error to exclude Professor Fischel's opinion testimony, that exclusion was not harmless.

This Court should judge the merits of Nacchio's petition for certiorari by reviewing the document, but a few brief reactions to the district court's opinion follow.

First, the district court decided that the proper materiality standard is not a substantial question because "[t]he *Basic* [*v. Levinson*, 485 U.S. 224, 231 (1988)] definition of materiality remains the current legal standard." (Exhibit J at 17.) The court further stated that the First Circuit's decisions in *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996), and *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996), did not "announce[]" a "rule that forward-looking statements can never be material," and therefore "there is no split of authority." (Exhibit J at 17.)

This district court misunderstood the issue raised in Nacchio's petition and the decisions from the First, Seventh, Ninth, and other circuits. Nacchio has never argued, nor does he argue in his petition, that forward-looking statements can never be material. The petition clearly explains that in *Basic* the Supreme Court explained that "[w]here the

Court's mandate has not issued and this Court always has the power to reconsider its decision *sua sponte*.

impact of the corporate development on the target's fortune is certain and clear, the *TSC Industries* materiality definition admits a straightforward application,” but “[w]here on the other hand, the event is contingent or speculative in nature, it is difficult to ascertain whether the ‘reasonable investor’ would have considered the omitted information significant at the time.” 485 U.S. at 232. The Supreme Court recognized the need for some additional “test for resolving this difficulty,” and ultimately adopted the “probability and magnitude” test for merger discussions. *Id.* at 237-38. The Court expressly recognized, however, that the “probability and magnitude” test might not be adequate for evaluating “other kinds of contingent or speculative information, such as earnings forecasts or projections.” *Id.* at 232 n.9.

The court of appeals decisions cited by Nacchio, including *Shaw* and *Glassman*, are thus struggling with the difficult and important question reserved by the Supreme Court in *Basic*. The district court's belief that those cases simply applied the *TSC / Basic* test, without any further guidance appropriate to the context, is refuted by the reasoning and holding of those decisions. In *Shaw*, the First Circuit held that whether “[p]resent, known information that strongly implies an important future outcome ... must be disclosed ... poses a classic materiality issue,” expressly “conceptualized” the company as an insider trading in the company's securities in order to evaluate its disclosure obligations, and held that internal predictions and interim operating results are immaterial as a matter of law unless “the [seller] is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be an extreme departure from the range of results which could be anticipated based on currently available

information.” *Shaw*, 82 F.3d at 1203, 1210. The holding of *Glassman* is similarly that “the undisclosed hard information ... did not indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” 90 F.3d at 631. Of course that is not a *per se* rule that forward-looking information can never be material. But it is also a far more stringent test than the one applied by this Court—and a test under which Nacchio would clearly be entitled to acquittal.

This presents a substantial question likely to result in reversal, if Nacchio prevails on the merits of that question. This Court held that it was “a close question” whether Nacchio was entitled to acquittal as a matter of law under a materiality standard far lower than the standard applied in the First and other circuits. If the Supreme Court were to determine that a heightened materiality standard applied, Nacchio would be acquitted as a matter of law.⁵

Second, the district court held that Nacchio’s petition does not raise a substantial question with respect to the jury instructions. The court stated that the question of whether a “reasonable basis” instruction should have been given “was not ... asserted in the Defendant’s Petition, and therefore is not considered here.” (Exhibit J at 20 n.17). But Nacchio’s petition does expressly raise that issue as grounds for certiorari (Exhibit H at 27-28), and also explains that even if Nacchio’s reasonable basis instruction was flawed and did not correctly state the law as this Court now understands it, that proposal

⁵ The district court appears to have conflated the materiality question with the jury instructions question and thus did not address many of Nacchio’s arguments in the petition.

did identify a flaw in the instructions given (that they gave insufficient guidance on materiality in light of the uncertain and predictive nature of this information), which put the burden on the district court to fashion instructions that were adequate to guide the jury's deliberations. The petition explains that at least seven circuits have held that "[t]he fact that counsel did not tender perfect instructions does not immunize from scrutiny on appeal a failure to instruct the jury adequately concerning the issues in the case."⁶ *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (citation omitted).⁶

The district court reasoned that this Court did not hold that instructions could never be reversible error unless they affirmatively misstate the law, but rather held that the instructions given here did not misstate the law and that Nacchio's own proposed instructions were legally flawed. But that reasoning simply misses the point of the petition and cited cases—which is that flaws or even legal errors in the defendant's own proposed instructions are not sufficient justification for failing to scrutinize the adequacy of the instructions given. The defendant is not required to tender instructions that are free from error; his burden is to identify problems with the instructions and to propose a solution that points the district court in the right direction. This Court's reasoning (and the district court's) that the conviction can be affirmed merely because the instructions

⁶ See also *Webster v. Edward D. Jones & Co.*, 197 F.3d 815, 820 (6th Cir. 1999) (“[E]ven if an incorrect proposed instruction is submitted which raises an important issue of law involved in light of proof adduced in the case, it becomes the duty of the trial court to frame a proper instruction on the issue raised”) (citation omitted); *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998) (same); *Walker v. AT&T Techs.*, 995 F.2d 846, 849 (8th Cir. 1993) (same); *United States v. Jones*, 909 F.2d 533, 538-39 (D.C. Cir. 1990) (Ginsburg, R., J.) (same); *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983) (same); *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 757 (3d Cir. 1976) (same).

given did not misstate the law, and Nacchio's proposal was flawed, conflicts with several other circuits that would nonetheless ask whether Nacchio's proposal alerted the district court to the need for additional guidance. And the district court's failure to provide such guidance here cannot be considered harmless, given how close the materiality issue in this case is.

Third, the district court acknowledged that the issues surrounding the exclusion of Professor Fischel's expert testimony and the proper procedural rules "have given rise to much confusion," "[t]his case demonstrates such confusion," "this area of evidentiary law is both unsettled and evolving," (Exhibit J at 26), and that the issues are recurring and "important," (*id.* at 32). However, the district court appears to have concluded that no substantial question is presented because the dispute between the majority and dissent was solely about "differing assessments of the trial court record" "akin to differing factual findings." (*Id.* at 31).

The district court analyzed this Court's *en banc* majority and dissenting opinions but ignored or misunderstood the issue raised *in Nacchio's petition*. Although Nacchio did request summary reversal of the *en banc* majority's decision at the end of his petition on the ground that the majority mischaracterized the trial court record, his principal argument for certiorari entirely *accepts* the majority's characterization of the record and explains why the *law* the majority applied to its construction of the record conflicts with the law applied in other circuits. In other words, the petition explains why the *en banc* majority's reasoning is incorrect, and conflicts with decisions of other circuits, even accepting the *en banc* majority's premise that Judge Nottingham excluded Professor

Fischel on *Daubert* grounds rather than for a perceived Rule 16 error. The petition explains how decisions of several other circuits, and in particular the Third Circuit, would have come out differently applying the legal standards adopted by the *en banc* majority—completely without regard to the more record-specific issues raised by the *en banc* dissenters. The district court did not address any of those arguments or cases from other circuits.

Success on this question would also likely result in a new trial. Indeed, this Court already conducted a harmless error analysis, which the district court apparently did not recall.

V. THIS COURT SHOULD STAY NACCHIO’S SURRENDER DATE TO PERMIT AN ORDERLY RESOLUTION OF HIS BAIL APPLICATION, INCLUDING, IF NECESSARY, SUPREME COURT REVIEW

Regardless of this Court’s decision regarding bail pending certiorari under §3143(b), Nacchio requests that this Court exercise its inherent authority to briefly stay the district court’s April 7, 2009 order requiring Nacchio to surrender by April 14, 2009, in order to permit orderly resolution of his application for bail, including, if necessary, review by the Supreme Court.⁷ *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983) (in context of reviewing merits of habeas petition and motion for stay of execution, explaining that where the “exigencies of time preclude a considered decision on the merits ... the motion for a stay must be granted”); *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (in the course of granting bail pending appeal, noting that the district court had

⁷ Nacchio requested that the district court stay his surrender date until appellate review of his bail application was complete. The court declined to do so and set his surrender date for April 14.

“denied the motion but granted a stay of commitment, which we extended” in order to have sufficient time to consider the merits of the bail application); *See* Fed. R. App. P. 8.⁸ We respectfully request that the stay continue in effect until noon one week after any denial of bail pending certiorari by the Supreme Court.

As explained above, Nacchio filed his petition for certiorari approximately three weeks after this Court’s *en banc* decision rather than the three months permitted by Supreme Court Rule 13. Nacchio will seek bail pending certiorari from the Supreme Court within 48 hours of any denial of bail by this Court. This is a highly accelerated schedule.

Three members of this Court, including the author of the *en banc* opinion, *unanimously* concluded that it is a “close question” whether Nacchio is innocent as a matter of law, *United States v. Nacchio*, 519 F.3d 1140, 1164 (10th Cir. 2008), and four judges of this Court would have granted a new trial. Nacchio is not a flight risk or a danger to anyone, and has been free pending appeal for two years now. Nacchio has affirmatively demonstrated that his petition is not for the purpose of delay. There is no harm to the government or any reason why a few additional days to permit an orderly resolution of whether he is entitled to continued release pending certiorari could possibly disserve the interests of justice.

⁸ Given the religious holidays beginning tonight and occurring this weekend, and the potential logistical issues involved in issuing a decision over a holiday weekend, we respectfully note that FRAP 8 authorizes a single judge to enter a stay.

CONCLUSION

This Court should stay the district court's order to surrender to allow the Court (and if necessary the Supreme Court) sufficient time to consider the merits of Nacchio's bail application, and then should grant continued bail pending Supreme Court resolution of a petition for certiorari.

Respectfully submitted,

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Dated: April 8, 2009

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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 documents submitted on April 8, 2009, and every document submitted in Digital Form or scanned PDF format 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 McAfeeAgent Version 4.0.0.1345, McAfee VirusScan Enterprise Workstation, Virus Definitions 4.0.5544, McAfee Anti-Spyware Enterprise Module, version 8.0.0.989, last updated on April 8, 2009, and, according to the program, are free from viruses.

s/ Maureen E. Mahoney

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **NACCHIO'S RENEWED EMERGENCY APPLICATION FOR RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI AND MOTION FOR A STAY OF THE DISTRICT COURT'S ORDER TO SURRENDER** with the Clerk of the Court for the United States Court of Appeal for the Tenth Circuit by using the appellate CM/ECF system on this 8th day of April, 2009. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I further certify that some of the participants in this case are not registered CM/ECF users and on the 8th day of April, 2009, I caused copies of the foregoing **NACCHIO'S RENEWED APPLICATION FOR RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI AND MOTION FOR A STAY OF THE DISTRICT COURT'S ORDER TO SURRENDER** to be sent via electronic mail to:

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EXHIBIT A

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

Criminal Case No. 05-cr-00545-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**RESPONSE BY UNITED STATES
TO MOTION FOR RECONSIDERATION**

Pursuant to the Court's minute entry (Doc. 542), the United States submits this response to Defendant Joseph P. Nacchio's motion for reconsideration (Doc. 541). That motion sought reconsideration of the Court's order (Doc. 540) denying Defendant's emergency motion for continued release (Doc. 538) pending resolution of his not-yet-filed petition for writ of *certiorari*.

As set forth below, the Court should deny the motion for reconsideration, but should also amend its prior order (Doc. 540) to include a finding that Defendant Nacchio has not satisfied his heavy burden under 18 U.S.C. § 3143(b).

TABLE OF CONTENTS

I. Background on events since the conviction... 3

II. Defendant’s bail motion failed to identify any questions presented. 5

III. The bail standards at this stage are stringent.. . . . 7

 A. At this stage, the “substantial question” standard is multi-layered and extremely difficult to meet.. . . . 7

 B. Defendant also must show that success on a substantial question would likely result in reversal or a new trial.. . . . 9

IV. The arguments Defendant presents do not meet these standards... 10

 A. The ruling that the exclusion of Defendant’s expert was not an abuse of discretion is not an issue as to which *certiorari* and reversal are likely.. . . . 10

 1. Defendant’s discussion of the burdens on a party challenging an expert lacks support... 11

 2. There is no circuit conflict regarding whether the exclusion was an abuse of discretion... 14

 B. The argument that the court should have applied a new heightened materiality standard is not an issue as to which *certiorari* and reversal are likely.. . . . 16

 C. The argument that “reasonable basis principles” should be applied in assessing materiality is not an issue as to which *certiorari* and reversal are likely.. . . . 19

 D. For the remaining issues, *certiorari* and reversal are not likely... 20

V. The Court should deny Defendant’s alternative request for release pending further bail applications... 22

CONCLUSION. 24

I. Background on events since the conviction.

Almost two years have passed since Defendant Joseph Nacchio was convicted by a jury of nineteen counts of insider trading in April 2007. Those counts related to offenses committed in April and May 2001, almost eight years ago.

In the past two years, the bail issues now before the Court have already been presented, in substance, to both this Court and the Tenth Circuit. Before Defendant's sentencing in July 2007, his current counsel filed a lengthy motion for bail pending appeal, raising most of the same arguments that he is now relying on in his latest motion for bail. After the district court denied that motion, his counsel filed a motion for bail pending appeal, raising essentially the same arguments. The Tenth Circuit granted that motion, and Defendant has been on bail ever since.

Most of those issues were resolved by the panel decision that was issued on March 17, 2008, almost one year ago. *See* Doc. 521 (panel decision) (attached as Att. 1). The panel reversed Defendant's conviction on the sole ground that his economics expert had been improperly excluded. But the panel also addressed and rejected Defendant's challenges on all other matters he had raised. These issues included the sufficiency of the evidence and the jury instructions – issues that appear, according to his motion for bail, to be the bulk of the issues Defendant now might raise in his petition for *certiorari*. *See* Doc. 538 at 8-20.

The Tenth Circuit then granted *en banc* review solely on the exclusion of the expert. That issue was extensively briefed by Defendant in August and September 2008. On February 25, 2009, the *en banc* majority affirmed the conviction, and vacated those

portions of the panel opinion relating to the expert issue. *See* Doc. 523 (*en banc* decision) (attached as Att. 2).

Notably, the *en banc* majority expressly revoked the panel's prior grant of release pending appeal, and lifted the stay of his sentence of imprisonment. *See* Doc. 523 at 52 ("This Court's grant of release pending appeal is revoked, the unsecured bond executed by Mr. Nacchio in the district court is exonerated, and the stay of Mr. Nacchio's sentence of imprisonment is hereby lifted."). It thus superseded the panel's prior disposition of this issue.

The *en banc* majority also remanded the case to the panel for proceedings on sentencing and forfeiture. Those proceedings do not affect whether Defendant should be in prison right now. Even under Defendant's own calculation in his appellate briefs, substantial prison time would be warranted. *See* 07-1311, Appellant's Opening Br. at 54 (arguing that "Nacchio is entitled to resentencing under the correct range, 41-51 months"). Because the sentencing and forfeiture proceedings are not yet resolved, the appeal is still pending, and there is no mandate yet.

Defendant has already obtained a short delay of his surrender date. On Friday, February 27, 2009, Defendant was notified of his prison designation. Under a prior order, Defendant was required to surrender to prison within 15 days of that date (Doc. 468). His surrender date thus would have been March 16, 2009, pursuant to the time calculation rules set forth in Fed. R. Crim. P. 45(a). However, this Court issued an order on March 4, 2009 directing Defendant to surrender on March 23, 2009 — effectively granting Defendant an extra week to report. *See* Doc. 528.

II. Defendant's bail motion failed to identify any questions presented.

On March 11, 2009, Defendant moved for "release under §3143(b) pending the resolution of a petition to the Supreme Court for a writ of *certiorari*." Doc. 538 at 1. He stated that his petition for *certiorari* would be filed by March 27.

Defendant's motion then discussed numerous issues. But he did not identify which of those various issues he will be presenting in his petition for *certiorari*. He did not identify any "questions presented for review, expressed concisely," as a petition for *certiorari* must contain. *See* S. Ct. R. 14.1(A). Nor did he discuss all of the standards that apply to a motion for bail pending a petition for *certiorari*.

Noting that no petition for *certiorari* had been filed, this Court denied the request for bail as premature. *See* Doc. 540. Defendant then moved for reconsideration, arguing that the Court has authority to rule on the merits of applications for release under the Bail Reform Act, 18 U.S.C. § 3143(b). *See* Doc. 541. On Friday, March 13, 2009, the Court ordered any responses to be filed by March 16, 2009. *See* Doc. 542.

The government submits that this Court need not resolve whether the Bail Reform Act permits a defendant who intends to petition for *certiorari* to seek release on that ground prior to a petition for *certiorari*. Even assuming *arguendo* that a party can do so if an appeal is pending, a party still has the burden to show that he will file a petition that raises issues sufficient to satisfy § 3143(b). Here, Defendant has not met this burden in his bail motion.

The Court's order denying the motion as premature thus reflects a legitimate and practical concern: a court evaluating whether a petition for writ of *certiorari* presents a substantial issue likely to result in reversal for purposes of § 3143(b) must, at a minimum,

be adequately informed as to the specific basis or bases on which the petition will rest. The need for clarity as to the questions to be raised in the *certiorari* petition is reflected in the advice given by the treatise Defendant cites, which suggests that a motion for bail pending *certiorari* should attach “a complete draft of the petition for *certiorari*.” See Doc. 541 at 3 (quoting E. Gressman, *Supreme Court Practice* 890 (9th ed. 2007)).

Here, Defendant has not so informed the Court. He has presented a motion raising numerous arguments, but he has not identified the question or questions he intends to present for review to the Supreme Court. His motion does not even represent which *topics* will be presented in his petition for writ of *certiorari*. This Court is thus left to speculate as to what the questions presented might be, which ones might be included, and what form the arguments might take. Nor is this an issue without substance: as set forth in more detail below, it is extremely difficult to piece together from Defendant’s arguments what his questions presented might be. Because Defendant has not adequately informed this Court as to the specific basis or bases on which his petition will rest, he has not satisfied the criteria set forth under § 3143(b).

The government further requests that the Court deny Defendant’s motion not only for this inadequacy, but on the merits as well. A substantive denial will eliminate any doubt as to the basis for this Court’s ruling, and will ensure full appellate review. As set forth below, the arguments he presents in his motion for bail do not come close to satisfying the stringent criteria applicable to his motion.

III. The bail standards at this stage are stringent.

The standards Defendant must meet to show he is entitled to bail are extremely difficult to meet at this stage. Because Defendant's motion for bail does not set forth all of the applicable standards, they are set forth below.

A. At this stage, the "substantial question" standard is multi-layered extremely difficult to meet.

Defendant's motion properly refers to 18 U.S.C. § 3143(b)(1). That section provides that *after* sentencing, the burden shifts to the defendant, and release pending further review is available only if the defendant establishes various criteria. Subsection (b)(1) provides that a judicial officer "shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, be detained, unless the judicial officer" makes certain findings. Among other things, a defendant must be detained unless the judicial officer finds "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in— (i) reversal, (ii) an order for a new trial, [or] (iii) a sentence that does not include a term of imprisonment."

"A 'substantial' question must be one that can be properly raised on appeal." *United States v. Affleck*, 765 F.2d 944, 952 n.13 (10th Cir. 1985). Here, because the issue relates to a petition for *certiorari*, it is necessary to consider the standards applicable to such petitions.

Supreme Court Rule 10 provides that a petition for writ of *certiorari* "will be granted only for compelling reasons." As relevant here, the Supreme Court may consider whether a court of appeal "has entered a decision in conflict with the decision of another

United States court of appeals on the same important matter ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (S. Ct. R. 10(a)), or "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question that conflicts with relevant decisions of this Court" (S. Ct. R. 10(c)).

Rule 10 further provides that a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

Because the case is still pending in the Tenth Circuit and the mandate has not yet issued, Defendant's petition must also meet an additional difficult standard: "A petition for a writ of *certiorari* to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

Particularly relevant to Defendant's request here are the extremely high standards the Supreme Court applies in evaluating whether to grant release to a party seeking *certiorari*. First, such requests "are granted only in extraordinary circumstances." *McGee v. Alaska*, 463 U.S. 1339, 1340 (1983) (Rehnquist, C.J., in chambers); *accord Julian v. United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, C.J., in chambers).

Second, applicants for bail "must also demonstrate that four members of [the Supreme Court] will vote to grant the petition for *certiorari*." *McGee*, 463 U.S. at 1340; *accord Julian*, 463 U.S. at 1309 (requiring a "reasonable probability" of four votes for

certiorari); *Bateman v. Arizona*, 429 U.S. 1302, 1305 (1976) (requiring “a reasonable probability that four Justices will vote to grant *certiorari*”). And it is the rare case in which the Supreme Court finds *certiorari* to be warranted.¹

Finally, there must also be “a significant possibility of reversal of the lower court’s decision.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In other words, even showing a likelihood of *certiorari* is not enough; the applicant must also show a likelihood of success on the merits. *See United States v. Warner*, 507 F.3d 508 (7th Cir. 2007) (observing that an applicant for bail pending *certiorari* “must show both a reasonable probability that four Justices will vote to grant *certiorari* and a reasonable possibility that five Justices will vote to reverse the judgment”).

B. Defendant also must show that success on a substantial question would likely result in reversal or a new trial.

Even if his petition for *certiorari* met all of these standards, Defendant would still need to show that a decision in his favor would likely result in reversal or a new trial.

Notably, a decision by the Supreme Court rejecting the *en banc* decision affirming the expert’s exclusion will *not* lead to automatic reversal or a new trial. The district judge excluded the expert based not just on Rule 702(2)’s reliability requirement, but also on several independent grounds. The *en banc* majority vacated the panel’s decisions on these other grounds. *See* Doc. 523 at 19 n.9, 52. A decision by the Supreme Court rejecting the *en banc* majority’s decision on the expert’s exclusion thus would still require

¹ Approximately 9000 petitions for *certiorari* are presented to the Supreme Court each year. In recent years, *certiorari* has been granted in fewer than 90 cases. *See* <http://www.abanet.org/jd/ajc/calnewsletters/200708/article6.pdf> (discussing statistics). The number of cases where *certiorari* has been granted and the lower court decision has been reversed is obviously lower still.

consideration of those other grounds, *see* Doc. 523 at 20 n.9, and if Defendant were unsuccessful as to any of those grounds, the conviction would stand.

Moreover, even if Defendant obtained (1) a decision by the Supreme Court rejecting the *en banc* majority's decision finding no abuse of discretion in the expert's exclusion, and (2) a subsequent decision rejecting the other independent grounds for the exclusion, a reversal or new trial still might not occur. An argument that the government presented to the *en banc* majority (which that court found it unnecessary to resolve) was that even if the district court abused its discretion on all of its grounds in excluding the expert, the correct result would be an analysis of harmless error. And even if the error were found to be harmless, the government contended, the issue remained whether a proper remedy was not reversal (as the panel had found) but a remand for additional findings.

In sum, even if Defendant were successful at the Supreme Court on the issue of whether the exclusion of the expert was an abuse of discretion, there would still remain several issues on which he would need to prevail before he would be entitled to reversal or a new trial. Accordingly, to the extent that Defendant has focused his argument on the *en banc* issue, this Court should also find that he has not shown a likelihood of reversal sufficient to satisfy § 3143(b).

IV. The arguments Defendant presents do not meet these standards.

A. The ruling that the exclusion of Defendant's expert was not an abuse of discretion is not an issue as to which *certiorari* and reversal are likely.

Defendant claims that the exclusion of his expert witness merits Supreme Court review. Doc. 538 at 3-8.

The *en banc* majority's opinion involves a close reading of the factual record, and that discussion will not be reproduced here. The decision is found on the docket at Doc. 523. In very brief summary, the *en banc* majority found that under the particular circumstances of this case, "we find unpersuasive (if not disingenuous) Mr. Nacchio's argument that he did not have notice" that Federal Rule of Evidence 702(2) was presented in the government's motion to exclude, which discussed Rule 702 "relative to each of [the expert's opinions]," including "references to his methodology and ... FRE 702's reliability requirement," and argued that Defendant "had not established the admissibility of the opinions due to, inter alia, failure to comply with FRE 702." Doc. 523 at 7-8. The *en banc* majority noted that Defendant had responded on this Rule 702 attack—and that he had pointed to what he called his "expert report"—but that he had "lost the contest over admissibility." Doc. 538 at 38 n.17.

In his motion for bail, Defendant acknowledges that the disagreement between the *en banc* majority and the dissenters reflects different readings of the record. Doc. 538 at 3. As Defendant notes, the dissenters read the record as showing that the district court's reasoning was affected by an allegedly incorrect Rule 16 analysis; the *en banc* majority disagreed. *Id.* Defendant does not argue that this disagreement over the record is likely to warrant Supreme Court review. Accordingly, he is forced to find other issues.

1. Defendant's discussion of the burdens on a party challenging an expert lacks support.

Defendant first claims the *en banc* majority's analysis "rests on a misunderstanding of the burdens of proof on a motion *in limine*." Doc. 538 at 3. He argues that when a party moves to exclude an opposing expert, the *movant* bears "the

burden to show that the necessary foundation could not be laid.” Doc. 538 at 4; *see id.* at 5 (claiming that there is a general “rule that the moving party bears the burden on a motion *in limine*”); *id.* (arguing that an expert cannot be excluded “merely because the proponent ha[s] not yet proven reliability”).

Defendant thus posits a regime under which a party seeking to exclude an expert on reliability grounds must affirmatively *disprove* the expert’s reliability – until the moment when the expert takes the stand, at which time the burden then suddenly shifts to the proponent. *Id.* at 4-5. In support of this regime, he cites cases involving whether a district court may deny a motion to suppress without a hearing, and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Defendant’s claim that a party moving to exclude expert testimony must prove *unreliability* — at least until trial, when the burden shifts to the proponent² — is unsupported and makes no sense. It is well established that an expert’s *proponent* bears the burden to show reliability under Rule 702. *See* 2000 Advisory Committee Notes to Fed. R. Evid. 702 (“the proponent has the burden of establishing that the pertinent admissibility requirements are met”). And the Supreme Court has repeatedly affirmed the exclusion of experts before trial where the *proponents* failed to establish reliability.

² Although it is not clear, it is possible that Defendant is making the far less sweeping argument that the government’s burden was simply to raise the expert issue in some detail. *See* Doc. 538 at 4 (the movant must “demonstrat[e] (at least) serious reasons for doubt”). If so, this case does not raise such an issue. As the *en banc* majority observed, “the government’s thorough motion ... challenged the admissibility of the expert testimony in extensive detail.” Doc. 523 at 37 n.17; *id.* at 7-8 (discussing the government’s motion and observing that it addressed each of Defendant’s opinions). The *en banc* majority thus had no occasion to address whether a short, conclusory motion would be sufficient to raise the issue, and so Defendant can hardly claim that the *en banc* majority held that a conclusory motion would be sufficient.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 145, 156, 158 (1999) (noting the proponent’s “failure to satisfy” the reliability requirement “in view of the record as developed by the parties”); *General Elec. Co. v. Joiner*, 522 U.S.136, 140, 146 (1997) (no abuse in excluding experts on papers). And this regime makes sense, as the expert’s *proponent* possesses the information necessary to show reliability.

Defendant has not shown that this burden shifts to the movant whenever a reliability issue is raised before the witness takes the stand at trial. An expert’s reliability can be tested at any time: once an opinion has been disclosed, the court need not wait until trial to determine if the 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). Nor do the rules of evidence require a court to wait until trial to issue definitive evidentiary rulings; on the contrary, a court may make “a definitive ruling on the record ... excluding evidence, either at or before trial.” Fed. R. Evid. 103(a). Under Defendant’s regime, an expert’s proponent could defend against a motion to exclude by saying absolutely nothing — at which point the motion would fail. Defendant offers no logical justification for this approach.

None of the authorities Defendant cites remotely support his argument, let alone reflect a circuit split or show any conflict with Supreme Court precedent that might warrant *certiorari*.

First, Defendant cites two decisions regarding motions to suppress (Doc. 538 at 4). *See United States v. Stoddart*, 48 Fed. Appx. 376, 380 (3d Cir. 2002) (unpublished); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). Both decisions are inapposite. In both cases, the courts held that it was not an abuse of discretion for a court

not to hold an evidentiary hearing where a defendant claimed that adequate *Miranda* warnings were not administered but failed to submit any affidavit to support the motion. Both cases implicitly recognize that a defendant himself would be expected to have some knowledge as to whether he received a *Miranda* warning. *See* 48 Fed. Appx. at 380; 231 F.3d at 621. These cases hardly establish any absolute rules about motions to exclude experts based on Rule 702.

Second, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), does not support Defendant's argument. In *Kumho*, the Supreme Court did not require any special procedure for resolving reliability disputes under Rule 702, as Defendant seems to suggest. On the contrary, the Court in *Kumho* emphasized the abuse of discretion standard, holding that a district judge has "considerable leeway in deciding ... whether or when special briefing or other proceedings are needed to investigate reliability." *Id.* at 152. *Kumho* thus supports the *en banc* majority's decision.

2. There is no circuit conflict regarding whether the exclusion was an abuse of discretion.

Defendant also contends the *en banc* majority created a circuit conflict by finding no abuse of discretion. Doc. 538 at 5-7. As set forth below, this argument lacks merit.

The *en banc* majority held, after a very close examination of the factual circumstances, that when the reliability issue was raised, Defendant "affirmatively engaged in the dispute and defended the witness's admissibility," and the resulting "record ... was fully adequate for the court to examine the reliability issue." *See* Doc. 523 at 34 n.16, 37 n.17. The *en banc* majority observed that "the government's thorough motion ... challenged the admissibility of the expert testimony in extensive detail" (*id.* at

37 n.17); that Defendant filed a response to the motion to exclude, responding to the Rule 702 arguments and pointing to his supplemental Rule 16 disclosure as an “expert report” (*id.* at 9, 32 n.15); and that Defendant did not request any opportunity to present more evidence.

The *en banc* majority thus did *not* hold, as Defendant suggests (Doc. 538 at 5-6), that district courts may rule on an inadequate record. Defendant’s argument rests on a misunderstanding of what makes a record inadequate. The fact that Defendant’s submissions did not show reliability did not make the record inadequate. It simply made Defendant’s submissions on the issue unsuccessful. *See id.* at 38 n.17 (“Mr. Nacchio simply lost the contest over admissibility”).

The *en banc* majority’s decision also does not present a conflict with decisions of the Third Circuit. The Third Circuit (and other circuits) have, in some factual circumstances, found an abuse of discretion where a proponent was denied an adequate opportunity to present evidence on reliability. But the Third Circuit has also repeatedly made clear — particularly since the Supreme Court’s 1999 decision in *Kumho* — that district courts have broad discretion to determine whether *Daubert* hearings are required under the particular circumstances. *See Player v. Motiva Enterps., LLC*, 240 Fed. Appx. 513, 521 (3d Cir. 2007) (whether to hold a *Daubert* hearing was within the district court’s discretion); *Citizens Financial Group, Inc. v. Citizens Nat’l Bank of Evans City*, 383 F.3d 110 (3d Cir. 2004) (affirming pretrial exclusion of expert testimony based on the expert’s report); *Jones v. City of Philadelphia*, 59 Fed. Appx. 468 (3d Cir. 2003) (affirming exclusion of expert without a hearing); *Scrofani v. Stihl Inc.*, 44 Fed. Appx. 559, 562 (3d Cir. 2002) (affirming exclusion of expert and denial of request for a *Daubert* hearing;

exclusion was proper based solely on the expert's report, which merely set forth "a series of unsubstantiated opinions"); *Combs v. Sch. Dist. of Philadelphia*, 32 Fed. Appx. 653, 655 (3d Cir. 2002) (affirming exclusion of expert without a hearing).

Indeed, if the Third Circuit adopted a rule requiring district courts to hold reliability hearings, such a rule would be contrary to *Kumho*, where the Supreme Court made clear that district courts must be granted "considerable leeway" in determining whether a hearing is necessary in a particular case. 526 U.S. at 152.³ And here, the *en banc* majority went out of its way to examine Third Circuit cases and explain that its decision did not conflict with those cases. *See* Doc. 523 at 44-46. No conflict exists.

B. The argument that the court should have applied a new heightened materiality standard is not an issue as to which *certiorari* and reversal are likely.

All of Defendant's remaining challenges are to the otherwise-unanimous panel decision in March 2007. Defendant's first challenge to that decision relates to whether the nonpublic information on which he traded was material. Defendant appears to be challenging the standards by which the panel assessed the sufficiency of the evidence. Defendant argues that the panel decision was in error because it applied the basic materiality test. He claims that in evaluating the sufficiency of the evidence, the Court should have followed the First Circuit, which he says has applied heightened materiality standards in cases involving predictive or forward-looking information. Doc. 538 at 8-15.

³ *See also Mukhtar v. Calif. State Univ.*, 299 F.3d 1053 (9th Cir. 2002) (a trial court has "broad latitude ... in deciding *how* to determine the testimony's reliability," and "a separate, pretrial hearing on reliability is not required") (emphasis in original); *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("Nowhere in *Daubert*, *Joiner*, or *Kumho Tire* does the Supreme Court mandate the form that the inquiry into relevance and reliability must take").

The problem Defendant faces in arguing for a heightened materiality standard is that the standard for materiality is well settled. The Supreme Court “explicitly has defined a standard of materiality under the securities laws ... that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)). In *Basic*, the Supreme Court held that this materiality standard applied to negotiations about a potential future merger. *Id.* at 232-39. The Court expressly rejected any “bright-line rule” for assessing materiality of a potential future merger, disavowing “[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality.” *Id.* at 236.

The First Circuit has not abandoned this general materiality definition. In *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996), the case that Defendant claims adopted a new heightened standard for materiality, the First Circuit expressly rejected any “bright-line rules” as “contrary to *Basic*.” *Id.* at 1210. It did observe that “the plaintiffs’ allegation” was that the company had information “indicating some substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties,” and the court found these allegations to be sufficiently material. *Id.* at 1211. But in referencing this “extreme departure,” the First Circuit was describing the *plaintiffs’* allegation, not setting a new, ambiguous, and unjustified “extreme departure” standard.

This “extreme departure” language has not been adopted by other courts. The only circuit court to even reference that phrase since *Shaw* is the First Circuit, which quoted it

in *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996). But even in *Glassman*, while quoting from *Shaw*, the court still examined the evidence using the basic language of materiality, assessing whether the company had results that “would have predicted a *material* departure” in results. *Id.* at 632 (emphasis added). Since *Glassman*, no circuit court (including the First Circuit) has even referenced this “extreme departure” phrase, let alone suggested that it sets a new heightened materiality standard.

There is similarly no merit in Defendant’s suggestion that the evidence of materiality here would be considered “categorically immaterial” (Doc. 538 at 12) in the First Circuit, or elsewhere. As noted, no bright-line tests are permissible after *Basic*, which mandates a fact-specific inquiry. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 235 (1988) (observing that the SEC’s “Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula” and that “[c]ourts also would do well to heed that advice”); *see also TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (“[t]he [materiality] determination requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts”). And Defendant identifies no case that purports to adopt such a numerical standard.⁴

⁴ Defendant cites SEC Accounting Bulletin 99, Doc. 538 at 9, but that Bulletin does not remotely help his argument. It expressly reaffirms the fact-specific approach of *Basic*; explains that the determination of materiality depends on numerous factors, including qualitative ones; and “expresses the views of the staff that ... misstatements are not immaterial simply because they fall beneath a numerical threshold.” 64 Fed. Reg. 45,150 (Aug. 19, 1999).

C. The argument that “reasonable basis principles” should be applied in assessing materiality is not an issue as to which *certiorari* and reversal are likely.

Defendant’s next argument is based on an SEC provision — 17 C.F.R. § 240.3b-6; *see id.* § 230.175 — that does not protect insider traders. Instead, it provides a safe harbor from liability for certain specific statements that are made, in “good faith” and with a “reasonable basis,” in documents filed by issuers (*i.e.*, companies) with the SEC. That “reasonable basis” provision does not help Defendant, for a slew of reasons, as the panel correctly found. *See* Doc. 521 at 37-40.

First, as the Tenth Circuit noted, the instructions tendered by Defendant relating to this issue were “confusing” and “nonsensical.” *See* Doc. 521 at 37-38.

Second, this rule provides a safe harbor for *companies*, not individual insiders. 17 C.F.R. § 230.175 (entitled “Liability for certain statements by *issuers*”) (emphasis added); *cf. Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 516 (7th Cir. 1989). (explaining that “Rule 175 is designed to release *enterprises* from [certain] binds”) (emphasis added).

Third, the rule protects *statements* filed with the SEC from liability; it does not protect other forms of conduct (such as trading). 17 C.F.R. § 230.175(b).

Fourth, the rule does not even address materiality. It provides a safe harbor for statements that are not *misleading*, by defining statements as not misleading if they were made with a reasonable basis and in good faith. Whether a public statement is misleading or dishonest is simply a different question from whether inside information was material.⁵

⁵ The *Wielgos* court on which Defendant relies did not establish a materiality rule, or a rule for insider trading. It was a false statements case. *Wielgos v. Commonwealth Edison Co.*, 688 F. Supp. 331, 334 (N.D. Ill. 1988), *aff’d*, 892 F.2d 509 (7th Cir. 1989). And even in that context, it expressly *declined* to resolve the case based

Fifth, Defendant speculates that not extending the protection to companies might make it hard for them to raise capital at certain times. Doc. 538 at 17-18. At best, this is a policy argument properly directed to the SEC, not an argument about the law as it stands. Moreover, it is not even an argument for extending the protection to individuals.

Finally, the instruction Defendant wanted would not have made a whit of difference to him. The safe harbor expressly applies only to statements made in “good faith.” 17 C.F.R. §§ 240.3b-6(a). Here, the jury *was* instructed on good faith, and was told that good faith is a *complete* defense, but found beyond a reasonable doubt that Defendant did *not* have good faith. An instruction discussing a safe harbor based on good faith thus would not have changed the outcome.

D. For the remaining issues, *certiorari* and reversal are not likely.

Defendant’s remaining arguments are presented very briefly, and merit only brief responses.

Defendant first claims that the Tenth Circuit panel erred by deciding that the materiality instruction was not erroneous unless it affirmatively misstated the law. *See* Doc. 538 at 19. Defendant claims this is the wrong standard to assess a jury instruction. But this argument mischaracterizes the Tenth Circuit panel decision, which did not ignore the question of whether the jury was adequately instructed on the law. As the panel held, “The Supreme Court has said that the ‘significance the reasonable investor would place on the withheld . . . information,’ is the test for materiality, *Basic Inc.*, 485 U.S. at 240, and that is what the jury was instructed.” Doc. 521 at 36-37. This is the correct standard,

on materiality grounds. *Id.* at 517 (“Our case may be decided, however, without regard to materiality.”); *id.* (explaining that materiality is a “fact-specific inquiry”).

and Defendant's argument has no merit. Nor does Defendant make any attempt to show that this is an issue worthy of *certiorari*.

Defendant next argues that even if his "reasonable basis" instruction was not perfect, he was still entitled to an adequate instruction on those "reasonable basis" principles as they related to materiality. Doc. 538 at 20. But as explained above, (1) the jury *was* adequately instructed on materiality, and (2) the "reasonable basis" protection did not apply to this case, for at least a half dozen reasons.

Defendant next argues that the district court's exclusion of the expert was "infected by its erroneous belief that Nacchio had committed an egregious Rule 16 violation," and that in affirming that exclusion, the *en banc* majority violated a rule that the abuse of discretion standard requires consideration of whether the discretion was guided by erroneous legal conclusions. Doc. 538 at 21. But the *en banc* majority made clear that the district court's exclusion of the expert based on Rule 702 was *not* infected by its Rule 16 ruling. Doc. 523 at 16-17, 17 n.7, 26 n.13, 33 n.16. This is merely a disagreement about how to read the record, and is hardly a cert-worthy issue.

Finally, Defendant argues that the *en banc* majority cited a case — *Sprint/United Mgmt. v. Mendelsohn*, 128 S. Ct. 1140 (2008) — and then misapplied it. *See* Doc. 538 at 22. But Defendant fails to note that these citations are hardly essential to the *en banc* court's decision. Also, the *en banc* court did not mis-cite *Sprint* to "presume" that the district court's order excluding the expert rested on Rule 702 grounds, as Defendant claims. Rather, the *en banc* majority found that its reading of the district court's decision was simply the most "natural" one. Doc. 523 at 20-21. And again, Defendant cites no authority to show that this is a cert-worthy issue.

V. The Court should deny Defendant's alternative request for release pending further bail applications.

In his motion for reconsideration, Defendant requests, in the alternative, that the Court agree to stay his surrender date until 14 days after this Court rules on a renewed bail application that he proposes to file on March 20, 2009, along with a petition for *certiorari*. See Doc. 541 at 4. In other words, he seeks to continue his surrender date until 14 days after the Court rules on an application that he has not yet made. The Court should deny this request.

First, Defendant has not made the necessary showing set forth in Section 3143(b). Section 3143(b) provides that after a conviction, the burden shifts to the defendant to establish that the criteria for release are met. See *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985) (observing that the 1984 Bail Reform Act “was intended to reverse the presumption so that the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption”). In enacting the Bail Reform Act of 1984, Congress recognized that “[o]nce guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal.” S. Rep. 98-225, reprinted in 1984 U.S.C.C.A.N. 3182, 3209. Giving “recognition to the basic principle that a conviction is presumed to be correct,” Congress provided that as to the factors in § 3143(b), “the burden of proof rests with the defendant,” and Congress “require[d] an affirmative finding” by a court that the defendant had established those factors. *Id.* at 3210. In other words, the Court should not grant release unless the criteria have been met.

Defendant has not met those standards. As set forth above: (1) Defendant has not even identified questions presented for review; (2) the showing Defendant must make is an extremely difficult one to make; and (3) he has not come close to showing that he has met the stringent standards with respect to any of his issues. Absent a finding that Defendant has met those standards, this Court should not grant any application for continued release.

Second, the Court should find that Defendant has had sufficient time to seek bail. It has been almost two years since his trial and conviction; Defendant has been released that entire time. All of the issues he raises in his motion were raised, at least initially, in his motions for bail that he filed back in July and August 2007. The bulk of his motion for bail raises issues addressing the panel's decision, which was issued almost exactly one year ago. The narrow issue the *en banc* majority addressed was identified back in July 2008, nine months ago, and was briefed by Defendant in detail in August and September 2008. And none of the challenges Defendant now raises in his bail motion are new. Each has previously been presented by Defendant either to the panel or to the *en banc* Tenth Circuit. Under these circumstances, Defendant is not entitled to additional time to identify the issue or issues on which he will petition for *certiorari* and submit yet another bail application.

Also, as noted, this Court already has effectively granted Defendant an extra week (from March 16 to March 23) before he must surrender.

Finally, it is notable that during this time before he must surrender, Defendant himself has multiplied the latest round of bail proceedings, by not presenting his application for release directly to the Supreme Court's Circuit Justice. He had previously

presented his motion for release to the district court (in July 2007) and to the Tenth Circuit (in August 2007). After the *en banc* Tenth Circuit revoked his bail, Defendant could have sought relief directly from the Circuit Justice. But he did not. He should not be granted continued release on the ground that he needs time to seek review from the Circuit Justice in the future when he has had the opportunity to seek relief from that Circuit Justice for weeks.

CONCLUSION

The Court should deny Defendant's motion for reconsideration, and should issue an order finding that Defendant Nacchio has not satisfied his heavy burden under 18 U.S.C. § 3143(b).

Respectfully submitted this 16th day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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EXHIBIT B

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

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**REPLY BRIEF IN SUPPORT OF JOSEPH P. NACCHIO'S EMERGENCY MOTION
FOR RECONSIDERATION OF EMERGENCY MOTION BY JOSEPH P. NACCHIO
FOR CONTINUED RELEASE PENDING SUPREME COURT RESOLUTION OF A
PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, TO STAY THIS
COURT'S ORDER OF SURRENDER PENDING RESOLUTION OF A MOTION FOR
CONTINUED RELEASE**

Defendant Joseph P. Nacchio hereby submits his reply to the government's March 16, 2009 response to the above-captioned motion.

**I. THIS COURT CAN AND SHOULD RULE EXPEDITIOUSLY ON THE MERITS
OF MR. NACCHIO'S MOTION FOR BAIL PENDING CERTIORARI**

The government's response notably declines to defend this Court's initial conclusion that the language of the Bail Reform Act, 18 U.S.C. §3143(b), precludes bail until a petition for certiorari has been filed. Instead, the government urges this Court to resolve the defendant's original motion for bail pending certiorari on the merits. We agree.

Even if this Court were correct that the language of the statute precludes it from *granting* bail until a petition for certiorari has been filed, that would not prevent this Court from reaching the merits of the issue in the present posture. This Court obviously could *deny* bail on the merits

before a petition has been filed; Nacchio's motion to reconsider cited a case where the Supreme Court did just that. And in the present posture this Court could also *grant* the requested relief effective (and conditional) upon Nacchio filing his petition for certiorari this Friday, March 20, 2009. At that point this Court will unquestionably have statutory power to act, and the defendant does not require any relief prior to that date because he is not scheduled to report until the following Monday.

The government has fully briefed its response on the merits of the bail request, and under the circumstances we respectfully request that this Court rule by the end of the day Wednesday, March 18, if possible.

II. DEFENDANT'S MOTION FOR BAIL PENDING CERTIORARI IS PROPERLY ADDRESSED TO THIS COURT, NOT UNTIMELY, AND COMPLETE

The government makes three procedural arguments that are plainly incorrect and should be rejected.

First, it suggests that defendant's motion for bail pending certiorari should have been directed to the Circuit Justice for the Tenth Circuit (Justice Breyer) instead of to the Tenth Circuit panel or this Court. The government cites no authority for that suggestion and it is plainly incorrect. Rule 23 of the Supreme Court's Rules states that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." It is the favored and usual practice for litigants in the Supreme Court to first seek any interim relief such as a stay or release from the court of appeals, before presenting an application to the Circuit Justice. Defendant did so, and the Tenth Circuit denied that request without prejudice to renewal after the issue has been presented *to this Court*.

Second, the government remarkably suggests that defendant has somehow unreasonably delayed in seeking bail pending certiorari. These arguments are meritless. The *en banc* court's 104-page complex opinion was issued on February 25, 2009, and the defendant filed an extensive motion for bail pending certiorari (substantively identical to the one later filed with this Court) with the Tenth Circuit on March 5, 2009—only eight days later. Since the government contends that a request for bail pending certiorari must satisfy stringent standards and identify precisely the issues that the defendant intends to pursue on certiorari, its suggestion that Nacchio unreasonably delayed by spending eight days to research, draft, and file such a motion is difficult to understand. The governing statute and Supreme Court rules give petitioners *ninety days* to file a petition for certiorari for a good reason. (The government's argument also necessarily presumes that this Court's interpretation of § 3143(b) is incorrect, and that an application for bail pending certiorari can be presented before a petition for certiorari is actually filed. The statute does not distinguish between requests directed to the Supreme Court and requests directed to this Court, and the government offers no distinction).

The government also suggests that defendant somehow unreasonably delayed because his motion for bail pending certiorari raises some issues relating to the Tenth Circuit *panel* opinion issued nearly a year ago, and other issues that have previously been presented to either the Tenth Circuit or this Court. As the government acknowledges, defendant has been out on release this entire time because the Tenth Circuit panel *granted* his motion for bail pending appeal, and then granted him a new trial. That release, and new trial, were not revoked until three weeks ago. The government's suggestion that defendant should have sought bail pending certiorari on the

issues resolved by the panel before the *en banc* court's ruling is clearly wrong. Defendant was already out on bail, and such a motion would have been dismissed as premature and senseless.

