

**Theodore Roosevelt American Inn of Court**

**October 26, 2016 Program**

**Proving and Challenging Financial Damages**

**PROGRAM OUTLINE**

I. Program Introduction and Overview

Kevin Schlosser will introduce the strategic issues involved in persuasive presentation of complex damages theories to a trier of fact.

II. Legal Presentation

Adam Solomon, Glenn R. Jersey III and Kassandra Zaeri will present applicable legal issues and standards for proving lost profits damages, dealing with *Daubert* and *Frye* challenges to experts, and establishing valuations of businesses in different contexts.

III. Case-Specific Presentation—Hon. Leonard Steinman presiding  
*Lost profits damages – Defense Perspective*

1. Factual Background and context of each presentation—**Kevin Schlosser**
2. Excerpt of defendant’s opening—**Kassandra Zaeri**
3. Excerpt of cross-examination of Plaintiff’s expert—**Thomas A. O’Rourke as counsel, John Gionis as witness**
4. Excerpt of defendant’s closing argument—**Kevin Schlosser**

IV. Case-Specific Presentation—Hon. Leonard Steinman presiding  
*Valuation of a closely-held Corporation – Plaintiff’s Perspective*

1. Factual background and context of each presentation—**Kevin Schlosser**
2. Excerpts of Plaintiffs’ opening—**Glenn R. Jersey**
3. Excerpt of cross-examination of Defendant’s expert by Plaintiffs’ counsel—**Lauren Grassotti as counsel, Eric Gruber as witness**
4. Excerpt of Plaintiffs’ closing argument—**Adam Solomon**

V. Conclusion—**Kevin Schlosser**

## LEGAL PRESENTATION OUTLINE

### **I. Lost Profits**

#### A. General Principles

1. “In an action for breach of contract, a plaintiff is entitled to recover lost profits only if he can establish both the existence and amount of such damages with reasonable certainty.” *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000) (emphasis added). Such lost profits damages “‘may not be merely speculative, possible or imaginary.’” *Id.* (quoting *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132 (1986)).
2. “Projections of future profits based upon ‘a multitude of assumptions’ that require ‘speculation and conjecture’ and few known factors do not provide the requisite certainty.” *Schonfeld*, 218 F.3d at 172 (citing *Kenford*, 67 N.Y.2d at 262, 502 N.Y.S.2d at 133).
3. To avoid summary judgment, Plaintiffs must show a reasonable certainty of the mere existence of lost profits. *See Summit Props. Int’l, LLC v. Ladies Prof’l Golf Ass’n*, No. 07 Civ. 10407, 2010 WL 2382405, at \*3 (S.D.N.Y. June 14, 2010).

#### B. Plaintiff’s Side of Lost Profits—Meeting “Reasonable Certainty” Standard At Trial

1. A plaintiff need not provide a calculation of lost profits to a mathematical certainty; instead, it “need only provide the jury the jury with a sound basis for approximating with reasonable certainty the profits lost as a result” of a defendant’s breach of contract. *S&K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 853 (2d Cir. 1987).
2. “[A] party claiming lost profits must eventually prove that it would have been able to pursue its business venture on the price, cost, and quantity terms it contemplates.” *ACCD Global Agric. Inc. v. Perry*, 12 CIV. 6286 KBF, 2013 WL 840706, at \*5 (S.D.N.Y. Mar. 1, 2013) (citing *Ho Myung Moolsan*, 07 Civ. 07483, 2010 WL 4892646, at \*8 (S.D.N.Y. Dec. 2, 2010)).
3. Calculations of lost profits based on the comparable sales of a competitor can meet “reasonable certainty” standard. *See Dupont Flooring Sys., Inc. v. Discovery Zone, Inc.*, No. 98 Civ. 5101, 2004 WL 1574629, at \*\*8-9 (S.D.N.Y. July 14, 2004).

4. Calculations should “account for the effects of . . . general market risks on the [venture’s] probability of success” including “entry of competitors” and “general market movements.” *Schonfeld*, 218 F.3d at 174.
  5. Established businesses
    - a. Where the company has been long-standing, “[t]he owner . . . may have it in his power to establish with reasonable certainty the amount of capital invested, the monthly and yearly expenses of operating his business, and the daily, monthly or yearly income he derived from it for a long time” and therefore more adequately prove lost profits. *Cramer v. Grand Rapids Show Case Co.*, 223 N.Y. 63, 68 119 N.E. 227, 228 (1918).
  6. New businesses
    - a. “Evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate” so they must then prove lost profits by identifying and analyzing a comparable company. *Schonfeld*, 218 F.3d at 172; see Carmen D. Caruso & Bruce S. Schaeffer, *Damages for Lost Future Profits in Franchise Disputes—Overcoming the New Business Rule and Establishing Reasonable Certainty*, 36 Franchise L.J. 1 (2016).
- C. Defendant’s Side of Lost Profits—Challenging “Reasonable Certainty” Standard At Trial
1. Damages calculations based on speculative or unsupported assumptions do not satisfy burden to prove lost profits with reasonable certainty
    - a. *Compania Embotelladora Del Pacifico v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 319 (S.D.N.Y. 2009) (plaintiff had failed to prove lost profits with reasonable certainty, offering “unreliable and inaccurate data, together with a series of assumptions that have no basis in fact or reality.”)
    - b. *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F. Supp. 1051, 1069 (S.D.N.Y. 1996) (lost profits claim rejected because expert’s report was “wrought with unsupported and speculative assumptions” about the number of products that would have been sold)
    - c. *Summit Props. Int’l, LLC v. Ladies Prof’l Golf Ass’n*, No. 07 Civ. 10407, 2010 WL 2382405, at \*\*3-4 (S.D.N.Y. June 14, 2010) (summary judgment granted dismissing lost

profits claims where underlying sales projections relied “on a host of speculative assumptions and few known factors”) (quotation marks omitted)

- d. *The Upper Deck Co., LLC v. Breakey Int’l, BV*, 390 F. Supp. 2d 355, 360 (S.D.N.Y. 2005) (summary judgment dismissing future lost royalty payments because expert report based upon “too many unsupported assumptions to establish the existence of lost royalties with the reasonable certainty required”)
- e. *Dupont Flooring Sys., Inc. v. Discovery Zone, Inc.*, 98 Civ. 5101, 2004 WL 1574629, at \*7 (S.D.N.Y. July 14, 2004) (“Courts repeatedly have rejected claims for lost profits that rest on a series of assumptions and projections.”) (quotation marks omitted; collecting cases)
- f. *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F. Supp. 1051, 1070 (S.D.N.Y.1996) (“To award plaintiff lost profits based on the unproven assumption that it would have [succeeded in its business ventures] would unjustly reward plaintiff rather than make it whole.”)

2. Calculations based on future projections of sales that are not supported by data of actual sales or independent market research do not meet “reasonable certainty” standard

- a. *Ho Myung Moolsan, Co., Ltd. v. Manitou Mineral Water, Inc.*, 07 Civ. 07483, 2010 WL 4892646, at \*\*9-11 (S.D.N.Y. Dec. 2, 2010)

## **II. Dealing With Challenges To Experts Under the *Frye* and *Daubert* Standards**

### **A. *Daubert* Standard—Federal Court**

#### **1. Federal Rule of Civil Procedure 702: Testimony by Expert Witnesses**

- a. “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.”

2. Trial court’s gatekeeper role

- a. District court judges must act as gatekeepers to exclude unreliable expert testimony, whether scientific or otherwise. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); Fed. R. Civ. P. 702 advisory committee’s note to 2011 amendment.
- b. “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 v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (emphasis added).
- c. “To warrant admissibility ... it is critical that an expert’s analysis be reliable at every step.” *Id.* at 267 (emphasis added). Therefore, “*any step that renders the analysis unreliable under the Daubert factors renders the expert’s testimony inadmissible.*” *Id.* (emphasis original). 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.* (emphasis added).

- d. 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 (emphasis added); *see also* Michael Hoenig, *Judicial ‘Gatekeeping’ of Experts Has Impact*, N.Y. L.J., Oct. 14, 2016.

### 3. Reliability Factors

- a. Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability
- b. Whether the technique or theory has been subject to peer review and publication
- c. The known or potential rate of error of the technique or theory when applied
- d. The existence and maintenance of standards and controls
- e. Whether the technique or theory has been generally accepted in the scientific community
- f. Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)
- g. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases “a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered”)
- h. Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994) (testimony excluded in part because experts did not make “any effort to rule out other possible causes for the injuries plaintiffs complain of, even though they admitted that this step would be standard procedure before arriving at a diagnosis”)

- i. Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997); *see Kumho Tire Co.*, 526 U.S. at 152 (trial court must “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”)
- j. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co.*, 526 U.S. at 151 (“*Daubert’s* general acceptance factor” does not “help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy”); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 279 (5th Cir. 1998) (expert opinion properly excluded as “speculative” and “lacking any scientific validity” where expert “could cite no scientific support for his conclusion”); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable)

B. *Frye* Standard—New York State Court

1. N.Y. C.P.L.R. § 4515 – Form of Expert opinion:

- a. “Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.”

2. Generally accepted test

- a. The proponent of the testimony must define the relevant scientific community and establish the general acceptance of the theory or technique by showing: the competence of the individual propounding the theory or technique; the purpose of the theory or technique; the procedures for obtaining the results; and the general acceptance of the methodology used by the individual in the defined scientific community.

- b. “An expert should generally be permitted to offer an opinion on a matter involving professional or scientific knowledge not within the range of ordinary training or intelligence, but in order for a particular scientific principle—or a particularly novel theory—to be considered sufficiently reliable to serve as the basis for an expert's opinion, it must first be shown to have general acceptance in the relevant field.” *Rodriguez v. Ford Motor Co.*, 17 A.D.3d 159, 160, 792 N.Y.S.2d 468, 470 (1st Dep’t 2005).
- c. “[T]he particular procedure need not be ‘unanimously indorsed’ by the scientific community but must be ‘generally accepted as reliable.’” *People v. Wesley*, 83 N.Y.2d 417, 423, 611 N.Y.S.2d 97, 100 (1994).

### III. Valuation

#### A. Biases and Pitfalls in Valuation

1. Estimation Uncertainty: Even if the sources of information used are correct, the data may not convert properly into the particular model or formula used, or if there are any mistakes made in transferring this data along the way, the final value will be incorrect.<sup>1</sup>
2. Firm-specific Uncertainty: Since the future is uncertain, any prediction about how well or poor a firm will do in the future may be very wrong. “The firm may do much better or much worse than we expected it to perform, and the resulting earnings and cash flows will be very different from our estimates.”<sup>2</sup>
3. Macroeconomic Uncertainty: “Even if a firm evolves exactly the way we expected it to, the macro economic environment can change in unpredictable ways. Interest rates can go up or down and the economy can do much better or worse than expected. These macro economic changes will affect value.”<sup>3</sup>

#### B. Valuation Factors

1. Market liquidity
2. Profit measurement and inaccurate calculation formulas
3. Varying capital structure of different yet similar companies

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<sup>1</sup> See *What is Valuation?*, NYU Stern School of Business, [http://pages.stern.nyu.edu/~adamodar/New\\_Home\\_Page/background/valintro.htm](http://pages.stern.nyu.edu/~adamodar/New_Home_Page/background/valintro.htm) (last visited Oct. 17, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

4. The market risk faced by the company
5. Operating structure of the company<sup>4</sup>
6. Economic trends
7. Industry factors
8. Competition
9. Regulations
10. Market position
11. Intangibles
12. Internal controls.<sup>5</sup>

C. Methods of Valuation

1. **Income approach** - This approach capitalizes the company's expected income or cash flow stream by determining the rate of return on investment required by a potential investor, and it sets the value at the amount appropriate to generate that rate of return. This method is often used in conjunction with a discounted cash flow analysis to estimate the present value of the future stream of net cash flows generated by the business. The valuator forecasts net cash flows or earnings for an appropriate time period and then converts them to present value using a discount rate or capitalization rate that reflects the company's risks.<sup>6</sup>
2. **Discounted cash flow or earnings method** - recognizes that a dollar today is worth more than one received in the future. Under this approach, a company's projected earnings are discounted to adjust for real growth, inflation and risk.<sup>7</sup>
3. **Market approach** - This approach gathers data from acquisitions of similar businesses or from the stock prices of comparable publicly traded companies. The valuator adjusts the data to account for differences between the subject company and comparable firms. An adequate number of comparable companies is necessary to produce credible results.<sup>8</sup>

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<sup>4</sup> See Loraine MacDonald, *Valuation of Private vs. Public Firms: why private companies tend to be valued lower than public firms*, Entrepreneur (July 3, 2001), <https://www.entrepreneur.com/article/41972>.

<sup>5</sup> *Business Valuation Strategies*, Kiesling (2008), <http://www.kiesling.com/wp-content/uploads/2015/04/Business-Valuation.pdf>

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

4. **Asset approach** - looks at the value of the company as the value of its underlying assets and liabilities. The asset approach is typically only used in the earlier stages of a business, before intangible assets and goodwill have significant value.<sup>9</sup>
5. “While valuations prepared for different purposes should be generally consistent, it is not appropriate to assume that a valuation performed for one purpose will be suitable for another purpose. The value of the company should consider the state of the industry and the economy, management’s competence and experience, the marketplace and competitors, barriers to entry, competitive forces, proprietary assets (either intangible or tangible assets, which tend to enhance value), work force, customers and vendors, strategic relationships, major investors, the cost structure and financial condition, the attractiveness of the industry segment, and risk factors faced by the company.”<sup>10</sup>

D. Types of “Value”:

1. **Fair Market Value** - defined as “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts”
2. **Fair value** - is an ambiguous term. In one context, fair value refers to the statutory standard of value usually used in court cases involving dissenting shareholders and other types of litigation. In this scenario, there is usually a willing buyer, but an unwilling seller. In another context, fair value is a standard used to determine the value of assets and liabilities in regard to business combinations for financial reporting purposes
3. **Equity value** - is the market value of all the assets of a business, including intangible assets, less liabilities — in other words, the value of a business to its common shareholders
4. **Minority value** - is the value reflecting an ownership position of less than 50% or the inability to make final decisions concerning the company
5. **Intrinsic value** - (also called fundamental value) is an analytical judgment of value based on the perceived characteristics inherent in the investment, without regard to the identity or characteristics of a particular investor. It represents the “true” or “real” value of an asset. Security analysts compare

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<sup>9</sup> Lawrence Dodyk, Dusty Stallings, & Richard Billovits, *A Look at Current Financial Reporting Issues: Valuation of Privately-Held-Company Equity Securities issued as Compensation*, PricewaterhouseCoopers LLP, No.2013-17 (July 25, 2013), <http://www.pwc.com/us/en/cfodirect/assets/pdf/dataline/dataline-2013-17-aicpa-valuation-guide.pdf>.

<sup>10</sup> *Id.*

the intrinsic value of a stock with its trading price to assess buying and selling opportunities

6. **Marketable value** - is the value of an equity assuming a pre-established market where that equity can be exchanged<sup>11</sup>

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<sup>11</sup> *Business Valuation Strategies, supra* note 5.

**CITED AUTHORITIES**

2013 WL 840706

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.ACCD GLOBAL AGRICULTURE  
INC. and Curt Meltzer, Plaintiffs,

v.

Alan P. PERRY and Farm Technologies  
Network LLC, Defendants.

No. 12 Civ. 6286(KBF).

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March 1, 2013.*MEMORANDUM DECISION & ORDER*

KATHERINE B. FORREST, District Judge.

\*1 “The district courts of the United States, as [the Supreme Court has] said many times, are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). In most cases, federal jurisdiction lies either in the cause of action arising under federal law, or in the parties' citizenship being diverse—that is, from different states. While it is clear why federal courts should adjudicate cases implicating federal law, the rationale for so-called “diversity jurisdiction” is more historical. The drafters of the Judiciary Act were concerned that state court judges might employ improper local biases in adjudicating large-dollar cases brought by or against people from foreign States. *See id.* (“In order to provide a neutral forum for what have come to be known as diversity cases, Congress also has granted district courts original jurisdiction in civil actions between citizens of different States .... To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, § 1332(a) requires that the matter in controversy in a diversity case exceed a specified amount, currently \$75,000.”) One wonders whether the fear of such local biases continues to justify the ability to access the federal courts, especially in light of the expertise one assumes state courts have over the issues of state law raised in diversity cases—and also in light of the overwhelming number of cases that make it into federal court on diversity grounds. Currently,

however, diversity remains an open avenue to the federal courts, and the courts must adjudicate those cases validly brought pursuant to diversity jurisdiction.

That does not mean, however, that federal courts should accept allegations of diversity without investigation—indeed, federal courts are *mandated* to *sua sponte* examine their own jurisdiction at every stage in the litigation:

Subject-matter jurisdiction can never be waived or forfeited ... [and] if courts become concerned about their own jurisdiction to hear cases, they have an independent *obligation* to ensure that they do not exceed the scope of their jurisdiction, and therefore they *must* raise and decide jurisdictional questions that the parties either overlook or elect not to press.

*Dumann Realty, LLC v. Faust*, 09 Civ. 7651, 2013 WL 30672, at \*1 (S.D.N.Y. Jan.3, 2013) (quotation marks omitted) (citing *Gonzalez v. Thaler*, — U.S. —, —, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012); *Henderson ex rel. Henderson v. Shinseki*, — U.S. —, —, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011)) (emphasis supplied). This means investigating all aspects of the diversity requirements—not only whether all plaintiffs are completely diverse from all defendants, but also whether the amount in controversy reaches the statutory level.

