

**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.

**TENDERED FOR FILING
MARCH 19, 2007**

Edward W. Nottingham
United States District Judge
by Jamie L. Hodges
Judicial Assistant/Deputy Clerk

**UNITED STATES' MOTION FOR PROPER EXPERT
DISCLOSURE BY DEFENDANT REGARDING DANIEL FISCHEL**

Defendant's expert disclosure was due on Friday, March 16, 2007. The "expert disclosure" that Defendant provided on that date regarding Daniel Fischel was highly inadequate. The government requests a complete, proper disclosure by Friday, March 23, 2007.

I. Brief background on Defendant expert disclosure obligation

Federal Rule of Criminal Procedure 16(b)(1)(C) provides that where a defendant has requested expert disclosure from the government, the defendant must himself provide 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." The Rule further provides, "The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." This disclosure of experts is "intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony though focused cross-examination."

See 1993 Adv. Comm. Notes to Fed. R. Crim. P. 16.

The disclosure must meet various criteria. First, it must be sufficient to “inform the requesting party whether the expert will be providing only background information or whether the witness will actually offer an opinion.” *Id.* Second, the requesting party is entitled “to be provided with a summary of the expert’s opinion.” *Id.* “Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert’s opinion.” *Id.* The disclosure should include “not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.” *Id.*

II. The actual disclosure

Defendant’s expert disclosure was of Daniel R. Fischel. (The expert disclosure is attached as Exhibit 1.) He is a law professor and the President of Lexecon, a litigation consulting firm. (His curriculum vita is attached as Exhibit 2 hereto.) Professor Fischel is not represented to be a person with personal knowledge of this case. Defendant’s disclosure regarding Professor Fischel is as follows:

1. Professor Fischel may testify about Mr. Nacchio’s holdings and transactions of Growth Shares, Qwest options, and Qwest stock. With respect to Growth Shares, Mr. Fischel is expected to testify about how Mr. Nacchio obtained the Growth Shares, the role of Growth Shares as an incentive compensation device, and Mr. Nacchio’s sales of Growth Shares. With respect to Qwest options, Mr. Fischel is expected to testify about how Mr. Nacchio obtained his growth options, the role of options as an incentive compensation device, Mr. Nacchio’s holdings of options, and Mr. Nacchio’s sales of shares obtained from the exercise of options. With respect to Qwest stock, Mr. Fischel is expected to testify about how Mr. Nacchio obtained Qwest stock as well as Mr. Nacchio’s contributions of

stock to the Nacchio foundation and a family partnership. Mr. Fischel may also testify about Qwest stock held by Mr. Nacchio's sons.

2. Professor Fischel may testify about Qwest's repurchase of approximately 22.22 million shares from BellSouth for \$45 per share in January 2001. Professor Fischel will explain that Qwest's board and management would not have considered the repurchase of shares from BellSouth to have been in the interest of Qwest or holders of Qwest securities (including themselves) if they were in possession of material adverse insider information about the Company. Professor Fischel may also compare the BellSouth repurchase price with Mr. Nacchio's sales prices.

3. Professor Fischel may testify about the guidance Qwest provided during 2000 and 2001 as well as the effect, if any, of Qwest's guidance on Qwest's stock price, analysts' recommendations, analysts' target prices, and analysts' forecasts. Among other things, Professor Fischel is expected to testify that after Qwest announced its guidance in September 7, 2000, its stock price declined. Professor Fischel will also explain that most analysts did not change their recommendations, target prices, or forecasts after Qwest announced its guidance. Professor Fischel will also explain that analysts had their own forecasts, and did not adopt Qwest's guidance as their forecasts. Professor Fischel will also explain that analysts understood that changes in economic conditions could cause Qwest's financial performance to be worse than expected.

4. Professor Fischel may testify about the guidance provided by other companies, including telecommunications companies during 2000 and 2001, and the effect, if any, of such guidance on stock prices, analysts' recommendations, analysts' target prices, and analysts' forecasts. Professor Fischel may also testify about how the actual results reported by these companies compares with their previous guidance.

5. Professor Fischel may testify about changes in economic conditions which resulted in changes in stock prices, guidance, and consensus earnings forecasts of telecommunications companies during 2001. Professor Fischel is expected to testify that these changes in economic conditions can explain why the financial performance of Qwest and other companies in 2001 turned out to be worse than had been previously expected, and that these performance shortfalls do not establish that guidance provided at earlier dates was unreasonable.

6. Professor Fischel may testify about the disclosures made by Qwest and other telecommunications companies concerning recurring and nonrecurring sources of revenue. Professor Fischel may testify that companies that sold IRUs did not always disclose separately the amounts of IRUs sold. Professor Fischel may also testify about stock sales by officers and directors of these companies.

7. If necessary, Professor Fischel may testify about the gains to Mr. Nacchio, if any, from the allegedly improper insider trading.

See Ex. 1 at 1-3.

III. The deficiencies of the expert disclosure

The government submits that Defendant's disclosure does not describe the opinions and provide the basis for them, as required by Rule 16(b)(1)(C). Rather, it is for the most part simply a list of broad topics. The government submits that the disclosure is wholly inadequate and does not even approach the disclosure required by the rules. A brief summary of the deficiencies in the disclosure is set forth below.