Finally, the government seems to suggest that Nacchio's motion is somehow procedurally deficient because it did not identify the questions or issues that defendant intends to present to the Supreme Court on certiorari. The motion presented to this Court discussed the errors in the Tenth Circuit's analysis that we believe merit certiorari in detail. We intend to raise those issues in the certiorari petition—all of them. To the extent the government is suggesting that such motions must include the formal "Questions Presented" precisely as they will eventually be worded in the certiorari petition, there is no such requirement. The statute requires the defendant to establish a "substantial question" for certiorari, and we have explained several. The government understands them well enough to respond at length. If this Court would like a more formal enumeration, however, we offer the following:

1. Whether the defendant is entitled to acquittal or a new trial because the Tenth Circuit adopted erroneous standards, in conflict with other circuits, for evaluating the materiality of internal corporate predictions and interim operating information allegedly bearing on whether the company will meet its public earnings projections.
2. Whether the defendant is entitled to a new trial because the Tenth Circuit adopted erroneous standards for the review of jury instructions that conflict with decisions of this Court and other circuits.
3. Whether the defendant is entitled to a new trial because the Tenth Circuit approved the use of impermissible procedures for the exclusion of expert testimony under Rule 702 that conflict with decisions of other circuits.

4. Whether the Tenth Circuit's decision should be reversed because it misapplied decisions of this Court, mischaracterized the district court's reasoning, failed to resolve all the issues presented on appeal, and held that Nacchio failed to address an issue that was the dominant focus of his brief.

III. THE GOVERNMENT CONCEDES THAT NACCHIO MEETS 18 U.S.C. §3143(b)(1)(A) AND MISSTATES THE STANDARD FOR RELEASE PENDING CERTIORARI UNDER §3143(b)(1)(B)

A. The Government Concedes That Nacchio Is Not A Flight Risk Or Danger

Nacchio is not a flight risk or danger. The government's response does not contend otherwise—nor has it ever. U.S. Response to Motion for Bond Pending Appeal 2 (Doc. No. 456 filed July 2007) (“U.S. 2007 Resp.”) (“Here the government does not contend that the defendant is a flight risk or a danger to the community.”). The district court previously found that Nacchio was not a flight risk or danger, (*see* Exhibit A at APP-1351 (Doc. No. 538).)—and understandably so. Nacchio has never missed a scheduled court date, and has already surrendered his passport to the government. Order Setting Conditions of Release (Doc. No. 12). The United States Probation Office has confirmed its view that Nacchio is not a flight risk or danger. (Exhibit T (Declaration of Sean M. Berkowitz).) Accordingly, this Court should find that Nacchio is not a flight risk or danger under §3143(b)(1).

If this Court has any unanswered concerns or needs more information, we respectfully request that the Court schedule an immediate telephonic hearing so that Nacchio can address any concerns the Court might have.

B. The Government Misstates The “Substantial Question” Standard For Release Pending Certiorari

Section 3143(b)(1)(B) conditions bail on a finding that “the appeal is not for the purpose of delay and raises a substantial question.”

First, the government does not contend that Nacchio’s petition for certiorari is for purposes of delay, nor has it ever. U.S. 2007 Resp. 2 (Doc. No. 456) (“Neither do we suggest that his eventual appeal will be for the purpose of delay.”). The district court previously found that Nacchio’s appeal was not for purposes of delay. (*See* Exhibit A at APP-1351 (Doc. No. 538).). Nacchio has offered to file a petition for certiorari more than two months before the required deadline. This Court should find that Nacchio’s petition for certiorari is not for purposes of delay.

Second, the government misstates the “substantial question” standard by asserting that it requires the defendant to establish a “likelihood of success” on a petition for certiorari (U.S. Response 9 (Doc. No. 543)), *i.e.*, that it is more likely than not that certiorari will be granted. The *en banc* Tenth Circuit has held otherwise. It interprets the term “‘substantial question’” to mean “a ‘close’ question or one that very well could be decided the other way.” *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (*en banc*) (citation omitted). The court further explained that “bail pending appeal is appropriate if, assuming that the ‘substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial.’” *Id.* at 952-53 (citation omitted). The inquiry is, of course, influenced by the discretionary nature of the Supreme Court’s certiorari jurisdiction, but the Tenth Circuit has clearly defined “substantial” to mean “close”—not a “likelihood of success.”

The government does not squarely address the statutory standard. It instead invokes (Doc. No. 543 at 8-9) various *pre*-Bail Reform Act in-chambers opinions from the Supreme Court (*see* Motion for Reconsideration (Doc. No. 541) Exhibit B at 11 (Solicitor General’s brief to Justice Stevens acknowledging that *Julian v. United States*, 463 U.S. 1308 (1983) “predate[es] the enactment of the Bail Reform Act”), two of which involved defendants in state custody, which implicates an “even greater” presumption against bail. *Bateman v. Arizona*, 429 U.S. 1302, 1304 (1976) (Rehnquist, J., in chambers) (“Due respect for the principles of comity necessitates a demonstration of compelling necessity before a single Justice of this Court will stay the considered mandate of the highest state tribunal.”); *McGee v. Alaska*, 463 U.S. 1339, 1340 (1983) (Rehnquist, J., in chambers) (noting limited role a federal court plays in “allow[ing] bail in federal habeas review of state proceedings”).¹ As Chief Justice Rehnquist explained in an in-chambers opinion *after* the Bail Reform Act was enacted: “The statutory standard for determining whether a convicted defendant is entitled to be released pending certiorari is clearly set out in 18 U.S.C. §3143(b), and the only real issue in this application is whether Morison’s appeal ‘raises a substantial question’” *Morison v. United States*, 486 U.S. 1306, 1306 (1988) (Rehnquist, J., in chambers).

¹ The government also invokes (Doc. No. 543 at 9) *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), which addressed procedures for considering a stay of execution. There, the Court noted nothing more than that a defendant seeking a stay of execution must show a “reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari,” and a “significant possibility” of reversal. 463 U.S. at 895 (citation omitted). Likewise, the Seventh Circuit’s decision in *United States v. Warner*, which addressed the standard for staying the court’s mandate, and stated that it addressed the request for bail “by separate order issued today,” 507 F.3d 508, 509, 510 (7th Cir. 2007), similarly used the “reasonable probability” of certiorari and “reasonable possibility” of reversal standards that Nacchio easily meets.

Regardless, to the extent some of the pre-Bail Reform Act precedents inform the proper interpretation of the term “substantial,” they require Nacchio only to “demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari.” *Julian*, 463 U.S. at 1309 (Rehnquist, J., in chambers). That does not mean, contrary to the government’s claims (Doc No. 543 at 7-10), that Nacchio must demonstrate a “likelihood of success.” The Supreme Court has expressly stated that “the adjective is important” and a “reasonable probability” does *not* mean “more likely than not.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *id.* (“reasonable probability” does not require a showing of likelihood of different outcome); *see also John Doe I v. Miller*, 418 F.3d 950, 952 (8th Cir. 2005) (“A ‘reasonable probability’ is something less than ‘more likely than not’”); *compare Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (noting that a preliminary injunction requires a showing of “a likelihood of success on the merits”). Indeed, the advisory committee notes on the 1994 amendments to Federal Rule of Appellate Procedure 41, which requires a showing that “the certiorari petition would present *a substantial question*,” explain that Rule 41(d)(2)(A) “is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See Robert L. Stern et al., Supreme Court Practice* § 17.19 (6th ed. 1986).” Section 17.19 of Stern, *Supreme Court Practice*, states that the standard requires a showing of “*a reasonable chance* that at least four Justices will vote for the Court to review the decision below and that, if the case is taken, a majority of the Court will vote to reverse,” *not* a showing of a likelihood of success.

Nacchio’s application meets the “reasonable probability” standard. The issues he will present conform to the standards for certiorari under Supreme Court Rule 10. *See also D’Aquino*

v. United States, 180 F.2d 271, 272 (1950) (Douglas, J., in chambers) (“The [bail] question may be ‘substantial’ even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable.”). Nacchio has identified several issues of national importance on which the circuits are in conflict, as well as several respects in which the Tenth Circuit’s resolution of this case departed from the usual course of judicial proceedings in a manner calling for an exercise of the Court’s supervisory power.

The government also wrongly invokes the heightened standard from Supreme Court Rule 11 that “[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” That “certiorari before judgment” standard applies to cases where “a notice of appeal has been filed and ... the case is properly docketed in the court of appeals” but the court of appeals has not yet resolved the issues on which certiorari is sought. Eugene Gressman et al., *Supreme Court Practice* 83 (9th ed. 2007); see, e.g., *Gratz v. Bollinger*, 537 U.S. 1044 (2002) (granting certiorari before judgment to review constitutionality of university’s admissions program prior to any ruling on the question by the Sixth Circuit). This case involves the far more common, indeed routine, circumstance where “a court of appeals [has] entered a nonfinal or interlocutory order at some point prior to

rendition of the court's final judgment." Gressman, *supra* at 81. Such cases are governed by the ordinary Rule 10 standards, with due allowance for whether the interlocutory posture would affect the Court's resolution of the issues or the appropriateness of its intervention. The government concedes that the issues remaining at the Tenth Circuit relate only to sentencing and forfeiture. Nacchio would be entitled to wait for their resolution before seeking certiorari on the issues presented here; the fact that he is not simply proves (again) that he has no interest in delay.

Finally, the government argues (Doc. No. 543 at 9-10) that even a victory in the Supreme Court would not "likely" produce an acquittal or new trial because the government has various alternative arguments for the exclusion of Fischel and an argument that his exclusion was harmless. All of those arguments were rejected by the panel, and the government cannot plausibly say it is "likely" that the Tenth Circuit would attempt to revive those issues *en banc* after being rebuked by the Supreme Court on the issues it did decide. (Indeed, it is hard to imagine the Supreme Court reversing the *en banc* court's decision without explaining, for example, that Fischel's testimony was relevant and would assist the jury). And none of these arguments could prevent the acquittal or new trial that will be required if the Supreme Court accepts Nacchio's arguments concerning materiality or the standards for reviewing jury instructions.

IV. MR. NACCHIO IS ENTITLED TO RELEASE PENDING CERTIORARI

Mr. Nacchio's initial motion established that the standards for bail pending certiorari, properly understood, are amply satisfied here. The following is a response to the government's arguments on the merits, organized in the same manner as §IV of the government's response.

A. The Exclusion Of Professor Fischel Presents A Substantial Question

The government concedes that the fundamental necessary premise for the *en banc* court's decision was that Nacchio bore the burden of establishing the reliability of Professor Fischel's methodology, in response to the government's motion to exclude. The government simply argues the *en banc* majority's view that Nacchio bore that burden, against the dissent's explanation that (in the absence of clear contrary instructions from the district court) Nacchio remained entitled to establish the reliability of Fischel's testimony at the usual time—on the stand. An issue on which the Tenth Circuit divides 5-4 is, obviously, a close question that could be decided either way.

On the merits, the government (like the *en banc* court) simply misunderstands the issue. Of course the proponent of expert testimony ultimately bears the burden to lay an appropriate foundation for its admissibility, before it can be admitted. The usual time for doing so is when the witness takes the stand. When his adversary moves *in limine* to force a resolution of the issue before the witness is even called to the stand, the *movant* must at least establish a “threshold level of unreliability” by “call[ing] sufficiently into question” the reliability of the testimony. Robert J. Goodwin, *The Hidden Significance of Kumho Tire*, 52 *Baylor L. Rev.* 603, 626-32 (2000).² That is nothing unique to *Daubert*. As *United States v. Stoddart*, 48 Fed. Appx. 376, 380 (3d Cir. 2002), and *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000), both

² See also Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 *Minn. L. Rev.* 1345, 1365 (1994) (“[T]he evidentiary policies underlying *Daubert*'s competing rationales, efficiency and fairness concerns, and the structure of the discovery rules, all dictate placing a burden on the opponent of the evidence to make a prima facie showing that the proponent's evidence suffers from the deficiencies identified in *Daubert*,” and that “the evidence should be presumed to be admissible until the opponent discharges its burden to show the contrary”).

demonstrate, when a litigant files a motion *in limine* to exclude evidence he cannot simply rely on the fact that the other side will bear the burden of demonstrating its admissibility and has not yet met that burden. The movant must come forward with facts indicating serious doubt about admissibility or his motion will be *denied* without a hearing (the posture of *Stoddart* and *Howell*). The Tenth Circuit's *en banc* decision here wrongly suggests that the motion to exclude could be *granted* in that posture without a hearing.

The Third Circuit cases cited in our motion, reversing district courts for granting *Daubert* motions without a hearing, illustrate the same point. The government tries to distinguish those cases on the ground that the “proponent was denied an adequate opportunity to present evidence on reliability.” (Doc. No. 543 at 15.) But the litigants in those cases had, if anything, substantially *greater* opportunity to demonstrate the reliability of their expert's testimony prior to the court's ruling than Nacchio had. For example, *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999), was a civil case where the proponent of expert testimony had proffered a full civil expert report in opposition to a summary judgment motion. (The disclosures required from criminal defendants are far less extensive). Just as in this case, the district court excluded the testimony on the ground that the expert “does not set forth in his report the methodology by which he made his determinations in this case.” 186 F.3d at 416. The Third Circuit could have affirmed (like the Tenth Circuit here) on the ground that the proponent of the testimony bore the burden of proof and failed to meet it in response to his adversary's motion. Instead the Third Circuit held that:

The district court's analysis of the Lambert Report does not establish that Lambert may not have “good grounds” for his opinions, *see Daubert [v. Merrell Dow Pharms., Inc.]*, 509 U.S. [579,] 590 [(1993)], but rather, that they are insufficiently explained and the reasons and foundations for them inadequately and perhaps

confusingly explicated. But if the court was concerned with the factual dimensions of the expert evidence, as we said in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1240 (3d Cir. 1993), “it should have held an *in limine* hearing to assess the admissibility of the [report],” giving plaintiff an opportunity to respond to the court’s concerns.

186 F.3d at 418. The Third Circuit also held that it was “immaterial for at least two reasons” that the proponent of the evidence had not even requested a hearing: “First, because the court has an independent responsibility for the proper management of complex litigation,” and “Second, because plaintiff could not have known in advance the direction the district court’s opinion might take and thus needed an opportunity to be heard on the critical issues before having his case dismissed.” *Id.* at 417-18. *Padillas* is indistinguishable from this case, except that in a criminal case the proponent of expert testimony is required to disclose much less before trial and due process concerns greatly amplify the importance of fair notice before exclusion. And the Third Circuit has not backed away from that principle. All of the cases the government cites at 15-16, stand for nothing more than the unremarkable proposition that a district court need not hold a *Daubert* hearing in every case—something Nacchio has never disputed—and do not contradict *Padillas*, *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) or *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000); *see* Emergency Motion 5 n. 2 (Doc. No. 538).³

³ In *Player v. Motiva Enterprises, LLC*, 240 Fed. Appx. 513, 520-21 (3d Cir. 2007), the Third Circuit simply held that the district court did not err by excluding the expert after finding that the expert’s report and the parties’ summary judgment briefing established that the expert’s methodology for performing his calculations was flawed (as opposed to undisclosed). Contrary to the government’s parenthetical asserting that the expert was excluded “based on the expert’s report,” the expert in *Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, was excluded *after* the “[expert] testified, and [the proponent] acknowledged *at the hearing*” flaws in the methodology. 383 F.3d 110, 119 (3d Cir. 2004) (emphasis added). A hearing was not necessary in *Combs v. School District of Philadelphia*, because “[t]he District Court found that Witkowski, whose testimony addressed ‘commonplace’ issues, had no expertise that would aid

Contrary to the government's suggestion (Doc. No. 543 at 12-13) nothing in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), is to the contrary. In *Kumho Tire* the expert had been extensively deposed about his methodology—the equivalent of the hearing that was denied here. 526 U.S. at 142-45. The parties disagreed about whether that methodology was reliable, but there was no dispute that the district court had the relevant information before it to make that assessment. And the Supreme Court explained that when a movant “call[s] sufficiently into question” the reliability of an expert’s testimony, the district judge must hold “appropriate proceedings” to “investigate reliability,” which can include “special briefing” or “other proceedings,” where the judge is to “ask questions.” *Id.* at 149, 151-52. The expert exclusion in *Joiner* followed summary judgment briefing where the defendant argued that the plaintiff’s expert testimony did not satisfy *Daubert* and similarly rested on extensive deposition testimony by the experts, and no uncertainty about what their methodology was. 522 U.S. at 140-41.

The government suggests that if the burden on a movant is “simply to raise the expert issue in some detail” then it met that burden because the *en banc* court said that “the government’s thorough motion . . . challenged the admissibility of the expert testimony in extensive detail.” (Doc. No. 543 at 12 n.2 (quoting *En Banc Op.* at 37 n.17). But the standard is not whether the government’s motion was “detail[ed],” but whether it raised serious reasons

the jury. No *Daubert* hearing was required.” 32 Fed. Appx. 653, 655 (3d Cir. 2002). In *Jones v. City of Philadelphia*, it appears that the expert was excluded without a hearing because the expert was to opine only on the ultimate legal issue in the case in violation of Federal Rule of Evidence 704. 59 Fed. Appx. 468, 469 (3d Cir. 2003). And in *Scrofani v. Stihl Inc.*, the expert’s report obviously did not meet the requirements of Rule 26, and also demonstrated that the expert did not “even read the warnings which accompany the TS-350 saw which, in any event, were the same warnings Fote described as necessary.” 44 Fed. Appx. 559, 562 (3d Cir. 2002).

for doubting the admissibility of the testimony. The government's motion to exclude was certainly long and made lots of arguments. But the gist of all those arguments (as in *Padillas*) was that Fischel's methodology had not yet been disclosed in Nacchio's Rule 16 notice, and that is all the district court found. (Exhibit U (Tr.) at APP-3921) (excluding Fischel for "failing to reveal the methodology") (emphasis added); (Exhibit V (Tr.) at APP-4075) ("Any suggestion that the Government was in possession of Fischel's ... methodology is simply disingenuous" because "[t]he March 29, 2007[] disclosure [which was Nacchio's Rule 16 notice] contained no methodology"); *id.* (citing "nondisclosure of the methodology ... [in] the original expert report" as basis for exclusion); (Exhibit U at APP-3930) (methodology is "sort of like trying to nail jello to the wall. You just don't know what it is."). The motion could not have raised serious doubts about the reliability of Fischel's methodology, when the government's whole point was that it simply did not know what that methodology was. As *Padillas* illustrates, such complaints *might* be enough to get the movant a hearing. They cannot justify excluding the testimony *without a hearing*.

B. The Standards For Materiality Present A Substantial Question

The government argues (Doc. No. 543 at 17) that the standards for the materiality of internal financial projections and interim operating data cannot present a substantial question for Supreme Court review, because the Supreme Court resolved in *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988), that the one and only sufficient standard for materiality is whether "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [trade]." (Quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).). That is incorrect.

The Supreme Court actually explained in *Basic* that “[w]here the impact of the corporate development on the target’s fortune is certain and clear, the *TSC Industries* materiality definition admits straightforward application,” but “[w]here, on the other hand, the event is contingent or speculative in nature, it is difficult to ascertain whether the ‘reasonable investor’ would have considered the omitted information significant at the time.” 485 U.S. at 232. The Supreme Court recognized the need for some additional “test for resolving this difficulty” in the context of prospective merger discussions, *id.*, and rejected the Third Circuit’s “agreement-in-principle” standard in favor of the Second Circuit’s test that required “‘a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity,’” *id.* at 237-38 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)). The Supreme Court expressly recognized, however, that this “probability and magnitude” test might not be adequate for evaluating “other kinds of contingent or speculative information, such as earnings forecasts or projections.” *Id.* at 232 n.9.

The court of appeals cases cited in Nacchio’s motion for bail pending certiorari are thus struggling with a difficult and important question that the Supreme Court expressly acknowledged, but left unresolved, in *Basic*. The government’s suggestion that the First Circuit cases do nothing more than apply the unadorned *TSC* standard is, with respect, refuted by even a cursory reading. In *Shaw* the First Circuit held that whether “[p]resent, known information that strongly implies an important future outcome ... must be disclosed ... poses a classic materiality issue,” and held that such forward-looking information (internal predictions and interim operating results) is immaterial as a matter of law unless “the [seller] is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering

will be an extreme departure from the range of results which could be anticipated based on currently available information.” *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1203, 1210 (1st Cir. 1996). The holding of *Glassman v. Computervision Corp.*, 90 F.3d 617, 631 (1st Cir. 1996), is similarly that “the undisclosed hard information ... did not indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” (Citation omitted.) The government does not even attempt to dispute that Nacchio would have been entitled to acquittal as a matter of law under that standard.⁴ That conflict with the First Circuit is alone sufficient to establish a substantial question for certiorari.

Turning to the Seventh Circuit cases, the government argues that the “reasonable basis” standard is inapposite for several reasons—none of which demonstrate the absence of a substantial question for certiorari.

First, it relies on the panel’s suggestion that Nacchio’s proposed instruction was “confusing” or “nonsensical.” The panel obviously failed to understand the relevance of the Seventh Circuit cases; that is the issue for certiorari. To the extent the panel also relied on a

⁴ Moreover, the government’s (uncited) claim (Doc. No. 543 at 17) that *Shaw* and *Glassman* were simply quoting the plaintiffs’ allegations as opposed to a holding is plainly wrong. The First Circuit held that “soft” information like internal predictions is always immaterial, 82 F.3d at 1211 n.21, and with respect to “hard” intra-quarterly operating results, the First Circuit expressly “conceptualize[d]” the company “as an individual insider transacting in the company’s securities,” before holding that on this “classic materiality issue” the “extreme departure” standard governed, *id.* at 1203, 1210. *Glassman* applied this standard to hold that the company could sell stock without disclosing that seven weeks into the quarter sales were only 24% of internal forecasts because “the undisclosed hard information ... did not indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” 90 F.3d at 631 (citation omitted). District courts in the First and other circuits have acknowledged that *Shaw* provides the governing standard. *E.g.*, *In re Seachange Int’l, Inc.*, No. Civ.A. 02-12116-DPW, 2004 WL 240317, at *8 (D. Mass. Feb. 6, 2004); *In re N2K Inc. Sec. Litig.*, 82 F. Supp. 2d 204, 208 (S.D.N.Y. 1999).

finding that Nacchio's proposed instruction was poorly drafted, that is not a barrier to review for reasons explained in our motion for bail (Doc. No. 538 at 19-20) and below.

Second, the government says that the SEC's reasonable basis regulations provide a safe harbor for *companies* not for individual insiders. That misses the significance of Qwest's safe harbor to this case. The relevance of *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989), and the point of Nacchio's proposed "reasonable basis" instructions, is that materiality in this case "revolves around" Robin Szeliga's December 2000 or January 2001 prediction of either 1.4% or 4.2% in "risk" to Qwest's year-end 2001 revenue projections. *Wielgos* explains that under Seventh Circuit precedent a mere internal *prediction* about the future is categorically immaterial and need not be disclosed. 892 F.2d at 515-16 (citing *Panter v. Marshall Field & Co.*, 646 F.2d 271, 291-93 (7th Cir. 1981)). (The First Circuit agrees, *Shaw*, 82 F.3d at 1211 n.21.) The only exception is *if* a public projection has been made *and* "the internal estimates are so certain that they reveal the published figures as materially misleading"—which brings squarely into play the SEC's regulations about when a public projection can be deemed misleading. *Wielgos*, 892 F.2d at 515-16; *accord Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 n.7 (9th Cir. 1980) ("partial disclosure of financial projections *makes* them material facts") (emphasis added). If the requirements of the "reasonable basis" rule are met, the public projection is "deemed not to be a fraudulent statement," 17 C.F.R. §240.3b-6, and that conclusive presumption carries over to "all of the bases of liability in the [securities laws] and [their] implementing rules," *Wielgos*, 892 F.2d at 513, which of course includes insider trading. As a matter of law, therefore, Szeliga's risk assessment could be material only if it reveals that Qwest's publicly issued projections lack a reasonable basis—precisely the theory of

materiality charged and tried (but not proven) here. *See* Emergency Motion at 16 n.10, & Exhibit R (Doc. No. 538).

Third, the government asserts (Doc. No. 543 at 19) that “reasonable basis” principles “protect *statements* filed with the SEC from liability; it does not protect other forms of conduct (such as trading).” That is incorrect, as is the assertion (Doc. No. 543 at 19 n.5) that *Wielgos* was just a false statements case. The Seventh Circuit explained that the reasonable basis rule applies to *any* theory of liability under the securities laws that depends on establishing that a public projection has become materially misleading. The company in *Wielgos* was indeed trading, and companies have the same duty to disclose all material information or abstain from selling that individuals have.⁵ The whole question in the case was whether the company could continue *selling its stock* without disclosing the internal predictions and interim operating results at issue. The Seventh Circuit held that it could, because that data was not yet sufficiently certain to show that the company lacked a reasonable basis for adhering to its projections.

Fourth, the government says that the reasonable basis rule relates to what is misleading rather than what is material. As is explained above, that is true—but the rule is nonetheless

⁵ *See Shaw*, 82 F.3d at 1203 (“Courts ... have treated a corporation trading in its own securities as an ‘insider’ for purposes of the ‘disclose or abstain’ rule.”); *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 56 n.21 (1st Cir. 2008) (same); *McCormick v. Fund Am. Cos.*, 26 F.3d 869, 876 (9th Cir. 1994) (“Numerous authorities have held or otherwise stated that the corporate issuer in possession of material nonpublic information, must, like other insiders in the same situation, disclose that information to its shareholders or refrain from trading with them.”); Mark J. Loewenstein & William K.S. Wang, *The Corporation As Insider Trader*, 30 Del. J. Corp. L. 45, 77 (2005) (“[C]ourts, commentators, and the SEC have all stated or assumed that a public corporation violates rule 10b-5 by buying its own shares in the market based on material, nonpublic information.”); *id.* at 58 n.48, 62 nn.57-58, 66 n.74 (collecting authorities); 7 Louis Loss & Joel Seligman, *Securities Regulation* 3499 (3d ed. rev. 2003) (“When the issuer itself wants to buy or sell its own securities, it has a choice: desist or disclose.”).

relevant here because the only way Szeliga's prediction could be material is if that prediction had sufficient weight and certainty to render Qwest's public projections misleading in the absence of additional disclosures. The government did not allege that anything Nacchio knew was material *independent of the projections*, and the Tenth Circuit's ruling on the sufficiency of the evidence depends on the premise that Szeliga's warning could be material only because a 'skittish' and 'mercurial' stock market would punish Qwest for even a minor shortfall *from the projections*. *United States v. Nacchio*, 519 F.3d 1140, 1165 (10th Cir. 2008).

Fifth, the government suggests (Doc. No. 543 at 20) that policy arguments can only be addressed to the SEC not the Supreme Court. The Supreme Court frequently considers the broader policy implications of the rules it adopts—particularly when interpreting statutes as vague and open-ended as §10(b). And the government's suggestion that no policy arguments could justify extending the protections of the reasonable basis rule to individuals rests on the unlikely assumption that companies care about their own exposure to civil liability but will not change their behavior in response to serious risks of imprisonment for senior executives.

Finally, the government argues that the reasonable basis instruction would not have helped Nacchio because the jury determined that he did not act in good faith. The instructions *did not* require the jury to find that Nacchio did not believe in good faith in Qwest's public revenue projections. It was Nacchio's theory of the case that conviction should require such proof, but the government convinced the district court otherwise. The instructions told the jury that "[a] defendant does not act in good faith if *even though he honestly holds a certain opinion or a belief ... he also knowingly employs a device, scheme or artifice to defraud.*" (Exhibit W (Tr.) at APP-4561) (emphasis added). The clear import of that instruction was that the jury was

entitled to convict even if Nacchio honestly believed that Qwest would make the numbers, if he also failed to disclose material inside information (which is a device, scheme, or artifice to defraud under §10(b)) or even if he engaged in any other unrelated dishonest act. (The government actually urged the jury to convict on the basis of vague testimony from David Weinstein, Nacchio's former financial adviser, that Nacchio had "asked [him] to assist [Nacchio] in an act of dishonesty involving Qwest." (Exhibit X (Tr.) at APP-3066.)

V. THE TENTH CIRCUIT'S APPROACH TO THE JURY INSTRUCTIONS RAISES SUBSTANTIAL QUESTIONS FOR CERTIORARI

The government's response to Nacchio's arguments about the Tenth Circuit's standards for reviewing the jury instructions basically collapses into its assertion that there was no error in the instructions because the *TSC* "what a reasonable investor would find important" standard is the one true, adequate to all circumstances definition of materiality. That is not true, *see supra*, at 15-17, and even the Tenth Circuit panel did not accept that. To the contrary, the panel acknowledged that "[i]n light of the fact-specific nature of the materiality determination it is important to give a jury enough guidance to sort out material information from noise" because "[i]t is difficult for untrained jurors to judge *ex post* what would have been important to reasonable investors *ex ante*." *Nacchio*, 519 F.3d at 1159. The panel criticized the instruction the district court gave as "not particularly informative." *Id.* But it held that there was no reversible error because under the Tenth Circuit's prior opinion in *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006), Nacchio could not complain about failure to give an instruction he did not request or an instruction he did request that was not a "correct statement[] of the law," and that the only "question before us is therefore whether the instructions Mr. Nacchio did receive misstated the law." *Id.* at 1159. That approach conflicts with holdings of

other circuits for two independent reasons explained in Nacchio's motion for bail pending certiorari. (Doc. No. 538 at 19-20.) The government does not deny those conflicts and apparently has no response. The proper standards for review of jury instructions is an important and recurring issue that raises a substantial question for certiorari.

VI. WHETHER SUMMARY REVERSAL IS WARRANTED IS A SUBSTANTIAL QUESTION

The government's only defense of the *en banc* court's indefensible failure to remand under *Koon v. United States*, 518 U.S. 81, 100 (1996), is to assert that the *en banc* court held that the district court's erroneous holdings about Rule 16 and relevance did not affect its exercise of discretion *at all*. That is untenable. The *en banc* dissent demonstrates persuasively that Judge Nottingham's decision was *entirely* based on Rule 16 and relevance. The *en banc* court does not and could not attempt to claim that those issues did not factor into his reasoning at all. To the contrary it asserts (quite unpersuasively) that *Daubert* was his "*principal* concern" and the "*primary* rationale for the court's decision." *En Banc* Opinion at 16-17 (Doc. No. 538, Exhibit C). As the dissent explains, however, that is not enough to avoid the need for a remand.

The *en banc* court repeatedly relied on *Sprint/United Management v. Mendelsohn*, 128 S. Ct. 1140, 1146 (2008), for the proposition that "[w]hen a district court's language is ambiguous ... it is improper for the court of appeals to presume that the lower court reached an incorrect conclusion." *En Banc* Opinion at 17, 12 n.6 (Doc. No. 538, Exhibit C). The court apparently missed the Supreme Court's actual holding in the case, which was that in the face of ambiguity "[a] remand directing the district court to clarify its order ... would have been the better approach." 128 S. Ct. at 1146. The government responds (Doc. No. 543 at 21) only that "the *en banc* majority found that its reading of the district court's decision was simply the most 'natural'

one.” But that misses the point. The *en banc* court obviously recognized there was ambiguity. Why else did it cite *Sprint*, and quote that language? It simply misunderstood the import of that ambiguity under the Supreme Court’s holding in that very case. The Supreme Court often summarily reverses when a court of appeals misunderstands the Court’s recent precedents, *e.g.*, *Nelson v. United States*, 129 S. Ct. 890 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009), or when the court of appeals reverses when it should have remanded, *e.g.*, *INS v. Ventura*, 537 U.S. 12 (2002); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001).

The government has no response at all to Nacchio’s demonstration that the panel clearly erred, in a manner meriting summary reversal under recent Supreme Court precedent, when it declined to consider the “probability” side of the “probability” and “magnitude” standard because of an obviously incorrect assertion about the content of Nacchio’s brief on appeal. *See* Emergency Motion at 9 n.4 (Doc. No. 538).

VII. THIS COURT SHOULD GRANT NACCHIO’S REQUEST FOR A BRIEF DELAY IN HIS REPORTING DATE TO PERMIT AN ORDERLY RESOLUTION OF THESE ISSUES, INCLUDING APPELLATE REVIEW

As an alternative to reconsideration, Nacchio asked this Court to exercise its inherent authority to briefly stay this Court’s own surrender order to permit an orderly resolution of the bail pending certiorari issue, including some opportunity for review by the Tenth Circuit and the Supreme Court, before Nacchio is required to surrender. The government does not deny that this Court has that authority.⁶ In light of the elapsed time and the government’s thorough briefing of

⁶ The government says that this Court should not grant any application for continued release without holding that the requirements of §3143(b) are satisfied, but a brief delay of the surrender date to permit consideration of whether continued release is warranted *is not a grant of continued release governed by §3143(b)*—any more than a brief delay for medical reasons would be.

the merits, we respectfully ask that this Court treat that request as an independent motion and rule on it regardless of this Court's disposition of the motion for reconsideration.

The government's suggestion that Nacchio has somehow inappropriately delayed the resolution of this bail issue is thoroughly meritless, for reasons explained above. And Nacchio is not "seek[ing] to continue his surrender date until 14 days after the Court rules on an application that he has not yet made." (Doc. No. 543 at 22.) The motion for bail pending certiorari was filed last Wednesday and is now fully briefed. Nacchio's request was that this Court defer his surrender date until this Court rules on that motion, and up to 14 days for appellate review, conditioned on Nacchio filing his petition for certiorari this Friday, March 20, 2009, and on his seeking review in the Tenth Circuit within 48 hours of any ruling from this Court—and review from the Supreme Court within 48 hours of any ruling from the Tenth Circuit. On those terms we believe that the necessary appellate review could take significantly less than 14 days. Indeed, we are prepared to renew our filing in the Tenth Circuit immediately upon any negative decision from this Court, and the Tenth Circuit has had the substance (indeed, the text) of our motion before it for nearly two weeks now. If this Court rules expeditiously, it is entirely possible that the Tenth Circuit could act before the end of this week—permitting an appeal to Justice Breyer (which the government apparently believes is the primary venue for consideration of this issue)

Courts, including the Supreme Court stay surrender or other imminent dates all the time in order to permit reasoned consideration of a bail or stay application. *E.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983) (in context of reviewing merits of habeas petition and motion for stay of execution, explaining that where the "exigencies of time preclude a considered decision on the merits ... the motion for a stay must be granted"); *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (in the course of granting bail pending appeal, noting that the district court had "denied the motion but granted a stay of commitment, which we extended" in order to have sufficient time to consider the bail application).

early next week. The net delay in reporting, if relief is not granted, could therefore be as little as a day or two.

This is a highly accelerated schedule, and it bears repeating that Nacchio is committing to file his petition for certiorari more than two months early in an attempt to obtain meaningful judicial consideration of his entitlement to release pending certiorari *before* he is required to report to prison. That is not an unreasonable request. A three judge panel of the Tenth Circuit, including the author of the *en banc* opinion, *unanimously* concluded that it is a “close question” whether this defendant is innocent as a matter of law, 519 F.3d at 1164, and four judges of that court believe it is a great injustice that he was not granted a new trial. He is not a flight risk or a danger to anyone, and—as the government points out—has been free pending appeal for two years now. The government points to no reason why a few additional days to permit an orderly resolution of whether he is entitled to continued release pending certiorari could possibly disserve the interests of justice.

Respectfully submitted this 17th day of March, 2009.

s/ Maureen E. Mahoney

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 2009, I electronically filed the foregoing **REPLY BRIEF IN SUPPORT OF JOSEPH P. NACCHIO'S EMERGENCY MOTION FOR RECONSIDERATION OF EMERGENCY MOTION BY JOSEPH P. NACCHIO FOR CONTINUED RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, TO STAY THIS COURT'S ORDER OF SURRENDER PENDING RESOLUTION OF A MOTION FOR CONTINUED RELEASE** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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EXHIBIT T

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

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**DECLARATION OF SEAN M. BERKOWITZ IN SUPPORT OF
DEFENDANT JOSEPH P. NACCHIO'S MOTION FOR RECONSIDERATION
AND FOR BAIL PENDING SUPREME COURT RESOLUTION
OF A PETITION FOR CERTIORARI**

I, Sean M. Berkowitz, declare as follows:

1. I am counsel for Defendant Joseph P. Nacchio in the above-entitled case.
2. On March 16, 2009, I contacted the U.S. Probation Office to ascertain its position regarding certain elements of Mr. Nacchio's application for bail pending Supreme Court resolution of a petition for certiorari.
3. U.S. Probation Officer Caryl Ricca informed me that she and her supervisor have conferred and the U.S. Probation Office believes that Mr. Nacchio is neither a flight risk, nor a danger to the community.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this seventeenth day of March 2009, at Chicago, Illinois.


Sean M. Berkowitz
LATHAM & WATKINS LLP

EXHIBIT U

4/5/2007 Trial Vol. 20

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME TWENTY

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 8:34 a.m., on the 5th day of April,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

4/5/2007 Trial Vol. 20

1 expected.

2 He will testify, according to defense, Qwest's stock
3 price did not decline significantly in September 2001 when it
4 reduced the guidance.

5 And he will testify finally, just like Qwest, other
6 telecommunications companies reaffirmed their guidance between
7 September 2000 and May 2001 and reduced their guidance after
8 May 2001.

9 All of those are facts. This witness has no direct
10 personal knowledge of all of those facts. It's perfectly
11 obvious. And the defense can establish those facts by
12 competent evidence if it wishes to do so.

13 For all of those reasons, primarily the gross defect
14 in failing to reveal the methodology, the motion to exclude the
15 testimony of Daniel Fischel is granted.

16 Who is your next witness?

17 MR. SPEISER: Your Honor, may I be heard?

18 THE COURT: No. You know, in this court, we follow
19 the rule, generally, that we have argument and ruling. Not,
20 the Court rules, and then it's an interactive process where you
21 get to argue later on. I have your motion, I have the
22 Government's motion, I have your response. Any argument that
23 you wish to make could have been put in the response.

24 MR. SPEISER: We were under tremendous time pressure.

25 THE COURT: So what? You could have put it in the

4/5/2007 Trial Vol. 20

1 They don't say what brokerage statement it is. I don't know
2 whether they're in evidence. Frankly, some of these are
3 actually going back to '97 or '98. Chances are, we may not
4 even have some of these statements to begin with. There is a
5 reference from --

6 I'm sorry, but I would like an opportunity to look at
7 the underlying data, see if it's right, see if there is any
8 basis for cross-examination, see if the calculations are right
9 or whether they're misleading in any way.

10 I'd like a chance to examine all of that. Right now
11 I'm not sure I could go back and reconstruct this. It says SEC
12 Form 4, that's a type of document.

13 THE COURT: That's consistent with this man's
14 testimony. It's sort of like trying to nail jello to the wall.
15 You just don't know what it is.

16 The rule provides, as follows: The underlying
17 documents, that is the originals, shall be made available for
18 inspection or copying or both at a reasonable time and place.
19 The Court may order that they be produced in court.

20 Is it the Government's request that I order they be
21 produced in court?

22 MR. TRASKOS: I think that's the easiest way to
23 proceed.

24 THE COURT: Do you have a problem with that?

25 MR. SPEISER: No, Your Honor.

EXHIBIT V

4/9/2007 Trial Vol. 22

2567

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME TWENTY-TWO

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 1:40 p.m., on the 9th day of April,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

4/9/2007 Trial Vol. 22

1 the defendant can call under the Rules of Evidence. But they
2 can't get in this factual testimony through the flagrant
3 hearsay attempts of Professor Fischel to use it.

4 The Court has already found that neither Khemka nor
5 Johnstone gave expert opinions. And to the extent that they
6 did, such opinions were solicited by the defense.

7 Accordingly, as I said, that's the first reason that
8 they don't need an expert to rebut Khemka's or Johnstone's
9 testimony.

10 As to the proposed methodology, the Court continues to
11 have the same difficulty with this methodology and
12 non-disclosure of the methodology as it had with respect to the
13 original expert report.

14 Any suggestion that the Government was in possession
15 of Fischel's opinion and/or methodology is simply disingenuous.
16 The March 29, 2007, disclosure contained no methodology or
17 reliable application of methodology to the case.

18 It was precisely that lack of -- lack of reliability,
19 along with other reasons, that led the Court on April 5, 2007,
20 to exclude much of Fischel's proposed testimony. The proposed
21 testimony now before the Court suffers from the same problems
22 as that which the Court has already excluded. There is no more
23 disclosure or substantially no more disclosure than we
24 originally had.

25 Further, even if it were reliable, the Court remains

EXHIBIT W

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME TWENTY-SEVEN

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 8:47 a.m., on the 12th day of April,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

4/12/2007 Trial Vol. 27

1 this Indictment because good faith on the part of the
2 defendant, if it is found by the jury, is simply inconsistent
3 with the intent to defraud alleged in each charge of the
4 Indictment.

5 A person who acts on a belief or an opinion honestly
6 held is not punishable under this statute merely because the
7 belief or opinion turns out to be inaccurate, incorrect or
8 wrong. An honest mistake in judgment does not rise to the
9 level of criminal conduct.

10 A defendant does not act in good faith if even though
11 he honestly holds a certain opinion or a belief if he also
12 knowingly employs a device, scheme or artifice to defraud.

13 The law is written to subject criminal punishment only
14 those people who knowingly defraud or attempt to defraud.

15 While the term "good faith" has no precise definition,
16 it encompasses among other things a belief or opinion honestly
17 held, an absence of an intention to defraud, and an intention
18 to avoid taking unfair advantage of another.

19 The burden of proof is not on Mr. Nacchio to prove his
20 good faith since the defendant has no burden to prove anything.

21 Rather, the Government must establish beyond a
22 reasonable doubt the opposite of bad faith. That is, he acted
23 with the intent to defraud charged in the Indictment.

24 If the evidence in the case leaves you with a
25 reasonable doubt as to whether Mr. Nacchio acted with the

EXHIBIT X

3/29/2007 Trial Vol. 13

1556

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Criminal Action No. 05-cr-00545-EWN

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs.

7 JOSEPH P. NACCHIO,

8 Defendant.

9 REPORTER'S TRANSCRIPT
10 TRIAL TO JURY
11 VOLUME THIRTEEN

12 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
13 Judge, United States District Court for the District of
14 Colorado, commencing at 1:20 p.m., on the 29th day of March,
15 2007, in Courtroom A1001, United States Courthouse, Denver,
16 Colorado.

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24 THERESE LINDBLOM, Official Reporter
25 901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

3/29/2007 Trial Vol. 13

1 Do you recall that?

2 A. Yes.

3 Q. And are you aware of another occasion in 2000 where
4 Mr. Nacchio asked you to assist him in an act of dishonesty
5 involving Qwest?

6 A. Yes.

7 MR. STRICKLIN: No further questions.

8 THE COURT: Do you wish any recross?

9 MR. STERN: Yes, I would.

10 THE COURT: Proceed.

11 But in what area? I want to define the areas you're
12 going to do recross in.

13 MR. STERN: Do I have to do it in the area of the
14 witness?

15 THE COURT: Yes. Everybody else has. Why should
16 there be an exception to you.

17 MR. STERN: I want to know the rules. I want to
18 inquire into the area, the gift of the shares was an
19 irrevocable gift. The intimation was Mr. Nacchio can take the
20 money out. He can't. That was the cross we just heard.

21 THE COURT: All right. Anything else?

22 MR. STERN: Yes, I want to ask about the repricing
23 issue, the cross we just heard. Frankly -- like Mr. Speiser --

24 THE COURT: Look, tell me the area you want. I don't
25 need a speech, please. What area do you wish to examine?

EXHIBIT C

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

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**EMERGENCY MOTION BY JOSEPH P. NACCHIO FOR CONTINUED RELEASE
PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI**

On February 25, 2009, a divided 5-4 *en banc* Tenth Circuit affirmed Joseph P. Nacchio's conviction for insider trading. On March 4, 2009, Nacchio filed a motion in the Tenth Circuit pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), seeking bail pending Supreme Court action on a petition for certiorari. Last night, the Tenth Circuit issued an order denying the motion "without prejudice to renewal subject to initial submission of that application to the United States District Court for the District of Colorado." Order, *United States v. Nacchio*, No. 07-1311 (Mar. 10, 2009). Nacchio therefore moves and submits this memorandum in support of his motion for an order continuing release under §3143(b) pending the resolution of a petition to the Supreme Court for a writ of certiorari.

This Court has issued an order of surrender requiring Nacchio to report to the custody of the Bureau of Prisons by noon on March 23, 2009. We respectfully request that this Court decide this motion on a highly expedited basis, by Monday, March 16, 2009, to allow sufficient

time for review (if necessary) by the Tenth Circuit and the Supreme Court prior to that date. In the alternative, if this Court denies the motion, we respectfully request that this Court stay its order of surrender so that the Tenth Circuit and the Supreme Court may have a full and fair opportunity to review this issue.

Under 18 U.S.C. §3143(b), continuing release is appropriate if the court finds by clear and convincing evidence that the defendant is not a flight risk or a danger, and also finds that his petition for certiorari is not for purposes of delay and raises a “substantial question” for review. As both Judge Nottingham and the Tenth Circuit have already determined (and the government has never claimed otherwise), Nacchio is not a flight risk or a danger. (Exhibit A (Sentencing Tr.) at APP-1351.)¹ Nor is Nacchio’s petition for the purposes of delay. Nacchio will file his petition for certiorari by March 27, 2009, months before the Supreme Court’s deadline, in order to ensure that the Court acts on the petition before its summer recess. If the government files its opposition to certiorari on time, Nacchio’s petition will be distributed for the Supreme Court’s conference on May 28. Even if the government seeks and obtains a 30-day extension, the petition will still be considered at the Supreme Court’s June 25 conference. The Supreme Court almost always acts on petitions for certiorari within a few days of the conference at which the petition is considered.

Thus, the only remaining question is whether Nacchio’s petition will raise a “substantial question” for review. 18 U.S.C. §3143(b)(1)(B). A “substantial question” is a “‘close’ question or one that very well could be decided the other way.” *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (citation omitted). In granting Nacchio bail pending appeal on August 22,

¹ “APP-” refers to the Appendix to Appellant’s Opening Brief filed Oct. 9, 2007 (10th Circuit).

2007, the Tenth Circuit already determined that Nacchio's appeal raises at least one "substantial" or "close" question. A unanimous panel of the Tenth Circuit then held on the merits that it was "a close question" whether Nacchio was entitled to acquittal as a matter of law on materiality grounds. *United States v. Nacchio*, 519 F.3d 1140, 1164 (10th Cir. 2008). That section of the panel's opinion was not vacated by the *en banc* court. And the *en banc* court's bitterly divided 5-4 decision regarding the exclusion of Nacchio's expert witness leaves no doubt that those issues also raise a "close" question that "very well could be decided the other way."

The relevant facts and procedural history are explained in the panel and *en banc* opinions of the Tenth Circuit, the Rule 33 motion (Doc. No. 532) filed with this court last week, and Nacchio's opening brief on appeal, which is attached hereto as Exhibit B.

I. THE EXCLUSION OF PROFESSOR FISCHEL'S EXPERT TESTIMONY PRESENTS A SUBSTANTIAL QUESTION

The Tenth Circuit's panel decision correctly held that the district court's decision to exclude Nacchio's expert witness, Professor Daniel Fischel, was based on an erroneous understanding of Rule 16, and that that error requires a new trial. The *en banc* court did not disagree with the panel's Rule 16 analysis; instead, it recast the district court's exclusion order as a freestanding *Daubert* ruling, and held that a *Daubert* dismissal was within the district court's discretion. As the *en banc* dissenters explain, that reformulation is inconsistent with the district court's actual reasoning. But even if the *en banc* court's erroneous premises are accepted, its analysis rests on a misunderstanding of the burdens of proof on a motion *in limine*, conflicts with other circuits, and merits Supreme Court review.