Here, after having done just that, the Court determines that the requirements for diversity jurisdiction are not met. Plaintiffs ACCD Global Agriculture (“ACCD”) and Curt Meltzer sue defendants Alan P. Perry and Farm Technologies Network LLC (“FTN”) on claims arising from a soured business collaboration. But almost the entirety of plaintiffs' theory of damages is based on the projected profits lost from the collapse of that collaboration—a collaboration on an unproven business based on sophisticated new science, in an untested foreign market. Such damages require, however, more than the mere assurance from the entity itself that the profits were realizable and realistic—more than the mere *ipsidixit* of “I say I can make that money, therefore I can”—and instead require plaintiffs to eventually establish both the existence and amount of the profits allegedly lost to a reasonable certainty. *See Schonfeld v. Hilliard*, 218 F.3d 164, 172–75 (2d Cir.2000); *Ho Myung Moolsan, Co. Ltd. v. Manitou*

*Mineral Water, Inc.*, 07 Civ. 7483, 2010 WL 4892646, at \*8 (Dec. 2, 2010); *Pot Luck LLC v. Freeman*, 06 Civ. 10195, 2010 WL 908475, at \*3 (S.D.N.Y. Mar.8, 2010).

\*2 But plaintiffs' complaint here simply asserts that plaintiffs “would [have made] over \$1 million per year in profits”—and makes no other proffer whatsoever concerning that allegation. This is insufficient to support a claim for lost profits, even at the motion to dismiss stage. And without those damages, the complaint does not allege an injury in excess of \$75,000. Because plaintiffs have alleged absolutely no facts suggesting that their actual recoverable damages are any more than \$12,157.08—far below the \$75,000 required for diversity jurisdiction to lie—the Court lacks jurisdiction over this action and must dismiss it.

Accordingly, the Court dismisses this action *sua sponte* without prejudice, and denies defendants' motion to dismiss as moot.

## BACKGROUND

The following facts are drawn from the First Amended Complaint (the “FAC”), the documents attached thereto, and the documents incorporated therein, and are construed in the light most favorable to plaintiffs. *Policemen's Annuity & Benefit Fund of City of Chicago v. Bank of Am., NA*, — F.Supp.2d —, 2012 WL 6062544, at \*1 (Dec. 7, 2012).

### *The Parties and the Dispute*

Plaintiff ACCD is an agricultural technologies company targeting international farming markets, and specifically China. (FAC ¶ 9.) Plaintiff Meltzer is the president, CEO, and a director of ACCD. (*Id.* ¶ 2.) Collectively as shareholders, Meltzer formed ACCD with defendant Perry, and two other individuals not involved in this lawsuit. (*Id.* ¶¶ 11, 16, 17.) Perry had worked in “crop production ... farming, agronomy, and soil sciences” for four decades, and served as vice president, treasurer, and a director of ACCD. (*Id.* ¶¶ 10, 11, 16, 18.) Perry was and is also the sole member and owner of defendant FTN—another soil sciences company. (*Id.* ¶¶ 12, 13.)

Meltzer had initially sought to pursue a business enterprise with Perry because of Perry's representations concerning

his soil sciences expertise. (*See id.* ¶¶ 10, 13–15.) Specifically, Perry told Meltzer that his and FTN's soil science technology allowed for significant production improvements over regular farming techniques. (*Id.* ¶¶ 13–15.)<sup>1</sup> But Perry “failed to provide supporting data to ACCD” to back up his representations, and—allege plaintiffs—those representations “were not accurate.” (*Id.* ¶ 13; *see also id.* ¶¶ 14, 15.) Despite Perry's failure to provide ACCD with data, ACCD still “projected that one farm of 5,000 acres ... with Perry's alleged expertise ... would generate over \$1 million per year in profits.” (*Id.* ¶ 38.) The FAC contains no factual support or data whatsoever concerning the more-than-\$1 million per-year-per-farm profits projected by ACCD.

In May 2011, Meltzer and Perry, and others, formed ACCD through execution of a “Shareholders Agreement.” (*Id.* ¶ 11; *see also id.* Ex. 1 (the “Shareholders Agreement”).) That agreement contained provisions, *inter alia*:

- \*3 • Requiring that Perry-and the other shareholders—devote “commercially reasonable” time to ACCD (Shareholder Agreement ¶ 7);
- Requiring that Perry license the FTN technology to ACCD for \$1.00 per year—until such time as ACCD “accept[s] its initial funding,” at which point requiring that Perry sell the technology to ACCD for \$1.00, which would then license the technology to FTN for \$1.00, provided that FTN use the technology only domestically (*id.* ¶ 8); and
- Requiring that a departing shareholder not compete with ACCD for two years, but permitting Perry to run FTN domestically provided he had no contact with ACCD's customers (*id.* ¶ 20).

By late 2011, however, the relationship between Meltzer and Perry had broken down. Perry allegedly interfered in various ways in ACCD's operations, (*see* FAC ¶¶ 23–27), and eventually resigned in December 2011. (*Id.* ¶ 28.) Due to that resignation, ACCD was denied “Perry's alleged expertise and his involvement and active participation.” (*Id.* ¶ 38.) Accordingly, ACCD was alleged denied the projected more-than-\$1 million per-year-per-farm profits the Meltzer/Perry collaboration would have generated.

***Facts Relating to Diversity Jurisdiction and Damages***

Diversity jurisdiction in cases with domestic parties requires that “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between ... citizens of different states.” 28 U.S.C. § 1332(a)(1). The parties on one side of the litigation must be completely diverse from the parties on the litigation's other side—that is, “no plaintiff can be a citizen of the same state as a defendant.” *Aurora Loan Servs. LLC v. Sadek*, 809 F.Supp.2d 235, 239 (S.D.N.Y.2011).

There is no dispute in this case that all plaintiffs are fully diverse from all defendants—plaintiffs are citizens of New York, and defendants are citizens of Maine. (FAC ¶¶ 1–4.)

There is also no present dispute amongst the parties as to the amount in controversy—defendants do not raise the issue in their pending motion to dismiss. But, the court's “independent obligation to ... raise and decide jurisdictional questions that the parties either overlook or elect not to press,” *Henderson*, 131 S.Ct. at 1202, requires that the Court examine the FAC's damages allegations on its own.

Plaintiffs' allegations concerning injury, harm, or otherwise suggesting damages, are—in toto—the following:

- Perry interfered with ACCD's operations in late 2011 by (1) impeding ACCD's “testing efforts”; (2) failing to pursue business opportunities in Mexico; (3) failing to pursue “citrus greening trials”; (4) “pull[ing]” an employee off an ACCD project; (5) “hav[ing] private conversations with” another employee<sup>2</sup>; and (6) “fail[ing] to set up private meetings for Meltzer with ... industry leaders.” (FAC ¶¶ 23–26.) There is not a single allegation as to how these alleged harms affected ACCD, either in terms of dollar amounts or in terms of practical consequences.

\*4 • Perry told Meltzer that Meltzer should restructure ACCD, however “Perry was not committed to the” restructuring, and “the restructuring was never completed.” (*Id.* ¶¶ 34–35.) What affect this had on ACCD or Meltzer, in terms of dollars, is not alleged.

- Perry and FTN have been competing with ACCD in violation of the Shareholders Agreement. (*Id.*

¶¶ 36–37.) What affect this has had on ACCD or Meltzer, in terms of dollars or in terms of practical consequences, is not alleged.

- Meltzer “advanced” certain sums to Perry totaling \$12,157.08 for certain business and personal expenses. Perry never paid Meltzer back. (*Id.* ¶¶ 31–33.)
- Due to Perry's alleged wrongful refusal to continue working with Meltzer and ACCD, ACCD has been unable to achieve its business plans. Specifically, “ACCD [had] projected that one farm of 5,000 acres under its management ... which [was] denied to ACCD by Perry's misconduct ... would generate over \$1 million per year in profits to ACCD. Thus, ACCD's damages for its lost profits due to Perry's and FTN's misconduct are well in excess of \$1 million.” (*Id.* ¶ 38.)

***Procedural History***

ACCD and Meltzer initially sued Perry and FTN on August 16, 2012. (ECF No. 1.) Defendants moved to dismiss, but before the Court ruled on that motion, plaintiffs filed the current FAC on October 12, 2012. (ECF No. 11.) Defendants then filed the current motion on October 26. That motion seeks dismissal of five of the FAC's seven counts—all on Rule 12(b)(6) grounds. (*See* ECF No. 13.) Shortly thereafter, on December 12, 2012, this action was transferred from Judge Barbara S. Jones to the undersigned. (ECF No. 17.)

**DISCUSSION*****Legal Standards***

“A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.” *Makarova v. United States*, 201 F.3d 110, 113 (2000); *see Williams v. Skyline Auto. Inc.*, 11 Civ. 8318, 2012 WL 1965334, at \*2 (S.D.N.Y. May 24, 2012). To survive a Rule 12(b)(1) challenge to the Court's subject matter jurisdiction, the plaintiff must “allege facts that affirmatively and plausibly” suggest that jurisdiction exists. *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir.2011); *see GMA Accessories, Inc. v. Dorfman–Pacific Co., Inc.*, 11 Civ. 3731, 2012 WL 899385, at \*3 (March 16, 2012) (dismissal is proper “when the

complaint fails to allege sufficient allegations to support subject matter jurisdiction”). The Court draws all well-pleaded facts from the complaint—and the documents attached thereto and incorporated therein—assumes such facts to be true, and construes reasonable inferences in the plaintiffs' favor. *Amidax*, 671 F.3d at 145.

The constitutional and statutory basis for jurisdiction in a diversity case such as this one is found in 28 U.S.C. § 1332. That section requires that “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between ... citizens of different states.” 28 U.S.C. § 1332(a)(1).

### *Lost Profits Damages*

\*5 The only injury or damages alleged by the FAC, other than ACCD's lost profits, consists of the \$12,157.08 Meltzer allegedly loaned or advanced Perry that Perry never paid back. Otherwise, the only damages articulated by plaintiffs are the “in excess of \$1 million” of lost profits based on ACCD's alleged “project[ion] that one farm of 5,000 acres ... would generate over \$1 million per year in profits.” (See FAC ¶¶ 31–33, 38.)

A plaintiff may recover lost profits “only if he can establish both the existence and amount of such damages with reasonable certainty. The damages may not be merely speculative, possible or imaginary ... and must be capable of measurement based upon known reliable factors without undue speculation.” *Schonfeld*, 218 F.3d at 172 (quotation marks and citations omitted). Thus, a party claiming lost profits must eventually prove that it would have been able to pursue its business venture on the price, cost, and quantity terms it contemplates. See *Ho Myung Moolsan*, 2010 WL 4892646, at \*8. “A court should be hesitant ... to rely on stated assumptions as to the” operating success of a proposed business venture. *Id.*; see *Dupont Flooring Sys., Inc. v. Discovery Zone, Inc.*, 98 Civ. 5101, 2004 WL 1594629, at \*7 (S.D.N.Y. July 14, 2004) (“Courts repeatedly have rejected claims for lost profits that rest on a series of assumptions and projections.”) (quotation marks omitted; collecting cases); *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F.Supp. 1051, 1070 (S.D.N.Y.1996) (“To award plaintiff lost profits based on the unproven assumption that it would have [succeeded in its business ventures] would unjustly reward plaintiff rather than make it whole.”)

Moreover, “evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate.” *Schonfeld*, 218 F.3d at 172. Thus, “[p]rojections of future profits based upon a multitude of assumptions that require speculation and conjecture and few known factors do not provide the requisite certainty.” *Id.*; see *Robin Bay Assocs., LLC v. Merrill Lynch & Co.*, 07 Civ. 376, 2008 WL 2275902, at \*7 (S.D.N.Y. June 3, 2008) (“the obvious reason [is] that there does not exist a reasonable basis of experience upon which to estimate lost profits”). Indeed, for 100 years, the New York Court of Appeals has been “reluctant” to award lost profits in cases involving new business ventures. See *Cramer v. Grand Rapids Show Case Co.*, 223 N.Y. 63, 119 N.E. 227, 228–29 (N.Y.1918).<sup>3</sup>

Finally, if sought on breach of contract claims,<sup>4</sup> plaintiff must additionally eventually prove that “lost profit damages,” specifically, “were within the contemplation of the parties when the contract was made.” *Schonfeld*, 218 F.3d at 172; *Robin Bay*, 2008 WL 2275902, at \*7 (“To recover lost profits the plaintiff must show both that the alleged loss is capable of proof with reasonable certainty and that the damages were fairly within the contemplation of the parties.”).

\*6 “Though courts often address the issue of lost profits at the summary judgment stage, New York courts have dismissed claims for lost profits where the pleadings suggest that an award of lost profits would require an unreasonable level of speculation.” *Robin Bay*, 2008 WL 2275902, at \*7 (on motion to dismiss, dismissing claims for lost profits arising from proposed construction of a casino in St Croix because “court would have to assume” that plaintiff would obtain funding to purchase land, secure proper licenses, complete construction, and operate the business profitably, when the industry was “in its infancy”);<sup>5</sup> see also *Pot Luck*, 2010 WL 908475, at \*3 (on motion to dismiss, dismissing claims for lost profits arising from proposed distribution of film in certain regions because such claims would require the court to assume the existence of markets in those regions, the terms of any distributorship agreements in those regions, the efforts of retained distributors, and the effectiveness of those efforts); *Calip Dairies, Inc. v. Penn Station News Corp.*, 262 A.D.2d 193, 194, 695 N.Y.S.2d 70 (1st Dep't 1999) (“The cause of action for lost profits was also properly dismissed [on motion to dismiss under N.Y. C.P.L.R.]

because the profits alleged to have been lost could not be determined with a reasonable degree of certainty.”); *Lama Holding Co. v. Smith Barney Inc.*, 215 A.D.2d 314, 315, 627 N.Y.S.2d 33 (1st Dep’t 1995; 676 R.S.D. Inc. v. Scandia Realty, 195 A.D.2d 387, 387, 600 N.Y.S.2d 678 (1st Dep’t 1993).

There is not a single allegation in the FAC in the case at bar suggesting that ACCD would ever have been profitable in China or the other international farming markets the FAC alleges were its targets. (See FAC ¶ 9.) As a preliminary matter, the Court notes that such allegations—well-pleaded, and with support—should not have been or be difficult for plaintiffs to produce. Indeed, it is *plaintiffs’* business whose profits are alleged to have been destroyed. It is there *plaintiffs* who should have the records and models and projections—without any need for discovery, or any other process—to support any allegations that ACCD would have made the many millions in lost profits that plaintiffs claim.

But there is no allegation that ACCD could acquire land in China on which to operate any farms; nor that ACCD could acquire any Chinese legal rights or licenses to operate the farms; nor that technologically-advanced farming in China is even possible, practically or legally; nor that ACCD could build the farms; nor that ACCD could find laborers with the necessary experience with technologically-advanced farming; nor that ACCD could find laborers at all; nor that the FTN farming techniques would be effective.

Nor is there any well-pleaded allegation even that ACCD could operate the farms profitably. Indeed, there is no allegation that ACCD or Meltzer had ever been successful in any venture similar to ACCD. And while the FAC alleges that Perry told Meltzer that Perry had had success in prior similar ventures, the FAC *specifically alleges that Perry was lying when he made those representations.* (See FAC ¶¶ 13–15.) It seems odd to accuse an individual of lying about his credentials and, in the very next breath,

claim damages based—essentially—solely on the withheld expertise of that individual. Likewise, the Court cannot—and will not—assume the effectiveness and profitability of unproven farming techniques that plaintiffs themselves allege were not as effective as they were represented to be.

\*7 In the absence of well-pleaded allegations supporting any of the facts listed above, “there is simply no basis for the court to determine lost profits at this point or any other stage of the litigation because such a calculation would require a high degree of speculation.” *Robin Bay*, 2008 WL 2275902, at \*8. Indeed, “a high degree of speculation” puts it lightly.

Plaintiffs’ damages claims based on ACCD’s alleged lost profits are therefore dismissed. The FAC is thus left with a claim for \$12,157.08 in money Meltzer advanced Perry, which Perry never repaid. But this is below the \$75,000 threshold required by 28 U.S.C. § 1332(a). Accordingly, the Court lacks subject matter jurisdiction and must dismiss this action.

## CONCLUSION

For the reasons stated above, plaintiffs’ FAC is dismissed. This dismissal is *without prejudice*, and plaintiffs are hereby granted leave to file a second amended complaint not later than March 11, 2013.

Defendants’ motion to dismiss is denied as moot.

The Clerk of the Court is directed to terminate the motion at ECF No. 12.

SO ORDERED.

## All Citations

Not Reported in F.Supp.2d, 2013 WL 840706

## Footnotes

- 1 Perry allegedly told Meltzer that his and FTN’s technology provided (1) “at least a 30% increase in production for nearly every crop ... for 15 years”; (2) “crop yields of 20% to 100% over the traditional N, P, K fertilizer program; and (3) “high end yield increases (of up to over 120%) for 11 different crops.” (FAC ¶¶ 13–15.)
- 2 The content of those conversations is not alleged.
- 3 “I have pointed out the limited business experience of plaintiffs, the fact that the enterprise was an adventure in a locality where neither one of them had before been engaged in business. No doubt the plaintiffs entertained hope that the

business venture upon which they were about to embark would prove successful. Such expectation was evidently based upon a consideration of the resident population of the city of Amsterdam, the business activity of the residents of that city, and the number and character of competitors in the same general line of business. Plaintiffs, however, had no assurance that the venture would not prove to be a failure. At the time the contract was made they had the lease of a vacant unfinished store. They had not as yet purchased goods, placed goods on sale, or secured one customer. They had before them the labor of building up a new business. Nevertheless, the courts below have held that plaintiffs may recover for the breach of the contract such an amount of profits as they would have made had they not been prevented from starting in business, such damages not to be based upon a business theretofore carried on, but measured by profits during a period of time corresponding to the period of interruption one year later. Therein material error was committed.

