BASIC FEDERAL EXPERT WITNESS STANDARDS

When seeking to introduce expert witness testimony, the proponent of the expert has the burden of establishing that the expert's opinion is admissible, including that it is sufficiently reliable. *See, e.g., Yaccarino v. Motor Coach Indus., Inc.*, 2006 WL 5230033, at *11 (E.D.N.Y. Sept. 29, 2006)(*citing Smith v. Herman Miller, Inc.,* 2005 WL 2076570, at *2)(E.D.N.Y. Aug. 26, 2005)("[t]he burden is on the party proffering the expert testimony to lay a foundation for its admissibility"). There are several factors considered by the Federal Courts in determining whether an expert's testimony will be allowed.

A. WILL THE EXPERT'S TESTIMONY ASSIST THE FACT FINDER

Before the Court considers the qualifications and reliability of a particular expert, it must be determined that "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. "On the question of when expert testimony is appropriate, the Advisory Committee Notes [to Fed.R.Evid. 702] refer to the traditional common law rule that expert testimony is called for when the 'untrained layman' would be unable intelligently to determine 'the particular issue' *in the absence* of guidance from an expert." *United States v. Mejia,* 545 F.3d 179, 189 (2d Cir. 2008).

Thus, an expert's testimony must "be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matter which a jury is capable of understanding and deciding without the expert's help." *Andrews v. Metro N. Comm. R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989). "Expert testimony is inadmissible when it addresses 'lay matters which [the trier of fact] is capable of understanding and deciding without the expert's help'." *Price v. Fox Entertainment Group, Inc.*, 499 F. Supp. 2d 382, 387 (S.D.N.Y. 2007) (excluding expert witness testimony regarding similarities of the works at issue in a copyright

case because the "jury is capable of recognizing and understanding the similarities between the works without the help of an expert"). In determining whether the testimony would assist the trier of fact, "the court must 'make a common sense inquiry into whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.'" *Bellis v. Tokio Marine and Fire Ins. Co.*, Ltd., 2006 WL 648013 at *2 (S.D.N.Y. Mar. 14, 2006) (citation omitted) (excluding expert testimony because it will not aid the trier of fact).

B. IS THE EXPERT QUALIFIED

Even if the subject is appropriate for expert testimony, "Fed.R.Evid. 702 imposes a two-fold analysis on the trial court. First, the court must determine whether the proposed witness is qualified as an expert." 2008 WL 906708*2. If the proposed witness is not qualified, that ends the inquiry: "If an expert lacks the requisite qualifications, any analysis of the reliability of their methods by the court is 'superfluous.'" *Lamela v. City of New York*, 560 F.Supp.2d 214, 224 (E.D.N.Y., 2008). It is only if the court determines that the witness does indeed have the necessary qualifications to be approved as an expert that "the court must [then] 'ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Nisanov,* 2008 WL 906708 *2, citing *Daubert v. Merrill Dow Farm, Inc.*, 509 U.S. 579, 597 (1993).

C. THE COURT AS GATEKEEPER – EXPERT TESTIMONY MUST BE RELIABLE AND RELEVANT

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), the Supreme Court instructed that district courts must act as "gatekeeper" to assess and screen proffered "expert" testimony to prevent the admission of unreliable opinions that could

inappropriately taint the trial. *See Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002). As explained by the Second Circuit in *Amorgianos*:

> "In fulfilling this gatekeeping role, a trial court should look to the standards of Rule 401 in analyzing whether proffered expert testimony is relevant, *i.e.*, whether it 'ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'... Next, the district court must determine 'whether the proffered testimony has a sufficiently "reliable foundation" to permit it to be considered.' ... In this inquiry the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony 'is the product of reliable principles and methods'; and (3) that 'the witness has applied the principles and methods reliably to the facts of the case.'"

Amorgianos, 303 F.3d at 265. The Second Circuit further observed that "when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Id.* at 266. "To warrant admissibility ... it is critical that an expert's analysis be reliable at every step." *Id.* at 267. "[A]ny step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." *Id.* The Second Circuit further instructed: "In deciding whether a step in an expert's analysis is unreliable, the district court should take a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Id.*. Taking its cue from an oft-cited Supreme Court case, the Second Circuit noted: "'[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Id.* at 266 (*quoting Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519

(1997)). In this regard, "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Israel v. Spring Indus., Inc.*, 2006 WL 3196956, at *2 (E.D.N.Y. Nov. 3, 2006).