1. The *en banc* court erroneously determined that it was Nacchio's responsibility to establish the reliability of Fischel's methodology in response to a motion to exclude. (Exhibit C

(*En Banc Op*) at 26 n.13, 23 n.11, 33.) Of course Nacchio bore the ultimate burden of laying a sufficient foundation for admissibility at trial. But when a litigant moves *in limine* to exclude evidence, *the movant* bears the burden of demonstrating (at least) serious reasons for doubt. The movant cannot simply rely on the fact that the non-moving party must establish admissibility and has not yet met that burden. *See United States v. Stoddart*, 48 Fed. Appx. 376, 380 (3d Cir. 2002) (“A district court may deny a motion to suppress without a hearing when the defendant fails to provide a factual basis for the hearing and merely relies upon the government’s ‘burden of proof to establish adequate *Miranda* warnings.’”) (citation omitted); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (same); (Exhibit D (*En Banc Br.*) at 27-28 & nn.14, 15). The posture is like summary judgment, where the movant has the *prima facie* burden to prove the absence of a triable dispute.

Neither the district court nor the *en banc* court ever suggested that the government made such a showing. The government did not even argue that the record established that Fischel’s testimony was unreliable; it repeatedly argued that Nacchio’s Rule 16 “disclosure does not set forth any ‘reliable principles and methods’ that Professor Fischel might possibly have used.” (Exhibit E (Doc. No. 334) at APP-398; Exhibit D at 6-7.) The district court faulted Nacchio for a supposed “gross defect in failing to *reveal* [Fischel’s] methodology,” (Exhibit F (Tr.) at APP-3921), and ruled that it was “*undisclosed* in this expert disclosure.” (*Id.* at APP-3917; *see also* Exhibit G (Tr.) at APP-4075 (“The March 29, 2007, disclosure [Nacchio’s Rule 16 notice] contained no methodology or reliable application of methodology to the case.”).) But uncertainty about Fischel’s methodology at the motion *in limine* stage was the *government’s* problem, since it bore the burden to show that the necessary foundation could not be laid.

Of course the district court could have shifted the burden by clearly ordering Nacchio to establish the grounds for Fischel's admissibility prior to putting him on the stand. Contrary to the *en banc* court's reasoning, however, the government does not accelerate the defendant's ultimate burden to show admissibility merely by filing a motion *in limine* pointing out that the defendant has not yet carried that burden. That would nullify the rule that the moving party bears the burden on a motion *in limine*, and squarely conflict with cases like *Stoddart* and *Howell, supra*.

In the *Daubert* context, the Supreme Court has explained that when the movant "call[s] sufficiently into question" the reliability of the expert's testimony, the district judge must hold "appropriate proceedings" to "investigate reliability," which can include "special briefing" or "other proceedings," where the judge is to "ask questions." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 151-52 (1999); *see also* Fed. R. Evid. 702, advisory committee's note to 2000 amends.; Fed. R. Evid. 104(a), advisory committee's note to 1972 proposed rule. None of that would be necessary if the expert could be excluded merely because the proponent had not yet proven reliability.

The Third Circuit has held several times that it was reversible error for a district court to grant a *Daubert* motion without holding a hearing, when the record was still insufficient to allow the court to assess the reliability of the testimony.² If the mere filing of a *Daubert* motion

² *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 854-55 (3d Cir. 1990) (reversing exclusion because the district court did not "provide[] the [proponents] with sufficient process for defending their evidentiary submissions" and "should have been given an opportunity to be heard on the critical issues before being effectively dispatched from court"); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (reversing exclusion of expert without hearing where report did not disclose methodology because that did not "establish that [the

notifies the proponent of expert testimony that he must supplement the record to establish reliability before the court rules on that motion, as the *en banc* court held here, then the Third Circuit would have held that the proponents failed to carry their burdens and all of those cases would have come out the other way. Instead the Third Circuit consistently holds that “failure to hold a hearing”—regardless of whether the proponent requests one—constitutes “an abuse of discretion where the evidentiary record is insufficient to allow a district court to determine what methodology was employed by the expert in arriving at his conclusions.” *Murray*, 2008 WL 2265300, at *2. This is a square circuit split, and the *en banc* court’s efforts to distinguish those cases are entirely unpersuasive. It was equally true in *Padillas*, for example, that the court would have to determine admissibility at some point; that a *Daubert* motion was “ripe for decision”; and that the proponent of the expert testimony “passed over” “opportunities” to offer additional clarification about methodology. (Exhibit C at 45.)

Other circuits agree. The Sixth Circuit has reversed the exclusion of an expert on the grounds that “a district court should not make a *Daubert* determination when the record is not adequate to the task” and “should only do so when the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance.” *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 393 (6th Cir. 2000); *see also Busch v. Dyno Nobel, Inc.*, 40 Fed.

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” and thus the proponent must have an “opportunity to respond to the court’s concerns”) (citation omitted); *Elcock v. Kmart Corp.*, 233 F.3d 734, 745 (3d Cir. 2000) (holding that where court cannot determine what methodology was used and methodology raises “significant reliability questions,” a *Daubert* hearing is “a necessary predicate for a proper determination as to the reliability of [the expert’s] methods”); *Murray v. Marina Dist. Dev. Co.*, No. 07-1147, 2008 WL 2265300, at *2 (3d Cir. June 4, 2008) (unpublished); *cf. Oddi v. Ford Motor Co.*, 234 F.3d 136, 153-55 (3d Cir. 2000) (affirming exclusion where record was complete).

Appx. 947, 961 (6th Cir. 2002) (reversing exclusion of expert because district court “is charged with the responsibility of ensuring that the record before the court is adequate”). The First Circuit has explained that “courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record” and “must be cautious—except when defects are obvious on the face of a proffer—not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.” *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). The advisory committee notes to the Rule 702 2000 amendments endorse *Cortes-Irizarry*, and the Third Circuit’s decision in *In re Paoli Railroad Yard PCB Litigation*, as examples of how courts should “consider[] challenges to expert testimony under *Daubert*.” Fed. R. Evid. 702, 2000 advisory committee’s note. Other circuits have affirmed decisions to exclude testimony without a hearing only after emphasizing that the record was sufficient to permit a fair evaluation of the expert’s methodology. *E.g.*, *Miller v. Baker Implement Co.*, 439 F.3d 407, 413 (8th Cir. 2006) (court must have “an adequate record on which to base its ruling”); *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1138-39 (9th Cir. 2002) (court had “an adequate record before it to make its ruling” including “the experts’ reports, some deposition testimony, and the experts’ affidavits”).

Commentators agree that *Kumho Tire* and basic evidentiary principles require a movant seeking to exclude expert testimony to establish serious reasons for doubting its reliability, on an adequate evidentiary record.³ This is an important and recurring issue on which the lower courts

³ See also Robert J. Goodwin, *The Hidden Significance of Kumho Tire*, 52 Baylor L. Rev. 603, 626-32 (2000) (explaining that *Kumho Tire* plainly holds that it is the *movant’s* burden to

are divided, and presents a substantial issue for certiorari.

2. The *en banc* court's decision also, as a practical matter, nullifies Rule 16 and imposes civil disclosure burdens on criminal defendants. The government now effectively concedes that criminal defendants have *no* obligation under Rule 16 to offer disclosures sufficient to justify the admissibility of an expert's testimony under *Daubert*. But the *en banc* court has held that the government can force a criminal defendant to supply such disclosures—the equivalent of a civil expert report and “all available arguments for the testimony's admissibility,” (Exhibit C at 26 n.13)—simply by filing a motion pointing out that the defendant has not yet disclosed what the rules do not require him to disclose. The government will exploit this loophole in every case, and the consequences for the administration of justice present a substantial question meriting Supreme Court review.

II. THE STANDARD FOR ASSESSING THE MATERIALITY OF INTERIM INFORMATION PORTENDING FUTURE RESULTS PRESENTS A SUBSTANTIAL QUESTION THAT HAS DIVIDED THE CIRCUITS

Nacchio's opening brief to the Tenth Circuit explained, and the government has never denied, that this case represents the first time a corporate executive has ever been criminally prosecuted for insider trading based on supposedly material “inside” information that earnings projections for future quarters might not be met. The Tenth Circuit held that the conviction could be sustained on the basis of testimony from Qwest's Chief Financial Officer Robin

establish a “threshold level of unreliability” by “call[ing] sufficiently into question” the reliability of the testimony); Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1365 (1994) (“[T]he evidentiary policies underlying *Daubert*'s competing rationales, efficiency and fairness concerns, and the structure of the discovery rules, all dictate placing a burden on the opponent of the evidence to make a *prima facie* showing that the proponent's evidence suffers from the deficiencies identified in *Daubert*,” and that “the evidence should be presumed to be admissible until the opponent discharges its burden to show the contrary”).

Szeliga—which it believed *might* be interpreted to suggest that she warned Nacchio in December 2000 or January 2001 of \$1.2 billion (4.2%) in total “risk” to Qwest’s revenue projections for *year-end* 2001. *United States v. Nacchio*, 519 F.3d 1140, 1163 (10th Cir. 2008). The panel acknowledged that it is “a close question” whether Nacchio is entitled to acquittal as a matter of law by reference to the SEC’s rule of thumb that discrepancies under 5% between *past* reported earnings and *past* actual earnings are generally immaterial. *Id.* at 1162-1164. But it held that the evidence was nonetheless (barely) sufficient for conviction because of testimony that the “skittish” and “mercurial” stock market would punish Qwest for even a small shortfall. *Id.* at 1164. That reasoning makes no allowance for the fact that Szeliga was talking about an uncertain *risk* eleven or twelve months in the future. The SEC’s guideline that errors in reported earnings under 5% generally are not material relates to *past shortfalls that have already occurred*, not to *risks* of events that are nearly a year away and dependent on the vicissitudes of the economy.⁴

Other circuits have adopted stringent standards for assessing the materiality of information bearing on uncertain future events, under which Nacchio would clearly be entitled to

⁴ The Tenth Circuit suggested that “in this case the parties have focused *solely* on the magnitude of the shortfall, should it occur,” not “the probability that the event will occur.” *Nacchio*, 519 F.3d at 1164 n.10 (emphasis added) (citing Exhibit B at 24). That was a clear error. The court was citing section I.B.2.b., a *one-page* section of Nacchio’s brief—but overlooked section I.B.2.a., titled: “*At the time of the trades, the information available to Nacchio did not reveal, to any degree of certainty, that Qwest would fail to meet its year-end numbers eight months in the future,*” *id.* at 19—a *five-page* section (nearly 10% of Nacchio’s brief), that argued that the information was too uncertain to be material. The Supreme Court has summarily reversed on similar grounds before, and should do so again here. *See Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (summary reversal where circuit held that defendant failed to raise argument when “[t]he fourth argument heading in his brief” plainly “sets out the ... claim”).

acquittal as a matter of law. Indeed, in several circuits allegations like these would promptly be dismissed as a matter of law even in a civil case. The standards for assessing the materiality of internal predictions and interim operating results present a question of great national importance, but “[n]either the Securities and Exchange Commission (SEC) nor the courts have answered the[] question[] with either uniformity or clarity.”⁵ The Tenth Circuit’s resolution of those issues rests on a premise—that insider trading cases against executives should be governed by entirely different standards than “false statement” claims against the company—that is highly debatable and very important. Even if that premise were accepted, the court’s analysis would still conflict with holdings of several other circuits. There is *at least* a “substantial question” for certiorari.

A. The Tenth Circuit’s Decision Squarely Conflicts With The Materiality Standards Applied By Other Circuits

1. The Tenth Circuit held that the cases applying heightened materiality standards to predictive or forward-looking information are inapposite here, because “Mr. Nacchio is being prosecuted for concealing true information while trading, not for making misleading statements.” *Nacchio*, 519 F.3d at 1160. But several circuits have applied far more rigorous standards, under which Nacchio would have been acquitted as a matter of law, when assessing the materiality of

⁵ Mitu Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 U.C.L.A. L. Rev. 675, 678 (1999). Commentators agree that the answer is “uncertain,” *id.* at 728-29, “frustrat[ing],” Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology & Practice of Insider Trading Regulation*, 99 Colum. L. Rev. 1319, 1337 (1999), that “[t]he confusion has turned to a hopeless clutter,” Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1641-42 (2004), and is “a controversial topic” that has “troubled” courts due to “concern[] over imposing potentially enormous liability [including, here, *imprisonment*] for failure to disclose such potentially uncertain information,” Bruce A. Hiler, *The SEC and the Courts’ Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 Md. L. Rev. 1114, 1129-30, 1195 (1987).

information just like this *in trading cases*.

The leading cases are *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996), and *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996). *Shaw* involved undisclosed internal predictions and interim operating results just like this case, and the company *sold its stock* while knowing of allegedly “material facts portending the unexpectedly large losses for the third quarter of fiscal 1994 that were announced later.” 82 F.3d at 1201-02. The First Circuit “conceptualize[d]” the company “as an individual insider transacting in the company’s securities,” to examine whether it was required to disclose or abstain from trading. *Id.* at 1203. And it held that “soft” information in the form of internal *predictions* is always immaterial as a matter of law. *Id.* at 1211 n.21.

Turning to the “hard” intra-quarterly operating results the company already had in hand, the First Circuit held that the defendant could continue selling stock without disclosing those results unless it “is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be *an extreme departure* from the range of results which could be anticipated based on currently available information.” *Id.* at 1210 (emphasis added). The court agreed that interim results may sometimes be material, but squarely rejected any obligation for a corporate or individual stock seller to “disclose interim operating results for the quarter in progress whenever it perceives a possibility that the quarter’s results may disappoint the market.” *Id.*⁶ The standard was satisfied in *Shaw* because the results were truly dire and the end of the quarter was only eleven days away. But it also emphasized that claims based on

⁶ The court detailed this analysis in the context of a Section 11 claim, but also held that the same standards apply to claims under Section 10(b). 82 F.3d at 1222 & n.37.

interim information presaging results four to six months in the future have been dismissed because the omissions should be “deemed immaterial as a matter of law.” *Id.* at 1210-11.

In *Glassman*, the company sold stock ahead of its third quarter earnings release while knowing that “as of week seven of the third quarter ... [sales] were only about 24% of *Computervision’s internal forecasts* for those weeks.” 90 F.3d at 630. Although that was more than halfway through the quarter, the First Circuit held that the company could sell its stock without disclosing what it knew about the interim results and trends because “the undisclosed hard information ... did not indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” *Id.* at 631 (citation omitted). The company was not required to “disclose or abstain,” and even *civil* liability was inappropriate as a matter of law.⁷

2. Nacchio would be entitled to acquittal as a matter of law in the First Circuit, which developed its *Shaw* test explicitly by reference to individual insider trading cases, and clearly would apply that test here. Under *Shaw*, the evidence the Tenth Circuit found dispositive—Szeliga’s forecast of 4.2% in “risk” to the 2001 projections—is “soft” predictive information and thus categorically immaterial. 82 F.3d at 1211 n.21. And that prediction was particularly “soft.” The forecasting process continued to be refined well after Szeliga communicated any risk to Nacchio. There was never a single internal Qwest estimate forecasting 2001 revenues below \$21.3 billion. Even Szeliga and Mohebbi testified that, based on the revised budget, it was their good-faith belief *at the time of Nacchio’s trades* that Qwest would meet its year-end projections.

⁷ See also *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (Alito, J.) (citing *Shaw* and *Glassman* as “claims of omissions or misstatements that are obviously so unimportant that courts can rule them immaterial as a matter of law”).

Graham also testified that the April 9 budget, which included his projection of *increased* indefeasible rights of use (IRU) sales, “provid[ed] our best belief of what things were going to happen.” (Exhibit H (Tr.) at APP-2702.) Casey’s assessment about IRUs—that he did not “have any visibility to what IRUs would be doing after the second quarter,” (Exhibit I (Tr.) at APP-2496)—was also “soft,” based on his assessment of the unpredictable path of the economy, and far from certain. Revenues were *35% greater* than Casey’s recent prediction for results *two months* in the future; the prediction the government has focused on here was for results *eight months* in the future, contradicted Graham’s assessment, and, regardless, identified only \$350 million of “risk” in projected IRU sales, which even if treated as a certainty, would have resulted in a 0.4% shortfall.⁸

The “hard” interim operating results that Nacchio had in April or May of 2001 certainly did not “indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” *Glassman*, 90 F.3d at 631 (citation omitted). Qwest’s first-quarter revenues were only \$4 million short of the internal “stretch” goal of \$5.055 billion. (Exhibit J (Trial exhibit A-20) at APP-4699-700.) In April, the company fell only 2.3% short of its internal estimate, (Exhibit K (Trial exhibit 940) at APP-5019), and Casey’s wholesale markets unit—the supposed epicenter of impending disaster—*beat* its internal target, (*id.* at APP-5021). Indeed, Qwest’s second-quarter revenues ultimately met investors’

⁸ See also *James v. Gerber Prods. Co.*, 587 F.2d 324, 327 (6th Cir. 1978) (no violation of §10(b) for failing to disclose interim results in connection with sale of stock because interim figures and projections “only rise to the level of materiality when they can be calculated with substantial certainty”); *Arber v. Essex Wire Corp.*, 490 F.2d 414, 421 (6th Cir. 1974) (no violation of §10(b) for failing to disclose information about future prospects and expectations before corporate and individual insider stock purchases because the law “does not require an insider to volunteer any economic forecast”).

expectations, (Exhibit L (Tr.) at APP-2381–82), and “non-recurring” revenue achieved 98% of the Board’s budget *for the year*, (Exhibit M (Trial exhibit GX932); Exhibit N (Trial exhibit GX947)). In *Glassman* the company knew five weeks before the end of the quarter that its sales *for that quarter* were running at only 24% of internal projections, and the First Circuit held that knowledge to be immaterial as a matter of law, even though the stock dropped 30% in one day when the shortfall was announced. The information Nacchio had about the current quarter was very positive. The government’s case here is based on interim data that, at most, ambiguously suggested a small shortfall in year-end results, *eight months in the future*.⁹ *Shaw* held that even “hard” information is immaterial as a matter of law if the events it supposedly portends are four to six months away, because the necessary inferences are inherently too uncertain. 82 F.3d at 1211.

And even if any “risk” of a 4.2% shortfall eight months in the future were treated as a certainty, a 4.2% shortfall is not “an extreme departure” from market expectations and did not “forebod[e] disastrous [year]-end results.” *Id.* at 1207, 1211. That risk was less than the threshold for materiality of errors in *already reported* revenues under SEC guidelines, which is also consistent with guidelines applied in other circuits. *See In re Apple Computer, Inc.*, 127 Fed. Appx. 296, 304 (9th Cir. 2005) (“[A] revenue estimate that was missed by approximately

⁹ The Tenth Circuit noted that “recurring” subscriber revenue had not accelerated by April to the extent Qwest had budgeted for. *Nacchio*, 519 F.3d at 1146. But two days before the first trade at issue *Nacchio disclosed that fact*, specifically telling the market that although Qwest had projected growth of 8-9% in the consumer and small business sector they had achieved only 6.3% (a 21% shortfall), that “we are [now] going to be talking somewhere between 6 and 8 percent” for the year, and that Qwest would have to rely more heavily on other sources to make the year-end projections. (Exhibit O (Trial exhibit GX593) at APP-4828, 4807-08.) The prosecution’s own analysts understood that disclosure loud and clear. (Exhibit P (Tr.) at APP-3636; Exhibit Q (Trial exhibit GX726).)

10% was immaterial as a matter of law.”); *Roots P’Ship v. Lands’ End, Inc.*, 965 F.2d 1411, 1418 (7th Cir. 1992) (describing an internal projection that differed from public projection by 4%-6.2% as a “slight[]” “deviat[ion]”).

B. The Tenth Circuit’s Rejection Of Reasonable Basis Principles Also Presents A Substantial Question

Numerous courts have held, and SEC rules provide, that a forward-looking statement like an earnings prediction “shall be deemed not to be a fraudulent statement . . . , unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.” 17 C.F.R. §§240.3b-6(a), 230.175(a). “Fraudulent statement” is defined broadly to encompass “all of the bases of liability” under the securities laws. *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 513 (7th Cir. 1989). The Tenth Circuit held that “reasonable basis” principles are inapposite in insider trading cases because the issue here is whether Nacchio possessed material inside information, not whether Qwest’s earnings projections had become misleading. There is at least a substantial question whether that distinction is supportable in cases like this one.

The Tenth Circuit is certainly correct that false statement cases and insider trading cases are different, and that it is possible for an insider to possess material information even if the company’s public projections are not materially misleading. The insider’s information might be material independent of whether it casts doubt on the projections, or the projections may be stale or heavily qualified and the company may have no duty to update them. But the information Nacchio knew was alleged to be material *only* because it supposedly suggested that Qwest’s public projections, which were reaffirmed contemporaneously with his trades, were unrealistic or

subject to more risk than the market would understand.¹⁰ In that posture, whether the projections were materially misleading without further disclosure and whether Nacchio's information was material *to an evaluation of whether the projections were misleading* are the same question.

Other circuits confronted with allegations like these have not distinguished between “false statement” and “insider trading” theories. The Tenth Circuit distinguished the Seventh Circuit's decision in *Wielgos* on the ground that the defendant was charged with making false statements, not insider trading. *Nacchio*, 519 F.3d at 1161 n.9. But the issue in *Wielgos* was whether the company violated the securities laws “when it sold [its] stock” when internal cost projections were more pessimistic than its public projections. 892 F.2d at 512.¹¹ The court did not label that claim a “false statement” or “insider trading” theory, but instead held that “reasonable basis” principles constrain “all of the bases of liability” under the securities laws. *Id.* at 513. The Seventh Circuit held that a company “need not disclose tentative internal estimates, even though they conflict with published estimates, unless the internal estimates are so certain that they reveal the published figures as materially misleading,” and could “sell[] [its] stock on the basis of [its public estimates]” until they “no longer [have] a reasonable basis.” *Id.*

¹⁰ The charge was that Nacchio knew “the business units were underperforming with regard to their specific internal budgets, and that *such underperformance would inhibit Qwest's ability to meet its 2001 financial guidance issued on September 7, 2000.*” Bill of Particulars 8 (emphasis added). That is the *only* theory of materiality in the indictment or argued at trial, and the conviction cannot be affirmed on any other basis. (See Exhibit R (12/11/07 Letter from Maureen Mahoney to Elisabeth Shumaker, pursuant to FRAP 28(j).) And this Court held that Szeliga's lower revenue prediction could be material, despite the SEC's guidance in SAB 99, only because the “skittish” and “mercurial” stock market would react negatively to any shortfall *as compared to the projections.* *Nacchio*, 519 F.3d at 1164; 3/10/09 Letter from Maureen Mahoney to Elisabeth Shumaker, pursuant to FRAP 28(j).

¹¹ There is no basis for distinguishing between sales by the company and individual insiders. *E.g., McCormick v. Fund Am. Cos.*, 26 F.3d 869, 876 (9th Cir. 1994).

at 515-16 (citation omitted).

Several other circuits have applied “reasonable basis” or similar principles in cases where the company sold stock without disclosing internal estimates or interim operating results that might suggest a departure from public expectations. In *Walker v. Action Industries, Inc.*, 802 F.2d 703, 709-10 (4th Cir. 1986), the Fourth Circuit held that the company had no duty to disclose internal financial reports projecting a sharp increase in first quarter “actual orders” and “projected sales”—a 95%-129% increase compared with the previous year’s first quarter—in connection with its tender offer. The court reasoned that the interim projections and actual results were still “uncertain.” *Id.* at 710. Similarly, in *In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407, 1419-20 (9th Cir. 1994), the company did not disclose declining demand and that “first quarter sales were disappointing,” which cast doubt on projections in its Debenture Offering. The Ninth Circuit held that the company “had no duty” to disclose the interim results, or “predict[] the collapse in sales [the first-quarter results foretold] that occurred in late 1987, long after the Debenture Offering.” *Id.* at 1417-18, 1420.

The Tenth Circuit’s analysis suggests that the plaintiffs in cases like *Wielgos* simply attached the wrong label to their claim, and that if they had accused the company of insider trading rather than misleading statements they would have won. But the Seventh Circuit explained that the reasonable basis rule is essential: “Any other position would mean that once the annual cycle of estimation begins, a firm must cease selling stock until it has resolved internal disputes and is ready with a new projection. Yet because large firms are eternally in the process of generating and revising estimates—they may have large staffs devoted to nothing else—a demand for revelation or delay would be equivalent to a bar on the use of projections if

the firm wants to raise new capital.” *Wielgos*, 892 F.2d at 516. This is a crucial substantive rule, not a pleading issue.

As a practical matter, the Tenth Circuit’s reasoning puts companies and insiders in an impossible position. Under that court’s decision, Nacchio did not commit fraud by reaffirming Qwest’s projections on April 24th despite his knowledge of the internal IRU projections at issue here (again, the shortfall in “recurring” revenue *was disclosed, supra* n. 9), but he somehow did engage in fraudulent practices by selling his stock two days later on the basis of the same knowledge. Criminal liability cannot turn on such vague distinctions.

The Tenth Circuit’s suggestion that a tougher standard for insider trading claims serves the purposes of the “reasonable basis” rule by further encouraging disclosure is, with respect, unrealistic. Under the government’s theory of the case and the court’s explicit reasoning, Nacchio’s inside information was “material” *only* because Qwest had first made projections and the “mercurial” stock market would punish the company for missing them. *Nacchio*, 519 F.3d at 1164. If making a projection can render internal forecasts and interim operating results “material” without the protections of the reasonable basis rule, companies will not make projections public in the first instance. Doing so would mean the company must constantly bare its internal forecasting and strategic thinking to the market and to competitors, or face a complete bar on raising capital and on stock purchases or sales by insiders. Courts and the SEC have recognized that the threat of civil liability under §10(b) will deter companies from issuing projections without the reasonable basis rule. Executives will be no less careful with their own freedom.

III. THE JURY INSTRUCTIONS PRESENT A SUBSTANTIAL QUESTION

The standards the Tenth Circuit applied in reviewing the materiality instruction conflict with the tests applied in other circuits in two ways that raise substantial questions.

1. The Tenth Circuit held that the instruction was “not particularly informative” and recognized the danger of asking “untrained jurors to judge *ex post* what would have been important to reasonable investors *ex ante*,” but nonetheless refused to find instructional error unless the uninformative instruction affirmatively “misstated the law,” *Nacchio*, 519 F.3d at 1159-1161. That is the wrong standard. “A trial judge’s duty is to give instructions sufficient to explain the law,” *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002), and an instruction is erroneous if it does not “contain[] an adequate statement of the law to guide the jury’s determination,” *United States v. Park*, 421 U.S. 658, 675 (1975). Other circuits have held that reversible error occurs when a facially correct instruction is “incomplete[],” *United States v. Escobar-de Jesus*, 187 F.3d 148, 164 n.10 (1st Cir. 1999) (citation omitted), or “inadequate to guide the jury’s deliberations,” *United States v. Marsh*, 894 F.2d 1035, 1040 (9th Cir. 1989) (citations omitted). *See also United States v. Dotson*, 895 F.2d 263, 264 (6th Cir. 1990) (“[T]he instruction given in this case was correct as far as it went, but it did not go far enough.”); *United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974) (“[A] facially correct statement of the law by the district judge” is “reversible error” if it “fail[s] to sufficiently relate the law to the particular facts of the case.”).¹²

¹² *See also* 9C Charles A. Wright & Alan R. Miller, *Federal Practice and Procedure* §2558 (3d ed. 2008) (“It is universally accepted that ... the appellate court in reviewing instructions ... is to satisfy itself that the instructions show no tendency to confuse or mislead the members of the jury *or insufficiently inform them with respect to the applicable principles of*

2. The Tenth Circuit held that Nacchio’s “reasonable basis” instruction was confusingly worded and did not accurately state the law. Even if his proposed fix was not perfect, Nacchio correctly identified that the instructions gave inadequate guidance on materiality in light of the uncertain nature of these forecasts. In at least seven circuits, “[t]he fact that counsel did not tender perfect instructions does not immunize from scrutiny on appeal a failure to instruct the jury adequately concerning the issues in the case.” *Heller Int’l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (citation omitted).¹³

IV. SUMMARY REVERSAL IS APPROPRIATE

There is also a substantial question whether the *en banc* court’s decision should be

law.”) (emphasis added); *United States v. Hastings*, 918 F.2d 369, 373 (2d Cir. 1990) (instructions “were sufficiently incomplete” and “inadequate with respect to the element of knowledge”); *United States v. Gordon*, 290 F.3d 539, 545 (3d Cir. 2002) (“[T]he instruction was incomplete and therefore incorrect . . .”); *Wichmann v. Bd. of Trustees of S. Ill. Univ.*, 180 F.3d 791, 804 (7th Cir. 1999) (“[W]e must determine whether the instruction misstates or insufficiently states the law.”) (emphasis added), *vacated on other grounds*, 528 U.S. 1111 (2000); *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986) (“[W]e must determine whether . . . the court gave adequate instructions . . . to ensure that the jury fully understood the issues.”).

¹³ *Webster v. Edward D. Jones & Co.*, 197 F.3d 815, 820 (6th Cir. 1999) (“[E]ven if an incorrect proposed instruction is submitted which raises an important issue of law involved in light of proof adduced in the case, it becomes the duty of the trial court to frame a proper instruction on the issue raised . . .”) (citation omitted); *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998) (“[W]e need not decide whether the defendants’ proffered instructions were correct as a matter of law. The requests sufficed to alert the district court to the need for some instructions, even if not the specific ones urged by the defendants . . .”); *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983) (“So long as an inadequate or improper request is sufficient to direct the court’s attention to a legal defense, the court is thereby alerted that a proper instruction is required.”); *Walker v. AT&T Techs.*, 995 F.2d 846, 849 (8th Cir. 1993) (same); *United States v. Jones*, 909 F.2d 533, 538-39 (D.C. Cir. 1990) (Ginsburg, R., J.) (same); *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 757 (3d Cir. 1976) (same); *see also* 9C Wright & Miller, *Federal Practice and Procedure* §2552 (“If the request directs the court’s attention to a point upon which an instruction to the jury would be helpful or necessary, the court’s error in failing to charge on the subject may not be excused because of technical defects in the request.”).

summarily reversed for clear misapplication of Supreme Court precedent.

1. Even if the district judge was entitled to exclude Fischel under *Daubert*, the decision to do so without permitting a hearing, voir dire, or argument was an exercise of discretion. The *en banc* court held that it “agreed to a rehearing on the question of the admissibility of Professor Fischel’s expert testimony,” (Exhibit C at 19 n.9), and acknowledged that its grant of rehearing embraced whether the district court abused its discretion, *id.* at 47-49 n.21. Nacchio pointed out that “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions,” and that the court’s exercise of discretion was infected by its erroneous belief that Nacchio had committed an egregious Rule 16 violation, and that the proposed testimony was irrelevant and would not assist the jury. (Exhibit S (*En Banc* Reply Br.) at 22-23 (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).)

The *en banc* court seemed to hold that this argument either was not within the *en banc* grant or that it is frivolous and does not “merit analytical attention.” (Exhibit C at 47-49 n.21.) Both suggestions are flatly inconsistent with the holding of *Koon*, and decisions of other circuits applying that principle.¹⁴ The *en banc* court also cannot take for itself, and away from the

¹⁴ See, e.g., *Torres-Rivera v. O’Neill-Cancel*, 524 F.3d 331, 335-36 (1st Cir. 2008) (court abuses its discretion “if it relies on an improper factor in working that [decisional] calculus ... [and] an error of law is always tantamount to an abuse of discretion”); *United States v. Street*, 531 F.3d 703, 710 (8th Cir.) (“An abuse of discretion occurs when ... an irrelevant or improper factor is considered and given significant weight”) (citation omitted), *cert. denied*, 129 S. Ct. 432 (2008); *Parra v. Bashas’, Inc.*, 536 F.3d 975, 977-78 (9th Cir. 2008) (“An abuse of discretion occurs when the district court, ‘in making a discretionary ruling, relies upon an improper factor’”); *LaSalle Nat’l Bank v. First Conn. Holding Group, L.L.C. XXIII*, 287 F.3d 279, 288 (3d Cir. 2002) (same); *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 370 (4th Cir. 2008) (same); *Marlin v. Moody Nat’l Bank NA*, 533 F.3d 374, 377 (5th Cir. 2008) (same); *United States v. Crucean*, 241 F.3d 895, 898 (7th Cir. 2001) (same); *Wexler v. Lepore*, 385 F.3d 1336, 1338 (11th Cir. 2004) (same); *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316,

original panel, the authority and responsibility to decide whether the district court abused its discretion—and then simply refuse to consider one aspect of that issue under binding Supreme Court precedent, such that it falls through a crack between the panel and *en banc* decisions and cannot be resolved. An appellate court cannot simply duck an issue it finds inconvenient.

2. The *en banc* court repeatedly cited *Sprint/United Management v. Mendelsohn*, 128 S. Ct. 1140 (2008), to presume that the district court’s order excluding Fischel rested on Rule 702 grounds rather than a misunderstanding of Rule 16. In *Sprint* the Supreme Court reversed the Tenth Circuit for presuming that an ambiguous district court opinion rested on erroneous grounds, and held that “[a] remand directing the district court to clarify its order ... would have been the better approach.” *Id.* at 1146. The *en banc* court here committed the very same error the Supreme Court reversed in *Sprint*, but in reverse.

CONCLUSION

This Court should continue bail pending disposition of a petition for certiorari.

1321 (D.C. Cir. 2008) (same), *cert. denied*, 129 S. Ct. 898 (2009).

Respectfully submitted this 11th day of March, 2009.

s/ Maureen E. Mahoney

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 2009, I electronically filed the foregoing **EMERGENCY MOTION FOR CONTINUED RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
SENTENCING

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 9:00 a.m., on the 27th day of July,
2007, in Courtroom A201, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

1 a defendant is to be remanded. And the defendant bears the
2 burden in order to avoid that to prove that he is not a flight
3 risk and is not a danger to the community.

4 And those matters are not at issue here. The
5 Government doesn't contend that he is a flight risk or a danger
6 to the community.

7 The rub is that at this stage in the proceedings, the
8 defendant must show that he has raised a substantial question
9 of law or fact on appeal that is likely to result in reversal
10 and order for new trial or a reduced sentence that doesn't go
11 past the expected duration of the appeal process.

12 The Tenth Circuit has ruled in *Affleck*, a case that
13 both parties cite, that a substantial question is a close
14 question or one that could very well be decided the other way
15 and one that if determined favorably to the defendant on appeal
16 would be likely to result in reversal or an order for a new
17 trial.

18 So, you know, there is no way to avoid the conclusion
19 that as a practical matter the Court has to second-guess
20 itself. The Court has to decide whether reasonable minds could
21 differ on some of these things. And if reasonable minds could
22 differ, whether there is harmless error; that is, whether an
23 error is going to result in reversal or a new trial.

24 So addressing the things that the defendant brought up
25 in the motion for bond on appeal, as opposed to other things

EXHIBIT B

**APPELLANT'S OPENING BRIEF FILED WITH THE 10TH CIRCUIT COURT
OF APPEALS ON OCTOBER 9, 2007**

[Intentionally omitted]

EXHIBIT C

**EN BANC OPINION OF THE 10TH CIRCUIT COURT OF APPEALS FILED ON
FEBRUARY 26, 2009**

[Intentionally omitted]

EXHIBIT D

**APPELLANT'S SUPPLEMENTAL BRIEF FILED WITH THE 10TH CIRCUIT
COURT OF APPEALS ON AUGUST 29, 2008**

[Intentionally omitted]

EXHIBIT E

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

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**UNITED STATES' MOTION TO EXCLUDE
TESTIMONY BY DANIEL FISCHEL**

The United States moves to exclude the testimony of Professor Daniel Fischel.

INTRODUCTION

Defendant provided its revised expert disclosure regarding Professor Daniel Fischel on Thursday, March 29, 2007. *See* Exhibit 1. Based on that disclosure, Professor Fischel should be excluded as an expert witness, for several reasons.

First, Defendant still has not complied with the expert disclosure rules. Despite the breadth of Defendant's prior disclosure on March 16, 2007, which appeared to be an attempt by Defendant to keep Professor Fischel's options open, Defendant now attempts to slip in several opinions that do not even fall within the broad topics of that prior disclosure. And while Defendant has now provided a long list of Professor Fischel's

Fischel is qualified to offer this opinion. Professor Fischel is not represented to have any special knowledge of Qwest, or of the transaction at issue, or of stock repurchases in general.

Second, there is no description of the reasons for this opinion. *See* Fed. R. Crim. P. 16(b)(1)(C). This disclosure simply sets forth the conclusion, without any description of how Professor Fischel reached that result.

Third, the disclosure does not set forth any “reliable principles and methods” that Professor Fischel might possibly have used in reaching his conclusion about Defendant’s incentives in this particular transaction. *See* Fed. R. Evid. 702(2). There is no disclosure of any economic analysis. Indeed, the disclosure is revealing in what it does not address. For example, the disclosure does not even purport to address the obvious fact that the repurchase would have raised Qwest’s stock price, resulting in additional gains to Defendant if he sold in the short run from selling at higher price. Also, a reliable analysis would need, at a minimum, to distinguish Defendant’s personal incentives from the incentives of others. It is clear from the disclosure that this basic distinction was not made, as it discusses the incentives of “Mr. Nacchio and other members of Qwest’s board” without any attempt to separate the two.

Fourth, there is no suggestion that Professor Fischel has reviewed “sufficient facts or data” to render this opinion, let alone data “of a type reasonably relied upon by experts in the particular field.” *See* Fed. R. Evid. 702(1), 703. Notably, in the listing of

EXHIBIT F

4/5/2007 Trial Vol. 20

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME TWENTY

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 8:34 a.m., on the 5th day of April,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

4/5/2007 Trial Vol. 20

1 the expert, and that is precisely what we have here.

2 The Court is concerned not only with the methodology,
3 which is absolutely undisclosed in this expert disclosure, the
4 Court is concerned that the Rule 702 stipulation that the
5 testimony must be helpful to the jury is not met here.

6 First, many aspects of the testimony are simply
7 nothing more than closing argument meant to rebut a suggestion
8 in a government closing argument or to buttress or repeat or
9 foreshadow an argument in the defense closing argument.

10 For example, he is -- he has alleged -- it is alleged
11 that he is going to testify that the defendant did not have an
12 incentive to trade on the basis of inside information.

13 All that factual material is before the Court as to
14 whether he did or did not have an incentive to trade on inside
15 information. For example, with respect to the growth shares,
16 there has been examination on that. Argument can be made one
17 way or another by the attorneys. And the jury does not need to
18 have an expert opinion to assist it in deciding whether there
19 was an economic incentive to trade or not trade on inside
20 information here.

21 Another example is that the proposed expert is
22 supposed to be testifying on the fact that the defendant's
23 sales did not increase during the relevant period of time.
24 Whether he has an opinion as to whether they increased is
25 neither here nor there. It's essentially irrelevant.

4/5/2007 Trial Vol. 20

1 expected.

2 He will testify, according to defense, Qwest's stock
3 price did not decline significantly in September 2001 when it
4 reduced the guidance.

5 And he will testify finally, just like Qwest, other
6 telecommunications companies reaffirmed their guidance between
7 September 2000 and May 2001 and reduced their guidance after
8 May 2001.

9 All of those are facts. This witness has no direct
10 personal knowledge of all of those facts. It's perfectly
11 obvious. And the defense can establish those facts by
12 competent evidence if it wishes to do so.

13 For all of those reasons, primarily the gross defect
14 in failing to reveal the methodology, the motion to exclude the
15 testimony of Daniel Fischel is granted.

16 Who is your next witness?

17 MR. SPEISER: Your Honor, may I be heard?

18 THE COURT: No. You know, in this court, we follow
19 the rule, generally, that we have argument and ruling. Not,
20 the Court rules, and then it's an interactive process where you
21 get to argue later on. I have your motion, I have the
22 Government's motion, I have your response. Any argument that
23 you wish to make could have been put in the response.

24 MR. SPEISER: We were under tremendous time pressure.

25 THE COURT: So what? You could have put it in the

EXHIBIT G

4/9/2007 Trial Vol. 22

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME TWENTY-TWO

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 1:40 p.m., on the 9th day of April,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

4/9/2007 Trial Vol. 22

1 the defendant can call under the Rules of Evidence. But they
2 can't get in this factual testimony through the flagrant
3 hearsay attempts of Professor Fischel to use it.

4 The Court has already found that neither Khemka nor
5 Johnstone gave expert opinions. And to the extent that they
6 did, such opinions were solicited by the defense.

7 Accordingly, as I said, that's the first reason that
8 they don't need an expert to rebut Khemka's or Johnstone's
9 testimony.

10 As to the proposed methodology, the Court continues to
11 have the same difficulty with this methodology and
12 non-disclosure of the methodology as it had with respect to the
13 original expert report.

14 Any suggestion that the Government was in possession
15 of Fischel's opinion and/or methodology is simply disingenuous.
16 The March 29, 2007, disclosure contained no methodology or
17 reliable application of methodology to the case.

18 It was precisely that lack of -- lack of reliability,
19 along with other reasons, that led the Court on April 5, 2007,
20 to exclude much of Fischel's proposed testimony. The proposed
21 testimony now before the Court suffers from the same problems
22 as that which the Court has already excluded. There is no more
23 disclosure or substantially no more disclosure than we
24 originally had.

25 Further, even if it were reliable, the Court remains

EXHIBIT H

3/28/2007 Trial Vol. 11

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME ELEVEN

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 1:33 p.m., on the 28th day of March,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
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1 Q. Now, to the right of that, these -- it reflects numbers
2 that are both forecasted and budgeted.

3 A. Yes.

4 Q. Those numbers are constantly changing; is that correct?

5 A. Yes.

6 Q. Which only shows that the forecasting process has
7 limitations, because the numbers are constantly being updated,
8 right?

9 A. I don't think it's a representation of the forecasting
10 limitations. I think it's a representation of the moment in
11 time that you do another forecast and the information you use
12 to produce the forecast.

13 Q. All right. And it's always changing, isn't it?

14 A. No, it's not necessarily always changing. And in this
15 case, in this year, it was.

16 Q. Well, that's what we're looking at right here. These
17 numbers change from forecast to budget, right?

18 A. From forecast view to forecast view, the numbers had a
19 tendency to change.

20 Q. All right. You're not saying that you're guaranteeing the
21 future, are you?

22 A. No. The representation of the forecast was providing our
23 best belief of what things were going to happen.

24 Q. What share of -- if you don't know the number, what share
25 of that Microsoft deal did global business participate in, if

EXHIBIT I

3/27/2007 Trial Vol. 9

1031

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME NINE

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 1:15 p.m., on the 27th day of March,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

3/27/2007 Trial Vol. 9

1 meeting with Mr. Nacchio where you reported to him on the
2 performance of your division and then also included projections
3 for your division for the remainder of 2001?

4 A. April -- in April. We had a meeting that was called a
5 business unit review, and it was the first quarter review. We
6 had done that since we started at Qwest. And basically, what
7 it was, is that -- the business units had -- business units
8 head was able to communicate with Joe, you know, what the
9 status of the business unit was, as well as reporting on the
10 results for the previous quarter, in this case, the first
11 quarter.

12 Q. And so this would be early April, after you had your first
13 quarter numbers, is that the way it worked?

14 A. Yes.

15 Q. And in your -- so did you have such a meeting with
16 Mr. Nacchio in early April?

17 A. Yes, I did.

18 Q. And what was the most important message that you wanted to
19 deliver and did deliver to Mr. Nacchio during that meeting?

20 A. Exactly what I said before, that, A, the IRU market was
21 drying up, that after the second quarter -- in the second
22 quarter, we felt like we were draining the pond in terms of the
23 IRU deals that were out there, and that we couldn't rely on
24 IRUs -- I couldn't see -- have any visibility to what IRUs
25 would be doing after the second quarter.

EXHIBIT J

QWEST COMMUNICATIONS INTERNATIONAL INC.

Audit Committee of the Board of Directors

May 2, 2001

A meeting of the Audit Committee of the Board of Directors (the "Committee") of Qwest Communications International Inc. (the "Corporation") was held Wednesday, May 2, 2001, commencing at 7:00 A.M. (Denver time) in the Corporation's Board Room, 1801 California, 52nd Floor, Denver, Colorado.

Present: Committee members L.G. Alvarado, J.L. Haines, P.S. Hellman and W.T. Stephens; Mr. Stephens presiding. Also present: J.P. Nacchio, Chairman and Chief Executive Officer of the Corporation, R.R. Szeliga, Executive Vice President and Chief Financial Officer of the Corporation, Y.A. Rana, Assistant Secretary of the Corporation, M. Schumacher, Vice President and Controller of Qwest Services Corporation ("QSC"), M. Evans, Vice President-Finance of QSC, R. Noles, Vice President - Internal Audit of QSC, and M. Iwan of Andersen LLP ("Andersen"), the Corporation's auditors.

The Committee dispensed with the reading of the minutes of the meetings of the Committee on February 7, 2001 and April 20, 2001, and such minutes were approved.

Ms. Szeliga led a discussion regarding the 2001 business plan overview and reviewed with the Committee a document entitled "Budget Overview", which had been previously distributed to the Committee and is attached to these minutes as Exhibit A.

The Committee discussed, among other things, the Corporation's budget targets, growth drivers and accounting issues together with challenges posed by the current economic conditions with respect to the Corporation's ability to meet its targets.

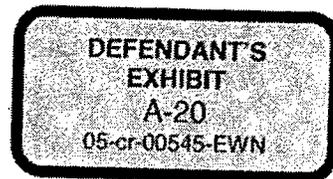
The Committee discussed its views regarding quarterly earnings press releases. The Committee also requested regular reports on the Corporation's performance and requested that the various business unit heads make presentations to the entire board of directors.

The Committee met in an executive session with Mr. Iwan and Mr. Noles.

Upon motion duly made and seconded, the meeting was adjourned at 8:10 A.M. (Denver time).



For the Committee



QIRU3580663

APP-4695



2001 Budget Established Stretch Goals

	Q1	Q2	Q3	Q4	FY
Board Approved Budget					
Revenue	\$ 5,055	\$ 5,304	\$ 5,564	\$ 5,877	\$ 21,800
EBITDA	1,995	2,111	2,245	2,449	8,800
EPS	0.09	0.12	0.14	0.18	0.54
Compensation Targets					
Revenue	5,055	5,250	5,405	5,710	21,420
EBITDA	1,995	2,080	2,168	2,317	8,560
EPS	n/a	n/a	n/a	n/a	n/a
Consensus Estimate - 4/19					
Revenue	5,048	5,240	5,446	5,798	21,532
EBITDA	2,000	2,089	2,182	2,333	8,604
EPS	0.13	0.14	0.14	0.17	0.58

Qwest Confidential Information - Do Not Disclose



1Q 2001 Actual Results

(\$M)	<u>Revenue</u>	<u>EBITDA</u>	<u>EPS</u>
Actuals	\$ 5,051	\$ 1,997	\$ 0.13
<i>YoY Growth</i>	11.8%	15.8%	-7.1%
<i>Seq. Growth</i>	0.7%	0.6%	-18.8%
Budget	5,055	1,995	0.09
\$ Variance	(4)	2	0.04
% Variance	-0.1%	0.1%	44.4%
Consensus	5,048	2,000	0.13
\$ Variance	3	(3)	-
% Variance	0.1%	-0.2%	-

Qwest Confidential Information - Do Not Disclose!

EXHIBIT K

Final

Executive Summary

April revenue of \$1,501M was 6% higher than last year, but (\$124M) worse than current estimate. Unfavorability to the budget was primarily in Global Business and Government (\$66M) due to timing issue related in voice/data CPE and Qwest interactive, volume related issues in local service, DSL, DIA, operator services, and wireless, and a miss in long distance and IP product related activity. Small Business and Consumer Markets also contributed to the unfavorability (\$38M) with gap not being covered and misses in wireless and long distance. Unfavorability to the current estimate was primarily in Global Business and Government (\$38M).