...

A distinction exists between the interruption of an established business and a new venture. The owner of an established business may have it in his power to establish with reasonable certainty the amount of capital invested, the monthly and yearly expenses of operating his business, and the daily, monthly, or yearly income he derived from it for a long time prior thereto and for the time during which the interruption of which he complains continued, thereby furnishing a reasonably correct estimate of the nature of the legal injury and the amount of damages which resulted therefrom. While evidence of such facts may be admissible they must not be uncertain or problematical. The requirement imposed upon one whose business has been established and interrupted cannot be enforced as to him and made less stringent to one embarking in a new business who cannot furnish data of past business from which the fact that anticipated profits would have been realized can be legally deduced." 119 N.E. at 228–29 (internal citations omitted).

- 4 Plaintiffs' FAC lists seven counts—some of which are plead "in the alternative" from each other—including one for breach of contract. Because no count includes a statement of the damages arising from that count, it is impossible for the Court to determine what damages claims are linked to which legal counts.
- 5 Indeed, the *Robin Bay* case is particularly instructive because there—like in the case at bar—the party against whom lost profits were claimed acted in the venture as an adviser without whom the venture could not proceed for lack of the venturers' expertise. Moreover, like this case, the claims in that case arose under contract, negligence, and fiduciary duty theories. See 2008 WL 2275902, at —1–2, 7–8.



KeyCite Yellow Flag - Negative Treatment

Distinguished by *Perry v. Hunt*, N.D.N.Y., September 18, 2012

303 F.3d 256

United States Court of Appeals,  
Second Circuit.Nikitas AMORGIANOS and Donna  
Amorgianos, Plaintiffs–Appellants,

v.

NATIONAL RAILROAD PASSENGER  
CORPORATION, d/b/a Amtrak, Defendant–  
Third–Party–Plaintiff–Appellee,  
Romano Enterprises, Romano Enterprises of  
New York, Inc., Ahern Painting, Ahern Painting  
Contractors Inc., and Dynamic Painting, Dynamic  
Painting Corporation, Third–Party–Defendants.

Docket No. 01–7508.

Argued: Feb. 11, 2002.

Decided: Aug. 28, 2002.

Bridge painter brought action against bridge owner to recover damages for nervous system injuries which he allegedly suffered due to exposure to of paint fumes while spray-painting inside a contained area. After jury returned verdict in favor of painter, the United States District Court for the Eastern District of New York Edward R. Korman, Chief District Judge, granted owner's motion for new trial and reassigned case. The District Court, David G. Trager, J., granted motion to preclude painter's experts from testifying, 137 F.Supp.2d 147, and granted summary judgment in favor of owner. Painter appealed. The Court of Appeals, John M. Walker, Jr., Chief Judge, held that: (1) grant of owner's motion for new trial was not impermissible post-trial *Daubert* ruling; (2) industrial hygienist's proposed expert testimony concerning solvent concentration to which bridge painter was exposed was properly excluded under *Daubert* as unreliable; and (3) proposed testimony of treating physician that nervous system injuries suffered by painter resulted from short-term exposure to paint solvent was properly excluded under *Daubert* as unreliable.

Affirmed.

## West Headnotes (20)

**[1] Federal Civil Procedure**

🔑 Tort actions

Grant of bridge owner's motion for new trial in painter's action for injuries sustained when he was allegedly exposed to toxic fumes while painting bridge was not impermissible post-trial *Daubert* ruling, where court based its ruling on finding that the jury's verdict was against the weight of the evidence, not on conclusion that painter's experts should have been excluded under *Daubert*.

2 Cases that cite this headnote

**[2] Federal Courts**

🔑 Expert evidence and witnesses

Court of Appeals reviews district court's determination to admit or exclude expert testimony under *Daubert* for abuse of discretion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

12 Cases that cite this headnote

**[3] Federal Courts**

🔑 Expert evidence and witnesses

Decision to admit or exclude expert scientific testimony is not an abuse of discretion unless it is manifestly erroneous. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

15 Cases that cite this headnote

**[4] Evidence**

🔑 Necessity and sufficiency

In analyzing admissibility of expert evidence, district court has broad discretion in determining what method is appropriate for evaluating reliability under the circumstances of each case. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

25 Cases that cite this headnote

**[5] Evidence**

🔑 Matters involving scientific or other special knowledge in general

In fulfilling gatekeeping role with regard to admission of expert testimony, trial court should look to standards of rule defining relevant evidence in analyzing whether proffered expert testimony is relevant, i.e., whether it has any tendency to make 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. Fed.Rules Evid.Rules 401, 702, 28 U.S.C.A.

39 Cases that cite this headnote

**[6] Evidence**

🔑 Necessity and sufficiency

District Court must determine whether proffered expert testimony has a sufficiently reliable foundation to permit it to be considered; in making this inquiry, district court should consider indicia of reliability identified in rule governing admission of such evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

83 Cases that cite this headnote

**[7] Evidence**

🔑 Necessity and sufficiency

In determining admissibility of expert testimony, district court must make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

46 Cases that cite this headnote

**[8] Evidence**

🔑 Necessity and sufficiency

Factors bearing on reliability of expert testimony listed in *Daubert* do not constitute

a definitive checklist or test. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

19 Cases that cite this headnote

**[9] Evidence**

🔑 Necessity and sufficiency

Inquiry envisioned by rule governing admission of expert testimony is a flexible one, and district Court's gatekeeping inquiry must be tied to the facts of a particular case. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

29 Cases that cite this headnote

**[10] Evidence**

🔑 Necessity and sufficiency

In undertaking flexible inquiry required under *Daubert* for admission of expert testimony, district court must focus on principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

90 Cases that cite this headnote

**[11] Evidence**

🔑 Necessity and sufficiency

When an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and rule governing admissibility of expert testimony mandate exclusion of that unreliable opinion testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

123 Cases that cite this headnote

**[12] Evidence**

🔑 Necessity and sufficiency

Where an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may go to the weight, not the admissibility of the expert's testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

42 Cases that cite this headnote

**[13] Evidence**

🔑 Necessity and sufficiency

*Daubert's* requirement that expert testify to scientific knowledge—conclusions supported by good grounds for each step in the analysis—means that any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

32 Cases that cite this headnote

**[14] Evidence**

🔑 Necessity and sufficiency

In deciding whether a step in an expert's analysis is unreliable, the district court should undertake 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. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

68 Cases that cite this headnote

**[15] Evidence**

🔑 Necessity and sufficiency

Minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render expert's opinion per se inadmissible; judge should only exclude the evidence if the flaw is large enough that the expert lacks good grounds for his or her conclusions. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

82 Cases that cite this headnote

**[16] Federal Civil Procedure**

🔑 Weight and Sufficiency of Evidence

**Federal Civil Procedure**

🔑 Lack of cause of action or defense

If admissible evidence is insufficient to permit a rational juror to find in favor of

plaintiff, district court remains free to direct a verdict or grant summary judgment for defendant. Fed.Rules Civ.Proc.Rules 50(a), 56, 28 U.S.C.A.

13 Cases that cite this headnote

**[17] Federal Civil Procedure**

🔑 Construction of evidence

**Federal Civil Procedure**

🔑 Presumptions

Once district court has deemed the evidence sufficiently reliable so as to be admissible, it is bound to consider the evidence in the light most favorable to plaintiff when deciding motions for summary judgment or judgment as a matter of law. Fed.Rules Civ.Proc.Rules 50(a), 56, 28 U.S.C.A.

4 Cases that cite this headnote

**[18] Evidence**

🔑 Medical testimony

Industrial hygienist's proposed expert testimony concerning solvent concentration to which bridge painter was exposed was properly excluded under *Daubert* as unreliable in painter's personal injury action against bridge owner; hygienist testified as to proper methodology for determining solvent concentration in an enclosed space, but did not follow that methodology in assessing the painter's exposure. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

4 Cases that cite this headnote

**[19] Evidence**

🔑 Medical testimony

District Court's evaluation of fit between proposed expert testimony on causation and scientific literature on which they relied did not usurp jury's and expert's roles in personal injury action brought by painter who was allegedly exposed to paint solvent while painting bridge. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

11 Cases that cite this headnote

## [20] Evidence

### 🔑 Medical testimony

Proposed testimony of treating physician that nervous system injuries suffered by bridge painter resulted from short-term exposure to paint solvent while he was painting bridge was properly excluded under *Daubert* as unreliable in painter's personal injury action against bridge owner, given analytical gap between the studies and physician's conclusions; studies did not address effects of short-term exposure to the solvent, involved exposure to variety of solvents, including those not in paint used by painter, and found symptoms inconsistent with those complained of by painter. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

8 Cases that cite this headnote

## Attorneys and Law Firms

\*259 Lawrence P. Biondi, New York, NY, for Plaintiffs–Appellants.

Angela Delfino Vitali, Jenkins & Gilchrist Parker Chapin LLP, New York, NY, for Defendant–Third–Party–Plaintiff–Appellee.

Before WALKER, Chief Judge, SACK and B.D. PARKER, Circuit Judges.

## Opinion

JOHN M. WALKER, JR., Chief Judge:

This case requires us to elaborate on the nature of the district court's role as the gatekeeper for scientific and technical testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Supreme Court's now-familiar *Daubert* ruling set forth the standards for the admissibility of expert scientific and technical testimony, providing that the district judge is to ensure that such testimony rests on a reliable foundation and is relevant to the case before the

court. *Id.* at 579. The question of how the district court is to perform this critical function is central to this appeal.

In June of 1998, a jury found in favor of plaintiffs Nikitas and Donna Amorgianos on a number of claims arising out of work-related injuries that Nikitas Amorgianos claimed to have suffered while engaged in a bridge painting project at a job site overseen by defendant National Railroad Passenger Corporation (“Amtrak”). Concluding that the jury verdict was against the weight of the evidence, the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief District Judge*) granted defendant Amtrak's motion for new trial. The case was then reassigned to Judge David G. Trager and defendant filed a *Daubert* motion to preclude plaintiffs' experts from testifying at the second trial. Judge Trager granted defendant's motion in a lengthy opinion, *Amorgianos v. National Railroad Passenger Corp.*, 137 F.Supp.2d 147 (E.D.N.Y.2001), and thereafter granted summary judgment in favor of Amtrak.

On appeal, plaintiffs argue that the district court abused its discretion in granting defendant's motion for new trial and thereafter \*260 by excluding plaintiffs' experts. They also contend that the district court erred in ultimately granting summary judgment. Finding no abuse of discretion or error in the district court's rulings, we affirm.

## BACKGROUND

### I. Plaintiffs' Claims

Plaintiff Nikitas Amorgianos (“Amorgianos”) seeks to recover damages for injuries he allegedly sustained as a result of toxic chemical exposure that occurred while he was painting a bridge at a job site overseen by defendant Amtrak. Amorgianos, who fell ill on August 28, 1995 while spray painting, alleges that his inhalation of and dermal exposure to toxic chemicals, and in particular to xylene, an organic solvent contained in paints, thinners, and primers used at the job site, caused him to suffer a variety of ailments. Specifically, he contends that his exposure to xylene resulted in “permanently disabling central nervous system dysfunctions, such as memory loss and cognitive deficits, and peripheral polyneuropathy, a neurological condition involving the loss of sensation and motor control in the extremities.”

Plaintiff Donna Amorgianos, Amorgianos's wife, claims loss of consortium and services.

## II. Procedural History

In April 1996, plaintiffs filed a complaint in state court that was later removed to the United States District Court for the Eastern District of New York. Thereafter, in June of 1998, the case proceeded to a jury trial before Judge Korman, resulting in a verdict in plaintiffs' favor. The jury awarded Amorgianos \$160,000 for loss of past earnings, \$340,000 for past pain and suffering, \$2.2 million for future pain and suffering, and \$572,000 for future lost earnings; it also awarded Mrs. Amorgianos \$60,000 for loss of consortium and services.

After trial, defendant Amtrak filed a motion for judgment as a matter of law or for a new trial, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure. Judge Korman denied Amtrak's motion for judgment as a matter of law but granted the motion for new trial upon concluding that the verdict was against the weight of the evidence. The case was then reassigned to Judge Trager.

In anticipation of a second trial, plaintiffs offered two experts who testified at the first trial, industrial hygienist Jack Caravanos and internist Dr. Jacqueline Moline, and one additional expert toxicologist, Dr. Jonathan S. Rutchik. Amtrak filed a *Daubert* motion to exclude the testimony of all three of plaintiffs' experts. By opinion, the district court granted the motion in part and denied it in part. *Amorgianos*, 137 F.Supp.2d 147.

In granting defendant's *Daubert* motion in part, the district court concluded that (a) Caravanos would not be permitted to testify regarding the concentration of xylene or other organic solvents to which Amorgianos was exposed because the methodology he used in calculating Amorgianos's exposure was unsound, *id.* at 174–76; (b) none of plaintiffs' experts would be permitted to testify “on the issue of general causation with respect to Mr. Amorgianos's alleged chronic neurological conditions,” because their opinions were unreliable, *id.* at 191, 177–91; and (c) plaintiffs' experts' testimony as to the duration of Amorgianos's alleged exposure was beyond their areas of expertise, *id.* at 176.

The district court also denied defendant's motion in part, holding that plaintiffs' experts could testify regarding Amorgianos's “alleged eye irritation, nausea, fever, and

other acute health conditions \*261 in the two- to three-day period after he ceased work on August 28, 1995, *provided* plaintiffs produce admissible expert evidence” regarding the xylene concentration to which Amorgianos was exposed, *id.* at 191; and that plaintiffs would be allowed to present otherwise admissible expert evidence based on the estimated duration of Amorgianos's exposure.

However, having excluded plaintiffs' proffered general causation testimony regarding the cause of Amorgianos's long-term neurological symptoms, the district court granted defendant leave to file a motion for summary judgment with respect to those claims and with respect to Mrs. Amorgianos's loss of consortium claims. *Id.* Finally, recognizing that the defects in Caravanos's expert opinion as to Amorgianos's xylene exposure level could be remedied if a more precise calculation method were applied, the district court granted plaintiffs leave to supplement the expert evidence. *Id.* In doing so, the district court advised plaintiffs that if they failed to supplement the record as indicated, defendant would be granted leave to file a motion for summary judgment with respect to all of Amorgianos's remaining claims. *Id.*

Plaintiffs failed to supplement the record and Amtrak's oral motion for summary judgment was granted with respect to all of plaintiffs' claims on March 30, 2001. This appeal followed.

On appeal, plaintiffs argue that the district court abused its discretion by granting defendant's motion for new trial and by excluding plaintiffs' experts under *Daubert*. Plaintiffs also contend that the district court erred in granting defendant's motion for summary judgment after excluding plaintiffs' experts. We address each of these arguments in turn.

## DISCUSSION

### I. Motion for New Trial

#### A. Standard of Review

This court reviews the grant of a new trial on the ground that the verdict was against the weight of the evidence for abuse of discretion. *Farrior v. Waterford Bd. of Educ.*, 277 F.3d 633, 634 (2d Cir.) (per curiam), *cert. denied*, 536 U.S. 958, 122 S.Ct. 2661, 153 L.Ed.2d 836 (2002). Granting

a new trial on that basis “is appropriate if ‘the jury has reached a seriously erroneous result or ... the verdict is a miscarriage of justice.’ ” *Id.* (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir.1998) (alteration in original)).

### *B. The Evidence at Trial*

In July 1995, Amorgianos, then in his early 40s and a bridge painter since 1974, began work for Amtrak on the Steinway Street Bridge project (the “project”). The project required sandblasting away old lead-based paint and repainting a street overpass in Astoria, Queens. As Amorgianos's duties entailed stripping and painting, he was required to work inside a containment enclosure built to protect pedestrians from lead paint dust and paint overspray (the “containment”).

At trial, there was conflicting evidence over whether Amtrak had supplied proper safety equipment, including organic vapor filters for the respirators that painters use to protect themselves from chemical exposure. There was also evidence suggesting that Amorgianos had used his respirator improperly. Amorgianos testified that during the last two weeks of the project, while spray painting inside the containment, he used a lead dust filter (which does not protect against paint fumes) because Amtrak had failed to provide a sufficient supply of organic vapor filters for the \*262 respirators. He also testified that, during these two weeks, there was no ventilation inside the containment because the containment's fresh air louvers were kept closed during painting and no fans were used.

Due to Amtrak's alleged failure to provide proper safety equipment and to ensure sufficient ventilation inside the containment, Amorgianos claimed that he suffered overexposure to xylene, an organic solvent, which caused him to fall acutely ill on August 28, 1995, with symptoms of fever, swollen joints, itchiness, headache, and difficulty moving. He testified that his condition worsened thereafter and that he now has no feeling in his hands, he drops things, his knees buckle beneath him, and he cannot walk as well as he could before the exposure. In addition, he claimed that he has no reflexes in the left side of his body, his whole body is numb and tingly, and he can no longer engage in outdoor or athletic activities.