Opinions or facts. First, the disclosure does not make clear, for each of these topics, whether Professor Fischel will be providing only background information, or whether he will actually offer an opinion. In short, the government cannot tell whether Professor Fischel will be testifying as to opinions or simply introducing facts to the jury. It appears that the main focus may be facts, given that the disclosure — with only a few isolated exceptions — generally does not provide any description of actual opinions. Unless he is offering expert opinions, Professor Fischel cannot simply testify before the jury as to the facts. There is no suggestion that Professor Fischel has firsthand knowledge of such information that would enable him to testify based on personal knowledge. *See* Fed. R. Evid. 602. Many of the topics that are identified — *e.g.*,

Defendant's holdings and transactions in shares and options, Qwest's disclosures, and so on — are simply matters of historical record and fact. Defendant cannot evade the rules of evidence by simply calling Professor Fischel to the stand to offer all of these facts into evidence.¹

Opinions and bases for opinions. Second, even where the disclosure in rare instances mentions an opinion, it does not in *any* instance provide a summary of the bases for Professor Fischel's opinion, as required by Rule 16(b)(1)(C). The disclosure does not refer to a single piece of "expert material" he intends to rely on — such as factual materials, articles, texts, studies, and so on — that bear on the proposed areas of testimony. The government has no idea what provides the basis for his opinions. As a result of this deficiency, the government is entirely unable to determine what scientific methods Professor Fischel has relied on (if any) and whether the opinion is based on "sufficient facts or data" as required by Rule 702, and thus will be unable to test those methods at trial.

Expertise. Third, the government cannot determine from the disclosure whether Professor Fischel is an expert in the areas as to which he might offer opinions. Based on the information provided at this point, which is Professor Fischel's CV, it appears that Professor Fischel is not a witness "qualified as an expert by knowledge, skill, experience, training, or education" in these topics under Rule 702. As to his education, Professor Fischel has a law degree. He does not appear to hold any degree in any other discipline that is relevant to the topics on which he has been offered to testify. Indeed, many of the topics — such as whether Qwest's "guidance ... was

¹ Even if he does offer opinions, he cannot introduce inadmissible facts except under certain circumstances. *See* Fed. R. Evid. 704.

unreasonable, *see* Ex. 1 at ¶ 5 — do not even seem susceptible of genuine expertise.

Breadth. Fourth, many of the topics that Professor Fischel might “testify about” are so broad that they are in many cases meaningless. Indeed, even where the disclosure refers in a rare instance to an opinion, it then refuses to limit his opinions, suggesting that his testimony might include such opinions “[a]mong other things.” Defendant’s failure to provide a meaningfully narrow description of the opinions Professor Fischel will testify about prevents the government from adequately preparing to cross-examine him on his opinions or prepare rebuttal expert testimony. In fact, many of topics are worded so broadly that an innumerable number of sub-topics could readily come within the scope of this testimony. This disclosure simply keeps Professor Fischel’s options wide open for extended, wide-ranging testimony.²

Relevance and helpfulness. Fifth, because the disclosure is so uninformative as to Professor Fischel’s actual opinions, it is impossible to determine whether such testimony would be both relevant and helpful to the jury. *See* Fed. R. Evid. 401, 702. His testimony must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute” as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993).

Province of jury and province of Court. Sixth, the government is concerned that given the largely undefined scope of Professor Fischel’s testimony, his testimony may invade either the province of the jury, the province of the Court, or both. The disclosure’s recitation of factual

² The government notes that according to Fischel’s curriculum vitae, he spent 25 days testifying in one case. *See* Ex. 2 at 13 (Glendale case). With the breadth of this disclosure, Fischel could surpass that record in the present case, with no notice to the defense of what the exact nature of his testimony will be.

topics on which Professor Fischel is expected to testify suggests that he may feel competent to simply tell the jury how to interpret whatever factual events happen to be presented in the case. The fact that Professor Fischel is a law professor by profession further raises a concern that absent some check on his testimony, he would be prone to offer opinions that address legal definitions that are reserved for the Court alone. Without the detailed and full disclosure required by the rules, the government cannot determine whether these concerns are well-founded.

Rule 403. Seventh, the government submits that much of Professor Fischel's proposed testimony appears inadmissible under Rule 403, which allows a court to exclude otherwise relevant evidence on the ground that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Because expert testimony can be both "powerful and quite misleading," a court applying Rule 403 "exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595. The government submits that Professor Fischel's testimony does not appear very probative and thus (once defined in a more complete disclosure) seems likely to be inadmissible under Rule 403.

Testimony as to mental state. Eighth, the government cannot determine whether portions of Professor Fischel's testimony would violate Rule 704(b). That rule bars an expert in a criminal case who is testifying with respect to the mental state or condition of a defendant from offering any opinion or inference "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are for the trier of fact alone." For example, the disclosure states that Professor Fischel

“will explain that Qwest’s board and management [*i.e.*, including Defendant Nacchio] would have considered the repurchase of shares from BellSouth to have been in the interest of Qwest or holders of Qwest securities (including themselves) if they were in possession of material adverse insider information about the Company.” This description suggests that Professor Fischel may testify as to Defendant’s mental state and thus violate Rule 704(b).

CONCLUSION

The government respectfully requests that Defendant’s expert disclosure is deficient and that Defendant should be ordered to provide a disclosure that remedies these deficiencies and complies with the Rules by no later than the close of business on Friday, March 23, 2007.

Respectfully submitted this 19th day of March, 2007.

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CERTIFICATE OF SERVICE

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