April expense of \$989M was \$14M better than budget. Favorability to the budget of \$19M occurred in Global Business and Government due to a \$6M credit related to a reclassification of Genuity contract COGS to Classic Qwest Facilities Costs, a volume miss in voice/data CPE \$5M, and cost controls on marketing and advertising \$5M. Wireless also contributed \$19M of the budget favorability as a result of lower volumes and operational efficiencies. Offsetting these positive variances was a miss of (\$15M) in Classic QWEST Facility Costs due to higher than expected international volumes and special access and interconnection charges being higher than expected. Also offsetting the positive variance was a miss of (\$14M) in Indirect SG&A and Corporate due primarily to unbudgeted gross sales tax receipts.

April expense of \$989M was \$60M better than current estimate. Overall the current estimate favorability was a result of ~\$40M of employee related expense favorability. Favorability to the current estimate of \$11M in Global Business and Government due to \$6M credit related to a reclassification of Genuity contract COGS to Classic Qwest Facilities Costs and a volume miss in voice/data CPE. Favorability to the current estimate of \$9M in Wireless was result of lower volumes and cost reductions. Wholesale Markets also contributed \$7M of the favorable current estimate variance due to reciprocal compensation being less than estimated and greater than expected employee expense savings. Other business units contributing to the current estimate favorability were Classic Q Facilities Cost \$7M, Product Management \$6M, Worldwide Networks \$6M, and Indirect SG&A Corporate \$6M.

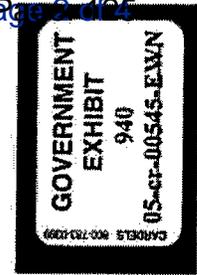
April EBITDA of \$512M, was 6% better than last year and \$25M better than current estimate however, (\$110M) worse than budget.

April below the line is \$65M better than budget consisting of: Depreciation/Amortization \$14M, Interest Expense \$14M, Non-Op (\$20M), and Income Taxes \$57M. April below the line is (\$13M) worse than current estimate consisting of: Depreciation/Amortization \$(1M), Interest Expense \$13M, Non-Op (\$10M), and Income Taxes (\$15M). April Normalized Net Income missed budget by (\$45M) and the diluted Normalized EPS budget by (\$.02). April Normalized Net Income beat current estimate by \$12M and diluted Normalized EPS current estimate budget by \$.01.

Total headcount for April was 66,270 or 1,604 more than budget.

Service results continue to improve. Delayed Service Orders – POTS>30 slipped to record low results of 281 in April.

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Summary of Operations
April 2001

Revenue (\$M)	\$ 1,512	\$ 1,423	\$ 2,114	\$ 1,591	\$ 1,425	\$ (124)	\$ 1,535	\$ 0.01	\$ 1,439
Expense (\$M)	1,009	931	1,114	969	1,002	14	1,048	0.00	981
EBITDA (\$M)	503	494	1,000	622	423	(110)	487	0.01	458
Diluted EPS	0.00	(0.01)	0.14	0.09	0.02	(0.02)	(0.01)	0.01	0.02
Cash EPS	0.06	0.05	0.19	0.05	0.08	(0.03)	0.05	0.00	0.07
Headcount	67,731	67,731	67,731	67,731	64,466	(1,600)	N/A	N/A	N/A
12/31/00 Actuals	67,139	66,448	66,432	66,270	64,466	(1,600)	N/A	N/A	N/A
Current Mo. Actuals	(6,357)	(7,970)	(7,109)	(7,256)	(8,460)	(1,600)	N/A	N/A	N/A
Headcount Change Since Merge	(874)	(1,280)	(1,280)	(1,461)	(1,461)	(1,461)	N/A	N/A	N/A
Headcount Change Since 12/31/00	270,245	265,200	304,176	296,665	309,575	12,971	N/A	N/A	N/A
Annualized Revenue Per Head **	\$ 1,416	\$ 698	\$ 330	\$ 660	\$ 968	\$ 308			
Capital Expenditures - (\$M)	568	568	352	381	568	308			
Quality of Service									
Delayed Service Orders - POTS >30	98.6%	98.6%	98.6%	98.6%	98.6%	98.6%			
% Commitments met - POTS and provisioning	95.4%	95.4%	96.4%	96.9%	96.9%	96.9%			
% Commitments met - Design Service Provisioning	3,511	3,864	12,600	14,463	14,463	14,463			
Backlog - Past Due \$(000) (Classic Qwest)	2,040	1,706	1,491	1,322	1,491	1,322			
Delayed Service Orders \$(000) - POTS & Design Services	838,942	868,609	908,000	941,222	1,022,692	(80,970)	956,197	(14,975)	632,389
Product Metrics	613,489	635,605	648,725	643,321	643,321	N/A	N/A	N/A	409,000
PDS Subscribers ***	274,880	288,129	306,593	323,598	354,498	(30,900)	N/A	N/A	136,428
Qwest DSL In-Region Subscribers *	69,889	74,418	78,036	82,359	83,119	(731)	N/A	N/A	38,954
Total Prepaid Subscribers	2,184,286	2,211,714	2,272,003	2,334,456	2,398,452	(174,196)	N/A	N/A	1,484,252
Custom Choice Subscribers (including 2nd line)	199,461	199,461	199,461	254,481	287,471	(32,990)	N/A	N/A	78,192
Settable Square Footage	45,827	45,827	45,827	45,827	45,827	(50,810)	N/A	N/A	15,500
Sold Square Footage									

* DSL subscribers metric includes YDSL subscribers. However, the metric does not include video only subscribers and Onaka YDSL subscribers.
 ** Calculation based on Annualized YTD Actual Revenue
 *** In March and April, approximately 4,000 OCS and 30,000 prepaid subscribers were removed from the subscriber count. The wireless subscriber cleanup project will be completed by June 2001.

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 Disclosure to Qwest employees having a need to know.

5/25/01 10:49 AM
 Summary of Ops summary

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SEGMENT REVENUE (\$M)			
	April Actuals	April Budget	April Budget Variance
RETAIL*			
WHOLESALE **	\$ 1,117	\$ 1,229	\$ (112)
DEX	253	242	11
NETWORK ACCESS OPERATIONS ***	126	136	(10)
OTHER ****	1	1	-
TOTAL QWEST	\$ 1,501	\$ 1,625	\$ (124)

SEGMENT EBITDA (\$M)			
	April Actuals	April Budget	April Budget Variance
RETAIL*			
WHOLESALE **	\$ 803	\$ 886	\$ (83)
DEX	207	199	8
NETWORK ACCESS OPERATIONS ***	83	91	(8)
OTHER ****	(463)	(464)	1
TOTAL QWEST	\$ (118)	\$ (90)	\$ (28)
		\$ 622	\$ (110)

* Retail includes: SBCM, BGS, QCS, Wireless and Classic Qwest Wholesale.

** Wholesale includes: Classic US West Wholesale.

*** Network Access Ops. includes: Product Management, Internet Strategy, Local Networks, DLEC/CLEC/BLEC, Qwest Network Construction Services, Worldwide Networks, IT and Classic Qwest Facility Costs.

**** Other includes: Admin, Finance, Corp., HR and Interational

5/16/01
5:08 PM

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Pictures in Qwest employees having a need to know

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QILL 0004786276
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EXHIBIT L

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME EIGHT

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 8:47 a.m., on the 27th day of March,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

3/27/2007 Trial Vol. 8

1 Q. Did you know on April 9 that you had made the quarter?

2 A. Yes.

3 Q. And I think we covered the fact that, indeed, you later
4 learned that you made the second quarter, right?

5 A. At some point later in the year, yes.

6 Q. Second quarter ends on what date, ma'am?

7 A. June 30.

8 Q. So at some point, I guess, in July?

9 A. Yes.

10 Q. So by approximately when in July did you learn that it
11 actually made the quarter -- second quarter?

12 A. Early days of July. I don't know.

13 Q. Can you give an approximation?

14 A. The first -- say, within the first ten days of July we
15 knew, because the books were closed enough, that everything was
16 in good shape.

17 Q. And I guess as you're approaching it from the end of the
18 quarter, you're monitoring things, aren't you?

19 A. Yes, absolutely.

20 Q. You had a pretty good idea as you went along that it would
21 be okay in terms of making the second quarter, right?

22 A. In terms of revenue, it was easier to see. In terms of
23 EBITDA, there was always more risk, because they were still
24 booking entries. But we would try to track it if we could, but
25 yes.

1 Q. And you made it?

2 A. Yes, we did.

3 Q. Now, in all fairness, Ms. Szeliga, whenever we're talking
4 about these projections, there are a lot of assumptions in
5 them, aren't there?

6 A. There are.

7 Q. Is it not fair to say that one of the principal assumptions
8 in making projections, whether it's six months out or nine
9 months out or one year out or 16 months out, is what is going
10 to be happening to the American economy, right?

11 A. Has an impact, yes.

12 Q. Well, and Qwest was a very big company, wasn't it, and is
13 it?

14 A. Yes.

15 Q. We tend to think of it in retrospect, but at the time we're
16 talking about, it was a very large company, wasn't it?

17 A. Yes.

18 Q. Operated in many states?

19 A. Yes.

20 Q. Had 65,000 or more employees?

21 A. And dwindling at that time, but, yes, it started out around
22 that number.

23 Q. Well, part of the dwindle was because of the synergies,
24 right?

25 A. Some of that was true.

EXHIBIT M



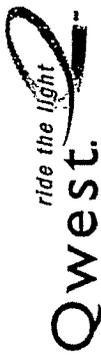
Summary of Operations
March 2001

	January 2001	February 2001	March 2001	Q1 2001	Q1 Budget	Budget Variance	Q1 2000
Revenue (\$M)	\$ 1,512	\$ 1,425	\$ 2,114	\$ 5,051	\$ 5,055	\$ (4)	\$ 4,516
Expense (\$M)	1,009	931	1,114	3,054	3,060	6	2,793
EBITDA (\$M)	503	494	1,000	1,997	1,995	2	1,723
Diluted EPS	\$ -	\$ (0.01)	\$ 0.14	\$ 0.13	\$ 0.09	\$ 0.04	\$ 0.14
Cash EPS	\$ 0.06	\$ 0.05	\$ 0.19	\$ 0.30	\$ 0.26	\$ 0.04	\$ 0.31
Headcount							
Current Mo. Actuals	67,139	66,448	66,422	66,422	69,597	(3,175)	
Current Mo. Actuals net of pipeline			65,258	65,258			
Annualized Revenue Per Head **	\$ 270,245	\$ 265,200	\$ 309,602	\$ 309,602	\$ 290,530	\$ 19,072	
Headcount Change Since Merger	(6,387)	(7,078)	(7,104)	(7,104)	(3,929)	3,175	
Capital Expenditures (\$M)	\$ 1,416	\$ 698	\$ 830	\$ 2,944	\$ 2,916	\$ 28	\$ 2,156
Quality of Service							
Delayed Service Orders - POTS >30	671	537	352				
% Commitments met - POTS total provisioning	98.5%	98.6%	98.6%				
% Commitments met - Design Services Provisioning	93.7%	95.4%	96.4%				
Backlog - Past Due \$(000) (Classic Qwest)	\$ 3,551	\$ 3,864	\$ 12,600				
Delayed Service Orders \$(000) - POTS & Design Services	\$ 2,040	\$ 1,706	\$ 1,491				
Product Metrics							
PCS Subscribers	838,842	868,609	908,000	908,000	959,404	(51,404)	
Qwest.net Subscribers	613,489	635,605	648,725	648,725	613,940	34,785	
Qwest DSL In-Region Subscribers	263,325	276,202	306,000	306,000	312,388	(6,388)	
Total Package Subscribers	69,889	74,418	78,037	78,037	104,851	(26,814)	
Custom Choice Subscribers (including 2nd line)	2,184,681	2,221,714	2,227,923	2,227,923	2,386,272	(158,349)	
Sellable Square Footage	199,661	199,661	199,661	199,661	199,661	-	

** Calculation Based on Annualized YTD Actual Revenue

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Disclose to Qwest employees having a need to know.





March 2001

Income Statement - Combined (Pro-forma Normalized)

	Current Month		YoY		Quarter-to-Date			
	Actual	B(W) Budget	YoY Y%	YoY Y%	Q1 Actual	B(W) CB	B(W) Budget	YoY V%
Revenue	\$ 2,114	\$ 128	17%		\$ 5,051	1	\$ (4)	12%
Cost of Sales **	714	(10)			1,822	(2)	(31)	
Gross Margin	1,400	118			3,229	(1)	(35)	
Gross Margin %	66%	1%			64%		-1%	
SG&A	400	26			1,232	(2)	37	
EBITDA	1,000	144	23%		1,997	(3)	2	16%
CM %	47%	4%	2%		40%		1%	2%
Depreciation/Amortization	382	37	19%		1,151	20	70	22%
Interest Expense	113	4	40%		338	6	13	36%
Non-Op (Income)/Expense	2	7	-71%		20	1	7	400%
EBIT	503	192	24%		488	24	92	-8%
Income Taxes	275	(90)	44%		270	(21)	(34)	-7%
Extraordinary (Income)/Expense	273	(273)			264	(264)	(264)	
Reported Net Income	(45)	(171)	-136%		(46)	(261)	(206)	-12.5%
Normalized Net Income*	\$ 228	\$ 102	7%		\$ 218	3	\$ 58	-9%
Diluted Normalized EPS	\$ 0.14	\$ 0.06	8%		\$ 0.13	\$ -	\$ 0.04	-7%
Cash EPS	\$ 0.19	\$ 0.06	6%		\$ 0.30	\$ -	\$ 0.04	-3%
Diluted Wt. Average Shares	1,671	(19)	-1%		1,674	(6)	(16)	-0.3%

* Normalized Net Income excludes Merger Related Costs (\$111M and \$128M for Mar and Mar QTD), Change in Derivative Mkt. Value (\$13M and \$-14M for Mar and Mar QTD), Early Extinguishment of Debt (\$65M for Mar and Mar QTD), and one-time investment write down (\$85M for Mar and Mar QTD).

** Cost of Sales for the year 2000 was calculated using a different methodology than 2001, reconciliation is in progress. Also, COGS does not tie to Corp. Accounting (earnings release) due to the fact that they eliminate all affiliate expense (COGS + SG&A) in SG&A. Methodology in Corp. Accounting is being changed in 2Q 2001.

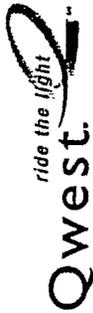


Sequential Growth (\$M)

	Revenue			Expense			EBITDA		
	Q101	Q400	% Change	Q101	Q400	% Change	Q101	Q400	% Change
GLOBAL BUSINESS & GOVERNMENT	1,722	1,551	11%	465	446	(19)	1,257	1,105	152
SMALL BUSINESS & CONSUMER MARKETS	1,684	1,685	0%	300	257	(43)	1,384	1,428	(44)
WHOLESALE MARKETS	1,200	1,166	3%	139	32	(107)	1,061	1,134	(73)
CLEC/DLEC/BLEC	-	-	0%	24	9	(15)	(24)	(9)	(15)
QNCS	52	7	643%	1	1	-	51	6	45
COMM. SERVICES/PMD	-	-	0%	19	69	50	(19)	(69)	50
DEX	342	501	(32)%	127	177	50	215	324	(109)
INTERNET STRATEGY	-	-	0%	11	1	(10)	(11)	(1)	(10)
QCS	27	23	17%	18	35	17	9	(12)	21
WIRELESS	-	-	0%	147	164	17	(147)	(164)	17
LOCAL NETWORKS	6	6	0%	453	442	(11)	(447)	(436)	(11)
WORLDWIDE NETWORKS	-	-	0%	73	68	(5)	(73)	(68)	(5)
CLASSIC QWEST FACILITIES COST	-	-	0%	809	765	(44)	(809)	(765)	(44)
INDIRECT SG&A, CORPORATE *	18	79	(77)%	498	566	68	(480)	(487)	7
TOTAL QWEST	5,051	5,018	1%	3,084	3,032	(52)	1,967	1,986	(19)
Total Merger Related Costs for Internal Time	-	-	0%	(30)	-	30	30	-	30
Total QWEST COMBINED excl. merger related costs	5,051	5,018	1%	3,054	3,032	(22)	1,997	1,986	11

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin, IT, Digital Media and International.

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SEGMENT EXPENSE (\$M)

	Jan Actuals	Feb Actuals	Mar Actuals	Q1 Actuals	Q1 Budget	Q1 Budget Variance
RETAIL*	\$ 296	\$ 302	\$ 345	\$ 943	\$ 1,018	\$ 75
WHOLESALE **	46	44	36	126	117	(9)
DEX	40	22	65	127	114	(13)
NETWORK ACCESS OPERATIONS ***	487	478	601	1,566	1,523	(43)
OTHER ****	140	85	97	322	288	(34)
TOTAL QWEST	\$ 1,009	\$ 931	\$ 1,144	\$ 3,084	\$ 3,060	\$ (24)
Total Merger Related Costs for Internal Time	-	-	(30)	(30)	-	30
Total QWEST COMBINED excl. merger related costs	\$ 1,009	\$ 931	\$ 1,114	\$ 3,054	\$ 3,060	\$ 6

* Retail includes: SBCM, BGS, QCS, Wireless and Classic Qwest Wholesale.
 ** Wholesale includes: Classic US West Wholesale.
 *** Network Access Ops. Includes: Comm. Services/FMD, Internet Strategy, Local Networks, DLEC/CLEC/BLEC, QNCS, Worldwide Networks, IT and Classic Qwest Facility Costs.
 **** Other includes: Admin, Finance, Corp., HR, International and Digital Media

4



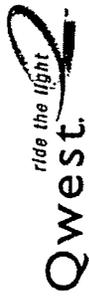
RECURRING vs NON-RECURRING REVENUE (\$M)

	Jan Actuals	Feb Actuals	Mar Actuals	Q1 Actuals	Q1 Budget	Q1 Budget Variance	Q1 CE	Q1 CE Variance
Recurring	\$ 467	\$ 478	\$ 565 A	\$ 1,510	\$ 1,511	\$ (1)	\$ 1,508	\$ 2
Non-recurring	21	-	191	212	134	78	212	-
GLOBAL BUSINESS & GOVERNMENT	488	478	756	1,722	1,645	77	1,720	2
SMALL BUSINESS & CONSUMER MARKETS	555	558	571	1,684	1,799	(115)	1,681	3
Recurring	326	302	341 B	969	941	28	967	2
Non-recurring	1	14	216	231	265	(34)	242	(11)
WHOLESALE MARKETS	327	316	557	1,200	1,206	(6)	1,209	(9)
QNCS Non-recurring	9	9	34	52	13	39	52	-
DEX	117	47	178	342	333	9	340	2
QCS	10	9	8	27	26	1	27	-
LOCAL NETWORKS	3	1	2	6	4	2	4	2
INDIRECT SG&A, CORPORATE *	3	7	8	18	29	(11)	17	1
TOTAL QWEST	\$ 1,512	\$ 1,425	\$ 2,114	\$ 5,051	\$ 5,055	\$ (4)	\$ 5,050	\$ 1

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., IT, Digital Media and International. Revenue includes pass-through taxes, real estate, Malheur, and Western Reinsurance.

A The increase in GBS March recurring revenues over February of \$87M is due to specific initiatives \$46M (mainly in government contracts \$14M, CPE opportunity \$14M, and product resale \$5M). Additional growth of \$41M includes voice CPE \$19M, Vicorp \$5M, and Qwest Interactive growth \$4M.

B The increase in Wholesale March recurring revenues over February of \$39M due primarily to \$13M USF retro adjustment, \$7M increase in information and billing services, and \$12M impact of the number of days (MOU impact) and higher volumes.



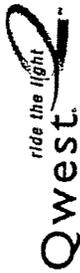
BUSINESS UNIT EXPENSE (\$M)

	Jan Actuals \$	Feb Actuals \$	March Actuals \$	Q1 Actuals \$	Q1 Budget \$	Q1 Budget Variance \$	Q1 CE \$	Q1 CE Variance \$
GLOBAL BUSINESS & GOVERNMENT	127	152	186	465	450	(15)	474	9
SMALL BUSINESS & CONSUMER MARKETS	102	93	105	300	335	35	303	3
WHOLESALE MARKETS	57	44	38	139	137	(2)	150	11
CLEC/DLEC/BLEC	11	5	8	24	27	3	24	-
QNCS	-	1	-	1	2	1	2	1
COMMUNICATION SERVICES/TMD	(4)	17	6	19	39	20	38	19
DEX	40	22	65	127	114	(13)	126	(1)
INTERNET STRATEGY	4	3	4	11	19	8	17	6
QCS	6	7	5	18	20	2	22	4
WIRELESS	49	51	47	147	192	45	155	8
LOCAL NETWORKS	163	144	146	453	463	10	462	9
WORLDWIDE NETWORKS	24	22	27	73	74	1	73	-
CLASSIC QWEST FACILITIES COST	220	221	368	809	700	(109)	818	9
INDIRECT SG&A, CORPORATE *	210	149	139	498	488	(10)	386	(112)
TOTAL QWEST	\$ 1,009	\$ 931	\$ 1,144	\$ 3,084	\$ 3,060	(\$ 24)	\$ 3,050	(\$ 34)
Total Merger Related Costs for Internal Time	-	-	(30)	(30)	-	30	-	30
Total QWEST COMBINED excl. merger related costs	\$ 1,009	\$ 931	\$ 1,114	\$ 3,054	\$ 3,060	\$ 6	\$ 3,050	(\$ 4)

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., HR, IT, Digital Media and International.

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BUSINESS UNIT EBITDA (\$M)

	Jan Actuals \$	Feb Actuals \$	Mar Actuals \$	Q1 Actuals \$	Q1 Budget \$	Q1 Budget Variance \$	Q1 CE \$	Q1 CE Variance \$
GLOBAL BUSINESS & GOVERNMENT	361	326	570	1,257	1,195	62	1,246	11
SMALL BUSINESS & CONSUMER MARKETS	453	465	466	1,384	1,464	(80)	1,378	6
WHOLESALE MARKETS	270	272	519	1,061	1,069	(8)	1,059	2
CLEC/DLEC/BLEC	(11)	(5)	(8)	(24)	(27)	3	(24)	-
QNCS	9	8	34	51	11	40	50	1
COMMUNICATION SERVICES/PMD	4	(17)	(6)	(19)	(39)	20	(38)	19
DEX	77	25	113	215	219	(4)	214	1
INTERNET STRATEGY	(4)	(3)	(4)	(11)	(19)	8	(17)	6
QCS	4	2	3	9	6	3	5	4
WIRELESS	(49)	(51)	(47)	(147)	(192)	45	(155)	8
LOCAL NETWORKS	(160)	(143)	(144)	(447)	(459)	12	(458)	11
WORLDWIDE NETWORKS	(24)	(22)	(27)	(73)	(74)	1	(73)	-
CLASSIC QWEST FACILITIES COST	(220)	(221)	(368)	(809)	(700)	(109)	(818)	9
INDIRECT SG&A, CORPORATE *	(207)	(142)	(131)	(480)	(459)	(21)	(369)	(111)
TOTAL QWEST	\$ 503	\$ 494	\$ 970	\$ 1,967	\$ 1,995	\$ (28)	\$ 2,000	\$ (33)
Total Merger Related Costs for Internal Time	-	-	30	30	-	30	-	30
Total QWEST COMBINED excl. merger related costs	\$ 503	\$ 494	\$ 1,000	\$ 1,997	\$ 1,995	\$ 2	\$ 2,000	\$ (3)

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., HR, IT, Digital Media and International.

Business Unit Q1 Current Estimate Variance Explanations

REVENUE

EXPENSE

WHOLESALE MARKETS		Favorable CE variance of \$11M is mainly due to the purchase accounting entry for reciprocal compensation in the amount of \$15.5M.
COMMUNICATION SERVICES/PMD		The favorable CE variance of \$19M is primarily due to \$5M of delayed advertising for DSL (timing issue), \$5M of new product development (voice over DSL) that was planned but did not occur, \$2M for headcount reductions that was not included in the forecast, \$3M of actual COGS that were transferred to another group and \$3M for expected DSL expense that did not occur.
WIRELESS		Favorable CE variance of \$8M is primarily attributable to outside sales channel expenses not being as high as expected.
LOCAL NETWORKS		Favorable CE variance of \$9M is primarily due to management employees being below budgeted levels reducing expenses by \$5M, \$8M relates to higher capitalization from accelerated infrastructure build and \$15M of other expense decrease relates to credits from Exchange Sales and Cost of Removal offset by (\$20M) of increased contractor expense which was primarily driven by higher capital work volumes.
INDIRECT SG&A, CORPORATE		Unfavorable CE variance of (\$112M) is mainly attributable to a (\$100M) hurt for purchase accounting in CFO (partially offset in IT by a \$25M benefit) and (\$45M) for Company task.

Business Unit Q1 Budget Variance Explanations

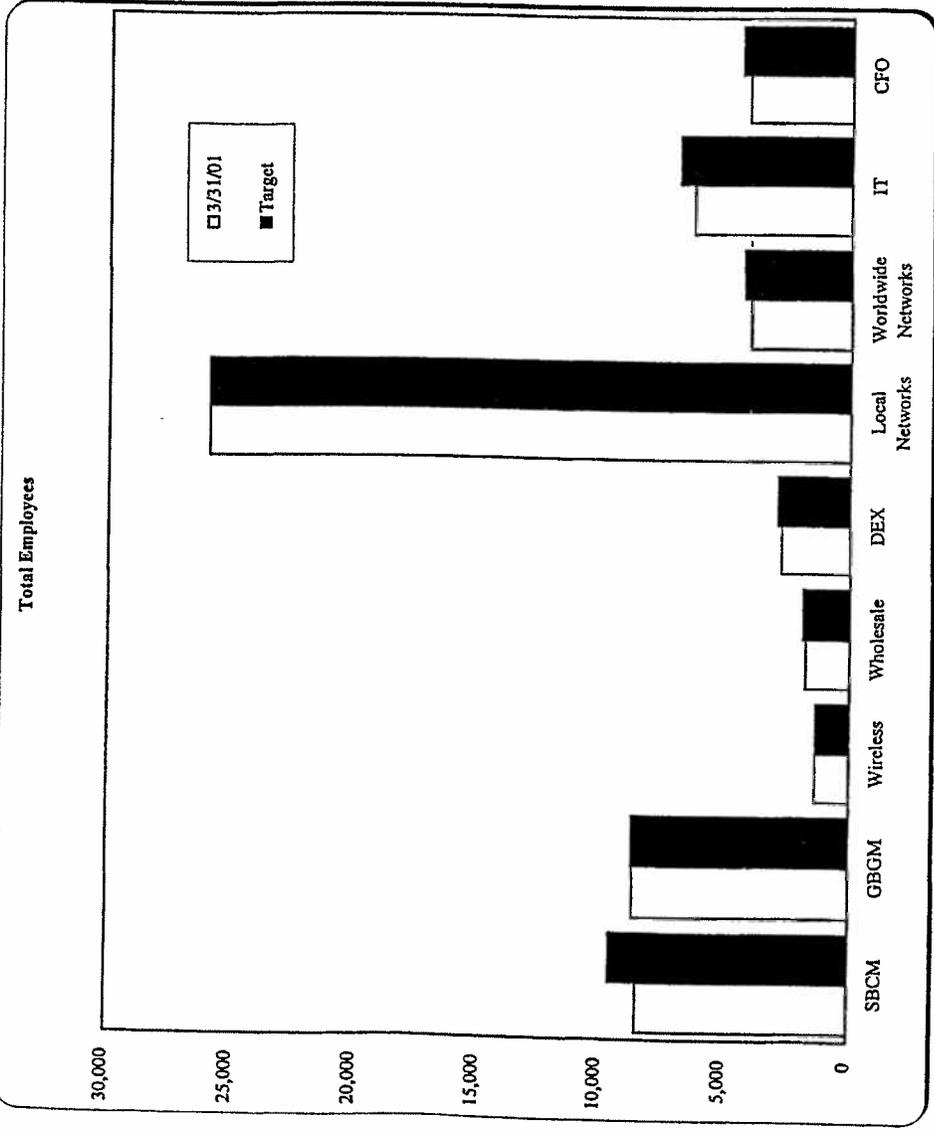
	REVENUE	EXPENSE
GLOBAL BUSINESS & GOVERNMENT	Favorable budget variance of \$77M is due to \$65M of YOIP/COBRA revenue and \$12M more in Data CPE revenue than expected (a large backlog of customer orders was closed in Mar).	Unfavorable budget variance of (\$15M) is due to increased COGS related to the increased revenue in YOIP and Data CPE.
SMALL BUSINESS & CONSUMER MARKETS	Unfavorable budget variance of (\$115M) is primarily due to gap of (\$72M) not being covered, miss by PCS of (\$38M) and product loading gap of (\$15M) not being covered offset by lines/packages/features of \$13M.	Favorable budget variance of \$35M is due to headcount being under budget by \$11M, lower marketing campaign spending of \$11M, \$6M less in contract labor/professional fees and \$9M of budget loaded expense GAP.
WHOLESALE MARKETS	Unfavorable budget variance of (\$6M) is primarily attributable to (\$16M) inability to deploy metro IRU's and (\$5M) miss in DIA/Dial for internet products, offset by \$12M in a one time USF retro adjustment.	
QNCs	Favorable budget variance of \$39M is attributable to \$25M of 4Q'00 sales being moved to 1Q'01 and the remaining difference is due to higher than planned dark fiber sales.	
COMMUNICATION SERVICES/PMID		The favorable budget variance of \$20M is primarily due to \$5M of delayed advertising for DSL (timing issue), \$5M of new product development (voice over DSL) that was planned but did not occur, \$2M for headcount reductions that was not included in the budget, \$3M of actual COGS that were transferred to another group and \$3M for expected DSL expense that did not come in.
DEX	Favorable budget variance of \$9M is primarily due to directory schedule changes of \$11M offset by Phoenix sales shortfall of (\$3M)	Unfavorable budget variance of (\$13M) is attributable to (\$9M) of task in plan and (\$4M) due to directory schedule changes not reflected in the budget.
INTERNET STRATEGY		Favorable budget variance of \$8M is due to a decline in employee costs (mainly salaries and wages) of \$1M and non employee costs such as marketing of \$9M offset by (\$2M) in mapping error of COGS (COGS are not being budgeted).
WIRELESS		Favorable budget variance of \$45M is due to Wireless missing revenue targets. Since revenues were lower than planned, there was a direct impact on expenses causing them to decrease as well.
LOCAL NETWORKS		Favorable budget variance of \$10M is primarily attributable to management employees being below budgeted levels reducing expenses by \$5M, \$8M relates to higher capitalization from accelerated infrastructure build and \$15M of other expense decrease relates to credits from Exchange Sales and Cost of Removal offset by (\$20M) of increased contractor expense which was primarily driven by higher capital work volumes
CLASSIC QWEST FACILITY COSTS		Unfavorable budget variance of (\$109M) is primarily due to switched revenue volumes being 1.2B higher than budgeted which drove an increase in costs of (\$37M) for IQ, IRU revenues were \$233M higher than budgeted which drove costs up (\$86M) and an overall decrease in IRU margins of (\$30M) offset by SB&C gap of \$32M.
INDIRECT SG&A, CORPORATE	Unfavorable budget variance of (\$11M) is primarily attributable to (\$5M) of Classic Qwest affiliate billing eliminations (offset in expense) and (\$13M) affiliate revenue adjustment offset by \$6M in higher pass through taxes.	Unfavorable budget variance of (\$10M) is mainly due to a (\$62M) hurt from purchase accounting for CFO partially offset by a \$25M help from purchase accounting for IT and \$20M in Corporate made up of the following: \$23M company task placeholder, \$10M reduction in contingency reserve, affiliate expense adjustment of \$15M and a \$10M B/S reconciliation reserve true-up offset by (\$24M) in health and bonus accruals for the BU's and (\$35M) for true-up of Classic Qwest bad debt reserve.

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Consolidated Qwest - Headcount

March 2001



	Actuals 3/31/01	Mar Budget	Budget Variance
Small Business & Consumer Markets	8,451	9,575	1,124
Global Business & Government	8,639	8,694	55
Wireless	1,350	1,341	(9)
Wholesale Markets	1,742	1,875	133
CLEC/DLEC/BLEC/QNCS	771	955	184
Comm. Services/PMD	390	412	22
DEX	2,727	2,884	157
Local Networks	25,923	25,961	38
Worldwide Networks	4,013	4,269	256
QCS/Internet Strategy	860	926	66
IT	6,299	6,878	579
HR	454	341	(113)
CAO	661	789	128
CFO	4,081	4,379	298
International	4	21	17
Corporate	57	297	240
Consolidated Qwest	66,422	69,597	3,175

10

QC
USW MGT SE, NCE
Sorted By Told Date

TOLD DATE	Count of TOLD DATE	PLAN TYPE	REG	STLA	WARN	Grand Total	Pension	Reg	STLA	WARN	Total Off Payroll by 3/31/03
1/1/00	1	PEN		1		1					
1/2/00	2			2		2					
1/6/00	3					3					
1/12/00	2					2					
1/17/00	6		1	15	1	25					
1/22/00	6		1			7					
1/31/00	1			1		2					24
2/1/00	1					1	2		21	1	
2/2/00	1		1			1					
2/5/00	1					1					
2/6/00	1					1					
2/9/00	1			1		2					
2/12/00	2					2					
2/14/00	1			1		1					
2/15/00	1			1		2					
2/16/00	2			1		2					
2/20/00	1			1		2					
2/21/00	1			1		2					
2/22/00	2			1		3					
2/26/00	2		1			2					
2/27/00	2		4	103		213					
2/29/00	3		1	7		11					
3/1/00	5			5		10					
3/2/00	1			3		4					
3/3/00	3			1		4					
3/6/00	20		19			39					
3/7/00	1			1		1					
3/8/00	14			23		37					
3/8/00	7			15		22					
3/10/00	8			5		13					
3/12/00	2					2					
3/13/00	9			9		16					
3/14/00	8		1	10		14					
3/15/00	4				3	7					
3/16/00	1			1		1					
3/19/00	1					1					
3/20/00	1					1					
3/21/00	1					1					
3/22/00	1		2			3					
3/23/00	1			1		2					
3/27/00	1			10		11					
3/28/00	11			25		36					
3/28/00	2					2					
3/30/00	9					9					
3/31/00	1			1		2					250
4/2/00	1			1		2					
4/13/00	1			3		4					
4/15/00	1			1		2					
4/16/00	1			1		2					
4/27/00	6			1		7					
4/30/00	1			1		2					
5/1/00	2			1		3					
5/4/00	2			1		3					
5/31/00	1			1		2					
6/1/00	1			1		2					
6/6/00	1			2		3					
6/15/00	1			1		2					
6/22/00	1			1		2					
6/28/00	2			1		3					
Grand Total	287	12	287	4		570	250				274

4/23/01
Prepared by Debbie Kvale
303-886-8856

USW Detail List of Severance - March 31, 2001.xls

EXHIBIT N



Summary of Operations

	April 2009	May 2009	June 2009	Q2 2009	Q3 Budget	Q2 Budget	Q3 2009
Revenue (\$Millions)	\$ 1,501	\$ 1,522	\$ 2,199	\$ 5,222	\$ 5,290	\$ (68)	\$ 4,654
Expense (\$Millions)	\$ 989	\$ 1,108	\$ 1,096	\$ 3,193	\$ 3,178	\$ (15)	\$ 2,860
EBITDA (\$Millions)	\$ 512	\$ 414	\$ 1,103	\$ 2,029	\$ 2,112	\$ (83)	\$ 1,794
Diluted EPS				\$ 0.08	\$ 0.12	\$ (0.04)	\$ 0.15
Cash EPS				\$ 0.29	\$ 0.33	\$ (0.04)	\$ 0.32
Capital Expenditures (\$Millions)	\$ 660	\$ 901	\$ 876	\$ 2,437	\$ 2,719	\$ 282	
Quality of Service							
Delayed Service Orders - POTS >30	281	204	131	131			
% Commitments met - POTS total provisioning	98.6%	98.3%	98.3%	98.4%			
% Commitments met - Design Services Provisioning	96.9%	97.4%	97.9%	97.4%			
Delayed Service Orders \$(000) - POTS & Design Services	\$ 1,322	\$ 1,359	\$ 1,149	\$ 1,149			
Product Metrics							
Wireless Subscribers ***	941,222	975,501	1,001,710	1,001,710	1,164,018	(162,308)	653,425
Qwest.net Subscribers	-	-	650,014	650,014	690,912	(40,898)	506,191
Qwest DSL In-Region Subscribers *	319,498	339,137	359,692	359,692	439,082	(79,390)	175,258
Total Package Subscribers	82,359	84,483	86,289	86,289	90,079	(3,790)	49,743
Custom Choice Subscribers (including 2nd line)	2,334,456	2,381,547	2,404,144	2,404,144	2,575,151	(171,007)	1,801,861
Sellable Square Footage	247,973	284,641	289,791	289,791			60,287
Sold Square Footage	75,595	77,890	82,884	82,884	177,420	(94,536)	18,356

* DSL subscribers metric includes VDSL subscribers. However, the metric does not include video only subscribers or Omaha VDSL subscribers.

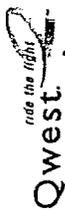
** Calculation Based on Annualized YTD Actual Revenue

*** Approximately 12,000 OCS and 39,000 prepaid subscribers have been removed from the subscriber count for the year. Additionally, Wireless is no longer offering zero rate plans.

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Summary of Ops summary

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Income Statement

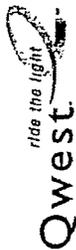
	Current Month		2nd Quarter		Year-to-Date		YoY V%	YoY V%
	Actuals	B/(W) Budget	Actuals	B/(W) Forecast	Actuals	B/(W) Budget		
Revenue	\$ 2,199	\$ 182	\$ 5,222	\$ 6	\$ 10,273	\$ (66)	12%	12%
Cost of Sales *	655	26	1,850	98	3,646	(9)	22%	21%
Gross Margin	1,544	208	3,372	104	6,627	(73)	7%	8%
Gross Margin %	70%	4%	65%	2%	65%	0%	0%	0%
SG&A	441	-	1,343	(65)	2,601	(16)	0%	-1%
EBITDA	1,103	208	2,029	39	4,026	(87)	13%	14%
Contribution Margin %	50%	8%	39%	1%	39%	-1%	-1%	-1%
Depreciation/Amortization	421	-	1,257	66	2,408	55	30%	26%
Interest Expense	119	5	343	5	681	42	41%	38%
Non-Operating (Income)/Expense	(18)	28	14	37	34	31	-7%	79%
EBIT	581	241	415	147	903	41	-27%	-18%
Income Taxes	379	(184)	287	(76)	557	(54)	-8%	-8%
Pro-forma Normalized Net Income	\$ 202	\$ 57	\$ 128	\$ 71	\$ 346	\$ (13)	-50%	-50%
Normalizing adjustments (net of tax)	(3,432)	(3,432)	(3,434)	(3,434)	(3,633)	(3,633)		
Extraordinary Item - Early Retirement of Debt (net of tax)	-	-	-	-	(65)	(65)		
Reported Net Income	\$ (3,230)	\$ (3,375)	\$ (3,306)	\$ (3,363)	\$ (3,325)	\$ (3,711)	2633%	1285%
Pro-forma Normalized Diluted EPS	\$ 0.08	\$ 0.05	\$ 0.05	\$ (0.04)	\$ 0.21	\$ -	-47%	-25%
Pro-forma Normalized Diluted Cash EPS	\$ 0.29	\$ 0.05	\$ 0.05	\$ (0.04)	\$ 0.59	\$ -	-9%	-6%
Pro-forma Reported Diluted EPS	\$ (1.99)	\$ -	\$ (1.99)	\$ -	\$ (2.02)	\$ -	1321%	731%
Diluted Weighted Average Shares	1,674	1,674	1,674	1,674	1,674	1,674		

	2Q		YTD
	Adj	Adj	
Write down EFN Invest	(1,649)	(1,649)	(3,049)
Integer Related Costs	(49)	(49)	(645)
Depr Cash Exp on Access Line	(22)	(22)	(22)
One Time Invest Write Down	(9)	(9)	(98)
Change in Derivative Mkt Value	(16)	(16)	(3)
Gain on Sale of Fixed Exchange	-	-	50
Tax on Normalizing Items	23	23	49
Total	(1,432)	(1,432)	(4,481)

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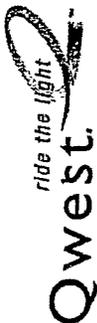
Sequential Growth

	Revenue			Expense			EBITDA		
	Q201	Q101	% Change	Q201	Q101	% Change	Q201	Q101	% Change
(SMillions)	\$	\$		\$	\$		\$	\$	
Global Business & Government	540	548	(8)	72	55	(17)	468	493	(25)
Small Business	1,456	1,430	2%	303	285	(18)	1,153	1,145	8
Consumer Markets	1,276	1,199	7%	140	138	(2)	1,136	1,061	75
Wholesale Markets	-	-	0%	21	24	3	(21)	(24)	3
CLEC/DLEC/BLEC	25	53	(28)	2	2	-	23	51	(28)
Qwest Network Construction Services	-	-	-	47	60	13	(47)	(60)	13
Product Management	348	342	6	123	127	4	225	215	10
DEX	-	-	-	1	1	-	(1)	(1)	-
Internet Strategy	26	27	(1)	19	18	(1)	7	9	(2)
Qwest.Cyber Solutions	-	-	-	155	161	6	(155)	(161)	6
Wireless	3	5	(2)	429	453	24	(426)	(448)	22
Local Networks	-	-	-	66	73	7	(66)	(73)	7
Worldwide Networks	-	-	-	972	809	(163)	(972)	(809)	(163)
Classic Qwest Facilities Cost	-	-	-	72	56	(16)	(68)	(50)	(18)
Internet Services Operations	8	35	(27)	449	467	18	(441)	(432)	(9)
Indirect SG&A, Corporate *									
Total Qwest combined excl. merger related costs	\$ 5,212	\$ 5,051	3%	\$ 3,193	\$ 3,054	\$(139)	\$ 2,029	\$ 1,997	\$ 32
									2%

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., IT and International.

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Business Unit Revenue Recurring/Non-recurring

(\$Millions)

	April Actuals	May Actuals	June Actuals	Q2 Actuals	Q2 Budget	Q2 Budget Variance	Q2 Forecast	Q2 Forecast Variance
Recurring	\$ 366	\$ 396	\$ 438	\$ 1,200	\$ 1,379	\$ (179)	\$ 1,215	\$ (15)
Non-recurring	3	-	333	336	136	200	336	-
Global Business & Government	369	396	771	1,536	1,515	21	1,551	(15)
Small Business	184	179	177	540	591	(51)	542	(2)
Consumer Markets	478	486	492	1,456	1,551	(95)	1,447	9
Recurring	327	323	340	990	990	-	995	(5)
Non-recurring	1	-	285	286	214	72	264	22
Wholesale Markets	328	323	625	1,276	1,204	72	1,259	17
Qwest Network Construction Services - Non-recurring	1	-	24	25	13	12	28	(3)
DEX	126	127	95	348	352	(4)	349	(1)
Qwest Cyber Solutions	10	8	8	26	34	(8)	27	(1)
Local Networks	1	1	1	3	4	(1)	4	(1)
Internet Services Operations	1	1	2	4	8	(4)	1	3
Indirect SG&A, Corporate *	3	1	4	8	18	(10)	8	-
Total Qwest	\$ 1,501	\$ 1,522	\$ 2,199	\$ 5,222	\$ 5,290	\$ (68)	\$ 5,216	\$ 6

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., HR, IT and International.

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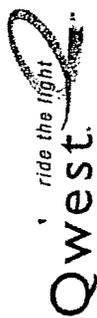
Business Unit Revenue

(\$Millions)	April Actuals	May Actuals	June Actuals	Q2 Actuals	Q2 Budget	Q2 Budget Variance	Q2 Forecast	Q2 Forecast Variance
Global Business & Government	\$ 369	\$ 396	\$ 771	\$ 1,536	\$ 1,515	\$ 21	\$ 1,551	\$ (15)
Small Business	184	179	177	540	591	(51)	542	(2)
Consumer Markets	478	486	492	1,456	1,551	(95)	1,447	9
Wholesale Markets	328	323	625	1,276	1,204	72	1,259	17
Qwest Network Construction Services	1	-	24	25	13	12	28	(3)
DEX	126	127	95	348	352	(4)	349	(1)
Qwest.Cyber Solutions	10	8	8	26	34	(8)	27	(1)
Local Networks	1	1	1	3	4	(1)	4	(1)
Internet Services Operations	1	1	2	4	8	(4)	1	3
Indirect SG&A, Corporate *	3	1	4	8	18	(10)	8	-
Total Qwest	\$ 1,501	\$ 1,522	\$ 2,199	\$ 5,222	\$ 5,290	\$ (68)	\$ 5,216	\$ 6

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., IT, and International. Revenue includes real estate and Malheur.

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Business Unit Expense

(\$Millions)	April		May		June		Q2		Q2		Q2		
	Actuals	\$	Actuals	\$	Actuals	\$	Actuals	\$	Budget	\$	Budget	Variance	
Global Business & Government	103	\$	136	\$	83	\$	322	\$	357	\$	35	\$	
Small Business	24		25		23		72		74		2	(1)	
Consumer Markets	96		103		104		303		284		(19)	(17)	
Wholesale Markets	51		45		44		140		131		(9)	26	
CLEC/DLEC/BLEC	9		5		7		21		31		10	4	
Qwest Network Construction Services	-		1		1		2		2		-	(1)	
Product Management	10		15		22		47		73		26	(6)	
DEX	43		46		34		123		128		5	3	
Internet Strategy	-		1		-		1		4		3	1	
Qwest-Cyber Solutions	7		6		6		19		21		2	(3)	
Wireless	56		54		45		155		243		88	16	
Local Networks	142		154		133		429		453		24	(23)	
Worldwide Networks	20		27		19		66		77		11	7	
Classic Qwest Facilities Cost	218		218		536		972		707		(265)	20	
Internet Services Operations	23		38		11		72		77		5	(13)	
Indirect SG&A, Corporate *	187		234		28		449		516		67	(58)	
Total Qwest	\$ 989	\$	1,108	\$	1,096	\$	3,193	\$	3,178	\$	(15)	\$ 3,226	\$ 33

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., HR, IT and International.

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Business Unit EBITDA

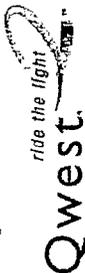
(\$Millions)	April		May		June		Q2		Q2		Q2	
	Actuals	Actuals	Actuals	Actuals	Actuals	Actuals	Actuals	Budget	Budget	Forecast	Forecast	Variance
Global Business & Government	\$ 266	\$ 260	\$ 688	\$ 688	\$ 1,214	\$ 1,158	\$ 56	\$ 1,151	\$ 63	\$ 1,151	\$ 63	
Small Business	160	154	154	154	468	517	(49)	471	(3)	471	(3)	
Consumer Markets	382	383	388	388	1,153	1,267	(114)	1,161	(8)	1,161	(8)	
Wholesale Markets	277	278	581	581	1,136	1,073	63	1,093	43	1,093	43	
CLEC/DLEC/BLEC	(9)	(5)	(7)	(7)	(21)	(31)	10	(25)	4	(25)	4	
Qwest Network Construction Services	1	(1)	23	23	23	11	12	27	(4)	27	(4)	
Product Management	(10)	(15)	(22)	(22)	(47)	(73)	26	(41)	(6)	(41)	(6)	
DEX	83	81	61	61	225	224	1	223	2	223	2	
Internet Strategy	-	(1)	-	-	(1)	(4)	3	(2)	1	(2)	1	
Qwest Cyber Solutions	3	2	2	2	7	13	(6)	11	(4)	11	(4)	
Wireless	(56)	(54)	(45)	(45)	(155)	(243)	88	(171)	16	(171)	16	
Local Networks	(141)	(153)	(132)	(132)	(426)	(449)	23	(402)	(24)	(402)	(24)	
Worldwide Networks	(20)	(27)	(19)	(19)	(66)	(77)	11	(73)	7	(73)	7	
Classic Qwest Facilities Cost	(218)	(218)	(536)	(536)	(972)	(707)	(265)	(992)	20	(992)	20	
Internet Services Operations	(22)	(37)	(9)	(9)	(68)	(69)	1	(58)	(10)	(58)	(10)	
Indirect SG&A, Corporate *	(184)	(233)	(24)	(24)	(441)	(498)	57	(383)	(58)	(383)	(58)	
Total Qwest	\$ 512	\$ 414	\$ 1,103	\$ 1,103	\$ 2,029	\$ 2,112	\$ (83)	\$ 1,990	\$ 39	\$ 1,990	\$ 39	

* Indirect SG&A, Corporate includes: Corporate, Finance, Admin., HR, IT and International.