To establish the necessary causal link between Amorgianos's alleged ailments and his workplace exposure to organic solvent vapors, plaintiffs offered

the testimony of two experts at the trial before Judge Korman: industrial hygienist Jack Caravanos and Dr. Jacqueline Moline, a board-certified internist and director of the occupational medicine program at Mount Sinai Hospital in Manhattan. Caravanos testified that a lead dust filter would be ineffective to protect against organic vapor exposure and stated that the ventilation inside the containment would have been insufficient because the containment's fresh air louvers were not open during painting and no fans were used. Caravanos also testified that the xylene level inside the containment was in the “thousands” of parts per million (ppm), whereas OSHA regulations set the limit for personal exposure to xylene at 100 ppm. Although Caravanos opined that exposure to xylene at these levels could cause the symptoms from which Amorgianos claimed to suffer, Judge Korman did not permit Caravanos to testify regarding the specific cause of Amorgianos's alleged ailments.

Dr. Moline, Amorgianos's treating physician, testified that Amorgianos suffered from persistent peripheral neuropathy, a central nervous system disorder, that was caused by workplace exposure to organic solvents.<sup>1</sup> Dr. Moline based her conclusions largely on the timing of the onset of his symptoms, the manifestation of his symptoms, and her elimination of other known causes of his ailments, such as diabetes. She testified that Amorgianos's symptoms have essentially remained constant during the time she has treated him, that he is profoundly weak, that the range of motion in his limbs is limited, that he has difficulty moving his knees, and that he cannot lift his left arm. She stated at trial, however, that as an internist, she was not personally qualified to interpret certain medical test results, including Amorgianos's nerve conduction studies and electromyography results.<sup>2</sup> Accordingly, she \*263 relied on other doctors' opinions regarding the results of those tests.

At trial, Amtrak countered plaintiffs' evidence with a surveillance video of Amorgianos walking without apparent difficulty, drinking several cups of coffee at a café, and smoking cigarettes. The defense also offered medical records from Ohio that were prepared following a car accident in 1996, which revealed, *inter alia*, that Amorgianos had a strong hand grasp and steady gait, that he denied weakness or numbness, that his reflexes were good, that his cranial nerve examination was normal, and that his motor strength was five out of five. These records were in direct conflict with the opinion offered by

his treating physician and expert, Dr. Moline, summarized above.

Defendant also produced the expert testimony of independent medical examiner Dr. Michael Rubin, a neurologist, who testified that his examination of Amorgianos revealed no abnormal findings, except for during sensation testing, which is based on information supplied by the patient. Dr. Rubin testified that Amorgianos's reported symptoms, i.e., greater weakness on the left side, is inconsistent with polyneuropathy or peripheral neuropathy, which would typically manifest in bilateral, symmetrical symptoms. In addition, defendant offered the testimony of Dr. Murray Budabin, another neurologist who examined Amorgianos, whose findings were consistent with Dr. Rubin's.

After the jury returned a verdict in plaintiffs' favor, Judge Korman concluded that granting a new trial was appropriate because, in his determination, "there was a miscarriage of justice in this case." The grounds for this decision included (1) the fact that the only experts qualified to interpret Amorgianos's neurological tests (Dr. Rubin and Dr. Budabin) concluded that the "results were normal and that at most [they] reflected a pinched nerve ... in the neck"; (2) Amorgianos's medical records from Ohio, which "if you believe them, show that [ ] the Plaintiff is a liar and a fraud, and that Dr. Moline's diagnosis is completely wrong"; (3) the video surveillance that revealed Amorgianos walking more than a quarter of a mile "without any difficulty"; (4) the testimony of the defense neurologists that the symptoms of toxically-induced peripheral neuropathy typically present in a symmetrical pattern, whereas Amorgianos complained of asymmetrical symptoms; and (5) the fact that there was no paint residue on the respirator Amorgianos had allegedly been using when he fell ill on August 28, 1995.

Judge Korman stressed that none of these factors taken alone would have been sufficient to upset the jury verdict, but that when taken together, along with the

problems about testimony regarding general causation, and questions about whether this incident happened in the way that the Plaintiff said it would have, which bears on the testimony of your other expert [Caravanos], ... suggest that this is a verdict that is seriously

erroneous or a miscarriage of justice, and clearly against the weight of the evidence. And for that reason I'm going to grant the Motion for a New Trial.

[1] Contending that the district court's grant of defendant's motion for new trial was grounded on the district court's post-trial determination that plaintiffs' expert testimony was unreliable and insufficient, plaintiffs argue that the district court abused its discretion in granting a new trial. Plaintiffs mischaracterize the district court's grant of a new trial as a post-trial *Daubert* ruling. As discussed above, the district court identified several pieces of evidence that, when taken together, suggest that the jury verdict in this case was a manifest miscarriage of justice because it \*264 was against the weight of the evidence. It was not a ruling based on a post-trial *Daubert* motion. *Cf. Macsenti v. Becker*, 237 F.3d 1223, 1230–34 (10th Cir.) (concluding that *Daubert* motion at the close of evidence was untimely; reviewing for plain error district court's admission of allegedly improper evidence under *Daubert*), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2593, 150 L.Ed.2d 752 (2001); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066–67 (9th Cir.1996) (concluding that party's post-trial challenge to plaintiff's evidence on *Daubert* grounds was untimely and had been waived).

The record makes clear that the district court was cognizant of the issues implicated by a post-trial *Daubert* ruling and did not base its grant of defendant's motion for new trial on the conclusion that plaintiffs' experts should have been excluded under *Daubert*. Nor did the district court conclude that plaintiffs' case was insufficient as a matter of law. In fact, the district court stated on the record that it was basing its determination on the weight of the evidence "[a]nd the question is whether the weight of the evidence was so overwhelmingly inconsistent [with the verdict]."

In light of the conflicting evidence summarized above, particularly the Ohio medical records and the surveillance video, the district court had a reasonable basis for finding that the jury verdict was against the weight of the evidence. We thus easily conclude that there was no abuse of discretion and affirm the district court's grant of defendant's motion for new trial.

## II. Expert Evidence Under *Daubert*

After the grant of defendant's motion for new trial and the transfer of the case to Judge Trager for further proceedings, defendant successfully filed a motion under *Daubert* to exclude plaintiffs' scientific and medical experts from testifying at trial. *See Amorgianos*, 137 F.Supp.2d at 160, 191. Plaintiffs argue that the district court's exclusion of the expert testimony was an abuse of discretion.

Specifically, plaintiffs contend that the district court overstepped its role in evaluating the expert evidence and that the district court imposed standards more stringent than those contemplated by the Supreme Court in *Daubert*. Claiming that Judge Trager “traded a judicial robe for a white lab coat in assessing the validity, reliability and ‘fit’ of the scientific materials relied upon by Amorgianos' experts,” plaintiffs maintain that he usurped the role of the jury and the experts by assessing the credibility, rather than the admissibility, of the expert testimony and by rendering his own opinion based on the scientific literature. For the reasons that follow, we reject plaintiffs' contentions.

### A. Standard of Review

[2] We review a district court's determination to admit or exclude expert testimony under *Daubert* for abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141–42, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (holding that “abuse of discretion is the proper standard of review of a district court's evidentiary rulings” and that *Daubert* did not alter this general standard). As the Supreme Court explained in *Kumho Tire*, “[o]ur opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it ‘review[s] a trial court's decision to admit or exclude expert testimony.’” 526 U.S. at 152, 119 S.Ct. 1167 (quoting *Joiner*, 522 U.S. at 138–39, 118 S.Ct. 512); *see, e.g., Campbell v. Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179, 185 (2d Cir.2001) (same).

\*265 [3] [4] A decision to admit or exclude expert scientific testimony is not an abuse of discretion unless it is “manifestly erroneous.” *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir.1995); *accord Joiner*, 522 U.S. at 142, 118 S.Ct. 512; *Campbell*, 239 F.3d at 185. Significantly, the abuse of discretion standard “applies as

much to the trial court's decisions about *how to determine reliability* as to its ultimate conclusion.” *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167 (emphasis added). Thus, in analyzing the admissibility of expert evidence, the district court has broad discretion in determining what method is appropriate for evaluating reliability under the circumstances of each case.

### B. District Court's Role Under *Daubert*

Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert and other scientific or technical expert testimony, provides 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, 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.

Fed.R.Evid. 702.

Interpreting Rule 702 in *Daubert*, the Supreme Court rejected the traditional *Frye* rule, under which courts required that a scientific theory be generally accepted by the scientific community in order to be admissible. *Daubert*, 509 U.S. at 585–89, 113 S.Ct. 2786; *see Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923); *see also Zuchowicz v. United States*, 140 F.3d 381, 386 n. 5 (2d Cir.1998) (discussing Supreme Court's rejection of *Frye*). Concluding that the bright-line “general acceptance” test established in *Frye* was at odds with the “liberal thrust” of the Federal Rules of Evidence, *Daubert*, 509 U.S. at 588, 113 S.Ct. 2786 (internal quotation marks omitted), the Supreme Court has made clear that the district court has a “gatekeeping” function under Rule 702—it is charged with “the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.* at 597, 113 S.Ct. 2786; *accord Campbell*, 239

F.3d at 184; Federal Judicial Center, Reference Manual on Scientific Evidence 11 (2d ed.2000).

[5] [6] [7] In fulfilling this gatekeeping role, the 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.’” *Campbell*, 239 F.3d at 184 (quoting Fed.R.Evid. 401) (alteration in original). Next, the district court must determine “whether the proffered testimony has a sufficiently ‘reliable foundation’ to permit it to be considered.” *Id.* (quoting *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786). 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.” Fed.R.Evid. 702. In short, the district court must “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom \*266 the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167.

[8] [9] Although Rule 702 sets forth specific criteria for the district court's consideration, the *Daubert* inquiry is fluid and will necessarily vary from case to case. The Supreme Court has identified a number of factors bearing on reliability that district courts may consider, such as (1) whether a theory or technique “can be (and has been) tested,” *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786; (2) “whether the theory or technique has been subjected to peer review and publication,” *id.*; (3) a technique's “known or potential rate of error,” and “the existence and maintenance of standards controlling the technique's operation,” *id.* at 594, 113 S.Ct. 2786; and (4) whether a particular technique or theory has gained “general acceptance” in the relevant scientific community, *id.* See also *Fed. Deposit Ins. Corp. v. Suna Assocs., Inc.*, 80 F.3d 681, 687 (2d Cir.1996) (discussing *Daubert* factors); Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.05[2][a], at 702–66 to 702–72.2 (Joseph M. McLaughlin ed., 2d ed.2002) (listing factors for the district court's consideration identified in *Daubert* and its progeny). These factors do not constitute, however, a

“definitive checklist or test.” *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786. Rather, “[t]he inquiry envisioned by Rule 702 is ... a flexible one,” *id.* at 594, 113 S.Ct. 2786, and “the gatekeeping inquiry must be tied to the facts of a particular case,” *Kumho Tire*, 526 U.S. at 150, 119 S.Ct. 1167 (internal quotation marks omitted).

[10] [11] In undertaking this flexible inquiry, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions. See *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. But, as the Supreme Court recognized in *Joiner*,

conclusions and methodology are not entirely distinct from one another.... [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.

522 U.S. at 146, 118 S.Ct. 512. Thus, 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. See *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 153 (3d Cir.1999) (“[A] district court must examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used.”).

[12] This is not to suggest that an expert must back his or her opinion with published studies that unequivocally support his or her conclusions. See *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir.2001) (observing that “[t]here is no requirement ‘that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness’”) (quoting *Heller*, 167 F.3d at 155); see also *Fed. Deposit Ins. Corp.*, 80 F.3d at 687 (finding no abuse of discretion in the admission of expert testimony based on a hybrid of two widely used methods). In *McCulloch*, for example, we affirmed the district court's admission of medical expert testimony despite the fact

that the expert “could not point to a single piece of medical \*267 literature” that specifically supported the expert’s opinion. 61 F.3d at 1043. Where an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may “go to the weight, not the admissibility” of the expert’s testimony. *Id.* at 1044; *see also Zuchowicz*, 140 F.3d at 387. A contrary requirement “would effectively resurrect a *Frye*-like bright-line standard, not by requiring that a methodology be ‘generally accepted,’ but by excluding expert testimony not backed by published (and presumably peer-reviewed) studies.” *Heller*, 167 F.3d at 155. Such a bright-line requirement would be at odds with the liberal admissibility standards of the federal rules and the express teachings of *Daubert*. *See McCulloch*, 61 F.3d at 1042, 1044.

[13] The flexible *Daubert* inquiry gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact. To warrant admissibility, however, it is critical that an expert’s analysis be reliable at every step. As Chief Judge Becker of the Third Circuit has explained, the *Daubert* “requirement that the expert testify to scientific knowledge—conclusions supported by good grounds for each step in the analysis—means that *any* step that renders the analysis unreliable under the *Daubert* factors renders the expert’s testimony inadmissible.” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir.1994); *see also Heller*, 167 F.3d at 155 (“[T]he reliability analysis applies to all aspects of an expert’s testimony: the methodology, the facts underlying the expert’s opinion, the link between the facts and the conclusion, *et alia*.”).

[14] [15] In deciding whether a step in an expert’s analysis is unreliable, the district court should undertake 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. A minor flaw in an expert’s reasoning or a slight modification of an otherwise reliable method will not render an expert’s opinion *per se* inadmissible. “The judge should only exclude the evidence if the flaw is large enough that the expert lacks ‘good grounds’ for his or her conclusions.” *In re Paoli*, 35 F.3d at 746; *see Daubert*, 509 U.S. at 590, 113 S.Ct. 2786. This limitation on when evidence should be excluded accords with the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the

necessary tools for challenging reliable, albeit debatable, expert testimony. As the Supreme Court has explained, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786; *accord Weinstein*, § 702.05[3] at 702–76.

[16] [17] In addition, if the admissible evidence is insufficient to permit a rational juror to find in favor of the plaintiff, the court remains free to direct a verdict or grant summary judgment for defendant. *See Weisgram v. Marley Co.*, 528 U.S. 440, 455–56, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000) (affirming appellate grant of judgment as a matter of law where court of appeals concluded that expert testimony was erroneously admitted and found the remaining evidence insufficient to support the jury’s verdict); *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786 (citing Fed.R.Civ.P. 50(a) & 56); *see, e.g., Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir.2000) (per curiam) (affirming district court’s grant of summary judgment). We have cautioned, however, that the district \*268 court’s *Daubert* gatekeeping role does not permit the district court, in ruling on evidentiary sufficiency, to reject admissible expert testimony. *See In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132–34 (2d Cir.1995); *see also Marbled Murrelet*, 83 F.3d at 1066–67. Once the district court has deemed the evidence sufficiently reliable so as to be admissible, it is “bound to consider the evidence in the light most favorable to plaintiff” when deciding motions for summary judgment or judgment as a matter of law. *In re Joint*, 52 F.3d at 1135.

### C. The District Court’s Conclusions

In this case, plaintiffs argue that the district court’s *Daubert* ruling usurped the jury’s function. They contend that the defects, if any, with respect to their proffered expert testimony went to its weight, not its admissibility. We disagree.

As Judge Trager observed, to establish their case under New York law, plaintiffs would have to prove that Amorgianos suffered from overexposure to xylene and that he is ill; they are also required to “produce expert opinion evidence based on suitable hypotheses in order to support a finding of causation.” *Amorgianos*, 137 F.Supp.2d at 160 (internal quotation marks omitted). More specifically, to establish causation, they must offer admissible expert testimony regarding both general

causation, i.e., that xylene exposure can cause the type of ailments from which Amorgianos claims to suffer; and specific causation, i.e., that xylene exposure actually caused his alleged neurological problems. *Id.* at 161; *see Zuchowicz*, 140 F.3d at 383 (“There is ... no older requirement in this area of law than the need to show such a link [i.e., medical causation] between the defendant's actions and the plaintiff's loss.”).

As set forth in Judge Trager's comprehensive opinion, the testimony of Amorgianos's experts was fatally flawed with respect to the duration and degree of Amorgianos's exposure to xylene, and on the issues of general and specific causation. The district court thus had a sound basis for each of its carefully circumscribed exclusions of plaintiffs' expert testimony.

[18] With respect to Caravanos, plaintiffs' industrial hygienist, the district court rejected his testimony regarding the xylene concentration inside the containment because Caravanos failed to apply his own methodology reliably. Caravanos testified that the evaporation rate of a solvent from paint “(and, hence, the resulting concentration of solvent vapor in an enclosed space) depends on the volatility/vapor pressure of the particular solvent in question, temperature, humidity and ‘radiant energy’, and that ‘proper exposure assessment’ ” would consider those variables. *Amorgianos*, 137 F.Supp.2d at 174 (quoting Trial Tr. at 41 (June 18, 1998)). In reaching his conclusion about Amorgianos's exposure, however, “Caravanos did not include any of these variables in his calculations. Instead, he included only variables for the amount of paint used, its xylene content, and the volume of the containment....” *Id.* (citations omitted). Although data on the additional variables was available to Caravanos, he inexplicably “did not find it necessary” to include them in his calculation despite his stated opinion that a “proper exposure assessment” would take them into consideration. *Id.* at 174, 175 n. 16. In light of his failure to apply the proper method for determining concentration and trial testimony suggesting that the solvent was evaporating from the paint more slowly than usual, the district court \*269 excluded Caravanos's opinion as unreliable.<sup>3</sup> *Id.* at 174–75.