The Second Circuit's decision in *Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005) stated that "FRE 702 'embodies a liberal standard of admissibility for expert opinions.'" "The shift under the Federal Rules to a more permissive approach to expert testimony, however, did not represent an abdication of the screening function traditionally played by trial judges. *Id.*

In its discussion on the courts' gatekeeper role, the Supreme Court has emphasized the courts' "task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). In *Kumho Tire Co, Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999), the Supreme Court observed that FRE 702 "'establishes a standard of evidentiary reliability'" for all experts, which "'requires a valid ... connection to the pertinent inquiry as a precondition to admissibility.'" The Supreme Court continued: "Where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question ... the trial judge must determine whether the testimony has 'a reliable basis ... .'" *Id.* at 149. The Supreme Court further emphasized "the importance of *Daubert's* gatekeeping requirement" where the objective "is to ensure the reliability and relevancy of expert testimony." *Id.* at 152. In *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000), the Supreme Court further observed: "Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."

The Second Circuit has endorsed and affirmed the district courts' exclusion of unreliable expert testimony in their gatekeeping function under FRE 702 and *Daubert*. *See, e.g., Hunt v.*

CNH Am. LLC, No. 12-1301-CV, 2013 WL 440176, at *3 (2d Cir. Feb. 6, 2013); *American Banana Co., Inc. v. J. Bonafede Co., Inc.*, 407 F. App'x 520, 523 (2d Cir. 2010); *LaBarge v. Joslyn Clark Controls, Inc.*, 242 F. App'x 780, 782 (2d Cir. 2007); *Kass v. W. Bend Co.*, 158 F. App'x 352, 352-53 (2d Cir. 2005); *Barban v. Rheem Textile Sys., Inc.*, 147 F. App'x 222 (2d Cir. 2005); *Franklin v. Consolidated Edison Co. of New York, Inc.*, 37 F. App'x 12, 14-15 (2d Cir. 2002); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 91-92 (2d Cir. 2000).

D. EXPERTS MAY RELY ON QUALIFIED HEARSAY EVIDENCE

When experts are relying upon hearsay evidence, the hearsay evidence should be properly qualified in itself. The Second Circuit has noted: "Under Rule 703, experts can testify to opinions based on inadmissible evidence, including hearsay, if 'experts in the field reasonably rely on such evidence in forming their opinions.'" *United States v. Mejia,* 545 F.3d 179, 197 (2d Cir. 2008). "The expert may not, however, simply transmit that hearsay to the jury. [citation.] ('When an expert is no longer applying his extensive experience and a reliable methodology, *Daubert* teaches that the testimony should be excluded.'). Instead, the expert must form his own opinions by 'applying his extensive experience and a reliable methodology' to the inadmissible materials. ... Otherwise, the expert is simply 'repeating hearsay evidence without applying any expertise whatsoever,' a practice that [would allow a party] 'to circumvent the rules prohibiting hearsay.'" *Id.* (citation omitted).

Courts prohibit an expert's "regurgitation" of statements made by parties and/or their attorney's as the basis for an opinion. *See, e.g., Arista Records LLC v. Usenet.com, Inc.,* 608 F.Supp. 2d 409, 424 (S.D.N.Y. 2009) ("An expert who simply regurgitates what a party has told him provides no assistance to the trier of fact through the application of specialized knowledge."); *Robinson v. Sanctuary Record Groups, Ltd.,* 542 F.Supp. 2d 284, 292 (S.D.N.Y.

2008) (excluding expert testimony because methodology was "founded on hearsay supplied by Plaintiffs' counsel -- hardly a source of first-hand, independent expert knowledge").

E. UNDUE PREJUDICE MUST BE AVOIDED

"Of course, expert testimony, like other forms of evidence, 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' Fed.R.Evid. 403." *United States v. Dukagjini*, 326 F.3d 45, 51-52 (2d Cir. 2003).

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