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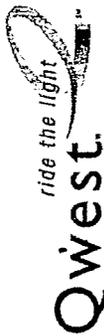


Business Unit 02'01 Budget Variance Explanations

	REVENUE	EXPENSE
Global Business & Government	Favorable budget variance of \$21M is primarily attributable to one time deals (Worldcom, KOC, Bell South) being \$201M greater than budget. The one time deals are offset by the following misses: (\$45M) in Private Line, (\$10M) in Local, (\$24M) in in Ops Services, (\$23M) in Hosting, (\$20M) in Long distance including IntraLata, (\$15M) in DIA, (\$9M) in Dial, (\$7M) in Content, (\$3M) in Shared Web Solutions and (\$3M) in Wireless.	Favorable budget variance of \$15M is due to Gemini (CPE Contract) accrual of \$30M. This accrual was double counted in the budget (booked for Global and Facilities). Since the actual expenses related to this budgeted item were recorded on Facilities books (not Global's), Global did better than budget by that amount.
Small Business	Unfavorable budget variance of (\$51M) is due to (\$26M) related to gap, (\$18M) for long distance and (\$14M) for wireless offset partially by an increase in Data revenue for \$5M due to frame relay	
Consumer Markets	Unfavorable budget variance of (\$35M) is primarily attributable to the following misses in revenue: (\$42M) for Wireless, (\$40M) relates to gap, (\$6M) in Custom Choice, (\$2M) in OOR Long Distance and (\$2M) for delays in Denver expansion of DSL	Unfavorable budget variance of (\$18M) is attributable to (\$18M) for gap absence
Wholesale Markets	Favorable budget variance of \$72M is due to \$72M for IRU sales and \$6M in Access offset by (\$7M) for private line volumes being less than expected and (\$4M) in long distance	Unfavorable budget variance of (\$9M) is attributable to (\$6M) in reciprocal compensation and (\$3M) for clean up of bankruptcy accounts and increase in bad debt expense
DLEC/CLEC/BLEC		Favorable budget variance of \$10M is primarily due to \$6M for savings in advertising and employee related expenses (lower than planned headcount) and \$3M for collocation credits
Product Management		Favorable budget variance of \$26M is mainly due to \$10M for spending declines in advertising and new product development, \$5M for task savings, \$5M in SG&A savings, and \$2M in savings for headcount reductions
DEX	Unfavorable budget variance of (\$4M) is attributable to published revenue shortfall of (\$7M), (\$2M) for New Ventures volume and (\$1M) for other offset by \$5M help in directory schedule changes.	Favorable budget variance of \$5M is attributable to \$11M help from lower printing, distribution, advertising and employee costs; \$3M for directory schedule changes, \$2M for lower new ventures costs, \$2M for other offset by (\$13M) for task in plan
Wireless		Favorable budget variance of \$88M is due to volumes being less than expected
Local Networks		Favorable budget variance of \$24M is due to accelerated headcount reductions combined with the elimination of systems work
Worldwide Networks		Favorable budget variance of \$11M is attributable to the following: \$7M associated with operationalizing reductions due to assigned tasks (training, travel, renegotiations of maintenance), \$2M for release of USW merger related costs and \$1M for Lucent damages
Classic Qwest Facilities Cost		Unfavorable budget variance of (\$269M) is attributable to the following: (\$252) for increased IRU sales, (\$75) for switched volumes, and (\$53M) for Dial Port impairment reversal. Offsets to this increase are as follows: \$43M for reduced switched CPM, \$38 for tasks and consumer gap of \$30M
Indirect SG&A, Corporate	The unfavorable budget variance of (\$10M) is mainly due to the Corporate entity. This variance is mainly due to (\$7M) for timing of pass thru taxes, (\$7M) for Classic Qwest affiliate revenue elimination (\$2M) for Y affiliate revenue and (\$1M) for reversal of toll account in Washington and Oregon. This is all offset by \$3M for Western Reinsurance internal revenue and \$3M for reversal of remaining balance in carrier access billing liability accrual	The favorable budget variance of \$67M is primarily due to CPD and Corporate. The variance is primarily due to \$66M company task plechholder, \$58M for adjustment of property tax accrual, \$46M for change in timing of occupational compensated absence reserve, \$21M for reclassification of idle asset costs and \$20M for true-up to management bonus reserve. These increases are offset by (\$52M) for purchase accounting, (\$30M) for true-up of uncollectible reserves, (\$29M) for unbudgeted gross receipt tax offset and (\$22M) for true-up of legal reserves

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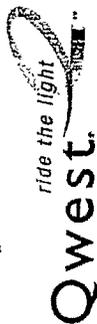
Business Unit Q2'01 Forecast Variance Explanations

	<u>REVENUE</u>	<u>EXPENSE</u>
Global Business & Government	Unfavorable forecast variance of (\$15M) is primarily attributable to Qwest Interactive for (\$4M), Long Distance for (\$3M), Hosting for (\$2M), Local Voice for (\$2M), Operator Services for (\$1M) and Wireless for (\$1M).	Favorable forecast variance of \$78M is due to \$30M for Genuity double book, \$20M for purchase accounting and the remaining amount should have been transferred to Internet Services Operations, Consumer and Product Management.
Consumer Market		Unfavorable forecast variance of (\$17M) is due to gap closure.
Wholesale Markets	Favorable forecast variance of \$17M is due to IRU sales.	Favorable forecast variance \$26M is attributable to reciprocal compensation
Wireless		Favorable forecast variance of \$16M is due to volumes being less than expected.
Local Networks		Unfavorable forecast variance of (\$23M) is due to the impact of expense controls.
Worldwide Networks		Favorable forecast variance of \$7M is attributable to the following: \$2M for transfer of expenses to Local Network, \$2M for salaries and benefits, \$2M for reclass of USW merger related costs and \$1M for Lucent damages.
Classic Qwest Facilities Cost		Favorable forecast variance of \$20M is due to the following: \$35M for reduced switched CPM, \$31M for tasks, \$14M for decreased IRU sales, and \$13M for increased IP Costs. These increases are partially offset by (\$37M) for switched volumes and (\$35M) for Dial Port impairment reversal.
Internet Services Operations		Unfavorable forecast variance of (\$13) is due to the fact that Global did not transfer enough budget to ISO. Global should have transferred \$18M more to ISO which would have caused ISO to have a favorable variance of \$5M.
Indirect SG&A, Corporate		The unfavorable forecast variance of (\$58M) is primarily due to CFO of which the majority of the variation is attributable to purchase accounting for (\$150M) offset by Corporate's positive variance of \$81M. Corporate's favorable variance is primarily due to a \$56M reversal of April and May bonus and health accrual, \$46M for timing of occupational compensated absence reserve and \$20M for true-up to management bonus reserve. This is partially offset by (\$30M) for true-up of Classic Qwest uncollectible reserve, (\$16M) for Y affiliate expense and (\$9M) for the reclass of "Classic Qwest less caps credits" (the portion of payroll expense that is to be capitalized) to the business units.

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Capital Analysis

Jun-01

2001 Results - Spending View

	Current Month		QTD		YTD		Comments
	Actuals	B/(W) Plan	Actuals	B/(W) Plan	Actuals	B/(W) Plan	
Global Business & Gvt Markets	\$ 3	\$ -	\$ 7	\$ 1	\$ 10	\$ -	June YTD capital expenditures are \$33M less than plan, driven by revisions to Network deployment schedules and ongoing efforts to reprioritize capital investments in support of revenue drivers and operational objectives. Capacity Purchases variance of (\$450M) YTD represents spending above the current annual plan, and significantly reduces the overall YTD underrun. The annual plan has been revised to \$8.8B from \$9.5B.
Small Business & Consumer Markets	-	-	-	-	-	-	
Wholesale Markets	-	1	-	3	-	6	
DLEC/CLEC/BLEC	-	30	78	12	183	13	* <u>DLEC/CLEC/BLEC</u> - Current month results and YTD spending \$13M less than plan reflect the reclassification of \$40M of assets from capital to inventory-held-for-sale transaction completed in June for eligible YTD purchases and construction activity.
Qwest Network Construction Services	10	(2)	34	(12)	46	(13)	* <u>Qwest Network Construction Services</u> - Construction projects completed ahead of schedule and an unanticipated \$5M Sierra Pacific conduit purchase drove the YTD \$13M greater than plan variance. Year-end results are anticipated to be on plan.
Product Management	2	4	6	11	6	19	* <u>Product Management</u> - YTD \$19M less than plan mainly due to a capital-to-expense accounting policy conversion for DSL modems (\$14M). Additional underruns in new product development and national expansion of Total Care is related to ongoing analysis of funding prioritization for systems initiatives in support of these lines. Underrun amounts will be used to cover overruns in other product portfolios.
DEX	1	-	2	-	2	2	* <u>QIS</u> - YTD \$78M less than plan driven primarily by deferred spending on DIA, DIAL, and Hosting projects in response to market conditions, and subject to rebudgeting. \$140M in authorization requests are in process, and spending is expected to increase Q3/Q4 as capital is redirected and approved.
QIS	24	32	101	68	139	78	* <u>Wireless</u> - YTD \$58M less than plan due to implementation schedule modification from Q1 to Q3 and Q4, to include purchases of certain Lucent and Nortel product software and hardware features. Capital expenditures are being managed to revenue expansion through deferred growth and capacity initiatives, with \$22M in commitments for construction and cell electronics to be booked in coming months.
Business Development	2	1	7	4	18	(1)	* <u>Local Networks</u> - YTD \$2M less than plan represents a significant reduction in the YTD plan variance. Overruns primarily in OSP Growth (\$144M), Private Line (\$79M), and Nortel JTI (\$24M) from scheduled activity accelerations were offset by underruns in Switch/IOF/CSPEC (\$97M), Interconnect (\$90M), BLEC (\$29M), and other initiatives subject to rebudgeting, delayed implementations and lower volume demand.
Wireless	16	13	76	10	235	58	* <u>Worldwide Networks</u> - YTD \$45M less than plan due to limited appropriations, ordering, and purchasing in May/June, primarily associated with Transport activity, while budget reductions were operationalized. Favorability to be consumed in Q3. Continued upward pressure from IRU and Private Line sales, and switched minutes of use.
Local Networks (A)	370	95	1,133	261	2,487	2	* <u>International</u> - YTD \$24M less than plan driven by delays in the Japan US Cable work. Increased spending is anticipated Q3 to support ATM, IP Transit and IPLC services in Asia.
Worldwide Networks	199	(7)	554	22	1,654	45	* <u>Information Technology</u> - YTD \$119M less than plan due to delays in business unit project prioritization and early-phase development projects not yet eligible for capitalization. The IT spending plan is under review and will be revised to leverage the YTD variance and reflect Q3/Q4 resource capacity.
International	-	2	-	8	-	24	* <u>CEO</u> - YTD \$53M less than plan due to suspended Real Estate material ordering pending building permits for network development and life-cycle infrastructure work (\$33M). Permit resolutions expected to trigger spending increase Q3.
Information Technology	67	16	213	36	342	119	
CFO (B)	30	(2)	71	12	100	50	
CAO	(6)	7	(3)	4	1	3	
Capacity Purchases (C)	197	(197)	197	(197)	450	(450)	
Inventory Constructed for Sale (D)	(39)	39	(39)	39	(78)	78	
Total Capital Expenditures	\$ 876	\$ 32	\$ 2,437	\$ 282	\$ 5,595	\$ 33	

Notes
 (A) Monthly variances reported internally by Local Network differ from the Corporate view shown above due to the monthly spread of the budget. Internal Local Network monthly plans are based on estimated monthly spends, while the Corporate monthly view reflects quarterly plan divided by three. Plan amounts agree by quarter.
 (B) Results include net annual change in prepaid capital expenditures.
 (C) Capacity Purchases represent spending above current annual plan of \$8.8B
 (D) Estimate of 2001 capital spending which has flowed through WIP for the construction of inventory held for sale.

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EXHIBIT O

Qwest Communications

04/24/01

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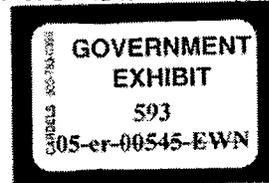
Good morning ladies and gentlemen and welcome to the Qwest First Quarter 2001 Earnings Release Conference Call. At this time all participants are in a listen only mode. Later we will conduct a question and answer session. I would now like to turn the call over to Mr. Lee Wolfe, Vice-President of Investor Relations. Mr. Wolfe you may begin.

Lee Wolfe: Good morning everyone. Welcome to the Qwest First Quarter Results Call. With me this morning as usual and of course is Joe Nacchio, our Chairman and CEO. But before I turn it over to Joe, I would like to remind everyone that we will be making some forward-looking statements today, which are based on the best information analysis currently available. But of course are subject to risks and uncertainties, which could cause actual results to differ materially from those we express or imply. And of course again these risks and uncertainties are on file at the FCC. Additionally we do not adopt analysts' estimates nor do we necessarily update forward-looking statements made today. With that I would like to turn it over to Joe.

Joseph Nacchio: Thanks Lee. Good morning everyone. We apologize for starting a few minutes late. We know there was another conference call scheduled in front of us. And for those of you who joined us from the AT&T call, I guess the best way to start would be to quote a famous English group that I am a particular fan of and use one of their best lines "And now for something completely different". With me on the call today, I would like to introduce 2 new members or really 3 new members or 3 new positions on our management team. Of course you know joining me on the call today will be my colleague and new CFO, Robin Szeliga. Afshin Mohebbi*, who you all know already, you know is now the President and Chief Operating Officer of Qwest. And just yesterday we announced joining us as Executive Vice President and President of our Wireless Group, Annette Jacobs*, who I will speak more of a little bit later. We also have on the call for the first time, although he will not be speaking, Cliff Holtz*, who joined us a week ago who will now handle our small business operations and I will be addressing that.

So we have a lot to cover this morning. I will go rather quickly. I want to cover 3 or 4 things actually in my brief opening remarks and then turn it Robin. I will provide you a brief overview of results. Robin will provide much greater detail, including what we will call our past to performance, something you have asked for as to how in a little bit more granular detail we actually achieved the growth rates. I know that has been a question people have wondered about. We are very pleased with our performance as you probably saw from our press release. We have 12 percent revenue growth our first quarter over first quarter, which I guess from people reporting so far in the industry and what I have been watching and reading, it is 2 to 3 times the rate of anyone else in the industry. So we will provide you some granularity later in the call as to how we continue that. I will give a brief overview of operational performance of our units. again allowing you to come back on questions on that later. I want to specifically address the balance of 2001 and make some general

Page 2 of 31



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Qwest Communications

04/24/09

Consumer and small business grew 6 percent, if you exclude our out of region long distance. If you include it, I believe it is 2.2 percent. I am sorry 2.7 percent. Just for the record we are not pleased with the performance of that unit. There have been management changes as you know on the Qwest side. We now have 2 Senior Executives where we had 1. Cliff Holtz* joined us to do small business. Jim Smith* moved from our Yellow Page operation, our Decks operation to run consumer. We think there is enormous upside here. That market was not covered. There was not the depth of analysis that we believe competitive firms should have in terms of understanding their markets. So we look for upside on consumer. The good news, while there are ways to improve, good things are occurring, 28 percent of our consumers now have bundles. That is up 40 percent over a year ago. We need to penetrate bundles more effectively in the business, small business market where we think we have enormous up selling opportunities. We are pleased with the progress of bundles, but we can get better performance out of consumer and small business and that is the reason for the new executive changes. We are reorganizing small business as I said with Cliff joining us. Our priorities will be to increase sales effectiveness and focus more on strategic products and bundles.

Wireless achieved a total of \$913 thousand subs is our now total. That is despite a plan \$30 thousand prepaid disconnects. We are moving out of the low value consumer space. But we had the strongest quarter in terms of gross ads, but with the cleaning up of the base we need to do better to meet the rest of the year. We need to insure that these, our wireless franchise is used as a bundle play. 7 national networks in a high capitalization commodity fight on pricing is not where we are going to be. We are moving this into a pure bundle play for consumer and small business. We have made changes in that unit. Annette joins us today. We are very comfortable and confident that we will meet our yearly targets as the year goes on.

DSL has been particularly strong for us, 125 percent growth in the first quarter. We have expanded the 74 markets now. And Shawn Gillmore* and his Product Team have made great progress in getting our infrastructure ready. And we will see more acceleration as the year goes on. I also want to say I remain very positive on our testing and the learnings we are having on our VDSL trials. We look forward to being able to (Inaudible) that product probably early next year. We still have some technology developments that need to be delivered to us this summer. Our operation forces need to be able to scale their workforce as we get capitalized labor rates down. We are looking forward to the opportunity to provide video on our services and attacking the cable monopolies that operate in our regions.

Gross margin, we will talk about a little bit more with the specific numbers. Robin will talk about that. Basically I will just say that they are inline with our investments for new products. We will get more scale economics on new products as we grow those new products in terms of market share. And we think gross margins will stabilize at about the level that we just reported for the balance of the year. Robin will talk more.

Qwest Communications

04/24/09

Let's talk a little bit about 2001 and why I reconfirm the estimates. In the face of I guess several of the larger players yesterday and this morning appointing to the economy for their less than targeted performance. And I have really 4 reasons why I am confident that I can do this at this time. First I have just finished 3 weeks of detailed operational reviews in every operation inside of Qwest. And we call it the Stump the Stars Meetings. And I have pretty good visibility and it goes without saying that we have challenges and my management team needs to continue to grow at a rate multiples of where our peers are as we take share. But I have confidence they can achieve it. Second, if we look at key products on the revenue side and key value drivers on the EBITDA side, we are hitting on several of them, but we have room to improve in several. For example as I said a moment ago, on the revenue side, I think we will get better performance out of small business and consumer with the new and more in-depth senior executive attention to that market. DSL I think we will continue to improve on and grow and that will poke additional revenue to our bundles. Our bundles in general have not been as effective on small business as we have been on consumer. We have a long way to go. I am looking to Annette and Cliff specifically to accelerate that effort and region. And optical services we can penetrate we believe the commercial market on the business side, not just the wholesale side more effectively. We have great margins on our optical services and we have the leading edge industry product (Inaudible)... The second reason is we are hitting on key revenue and EBITDA drivers. Third is our region economics remain stronger than the rest of the economy despite the fact I am sure the entire economy including our region is feeling some softness. We are holding up (Inaudible) when we look at the variety of Bureau of Labor Statistic data that comes out whether you are looking at unemployment claims, housing starts, new business formations. We have some slow down. We can see that in those statistics in the first quarter, but not the material side that it effects our growth in business access lines, second lines, advance features and/or bundles. To make that point just comparison you will see in our attachment, we see our business access lines in the region growing at about 5.5 percent. Consumer slightly negative at this time, overall about 1.3. I only compared that to what I read for BellSouth in terms of what they published where I think their business was 1.7, their overall was .1. So the Southeast always tends to be a strong region. We are considerably stronger. If you look at voice grade equivalent, we are looking at voice grade equivalent lines growing to 24 percent. And that by the way is completely consistent with our strategy of driving more local loops to broadband. So when I look at those underlying dynamics, I feel comfortable that with interest cuts, potentially the tax cut, we will see the economy strengthen in the second half. We have good momentum going through the first half and therefore I think I can hold the numbers. And then finally and I think is no small matter, I think we have a management team that I am very proud of that continues to execute and innovate. We wear our "No Wining" buttons around here. You know when something goes wrong; you come up with something new. That is what we get paid for. So if one product is not as good, you go pump another product, you change your sales compensation, you change your distribution strategies and you do it rather quickly. And so I think this is a world class team. I know many of you have doubted we would make

Qwest Communications

04/24/09

drops several hundred million more. But we will give greater guidance on that as we get later in to the year.

Lynette Donovan*: And my real question is for the consumer and small business segment. I think back in January you had indicated that your goals would grow that revenue line about 8 to 9 percent for the full year. Given that growth was a (Inaudible) quarter, I am just curious on, can you elaborate is that still your goal or?

(Cross talk)

Lynette Donovan*: How do you back end the second half of the year in that segment.

Joseph Nacchio: Let me just be clear. If we exclude and I think what we are... Just for clarification, if exclude out of region long distance on the consumer side, which we are basically in a harvest strategy, the growth was 6.3 in our franchise territory. We are going to get it closer to 8. But the real answer to you Lynette is that it was not working as it should. We made management changes at the top. We brought some new people in both on the consumer and small side where we split it. We are going to make our revenue numbers for the year. They can accelerate. To be fair I need to give Jim and Cliff a little bit more time. Although Jim has started showing improving results. We saw them in March already. And we will see as the year goes on where it goes and that. But I think we are going to be talking somewhere between 6 and 8 percent (Inaudible).

Lynette Donovan*: And now with long distance entry in that number right?

Joseph Nacchio: Oh no long distance entry in that number, none.

Lynette Donovan*: Great. Thanks.

Lee Wolfe: Next question please.

Christine: We have Anna-Maria Kovak* from Jamie Montgomery Scott online with a question, please state your question.

Anna-Maria Kovak*: First of all on recip comp...

Joseph Nacchio: Anna-Maria could you say it a little louder please?

Anna-Maria Kovak*: Yes. On recip comp, what are you looking for in terms of benefit I guess on the ILEC side from the new rule?

Joseph Nacchio: Recip comp compared to what we anticipated?

Anna-Maria Kovak*: Yes in terms of paying out.

EXHIBIT P

4/4/2007 Trial Vol. 18

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME EIGHTEEN

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
Judge, United States District Court for the District of
Colorado, commencing at 8:49 a.m., on the 4th day of April,
2007, in Courtroom A1001, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

4/4/2007 Trial Vol. 18

1 further.

2 Q. Okay. Did you expect Qwest to divulge to you or to other
3 analysts the debates that it was having amongst its executives
4 about how it should reach its budgets or what products to
5 emphasize or whether it was going to make this particular area
6 in the budget or it may have to shift to another area in the
7 budget? Did you expect those types of debates to be disclosed
8 to you?

9 A. The debates in terms of internal workings and strategy, I
10 don't expect that to be disclosed; but I do expect material
11 items to be disclosed.

12 Q. Now, you said that you were present at the April 24, 2001,
13 analyst conference. I'd like to play another section from that
14 conference to you.

15 (Tape played.)

16 Do you recognize Mr. Nacchio's voice?

17 A. Yes, I do.

18 Q. Do you remember hearing that?

19 A. Yes, I do.

20 Q. And was not Mr. Nacchio telling you things where they were
21 not being successful in the first quarter?

22 A. In that particular instance, yes.

23 Q. And this analyst telephone conference lasted for an hour or
24 so?

25 A. Approximately.

EXHIBIT Q

DAVENPORT & COMPANY LLC
Equity Research - Telecom

Company Update
4/25/01

Qwest Communications (Q-NYSE-\$37.30) – Buy (1)				F. Drake Johnstone (804) 780-2091		
<i>First Quarter Earnings. Lowering Target Price.</i>				djohnstone@davenportllc.com		
Target:	\$50	EPS (FY: Dec)	OCF/Shr	*EV/OCF	LT Debt /Total Cap:	30.3%
Risk Category:	Business Risk	2000A: \$0.59	\$4.50	17.8x	Book Value:	\$24.55
Market Cap:	\$62.5 billion	2001E: \$0.65	\$5.20	15.4x	Price/ Book:	1.5x
52-Week Range:	\$59.87 - \$30	2002E: \$0.80	\$7.20	11.1x	Dividend / Yield:	N/A
*EV/OCF= enterprise value (equity value plus debt minus cash)/operating cash flow.						

- Qwest reported first quarter earnings of \$0.13- in-line with consensus estimates. The company's revenue growth accelerated from 10% year-over-year in the fourth quarter of 2000 to 12% in the first quarter, also in-line with consensus expectations. Qwest's commercial services revenue improved from 19% in the fourth quarter of 2000 to 26% in the first quarter 2001 and Internet and data services revenue (45% of commercial services revenue and 25% of company revenue) increased from 40% in the fourth quarter to 44% in the first quarter. The company added 51,000 DSL customers in the first quarter to 306,000, representing a 125% year-over-year increase. Qwest appears on track to double its number of DSL subscribers from 250,000 to 500,000 this year. While the company posted strong wireless subscriber growth (51.3%) and revenue (45%) in the first quarter, we doubt the company will achieve its objective of doubling its wireless subscribers from 800,000 to 1.6 million by year-end.
- Qwest maintained its 2001 guidance for \$21.3-\$21.7 billion revenue and \$8.5-\$8.7 billion operating cash flow. Qwest should be able to sustain 40%+ growth in Internet and data revenue over the next five years, with this segment increasing from 25% of revenue in the first quarter 2001 to 44% in 2005. We believe Qwest's revenue growth could improve from 13-15% in 2001 to 15%+ in 2002 as the company benefits from entry into the long distance market in a number of states in the former U.S. West region. SBC and Verizon have been quite successful competing for residential long distance customers in Texas and New York, respectively, gaining 20% share within a year. However, these carriers did not target the business market. Qwest will target both the business and consumer markets once it enters a new long distance market and therefore should obtain a greater boost to its revenue. The company should be able to obtain regulatory approval to enter at least one long distance market by mid-year and several more by year-end. Strong growth in Internet, data and wireless and long distance revenue (beginning in 2002) should enable the company to achieve its five-year target of 15-17% revenue growth and 18-20% operating cash flow growth.

Additional companies mentioned in this report include: SBC Communications (SBC-NYSE-\$39.7), Verizon (VZ-NYSE-\$52.81)

Additional Information is Available Upon Request

This information has been compiled from various sources and may not be complete. It is not guaranteed and is not a representation by us. Any opinion expressed herein is based upon our interpretation of the information from such sources. This information is not furnished in connection with any offer to sell securities or in connection with the solicitation of an offer to buy securities. Our firm, or its officers or members of the firm, may at times have a long or short position in the securities mentioned herein and may make purchases or sales of these securities while this memorandum is in circulation.



APP-4935

EMC0025902

EXHIBIT R

**APPELLANT'S SUPPLEMENTAL AUTHORITY
PURSUANT TO FRAP 28(j) FILED WITH THE 10TH CIRCUIT COURT OF
APPEALS ON DECEMBER 11, 2007**

[Intentionally omitted]

EXHIBIT S

**APPELLANT'S SUPPLEMENTAL REPLY BRIEF FILED WITH THE 10TH
CIRCUIT COURT OF APPEALS ON SEPTEMBER 15, 2008**

[Intentionally omitted]

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

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

PROPOSED ORDER

Upon consideration of the Emergency Motion By Joseph P. Nacchio For Continued Release Pending Supreme Court Resolution Of A Petition For Certiorari, the Court hereby finds that:

1. Defendant Joseph P. Nacchio is not likely to flee.
2. Nacchio does not pose a danger to the safety of another person or the community.
3. Nacchio's Petition for Certiorari is not for the purpose of delay.
4. Nacchio's Petition for Certiorari will raise a substantial question of law or fact as required for bail under 18 U.S.C. §3143(b).

THEREFORE, it is hereby ORDERED that the Emergency Motion By Joseph P. Nacchio For Continued Release Pending Supreme Court Resolution Of A Petition For Certiorari is GRANTED.

Dated: March ____, 2009

BY THE COURT

Marcia S. Krieger
United States District Judge

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-MSK-01

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

**ORDER DENYING DEFENDANT'S EMERGENCY MOTION FOR CONTINUED
RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR
CERTIORARI, AS PREMATURE**

THIS MATTER comes before the Court on Defendant's Emergency Motion for Continued Release Pending Supreme Court Resolution of a Petition for Certiorari (#538) filed March 11, 2009. In it, the Defendant asks for 1) determination of the Motion by the Court by March 16, 2009; and 2) bail pending the filing and determination of an anticipated Petition to the United States Supreme Court requesting a Writ of Certiorari.

Upon review of the Motion, the Court finds that:

- 1) Defendant seeks relief solely under the Bail Reform Act of 1984, 18 U.S.C. § 3143(b) "pending Supreme Court action on a petition for certiorari;"
- 2) Defendant offers no other authority for the relief requested;
- 3) By its express terms, 18 U.S.C. § 3143(b) allows consideration of a bail request only after the petition of certiorari has been filed.

the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who **has filed** an appeal or

a **petition for a writ of certiorari**, be detained, unless the judicial officer finds [specific grounds]; and

4) According to the Motion, no petition has yet been filed. Therefore, the Motion must be denied as premature.

IT IS THEREFORE ORDERED that:

- 1) The request for expedited determination by March 16, 2009 is **GRANTED**.
- 2) The request for bail pursuant to 18 U.S.C. § 3143(b) is **DENIED**, without prejudice.

DATED at Denver, Colorado, this 11th day of March, 2009.

BY THE COURT:



Marcia S. Krieger
United States District Judge

EXHIBIT E

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

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**EMERGENCY MOTION FOR RECONSIDERATION OF EMERGENCY MOTION BY
JOSEPH P. NACCHIO FOR CONTINUED RELEASE PENDING SUPREME COURT
RESOLUTION OF A PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, TO
STAY THIS COURT'S ORDER OF SURRENDER PENDING RESOLUTION OF A
MOTION FOR CONTINUED RELEASE**

On March 11, 2009, this Court issued an order denying as premature Joseph P. Nacchio's Emergency Motion for Continued Release Pending Supreme Court Resolution of a Petition for Certiorari. Order, *United States v. Nacchio*, No. 1:05-cr-545-1 (Doc. No. 540 Mar. 12, 2009). The Court held that "[b]y its express terms, 18 U.S.C. §3143(b) allows consideration of a bail request only after the petition for certiorari has been filed.... According to the Motion, no petition has yet been filed. Therefore the Motion must be denied as premature." *Id.*

Nacchio respectfully moves the Court to reconsider. The Supreme Court and courts of appeal have consistently acted and ruled on the merits of applications for release pending action on a petition for certiorari under the Bail Reform Act, 18 U.S.C. §3143(b), prior to the filing of a petition for certiorari. The leading treatise on Supreme Court practice indicates that §3143(b)

permits courts to act prior to the filing of the petition for certiorari. And the statute does not clearly require that defendants must invariably be detained while a petition for certiorari is prepared.

Alternatively, we request that this Court briefly stay its Order to Surrender in Lieu of Transportation by the United States Marshal pending this Court's consideration of Nacchio's application for release (and up to 14 days for any necessary appellate review) following the timely filing of a petition for certiorari. Nacchio has already pledged to file his petition on an expeditious schedule, and simply seeks an orderly procedure for the resolution of the bail issue.

We also respectfully request that this Court resolve this motion on an expeditious basis so that meaningful appellate review will be possible if the requested relief is denied.

1. The Supreme Court has consistently acted and ruled on the merits of applications for release pending action on a petition for certiorari under the Bail Reform Act, 18 U.S.C. §3143(b), prior to the filing of a petition for certiorari. In *Morison v. United States*, Chief Justice Rehnquist noted that the defendant had filed his bail application requesting "to remain free on bond pending the consideration of his yet-to-be-filed petition for writ of certiorari." 486 U.S. 1306, 1306 (1988). Chief Justice Rehnquist denied the application on the ground that the defendant had not raised a substantial question with respect to all of the counts of conviction. *Id.* The Chief Justice did not in any way suggest that the application was premature or that the lack of an already-filed petition for certiorari prohibited him from considering the merits of the application.

More recently, Justice Stevens denied a bail application filed on behalf of former Illinois Governor George Ryan. Ryan sought from Justice Stevens "an order granting ... continued

release from confinement pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), pending the filing of, and final action on, a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit” on October 31, 2007. (Exhibit A (*Warner v. United States*, No. 07A373).) In its response, the Solicitor General *did not* contend that Ryan’s bail application was premature. (Exhibit B (Solicitor General’s Opposition).) And Justice Stevens ruled on the application on November 6, 2007—nearly three months before Ryan filed his petition for writ of certiorari on January 23, 2008. *Warner v. United States*, No. 07-977.

Courts of appeal have also ruled on bail applications filed under §3143(b) before a petition for writ of certiorari had been filed. *See, e.g., United States v. Krilich*, 178 F.3d 859, 860 (7th Cir. 1999) (denying bail for a defendant who “plans to file a petition for certiorari” because his case did not present a substantial question of law likely to result in reversal or a reduced sentence).

Moreover, the leading treatise on Supreme Court practice states that “[i]n many cases pending or *about to be filed in the Supreme Court*, the petitioner or appellant must consider applying to the Court or to an individual Justice thereof for ... release on bail.” Eugene Gressman et al., *Supreme Court Practice* 846 (9th ed. 2007) (emphasis added). The treatise advises applicants that “[i]n a real sense, the application constitutes a ‘dry run’ of the *prospective* petition for certiorari,” and that “[i]f time permits, the applicant should prepare *a complete draft of the petition for certiorari* and attach it to the release application. Otherwise, the substance of the petition should be incorporated in the body of the release application.” *Id.* at 890 (emphasis added).

We acknowledge the textual appeal of this Court’s interpretation of §3143(b), but

respectfully submit that other courts (including the Supreme Court) have not read it that way, and that the statutory text is at least ambiguous. The statute expressly permits continuing release for a defendant that has “filed an appeal or a petition for a writ of certiorari,” and Nacchio has clearly “filed an appeal.” That appeal remains pending at the Tenth Circuit, and the mandate has not issued. This Court’s interpretation would suggest that courts have authority to grant release during the appeal, and authority to grant release during the Supreme Court’s consideration of a certiorari petition, but no authority to grant release during the unavoidable (and relatively brief) interim period while a petition for certiorari is being prepared. It is highly unlikely that Congress would have intended such an anomalous result, and the statutory text does not clearly require it.

Accordingly, Nacchio respectfully requests that this Court reconsider its March 11, 2009 order and address Nacchio’s motion for bail on the merits.

2. In the alternative, Nacchio requests that this Court conditionally stay its March 4, 2009 Order to Surrender in Lieu of Transportation by the United States Marshall pending this Court’s consideration of the application for bail and up to 14 days after this Court’s decision to permit appellate consideration by the Tenth Circuit and Supreme Court if necessary, on the condition that Nacchio file his petition for certiorari by the end of next week, Friday, March 20, 2009, and file a renewed bail application with this Court that same day. March 20 is approximately three weeks after the *en banc* court’s decision rather than the three months permitted by Supreme Court Rule 13, and is three days before the March 23 surrender deadline ordered by this Court. This Court will be familiar with the merits of the application and could rule on it expeditiously. Such a stay could also be conditioned on Nacchio seeking appellate review of any denial of the bail application within 48 hours, and Supreme Court review within

48 hours of any denial by the Tenth Circuit. We would inform the Tenth Circuit and the Supreme Court of the pending stay and its terms, and there is every reason to believe that they too would act expeditiously on Nacchio's application.

This and other courts often stay orders of surrender for many reasons, *including* the need for sufficient time to review an application for bail. *See, e.g., United States v. Ford*, No. 05-cr-00537-REB (D. Colo. Doc. No. 224 May 1, 2007) (order granting defendant's motion to stay the order to surrender to allow the court sufficient time to review the bail application); *United States v. Weisberg*, No. 07 CR66Sc, 2008 WL 5114218, at *5 (W.D.N.Y. Nov. 25, 2008) (noting that court had extended surrender date to consider motion for bail pending appeal); *United States v. Webb*, No. 08-10142-WEB, 2009 WL 392671, at *2 (D. Kan. Feb. 17, 2009) (granting in part defendant's request for a stay of his surrender date).

The power to stay is "incidental to the power inherent in every court" and "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see also United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1989) (en banc) (district courts have ""inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases") (citation omitted). A party seeking a stay "must make out a clear case of hardship or inequity ... if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis*, 299 U.S. at 255. And in all events a court deciding whether to issue a stay "must weigh competing

interests and maintain an even balance.” *Id.* at 254-55. The exercise of such discretion is not inconsistent with §3143(b), which governs continuing release pending appeal or certiorari—not whether a defendant must be compelled to surrender during consideration of a §3143(b) application.

Here, a stay pursuant to this Court’s inherent authority is appropriate. The government will suffer no prejudice if the Court grants Nacchio’s request and conditionally stays its surrender order for the time necessary to act on a bail application and up to 14 days for any necessary appellate review. Nacchio is not a flight risk or a danger to anyone, and simply desires some orderly process for the adjudication of the continuing release issue that avoids the risk that Nacchio could surrender to the custody of the Bureau of Prisons and then be granted bail a few days later. It does not serve the interests of either the defendant or the government to run that risk if a more orderly procedure can be devised. If this Court believes that some other procedure would be appropriate, we will proceed in whatever fashion it dictates. We also note that this Court has before it a motion to extend the surrender date on other grounds that, if granted, would render the relief requested here even more modest.

Respectfully submitted this 12th day of March, 2009.

s/ Maureen E. Mahoney
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2009, I electronically filed the foregoing **EMERGENCY MOTION FOR RECONSIDERATION OF EMERGENCY MOTION BY JOSEPH P. NACCHIO FOR CONTINUED RELEASE PENDING SUPREME COURT RESOLUTION OF A PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, TO STAY THIS COURT'S ORDER OF SURRENDER PENDING RESOLUTION OF A MOTION FOR CONTINUED RELEASE** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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EXHIBIT A

No.

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE E. WARNER and GEORGE H. RYAN, SP

v.

UNITED STATES OF AMERICA, *Respondent*

On Application From The United States Court Of
For The Seventh Circuit, Nos. 06-3517 & 06-3
There On Appeal From The United States District
For The Northern District Of Illinois, Eastern Division, No

2007 OCT 31 P 3:17
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U.S. SUPREME COURT

EMERGENCY APPLICATION FOR CONTIN
BAIL ON APPEAL PENDING CERTIORARI

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**Counsel of Record
for Lawrence E. Warner*

**Counsel of Record
for George H. Ryan, Sr.*

Dated: October 31, 2007

[Additional Counsel Listed On Signature Page]

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit;

The Applicants Lawrence E. Warner and George H. Ryan, Sr., hereby apply for an order granting them continued release from confinement pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3143(b), pending the filing of, and final action on, a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Absent relief from this Court, Warner and Ryan will be required to surrender to the custody of the Bureau of Prisons on November 7, 2007.

INTRODUCTION

George Ryan — the former governor of Illinois — and his longtime friend, Lawrence E. Warner, were convicted of “honest services” mail fraud and other federal crimes following a six-month, public corruption trial that Judge Richard A. Posner has characterized in dissent as “a travesty.” 10/25/07 7th Cir. Order at 6 (denying rehearing en banc) (en banc) (Posner, J., dissenting, joined by Kanne and Williams, JJ.) (attached as Ex. B). Indeed, in that deeply flawed trial — for the first time in the history of American jurisprudence — a federal district court reconfigured a jury’s composition after eight days of tumultuous deliberations and extensive jury misconduct; and substituted two alternates after interrogating deliberating jurors about their *own* false statements in the presence of federal prosecutors (who themselves had thought it necessary to immunize the jurors) — all at a time when the jurors’ likely division on the evidence was manifest.

EXHIBIT B

IN THE SUPREME COURT OF THE UNITED STATES

No. 07A373

LAWRENCE E. WARNER and GEORGE H. RYAN, SR., APPLICANTS

v.

UNITED STATES OF AMERICA

ON EMERGENCY APPLICATION FOR BAIL PENDING CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the emergency application for bail pending certiorari.

STATEMENT

1. In November 1990, George Ryan won election as Illinois' Secretary of State. He was re-elected to that post in 1994. Throughout Ryan's two terms in that office, Lawrence Warner was one of Ryan's closest friends and unpaid advisors.

One of Ryan's duties as Secretary of State was to award leases and contracts for the office. Ryan engaged in improprieties in steering four leases and three contracts to his friends and associates, including Warner. The evidence showed, among other

things, that Ryan steered an \$850,000 four-year office lease to Warner for a property that Warner had recently purchased for just \$200,000. Ryan took regular Jamaican vacations paid for by a currency-exchange owner to whom Ryan later steered a \$600,000 five-year office lease. Ryan took a Mexican vacation paid for by an individual to whom Ryan later steered another office lease and a lobbying contract worth nearly \$200,000 for virtually no work. Warner received more than \$800,000 for helping a company land a major office contract without registering as a lobbyist, and he included another of Ryan's friends in that arrangement at Ryan's request before the contract was awarded. The end result was hundreds of thousands of dollars in benefits for Warner and Ryan, including financial support for Ryan's successful 1998 campaign for governor of Illinois. 498 F.3d at 675; Gov't C.A. Br. 3-17.

2. In December 2003, a federal grand jury in the Northern District of Illinois indicted Ryan and Warner for racketeering conspiracy and mail fraud. Ryan was also charged with making false statements to the Federal Bureau of Investigation (FBI), obstructing and impeding the Internal Revenue Service (IRS), and filing false tax returns; Warner was charged with attempted extortion, money laundering, and structuring a financial transaction.

3. Prospective jurors filled out a 110-question, 33-page form, which covered, among many other topics, their criminal and

litigation histories, their knowledge of the investigation of Ryan, and their awareness of Ryan's positions on public issues. Counsel for all parties and the district court reviewed the questionnaires for four days; voir dire consumed another six days. The district court seated 12 jurors and eight alternates. The trial lasted six months, and the prosecution presented approximately 80 witnesses against applicants. 498 F.3d at 675.

The jury retired on March 13, 2006, and deliberated for eight days. On March 20, 2006, Juror Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and shouting profanities. The court conferred with counsel and responded with a note instructing the jurors to treat one another "with dignity and respect." Two days later, the court received a note from Juror Losacco, signed by seven other jurors, asking if Juror Ezell could be excused because she was refusing to engage in meaningful discourse and was behaving in a physically aggressive manner. The court again conferred with counsel, noting that "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not." The next morning the court responded with a note, which began, "You twelve are the jurors selected to decide this case." The note then reiterated that the jurors were to treat each other with respect and reminded them of their duties. 498 F.3d at 675-676.

On the eighth day of deliberations, the Chicago Tribune reported that one of the jurors had given untruthful answers on the initial juror questionnaire regarding his criminal history. The court stopped the jury's deliberations while it looked into the new allegations. After a background check confirmed that Juror Pavlick had not disclosed a felony DUI conviction and a misdemeanor reckless conduct conviction, the court questioned him individually. The court asked counsel if there would be any objection to dismissing Pavlick. Ryan's counsel voiced no objection when Warner's counsel moved to dismiss Pavlick or when the court granted that motion. 498 F.3d at 676.

Background checks were run on all of the jurors and alternates. Those checks revealed that Juror Ezell had seven criminal arrests, an outstanding warrant for driving with a suspended license, and an arrest under a false name. The government told the court that it would have moved to excuse Ezell for cause had it known during voir dire that she had given law enforcement officers false booking information, as this case also involved charges of providing false information to law enforcement officers. The court questioned Ezell, who acknowledged her untruthfulness. Even then, however, she was not forthcoming about her use of the false name. The court concluded that Ezell was not being truthful. Warner's counsel agreed that Ezell should be excused, while Ryan's counsel took no position initially. When the

government moved to dismiss Ezell, Ryan's counsel objected to the standard employed but not to the decision to remove Ezell based on her untruthfulness. See 498 F.3d at 676.

The court also questioned a number of other jurors about litigation matters. Gomilla and Talbot had filed for bankruptcy in the mid-1990s, but neither included that information in response to a question about whether they had ever appeared in court or been involved in a lawsuit. That question appeared in a section entitled "Criminal Justice Experience." Several other jurors failed to disclose criminal history: Juror Svymbersky, an alternate, who stole a bicycle at age 18 or 19 in 1983 and thought that the charges had been expunged; Juror Rein, who was arrested for assault for slapping his sister in 1980, but had never appeared in court; Juror Casino, who had three arrests that he had not remembered when filling out the questionnaire, because they occurred about 40 years earlier, when he was in his early 20s; and Juror Masri, an alternate, who reported a 2000 DUI conviction but had said nothing about a 2004 DUI conviction or about being on probation at the time of the voir dire. See 498 F.3d at 676.

The defense argued that Svymbersky, Rein, Casino, and Masri should be dismissed for dishonesty, while the government took the position that all four were fit to serve. The district court re-interviewed Casino and Svymbersky, who both again stated that they had not recalled the incidents when filling out their

questionnaires. The district court credited the testimony of Svymbersky, Rein, and Casino, concluding that they did not lie to the court. The district court did not credit Masri's testimony and excused him; no one objected. 498 F.3d at 677.

In light of the dismissals, it became necessary to seat alternates Svymbersky and DiMartino on the jury in place of Ezell and Pavlick. As authorized by Federal Rule of Criminal Procedure 24(c)(3), the district court decided that the reconstituted jury would need to restart deliberations. It questioned each of the remaining original jurors to ensure that they understood their obligation to disregard whatever had gone on before and to begin deliberations anew, and that they felt capable of doing so. They all answered yes. The court then re-read its instructions to the reconstituted jury, adding a new one that instructed the jurors not to consider the court's questioning as part of their deliberations. The new jury began deliberating on March 29, 2006. After ten days, it returned guilty verdicts on all counts. 498 F.3d at 677; C.A. App. 590.

After the verdict, dismissed juror Ezell publicly criticized the jury and the verdict. On April 25, 2006, defense counsel asked the court to conduct a formal inquiry into her comments. On April 26, the court held a hearing and determined that "the allegations that Ms. Ezell appears to be making [do not] constitute the kind of misconduct [that would require an inquiry]." At some point later

that day or the next day, defense counsel learned through new media reports that Ezell had alleged that Juror Peterson had brought into the jury room "case and law" about removing a juror for failing to deliberate. Defense counsel filed a new motion for an inquiry, which the court granted. On May 5, 2006, the court opened its inquiry into Ezell's allegations, interviewing both Ezell and Peterson. Ezell told the court that she had previously forgotten about "the case law." Peterson acknowledged bringing into the jury room an article published by the American Judicature Society (AJS) about the substitution of jurors and a handwritten note recording her own thoughts about the duty to deliberate. She had read a portion of the article and the handwritten note to the rest of the jurors. The court concluded that those two excerpts "did not prejudice the outcome," and the court ultimately denied applicants' motion for a new trial on that (and several other) grounds. 498 F.3d at 677; Gov't C.A. Br. 20-37, 53-56.

4. Following their convictions, applicants moved in the court of appeals for release pending appeal. The court granted the motion and stated that "[i]f the judgment is affirmed, the grant of bail pending appeal will end automatically, without waiting for this court to issue its mandate." Application Addendum Ex. D.

5. The court of appeals affirmed applicants' convictions. 498 F.3d at 674-699.

a. The court of appeals held, among other things, that: Peterson's introduction into the jury room of the AJS article was improper but did not prejudice applicants, and thus was harmless error; the district court did not abuse its discretion when it ordered substitutions of Ezell and Pavlick after eight days of deliberations; the State of Illinois could serve as a RICO enterprise; and the honest-services statute, 18 U.S.C. 1346, is not void for vagueness as applied to applicants. 498 F.3d at 678-691, 693-696, 597-699.