Because Caravanos's opinion rested on a faulty assumption due to his failure to apply his stated methodology “reliably to the facts of the case,” Fed.R.Evid. 702, Caravanos's expert opinion regarding

the xylene concentration to which Amorgianos was exposed was not based on “good grounds.” *In re Paoli*, 35 F.3d at 746. Accordingly, the district court's exclusion of Caravanos's testimony regarding the xylene concentration inside the containment was not an abuse of discretion.

[19] With respect to the court's exclusion of plaintiffs' experts' general causation testimony, Judge Trager conducted an extremely thorough review of the scientific literature on which plaintiffs' experts relied, *see Amorgianos*, 137 F.Supp.2d at 192–216. Although this degree of review, while commendable, may not always be necessary to evaluate whether proffered expert testimony is admissible, Judge Trager's evaluation of the fit between the experts' opinions and the scientific literature on which they relied was certainly within the broad discretion afforded to the district court under *Daubert* and its progeny, and did not impinge upon the jury's function. It is precisely such an undertaking that assures that an expert, when formulating an opinion for use in the courtroom, will employ the same level of intellectual rigor as would be expected in the scientific community.

The Supreme Court recognized in *Joiner* that the district court may carefully review the studies on which proffered experts rely in forming their opinions:

[B]ecause it was within the District Court's discretion to conclude that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions that Joiner's exposure to PCB's contributed to his cancer, the District Court did not abuse its discretion in excluding their testimony.

*Joiner*, 522 U.S. at 146–47, 118 S.Ct. 512. Accordingly, we reject plaintiffs' assertion that the district court's method of evaluating the reliability of the experts constituted a usurpation of the jury's and experts' roles.

We hold that the district court's exclusion of all of plaintiffs' expert general causation testimony with respect to Amorgianos's long-term ailments<sup>4</sup> was not an abuse of discretion. As succinctly summarized by the district court, plaintiffs needed to offer admissible expert causation testimony to establish the following hypothesis:

that exposure to xylene in amounts averaging 500 to 2000 ppm on August 28, 1995 and each of preceding three workdays, and for three to five hour periods on intermittent days in the preceding thirty days can, as a general matter, cause the complex of [central nervous \*270 system] and [peripheral nervous system] symptoms that Mr. Amorgianos alleges.

*Amorgianos*, 137 F.Supp.2d at 178.

[20] With respect to Amorgianos's treating physician, Dr. Moline, the district court thoroughly reviewed all of the materials on which she relied in forming her opinion and concluded that there was "too great an 'analytical gap' between the conclusions reached by the authors of Dr. Moline's cited articles and the conclusions that she draws from their work." *Id.* at 185. Although Dr. Moline relied on a number of published articles in concluding that Amorgianos's xylene exposure caused him to suffer from polyneuropathy, the district court's close analysis of those studies revealed that (1) none of them provides evidence of the neurological effects of short-term xylene exposure; (2) all of the articles involved individuals who were exposed to a variety of solvents, many of which were not contained in the paint Amorgianos used; and (3) all of the articles connecting solvent exposure to peripheral nervous system symptoms found evidence of symmetrical polyneuropathy only, not of the asymmetrical symptoms of which Amorgianos complained. *Id.*

Accordingly, for the reasons stated in its thorough opinion, we find that the district court did not abuse its discretion in excluding Dr. Moline's testimony upon reasonably concluding that the analytical gap between the studies on which she relied and her conclusions was simply too great and that her opinion was thus unreliable. *See Joiner*, 522 U.S. at 146–47, 118 S.Ct. 512; *see, e.g., Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1132 (D.C.Cir.2001) (affirming judgment as a matter of law for defendant where plaintiff's experts relied on epidemiological evidence that failed to establish a causal link between breast implants and the disease from which plaintiff suffered).

For the same reasons, the district court's rejection of Dr. Rutchik's and Caravano's general causation opinion testimony was also not an abuse of discretion. *See Amorgianos*, 137 F.Supp.2d at 185–88 (discussing problem of "fit" between Dr. Rutchik's conclusions and the articles upon which he relied); *id.* at 188–91 (discussing

Caravano's lack of qualifications, as an industrial hygienist, to theorize regarding general medical causation and the unreliable methodology he used; pointing out that Caravano "did not actually read a single article as part of his literature survey").

Under the Supreme Court's analysis in *Joiner* and its unequivocal statement in *Kumho Tire* that the district court has discretion in deciding *how* to determine reliability, we conclude that the approach the district court used in this case was not an abuse of discretion. The district court's rigorous analysis of the methods that plaintiffs' experts used in reaching their opinions was appropriate given the facts of this case. In light of the defects in the methodologies employed by plaintiffs' experts and the district court's reasonable determination that there was a significant "analytical gap" between the experts' opinions and the studies on which they relied in reaching their conclusions, the district court's exclusion of plaintiffs' experts' testimony because it was not grounded in science was well within its discretion. *See Amorgianos*, 137 F.Supp.2d at 191 (concluding that plaintiffs' experts' "opinions are not based on 'scientific ... knowledge' and will not assist the jury in determining the issue of causation in this case").

### III. Motion for Summary Judgment

Having concluded that the district court did not abuse its discretion in granting defendant's *Daubert* motion, we also affirm the district court's grant of defendant's \*271 motion for summary judgment. In the absence of any expert evidence as to general causation and a gap in plaintiffs' case with respect to Amorgianos's xylene exposure due to the deficiencies in Caravano's testimony regarding the xylene concentration inside the containment, defendant was entitled to summary judgment because of plaintiffs' failure to present any admissible evidence in support of their theory of causation. *See, e.g., Brooks*, 234 F.3d at 92 (affirming district court's grant of summary judgment where plaintiff had no expert evidence to support a finding of causation under his design defect theory after his expert was excluded); *see also Raskin v. Wyatt Co.*, 125 F.3d 55, 65–67 (2d Cir.1997) (holding that it is appropriate for the district court to determine the admissibility of scientific and other evidence and to rely only on admissible evidence in ruling on summary judgment).

CONCLUSION

For the foregoing reasons, the judgments of the district court are affirmed.

All Citations

303 F.3d 256, 59 Fed. R. Evid. Serv. 639

Footnotes

- 1 “ ‘Neuropathy’ is a general term that denotes ‘any disorder affecting any segment of the nervous system,’ *Stedman’s Medical Dictionary* 1048 (25th ed.1990), while ‘peripheral neuropathy’ or ‘peripheral polyneuropathy’ [“PN”] is a somewhat more specific term that denotes a ‘disease process involving a number of peripheral nerves,’ *id.* at 1236. PN usually affects both sensory and motor function.” *Amorgianos*, 137 F.Supp.2d at 181.
- 2 As Judge Trager explained in his *Daubert* ruling, “[n]eurological abnormalities may be observed on some neurophysiological or neuroradiological measures, such as CT and MRI scans, electromyography, and electroencephalography.” *Amorgianos*, 137 F.Supp.2d at 181.
- 3 Recognizing, however, that Caravanos could remedy the defects in his testimony regarding the concentration in the containment by applying the proper method, the district court granted plaintiffs leave to supplement his expert report. *Amorgianos*, 137 F.Supp.2d at 175. Plaintiffs declined to do so.
- 4 As mentioned above, the district court denied defendant's motion to exclude plaintiffs' expert testimony on the issue of the general causation of the acute symptoms (such as eye irritation, nausea, and fever) that Amorgianos allegedly suffered in the two to three days after August 28, 1995, provided that plaintiffs produce admissible evidence on the xylene concentration inside the containment. *Amorgianos*, 137 F.Supp.2d at 191.



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Kidder, Peabody & Co., Inc. v. IAG Intern. Acceptance Group N.V., S.D.N.Y., November 17, 1998

944 F.2d 983

United States Court of Appeals,  
Second Circuit.

CARE TRAVEL COMPANY,  
LTD., Plaintiff-Appellee,

v.

PAN AMERICAN WORLD AIRWAYS,  
INC., Defendant-Appellant.

No. 1355, Docket 91-7035.

|

Argued April 11, 1991.

|

Decided Sept. 5, 1991.

Travel agency brought suit against airline, alleging that airline breached agency agreement which allegedly granted agency exclusive right to sell airline's tickets from England to Karachi, Pakistan and Bombay, India. The United States District Court for the Southern District of New York, Thomas P. Griesa, J., entered judgment on jury verdict in favor of agency in the amount of \$586,868. Airline appealed. The Court of Appeals, Martin, District Judge, sitting by designation, held that: (1) parol evidence was properly admitted to interpret agreement; (2) determination of content of terms of modification of agreement was matter for jury; (3) airline was not denied a fair trial on ground that district judge introduced theory not advanced by plaintiff; and (4) issue of damages was properly presented to jury.

Affirmed.

West Headnotes (12)

**[1] Evidence**

🔑 Contracts in General

Under New York law, if a contract is unambiguous on its face, rights of parties under such contract should be determined solely by terms expressed in the instrument itself rather than from extrinsic evidence as to

terms that were not expressed or judicial views as to what terms might be preferable.

38 Cases that cite this headnote

**[2] Contracts**

🔑 Ambiguity in General

Determination whether contract language is readily susceptible to one or more interpretations is made by court with reference to the contract alone.

16 Cases that cite this headnote

**[3] Evidence**

🔑 Contracts of Employment

Agency agreement with appointed travel agency sales agent for airline and which allegedly granted agency exclusive right to sell airline tickets to certain destinations was ambiguous, and extrinsic evidence was properly admitted to determine whether agency was limited to a geographical location from which it could sell tickets or by specific markets to which it could sell tickets.

18 Cases that cite this headnote

**[4] Contracts**

🔑 Questions for Jury

Issue of content of terms of modification of agency agreement between travel agency and airline was properly submitted to jury in travel agency's breach of contract action against airline.

Cases that cite this headnote

**[5] Contracts**

🔑 Sufficiency

Preexisting duty rule was inapplicable to render invalid modification of agency agreement between travel agency and airline, where both parties did, or promised to do, something in addition to their preexisting duties; airline promised agency that it would not terminate their contract within 90 days, as it had an immediate right to do, but

would extend length of contract for period of at least 90 days after the end of a reasonable time during which both agency and competitor would be operating as nonexclusive agents for airline; moreover, in return, agency temporarily agreed to operate as a nonexclusive agent, which caused it to suffer significant economic loss.

8 Cases that cite this headnote

**[6] Federal Civil Procedure**

🔑 Judge's Remarks and Conduct

Judge may not impose his own opinions on jury and must avoid at all costs assuming role of an advocate by making arguments to jury.

2 Cases that cite this headnote

**[7] Federal Civil Procedure**

🔑 Judge's Remarks and Conduct

Trial judge is not permitted to add to facts or present his own theories when they are not strongly grounded in the evidence.

Cases that cite this headnote

**[8] Federal Civil Procedure**

🔑 Judge's Remarks and Conduct

Airline which was sued by travel agency for breach of agency agreement did not establish that it was denied a fair trial when district judge introduced theory of recovery not advanced by travel agency by means of series of questions which district judge asked plaintiff's main witness; identical line of questioning was initially introduced by plaintiff at outset of case and during direct testimony of witness, and thus rather than introducing a new theory, testimony elicited by district judge was well within court's duty to clarify and fully develop relevant facts for jury's elucidation.

3 Cases that cite this headnote

**[9] Principal and Agent**

🔑 Measure and Amount of Damages

Airline which was sued by travel agency for breach of agency agreement did not establish that stricter standard of proof of damages required of a new business under New York law was proper standard to measure damages; airline's own witnesses confirmed that travel agency was selected to act as exclusive agent for airline due to its prior experience and existing network of subagents.

3 Cases that cite this headnote

**[10] Damages**

🔑 Loss of Profits

Lost profits may be recovered under New York law if it is demonstrated with certainty that such damages have been caused by the breach, damages are capable of proof with reasonable certainty, and there is a showing that particular damages were fairly within contemplation of parties to the contract at time it was made.

18 Cases that cite this headnote

**[11] Principal and Agent**

🔑 Measure and Amount of Damages

Evidence in action in which travel agency alleged that airline breached agreement which granted agency exclusive right to sell airline tickets to certain destinations was sufficient to allow issue of damages to go to jury; travel agency, relying in part upon airline's own reports, presented evidence as to actual sales made by it and competitor during relevant period, and calculated commission rate that it would have earned as exclusive agent.

6 Cases that cite this headnote

**[12] Principal and Agent**

🔑 Actions for Damages in General

Court's instruction on damages in action for breach of exclusive agency agreement between travel agency and airline was adequate, notwithstanding airline's complaint that court failed to inform jury that agency was seeking damages in form of lost profits, failed to

discuss how lost profits should be calculated, and failed to inform jury that it could not speculate in awarding damages; charge instructed jury to ask what loss agency suffered by breach of contract, and what agency would have gained had contract been carried out; moreover, while jury was not specifically instructed that it should refrain from speculation, instruction guided jury on how to use the evidence to calculate an award.

25 Cases that cite this headnote

### Attorneys and Law Firms

\*984 Malcolm A. Hoffman, New York City, for plaintiff-appellee.

Rita Murphy-Johnson, New York City (Pan American World Airways Legal Department, of counsel), for defendant-appellant.

\*985 Before CARDAMONE and MAHONEY, Circuit Judges, and MARTIN, District Judge. \*

### Opinion

MARTIN, District Judge:

Appellant Pan American World Airways, Inc. ("Pan Am") appeals from a judgment against it entered December 11, 1990 in the Southern District of New York, Thomas P. Griesa, District Judge, following a two-week jury trial.

Appellee Care Travel Company, Ltd. ("Care Travel") commenced this diversity action on March 24, 1989, alleging that Pan Am breached the parties' agency agreement which appointed appellee a Pan Am General Sales Agent and which allegedly granted appellee the exclusive right to sell Pan Am tickets from England to Karachi, Pakistan and Bombay, India. The jury found that appellant, by permitting another travel agency to sell tickets from England to Karachi and Bombay, breached the parties' written agency agreement. The jury further found that appellant made and breached promises after April 26, 1985 to remedy its alleged breach of the agreement. The jury awarded appellee \$586,868 in damages.

On appeal, Pan Am argues that (1) the district court erred by admitting parol evidence that the jury utilized in interpreting the agreement; (2) Care Travel's continued performance after the alleged breach of the written agreement constituted an acceptance of a new agreement; (3) Care Travel, as a matter of law, is not entitled to recover for a breach of a promise to cure a prior breach; (4) it was denied a fair trial when the district judge introduced an erroneous theory not advanced by plaintiff; (5) and the issue of damages was not properly presented to the jury.

### BACKGROUND

In 1984, Pan Am, due to its limited connections in the Indian and Pakistani communities of the United Kingdom, was interested in appointing a General Sales Agent ("GSA") to market and sell airline tickets in these communities for flights to the Indian subcontinent. As a result, Peter Moss of Pan Am contacted Mr. Babu Patel and Mr. Jagdish Patel who, along with Mr. Rajinder Dugal, owned and operated Rajan Travels. The principals of Rajan Travels expressed an interest in the idea and a series of meetings followed in the spring, summer and fall of 1984.

At that time, Empire Travel was already acting as a Pan Am GSA in the United Kingdom selling tickets to the Indian subcontinent. Empire Travel operated out of Southall, Middlesex, an area west of London. Nevertheless, Care Travel claimed that during the negotiations that ensued between it and Pan Am, the appellant made it known that it wanted a single company to act as its GSA in the United Kingdom. The principals of Rajan Travels thus activated a dormant company, Care Travel, for this purpose.

In July of 1984, after months of negotiations, Pan Am delivered to Care Travel its standard General Sales Agency Agreement (the "Agency Agreement") for the latter's review. The Agency Agreement provided that Care Travel was appointed to act as Pan Am's GSA within the General Sales Territory described in Annex A to the Agency Agreement. Annex A listed Care Travel's GSA territory as "London W1," an area within London. Although the standard GSA agreement provided that Care Travel would sell tickets to all of India and Pakistan, a subsequent writing memorialized the parties' agreement

that Care Travel could only sell tickets to Karachi and Bombay.

The specification of a separate territory out of which both Care Travel (London W1) and Empire Travel (Southall, Middlesex) allegedly could operate was consistent with the regulations and resolutions of the International Association of Travel Agents (“IATA”), which governs relations between airlines and travel agents and which were incorporated into the Agency Agreement. \*986 Specifically, paragraph 10 of IATA Resolution 876 provides that:

- (a) when a GSA is appointed, the territory in which it may exercise the authority delegated by the appointing Member shall be clearly defined in the agreement between the parties concerned and shall in no case be smaller than a political unit (i.e., country, state, province, county, town or village, or the equivalents or combination thereof) with a population at the time of appointment of not less than 10,000; any existing or subsequently established branch offices of the GSA within the defined territory shall be subject to all of the terms and conditions of the existing General Sales Agency Agreement;
- (b) in any one territory no member shall appoint more than one GSA.

Also expressly incorporated into the parties' Agreement was a “Pan American World Airways General Sales Agency Questionnaire” (the “Questionnaire”), which Rajan Travels, on behalf of the soon-to-be activated Care Travel, was required to complete and return to appellant as part of the GSA application process. In the Questionnaire, Care Travel was asked the following questions:

What percentage of the territory's production do you expect to be directly sold by your office? How is it composed in terms of commercial account, pleasure, government or military travel? What plans do you have to solicit each of these traffic sources:

Care Travel provided a single response: “All sales are through our own offices and about 250 sub-Agents at our

disposal.” The Questionnaire was returned to Pan Am in August of 1984.