The court of appeals noted that applicants did not argue on appeal that the problems with the jury had a cumulative, prejudicial effect, 498 F.3d at 674, or that any juror issues constituted structural error, id. at 704. Nor, the court explained, did applicants claim that the evidence was insufficient to support any of the charges on which they were convicted. Id. at 674. In the end, the majority observed that "the district court handled most problems that arose in an acceptable manner, and that whatever error remained was harmless" in light of the "overwhelming" evidence against applicants. Id. at 674, 675.

b. Judge Kanne dissented. 498 F.3d at 705-715. He relied on two arguments that applicants had not raised on appeal: that jurors' conflicts of interest created structural error, and that the cumulative effect of multiple errors regarding jury management and jury deliberation resulted in an unfair trial. Judge Kanne

opined that "there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation" and that "the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand." Id. at 706.

6. On August 22, 2007, the court of appeals granted applicants' motion to continue bail pending appeal, but only until the court issued its mandate. Application Addendum Ex. E.

7. On October 25, 2007, the court of appeals denied applicants' petition for rehearing en banc. Judges Posner, Kanne, and Williams dissented. Although they agreed that the "evidence of the defendants' guilt was overwhelming," they stated that the trial did not meet minimum standards of procedural justice. Application Addendum Ex. B at 5.

8. On October 31, 2007, the court of appeals denied applicants' motion to stay the mandate and continue bail pending certiorari. Judge Wood wrote:

Appellants here have shown neither a reasonable probability that the [Supreme] Court will grant certiorari nor a reasonable possibility that this court's decision will be reversed. Most of the arguments presented in the dissent to the panel's opinion were not preserved in the district court, and none of the arguments in the dissent to the order denying rehearing en banc has ever been advanced by the appellants. Before it could reach these questions, the Supreme Court would have to disregard a series of forfeitures. It is unlikely that the Court would do so, especially given the strength of the government's case.

The voluminous record here demonstrates that the appellants were guilty of the crimes with which they were charged. Although they would undoubtedly like to postpone the day of reckoning as long as they can, they have come to the end of the line as far as this court is concerned.

Application Addendum Ex. H. Judge Kanne dissented. Ibid.

9. Applicants have been ordered to self-surrender to the Bureau of Prisons on November 7, 2007, before 5:00 p.m. Application Addendum Ex. F, G.

ARGUMENT

THE EMERGENCY APPLICATION FOR BAIL PENDING CERTIORARI SHOULD BE DENIED

The Bail Reform Act of 1984, as amended, 18 U.S.C. 3141 et seq., applies to requests for bail pending certiorari. See Robert L. Stern, et al., Supreme Court Practice § 17.5, at 762-763 (8th Ed. 2002). It provides:

Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds --

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released * * *; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in --

- (i) reversal,
- (ii) an order for a new trial,
- (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. 3143(b) (1) .

Thus, applicants must show that a "substantial question" is "likely" to result either in the overturning of their convictions or in reduced sentences of imprisonment that are shorter than the time that would expire between their imprisonment starting November 7, 2007, and the conclusion of this Court's proceedings. See 18 U.S.C. 3143(b) (1) (B). Because this Court's certiorari jurisdiction is discretionary, that means that applicants must show that it is "likely" (*ibid.*) that this Court would both grant a writ of certiorari and reverse.

Thus, as Justices of this Court have explained, albeit in cases predating the enactment of the Bail Reform Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers) (citing Graves v. Barnes, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)). Cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (when the court of appeals has denied a stay, the applicant's burden "is particularly heavy"); Planned Parenthood of Southeastern Pennsylvania v. Casey, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) ("The burden is on the applicant to 'rebut the presumption that the decision below -- both on the merits and on the proper interim disposition -- is

correct.'") (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). "At a minimum, a bail applicant must demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari." Julian, 463 U.S. at 1309 (citing Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers)).

Applicants fall well short of demonstrating the "extraordinary circumstances" required for bail pending certiorari. As Judge Wood determined in denying bail pending certiorari, there is no reasonable probability that this Court will grant certiorari on any of the issues raised in the application, let alone reverse the judgment below. Application Addendum Ex. H; see Gov't C.A. Answer to Pet. for Reh'g or Reh'g En Banc (attached). While applicants focus on alleged juror errors, they forfeited or waived most of the juror issues advanced in their application. To the extent that some of those arguments were preserved, they are refuted by the district court's findings of fact, which were affirmed by the court of appeals. As the court of appeals explained, "the district court took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, concluded that this one was." 498 F.3d at 704. Those fact-bound rulings -- made in the context of this highly unusual fact pattern that is not likely to recur -- are correct and would not warrant

this Court's review even if applicants had properly preserved their challenges.

Applicants' other challenges relate only to their RICO and honest-services convictions, and are not relevant to this application. Applicants would remain subject to significant prison sentences even if their convictions on those particular counts were overturned. And their convictions on those counts, which do not implicate circuit splits, would not warrant this Court's review in any event.

1. Applicants argue (Application 13-18) that the court of appeals erroneously considered the effect of each alleged jury error in isolation rather than considering their cumulative effect. The court of appeals did not reach that contention because, in that court, the applicants did "not argue that the problems with the jury had a cumulative, prejudicial effect, even though they made this argument in their motion for a new trial before the district court." 498 F.3d at 674. Because applicants abandoned their cumulative-error challenge in the court of appeals, and that court did not address the challenge, it is not properly before this Court. See United States v. Williams, 504 U.S. 36, 41 (1992). Applicants make no effort to explain why this Court should grant certiorari to consider a forfeited argument; indeed, their application does not even acknowledge the forfeiture.

Applicants' contention (Application 15-17) that the court of appeals' decision is in conflict with decisions of this Court and other courts of appeals simply ignores the fact that the court of appeals did not consider the cumulative error question because applicants had abandoned it. Cf. United States v. Jawara, 474 F.3d 565, 581 n.10 (9th Cir. 2007) (declining to conduct cumulative error analysis where the defense did not raise such a claim on appeal).

Moreover, the district court and the court of appeals both determined that only one jury error occurred (the jury's consideration of the AJS material concerning the duty to deliberate). See 498 F.3d at 696-697. Because the cumulative error doctrine looks to the cumulative effect of multiple errors, it is inapplicable here. "If there are no errors or a single error, there can be no cumulative error." United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001).¹

¹ The original jury was exposed to a paragraph from an AJS article regarding substitution of a juror who is unwilling or unable to deliberate. The court of appeals correctly determined that the district court had not abused its discretion in concluding that the jury's exposure to that material did not warrant a new trial. 498 F.3d at 681. The AJS material did not relate to applicants' guilt, and it was consistent with the court's instructions. Juror Peterson's testimony, which the district court credited, was that Juror Ezell did not change her approach to the deliberative process after the AJS material was read. C.A. App. 645. Ezell herself had forgotten about the article until days after the verdicts were returned. Id. at 625. In any event, Ezell was removed from the jury for unrelated reasons (at a time when her views were unknown to the litigants and the court), and the reconstituted jury was instructed to begin deliberations anew. See

In an attempt to establish a predicate for a cumulative-error claim, applicants rely (Application 14) on allegations of error that are both unsupported by the record and contrary to the district court's factual findings and credibility determinations (which were affirmed by the court of appeals). For example, applicants claim (Application 12) that there was an "astonishing effort" by the jurors to force out a "defense juror," when the district court found that there was no evidence to support such a claim. See C.A. App. 83-84, 646. Applicants also claim as error (Application 12) the removal of Ezell, a "defense juror," when they did not argue she was a defense juror at the time of her removal and the district court emphatically found that Ezell's views were unknown to the parties and to the district court at that time. See C.A. App. 84; 498 F.3d at 687 ("We cannot find any basis in the record to conclude that the district court dismissed Ezell because of her view of the evidence."). Finally, applicants allege (Application 12) "a raft of other juror misconduct," while ignoring the district court's specific findings that no such misconduct occurred. See, e.g., C.A. App. 87, 92 (no exposure to media coverage). This Court does not review the concurrent factual findings of two courts below "in the absence of a very obvious and exceptional showing of error," Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996), which is not the case here. In any

event, applicants abandoned their cumulative-error claim in the court of appeals.

2. Applicants argue (Application 18-22) that the district court's questioning of jurors about statements they made during voir dire constituted structural error requiring automatic reversal.

a. As with their cumulative error claim, applicants did not properly preserve that claim in the lower courts. Indeed, applicants themselves insisted on much of the questioning. As the court of appeals explained, "many of the investigations were done at the request of the defense." 498 F.3d at 703. For example, jurors Gomilla and Talbot were questioned about bankruptcy filings they made 10 and 11 years earlier, which the defense had discovered by combing court records over the weekend. Applicants insisted on those inquiries, over the government's objection, even though the only voir dire question that arguably called for such information appeared under the heading "Criminal Justice Experience." See C.A. App. 481, 487, 493. Applicants ultimately declined to move to dismiss Gomilla or Talbot. Id. at 518. As the court of appeals explained, applicants "cannot embed a ground of automatic reversal into a case" by insisting on questioning jurors and then arguing that the questioning they demanded requires automatic reversal. 498 F.3d at 703. Applicants do not attempt to refute that point; instead, they simply ignore it.

b. In any event, there was no error, much less structural error, in the questioning. As the court of appeals recognized (498 F.3d at 704), this Court's decision in Remmer v. United States, 347 U.S. 227 (1954), disposes of applicants' structural error argument by holding that even interrogation of a deliberating juror by law-enforcement officers about an extraneous contact is subject to harmless error analysis (as opposed to automatic reversal). Id. at 228 (remanding for determination whether extraneous influence was harmless). By requiring an inquiry into prejudice, Remmer makes clear that questioning of a juror does not per se prevent his continued service as a juror.

Applicants (Application 18) cite Remmer v. United States, 350 U.S. 377 (1956) (Remmer II), for the proposition that this Court ordered a new trial in that case "over the district court's finding of no prejudice." But the Court reversed in Remmer II not on the ground that prejudice was irrelevant, but on the ground that the district court had undertaken an "unduly restrictive" inquiry into whether prejudice had resulted in that case. Id. at 382. This Court then held that "on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident," the defendant had established prejudice and was entitled to a new trial. Ibid. Contrary to applicants' argument, therefore, neither Remmer I nor Remmer II treated law-enforcement

questioning of jurors as structural error; instead, they rested on whether the defendant had been prejudiced.

The proceedings in the district court here demonstrate that courts can evaluate, on a case-by-case basis, the prejudicial effect of questioning of jurors. As the court of appeals explained, the district court "took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, concluded that this one was." 498 F.3d at 704. The court of appeals correctly deferred to the district court's first-hand assessment of the jury: "the jurors who deliberated to verdict in this case were diligent and impartial * * * * They sat attentively through nearly six months of evidence * * * * The court believes these jurors made every effort to be fair, even amid extraordinary public scrutiny." *Id.* at 683 (quoting district court's findings). Those findings are fully supported by the record, while applicants' complaints are not. *Id.* at 688.

When questioning jurors, the district court took pains to ensure that the questioning would not affect a juror's ability to be fair and impartial. See, *e.g.*, C.A. App. 524, 578 (assuring Svymbersky that questioning was "generated by media, not by anybody in here," and receiving Svymbersky's assurance that the questioning would have "no bearing over [his] judgment in this trial"); *id.* at 548 (receiving assurance from Rein that questions did not make him

feel that he had to please the court or to “please one side or please the other in connection with your deliberations”); id. at 551, 575 (receiving assurance that Casino could be fair). The district court also explained to the reconstituted jury that the questioning and the dismissal of two jurors was “not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. * * * * [N]one of my questions should be considered in any way as you deliberate.” Id. at 590.

Moreover, the conduct of the reconstituted jury demonstrates that it was not intimidated or pressured into returning a guilty verdict. After being painstakingly reinstructed, the reconstituted jury began deliberations that lasted for ten days. See 498 F.3d at 677. During the second round of deliberations, the jury asked for additional instructions that the original jury had not sought. Id. at 690. Those are not the actions of a jury that has been pressured or intimidated into returning a verdict for the prosecution. Instead, they show that the jury was diligently and impartially fulfilling its duty.

While applicants (Application 19) rely on press reports that jurors faced perjury investigations, they ignore the district court’s finding that “there is no indication in the record that any jurors saw more than headlines in connection with this matter.”

C.A. App. 87. Nowhere in the transcript is there an indication that the jurors were reading press reports about possible investigations of the jurors themselves. Instead, the record reflects that the jurors were not aware of the press reports and had only tangential exposure to them. See *id.* at 525, 546, 551-552.

While applicants state (Application 1) that the prosecutors "thought it necessary to immunize the jurors," no discussion of immunity took place in front of jurors. In the course of in camera discussions about the questioning of jurors, the court asked the parties whether the jurors should be given any warnings regarding self-incrimination. Tr. 24,366, 24,385-389, 24,392, 24,402-403, 24,405-410, 24,412-414. The government responded that anything the jurors said would not be used against them. Tr. 24,500-501. Although the court told one juror (Gomilla) that nothing he said would be used against him, that warning was not repeated for other jurors, and the defense raised no objection.

Applicants contend (Application 19) that Juror Losacco was fearful of prosecution because she said that she was "scared." The court of appeals correctly recognized that the record supported the district court's finding that Juror Losacco was uncomfortable because of the presence of a roomful of attorneys, not because she feared being prosecuted. 498 F.3d at 687. Losacco said, immediately preceding her comment about being afraid, that she felt

she was in a job interview. C. A. App. 581. One who is fearful of being prosecuted does not describe the setting as that of a job interview.²

c. There is no circuit conflict on this fact-bound question. Applicants claim (Application 21) that the court of appeals' decision conflicts with the Ninth Circuit's decision in United States v. Rosenthal, 454 F.3d 943, 950 (2006). As the court of appeals explained, however, Rosenthal is factually inapposite. 498 F.3d at 682. During jury deliberations in Rosenthal, one juror asked an attorney friend whether she must follow the instructions or whether she had "any leeway" for independent thought. Rosenthal, 454 F.3d at 1245-1246. The attorney advised that the juror "could get into trouble if [she] tried to do something outside those instructions," and the juror repeated that to another juror. Id. at 1246. Reasoning that "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors," the Ninth Circuit held that there was a reasonable possibility that the extraneous information prejudicially affected the verdict. Ibid. Here, in contrast, the district court found that no juror was intimidated by

² While applicants point out (Application 19) that at least two jurors retained attorneys, they did so after the verdict, when the defense filed motions and made statements in the media alleging juror misconduct and requesting investigations of the jurors.

the questioning, and no juror was told that he could be in trouble because of the verdict. See C.A. App. 88.³

3. Applicants claim (Application 22-25) that the district court's dismissal of two jurors and one alternate, and substitution of alternates for the two dismissed jurors, was unlawful. That contention is incorrect, was partially forfeited, and does not warrant this Court's review.

a. The substitution was authorized by Federal Rule of Criminal Procedure 24(c)(3), which authorizes replacement of a juror by an alternate "after the jury retires to deliberate," and specifies that "[i]f an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." As the court of appeals explained, the district court correctly determined that two jurors and one

³ Applicants argue (Application 21) that the court of appeals' opinion "squarely" conflicts with this Court's decision in United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006), which held that the denial of the right to retained counsel of choice is a structural error. Id. at 2564-2565. Gonzalez-Lopez noted in a footnote that whether error is structural depends on several factors, including the difficulty of assessing the effect of the error. 126 S. Ct. at 2564 n.4. While applicants argue (Application 21) that courts cannot "quantitatively assess or discern actual prejudice" in this context, the courts reasonably determined that there was no prejudice here, as discussed in the text. In any event, there is certainly no conflict on the question whether the alleged error at issue here is structural, because Gonzalez-Lopez involved the right to counsel, not an asserted right to jurors free from inquiries into the accuracy of their voir dire responses. While the denial of an impartial decision maker may be structural error, a court is entitled to consider all of the facts and circumstances before determining whether a juror was impartial.

alternate -- Pavlick, Ezell, and Masri -- should be dismissed because they deliberately withheld information that would have provided grounds for their dismissal for cause. 498 F.3d at 685-687. In connection with one of Ezell's seven undisclosed arrests, she gave false information to law enforcement authorities (C.A. App. 463-464, 506) -- conduct similar to a charge against applicant Ryan. One of Pavlick's undisclosed arrests and convictions was for a felony DUI offense that took place while Ryan was Secretary of State (*id.* at 460), and, unknown to the parties, during jury selection Masri was on probation for an undisclosed 2004 DUI conviction (*id.* at 543). Not only did the trial evidence focus on Ryan's tenure at the Secretary of State's Office, which sets drunk-driving policies, but the defense presented witnesses who testified about Ryan's achievements in strengthening drunk-driving laws. See 498 F.3d at 686-687.⁴

There was nothing wrong with the removal of those jurors. Indeed, applicants did not object to dismissing Ezell, Pavlick, or Masri (other than as to the legal standard employed by the district court), and thereby forfeited that objection as well. See 498 F.2d

⁴ The district court questioned three other jurors (Casino, Svymbersky, and Rein) about their contacts with the criminal justice system 23-44 years earlier, and found that those jurors credibly reported that they had not thought of their long-ago brushes with the law during voir dire. Thus, the court did not dismiss those jurors, who had not deliberately withheld information and had not committed crimes related to the allegations in this case. See C.A. App. 524-525, 528, 545-547, 550-552, 575, 577-578.

at 676-677. In addition, the court of appeals found no basis in the record for concerns that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations," or "that the district court dismissed Ezell because of her view of the evidence or that the prosecution tricked the district court into dismissing Ezell for cause based on its belief about Ezell's view of the evidence." 498 F.3d at 688. Rather, Ezell's views were unknown to the litigants and court at that time, and applicants never argued otherwise when she was dismissed. C.A. App. 411, 534. The jury was instructed that "the circumstances that brought about the fact that these two jurors were excused * * * were not prompted by * * * your previous deliberations." Id. at 590.

Nor is there any other indication that the substitution was improper. Before allowing the commencement of deliberations by the reconstituted jury, the district court ensured that the two new jurors had not discussed the case and had not been exposed to prejudicial media coverage, and that each of the remaining original jurors was capable of deliberating anew and disregarding what had gone before. C.A. App. 523-524, 579-584. Moreover, the reconstituted jury deliberated for ten days, and before returning a verdict, the jury asked for information that was not requested by the original jury. See p. 19, supra. As the district court found, the jurors who deliberated to judgment were "diligent and

impartial” and “made every effort to be fair, even amid extraordinary public scrutiny.” C.A. App. 683.

b. The substitution of two jurors would not warrant this Court’s review in any event. While applicants argue (Application 12) that the court of appeals “astonishingly held” that there is no constitutional limitation on the substitution of jurors, it did no such thing. Instead, the court of appeals rejected applicants’ contention that “almost any decision to substitute [during deliberations is] prejudicial,” and determined that the substitution was appropriate on the facts of this case. 498 F.3d at 688-691.

Nor is there a circuit split on the correct legal standard. While applicants repeatedly contend (Application 1, 12, 22) that the substitution was unprecedented, two other courts of appeals recently reviewed high-profile cases involving juror replacement after days of deliberations. Like the court of appeals here, both of those courts deferred to the trial judges’ findings and upheld the verdicts reached by reconstituted juries. See United States v. Kemp, 500 F.3d 257, 301-306 (3d Cir. 2007); United States v. Ronda, 455 F.3d 1273 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, 127 S. Ct. 1338 (2007).

As the court of appeals recognized, the cases on which applicants rely pre-date an amendment to Rule 24 that specifically provides for substitution of an alternate for a deliberating juror.

498 F.3d at 689. Thus, those cases say nothing about the standard of review following the change in the rule. See ibid.

Nor was there a conflict before the rule change. Applicants claim that United States v. Register, 182 F.3d 820 (11th Cir. 1999), cert. denied, 530 U.S. 1250 (2000), conflicts with United States v. Josefik, 753 F.2d 585 (7th Cir.), cert. denied, 471 U.S. 1055 (1985), but the two cases are in harmony. In Register, the Eleventh Circuit held that the substitution of an alternate for a deliberating juror requires reversal "only where 'there is a reasonable possibility that the district court's violation * * * actually prejudiced [the defendant] by affecting the jury's final verdict.'" 182 F.3d at 842. The Seventh Circuit in Josefik adopted a similar rule: "only prejudicial violations of the rule are reversible errors." 753 F.2d at 587. Thus, there is no conflict.

4. In addition to the juror issues, applicants advance (Application 26-30) two arguments that are specific to some but not all of the counts on which they were convicted: that a State cannot constitute a criminal enterprise under the RICO statute; and that the "honest services" fraud statute, 18 U.S.C. 1346, is void for vagueness.

a. Even if those claims were meritorious, they would not provide a basis for granting bail pending certiorari. Bail is appropriate only if a defendant "raises a substantial question of

law or fact likely to result in," among other things, "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. 3143(b)(1)(B)(iv) (emphasis added). Even if applicants prevailed on their RICO and honest-services convictions, that standard would not be satisfied because applicants would still be subject to significant sentences of imprisonment for their other counts of conviction.

Ryan was convicted of three false statement counts, in violation of 18 U.S.C. 1001 (Counts 11-13), each of which carries a maximum of five years of imprisonment. He was also convicted of obstructing the IRS, in violation of 26 U.S.C. 7212 (Count 18); and filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 19-22). Each of the Title 26 violations carries a maximum of three years of imprisonment. Under the Probation Office's Guidelines calculations, the false statement counts were grouped with the RICO and mail fraud counts (Ryan PSR, lines 595-607), which means that the advisory Guidelines range for the false statement counts standing alone is the same as the advisory Guidelines range of 78-97 months of imprisonment that the district court used in sentencing Ryan to 78 months of imprisonment. The Title 26 convictions were not grouped with the other counts, but the probation officer calculated that the offense level for the four

tax-related offenses was 14, resulting in an advisory Guidelines range of 15-21 months (Ryan PSR, line 790).

Thus, under any possible scenario, Ryan's advisory Guidelines range would call for a period of imprisonment significantly longer the time this Court will need to consider and rule on his certiorari petition. Especially considering that the district court imposed within-Guidelines sentences for both applicants, reversal of the RICO and honest-services counts would not be "likely to result in * * * a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. 3143(b)(1)(B)(iv) (emphasis added).

Similarly, Warner was convicted of extortion, in violation of 18 U.S.C. 1951 (Count 14), which carries a maximum of 20 years of imprisonment. He was also convicted of structuring financial transactions, in violation of 31 U.S.C. 5324 (Count 17), which carries a maximum of 10 years of imprisonment. The Probation Office calculated that the offense level for the extortion count alone was 17, which would have equated to an advisory Guidelines range of 24-30 months. Warner PSR, lines 506-510. The offense level for the structuring count alone was 18, which would have equated to an advisory Guidelines range of 27-33 months.⁵ Thus,

⁵ Arguably, if the RICO and fraud convictions were overturned, the advisory Guidelines range for the structuring count could decrease two levels to 16, due to the absence of underlying

even if the RICO and fraud convictions were reversed, Warner, like Ryan, would likely be imprisoned for a significantly longer period of time than it will take this Court to consider and rule on his certiorari petition.

b. In any event, as applicants note (Application 26), the question whether a State is a RICO enterprise is one of "first impression" at the appellate level. 498 F.3d at 694. Accordingly, there is no circuit conflict requiring resolution by this Court. Moreover, as applicants acknowledge (Application 26), numerous courts have recognized that governmental entities can be RICO enterprises.

c. While applicants argue (Application 28-30) that the lower courts are in disarray on whether the "honest services" fraud statute, 18 U.S.C. 1346, is void for vagueness, they cite no case holding that the statute is unconstitutionally vague. Instead, they rely solely on dissenting opinions. See Application 29.

Nor does this case implicate any conflict concerning the application of the statute. Applicants assert (Application 29) a conflict between United States v. Bloom, 149 F.3d 649 (7th Cir. 1998), and United States v. Panarella, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002). While in Bloom the Seventh Circuit held that honest services mail fraud consists of the misuse

criminal activity. See Sentencing Guidelines § 2S1.3(b)(2). In that event, the advisory Guidelines range for the structuring count would be 21-27 months.

of office for private gain, 149 F.3d at 656-657, in Panarella, the Third Circuit held that an honest services violation can be proven where a public official "conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that the official knows will directly benefit the concealed interest," regardless whether the concealed interest influenced the official's actions, 277 F.3d at 680.

While Panarella arguably takes a more expansive view of honest-services mail fraud violations than does Bloom, any conflict is irrelevant here because the jury instructions gave applicants the benefit of the most restrictive legal standard articulated by any court of appeals. The district court instructed the jury that, in order to be found guilty of honest services fraud, a public official must misuse his position for himself or another. The court then went even farther by requiring a nexus between the action taken and the benefit received: the government was required to prove that "the public official accepted the personal financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." 498 F.3d at 698 (quoting jury instruction). Thus, as the court of appeals concluded, the conduct the district court required the jury to find would unquestionably constitute honest services fraud in any circuit. Id. at 698-699 ("Although the intangible rights theory of federal mail fraud may have its problems when applied to

other fact settings, it is not unconstitutionally vague as applied here.”).

Applicants also claim (Application 30) that this case presents a circuit conflict regarding the need to prove a violation of state law as a prerequisite for an honest-services violation. It is true that the Fifth and Third Circuits require the government to prove a violation of state law as a prerequisite to proving an honest services violation, see United States v. Brumley, 116 F.3d 728, 733-34 (5th Cir.), cert. denied, 522 U.S. 1028 (1997); Panarella, 277 F.3d at 694, while the Seventh Circuit does not, see United States v. Martin, 195 F.3d 961, 967 (1999), cert. denied, 530 U.S. 1263 (2000). But applicants argued below that violations of state law were irrelevant to honest services mail fraud. Applicants’ C.A. Br. 61. Thus, they are not in a position to complain that the jury was not required to find a state-law violation.

To the extent that applicants are complaining that the jury should not have considered state law, the jury instructions address that matter as well. As discussed, the court made clear to the jury that it could not convict applicants based merely on a state-law violation, but instead had to find that Ryan misused his position for himself or another and “accepted the personal financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.” 498 F.3d at 698 (quoting jury instruction); see ibid.

(cautioning that "not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation"). Because the jury instructions in this case were favorable to applicants, there is no likelihood that this Court would grant review and reverse on that issue.⁶

CONCLUSION

The application for bail pending certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

NOVEMBER 2007

⁶ The dissent from denial of rehearing en banc (at 7-15) relied primarily on the length of applicants' trial. Applicants do not challenge the trial's length, and for good reason -- they bear much of the responsibility for it. See, e.g., Tr. 10,404 (defense objection to government's motion to impose time limits on testimony).

EXHIBIT F

**U.S. District Court
District of Colorado (Denver)
CRIMINAL DOCKET FOR CASE #: 1:05-cr-00545-MSK-1**

* * *

03/13/2009	542	ORDER SETTING DATE FOR RESPONSE TO MOTION: THIS MATTER comes before the Court on the 541 Emergency MOTION for Reconsideration re 540 Order on Motion for Release from Custody, filed by Joseph P. Nacchio. The Motion contains no agreement between the parties, therefore, in order to provide adequate opportunity for response and for prompt determination, IT IS HEREBY ORDERED that any response or objection to the Motion shall be filed with the Court no later than <u>5:00 p.m. on Monday, March 16, 2009</u> . Objections and requests for hearing shall clearly specify the grounds upon which they are based, including citation of supporting legal authority, if any. A reply to the response shall be filed with the Court no later than <u>5:00 p.m. on Tuesday, March 17, 2009</u> by Judge Marcia S. Krieger on 3/13/09.TEXT ONLY ENTRY – NO DOCUMENT ATTACHED (msksec,) (Entered: 03/13/2009)
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* * *

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER

Courtroom Deputy: Patricia Glover
Court Reporter: Paul Zuckerman

Date: March 19, 2009

Criminal Action No. 05-cr-00545-MSK

Parties:

Counsel Appearing:

UNITED STATES OF AMERICA,

Kevin Traskos
James Hearty

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Kip Johnson

Defendant.

AMENDED COURTROOM MINUTES

HEARING: Motion for Postponement of Surrender Date (Doc. #536)

10:32 a.m. Court in session.

Defendant is not present.

The Court addresses information regarding recusal.

10:38 a.m. Court in recess

10:52 a.m. Court in session

Counsel have no motion(s) to recuse.

The Court addresses Motion for Postponement of Surrender Date (Doc. #536)

Argument by Messrs. Johnson and Traskos.

ORDER: The Motion for Postponement of the surrender date (**Doc. #536**) is **DENIED**. The Motion for Reconsideration (**Doc. #541**) had two requests 1) to reconsider denial of the motion for bail and 2) to stay the reporting date to allow the Court to consider the bail motion. This motion is **GRANTED** as to the requested stay upon the following condition: That a petition for certiorari is filed tomorrow, March 20, 2009, with the United States Supreme Court and a copy is provided to this Court with a request that the Court consider the arguments that were previously made in the previously filed motion. In that event, the order of surrender (Doc. #528) will be stayed pending further order of this court. Ruling on the remaining issues in the motion are deferred.

EXHIBIT H

No.

**In the
Supreme Court of the United States**

JOSEPH P. NACCHIO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Joseph P. Nacchio, the former CEO of Qwest Communications, was convicted of insider trading for selling Qwest stock while knowing internal Qwest predictions and interim operating results allegedly placing Qwest at risk of missing its year-end 2001 public revenue projections eight to twelve months in the future. The Tenth Circuit panel and *en banc* opinions affirming that conviction conflict with holdings of other circuits and raise several questions meriting review.

1. Whether the defendant is entitled to acquittal or a new trial because the Tenth Circuit, in conflict with the standards applied in other circuits, erred by upholding the jury instructions bearing on the materiality of the type of information at issue, and by holding that there was sufficient evidence that the defendant failed to disclose material information and knew it.

2. Whether the judgment must be reversed and remanded for a new trial because the Tenth Circuit approved the use of impermissible procedures for the exclusion of expert testimony under Rule 702 that conflict with decisions of other circuits.

3. Whether the Tenth Circuit's decision should be summarily reversed because it misapplied decisions of this Court, mischaracterized the district court's reasoning, failed to resolve all the issues presented, and held that Nacchio failed to address an issue that was a principal focus of his brief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	viii
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	15
I. THE TENTH CIRCUIT’S MATERIALITY ANALYSIS MERITS REVIEW	17
A. The Tenth Circuit’s Holding Conflicts With Other Circuits.....	17
B. The Materiality Issues Present Questions Of National Importance.....	24
II. THE TENTH CIRCUIT’S INSTRUCTIONAL ANALYSIS CONFLICTS WITH OTHER CIRCUITS	26
III. THE TENTH CIRCUIT’S <i>DAUBERT</i> ANALYSIS CONFLICTS WITH OTHER CIRCUITS AND MERITS REVIEW	28
IV. SUMMARY REVERSAL IS WARRANTED	32
CONCLUSION.....	35

TABLE OF CONTENTS—Continued

Page

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit on Rehearing En Banc vacating the panel opinion in part, <i>United States v. Nacchio</i> , No. 07-1311 (10th Cir. filed Feb. 25, 2009)	1a
Opinion of United States Court of Appeals for the Tenth Circuit Reversing the Judgment and Remanding for New Trial, <i>United States v. Nacchio</i> , 519 F.3d 1140 (10th Cir. Mar. 17, 2008).....	101a
<i>United States v. Nacchio</i> , Order Granting Rehearing En Banc, 535 F.3d 1165 (10th Cir. July 30, 2008).....	169a
U.S. Const. amend. V, §1.....	171a
15 U.S.C. §78j.....	172a
15 U.S.C. §78ff	173a
17 C.F.R. §230.175(a)	176a
17 C.F.R. §240.3b-6(a).....	177a
SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (Aug. 19, 1999).....	178a
Federal Rule of Criminal Procedure 16.....	194a

TABLE OF CONTENTS—Continued

	Page
Federal Rule of Evidence 104	201a
Federal Rule of Evidence 702	202a
Indictment filed Dec. 20, 2005 (D. Colo. Docket No. 1).....	203a
Government’s Bill of Particulars filed Apr. 10, 2006 (D. Colo. Docket No. 47).....	212a
Testimony and Exhibits from Trial Proceedings held Mar. 20 – Apr. 12, 2007	
Trial Transcript of Mar. 20, 2007 (D. Colo. Docket Nos. 285, 321) (Volume One excerpts).....	225a
Trial Transcript of Mar. 26, 2007 (D. Colo. Docket No. 313) (Volume Six excerpts).....	227a
Trial Transcript of Mar. 26, 2007 (D. Colo. Docket No. 314) (Volume Seven excerpts).....	231a
Trial Transcript of Mar. 27, 2007 (D. Colo. Docket No. 311) (Volume Eight excerpts).....	235a
Trial Transcript of Mar. 27, 2007 (D. Colo. Docket No. 312) (Volume Nine excerpts).....	237a

TABLE OF CONTENTS—Continued

	Page
Trial Transcript of Mar. 28, 2007 (D. Colo. Docket No. 319) (Volume Eleven excerpts).....	243a
Trial Transcript of Apr. 4, 2007 (D. Colo. Docket No. 343) (Volume Nineteen excerpts).....	246a
Trial Transcript of Apr. 5, 2007 (D. Colo. Docket No. 346) (Volume Twenty excerpts).....	248a
Trial Transcript of April 9, 2007 (D. Colo. Docket No. 368) (Volume Twenty-two excerpts).....	268a
Trial Transcript of April 9, 2007 (D. Colo. Docket No. 369) (Volume Twenty-three excerpts)	271a
Trial Transcript of April 12, 2007 (D. Colo. Docket No. 480) (Volume Twenty-seven excerpts).....	273a
Government’s Trial Exhibit 929, Current View of 2001 and Current Estimate Includes a Shortfall of Recurring Revenue Growth of 19%, excerpts of 2001 Product Revenue Update for All Business Units, dated April 9, 2001 (excerpts)	276a

TABLE OF CONTENTS—Continued

	Page
Government’s Trial Exhibit 959, Wholesale Markets Risk/Opportunity, excerpt of Email from Kathleen Kochis to Greg Casey, Robin Szeliga, Afshin Mohebbi et al. regarding Wholesale Markets 1st Quarter Review, dated April 12, 2001 (excerpts).....	278a
Government’s Trial Exhibit 593, Transcript of Qwest conference call hosted by Lee Wolfe, dated April 24, 2001 (excerpts).....	280a
United States’ Motion to Exclude Testimony of Fischel, with attached March 29, 2007 Federal Rule of Criminal Procedure 16(b) letter, filed Apr. 3, 2007 (D. Colo. Docket No. 334) (excerpts).....	297a
Reply to United States Motion to Exclude Testimony by Daniel Fischel filed Apr. 4, 2007 (D. Colo. Docket No. 340).....	330a
Motion to Permit Rebuttal of, or, Alternatively, to Strike, Opinion Testimony by Witnesses Johnstone and Khemka Adduced by the Government in Contravention of the Court’s Prior Order and memorandum of Decision Limiting Their Testimony [#305] filed Apr. 7, 2007 (Docket No. 347) (excerpts).....	336a

TABLE OF CONTENTS—Continued

	Page
United States’ Proposed Disputed Jury Instructions and Joseph P. Nacchio’s Additional Requests to Charge, Exhibits 3 and 7 to Motion to Add to the Docket Certain Materials filed May 31, 2007 (D. Colo. Docket No. 424) (excerpts)	338a
Sentencing Transcript of July 27, 2007 (D. Colo. Docket No. 462) (excerpts)	349a
Appellant’s Opening Brief, <i>United States v.</i> <i>Nacchio</i> (10th Cir. filed Oct. 9, 2007) (excerpts).....	351a

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988)	2, 22
<i>Bueno v. City of Donna</i> , 714 F.2d 484 (5th Cir. 1983)	28
<i>Busch v. Dyno Nobel, Inc.</i> , 40 Fed. Appx. 947 (6th Cir. 2002).....	30
<i>Cortes-Irizarry v. Corporacion Insular de Seguros</i> , 111 F.3d 184 (1st Cir. 1997).....	31
<i>Dye v. Hofbauer</i> , 546 U.S. 1 (2005)	34
<i>Freeman v. Decio</i> , 584 F.2d 186 (7th Cir. 1978)	22
<i>Glassman v. Computervision Corp.</i> , 90 F.3d 617 (1st Cir. 1996).....	18, 20
<i>Heller International Corp. v. Sharp</i> , 974 F.2d 850 (7th Cir. 1992)	27
<i>In re Apple Computer, Inc.</i> , 127 Fed. Appx. 296 (9th Cir. 2005).....	21
<i>In re Burlington Coat Factory Securities Litigation</i> , 114 F.3d 1410 (3d Cir. 1997).....	18

TABLE OF AUTHORITIES—Continued

	Page
<i>In re Paoli Railroad Yard PCB Litigation</i> , 916 F.2d 829 (3d Cir. 1990), <i>cert. denied</i> , 499 U.S. 961 (1991)	30
<i>INS v. Ventura</i> , 537 U.S. 12 (2002)	33
<i>J&R Marketing, SEP v. GMC</i> , 549 F.3d 384 (6th Cir. 2008)	23
<i>Jahn v. Equine Services, PSC</i> , 233 F.3d 382 (6th Cir. 2000)	30
<i>Kelly v. South Carolina</i> , 534 U.S. 246 (2002)	26
<i>Kisor v. Johns-Manville Corp.</i> , 783 F.2d 1337 (9th Cir. 1986)	27
<i>Koon v. United States</i> , 518 U.S. 81 (1996)	15
<i>Krim v. BancTexas Group, Inc.</i> , 989 F.2d 1435 (5th Cir. 1993)	19, 20
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999)	29
<i>Major League Baseball Players Association v. Garvey</i> , 532 U.S. 504 (2001)	33

TABLE OF AUTHORITIES—Continued

	Page
<i>McCormick v. Fund American Cos.</i> , 26 F.3d 869 (9th Cir. 1994)	23
<i>Moore v. United States</i> , 129 S. Ct. 4 (2008)	35
<i>Murray v. Marina District Development Co.</i> , No. 07-1147, 2008 WL 2265300 (3d Cir. June 4, 2008)	30
<i>Nelson v. United States</i> , 129 S. Ct. 890 (2009)	33
<i>New Jersey Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.</i> , 537 F.3d 35 (1st Cir. 2008).....	23
<i>Padillas v. Stork-Gamco, Inc.</i> , 186 F.3d 412 (3d Cir. 1999).....	30
<i>Panter v. Marshall Field & Co.</i> , 646 F.2d 271 (7th Cir.), <i>cert. denied</i> , 454 U.S. 1092 (1981)	23
<i>Posttape Associates v. Eastman Kodak Co.</i> , 537 F.2d 751 (3d Cir. 1976).....	28
<i>Shaw v. Digital Equipment Corp.</i> , 82 F.3d 1194 (1st 1996).....	17, 18, 21, 22, 23
<i>Spears v. United States</i> , 129 S. Ct. 840 (2009)	33

TABLE OF AUTHORITIES—Continued

	Page
<i>Sprint/United Management Co. v. Mendelsohn</i> , 128 S. Ct. 1140 (2008)	14, 33
<i>TSC Industries, Inc. v. Northway</i> , 426 U.S. 438 (1976)	26
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	15
<i>United States v. Dotson</i> , 895 F.2d 263 (6th Cir.), <i>cert. denied</i> , 498 U.S. 831 (1990)	27
<i>United States v. Escobar-de Jesus</i> , 187 F.3d 148 (1st Cir. 1999), <i>cert. denied</i> , 528 U.S. 1176 (2000)	27
<i>United States v. Gordon</i> , 290 F.3d 539 (3d Cir.), <i>cert. denied</i> , 537 U.S. 1063 (2002)	27
<i>United States v. Hastings</i> , 918 F.2d 369 (2d Cir. 1990)	27
<i>United States v. Holley</i> , 502 F.2d 273 (4th Cir. 1974)	27
<i>United States v. Howell</i> , 231 F.3d 615 (9th Cir. 2000), <i>cert. denied</i> , 534 U.S. 831 (2001)	29
<i>United States v. Jones</i> , 909 F.2d 533 (D.C. Cir. 1990)	28

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Marsh</i> , 894 F.2d 1035 (9th Cir. 1989), <i>cert. denied</i> , 493 U.S. 1083 (1990)	27
<i>United States v. Park</i> , 421 U.S. 658 (1975)	27
<i>United States v. Stoddart</i> , 48 Fed. Appx. 376 (3d Cir. 2002)	29
<i>Vaughn v. Teledyne, Inc.</i> , 628 F.2d 1214 (9th Cir. 1980)	19, 23
<i>Walker v. Action Industries, Inc.</i> , 802 F.2d 703 (4th Cir. 1986), <i>cert. denied</i> , 479 U.S. 1065 (1987)	19, 26
<i>Walker v. AT&T Technologies</i> , 995 F.2d 846 (8th Cir. 1993)	28
<i>Webster v. Edward D. Jones & Co.</i> , 197 F.3d 815 (6th Cir. 1999)	27
<i>Wielgos v. Commonwealth Edison Co.</i> , 892 F.2d at 509 (7th Cir. 1989).....	19, 20, 22, 26
<i>Wilson v. Maritime Overseas Corp.</i> , 150 F.3d 1 (1st Cir. 1998).....	28

TABLE OF AUTHORITIES—Continued

Page

STATUTES, RULES AND REGULATIONS

28 U.S.C. §1254(1)1
17 C.F.R. §230.175(a)19
17 C.F.R. §240.3b-6(a).....19

OTHER AUTHORITY

Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994)31
3 *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* (2d ed. 2008)24
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TABLE OF AUTHORITIES—Continued

	Page
Hiler, <i>The SEC and the Courts’ Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views</i> , 46 Md. L. Rev. 1114 (1987)	25
Langevoort & Gulati, <i>The Muddled Duty to Disclose Under Rule 10b-5</i> , 57 Vand. L. Rev. 1639 (2004)	25
Loewenstein & Wang, <i>The Corporation As Insider Trader</i> , 30 Del. J. Corp. L. 45 (2005)	23
7 Loss & Seligman, <i>Securities Regulation</i> (3d ed. rev. 2003)	23
Rosen, <i>Liability for “Soft Information”: New Developments and Emerging Trends</i> , 23 Sec. Reg. L.J. 3 (1995).....	25
Schneider, <i>Soft Disclosure: Thrusts & Parries When Bad News Follows Optimistic Statements</i> , 26 Rev. Sec. & Commodities Reg. 33 (1993).....	25

OPINIONS BELOW

The Tenth Circuit's panel opinion is reported at 519 F.3d 1140. App.101a-68a. The court's order granting rehearing *en banc* is reported at 535 F.3d 1165. App.169a-70a. Its *en banc* opinion is reported at 555 F.3d 1234. App.1a-100a.

JURISDICTION

The Tenth Circuit's *en banc* opinion was issued on February 25, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the relevant statutes, regulations and rules.

INTRODUCTION

A sharply divided *en banc* Tenth Circuit recently reinstated the conviction of Joseph P. Nacchio, the former CEO of Qwest Communications, for insider trading. Nacchio built Qwest into a telecommunications giant but became a high-profile target after Qwest's stock collapsed amid the 2001 telecommunications meltdown and a subsequent accounting restatement. He was accosted on the streets, depicted by the Denver Post alongside North Korean dictator Kim Jong Il, and even the trial judge "s[aw] no reason why this man who grew up, the son of Italian immigrants ... in New Jersey and New York, should ever have come out here to Colorado." App.349a.

After five years of investigating, the prosecution evidently concluded that it could not prove any wrongdoing behind the restatement or the decline in Qwest's share price, and decided instead to prosecute

Nacchio for insider trading. The case merits review for several reasons.

First, this is the first time an executive has *ever* been charged with insider trading when the allegedly material “inside” information consisted of internal corporate risk assessments about financial results for future quarters. The Tenth Circuit agreed it was a “close question” whether that information was immaterial as a matter of law, but ultimately held that Nacchio could be sent to prison because a Qwest manager allegedly warned him in December 2000 or January 2001 of some “risk” that Qwest *might* fall short of its year-end 2001 projections by up to 4.2%, eleven or twelve months later, in a highly uncertain economic climate.

This Court recognized in *Basic Inc. v. Levinson*, 485 U.S. 224, 232 n.9 (1988), that special standards may be necessary for assessing the materiality of “contingent or speculative information, such as earnings forecasts or projections,” but declined to resolve the issue. In the ensuing two decades the lower courts have fractured. In several other circuits, the allegations against Nacchio would have been dismissed as a matter of law even in a civil case. The proper standard is a matter of great national importance and merits review.

Second, the Tenth Circuit affirmed the jury instructions only by holding that uninformative instructions are not reversible unless they affirmatively misstate the law, and that a defendant forfeits any challenge unless his own proposed instructions are perfect. Those holdings squarely conflict with holdings of this Court and multiple other circuits.

Third, the prosecution convinced the court to exclude the heart of Nacchio's defense—the proposed expert testimony of Professor Daniel Fischel. Fischel is the former dean of the University of Chicago Law School, and the nation's leading expert in securities matters. He has testified more than 200 times (including for the government) and had never before been excluded. The government somehow convinced the district court that expert testimony on materiality and stock price movements is irrelevant or unnecessary in securities cases, and that Fischel should be excluded without *voir dire* or a *Daubert* hearing because Nacchio's pre-trial summary notice under Federal Rule of Criminal Procedure 16 did not establish the admissibility of the testimony under Rule 702. All of that was clear error, as the panel held when granting a new trial.

The government then abandoned its prior arguments and convinced the *en banc* court to affirm, on the new ground that Nacchio failed to justify Fischel's methodology under *Daubert* in response to the government's motion. That analysis conflicts with decisions of this Court and other circuits holding that expert testimony cannot be excluded without a hearing unless the existing record allows the court to evaluate the expert's methodology.

Finally, at a minimum summary reversal is warranted. As the *en banc* dissenters explained in detail, the majority mischaracterized the district court's decision, ignored settled law, and ducked meritorious issues to gloss over obviously prejudicial errors by a district judge whose "sense of fairness toward this defendant" was very much in doubt, App.92a (McConnell, J., dissenting), and who openly

displayed ethnic bias against the defendant and his counsel and recently resigned in disgrace in a lurid prostitution and obstruction of justice scandal.

STATEMENT OF THE CASE

Factual Background

1. Nacchio held 7.4 million \$5.50 options expiring in June 2003. He did not want to sell and asked the board to extend the term. CAJA-1929-30.¹ For accounting reasons, the board could not. *Id.* To protect Qwest by spreading the sales over time, CAJA-1879, Nacchio announced in October 2000 that (so long as the price was reasonable, CAJA-2958) he would exercise and sell about a million options per quarter—but that he would not sell any of his vast holdings without a sunset problem, CAJA-1929. This announcement was months before the government alleges Nacchio received any material information. *E.g.*, CAJA-1392.

2. On September 7, 2000, Qwest raised its 2001 public revenue projections to \$21.3-\$21.7 billion. CAJA-4781. Qwest's business units then developed budgets designed to meet internal targets that were "set higher than the street numbers to encourage the employees to exceed the public values." CAJA-1918, 2138-39, 2373-77. The internal target was initially \$22 billion, and later \$21.8 billion. CAJA-2267, 2429-30.

Qwest had met or exceeded its public revenue targets for 17 straight quarters. CAJA-2259. Qwest's revenues came from "recurring" subscriber revenues (such as phone service) and sales of capacity on Qwest's fiber-optic network, known as infeasible rights of use

¹ "CAJA" refers to the joint appendix in the Tenth Circuit. "GX" refers to the government's trial exhibits.

or “IRUs.”² Qwest’s 2001 projections were initially based on growth in “recurring” revenues, CAJA-2177, 2600, and IRU sales.

3. In December 2000 or January 2001, the government’s cooperating witness Robin Szeliga told Nacchio that when she “aggregated all the risk” in “the targets that had been assigned to the [business units],” she saw “a billion dollars of risk as it related to the target that we had set.” App.229a-230a. The Tenth Circuit later held it was ambiguous whether Szeliga was talking about the \$22 billion internal target (suggesting a possible \$300 million, or 1.4%, shortfall from the \$21.3 billion public projection) or instead was describing the contents of a memo, which Nacchio never saw, forecasting \$1.2 billion in risk against a \$21.6 billion baseline (a \$900 million, or 4.2%, shortfall from the public projection). App.141a-43a.

Qwest’s revenues met public expectations in the first and second quarters (during Nacchio’s trades), and nearly equaled the internal targets. CAJA-2309-10. In April, although “recurring” revenue was off its internal target by 19%, App.277a, IRU sales in Grant Graham’s global-business unit and Greg Casey’s wholesale-markets unit were booming. Graham’s first quarter sales were 61% *greater* than forecast, CAJA-5060; GX932, and by the end of the second quarter, these units achieved “non-recurring” revenues of \$1.065 billion—98% of the company’s *year-end* target. GX932; GX947.

² This petition accepts the Tenth Circuit’s phrasing, but IRU sales also “recurred” year-after-year, and historically dominated Qwest’s revenues.

Because IRU sales were greater than projected but “recurring” revenue growth was disappointing, in early April Qwest’s senior managers revised their projections. That “current estimate” or “Current View of 2001” projected that 2001 revenue would reach \$21.56 billion, *comfortably above the low end of the public projection.* App.276a-77a. Graham, a cooperating witness for the government, testified that “[t]he representation of the [April 9] forecast” “provid[ed] our best belief of what things were going to happen.” App.244a. Szeliga testified that Nacchio was told at this meeting that, as of April 9th, “*with all of the debates ... the internal current view of Qwest was that they would reach \$21.5 billion by December 31st, 2001.*” App.236a; CAJA-3276-77 (COO confirming same).

The only quantifiable “risk” presented to Nacchio was in Casey’s wholesale-markets forecast, which identified \$350 million of budget “risk” due to “slowed” “capital spending among Carriers” and Casey’s predictions about the economy. App.278a, 241a-42a; CAJA-2228-29. Graham disagreed, and Casey had been wrong before—his unit’s fourth-quarter 2000 revenues were \$276 million or almost 35% greater than he projected. CAJA-4939-40, 5049. Even if Casey’s “risk” were treated as certain, it suggested a 0.4% shortfall.

4. On April 24, 2001, Nacchio and Szeliga reaffirmed Qwest’s public projections in a conference call with analysts. App.281a-96a. Nacchio disclosed, however, that he was “not pleased with the performance of [the consumer and small business] unit,” App.286a—known to the market as the main driver of “recurring” revenues—and that Qwest had to reduce its reliance on that sector for year-end revenue

projections. Although the Tenth Circuit later held that “[a] reasonable jury” could conclude that Nacchio knew “recurring revenue was off its target by 19%,” and “that he acted upon this nonpublic information when deciding to trade,” App.155a, on the April 24 call Nacchio *told the market* that although Qwest had projected growth of 8-9% in the consumer and small business sector, they had achieved only 6.3%—disclosing a 21% shortfall—and that “we are [now] going to be talking somewhere between 6 and 8 percent” for the year. App.294a-95a. (The prosecution’s analyst witnesses understood that disclosure loud and clear. CAJA-3636, 4935.) Nacchio said there was “softness” in the economy, but Qwest could “hold the numbers” if “the economy strengthen[s] in the second half.” App.289a-90a. Szeliga confirmed at trial that she was “still confident in our guidance” at that point. CAJA-2240; App.292a-94a.

5. Two days later Qwest’s April trading window opened. Nacchio sold 1.2 million shares before the window closed on May 15, but still not enough to catch up to the target he had set in October 2000. CAJA-4765. He then entered into an automatic plan to exercise 10,000 options per day so long as the stock price was above \$38. CAJA-2000, 3044, 5158-59. Qwest’s General Counsel, who knew everything Nacchio knew, “represented and warranted” that Nacchio had no material nonpublic information by approving the plan. CAJA-5157, 5172, 2201, 2222. After May 29, Qwest’s stock fell below \$38. CAJA-4761-63. Nacchio never sold another share and ended the year with more vested options than he had at the beginning. CAJA-4764-65.

6. *No one* told Nacchio the projections had to be reduced until August 15, 2001. App.232a-34a. After conducting an internal review, on September 10, 2001, Qwest issued a press release lowering its projections. CAJA-4933. Its stock price *increased* 10%. CAJA-4763. Nonetheless, Qwest stock declined dramatically throughout 2001 commensurate with the telecommunications index.

PROCEDURAL HISTORY

District Court Proceedings

1. Nacchio proposed instructions explaining that forward-looking statements are not materially misleading unless they lack “a reasonable basis,” and that “data, assumptions, and methods” or “internal projections” need not be disclosed unless they are “so certain that they show the published figures to have been without a reasonable basis.” App.341a-48a; CAJA-4162-64, 4180-82. The government also proposed instructions, drawn from this Court’s opinion in *Basic*, clarifying that the materiality of predictive information requires a balancing of “probability” and “magnitude.” App.338a-40a.

The district court held that those principles are “wholly inappropriate” “for this type of insider trading case.” App.272a. It instructed the jury that “[i]nformation may be material even if it relates not to past events but to forecasting and forward-looking statements so long as a reasonable investor would consider it important in deciding to act or not to act with respect to the securities transaction at issue.” App.274a.

2. After Judge Nottingham excluded under the Classified Information Procedures Act critical evidence regarding Nacchio’s expectations of substantial IRU

revenues from clandestine government agencies, Nacchio's defense rested almost entirely on Fischel's expert testimony. Nacchio gave the prosecution notice, compliant with Rule 16, on March 29, 2007. App.300a-29a.

On April 3, the government filed a "Motion To Exclude Testimony By Daniel Fischel," arguing: (1) that Fischel's testimony was "irrelevant" and "would not assist the jury"; and (2) that "Defendant still has not complied with the [Rule 16] expert disclosure rules," and "[b]ased on that disclosure, Professor Fischel should be excluded." App.297a-99a. The prosecution repeatedly (but incorrectly) argued that the disclosure requirements under Criminal Rule 16 were the same as Civil Rule 26, and that Fischel's methodology was not sufficiently disclosed to permit *Daubert* evaluation. *E.g.*, CAJA-368, 408, 418-21.

Less than 24-hours later,³ Nacchio responded by explaining that the testimony was relevant, App.333a-34a, and that he had disclosed everything required by Rule 16. App.330a-33a. Just before Judge Nottingham adjourned that day, he said he had not "look[ed] at" the issue, and was informed that Fischel would testify in the morning. App.247a.

The next morning, he told the government "I know you want a ruling, Mr. Stricklin, but—who is going to [cross]-examine Mr. [Fischel]?" App.251a. The court

³ That 24 hours included a full trial day and the second night of Passover. Nacchio had requested a brief adjournment so his lawyers could observe the holiday with their families, but the judge, after consulting with his "Jewish friends," Supp. App. 68, adjourned only one hour early on the first night so "[y]ou can go to eat gefiltefish [sic]," App.245a.

then expressed concern with the government's choice: "Really? Mr. Wise has taken a shot at him before." *Id.*

When the defense called Fischel, the court excused the jury. App.252a. Before either party could speak, he excluded Fischel's testimony on the grounds that Nacchio's Rule 16 notice had not established the reliability of Fischel's methodology under Rule 702. *E.g.*, App.253a ("[T]he deficiencies under *Daubert* and *Kumho Tire* in these disclosures are so egregious."). As the court later explained, it excluded Fischel because "[a]ny suggestion that the Government was in possession of Fischel's ... methodology is simply disingenuous" because "[t]he March 29, 2007[] disclosure [Nacchio's Rule 16 notice] contained no methodology or reliable application of methodology to the case. It was precisely that [nondisclosure] ... that led the Court ... to exclude much of Fischel's proposed testimony." App.269a. He also held that the proposed testimony was irrelevant, unnecessary, and unlikely to assist the jury because this was like "a simple negligence case." App.249a.

The defense asked: "Your Honor, may I be heard?" The court responded: "No." App.258a-259a. Although the court said it needed more information regarding methodology to make a reliability determination, it refused to let counsel speak or Fischel (who was in the courtroom) testify to the evidentiary foundation. The court then remarked that the trial was "way ahead of time" and "is going to be completed easily within probably half the time that ... was allotted to it," App.266a-67a, and excused the jury for the entire afternoon Thursday and until Monday morning.

Over the weekend, Nacchio filed a motion to reconsider and hold a *Daubert* hearing. App.336a-37a.

On Monday, Fischel gave a brief factual summary under FRE 1006 of the dates and amounts of Nacchio's trades. CAJA-3980. The defense again asked to elicit opinion testimony or for the requested *Daubert* hearing. CAJA-4064. With Fischel sitting in the witness chair, the court stated that "[t]here is no more disclosure or substantially no more disclosure than we originally had" in "the original expert report," and that "even if it were reliable, the Court remains of the conclusion that the testimony is of no relevancy." App.269a. It then again said "we're moving much faster than ever anticipated," and excused the jury until the following afternoon. App.269a-70a.

The government exploited that ruling in its closing argument, emphasizing its two analysts' unrebutted materiality testimony, CAJA-4278, 4501, and telling the jury that when the allegedly undisclosed information was disclosed "the stock price does drop," CAJA-4478. Nacchio was unable to show the jury Fischel's econometric analyses proving otherwise. App.112a; 7a.

Nacchio was acquitted of 23 counts covering trades in January-March, but convicted of 19 counts covering trades in April-May, and was sentenced to 72-months' imprisonment, fined \$19 million, and ordered to forfeit \$52 million.

Proceedings In The Tenth Circuit

1. The panel majority opinion, written by Judge McConnell, held that the district court misinterpreted Rule 16, which does not require a defendant to establish reliability under *Daubert*. App114a-19a. "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 on which a *Daubert* ruling could be made.” App.119a-24a. The majority also reversed the district court’s additional conclusions that the economic analysis was irrelevant and unhelpful, explaining that such testimony is “routine” in securities cases and endorsed by the commentary to Rule 702. App.124a-26a.

2. The panel rejected Nacchio’s remaining arguments. It held that securities precedents articulating a high threshold for materiality of uncertain predictions were inapposite, since “Mr. Nacchio is being prosecuted for concealing true information while trading, not for making misleading statements.” App.136a.

The panel held that materiality “revolves around interpreting” Szeliga’s December/January warning about a “billion dollars of risk as it related to the target that we had set.” App.141a (quoting App.230a). It acknowledged that on cross-examination Szeliga testified that she told Nacchio the risk related to the internal target, and therefore forecast only a 1.4% shortfall from the public numbers. App.141a-42a. But the panel concluded that “on re-direct examination, Ms. Szeliga corrected herself (*without saying so*), stating that the risk was closer to \$1.2 billion and that it was against the public target at the time, not the private [internal] one.” App.142a (emphasis added). It pointed to testimony where the government simply asked Szeliga to add and subtract numbers on a memo that would have indicated a 4.2% risk. *Id.* (citing App.239a-41a). The panel acknowledged that “Ms. Szeliga testified that Mr. Nacchio never saw the memo,” but nonetheless accepted the government’s (unsupported)

assertion that “she was talking to him about its contents.” App.143a.⁴ It concluded that “[g]iven Ms. Szeliga’s [unstated] clarification on re-direct, the jury was entitled to believe that the higher figure was accurate.” *Id.*

The panel said it was “a close question” whether a 4.2% shortfall was immaterial as a matter of law, App.143a, but concluded it was close enough to the SEC’s 5% “guideline[] for the materiality of errors in reported revenues” because of “[s]pecial factors”—namely, Nacchio’s assertion at a sales conference that a “skittish” and “mercurial” stock market could punish Qwest for even a small shortfall. App.140a, 143a.

The panel concluded that the “reasonable basis” instruction Nacchio proposed was confusing and inapposite in insider trading cases. The panel recognized that “it is important to give a jury enough guidance to sort out material information from noise,” and that the district court’s instruction was “not particularly informative,” but held there was no reversible error because the instructions did not affirmatively “misstate[] the law.” App.132a-34a.

4. The court granted rehearing *en banc* limited to whether the exclusion of Fischel was erroneous. App.169a-70a.

The *en banc* majority declined to consider the district court’s Rule 16 and relevance errors. The majority acknowledged that the government “framed

⁴ The court ignored Szeliga’s testimony that she “discussed the billion dollar risk with Mr. Nacchio ... not this—not the specifics of this memo,” App.238a, and her unambiguous testimony that “a month into the year” “I thought we had a billion dollars of risk built into the stretch targets” (*i.e.*, the higher internal targets), App.232a.

its challenge to Professor Fischel's expert testimony as an objection to the sufficiency of Mr. Nacchio's Rule 16 disclosure," App.15a-16a, but found it significant that the motion argued that Nacchio's Rule 16 notice "had not established the admissibility of the evidence," under *Daubert* and Rule 702, App.8a. It held that the motion required Nacchio to "marshal his FRE 702 arguments," App.38a, and "set[] forth all available arguments for the testimony's admissibility," App.25a n.13, and that the district court could summarily exclude Fischel without permitting argument, *voir dire*, or a hearing.

The majority refused to consider whether the district court's misapprehensions concerning Rule 16 and relevance might have affected its discretionary decision to proceed in this manner, App.18a n.9, 46a n.21, and repeatedly relied on *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), to presume that Judge Nottingham's ruling "rested on *Daubert* grounds," App.15a-16a, 11a n.6, 19a, while ignoring the *judge's own statement* that *Daubert* was *not* "the main bas[is] on which the Court rested its decision," and that Rule 16 *was* "one of multiple bases." App.350a.

The *en banc* court remanded to the panel to address unresolved sentencing and forfeiture issues.

Judge McConnell, joined by Chief Judge Henry and Judges Kelly and Murphy, dissented. They explained that in criminal cases an expert's methodology is almost always elicited on the stand, that the district court never ordered any different procedure here, and that Nacchio was entitled to respond to the government's motion by pointing out that Rule 16 simply does not require disclosures sufficient to satisfy

Daubert. Even if a *Daubert* challenge had been squarely presented, the dissenters reasoned that it was still a flagrant abuse of discretion and a violation of due process for the district court to exclude the testimony without permitting *voir dire* or a hearing—and that the *en banc* court’s reasoning conflicted with other circuits. The dissenters criticized the majority’s “unprecedented holding” that defendants are entitled to *no* notice about how a district court will resolve *Daubert* issues, which “will apply in all future cases, until ... the Supreme Court intercedes.” App.74a. Finally, the dissenters explained that the court’s misunderstandings of Rule 16 and relevance obviously infected its discretion, requiring a remand under *Koon v. United States*, 518 U.S. 81 (1996), and criticized the *en banc* court for ducking the issue. App.86a-92a.

Chief Judge Henry and Judge Kelly dissented in even more emphatic terms. App.93a-100a.

5. On March 5, 2009, Nacchio filed a Rule 33 motion for a new trial, explaining that Szeliga recently clarified in sworn deposition testimony that the “risk” she described to Nacchio was only a 1.4% shortfall in year-end revenues. The district court’s consideration of that motion does not deprive this Court of jurisdiction. *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984).

REASONS FOR GRANTING THE WRIT

1. Even in civil securities cases, the SEC and other circuits have recognized that the materiality of risks or predictions about future events must be assessed under special rules and with great caution, because of the danger that a jury guided only by vague standards will find “fraud by hindsight.” The Tenth Circuit’s holding that such safeguards are inappropriate in

insider trading cases squarely conflicts with other circuits (which apply the same principles in trading cases), and introduces an illogical discontinuity into the law. Either the Tenth Circuit has opened a huge loophole for securities plaintiffs to evade settled law by re-pleading “false statement” cases as “insider trading” cases, or it believes (again contrary to settled law) that individuals must disclose more than the company when both sell stock.

More broadly, the standards governing the materiality of predictive information are highly unsettled and important. Other circuits regard uncertain internal predictions as not just immaterial but misleading, and would have punished Nacchio *for disclosing them*. Corporate executives deserve comprehensible standards, not capricious imprisonment.

2. Nacchio correctly identified a defect in the instructions, and proposed an alternative based on Seventh Circuit cases. The panel’s holdings that Nacchio forfeited any challenge because his proposal was imperfect, and that the instructions given were acceptable merely because they did not “misstate” the law, conflict with decisions of this Court and other circuits.

3. The *en banc* court’s *Daubert* analysis conflicts with decisions of several other circuits and merits review. Litigants are entitled to notice and an opportunity to lay an appropriate foundation for expert testimony. The Tenth Circuit’s holding misunderstands the burden of proof on a motion *in limine*, and severely undermines the careful distinctions between the civil and criminal expert rules.

4. At a minimum, summary reversal is appropriate. The Tenth Circuit seriously misunderstood this Court's decisions in *Koon* and *Sprint*, mischaracterized the district court's decision, failed to resolve all the issues presented on appeal, and inexplicably held that Nacchio failed to address an issue that was a principal focus of his brief.

I. THE TENTH CIRCUIT'S MATERIALITY ANALYSIS MERITS REVIEW

A. The Tenth Circuit's Holding Conflicts With Other Circuits

The Tenth Circuit's materiality analysis conflicts with several other circuits, which have held that internal predictions and interim operating results are immaterial as a matter of law unless they establish a very strong likelihood that the company's eventual reported performance will be substantially below what the market is expecting.

1. The First Circuit has held that such information is material only if it establishes a "likelihood" of an "extreme departure" from market expectations, and the end of the reporting period is very close.

In *Shaw v. Digital Equipment Corp.*, the company sold stock while knowing of allegedly "material facts portending the unexpectedly large losses for the third quarter of fiscal 1994 that were announced later." 82 F.3d 1194, 1201-02 (1st Cir. 1996). The First Circuit held that "soft" information like internal *predictions* is always immaterial. *Id.* at 1211 n.21. Turning to the "hard" intra-quarterly operating results the company had in hand, the First Circuit "conceptualize[d]" the company "as an individual insider transacting in the company's securities," noted that whether "[p]resent, known information that strongly implies an important

future outcome ... must be disclosed (assuming the existence of a duty), poses a classic materiality issue,” and held that the company could continue selling stock *without disclosing interim operating results* unless “the [seller] is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be an extreme departure from the range of results which could be anticipated based on currently available information.” *Id.* at 1203, 1210. That standard was satisfied in *Shaw* because the results were dire and the quarter-end was only eleven days away. But the First Circuit emphasized that claims based on information supposedly presaging results 4-6 months in the future have been dismissed because the omissions should be “deemed immaterial as a matter of law.” *Id.* at 1210-11.

In *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996), the company knew that “as of week seven of the third quarter ... [sales] were only about 24% of *Computervision’s internal forecasts* for those weeks.” *Id.* at 630. Although the end of the quarter was only five weeks away, and the stock later dropped 30% when quarterly results were announced, the First Circuit held that the company could sell its stock without disclosure because “the undisclosed hard information ... did not indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” *Id.* at 631 (citation omitted); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (Alito, J.) (citing *Shaw* and *Glassman* as examples of “claims of omissions or misstatements that are obviously so unimportant that courts can rule them immaterial as a matter of law”).

Other circuits reach similar results (in cases where the company was buying or selling stock) by holding that internal financial projections are immaterial unless the company knows them to be true “to a certainty.” *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993); *see also Walker v. Action Indus., Inc.*, 802 F.2d 703, 708-10 (4th Cir. 1986) (collecting case law, and holding that company had no duty to disclose dramatic increase in first quarter “actual orders” and “projected sales” because longer term consequences were still “uncertain”), *cert. denied*, 479 U.S. 1065 (1987). The Seventh Circuit holds that internal projections *never* have to be disclosed, unless projections have been released and “the internal estimates are so certain that they reveal the published figures as materially misleading” and lacking in any “reasonable basis.”⁵ *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 515-16 (7th Cir. 1989) (Easterbrook, J.); *see also Walker*, 802 F.2d at 708 (concluding that Second Circuit agrees with the Seventh). *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 n.7 (9th Cir. 1980) (“partial disclosure of financial projections *makes* them material facts.”).

2. Nacchio would be entitled to acquittal under any of those standards. Szeliga’s forecast of 4.2% “risk” to the 2001 projections is “soft” information about highly uncertain events nearly a year in the future. The combined estimates from the business units *always* exceeded the public projections, and *no one* at Qwest

⁵ The “reasonable basis” language comes from SEC safe harbors precluding any theory of securities liability premised on an assertion that public projections are materially misleading, if those projections have a reasonable basis. 17 C.F.R. §§230.175(a), 240.3b-6(a).

advised Nacchio to reduce the projections until months after his last trade. The IRU risk Casey identified in April was small and based on his inherently uncertain predictions about the broader economy. *Supra* 6; *Krim*, 989 F.2d at 1449 (economic forecasts not material); *Wielgos*, 892 F.2d at 515 (securities laws require disclosure of *firm-specific* information).

The “hard” interim operating results that Nacchio had in April or May 2001 did not “indicate a ‘substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.’” *Glassman*, 90 F.3d at 631. Qwest met expectations in the first and second quarters. In *Glassman*, the company knew five weeks before the end of the quarter that its sales *for that quarter* were running at only 24% of internal projections, and the First Circuit held that knowledge was immaterial as a matter of law. Qwest’s “recurring” revenue growth was disappointing but its other revenue sources were running above budget, and that shift *was disclosed*. *Supra* 5-7. Nacchio also knew (and Casey did not) about Qwest’s prospects to receive substantial IRU revenues from classified government contracts. CAJA-2396-2400.

The panel was unpersuaded—and erroneously held that the court’s exclusion of the classified information was harmless—because it believed that negative and positive information cannot offset each other. “If an insider trades on the basis of his perception of the net effect of two bits of material undisclosed information, he has violated the law in two respects, not none.” App.128a. That might be fair, except that the sole theory of materiality charged or tried in this case was that Nacchio knew, “from early in 2001 through

September 2001, that the business units were underperforming with regard to their specific internal budgets, and that *such under-performance would inhibit Qwest's ability to meet its 2001 financial guidance issued on September 7, 2000.*" App.219a (emphasis added). The panel understood that the charge was solely that Nacchio knew of material undisclosed risks *to the projections*, App.103a-04a, 109a, 143a, and held that Szeliga's "risk" prediction could be material, despite the SEC's guidance in SAB 99, only because the "skittish" and "mercurial" stock market would react negatively to any shortfall *as compared to the projections*. App.143a-44a.

Finally, even if any "risk" of a 4.2% shortfall eight months in the future were treated as a certainty, that is not "an extreme departure" and did not "forebod[e] disastrous [year]-end results." *Shaw*, 82 F.3d at 1210. As the Tenth Circuit acknowledged, that risk was less than the threshold for materiality of errors in *already reported* revenues under SEC guidelines. Other circuits have held that shortfalls in this range are immaterial. See *In re Apple Computer, Inc.*, 127 Fed. Appx. 296, 304 (9th Cir. 2005) ("[A] revenue estimate that was missed by approximately 10% was immaterial as a matter of law").

3. The Tenth Circuit erroneously held that the case law discussed above applies only in *false statement* cases. Many of these cases involved stock sales or purchases by the company in addition to allegedly misleading statements. In *Shaw* and *Glassman* the companies were *selling stock* without disclosing the dire shortfalls they were experiencing. The First Circuit expressly "conceptualize[d]" the company "as an individual insider transacting in the company's

securities.” *Shaw*, 82 F.3d at 1203. In *Wielgos*, the company was similarly accused of *selling stock* with a registration statement incorporating cost projections lower than the company’s own internal estimates. 892 F.2d at 512. And the Seventh Circuit has rejected insider trading claims against individuals based on internal predictions. See *Freeman v. Decio*, 584 F.2d 186, 198-200 (7th Cir. 1978). This Court explained in *Basic* that the materiality standard does not vary “depending on who brings the action or whether insiders are alleged to have profited.” 485 U.S. at 240 n.18. The Tenth Circuit’s distinction wrongly suggests that if the plaintiffs in cases like *Glassman* and *Wielgos* had just accused the company of insider trading rather than misleading statements they would have won. These are crucial substantive rules, not mere pleading issues.

Perhaps the Tenth Circuit was confused by the fact that the “reasonable basis” safe harbor directly applies only to claims that public projections are materially misleading. But the relevance of *Wielgos*, and the point of Nacchio’s proposed instructions, is that under Seventh Circuit precedent an internal projection is categorically immaterial and need not be disclosed. (The First Circuit agrees, *Shaw*, 82 F.3d at 1211 n.21.) The only exception is *if* a public projection has been made *and* “the internal estimates are so certain that they reveal the published figures as materially misleading”—which brings into play the SEC’s regulations about when a public projection can be deemed misleading for purposes of *any* theory of securities liability. *Wielgos*, 892 F.2d at 515-16. As a matter of law, therefore, Szeliga’s risk assessment could be material only if it reveals that publicly issued

projections lack any reasonable basis.⁶ Yet the district court wrongly told the jury that Qwest's disclosure obligations were *irrelevant*, which also decimated Nacchio's scienter defense. App.274a-75a.

The only real way to distinguish "company trading" cases like *Shaw*, *Glassman*, *Wielgos*, etc., from individual insider trading cases would be if companies do not have the same duty to disclose material information before trading that individuals have. The consensus has been that corporations do have that duty,⁷ but a circuit split has developed. See *J&R Mktg., SEP v. GMC*, 549 F.3d 384, 396-97 (6th Cir. 2008) (declining "to impose upon issuers the same duty faced by those who engage in insider trading"). If the Tenth Circuit has implicitly joined the Sixth, that conflict too merits review.

Finally, in at least the Seventh and Ninth Circuits an internal projection *cannot* be released unless it is "reasonably certain," a standard plainly not met here. *Panter v. Marshall Field & Co.*, 646 F.2d 271, 291-93 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Vaughn*,

⁶ The panel unfairly accused Nacchio of conflating the duties to "disclose or abstain." App.136a-37a. The two sometimes converge in omissions cases but are distinct in many common fact patterns.

⁷ See *Shaw*, 82 F.3d at 1203 ("Courts ... have treated a corporation trading in its own securities as an 'insider' for purposes of the 'disclose or abstain' rule."); *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 56 n.21 (1st Cir. 2008) (same); *McCormick v. Fund Am. Cos.*, 26 F.3d 869, 876 (9th Cir. 1994) (collecting "[n]umerous authorities" holding that corporate issuers and individual insiders are subject to same rules); Loewenstein & Wang, *The Corporation As Insider Trader*, 30 Del. J. Corp. L. 45, 77 (2005) (same); *id.* at 58 n.48, 62 nn.57-58, 66 n.74 (collecting authorities); 7 Loss & Seligman, *Securities Regulation* 3499 (3d ed. rev. 2003) (same).

628 F.2d at 1221. The Tenth Circuit is sending Nacchio to prison for selling stock without disclosing conflicting predictions (worries, really) by his employees that other circuits would regard as misleading and punish him for disclosing. This is terribly unfair, particularly when criminal conviction requires proof that the defendant *knew* the information was material, App.147a, and vividly illustrates the depth of confusion in the lower courts.

4. The Tenth Circuit suggested in a footnote that “in this case the parties have focused solely on the magnitude of the shortfall, should it occur,” not “the probability that the event will occur.” App.144a n.10 (citing App.361a). That clear error should be ignored (or summarily reversed). The Tenth Circuit was citing section I.B.2.b., a *one-page* section of Nacchio’s brief—but overlooked section I.B.2.a., titled: “*At the time of the trades, the information available to Nacchio did not reveal, to any degree of certainty, that Qwest would fail to meet its year-end numbers eight months in the future,*” App.356a-60a—a *five-page* section (nearly 10% of Nacchio’s brief), that argued that the information was too uncertain to be material, citing (*inter alia*) *Shaw* and *Wielgos*.

B. The Materiality Issues Present Questions Of National Importance

In the more than twenty years since this Court last addressed the issue in *Basic*, “[f]orward looking information probably has been the most prolific subject of securities fraud litigation.” 3 *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* §6:5 (2d ed. 2008). The materiality of such information is a question of great national importance that “[n]either the Securities and Exchange Commission

(SEC) nor the [lower] courts have answered ... with either uniformity or clarity.” Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 U.C.L.A. L. Rev. 675, 678 (1999).⁸

As a practical matter, the Tenth Circuit’s reasoning puts companies and executives in an impossible position. Every corporation produces a constant stream of conflicting opinions, estimates, and projections. A high threshold for the materiality of internal forecasts (or of interim operating data alleged to be material only because of what it supposedly portends for the future) is essential to basic corporate functioning. Companies cannot bare their internal debates and forecasting process to the public and to

⁸ Commentators agree the governing standards are “uncertain,” *id.* at 728-29, “unresolved,” Gwyn & Matton, *The Duty to Update the Forecasts, Predictions, and Projections of Public Companies*, 24 Sec. Reg. L.J. 366, 366 (1997), an “endemic hazard” that makes it “especially difficult” for managers to determine what is material, Rosen, *Liability for “Soft Information”*: *New Developments and Emerging Trends*, 23 Sec. Reg. L.J. 3, 3, 43 (1995), “a controversial topic” that has “troubled” courts because of the “concern[] over imposing potentially enormous liability [including, in this case, *imprisonment*] for failure to disclose such potentially uncertain information,” Hiler, *The SEC and the Courts’ Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 Md. L. Rev. 1114, 1129, 1195 (1987), that “[t]he confusion has turned to a hopeless clutter,” Langevoort & Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1641-42 (2004), and that “[i]t is difficult to state precisely what the law is ... because there are inconsistent holdings and dicta in the cases to support both plaintiffs and defendants on a number of key issues,” Schneider, *Soft Disclosure: Thrusts & Parries When Bad News Follows Optimistic Statements*, 26 Rev. Sec. & Commodities Reg. 33, 33 (1993).

competitors, and investors would not be well served if they tried. *See TSC Indus., Inc. v. Northway*, 426 U.S. 438, 448-49 (1976) (“[B]ury[ing] the shareholders in an avalanche of trivial information ... is hardly conducive to informed decisionmaking.”); *Walker*, 802 F.2d at 710 (disclosure of internal projections would be “impractical” and likely to mislead); *Wielgos*, 892 F.2d at 516 (such a requirement would prevent companies from raising capital).

The practical effect of the Tenth Circuit’s holding will be that corporate insiders cannot buy or sell company shares *ever*. That will reduce the value of company stock and options in compensation, and deprive the market of information (executive trading decisions) that actually *is* useful to investors. It will also seriously discourage companies from issuing projections at all. Nacchio’s inside information was supposedly “material” here *only* because Qwest had first made public projections. *Supra* 13, 20-21. If making a projection can render internal forecasts and interim results “material,” and subject executives to criminal liability, without reasonable safeguards like those applied in *Shaw* and *Wielgos*, companies will not do it.

II. THE TENTH CIRCUIT’S INSTRUCTIONAL ANALYSIS CONFLICTS WITH OTHER CIRCUITS

1. The Tenth Circuit acknowledged that the skeletal materiality instruction was “not particularly informative,” but held there could be no reversible error unless it affirmatively “misstated the law.” App.133a-34a.

That is the wrong standard. “A trial judge’s duty is to give instructions sufficient to explain the law,” *Kelly*

v. South Carolina, 534 U.S. 246, 256 (2002), and an instruction is erroneous if it does not “contain[] an adequate statement of the law to guide the jury’s determination,” *United States v. Park*, 421 U.S. 658, 675 (1975). Other circuits have held that reversible error occurs when a facially correct instruction is “incomplete[],” *United States v. Escobar-de Jesus*, 187 F.3d 148, 164 n.10 (1st Cir. 1999) (citation omitted), *cert. denied*, 528 U.S. 1176 (2000), or “inadequate to guide the jury’s deliberations,” *United States v. Marsh*, 894 F.2d 1035, 1040 (9th Cir. 1989) (citation omitted), *cert. denied*, 493 U.S. 1083 (1990). *See also United States v. Dotson*, 895 F.2d 263, 264 (6th Cir.) (reversing “correct ... but not sufficient” instruction), *cert. denied*, 498 U.S. 831 (1990); *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986); *United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974); *United States v. Gordon*, 290 F.3d 539, 545 (3d Cir.), *cert. denied*, 537 U.S. 1063 (2002); *United States v. Hastings*, 918 F.2d 369, 373 (2d Cir. 1990).

2. The Tenth Circuit held that Nacchio’s “reasonable basis” instruction was confusing and did not accurately state the law as the court of appeals viewed it. Even if his proposed fix was not perfect, Nacchio correctly identified that the instructions gave inadequate guidance on materiality in these circumstances.

In at least seven circuits, “[t]he fact that counsel did not tender perfect instructions does not immunize from scrutiny on appeal a failure to instruct the jury adequately concerning the issues in the case.” *Heller Int’l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (citation omitted); *see also Webster v. Edward D. Jones & Co.*, 197 F.3d 815, 820 (6th Cir. 1999) (“[E]ven if an

incorrect proposed instruction is submitted which raises an important issue of law involved in light of proof adduced in the case, it becomes the duty of the trial court to frame a proper instruction on the issue raised”) (citation omitted); *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998) (same); *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983) (same); *Walker v. AT&T Techs.*, 995 F.2d 846, 849 (8th Cir. 1993) (same); *United States v. Jones*, 909 F.2d 533, 538-39 (D.C. Cir. 1990) (Ginsburg, R., J.) (same); *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 757 (3d Cir. 1976) (same).

III. THE TENTH CIRCUIT’S *DAUBERT* ANALYSIS CONFLICTS WITH OTHER CIRCUITS AND MERITS REVIEW

1. The Tenth Circuit held the government’s motion was based on “Nacchio’s failure to carry his burden to demonstrate that Professor Fischel’s testimony was admissible.” App.21a, 24a-25a & n.13, 22a n.11, 33a & n.16. It cites no case or rule requiring Nacchio to establish reliability in response to a motion to exclude, concedes that Nacchio’s expectation of establishing reliability on the stand “may have been reasonable,” but still concludes the district court had no “obligation to provide specific notice” that the *Daubert* issue would be resolved in some other way. App.21a-22a & n.10.

Of course Nacchio bore the ultimate burden of laying a sufficient foundation for admissibility at trial. But when a litigant moves *in limine* to exclude evidence *the movant* bears the burden of producing facts sufficient to require a hearing or exclusion. The posture is like summary judgment, where the movant has the *prima facie* burden to prove the absence of a triable dispute. Such motions should be *denied* without

a hearing if the movant relies only on the opponent's ultimate burden of proof. See *United States v. Stoddart*, 48 Fed. Appx. 376, 380 (3d Cir. 2002) (upholding denial of motion to suppress without a hearing where defendant "merely relies upon the government's 'burden of proof to establish adequate *Miranda* warnings'") (citation omitted); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (same), *cert. denied*, 534 U.S. 831 (2001). A motion to exclude certainly cannot be *granted* on such a thin basis.

The government never made even a *prima facie* showing of unreliability; it simply argued that Fischel's methodology was undisclosed. The district court could have accelerated Nacchio's burden by clearly ordering him to proffer the grounds for Fischel's admissibility in writing. Contrary to the *en banc* court's reasoning, however, the mere filing of a motion pointing out that the foundation has not yet been laid *does not* alert the defendant that he may be precluded from laying that foundation at the usual time—on the stand.

This Court has explained that when a movant "call[s] sufficiently into question" the reliability of expert testimony, the court must hold "appropriate proceedings" to "investigate reliability," which can include "special briefing" or "other proceedings," where the judge is to "ask questions." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 151-52 (1999). None of that would be necessary if the expert could be excluded merely because the proponent had not yet proven reliability.

The Third Circuit has reversed district courts for granting *Daubert* motions without a hearing, when the record was insufficient to allow an assessment of

reliability.⁹ If merely filing a motion notifies the proponent that he must establish reliability before the court rules, then all those cases would have come out the other way. The Third Circuit consistently holds that “failure to hold a hearing”—regardless of whether the proponent requests one—constitutes “an abuse of discretion where the evidentiary record is insufficient to allow a district court to determine what methodology was employed by the expert in arriving at his conclusions.” *Murray v. Marina Dist. Dev. Co.*, No. 07-1147, 2008 WL 2265300, at *2 (3d Cir. June 4, 2008) (unpublished); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417-18 (3d Cir. 1999) (explaining that it was “immaterial” that the proponent had not requested a hearing before the exclusion).

Other circuits agree. The Sixth Circuit has reversed the exclusion of an expert because “a district court should not make a *Daubert* determination when the record is not adequate to the task.” *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 393 (6th Cir. 2000); *see also Busch v. Dyno Nobel, Inc.*, 40 Fed. Appx. 947, 961 (6th

⁹ *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 854-55 (3d Cir. 1990) (reversing exclusion because the district court did not “provide[] the [proponents] with sufficient process for defending their evidentiary submissions” and “should have been given an opportunity to be heard on the critical issues before being effectively dispatched from court”), *cert. denied*, 499 U.S. 961 (1991); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (reversing exclusion of expert without hearing where report did not disclose methodology because that did 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” and thus the proponent must have an “opportunity to respond to the court’s concerns”) (citation omitted).

Cir. 2002) (“district court ... is charged with the responsibility of ensuring that the record before the court is adequate”). The First Circuit has explained that “courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record” and “must be cautious—except when defects are obvious on the face of a proffer—not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.” *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). The advisory committee notes to Rule 702’s 2000 amendments endorse *Cortes-Irizarry* and *In re Paoli Railroad Yard PCB Litigation* as examples of how courts should “consider[] challenges to expert testimony under *Daubert*.”

Commentators agree that *Kumho Tire* and basic evidentiary principles require a movant seeking to exclude expert testimony to establish serious reasons for doubting its reliability, on an adequate evidentiary record.¹⁰ This is an important and recurring issue on which the lower courts are divided.

2. The Tenth Circuit’s decision also transforms criminal expert practice. Criminal defendants have *no* obligation under Rule 16 to offer disclosures sufficient to justify the admissibility of an expert’s testimony under *Daubert*, and ordinarily may establish the

¹⁰ Goodwin, *The Hidden Significance of Kumho Tire*, 52 Baylor L. Rev. 603, 626-32 (2000) (movant must establish a “threshold level of unreliability” by “call[ing] [reliability] sufficiently into question”); Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1365 (1994) (“[T]he evidence should be presumed to be admissible until the opponent discharges its burden to show the contrary.”).

reliability of expert testimony by questioning the witness. App.114a-24a. But the Tenth Circuit has now held that the government can force defendants to supply such disclosures—the equivalent of a civil expert report and “all available arguments for the testimony’s admissibility,” App.25a n.13—simply by filing a motion pointing out that the defendant has not yet disclosed what the rules did not require him to disclose. The government will exploit this loophole in every case, collapsing the civil and criminal expert rules and threatening the constitutional principle that a defendant cannot be forced to prematurely disclose his defense. The consequences for the administration of justice merit review.

IV. SUMMARY REVERSAL IS WARRANTED

This case merits plenary review, but at a bare minimum should be summarily reversed.

1. Even if the judge was entitled to exclude Fischel under *Daubert*, doing so without permitting a hearing, *voir dire*, or argument was an exercise of discretion. The *en banc* court granted rehearing on whether the district court abused its discretion. App.46a n.21. Nacchio pointed out that “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions,” and that the court’s discretion was obviously infected by its erroneous belief that Nacchio had committed an egregious Rule 16 violation, and that the proposed testimony was irrelevant and unhelpful. *En Banc* Reply Br. at 22-23.

The *en banc* court held that this argument either was not within the *en banc* grant or that it is frivolous and does not “merit analytical attention.” App.46a n.21. Both suggestions are flatly inconsistent with

settled law. App.86a-92a (McConnell, J., dissenting). The *en banc* court also cannot take for itself, and away from the panel, the authority and responsibility to decide whether the district court abused its discretion—and then simply refuse to consider one aspect of that issue such that it falls through a crack between the decisions and cannot be resolved. When an appellate court simply refuses to resolve a material issue, it departs from the usual course of judicial proceedings and calls for this Court’s supervisory power.

2. The *en banc* court repeatedly cites *Sprint* to presume that the district court’s order excluding Fischel “rested on *Daubert* grounds,” App.15a-16a, 11a n.6, 19a, and not on its misinterpretation of Rule 16, notwithstanding the district judge’s express statement that *Daubert* was *not* “the main bas[is] on which the Court rested its decision.” App.350a. In *Sprint* this Court reversed the Tenth Circuit for presuming that an ambiguous district court opinion rested on erroneous grounds, and held that “[a] remand directing the district court to clarify its order ... would have been the better approach.” 128 S. Ct. at 1146. The *en banc* court here committed the very same error in reverse. This Court often summarily reverses when a court of appeals simply misunderstands this Court’s recent precedents, *e.g.*, *Nelson v. United States*, 129 S. Ct. 890 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009), or when the court of appeals reverses when it should have remanded, *e.g.*, *INS v. Ventura*, 537 U.S. 12 (2002); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001).

3. The panel’s footnoted suggestion that Nacchio did not argue that Szeliga’s prediction was immaterial

because of its uncertain nature is inexplicable plain error that warrants summary reversal. *Supra* 24; see *Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (summary reversal where circuit held that defendant failed to raise argument when “[t]he fourth argument heading in his brief” plainly “sets out the ... claim”). Any attention to the uncertainties inherent in Szeliga’s forecast should have led the panel to conclude that it was immaterial as a matter of law—since that was a “close question” on magnitude grounds alone. App.143a.

4. Finally, a brief review of the record, App.252a-59a, 268a-69a, will demonstrate that the panel and *en banc* dissent correctly described the basis of the district court’s decision to exclude Fischel, and confirm their conclusion that an appalling injustice was done here. It cannot possibly be within a judge’s discretion to exclude a criminal defendant’s only substantive witness because he needs more information to assess methodology while simultaneously prohibiting counsel and the witness from providing it, and to then excuse the jury for much of the next four court days because “we’re moving much faster than ever anticipated” and need “to slow down just for a little bit.” App.269a-270a. This was a “draconian decision” that “flies in the face of the truth-finding goals of trial, the constitutional safeguards to a full defense, [and] the liberal thrust of the rules of evidence,” App.99a (Henry, CJ, dissenting), and the *en banc* majority’s zeal to defend it on grounds contrary to the district court’s express language (and to call Nacchio, his lawyers, and Judge McConnell and the dissenters “disingenuous,” App.27a), is alarming. With respect, and appreciation for the limits of this Court’s role, the administration of justice would benefit

35

from a reminder that unpopular high-profile defendants are still entitled to basic fairness. *See Moore v. United States*, 129 S. Ct. 4 (2008) (summarily reversing when circuit mischaracterized basis for district court's ruling).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Criminal Action No. 05-cr-00545-MSK-01

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

ORDER VACATING SURRENDER ORDER

Defendant JOSEPH P. NACCHIO, was previously ordered to surrender himself by reporting to the Warden, FCI Schuylkill, Minersville, Pennsylvania, on March 23, 2009, by 12:00 noon, and to travel at his own expense (Surrender Order) (# 528).

Pursuant to the Court's oral order issued on March 20, 2009 and satisfaction of the condition precedent of filing of a Petition for Writ of Certiorari with the Supreme Court of the United States,

IT IS ORDERED that the Surrender Order is vacated. The date and terms of his surrender will be addressed by subsequent Order of the Court.

DATED at Denver, Colorado, this 20th day of March, 2009.

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger
United States District Judge

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**ORDER GRANTING MOTION FOR RECONSIDERATION
AND DENYING REQUEST FOR BAIL**

THIS MATTER comes before the Court on the Defendant's Emergency Motion to Reconsider his Emergency Motion for Continued Release Pending Resolution of a Petition for Certiorari (#541), the Government's Response (#543), the Defendant's Reply in Support (#546), and the Defendant's Supplement (#556) (collectively referred to as the "Motion").

On April 19, 2007, the Defendant was convicted on 19 counts of securities fraud for insider stock trades he made in the first half of 2001. On July 27, 2007, he was sentenced to concurrent imprisonment terms of seventy-two months on each count of conviction. The Defendant appealed his conviction to the Tenth Circuit Court of Appeals. The Circuit Court granted Defendant's request for bail¹ with the expectation that the appeal would be expedited. A three-judge panel unanimously determined all but one of the issues pertaining to the Defendant's

¹ It authorized his release conditioned on the \$2 million unsecured bond he had posted in the trial court.

conviction.² On a single issue - exclusion of expert testimony - the judges disagreed. The majority found that the trial court had abused its discretion in excluding the evidence. It reversed the Defendant's conviction and ordered a new trial. The Government sought review by the entire Circuit Court. Sitting *en banc*, the Circuit Court reconsidered only the expert testimony issue. In a divided decision, it reversed the panel decision and affirmed the Defendant's conviction. It also exonerated the Defendant's bond and lifted the stay of his sentence.

This Court³ then entered an Order directing the Defendant to report to the institution designated by the Bureau of Prisons to begin serving his sentence. In response, the Defendant filed an emergency motion with the Circuit Court. He announced that he would request review by the United States Supreme Court, and pending determination of his forthcoming Petition for Certiorari, he requested to remain free on bail pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3143(b). The Tenth Circuit denied his motion, directing him to file it with this Court.

The Defendant immediately renewed his motion for bail pending appeal in this Court. His motion was denied as premature because he had not yet initiated an appeal with the United States Supreme Court by filing a Petition for Certiorari.⁴ That deficiency was cured on March

² It reserved determination of two issues pertaining to the Defendant's sentence - the amount to be forfeited and application of a sentencing enhancement pursuant to the Federal Sentencing Guidelines.

³ Due to the resignation of the judge who had presided over the matter through sentencing, this case was reassigned to the undersigned on February 25, 2009.

⁴ The pertinent provision of the Bail Reform Act, 18 U.S.C. § 3143(b), states that the request for bail pending appeal can be granted only after the petition for certiorari is filed. This makes sense. In order to obtain bail pending appeal, a defendant must show that he has raised substantial question of law or fact that would entitle him to a reversal, new trial or abrogation of his sentence. If the appeal is to the United States Supreme Court, such questions necessarily

20, 2009.⁵

The issue that is now before this Court is whether the Defendant is entitled to bail pursuant to 18 U.S.C. § 3143(b) pending the Supreme Court's determination of his Petition.

I. JURISDICTION

In resolving this issue, the Court exercises jurisdiction pursuant to 18 U.S.C. §§ 3041 and 3143. *United States v. Snyder*, 946 F.2d 1125, 1125 (5th Cir. 1991).

II. MATTERS NOT DETERMINED

The issue presented is narrow. As a consequence, in issuing this Order, the Court does not consider whether the Defendant's conviction was proper, whether the Tenth Circuit's decision to affirm it was correct, whether the United States Supreme Court will grant certiorari to consider the Defendant's appeal,⁶ or what the likely outcome of such appeal might be. Similarly, despite public interest in many aspects of this case, for determination of this issue it is neither necessary, nor appropriate, to consider the identities, characteristics, or personalities of the Defendant, any victim(s) of the offenses, the witness who offered the expert testimony, or the

must be raised in a petition for certiorari. Because any reversal, new trial or abrogation of a defendant's sentence would be limited to questions raised in the petition, the petition must be filed so that its contents can be considered in conjunction with a request for bail.

⁵ For ease of reference, a copy of the Defendant's Petition for Certiorari filed with the United States Supreme Court can be found at Docket #556.

⁶ The Government has argued that this Court should determine the likelihood that the Supreme Court will grant the Defendant's Petition for Certiorari. This is based upon two cases in which a Justice of the Supreme Court was asked to determine a motion for bail pending appeal. See: *McGee v. Alaska*, 463 U.S. 1339 (1983) and *Julian v. United States*, 463 U.S. 1308 (1983). Both of these cases arose before the enactment of the Bail Reform Act. Although each Justice opined as to how many of the other Justices might support granting certiorari, this does not set the standard for review under the Bail Reform Act, and furthermore would require inappropriate speculation by this Court.

trial judge who excluded it.