Care Travel was due to commence business operations as a Pan Am GSA on October 1, 1984. Since Pan Am had, at that time, still not signed the Agreement, Ramon G. Evans, Pan Am's Sales Manager for the United Kingdom and Northern Europe, by letter dated September 25, 1984, wrote Jagdish Patel and confirmed various points upon which the parties had agreed. Included among the matters discussed is the statement by Pan Am that Empire Travel would be notified that, commencing October 1, 1984, it would only be permitted to sell tickets to Delhi. Further, Empire Travel would be informed that, apart from a short overlap period during which it would be allowed to honor tickets it had sold before October 1, 1984, Empire Travel would no longer be authorized to sell tickets to Bombay and Karachi.

In the next few weeks, Pan Am forwarded to Care Travel a letter providing the fare levels for tickets from England to Bombay and Karachi and, finally, the signed Agency Agreement.<sup>1</sup> At the same time, Care Travel commenced its operations in an office in London that was designed to appear as a Pan Am office.

Not long after the overlap period discussed in the September 25, 1984 letter had ended, Pan Am workers went on strike. As a result, the airline did not operate flights to India and Pakistan during February and March of 1985. After the strike ended, Pan Am, in an “urgent need” to recoup losses caused by the strike, sent out a letter dated April 26, 1985 (the “Letter”) to Care Travel and Empire Travel notifying each that henceforth, both Empire Travel and Care Travel would be permitted to sell tickets to Karachi, Bombay and Delhi.

Care Travel immediately objected in writing to this new policy as contrary to the understanding upon which it had agreed to become Pan Am's GSA. According to appellee, Pan Am responded by stating that the new arrangement was necessary for a short period of time in order to allow Pan Am to recoup its losses caused by the strike. In addition, Rajinder Dugal, plaintiff's majority shareholder testified at trial that Pan Am promised to terminate Empire Travel if Care Travel would, for a short period of time, continue to sell tickets in competition with Empire Travel.

\*987 Mr. Dugal testified at trial that the next two and one-half-year period—from April of 1985 until Care Travel's termination in October of 1987—was marked by Care Travel's repeated complaints to Pan Am that the non-exclusive GSA arrangement was resulting in a price war between GSAs that was costing Care Travel substantial revenue. Mr. Dugal further testified that, in response to such complaints, Pan Am repeatedly assured Care Travel that the termination of Empire Travel was forthcoming.<sup>2</sup> Pan Am, however, continued to do business with Empire Travel, even after that GSA filed for and emerged from bankruptcy.

Care Travel claimed that it was disappointed by this turn of events but continued throughout 1986 and 1987 to sell tickets at a loss in reliance upon Pan Am's promises to remedy its alleged breach. In 1987, an affiliated company of Empire Travel, Sun and Sand Travel, also went into bankruptcy. Thereafter, Pan Am again notified Care Travel that it was terminating Empire Travel and, indeed, in the late summer of 1987, Empire Travel was terminated.

Pan Am, however, soon after reversed course and, by letter dated October 30, 1987, provided appellee with a 90-day notice of termination. A newly formed company, Hindustan Travels, run by the Kumar family, which owned Empire Travel, was given the exclusive right to sell Pan Am tickets in the United Kingdom for routes from London to the Indian subcontinent.

At the conclusion of the trial, the trial judge submitted to the jury a series of special interrogatories that asked the jury (1) whether Pan Am appointed Care Travel to be its GSA in the United Kingdom for flights to Bombay and Karachi; (2) whether Pan Am breached this agreement; (3) whether Pan Am made a promise or series of promises to remedy its earlier breach; (4) whether Pan Am breached the subsequent promise or promises; and (5) what damages Care Travel suffered as a result. The jury answered the first four questions in the affirmative and awarded Care Travel \$586,868 in damages. Judgment was entered on December 11, 1990. Pan Am subsequently moved for and Judge Griesa denied a motion for judgment notwithstanding the verdict. This appeal followed.

## DISCUSSION

We first address Pan Am's parol evidence contention. Pan Am argues that the Agency Agreement clearly and unambiguously limited Care Travel's territory to "London W1." Thus, appellant contends that the district court erred in determining that the Agency Agreement was ambiguous and, as result, permitting the jury to consider parol evidence in interpreting the scope of Care Travel's agency.<sup>3</sup>

"In a contract action, the court's general objective should be to give effect to the [expressed] intentions of the parties in entering into the agreements." *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir.1990); see also *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir.1989); *Hartford Acci. & Indemnity Co. v. Wesolowski*, 33 N.Y.2d 169, 171-72, 350 N.Y.S.2d 895, 898, 305 N.E.2d 907, 910 (1973).

[1] Under New York law, which governs the Agreement at issue here, if a contract is unambiguous on its face, the parties' rights under such a contract should \*988 be determined solely by the terms expressed in the instrument itself "rather than from extrinsic evidence as to terms that were not expressed or judicial views as to what terms might be preferable." *Metropolitan Life Ins. Co.*, *supra*, 906 F.2d at 889; see also *W.W.W. Assoc., Inc. v. Giancontieri*, 77 N.Y.2d 157, 565 N.Y.S.2d 440, 443, 566 N.E.2d 639, 642 (1990); *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56, 421 N.Y.S.2d 556, 559, 396 N.E.2d 1029, 1031 (1979). On the other hand, parol evidence may be admitted to explain a writing when its terms are ambiguous. *Investors Ins. Co. of America v. Dorinco Reinsurance Co.*, 917 F.2d 100, 104 (2d Cir.1990); *Health-Chem Corp. v. Baker*, 737 F.Supp. 770, 773 (S.D.N.Y.), *aff'd*, 915 F.2d 805 (2d Cir.1990).

[2] Contract language is unambiguous when it has "a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *Hunt Ltd.*, *supra*, 889 F.2d at 1277 (quoting *Breed v. Insurance Co. of North America*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282 (1978)). Conversely, a term is ambiguous when it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular

trade or business.’ ” *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir.1987) (quoting *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F.Supp. 987, 994 (S.D.N.Y.1968)). The determination as to whether the contract language is readily susceptible to one or more interpretations is made by the court with reference to the contract alone. *Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir.1990); *W. W. W. Assoc.*, *supra*, 565 N.Y.S.2d at 443, 566 N.E.2d at 642.

[3] Since we believe that the entire integrated Agency Agreement is reasonably susceptible to more than one interpretation as to the scope of appellee's agency status, we find that the district court properly applied the above-discussed principles when it permitted the jury to consider extrinsic evidence to interpret the Agency Agreement.

The appellant argues that no ambiguity exists since the Agency Agreement clearly provides that appellee was appointed to act as Pan Am's GSA solely within the London W1 general sales territory. The IATA regulations, which appellant concedes are incorporated into the Agency Agreement, however require that GSA's defined territory “in no case be smaller than a political unit (i.e., country, state, province, county, town or village, or the equivalents or combination thereof)...” It seems clear that London W1 was not, as required, a “political unit (i.e., country, state, province, county, town or village, or the equivalents or combination thereof).” Therefore, its inclusion as the territory covered by the parties' Agency Agreement raises ambiguities which required resort to extrinsic evidence. In other words, the very term upon which appellant relies to establish the clarity of the Agency Agreement was itself ambiguous.

Moreover, the form contract provided by Pan Am to appellee states that the GSA's office address is indicated in Annex B. No office address is listed in Annex B. However, Annex A, the location where the London W1 territory is listed, is entitled “General Sales Agency Office Addresses.” Thus, it is unclear whether the London W1 referred to in Annex A was merely the address of Care Travel's office or whether it was the territory from which appellee was required to operate. The admission of evidence outside the four corners of the document was, thus, necessary to ascertain the significance of the London W1 term.

In addition, the Agency Agreement required Care Travel to maintain agents within its general sales territory. In the Pan Am Questionnaire completed by appellee, which was made part of the Agency Agreement, Care Travel refers to its general sales territory as the place where its network of 250 subagents are located. \*989 This response appears to conflict with the provision in the Agreement limiting Care Travel's territory to London W1 and, thus, at the very least results in a further ambiguity necessitating the admission of parol evidence as a means of clarifying the parties' intent.

Appellant also argues that the lack of any provision in the Agency Agreement restricting the destinations to which Care Travel could sell tickets undercuts appellee's argument that extrinsic evidence was properly admitted to establish that Care Travel was appointed Pan Am's exclusive GSA throughout the United Kingdom for the purpose of servicing the Karachi and Bombay markets. However, in the cover letter to Care Travel enclosing the Agency Agreement signed by Pan Am, appellant confirmed the parties' agreement that appellee was appointed to service the gateways of Karachi and Bombay. This letter modified the parties' Agency Agreement since the Agency Agreement provided that Care Travel would sell to destinations in India and Pakistan and did not specify any cities within these countries. As a result, Pan Am's Sales Manager, Ramon Evans, required Care Travel to signify its agreement to this change by signing the letter and returning a copy to Pan Am. This letter, which was expressly incorporated into the parties' Agency Agreement, creates a further ambiguity that renders it impossible to glean from the instrument itself the plain intent of the parties.

Given the ambiguities discussed above, we conclude that resort to evidence outside the four corners of the Agency Agreement was necessary in order to determine whether Care Travel's agency was limited to a geographical location-London W1-from which it could sell tickets or by specific markets to which it could sell Pan Am tickets. Accordingly, we find that the district court properly admitted the parol evidence regarding the parties' intent.

[4] Pan Am's next two grounds for appeal are related and, thus, will be discussed in tandem. Appellant argues that Care Travel's continued performance after the alleged April 26, 1985 breach of the Agency Agreement constituted an acceptance of a new agreement; one in

which Care Travel was no longer the exclusive Pan Am GSA for the Karachi and Bombay markets. Further, Pan Am contends that the judgment must be reversed because, as a matter of law, Care Travel is not entitled to recover for Pan Am's breach of its alleged promise or promises to cure its prior breach.

In order to make these arguments, Pan Am assumes, *arguendo*, that its April 26, 1985 letter permitting both Care Travel and Empire Travel to sell tickets to Bombay, Karachi and Delhi constituted a unilateral modification of and, thus, a termination of the parties' Agency Agreement. From there, Pan Am argues that since the parties' contract was terminable at will upon ninety days' written notice, appellee was entitled to at most only the damages suffered in this ninety day post-termination period.

Appellant further argues that, since Care Travel continued to perform under the post-April 26, 1985 arrangement, the original Agency Agreement was modified and, therefore, Care Travel waived its rights to insist on application of the parties' initial contract. Accordingly, appellant argues that Care Travel is not entitled to recover any damages under the old contract, including any damages sustained during the ninety-day notice period.

In effect, Pan Am's argument is premised upon the following assumptions: that the parties' initial contract was terminable at will upon ninety-days' notice, that the contract was unilaterally modified and, thus, terminated, by Pan Am in its April 26, 1985 letter, that this termination left the parties free to form a new contract with terms that differed from those contained in the initial contract and, finally, that Care Travel's continued performance following the termination of the initial contract constituted an assent to the modification of the Agency Agreement on those terms proposed by appellant.

Pan Am cites a number of cases which purportedly support the legal argument that if a party, notwithstanding its objection, \*990 continues to perform under a new or changed contract, the party has accepted the modified contract and, thus, has no damage remedy arising from the modification since it has waived its right to insist on the application of the parties' initial contract. *Flint v. Youngstown Sheet & Tube Co.*, 143 F.2d 923 (2d Cir.1944); *Curtiss Candy Co. v. Silberman*, 45 F.2d 451 (6th Cir.1930); *Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 460 N.Y.S.2d 552 (1st Dep't 1983); *Omega*

*Precision Hand Tools, Inc. v. H. Alpers & Associates, Inc.*, 49 A.D.2d 885, 373 N.Y.S.2d 215 (2d Dep't 1975); *Horowitz v. La France Industries, Inc.*, 274 A.D. 46, 79 N.Y.S.2d 794 (1st Dep't 1948).

The fact patterns found in these cases, however, are distinguishable from that found in the instant action in several important respects. Specifically, in each cited case, one party unilaterally attempted to terminate an at-will contract by insisting upon a modification of its terms. The other party then indicated its assent to the new contract by continuing to perform. Accordingly, the courts found that the assent to the modification on the terms proposed by the breaching party precluded any recovery based upon the initial agreement.

Here, however, as the District Court noted, the contract between the parties provided that “[f]ailure to exercise or delay in the exercising of any right under this Agreement shall not waive or otherwise prevent the enforcement or exercise of such right or any other right.”

Further, the jury was presented with evidence that Care Travel objected to the terms proposed by Pan Am in the Letter and that, in response to Care Travel's objections, Pan Am repeatedly promised to restore Care Travel's position to that of exclusive GSA. Moreover, evidence was presented that Care Travel continued to perform only in reliance upon these promises. Thus, Care Travel did not waive the right to recover damages for Pan Am's breach because of its agreement; rather, Care Travel agreed to continue to perform as Pan Am's agent on a non-exclusive basis in return for Pan Am's promise to award it an exclusive right in the future. Thus, the cases cited by appellant are inapposite.

In effect, the jury was presented with evidence that the parties' relationship was modified by the Letter. The parties differed, not surprisingly, as to the terms of that modification. Appellant, on the one hand, contended that the modification was based upon its April 26, 1985 letter which permitted both Care Travel and Empire Travel to sell Pan Am tickets to Karachi, Bombay and Delhi. Care Travel, on the other hand, contended that its assent to sell tickets on a nonexclusive basis was temporary and conditioned on a restoration of it as Pan Am's exclusive GSA for Karachi and Bombay.

Given this issue of fact, the issue of the terms of the Agency Agreement's modification was properly submitted to the jury. In doing so, the trial judge did not frame the issue in terms of a modification of the initial Agreement. Instead, the trial judge asked the jury whether Pan Am acknowledged its April 26, 1985 breach of the Agency Agreement by promising to remedy the breach by restoring Care Travel to its position as exclusive GSA. Further, the judge instructed the jury to determine whether Care Travel performed thereafter in reliance upon, and whether Pan Am in fact breached, this alleged subsequent promise or series of promises.

[5] Pan Am objects to this theory of recovery, arguing that a promise to comply with a pre-existing legal duty is not adequate consideration upon which a valid contract may be based. *See Goncalves v. Regent Intl. Hotels, Ltd.*, 58 N.Y.2d 206, 220, 460 N.Y.S.2d 750, 757-58, 447 N.E.2d 693, 699-701 (1983); *Fafoutis v. Lyons*, 149 A.D.2d 565, 566, 540 N.Y.S.2d 20, 21 (2d Dep't 1989).

In the present case, however, the parties did not simply covenant to perform their preexisting obligations. Rather, both parties did, or promised to do, something in addition to their pre-existing duties. Specifically, the parties' initial Agreement permitted Pan Am to terminate Care Travel on 90 days' notice. Evidence was presented \*991 that, rather than exercise its right to do so, Pan Am instead promised to terminate Care Travel's competitor, Empire Travel, in the future. In return, Care Travel temporarily agreed to operate as a non-exclusive GSA under an arrangement which, appellee argued, caused it to suffer significant economic loss. As a result of this bargained-for exchange of promises, both parties suffered detriments and bestowed benefits on the other that differed from those placed on the parties in the Agency Agreement. These differing benefits and burdens supplied the consideration necessary to support the modification. As one commentator has explained:

... if the bargained-for performance rendered by the promisee includes something that is not within the requirements of the pre-existing duty, the law of consideration is satisfied. It makes no difference that the agreed consideration consists almost wholly of a performance that is already required and that this performance is the main object

of the promisor's desire. It is enough that some small additional performance is bargained for and given.

1A Corbin on Contracts § 192 at 180 (1963). *See, e.g., Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1359-60 (D.C.Cir.1982).

Here, Pan Am, in effect, promised Care Travel that it would not terminate their contract within 90 days, as it had an immediate right to do, but agreed to extend the length of the contract to a period of at least 90 days after the end of a reasonable period of time during which both Care Travel and Empire Travel would be operating as non-exclusive agents. Since this was different from Pan Am's pre-existing duty, we find the pre-existing duty rule inapplicable to the present situation.

In any event, if there was no new consideration, Pan Am's original agreement to use Care Travel as its exclusive agent for Bombay and Karachi remained in effect. Since Pan Am did not exercise its right to terminate Care Travel by giving 90 days notice, it remains liable for the damages suffered by Care Travel as a result of Pan Am's breach of its obligation of exclusivity.

As a further ground for appeal, Pan Am argues that the district judge overstepped his bounds of discretion and committed reversible error when, on his own initiative, he introduced into the case the theory that Pan Am's liability could be based upon its breach of a series of promises to cure the original breach of contract. Pan Am contends that this theory of recovery had never been advanced by the parties.

Pan Am further argues that, in presenting this theory, the district judge improperly conveyed his personal views about the merits of the parties' claims and their witnesses' credibility. Specifically, Pan Am contends that the district judge conveyed to the jury his opinion that the testimony of plaintiff's witness, Rajinder Dugal, was worthy of belief while that of defendant's witness, Ramon Evans, was not. In effect, Pan Am argues that the district judge assumed the role of an advocate and, in doing so, deprived it of a fair trial.