III. PERTINENT HISTORY

A. The Appeal of Defendant's Conviction to the Tenth Circuit Court of Appeals

In the Tenth Circuit Court of Appeals, the Defendant argued that his conviction should be reversed. The three-judge panel unanimously held that the jury had been properly instructed and that the evidence was sufficient to convict the Defendant. *United States v. Nacchio*, 519 F.3d 1140, 1157-69 (10th Cir. 2008). However, the panel was divided as to whether the trial court had abused its discretion in excluding expert testimony. The majority found that the trial court had abused its discretion by requiring the Defendant to disclose more information than was mandated by Federal Rule of Criminal Procedure 16 and by excluding the proffered expert testimony without holding an evidentiary hearing. *Id.* at 1149-56. The dissent found no abuse of discretion because the Defendant had been given ample opportunity to disclose information necessary to meet the foundational requirements for admission of expert testimony pursuant to Federal Rule of Evidence 702, but had failed to satisfy those requirements. *Id.* at 1170-76 (Holmes, J. dissenting).

Sitting *en banc*, the Tenth Circuit reconsidered only the panel's determination with regard to the exclusion of expert testimony. In its February 25, 2009 decision, a divided Court reversed the panel and affirmed the Defendant's conviction. *United States v. Nacchio*, 555 F.3d 1234, 1259 (10th Cir. 2009). The split in the decision hinged on differing interpretations of the trial court record. The majority found no abuse of discretion by the trial court either in the process it used to determine the admissibility of the Defendant's expert testimony or in its decision to exclude it. *Id.* at 1241-42. It found that the process included disclosure by the

Defendant pursuant to Fed. R. Crim. P. Rule 16 (b)(1)(C), as well as an opportunity to supplement such disclosure with information sufficient to satisfy the foundational requirements for admission of such evidence pursuant to Federal Rule of Evidence 702. *Id.* at 1244-51.

Because the entire process gave the Defendant sufficient notice and opportunity to make a showing sufficient to satisfy the requirements of Rule 702, and the Defendant failed to do so (particularly in failing to disclose the methodology used by the expert), the majority concluded there was no error in excluding the expert's testimony.

The dissenting judges read the trial record differently. They found that the trial court had failed to give the Defendant notice and opportunity to make a showing or proffer regarding the expert's methodology. The dissenters believed that the trial court had improperly based its decision to exclude the expert testimony on the Defendant's Rule 16 disclosure, without giving the Defendant an opportunity to present the necessary Rule 702 evidence at a separate hearing. *Id.* at 1259-73.

In conjunction with affirming the Defendant's conviction, the Circuit Court remanded the case to the original panel to address unresolved issues with regard to calculation of the sentence imposed and asset forfeiture. No mandate has issued.

B. Post-Appeal Proceedings in This Court

Shortly after the Tenth Circuit revoked the Defendant's bail, this Court issued an Order (#528) directing him to report to the institution selected by the Bureau of Prisons to serve his sentence.⁷ After the Tenth Circuit denied his emergency motion for bail, he filed a similar Motion in this Court (#538).

⁷ The reporting date was March 23, 2009.

He also filed a number of other motions: a Motion for New Trial (#532);⁸ a Motion for Postponement of his surrender to the Bureau of Prisons for health reasons (#536, as supplemented at #547); a number of motions to seal documents pertaining to his health (#534, 535); and the subject Motion for Reconsideration (#541), Reply (#546), and Supplement (#556). In all of these pleadings, for a host of differing reasons, the Defendant requested a delay in reporting to prison to serve his sentence.

The Court held an expedited hearing to address the Motion for Postponement. At that hearing, the Defendant announced that his health issue was not as dire as feared, but that he nevertheless desired to remain free on bond until the United States Supreme Court determined his Petition for Certiorari. Conditioned upon the Defendant filing his Petition on March 20, 2009, this Court vacated its Order to report to the Bureau of Prisons until further order.

IV. ANALYSIS

The Defendant seeks to remain free on bail pending the determination of his Petition for Certiorari by the United States Supreme Court. The Government opposes this request.

Once a Defendant has been convicted and sentenced, he has no presumptive right to remain free on bail. The Court can grant bail only if the Defendant satisfies the requirements of

18 U.S.C. § 3143(b).⁹ The Defendant must show that:

⁸ This is premised upon new information obtained in a deposition in a related civil case.

⁹ The statute requires that a judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –

- (1) he is not likely to flee or pose a danger to the community; **and**
- (2) his appeal is not for the purpose of delay; **and**
- (3) his appeal raises a substantial question of law or fact likely to result in reversal, a new trial, or re-sentencing that would not include a period of incarceration.

By the terms of the statute, the Defendant must establish the first requirement by clear and convincing evidence. In accordance with case law, the Defendant must establish the second and third requirements by a preponderance of the evidence. *See United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985).

A. Is There a Risk of Flight or Danger to the Community?

In this case, the parties agree that Defendant is not likely to flee and does not pose a danger to the community. Accordingly, this requirement is satisfied.

B. Is the Appeal Brought for the Purpose of Delay?

As to the second requirement, there is some question. The Government does not directly argue that the Defendant's current appeal is brought for the purpose of delay, but implies that the appeal is just part of a strategy designed to delay the time he must report to prison. Even without an express argument by the Government, the Defendant has the burden of proof on this

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community . . . and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

issue. He must show that it is more likely than not that his appeal to the United States Supreme Court is **not** for purposes of delay.

The procedural history of this case lends support to the Government's belief. The Defendant has been free on bail since his arraignment on December 20, 2005. After his conviction was affirmed, the Defendant filed no motions until this Court issued its Order requiring the Defendant to report to the institution selected by the Bureau of Prisons. He then sought bail first in the Tenth Circuit, then in this Court. He consulted his doctor about a "suspicious growth" on his leg that the doctor had been monitoring over several months, and he requested a delay in his reporting date to allow for treatment and convalescence. Indeed, with the exception of his Motion for New Trial, all of the Defendant's requests have all been directed at delaying his surrender to the Bureau of Prisons.

Unfortunately, by virtue of the terms of the Bail Reform Act, the Defendant's current request for bail was dependent upon the filing of his Petition. In order to frame the issue with regard to bail, the Defendant shortened the time for filing of his Petition from the 90 days accorded him by the Supreme Court Rules. In addition, he has repeatedly asked that if the instant Motion is denied by this Court, it extend some sort of stay in his reporting to prison to allow him to appeal such ruling to the Tenth Circuit and United States Supreme Court. The justification he offers is that such extra time will allow him to "avoid[] the risk that [he] could surrender to the custody of the Bureau of Prisons and then be granted bail a few days later."

On the question of delay, the Defendant offers neither an affirmative statement that the appeal is not interposed for purpose of delay, nor any meaningful argument. All the Defendant says is that the Government did not contend that delay was the purpose of his appeal to the Tenth

Circuit when he requested bail in 2007.

Under a preponderance of evidence standard, the Defendant's showing is insufficient. This finding alone would justify the denial of the Defendant's Motion, but in deference to the fact that the Government did not expressly raise the issue, the Court will proceed to consider the third requirement for bail.

C. Are There Substantial Questions of Law or Fact That, if Resolved in Favor of the Defendant, Would Likely Result in Reversal, New Trial, or Abrogation of the Defendant's Sentence?

In evaluating this requirement, the Court engages in a two-step inquiry. First, it must determine whether the Defendant's Petition for Certiorari raises a "substantial question of law or fact." 18 U.S.C. § 3143(b) does not define what constitutes a substantial question of law or fact, therefore circuit courts have supplied a variety of definitions.¹⁰ The instructive case in the Tenth Circuit is *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985). It teaches that a "substantial question" is more than non-frivolous; it is a close question or one that could be determined the other way.

The unusual procedural course of post-appellate proceedings in this case has resulted in complications that make ascertaining whether there is a substantial question of law or fact a more difficult exercise. In ordinary circumstances, a defendant would flesh out the arguments in the Petition for Certiorari first, and then file a Motion for Bail in the trial court that highlights the

¹⁰ Several circuits define it as a "close question" or "one that very well might be decided the other way." See *United States v Eaken*, 995 F2d 740, 741 (7th Cir 1993); *United States v Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991); *United States v. Giancola*, 754 F2d 898, 901(11th Cir. 1985). The Ninth and Third Circuits use a "fairly debatable" criterion. See: *United States v. Handy*, 761 F2d 1279, 1281-83 (9th cir 1985); *United States Montoya*, 908 F2d 450, 450-51 (9th Cir. 1990); *United States v. Smith*, 793 F.2d 85, 89-90 (3d Cir. 1986).

substantial questions raised by the Petition. Here, however, the Defendant filed a Motion for Bail that anticipated certain arguments being made in the Petition, then drafted a Petition that, unfortunately, raises issues that, to some degree, differ from those anticipated in the Motion for Bail.¹¹ In addition, rather than progressively refining the arguments to a precise, focused point as the case proceeded through each layer of the appeals process, the Defendant's position has shifted laterally and, in some respects, even broadened. At this point, some of the newly-formed arguments raised in the Petition appear to be strategically crafted to create the appearance of circuit split on issues of law with a hope of attracting the interest of the Supreme Court. But in doing so, the Defendant has been forced to mischaracterize the holdings and reasoning of the

¹¹For example, in the Motion, the Defendant contends that the following substantial questions are presented: (1) with regard to the exclusion of the expert testimony, the trial court's "erroneous understanding of Rule 16" and the *en banc* Court's "misunderstanding of the burdens of proof on a motion in limine" operated to "nullif[y] Rule 16 and impose[] civil disclosure burdens on criminal defendants"; (2) with regard to jury instructions on the element of "materiality" of undisclosed information, the Tenth Circuit's "standard for assessing the materiality of interim information portending future results" "squarely conflicts with the materiality standards applied in other circuits"; (3) the Circuit erred in rejecting the Defendant's arguments that a jury instruction on "reasonable basis principles" was required; (4) the jury instructions given were patently defective, insofar as the Circuit "held" that the materiality instruction was "not particularly informative" and it "held" that the "reasonable basis instruction was confusingly worded and did not accurately state the law"; and (5) that "summary reversal is appropriate" because the trial court "erroneous belief that Nacchio had committed an egregious Rule 16 violation" infected its subsequent exercise of discretion.

In contrast, the arguments actually raised in the Petition are: (1) "Whether the defendant is entitled to acquittal or new trial because the Tenth Circuit, in conflict with the standards applied in other circuits, erred by upholding the jury instructions bearing on the materiality of the type of information at issue, and by holding that there was sufficient evidence that the defendant failed to disclose material information and knew it"; (2) "Whether the judgment must be reversed and remanded for a new trial because the Tenth Circuit approved the use of impermissible procedures for exclusion of expert testimony under Rule 702 that conflict with decisions of other circuits"; and (3) "Whether the Tenth Circuit's decision should be summarily reversed because it misapplied decisions of the Court, mischaracterized the district court's reasoning, failed to resolve all the issues presented, and held that Nacchio failed to address an issue that was a principal focus of his brief."

Tenth Circuit panel and *en banc* decisions and to elevate *dicta* in cases from other circuit courts.

For purposes of this ruling, the Court focuses only on those questions that are squarely presented in both the Motion and in the Petition. It is axiomatic that, because the Supreme Court will only consider arguments raised in the Petition, a question presented in the Motion but not found in the Petition cannot result in reversal of the conviction or a new trial. At the same time, a question that appears in the Petition, but which is not discussed in the Defendant's Motion for Bail is not proper grist for consideration here.

With the understanding that the Court can only address those particular questions presented in both the Motion and Petition, the Court finds that there are three that the Defendant contends are substantial and support the granting of bail: (1) that the Tenth Circuit erred in affirming the definition of the materiality used by the trial court in instructing the jury; (2) that the Tenth Circuit erred with regard to the standard it used in evaluating certain jury instructions; and (3) and that the Tenth Circuit erred in affirming the exclusion of the Defendant's expert testimony.

The second step in assessing a request for bail pending appeal requires the Court to determine whether the resolution of a substantial question would be likely to result in an outcome of reversal, a new trial, or abrogation of a prison sentence. *Id.* In essence, a defendant must show that if one or more of the substantial questions raised were ultimately determined in his favor, the likely result would be a reversal of the conviction, a grant of a new trial on all counts of conviction for which a sentence of imprisonment has been imposed, or a re-sentencing that would result only in probation, a fine, or some other non-incarceration punishment. *Id.* at 953. In this regard, the Defendant's motion is effectively silent. Beyond arguing the

substantiality of the legal and factual issues, in no instance does the Defendant proceed to analyze the likely consequences that would flow from a ruling in his favor; rather, he appears to simply assume that victory on the legal question will entitle him to reversal of the conviction and/or a new trial. Such confidence is not always warranted, as some errors committed by a trial court are subject to “harmless error” analysis. The Defendant’s failure to indicate which errors require reversal *per se* and which errors merely trigger harmless error review (much less his failure to articulate why he would be able to demonstrate that a given error was indeed harmful) is a persistent defect in his Motion that would hobble even a successful demonstration of a substantial question of law or fact.

D. The Tenth Circuit Erred in Affirming the Trial Court’s Definition of Materiality

In his Petition, the Defendant argues that the Tenth Circuit affirmed the trial court’s use of a definition of the term “materiality” that is in conflict with that applied in the First Circuit. The Defendant argued to the Tenth Circuit, and argues again now, that decisions from the First Circuit provide for a different definition of materiality in cases involving stock trades based on inside information. The Government responds that a well-settled definition of materiality was given in this case and the cases that Defendant relies upon do not deviate from it. A brief review of the proceedings in the trial court and the actual determination by the Tenth Circuit is instructive.

1. Trial Court Proceedings

The Defendant was charged with and convicted of insider trading - trading of stock by a corporate insider, based on **material** information that is not available to the public. *United States v. O’Hagan*, 521 U.S. 642, 651-52 (1997) (emphasis added). In this case, Defendant was

accused of trading Qwest securities based, in part, on forward-looking projections contained in an internal document that was not available to the public. The trial court instructed the jury with the following definition of “materiality:”

for you to find a material matter or a material omission, the Government must prove beyond a reasonable doubt that the matter misstated or the matter omitted was of such importance that it could reasonably be expected to cause a person to act or not to act with respect to the securities transaction at issue. Information may be material even if it relates not to past events, but to forecasts and forward-looking statements, so long as a reasonable investor would consider it important in deciding to act or not to act with respect to the securities transaction at issue. The securities fraud statute under which these charges are brought is concerned only with such material misstatements or such material omissions and does not cover minor or meaningless or unimportant matters or omissions. So the test is whether the matter misstated or the matter omitted was of such importance that it could reasonably be expected to cause a person to act or not to act with respect to the securities transaction at issue.

Docket # 480. The last sentence of this instruction iterates the definition of materiality that the Supreme Court set forth in *Basic v. Levinson*, 485 U.S. 224, 231 (1988).¹²

2. Appellate Proceedings

In his appeal to the Tenth Circuit, the Defendant argued that the trial court should not have used the *Basic* definition of materiality. Instead, he contended a different definition should have been used: that as a matter of law, forward-looking projections can never be material. Had

¹² In *Basic*, the Supreme Court explained that the “standard of materiality under the securities laws, is that ‘an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.’” 485 U.S. 224, 231 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)). The definition is fact-specific, and turns upon “the significance the reasonable investor would place on the withheld or misrepresented information.” *Id.* at 240.

that definition been used, the Defendant contended the evidence would have been insufficient to support a conviction.

The Defendant argued to the Tenth Circuit, as he does here, that this limitation on the *Basic* definition of “materiality” had been adopted in two First Circuit cases, *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996) and *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir 1996). Although these cases involved civil claims of securities fraud based upon allegedly misleading statements made to the public, rather than claims involving insider trading, the opinions included *dicta* with regard to the materiality of forward-looking projections. The Defendant argued that such comments by the First Circuit should have been incorporated into the instruction given on materiality in this case. The Tenth Circuit panel here found that the *Basic* definition of materiality given by the trial court gave was legally correct, and that based on this definition, the evidence was sufficient to support a conviction. The *en banc* Court did not review this determination.

3. Is there a Substantial Question?

The first difficulty with Defendant’s contention that there is a substantial question on the issue of materiality is that neither the Tenth Circuit’s holding nor the import of the First Circuit cases upon which he relies are accurately characterized.

In his Petition, the Defendant states that “The Tenth Circuit erroneously held that [*Shaw* and *Glassman*] appl[y] only in false statement cases” (Petition at 21) and that “The Tenth Circuit’s holding conflicts with other circuits” (Petition at 17). The Tenth Circuit did not so

hold. The Tenth Circuit held¹³ only that the materiality instruction given in this case stated the law correctly, 519 F.3d at 1159-60.

The Defendant also overstates the significance of the First Circuit cases upon which he relies. As noted, *Shaw* and *Glassman* both were civil actions alleging securities fraud by omission or misrepresentation of statements to the public. In both *Shaw* and *Glassman*, the First Circuit was presented with the issue of whether adequate allegations were asserted in a complaint. In neither case did the First Circuit purport to express or adopt a new definition of “materiality” that differed from the *Basic* rule.

In *Shaw*, the First Circuit affirmed in part and reversed in part the trial court’s dismissal of civil securities fraud claims, finding that a handful of alleged misrepresentations were actionable. The comments of the court with regard to materiality arise in the context of the issue concerning the a security issuer’s failure to disclose that revenue figures for the fiscal quarter in progress were lagging behind expectations and that the company was projecting a significant loss for the quarter. *Id.* at 1207. Although a footnote suggests that the court distinguished between “hard” information and “soft” information (which included “projections”),¹⁴ the First

¹³The trial court addressed and rejected two alternative arguments by the Defendant regarding the materiality instruction, although neither issue is essential to the court’s holding that the instructions actually given were correct. The court deemed a supplemental jury instruction on the materiality of forward-looking statements proffered by the Defendant to be “simply confusing” with “nonsensical syntax,” 519 F.3d at 1160, and rejected an argument by the Defendant that an SEC rule providing “a safe harbor for forward-looking statements filed with the SEC,” applicable to securities fraud actions, should be extended to apply in insider trading cases as well. The court rejected the invitation to expand the rule, finding that an insider’s obligations to avoid trading on non-private information is qualitatively different than the duty of a speaker to avoid making false statement. *Id.* at 1160-61. Once again, neither of these issues constitute the specific holding of the court on the materiality issue.

¹⁴ *Id.* at 1211 n. 21.

Circuit ultimately rejected the defendant's argument that because an issuer is never required to disclose forward-looking projections and forecasts, such are per se immaterial. *Id.* at 1209-10. Without speaking to the validity of the predicate assumption (*i.e.* that issues are never required to disclose forward-looking statements), the Court simply noted that a bright-line test deeming a particular category of information to be material or immaterial as a matter of law would be inconsistent with the flexibility of the *Basic* standard. *Id.* at 1210. Because the *Shaw* court was not called upon to determine, and indeed did not purport to determine, whether forward-looking statements are immaterial as a matter of law, comments to that effect (which this Court does not necessarily find in *Shaw*) must be regarded as *dicta*. By no means does *Shaw* announce a new rule of law with regard to the materiality of forward-looking information; if anything, it merely affirms that the materiality of present information that augurs future events is analyzed under the *Basic* standard. Thus, there is no "circuit split" between any rule established in *Shaw* and the instructions given to the jury here.

Glassman addressed the sufficiency of allegations in a complaint in a civil securities fraud action directed at the accuracy and completeness of information disclosed to the public in conjunction with an initial public offering. The plaintiff alleged that the issuer should have disclosed the fact that mid-quarter revenues were below expectations, and the defendant argued that forward-looking projections were immaterial as a matter of law. 90 F.3d at 623-24. The First Circuit affirmed the dismissal of the claims, explaining that "deviations from internal forecasts, without more, do not produce a duty to disclose." *Id.* at 631. But the Court's decision was not based on the simple fact that the information involved forecasts and projections – had it done so, it would have run afoul of its prior decision in *Shaw*. Rather, the Court explained that

the deviation from projections was not material because of other circumstances – *i.e.* that the quarter was only half-finished, that the company typically experienced an upturn in business in the latter half of each quarter – which made the forward-looking projections unreliable and thus, immaterial. *Id.* at 631-32. *Glassman* relies heavily on language in *Shaw* that deprecates the materiality of projections, but it also acknowledges language from *Shaw* suggesting that, where their predictive value is high enough, forward-looking statements may be considered material. *Id.* at 632 & n. 23. As with *Shaw*, no rule that forward-looking statements can never be material is announced in *Glassman*.

The *Basic* definition of materiality remains the current legal standard.¹⁵ It was applied by the Tenth Circuit in this case and by the First Circuit, explicitly in *Shaw* and implicitly in *Glassman*. The Defendant raises interesting theoretical questions as to whether a different standard should be applied in with regard to forward-looking projections in insider trading cases, especially criminal actions. However, there is no split of authority or contrary precedent which gives rise a close question as to whether the Tenth Circuit’s holding in this case was correct.

Accordingly, the Defendant has not demonstrated a substantial question with regard to the materiality instruction. Moreover, as discussed generally above, he has made no showing that any error with regard to that instruction is likely to result in a reversal, new trial or abrogation of his sentence.

¹⁵ The Defendant also cites to cases from the Seventh and Ninth Circuits, but all demonstrate application of the *Basic* definition of materiality. *See Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989) (applying *Basic* definition); *accord Panter v. Marshall Field & Co.*, 646 F.2d 271, 289 (7th Cir. 1981); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 (9th Cir. 1980).

E. The Tenth Circuit Erred in the Standard it Used to Evaluate the Jury Instructions

The Defendant argues that the Tenth Circuit applied an incorrect standard in evaluating his challenges to the trial court's jury instructions, both with regard to his challenge to the materiality instruction as well as an instruction proffered by the Defendant but rejected by the trial court. Again, a brief review of the record is helpful in determining whether a substantial question is presented.

1. Trial Court and Appellate Proceedings

During the charging conference, the Defendant objected to the materiality instruction and sought to include information on forward-looking statements, cautionary information, and warnings (#469). The trial court overruled the objections. The Defendant also tendered an instruction addressing the "reasonable basis" exception to civil liability for making misleading statements to the public. The trial court declined the tendered instruction.

In his appeal, the Defendant contended that the materiality instruction was not sufficient because it did not contain the requested language that the Defendant believed was necessary to clarify the concept of materiality. Defendant also argued that the excluded "reasonable basis" instruction was necessary to instruct the jury properly.

The Circuit Court reviewed both instructions to determine whether they, in conjunction with all of the other instructions, "accurately informed the jury of the governing law," as required by prior circuit precedent in *United States v. McClatchey*, 217 F.3d 823, 834 (10th Cir. 2000) and *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1262 (10th Cir. 2000). 519 F.3d at 1158-59. Finding that the materiality instruction set forth the Supreme Court's controlling definition in *Basic*, the Circuit concluded that the instruction was "not legally incorrect." *Id.* at

1159, 1162. With regard to the proffered instruction, the panel determined that it addressed civil liability with regard to claims that public statements were misleading, and therefore it was not an accurate statement of the law for a case such as this, involving insider trading based upon information that was not made public. *Id.* at 1159, citing *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006). The *en banc* Court did not address this issue.

2. Is There a Substantial Question?

The Defendant argues that the Tenth Circuit used the wrong test in evaluating the “materiality” and proffered “reasonable basis” instructions. He contends that instead of determining whether they “affirmatively misstated the law,” the Tenth Circuit should have determined whether they “adequately advised the jury.” The Defendant directs the Court to opinions from the Supreme Court, as well as the First, Second, Third, Fourth, Sixth, and Ninth Circuits, which he contends stand for the proposition that appellate courts must ensure that instructions given by trial courts are adequate to explain the law to juries, not merely correct statements of law.¹⁶

Again, the Defendant’s argument is premised upon an inaccurate statement of what the Tenth Circuit did. In the Petition, the Defendant states that “The Tenth Circuit acknowledges

¹⁶ Some of the opinions cited actually stand for other propositions - that no omission may be made from an instruction that shifts the burden of proof from the government to a defendant, *see United States v. Dotson*, 895 F.2d 263, 264 (6th Cir. 1990), and that judges must adjust instructions to the facts of a particular case, *see United States v. Holley*, 502 F.2d 273, 276-77 (4th Cir. 1974). However, others stand for the proposition stated. *See, e.g. United States v. Park*, 421 U.S. 658, 675 (1975) (suggesting that a proper instruction must “contain[] an adequate statement of the law to guide the jury’s determination”); *accord United States v. Gordon*, 290 F.3d 539, 545 (3d Cir. 2002); *United States v. Escobar-De Jesus*, 187 F.3d 148, 164 (1st Cir. 1999); *United States v. Marsh*, 894 F.2d 1035, 1040 (9th Cir. 1990); *United States v. Hastings*, 918 F.2d 369, 373 (2d Cir. 1990).

that the skeletal materiality instruction was ‘not particularly informative,’ but **held** there could be no reversible error unless it affirmatively ‘misstated the law.’” (Emphasis added.) The Tenth Circuit did not **hold** that there could be no error unless the instructions misstated the law. Rather, it found on this record that because the materiality instruction given by the trial court was legally correct, the trial court did not err in giving it, and that because the proffered “reasonable basis” instruction was not an accurate statement of the law in this context, the trial court did not err in rejecting it. 519 F.3d at 1159. Nothing in the Circuit’s decision indicates that it determined that either of the instructions proposed by the Defendant were necessary to “adequately advise the jury,” and thus, nothing in the Circuit’s holding warrants an inference that it refused to apply that standard.

To the contrary, these determinations made as part of the Circuit’s consideration of the instructions as a whole. The Court announced quite plainly the standard of review that it employed: “We review the instructions as a whole *de novo* to determine whether they accurately informed the jury of the governing law.” 519 F.3d at 1158-59 (internal quotes omitted). Indeed, among its reasons for affirming the rejection of the proffered instruction, the Circuit agreed with the trial court that, even if the proffered instruction was an accurate statement of the law, it was nevertheless properly excluded because it would have caused the materiality instruction to become misleading. 519 F.3d at 1161. The Circuit used precisely the same analytical framework as that employed in other circuits. Thus, there is no substantial question with regard to the analytical standard used.¹⁷

¹⁷The Court notes that in his Motion, the Defendant raised another issue namely that the trial court should have given the reasonable basis instruction and that the Tenth Circuit should have reversed for its failure to do so. This issue was not, however, preserved and asserted in the

Moreover, as noted earlier, the Defendant has made no showing as to the likelihood that this question, if resolved in favor of the Defendant, would result in a reversal, new trial or abrogation of his sentence. Such a showing is particularly important here, insofar as any legal error in applying the wrong standard for evaluating the instructions would likely be mitigated by the Circuit's (unchallenged) determinations that neither of the instructions urged by the Defendant were both legally correct and non-misleading. Thus, even if the Defendant demonstrated a substantial question as to the standard used by the Circuit in evaluating the jury instructions, he has not carried his burden of showing that the likely consequence of resolution in his favor would result in him avoiding his sentence of incarceration.

F. The Tenth Circuit Erred in Affirming the Exclusion of the Defendant's Expert Testimony

The Defendant does not directly contend that the Circuit erred in holding that the trial court did not abuse its discretion in excluding the Defendant's expert testimony. Instead, he makes several arguments with regard to defects in the process used by the trial court. First, he argues that the process improperly shifted to the Defendant the burden undertaken by the Government in its Motion in Limine to exclude the evidence. Second, he contends that the process did not create a sufficient record for a determination of the admissibility of the expert testimony. Finally, he argues that the Circuit's decision "transforms criminal expert practice" because it requires criminal defendants to make Rule 16 disclosures sufficient to satisfy Rule 702. The Government responds that the Defendant has shown no substantial question. In addition, it contends that if there was a reversal on this issue, it would not result in reversal or

Defendant's Petition, and therefore is not considered here.

new trial, but instead in a remand for an evidentiary hearing to determine whether the trial court's error in excluding the expert testimony was harmless.

In evaluating whether there is a substantial question, it is helpful to refer to the historical context with regard to the law and procedure applicable to admissibility of expert testimony. Then, it is important to understand how the issue arose and was handled in the trial court, and ultimately it is critical to consider the precise determination that the Tenth Circuit made.

1. Federal Rule of Evidence 702

The foundational requirements for admission of expert opinion evidence are set forth in Federal Rule of Evidence 702. It provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The current version of Rule 702, which became effective December 1, 2000, was adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and subsequent cases applying it, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137(1999).

The prior version of Rule 702¹⁸ was “expert centric.” Once a witness was qualified by knowledge, skill, experience, training, or education, he or she could express any opinion falling within the scope of his or her expertise. From this requirement arose the practice of presenting

¹⁸ Rule 702 read in full as follows: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

an expert at trial, then providing an opportunity for *voir dire* as to the expert's qualifications and for an objection. A court then either received the expert and defined the scope of expertise, or rejected the expert. Thus, under the old Rule 702, a party needed only to establish that an expert had sufficient qualifications in a particular subject area in order to have the expert's opinion testimony admitted.

In *Daubert*, the Supreme Court recognized that simply because a witness had particular skill, knowledge or experience did not mean that the witness's testimony was reliable. Too often, it concluded, witnesses with knowledge or expertise areas without scientific discipline ("junk science") were allowed to offer opinions to juries. Therefore, the Court charged trial courts with the responsibility of acting as gatekeepers to exclude unreliable testimony. To assess the reliability of scientific opinion testimony, trial courts were instructed to consider a non-exclusive list of factors.¹⁹ In *Kumho Tire*, the Court expanded the application of the *Daubert*

¹⁹ The *Daubert* Court enumerated five factors: (1) whether the expert's technique or theory has been or can be tested; (2) whether the technique or theory has been subject to peer review and publication; (3) whether there is a known or potential rate of error of the technique or theory when applied; (4) whether standards and controls for the technique or theory exist and are used; and (5) whether the technique has been accepted in the scientific community. Subsequent cases have broadened the inquiry and enumerated additional factors, including: (1) whether the expert employed the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life; (2) whether the expert proposes to testify about matters growing naturally and directly out of research he or she conducted independent of the litigation or whether the expert developed opinions expressly for purposes of testifying; (3) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion (*i.e.*, whether there is too great an analytical gap between the data and the opinion proffered); (4) whether the expert adequately accounted for obvious alternative explanations; (5) whether the expert was as careful as he or she would be in regular professional work outside of paid litigation consulting; (6) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give; (7) the extensiveness of the expert's credentials; (8) the expert's ability to articulate a process that he or she applied; (9) whether the industry adheres to a particular practice; and (10) whether the opinion consists of summary conclusions or broad generalizations based on perfunctory analysis with no supporting specifics.

factors to all expert testimony. It also expressly left the procedure to be used to determine admissibility to the discretion of trial courts. 526 U.S. at 141-42. The combination of *Daubert* and *Kumho Tire* shifted the focus of a trial court's inquiry from exclusive consideration of an expert's qualifications to determination of the reliability of the witness's discipline and practice. In that regard, it made the determination of admissibility of expert testimony more "discipline centric."

The current version of Rule 702 reflects another evolutionary step. The detailed requirements of Rule 702 rule further reduces the importance of "who" expresses the opinion, and instead direct courts to consider "how" the opinion was derived. Put differently, the new Rule 702 is "opinion centric." The rule sets out four foundational requirements: (1) that the witness have sufficient knowledge, skill, experience, training or education; (2) that the witness used to reliable principles and methods to derive the opinion or as a basis for his or her testimony; (3) that the witness used sufficient facts and data (as required by the principles or methods); and (4) that the witness reliably applied the principles and methods to the facts of the case. The burden of establishing these foundational components is upon the party that proffers the opinion. *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.1 (10th Cir. 2001); *see also* Fed. R. Evid. 702 advisory committee's note.

Rule 702 does not, however, describe the process by which admissibility of expert testimony is determined. This is governed by other Federal Rules of Evidence, notably Rules

See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1993); *Hynes v. Energy West, Inc.*, 211 F.3d 1193 (10th Cir. 2000); Fed. R. Evid. 702 advisory committee's note.

103 and 104.²⁰ It also does not specify what, if any, disclosures must be made by the proponent of the evidence prior to any determination. These are governed by Federal Rule of Civil Procedure 26²¹ in civil cases and Federal Rule of Criminal Procedure 16(b)(1)(C)²² in criminal cases. Interestingly, neither Fed. R. Civ. P. 26 nor Fed. R. Crim. P. 16 have been amended since the amendment of Rule 702.

In the eight years since the current version of Rule 702 became effective, the law and practice relative to the admission of expert opinion evidence has been evolving. Courts and attorneys have experimented²³ with procedures to implement Rule 702. These efforts, in

²⁰ Rule 104 sets out the procedures applicable to “preliminary matters” which include the determination of the admissibility of evidence. As noted in Comments to the rule, the applicability of a particular rule of evidence turns upon the existence of a fact or condition. This rule allows courts to conduct hearings to determine such facts and conditions. The determination of whether Rule 702’s requirements are satisfied may involve such fact finding. Courts are accorded broad latitude as to the procedures used to make admissibility determinations under Rule 104. *See, e.g., United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122-23 (10th Cir. 2006). Rule 103 sets out the protocol for preserving a record relative the admission or exclusion of evidence.

²¹In pertinent part, civil litigants must disclose the identity of their expert witnesses and provide written reports from the expert containing a statement of the expert’s opinions, his or her qualifications, and the “data or other information considered by the expert” in forming the opinions. Fed. R. Civ. P. 26(a)(2)(A),(B).

²² In pertinent part, Fed. R. Crim. P. 16 requires criminal defendants to “give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial. . . . This summary must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Interestingly, neither Fed. R. Civ. P. 26 nor Fed. R. Crim. P. 16 has been amended to reflect the current requirements of Rule 702.

²³ This has created wide disparity in practice. For example, in the Tenth Circuit, trial courts may either conduct a hearing or resolve Rule 702 issues by other means. *See, e.g., United States v. Benally*, 541 F.3d 990, 993 (10th Cir. 2008); *United States v. Blake*, 284 F. App’x. 530, 540 (10th Cir. 2008); *United States v. Sutherland*, 191 F. App’x. 737, 741 (10th Cir. 2006). On this Court (with five active and four senior judges), I am aware of only three judges who have conducted Rule 702 evidentiary hearings. As one, I have presided over 30 days of Rule 702

conjunction with the fundamental changes caused by *Daubert* and amendment of Rule 702 and by the interplay with other procedural rules have given rise to much confusion.

This case demonstrates such confusion²⁴ and reflects the continuing evolution in legal thought as to how courts can best assess and determine the admissibility of expert opinion evidence. Because this area of evidentiary law is both unsettled and evolving, many interesting

hearings in the last four years. My procedures and a form motion to request a hearing are posted on the Court website.

http://www.cod.uscourts.gov/Documents/Judges/MSK/msk_702procedures.pdf Much of the time spent in such hearings is devoted to developing a common understanding of what is an opinion, a methodology, or an assumption/fact. During these hearings, reliance upon an expert's report (Rule 26) or disclosure (Rule 16) has not often proven helpful because these are not drafted to address the requirements of Rule 702.

A very homely, and admittedly imperfect, analogy that I routinely use is that an opinion is the witness's end product. It is like a "cake." For it to be admissible, there must be a "baker" (who has the requisite skill, knowledge, training and education), a "recipe that reliably results in a cake" (a reliable method or principle), the baker must reliably follow the recipe and must use the amounts of ingredients (facts and data) required by it. The Rule 702 hearing does not address what flavor the cake is, whether it is tasty, whether it rose high enough, or whether it is frosted or decorated. In other words, issues of whether a jury might want to eat the cake are issues of the weight to be given to the opinion.

²⁴ For example, although Rule 702 clearly governed the admission of the expert witness testimony in this case, in all of the orders and opinions in this case, there is only one reference to its terms and provisions. Without apparent recognition of any difference between Rule 702 and *Daubert*, the parties and courts have referred to the admissibility of expert opinion testimony as a "*Daubert*" determination or process. In addition, the parties and opinions repeatedly refer to the exclusion of Defendant's expert witness, rather than his opinions. Such references are technically inaccurate. The witness was not "excluded"; he testified as to factual matters. Only his expert opinions were excluded. But these slips harken back to the former practice under the old Rule 702 when the determination of the admissibility of expert opinion testimony rested solely on "who" the witness was. Under the old rule, witnesses, rather than opinions, were excluded. Finally, the briefs, petition, and the opinions are all salted with references to the expert witness's credentials, especially the many times that he testified in other matters. Because current Rule 702 predominantly focuses upon "how" an opinion is derived, the fact that a witness provided expert opinion testimony in another or in many matters is usually irrelevant.

issues have arisen²⁵ and will continue to arise. But an interesting, and even important issue is not necessarily a substantial question in the context of this case.

2. The Rule 702 Issue in the Trial Court.

During the trial, Defendant announced his intention to present a expert testimony regarding, *inter alia*, the market for stock generally and Qwest stock specifically, and analysis of the stock trades that officers of other companies were making at the time of the transactions at issue. In accordance with Fed. R. Crim. P. 16 (b)(1)(C), the Defendant submitted a seven-paragraph summary of the proffered opinions. In response, the Government filed a motion seeking a more detailed disclosure (#296). In it, the Government argued that Defendant's disclosure did not satisfy the requirements of Rule 16 in that it did not adequately describe the expert's opinions or provide bases therefor. In addition, the Government argued that the disclosure did not satisfy the requirements of Federal Rule of Evidence 401, 403, 602, 702, or 704. The trial court agreed, finding that Defendant: (1) had "offer[ed] no bases or reasons whatsoever" for the opinions offered, as required by Rule 16; (2) had not adequately clarified if the expert's testimony would concern facts or opinions, as required by Federal Rule of Evidence 602; (3) had failed to establish that the expert was qualified to testify on the topics presented, as required by Federal Rule of Evidence 702; (4) had failed to the establish that the testimony would be relevant or helpful to the jury and not confusing, as required by Federal Rules of Evidence 401, 403, and 702; and (5) had failed to clarify whether the testimony would concern Defendant's mental state and, thereby, potentially violate Federal Rule of Evidence 704. The

²⁵ For the aid of practitioners, I have set out my current understanding about how Rule 702 works in *United States v. Crabbe*, 556 F. Supp. 2d 1217 (D. Colo. 2008).

trial court ordered Defendant to “produce an expert disclosure compliant with the federal rules described” in the order (#297). The order did not outline precisely what should be submitted, but the Defendant did not seek clarification.

The Defendant then produced a ten-page disclosure, to which the Government responded by filing a sixty-three page motion in limine (#334). In it, the Government argued that the Defendant still had not satisfied the requirements of Rule 16 or Federal Rules of Evidence 403, 602, or 702. Specifically, the Government complained that: (1) the testimony consisted of a recitation of facts not within the witness’s personal knowledge; (2) the testimony was not relevant and would not be helpful to the jury; (3) the expert was not adequately qualified to give the proposed testimony; (4) the facts upon which the expert relied in arriving at his opinion were not facts a reasonable expert would rely upon; and (5) Defendant did not establish that the expert used a reliable methodology in reaching his opinions. Nine pages of the argument addressed Defendant’s purported failure to satisfy Rule 702, noting repeatedly that the Defendant had presented “no indication” that the expert had “reached the opinion by applying reliable principles and methods to an adequate and correct set of facts.” The Defendant’s response included only brief discussion of Rule 702 and a conclusory statement that the expert’s opinions to be offered “[were] proper under Rule 702” (#340). The response provided no indication, either specifically or by proffer, of the methodology or principles used, how they were applied, or what facts and data was considered by the witness in formulating his opinions.

The trial court offered no opportunity for argument, and neither party requested an evidentiary hearing. In an oral ruling, the trial court granted the Government’s motion in limine finding “egregious” deficiencies under the Federal Rules. It excluded the expert opinion

testimony on a number of rationales, “most convincingly [that] Defendant had] made no attempt to comply with Rule 702 or *Daubert* and establish that either the expert’s testimony was ‘the product of reliable principles and methods’ or that the expert had ‘applied principles and methods reliably in this case.’” The trial court found the Defendant’s representations that the expert had “completed extensive review of SEC filings, press releases and other financial data and applied his academic study and professional experience in economics and the public market to formulate opinions” inadequate under Rule 702, which requires that a witness who bases his opinions upon knowledge and experience to “explain how that experience led to the conclusion reached, why the experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts in this case.” The trial court also questioned whether the testimony would be relevant or helpful to the jury under either Rule 702 or 403, and noted that many of the proffered opinions were statements of fact under Rule 602. After the ruling was made, Defendant’s counsel asked the trial court to be heard on the issue, but the trial court refused. Proceedings resumed and the expert witness was allowed to give factual summary testimony only.

3. The Tenth Circuit’s Determination with Regard to the Trial Court’s Rule 702 Decision

As noted, the three-judge panel determined, by split decision, that the trial court abused its discretion by determining the admissibility of the expert testimony based solely upon the Rule 16 disclosure and without allowing the Defendant an opportunity for an evidentiary hearing in which it could present the expert witness and the Government could engage in *voir dire*.

Sitting *en banc*, the Court was also divided as to this issue. Its division was based upon differing interpretations of the trial court record. The majority found that the trial court did not

exclude Defendant's expert testimony as a sanction for failure to make an adequate disclosure pursuant to Rule 16, but instead as a substantive determination under Rule 702 based upon all disclosures the Defendant made. 555 F.3d at 1242 & n.7. The majority noted that the trial court gave the Defendant three days to supplement his initial Rule 16 disclosure, which he did. In the supplement, he disclosed that the witness had conducted a "study of the Questioned Sales in relation to various benchmarks and other relevant criteria" and that he had "analyzed Qwest's guidance, its actual stock performance and reaction from the investment community; Qwest's guidance history compared to the guidance history of other telecommunications firms; and various facets of Qwest's revenue from indefeasible rights of use." It was to this disclosure that the Government filed its lengthy objection contending, among other things, that an inadequate showing had been made as to the witness's methodology and its reliability. To the Government's arguments, the Defendant filed a seven page response stating a conclusion that the witness would opine on "specialized knowledge as contemplated under Rule 702, which would assist the trier of fact" and that the witness had undertaken "extensive review" to formulate his opinions. Given this lengthy history, the majority found that the Defendant had sufficient opportunity, without an evidentiary hearing, to show the methodology used by its witness and the reliability of the methodology. Because the Defendant did not do so, the majority held "that the expert testimony was properly excluded." 555 F.3d at 1256.

Both the majority and the dissent agreed that the trial court was authorized under Rules 702 and 104 to craft a procedure for determining whether the opinion testimony of Defendant's expert was admissible. *See* 555 F.3d at 1260 (dissenting opinion). The dissenting members of the Court simply read the trial record differently and, consequently, made different findings.

They found that, although the trial court had discretion to require a proffer sufficient to satisfy Rule 702 instead of conducting an evidentiary hearing, it did not adequately advise the parties of the procedures it intended to impose. 555 F.3d at 1265. In addition, the dissenters found that in making a written proffer, the Defendant did not intend to abandon his right to present evidence with regard to 702 issues at a hearing, nor did he concede that his written disclosure should be treated as his Rule 702 showing. The dissenting judges regarded the exclusion of the expert opinion evidence as a sanction for failing to comply with Rule 16 disclosure obligations. *Id.* at 1277. Under these circumstances, the dissenting judges concluded that the trial court's exclusion of proffered expert testimony was an abuse of discretion.

4. Is There a Substantial Question? Is it One of Law or Fact?

This Court begins with the obvious - the holding of the Tenth Circuit is simply that the trial court did not abuse its discretion in excluding the opinion testimony of Defendant's expert. The holding announces no new rule of law, nor does it endorse the procedure used by the trial court to the exclusion of other methods of making Rule 702 determinations. Both the majority and dissenting judges agree that the trial court had discretion to establish a process to determine Rule 702 issues, and they agree that the process did not need to include an evidentiary hearing. Their differing conclusions spring simply from differing assessments of the trial court record. In essence, their interpretations of the record are akin to differing factual findings.

Viewed in this light, it is difficult to apply the substantial question analysis. Substantial questions of law are those about which judges can fairly disagree. But it is not so clear what the standard is when the appellate court is making determinations that are akin to factual findings. The parties have not pointed the Court to authority addressing this issue, and the Court is not

aware of any. The matter is further complicated by the burden and standard of proof enunciated in *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985). *Affleck* expressly adopts a preponderance of the evidence standard.

One way to look at this issue is by applying the preponderance of the evidence standard, which ordinarily requires the party with the burden to show that something is more likely than not. Here, the Defendant has not demonstrated that it is likely that the dissent's interpretation of what occurred in the trial court is more accurate than the interpretation of the majority.

If reviewed in the light of a legal question, then the Court focuses upon the standard of review that was applied by the Tenth Circuit - whether the trial court abused its discretion. It does not appear that there is any substantial question that this standard was the correct one to be applied. Indeed, the case authority relied upon by the Defendant all reflects application of this standard. As to applications of that standard, all of the decisions to which the Defendant refers were fact specific, and the facts as well as the procedural context are distinguishable from the facts in this case. None of the other cases are criminal matters; none involve a series of disclosures made in response to a hybrid challenge to both the sufficiency of disclosure under Rule 16 and the sufficiency of the foundation under Rule 702. Thus, they do not demonstrate that there is a substantial legal question.

Questions of what process should be used in a criminal case to make Rule 702 determinations and whether a Rule 16 disclosure can be treated as a party's sole proffer under Rule 702 are interesting and important. But they are not the questions that were determined in this case and they have not yet been determined elsewhere. Therefore, they create no substantial question.

5. If the Defendant Prevailed on These Questions, Would it Likely Result in a Reversal of his Conviction, a New Trial, or an Abrogation of his Sentence?

Assuming that there is a substantial question of law or fact, however, the Defendant has not addressed how the resolution of the question would affect his conviction and sentence, and therefore has not satisfied his burden of proof.

The Government makes a perceptive argument that an error in excluding the expert opinion evidence testimony would not likely (or at least would not automatically) compel a reversal of the judgment of conviction or a new trial. Not all trial court errors require reversal or a new trial. That turns on whether the error is harmless or not. An error in not conducting a hearing to resolve Rule 702 issues would be harmless if, after such hearing, the evidence was ultimately excluded. To this Court's understanding, the Defendant has never made a proffer as to what evidence he would have presented at an evidentiary hearing. Therefore, a reviewing court could not determine whether the evidence would have been admitted if a hearing had been held. If the failure to conduct a hearing was error, it is likely that the matter would be remanded to the district court to conduct a hearing to determine whether the proffered expert testimony was admissible. Only if the district court concluded that the evidence was admissible would reversal or a new trial be appropriate.

For the foregoing reasons, the Court finds that the Defendant has not established a substantial question of fact or law, or that if the question raised were determined in his favor, that there would be a reversal of his conviction, new trial or abrogation of his sentence.

V. CONCLUSION

The Defendant has not shown that his appeal has not been interposed for purposes of

delay, that any substantial question of law or fact has been raised in his appeal or that if he were to prevail on the questions he has raised that their determination would likely result in reversal of his conviction, a new trial or abrogation of his sentence. Accordingly, he has not shown that he is entitled to bail pursuant to Bail Reform Act of 1984, 18 U.S.C. §3143(b).

IT IS THEREFORE ORDERED that:

- 1.) The Emergency Motion for Reconsideration (#541) is **GRANTED**, but upon reconsideration the Defendant's request for bail is **DENIED**.
- 2.) The Court will concurrently issue a separate Order setting forth the date, location, and other details of the Defendant's surrender to the institution selected by the Bureau of Prisons.

Dated this 7th day of April, 2009

BY THE COURT:



Marcia S. Krieger
United States District Judge