As this Court has previously explained, a federal district judge "is charged to see that the law is properly administered, and it is a duty which he cannot discharge

by remaining inert.” *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir.1945) (Learned Hand, J.). Rather than “simply act[ing] as moderator,” *Ah Lou Koa v. American Export Isbrandtsen Lines, Inc.*, 513 F.2d 261, 263 (2d Cir.1975), “or mere passive spectator,” *Pariser v. New York*, 146 F.2d 431, 433 (2d Cir.1945), a federal district judge who conducts a jury trial “has the duty to see that the facts are clearly presented....” *Id.* at 433. In order to do so, the judge is permitted to summarize the evidence for the jury and, if he chooses, to comment on it. *American Export Isbrandtsen*, *supra*, 513 F.2d at 263. In addition, a judge may also “interpose relevant questions to witnesses ‘to clarify both legal and factual issues and thus minimize possible confusion in the jurors' minds.’ ” *Dixon v. Maritime Overseas Corp.*, 490 F.Supp. 1191, 1196 (S.D.N.Y.1980) (quoting *Anderson v. Great Lakes Dredge & Dock Co.*, 509 F.2d 1119, 1131 (2d Cir.1979)). *See also Pariser*, *supra*, 146 F.2d at 433; Fed.R.Evid. 614(b) \*992 (“[t]he court may interrogate witnesses, whether called by itself or by a party”).

[6] [7] There are, however, recognized limitations on the judge's right to actively participate in the trial. Specifically, a judge may not impose his own opinions on the jury and must avoid at all costs assuming the role of an advocate by making arguments to the jury. *American Export Isbrandtsen*, *supra*, 513 F.2d at 263; *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir.1970), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 581, 27 L.Ed.2d 631 (1971), *reh. denied*, 401 U.S. 966, 91 S.Ct. 968, 28 L.Ed.2d 249 (1971); *United States v. Marzano*, *supra*, 149 F.2d at 926. Finally, a trial judge is not permitted to add to the facts or “present his own theories when they are not strongly grounded in the evidence.” *American Export Isbrandtsen*, *supra*, 513 F.2d at 263.

[8] Read against the backdrop of these prohibitions, we find no merit to Pan Am's contentions. To begin with, Pan Am's argument that the district judge, on his own initiative, introduced a new theory of liability into the case is premised upon a series of questions the district judge asked plaintiff's main witness, Rajinder Dugal. These questions related to alleged conversations between Dugal and Pan Am's witness, Evans, regarding promises Evans allegedly made to remedy Pan Am's breach of contract by restoring Care Travel as Pan Am's exclusive GSA for the Karachi and Bombay destinations. Pan Am contends that this series of questions provided the framework for a new theory; one never previously advanced by Care Travel.

A review of the record, however, indicates that the identical line of questioning had been initially introduced by Care Travel at the outset of its case in Dugal's direct testimony. Indeed, Dugal's testimony on direct examination and in response to the district judge's questions establishes that Care Travel maintained from the commencement of the trial that it continued to act as Pan Am's GSA on a non-exclusive basis in reliance on Pan Am's repeated promises to restore the relationship to an exclusive one. Thus, the theory of recovery of which Pan Am now complains, while perhaps not articulated with precision by Care Travel, was “strongly grounded in the evidence.” As a result, we find that, rather than introducing a new theory, the testimony elicited by the district judge was well within the Court's duty to clarify and fully develop the relevant facts for the jury's elucidation, and to assist the jury in giving meaning to such facts by organizing them in a coherent manner.

Pan Am also complains about the manner in which this allegedly new theory was presented to the jury. However, we do not believe that the district judge's mode of questioning Dugal indicated to the jury a bias on the court's part in favor of Care Travel or indicated that the judge had an opinion regarding the significance of the alleged new theory or of the credibility of the witnesses. Indeed, the sole excerpt to which Pan Am refers in support of the district judge's alleged bias evidences that the judge made clear that he supported neither parties' presentation:

But the way I think it shapes up is this. The issue is presented by Mr. Dugal's testimony, and whether you accept his testimony or not that's up to you and I don't know whether you will or you won't, but let me put it this way, his testimony presents the following issue.

Did Pan American acknowledge the breach of contract and make an agreement to remedy that breach, or a series of agreements to remedy the breach? Because if you accept-again I don't know whether you will or you won't-but if you accept Mr. Dugal's testimony that basically is the significance of it. Or you could conclude that that's the significance of it. That would be up to you. At least that's the issue: Did Pan American make an agreement or a series of agreements to remedy the breach?

Well, that obviously is a different promise than that contained in the original agreement so there is a separate issue about that.

And did Care Travel keep on acting in its capacity as the general sales agent in \*993 reliance upon that promise or series of promises.

Moreover, the district judge coupled this instruction with a cautionary warning that the court's statements were not evidence and that the jury-and not the court was to make the ultimate assessment of the facts.<sup>4</sup>

In short, having carefully reviewed the record, we find no evidence that the district judge became an advocate for any party or introduced a theory into the case not grounded in the evidence. Nor do we find any evidence that Pan Am was prejudiced by the questions and comments the court did make. Accordingly, we find Pan Am's contentions in this regard to be without merit.

[9] The final errors asserted by Pan Am refer to the question of damages. Appellant first contends that Care Travel failed to meet the stricter standard of proof of damages required of a new business under the test articulated by New York's Court of Appeals in *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132, 493 N.E.2d 234, 235 (1986). Pan Am contends that without the requisite stricter proof, Care Travel's claim for damages was based on nothing more than pure speculation and, thus, the issue of damages should not have been submitted to the jury.

Pan Am's argument and, thus, its reliance on *Kenford*, rests on the assumption that Care Travel was a new venture. As testimony from Pan Am's own witness, John Varley, demonstrates, this assumption is misplaced. Mr. Varley, a high-ranking Pan Am official who had been employed by appellant since 1959, testified that Pan Am was interested in having Care Travel act as its GSA in the United Kingdom due to the track record of Care Travel's principals:

... they appeared to have the general expertise to represent Pan American in the United Kingdom, to sell air transportation between London Heathrow, where we operated from, to Bombay, India and Karachi, Pakistan.

They had the expertise. They had the subagency network within the United Kingdom, they had particular affiliation to the ethnic and religious groups that lived both in that particular area of India and certainly Bombay and Pakistan. They had affiliations with the United Kingdom for those same groups of people and subject to a financial evaluation and credit rating from a credit agency they were seriously being considered as a future appointee to handle Pan Am sales.

Other Pan Am witnesses, including Evans and John McGhee, Pan Am's regional director of marketing for northern Europe, confirmed that Care Travel was selected to act as appellant's GSA due to their prior experience and the existing network of subagents they brought with them.<sup>5</sup> In such a case, the stricter "new business" standard is inapposite to the facts of this case. *Cf. Hirschfeld v. IC Secur., Inc.*, 132 A.D.2d 332, 337, 521 N.Y.S.2d 436, 440 (1st Dep't 1987) ("While plaintiffs seek to cast this agreement as a new business venture, defendants ... have been in the syndication \*994 business for an extended period of time and the transaction herein is of the same type as the many others they have successfully completed"), *app. dismd. without op.*, 72 N.Y.2d 841, 530 N.Y.S.2d 556, 526 N.E.2d 47 (1988); *S. Jon Kreedman & Co. v. Meyers Brothers Parking-Western Corporation*, 58 Cal.App.3d 173, 130 Cal.Rptr. 41 (Cal.App.Ct.1976) ("although this particular parking garage was new, the parking business is ... not a new business and [defendant] was a highly experienced garage operator").

[10] We further find that appellee presented sufficient evidence of its damages to allow the issue to go the jury. Under New York law, as articulated by the Court of Appeals in *Kenford*, lost profits may be recovered if it is "[f]irst ... demonstrated with certainty that such damages have been caused by the breach." *Kenford, supra*, 67 N.Y.2d at 261, 502 N.Y.S.2d at 132, 493 N.E.2d at 235. Second, the damages must be capable of proof with reasonable certainty. *Id.* In other words, "the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." *Id., citing Wakeman v. Wheeler & Wilson Manuf'g Co.*, 101 N.Y. 205, 4 N.E. 264 (1886). Finally, "there must be a showing that the particular damages were fairly

within the contemplation of the parties to the contract at the time it was made.” *Id.*, citing *Witherbee v. Meyer*, 155 N.Y. 446, 50 N.E. 58 (1898).<sup>6</sup>

[11] Applying these rules to the present case, we find that Pan American's “assertion that the proof of any lost profits was purely speculative ... is belied by the evidence.” *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 852 (2d Cir.1987) (citation omitted). Specifically, Care Travel, relying in part upon appellant's own reports, presented evidence as to the actual sales made by both Care Travel and Empire Travel during the April 1985-January 1988 period for the Bombay, Karachi and Delhi routes. Care Travel then applied to this figure an estimated percentage of sales to the Indian subcontinent attributable to only the Karachi and Bombay routes, since those were the destinations to which Care Travel claimed a contractual exclusive. In doing so, appellee again relied on Pan Am's own documents.<sup>7</sup> Care Travel then calculated a commission rate that it would have earned as an exclusive GSA and applied this rate to the sales figures for the Karachi and Bombay markets. In order to arrive at its net lost profit, Care Travel then calculated and subtracted the actual income it received on sales made during the relevant period and the costs avoided on the sales not made.<sup>8</sup>

Appellant takes issue with the two major assumptions or estimations made by Care Travel in its damage calculations; namely that Care Travel, if it had been the exclusive GSA, would have received a 12% commission and would have sold all of the Pan Am tickets sold by Empire Travel to Karachi and Bombay. The mere fact that appellant disagrees with the methodology utilized by Care Travel in arriving at its 12% commission rate or Care Travel's assumption that all of Empire Travel's sales to Karachi and Bombay would have neatly transferred to Care Travel does not render Care Travel's proof speculative.

Moreover, Pan Am, and the trial judge, vigorously challenged and Care Travel defended the assumptions underlying its damage proof. With respect to the 12% commission rate, Pan Am argued that the correct figure that should have been applied was the actual 2.67% profit margin Care Travel obtained during the October 1984-April 26, 1985 period prior to the alleged breach. In response, Care Travel's damage witness presented a reasonable explanation as to why this figure was rejected

as irrelevant. Specifically, the witness explained that the time period during which the 2.67% return was obtained included the overlap period during which both of Pan Am's GSAs were selling tickets to the same destinations. Accordingly, the witness explained that since Care Travel was not acting on an exclusive basis during this period, the 2.7% did not establish the proper profit margin for an exclusive Pan Am GSA.

With respect to the tickets that Care Travel would have sold had it been the exclusive GSA, Pan Am's witness, Ramon Evans, testified that, in his “personal belief,” 100% of Empire Travel's sales to Bombay and Karachi would not have been transferred to Care Travel. Mr. Evans theorized that the entry of two GSAs competing for sales to the same destinations expanded the market to these destinations and, thus, without such competition Care Travel would have sold less tickets as an exclusive GSA than it did in competition with Empire Travel.

Earlier in the trial, Judge Griesa similarly and quite vigorously challenged Care Travel's witness on his assumption that all of the tickets that Empire Travel sold to Bombay and Karachi would have been sold by Care Travel. Indeed, in response to the trial judge's line of questioning, Care Travel's damage witness, Mark Pickering, conceded that the price war between Care Travel and Empire Travel could have increased sales volume and that, absent the price war, sales may have been less than it was when both GSAs were competing. In addition, the trial judge's questions to Pickering suggested that Care Travel might not have captured all of Empire Travel's sales since the two GSAs did not utilize all the same subagents.

Admittedly, Care Travel's responses to these challenges were not completely convincing. However, the alleged inadequacy of the responses does not make Care Travel's damage proof speculative. Rather, given the extent of Care Travel's damage proof, we believe that the trial court was well within the proper bounds to submit the damages issues to the jury. *S & K Sales Co. v. Nike, Inc.*, *supra*, 816 F.2d at 853; *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1260 (2d Cir.1987).

Moreover, Care Travel's damage presentation concluded with a request for \$970,846.00. The jury awarded Care Travel \$563,858.00. The compromise nature of the verdict gives rise to an inference that the jury considered both

parties' arguments and attempted to arrive at a reasonable estimate of appellee's damages.

Finally, we deal with Pan Am's objections to the propriety of the damage instruction given to the jury. Pan Am claims that the charge as it related to damages lacked the clarity required to give the jury an adequate understanding of the law and how it should be applied to the evidence. The appellant specifically cites the trial court's failure to inform the jury that, if liability was found, the damages plaintiff was seeking were its lost profits, the court's failure to discuss how lost profits should be calculated and, finally, the court's failure to inform the jury that it may not speculate in awarding damages.

Pursuant to Fed.R.Civ.P. 51, “[n]o party may assign as error the giving or failure to give an instruction unless the party objects thereto ... stating distinctly the matter objected to and the grounds of the objection ...” An exception may be made only when there is “plain error,” that is, “where the error may result in a miscarriage of justice or in obvious instances of misapplied law.” *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1324 (2d Cir.1990); see also *Proteus Books Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 514 (2d Cir.1989).

**\*996** In this case, the Court spent a great deal of time discussing the charge with counsel and seeking their input. Despite ample opportunity to raise objections to the charge, counsel did not raise the issues they now press on appeal.

At the conference prior to submission of the charge, Judge Griesa explained in detail how he would instruct the jury to calculate damages if they deemed such an award proper:

If they find a breach of promise or breach of contract, they will be entitled to consider the damages as a question of fact considering it, however-and this is very important for the plaintiff because I don't want to have to contradict you-they have to consider it in terms of what were the damages, if any, flowing from a breach of contract. That is not the same as saying what would my profits have been during the time I was performing a contract.

In other words, if they find that Evans promised to remedy the breach and failed to keep that promise what damages flowed from that.

In other words, I will tell the jury the standard is what do they find as a fact that Care would have been entitled to make had Evans kept his promise. That is not the same as finding what would Care's profit have been during the time of this promised arrangement. I think you can argue it but it's not the same and you'll have to be careful about that.

Appellant objected only to the extent of arguing that damages should be limited to the 90-day notice period and arguing that Care Travel was a new business and, therefore, in awarding damages, the jury must avoid speculation because “to measure damages for that type of entity is much stricter than if it was an ongoing business that had a history.” As the above discussion of those issues demonstrates, the Court properly rejected these instructions.

Appellant did not specifically object to the trial court's determination that the recoverable damages were not necessarily “lost profits.” Accordingly, appellant's current objections to the damage instructions were not preserved for appeal. *Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404, 409 (2d Cir.1988).

**[12]** In any event, we find the district court's charge adequate even if the “plain error” standard of review is not applied. If such a standard is not applied, a jury instruction will be deemed adequate, so long as the charge, taken as a whole, “is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it.” *Fernandez v. Fitzgerald*, 711 F.2d 485, 487 (2d Cir.1983) (quoting *Oliveras v. United States Lines Co.*, 318 F.2d 890, 892 (2d Cir.1963)). See also *Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228, 231 (2d Cir.1991) (“As a general rule, we will not upset a judgment because of an error in jury instructions if the charge given was correct and sufficiently covered the essential issues”); *New York v. Pullman, Inc.*, 662 F.2d 910, 917 (2d Cir.1981) (charge sufficient if, “taken as a whole, is fundamentally fair”), cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982); *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362-63 (2d Cir.1966) (charge sufficient if, “taken as a whole and viewed in light of the evidence, shows no tendency to confuse the jury as to the principles of law which are applicable”); *Franks v. United States Lines Company*, 324 F.2d 126, 127 (2d Cir.1963) (charge sufficient if it assures a party “a fair consideration of all

his theories”). Thus, perfection is not expected. *Evans v. Transportacion Maritime Mexicana SS “Campeche”*, 639 F.2d 848, 860 (2d Cir.1981). Moreover, a trial court has discretion in the style and wording of jury instructions. *Franks, supra*, 324 F.2d at 127. Accordingly, the court is not obliged to use the exact words proposed by a party. *Pullman, supra*, 662 F.2d at 917.

Applying the above principles to our review of the record convinces us that the trial judge's damage instructions adequately reflected the pertinent law and enabled the jury to decide the issues intelligently. The court's charge instructed the jury to ask “what loss did Care suffer from the breach of contract, if it occurred” and “what would Care have gained had the contract or the promise been carried out.” \*997 Transcript, p. 571. The charge also informed the jury that “you are trying to ... put Care into the position it would have been had the promise or contract been carried out.” *Id.*

Further, the Court reminded the jury that, although “there is really no way of knowing to a certainty what the [damages are],” nevertheless:

you are not left totally in the dark by any means.

You've got a lot of evidence about what Pan Am's business was there, what sales ability Care Travel had in the United Kingdom in its market. You have a lot of evidence about the stability of Care Travel and any related companies as business entities. This is not a situation where the Care Travel people were about to fail or something like that.

Moreover, as appellant requested, the trial court instructed the jury that,

in making a reasonable estimation ...  
[y]ou can consider, among other things, the right of Pan American to

terminate on 90 days' notice but you can also consider whether Pan Am, if they had carried out their promise, if you find there was a breach of the promise, you can consider what would Pan Am have done had they carried out the promise. It is a factual question for you, which you can reasonably appraise. Had they given Care the exclusive right to sell to these gateways, would they have terminated Care in 90 days' notice? It is a factual question for you. Or would they have gone on for some reasonable period of time dealing with Care on an exclusive basis.

Thus, while the jury was not specifically instructed that it should refrain from speculation,<sup>9</sup> the charge guided the jury on how to use the evidence to calculate a damage award. In short, we find that the charge, taken as a whole, “adequately acquainted the jurors with appellant's theory of the case,” *Fernandez v. Fitzgerald, supra*, 711 F.2d at 488, and allowed the jury to make an informed, reasonable estimate of the damages suffered by Care Travel. Accordingly, we reject appellant's challenges to the jury instructions.

## CONCLUSION

For the reasons discussed above, we affirm the judgment of the trial court in all respects.

**AFFIRMED.**

## All Citations

944 F.2d 983

## Footnotes

- \* The Honorable John S. Martin, Jr., District Judge of the District Court for the Southern District of New York, sitting by designation.
- 1 The signed Agency Agreement was accompanied by a cover letter, previously noted, which confirmed that the parties had agreed that Care Travel would be permitted to sell tickets to Karachi and Bombay.
- 2 While appellant points to two letters written by Care Travel to it as indicating that Care Travel, in fact, was satisfied with its relationship with Pan Am, Care Travel, on the other hand, contends that it wrote the letters at the suggestion of Pan Am in order to provide Pan Am with the documentation needed to terminate Empire Travel.

- 3 Pan Am, thus, contends that its GSAs were granted the exclusive right to sell tickets in their designated territories to any destination on the Indian subcontinent. In other words, both Care Travel, within W1, and Empire Travel, within Southall, could sell tickets to Bombay, Karachi and Delhi. Interpreting the Agency Agreement in this manner, Pan Am argues that its April 26, 1985 Letter permitting both Empire Travel and Care Travel to sell tickets to Karachi, Bombay and Delhi could not constitute a breach of the Agency Agreement. The jury, however, disagreed.
- 4 Specifically, at the outset of his charge, the district judge instructed the jury that:
- I have asked more questions in this case than I would normally ask in a case to be tried by a jury, but as the case unfolded it seemed to me that there was some rather difficult issues and I felt that sometimes things were not entirely clear to me and I felt they might not be entirely clear to you, and the purpose of a trial is to make the facts clear to the jury, make the issues clear and then how the jury decides those issues on the basis of the facts is up to the jury. Nothing I have said has been intended to indicate to you how you should resolve the issues before you. It has always been intended-what I have done in the case, has been intended to draw out the facts, help to illustrate the issues in a more clear and precise way so that you can decide the answers to the ultimate questions.
- 5 Indeed, in his opening to the jury, Pan Am's counsel stated that "Care Travel consists of three directors, all of whom have been in the travel agency business for well over 20 years, and in fact they boasted that they created the concept of an ethnic GSA and they said they would be your GSA." Although not evidence, this statement is further indication that Pan Am itself did not consider Care Travel a "new business" in the same sense as the term was discussed in *Kenford, supra*.
- 6 In the present action, appellant appears only to challenge the alleged failure of Care Travel to provide proof of its damages with the requisite "reasonable certainty."
- 7 In fact, the \$9 million figure arrived at by Care Travel for the total sales volume that one Pan Am GSA servicing Bombay and Karachi on an exclusive basis would have achieved was more conservative than the \$10-12 million figure contained in Pan Am's own internal documents. Specifically, Mr. Witt, a Pan Am official, wrote:
- Empire/Care/Cambata will all promise 10 to 12 million [dollars] if they are given the GSA on an exclusive basis, and I feel sure with the right conditions of allocation and blind eye to some degree of malpractice this would be true.
- 8 Given Care Travel's damage proof, the jury was supplied with a "basis for multiple mathematical calculations capable of determining with some specificity the financial repercussions of [defendant's] breach." *Lexington Products, Ltd. v. B.D. Communications, Inc.*, 677 F.2d 251, 254 (2d Cir.1982). Similarly, plaintiff in the instant case had "a track record of ... sales before [defendant's] breach." *Id.* These factors distinguish the present case from *Kenford*.
- 9 As noted above, appellant did not ask for a general charge that the jury should not refrain from speculation. This language was raised solely in the context of Pan Am's flawed argument that Care Travel was not a new venture.

 KeyCite Yellow Flag - Negative Treatment  
Disagreed With by Hulse v. State, Dept. of Justice, Motor Vehicle Div.,  
Mont., May 5, 1998

29 F.3d 499  
United States Court of Appeals,  
Ninth Circuit.

H. Jerome CLAAR; Ben Mar; Maynard  
Young; Donald Doll, Plaintiffs-Appellants,  
v.

BURLINGTON NORTHERN RAILROAD  
COMPANY, Defendant-Appellee.

Dick EGGAR; Ray Ellison, Plaintiffs-Appellants,  
v.

BURLINGTON NORTHERN RAILROAD  
COMPANY, Defendant-Appellee.

Nos. 92-35337, 92-35539.

|  
Argued and Submitted Dec. 15, 1993.

|  
Decided July 14, 1994.

Former employees of railroad brought separate actions under the Federal Employers' Liability Act (FELA), alleging that they suffered from variety of ailments stemming from exposure to chemicals while working at railroad's facility. The United States District Court for the District of Montana, James F. Battin, Chief Judge, granted summary judgment for railroad, and plaintiffs appealed. The Court of Appeals, Canby, Circuit Judge, held that district court properly scrutinized reasoning and methodology underlying expert testimony proffered by plaintiffs, and did not manifestly err in holding it inadmissible for failure to explain basis for conclusions that exposure to chemicals at facility caused plaintiffs' ailments.

Affirmed.

West Headnotes (4)

- [1] **Evidence**  
 Basis of Opinion

Under evidence rule, district court was both authorized and obligated to scrutinize carefully reasoning and methodology underlying affidavits offered by expert witnesses. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

63 Cases that cite this headnote

[2] **Federal Civil Procedure**

 Sufficiency of showing

District court in action by former employees of railroad alleging ailments stemming from exposure to chemicals at workplace properly refused to admit affidavits of expert witnesses offered in opposition to railroad's motion for summary judgment, where witnesses failed to explain basis for their conclusions; moreover, neither expert made any effort to rule out other possible causes for injuries plaintiffs complained of, and toxicology section of affidavits failed to discuss majority of medical conditions alleged by plaintiffs. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

117 Cases that cite this headnote

[3] **Labor and Employment**

 Questions of Law or Fact

Although quantum of evidence sufficient to present a jury question of causation in an action under the Federal Employers' Liability Act (FELA) is less than that in a common-law tort action, plaintiffs in a FELA case still must demonstrate some causal connection between defendant's negligence and their injuries. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

69 Cases that cite this headnote

[4] **Federal Civil Procedure**

 Affidavits

Parties are not permitted to file late affidavits in support of their opposition to a motion for summary judgment without invoking civil procedure rule and indicating why

they cannot timely file required affidavits.  
Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

11 Cases that cite this headnote

### Attorneys and Law Firms

\*500 William A. Rossbach, Rossbach & Whiston, Missoula, MT, for plaintiffs-appellants.

Richard S. Cornfield, Coburn, Croft & Putzell, St. Louis, MO, for defendant-appellee.

Appeals from the United States District Court for the District of Montana.

Before: GOODWIN, CANBY, and KOZINSKI, Circuit Judges.

### Opinion

CANBY, Circuit Judge:

Plaintiffs Claar, Mar, Young, Doll, Eggar, and Ellison appeal the district court's grant of summary judgment for the defense in their action against their former employer, Burlington Northern Railroad, brought under the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 *et seq.* The district court held inadmissible the expert testimony that plaintiffs offered in support of their claims, and granted summary judgment because, without that testimony, plaintiffs failed to show any causal connection between their workplace chemical exposure and their injuries. We affirm.

## I

Plaintiffs are members of a group of twenty-seven people who brought suit against Burlington Northern, alleging that they suffer from a variety of ailments stemming from their exposure to a variety of chemicals while working at Burlington Northern's Livingston, Montana, shop. Out of concern that plaintiffs might not be able to demonstrate a causal connection between their workplace chemical exposure and their injuries, the district court issued a case management order consolidating the twenty-seven cases for pretrial purposes. The order required plaintiffs to submit affidavits describing their exposure

to the chemicals they claim harmed them, and affidavits from physicians listing each plaintiff's specific injuries, the particular chemical(s) that in the physician's opinion caused each injury, and the scientific basis for the physician's conclusions. The court selected the cases of the present six plaintiffs for adjudication as test cases, and stayed the remaining cases.

Dr. Mark Hines prepared an affidavit concerning Eggar, and Dr. Richard Nelson prepared affidavits concerning the remaining five plaintiffs. The district court found these affidavits deficient because they failed to explain which chemical(s) caused which injuries, and failed to explain the scientific basis for the physicians' conclusions that plaintiffs' injuries were caused by workplace chemical exposure. Consequently, it ordered a second round of affidavits, again insisting that the physicians explain the basis for their opinions.

Approximately one month after receipt of the new affidavits, Burlington Northern moved for summary judgment on the ground that the affidavits were inadmissible. The district court agreed, finding that the affidavits still failed to explain Drs. Hines's and Nelson's reasoning and methods, and concluding that they lacked "the foundation and reliability necessary to support expert testimony." The court held that, without the affidavits, plaintiffs could not demonstrate a causal relationship between chemical exposure and their injuries, and granted summary judgment for Burlington Northern. This appeal followed.

## II

Plaintiffs first argue that the district court improperly relied on Fed.R.Evid. 703 for authority to scrutinize the reasoning and methodology underlying their affidavits. We review *de novo* the district court's interpretation of the Federal Rules of Evidence, *United States v. Williams*, 989 F.2d 1061, 1070 (9th Cir.1993), and will uphold its decision to exclude expert testimony unless it is "manifestly \*501 erroneous," *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1429 (9th Cir.1991).

Rule 703 provides, in relevant part:

The *facts or data* ... upon which an expert bases an opinion or

inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the *facts or data* need not be admissible in evidence.

(Emphasis added.) To the extent that the district court relied on Rule 703, we agree that it was in error. The plain language of the rule permits no other conclusion. See *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1118 (5th Cir.1991) (Clark, C.J., concurring), *cert. denied*, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992). Rule 703 merely relaxes, for experts, the requirement that witnesses have personal knowledge of the matter to which they testify. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, ----, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993); Fed.R.Evid. 602 (“A witness may not testify to a matter unless ... the witness has personal knowledge of the matter.... This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.”). It does not deal with the authority of the court to scrutinize an expert's methodology or reasoning.

[1] In evaluating the reliability of the affidavits offered by plaintiffs' experts in this case, however, the district court relied not only on Rule 703, but also on Rule 702. And Rule 702 does provide authority for evaluating the reasoning and methodology underlying expert testimony.<sup>1</sup> In fact, it requires a court to do so:

[T]he trial judge *must* ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is Rule 702.

.....

Faced with a proffer of expert scientific testimony, then, the trial judge *must* determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary *assessment of whether the reasoning or methodology underlying the testimony is scientifically valid* and of whether that reasoning or methodology properly can be applied to the facts in issue.

*Daubert*, 509 U.S. at ---- - ----, 113 S.Ct. at 2795-96 (emphasis added).<sup>2</sup> Accordingly, the district court was both authorized and obligated to scrutinize carefully the reasoning and methodology underlying the affidavits offered by the plaintiffs in this case. The only question is whether it did so correctly.

Plaintiffs contend that the district court did not confine itself to examining their experts' reasoning and methods, but instead based its decision to exclude the affidavits on improper assessments of the experts' credibility. We disagree. It is true that, whenever a court rejects expert testimony because it is based on faulty methodology or reasoning, it follows implicitly that the expert's conclusions are not to be credited. But as long as the court's analysis focuses on the expert's methods and reasoning, and not on the expert's conclusions, its actions are proper. *Daubert*, 509 U.S. at ----, 113 S.Ct. at 2797. Here, the district court confined itself to an inquiry into the reliability of the methods and reasoning underlying the conclusions in the proffered affidavits. Therefore, the court did not overstep its authority.

**\*502 [2]** Fundamentally, the district court was concerned that the experts, Drs. Hines and Nelson, failed to explain the basis for their conclusions. Before admitting the affidavits, the district court was affirmatively required to find that the experts' conclusions were based on scientific knowledge. *Id.* at ----, 113 S.Ct. at 2796. This requirement means that the court had to determine that Drs. Hines and Nelson arrived at their conclusions using scientific methods and procedures, and that those conclusions were not mere subjective beliefs or unsupported speculation. *Id.* at ----, 113 S.Ct. at 2795. In an effort to make this determination, the district court repeatedly ordered the experts to explain the reasoning and methods underlying their conclusions. Despite those orders, the affidavits are devoid of any such explanation. Consequently, the district court could not make the findings required by Rule 702, and therefore properly refused to admit the affidavits into evidence. We find no error in the district court's decision.

The district court made other findings that also focus exclusively on the experts' methods and that support its decision to exclude the affidavits. For example, it found that neither Dr. Hines nor Dr. Nelson made any effort to rule out other possible causes for the injuries

plaintiffs complain of, even though they admitted that this step would be standard procedure before arriving at a diagnosis.<sup>3</sup> See *Daubert*, 509 U.S. at ----, 113 S.Ct. at 2797 (use of generally accepted scientific methods one indication of reliability). For example, Dr. Nelson diagnosed Eggar as having “dyscalculia” (poor arithmetic ability) and “spelling dyspraxia” (poor spelling ability), without first reviewing Eggar's school records, which indicate that he suffered from these “conditions” since childhood. Because he failed to review these records, Dr. Nelson could testify reliably only that Eggar's spelling and arithmetic abilities are below average. He offered no scientific basis for concluding that chemical exposure played any part at all in Eggar's condition.<sup>4</sup>

Similarly, the district court found that the toxicology sections of the affidavits, which summarize the scientific literature discussing evidence that particular chemicals can cause particular injuries (and which thus are a necessary foundation for any conclusions the experts might draw), fail to discuss the majority of the medical conditions alleged by plaintiffs. Consequently, the court correctly determined that there is no evidence that the experts' conclusions about the cause of these conditions are based on anything more than subjective belief and unsupported speculation.

The district court also found that Drs. Hines and Nelson formed their opinions before reading the relevant literature, even though they admitted that they were not sufficiently familiar with the field to diagnose the causes of plaintiffs' injuries without first reviewing that literature.<sup>5</sup> The district court correctly considered this finding, which sheds light on the experts' methods, in making its admissibility determination. “In order to qualify as ‘scientific knowledge’ [as required by Rule 702], an inference must be derived by the scientific method.” *Daubert*, 509 U.S. at ----, 113 S.Ct. at 2795. Coming to a firm conclusion first and then doing research to \*503 support it is the antithesis of this method. See *Viterbo v. Dow Chemical Co.*, 646 F.Supp. 1420, 1425 (E.D.Tex.1986), *aff'd*, 826 F.2d 420 (5th Cir.1987). Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the

district court as lacking the objectivity that is the hallmark of the scientific method.

We conclude that the district court correctly applied Rule 702, and did not manifestly err in rejecting the proffered expert testimony as unreliable.<sup>6</sup>

### III

Plaintiffs next argue that, even if the district court otherwise correctly applied Rule 702, it erred in demanding that the experts demonstrate a causal connection between specific injuries and specific chemicals, contending that FELA “requires no such specific causation evidence.”<sup>7</sup> This argument misconceives both the standard of causation under FELA and its relationship to the Federal Rules of Evidence.

[3] The standard of causation under FELA and the standards for admission of expert testimony under the Federal Rules of Evidence are distinct issues and do not affect one another. *Cf.* Fed.R.Evid. 1101(b) (rules apply equally to both civil and criminal proceedings even though the burdens of proof are different). It is true that under FELA the quantum of evidence sufficient to present a jury question of causation is less than it is in a common law tort action. *Pierce v. Southern Pacific Trans. Co.*, 823 F.2d 1366, 1370 (9th Cir.1987). Under FELA, the jury should determine liability so long as the evidence justifies “with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury.” *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493 (1957). This does not mean, however, that FELA plaintiffs need make no showing of causation. Nor does it mean that in FELA cases courts must allow expert testimony that in other contexts would be inadmissible. It means only that in FELA cases the negligence of the defendant “need not be the sole cause or whole cause” of the plaintiff's injuries. See *Oglesby v. Southern Pacific Trans. Co.*, 6 F.3d 603, 608 (9th Cir.1993). FELA plaintiffs still must demonstrate some causal connection between a defendant's negligence and their injuries. *Id.*; *Mayhew v. Bell S.S. Co.*, 917 F.2d 961, 964 (6th Cir.1990);<sup>8</sup> *Edmonds v. Illinois Central Gulf R.R.*, 910 F.2d 1284, 1288 (5th Cir.1990); *Moody v. Maine Central R.R. Co.*, 823 F.2d 693, 695 (1st Cir.1987).<sup>9</sup>

*Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963), and \*504 *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), do not compel a different conclusion. These cases arguably stand for the proposition that, in order to create an issue for the jury, a FELA plaintiff need show only the mere possibility that a defendant's actions caused his injuries. Plaintiffs here contend that they satisfied this minimal standard by establishing that they were exposed to some chemicals that can cause some of the injuries they complain of, and that the district court erred in demanding that their experts further demonstrate a causal connection before letting the case go to the jury.

*Gallick* and *Lavender*, however, involved situations in which no special expertise was necessary to draw a causal inference. Once evidence was presented that the plaintiff's injuries just possibly may have been caused by the railroad's negligence, the jury in those cases was qualified to determine whether the railroad's negligence in fact played a part in causing the injuries. Here, in contrast, expert testimony is necessary to establish even that small quantum of causation required by FELA. See *Moody*, 823 F.2d at 695 (if drawing a particular conclusion requires specialized knowledge, expert testimony is required) (citing *W.P. Prosser and Keeton on Torts* 269 (5th ed. 1984)); *Mayhew*, 917 F.2d at 963. Plaintiffs, not having proffered any admissible expert testimony, have no evidence that workplace exposure to chemicals played any part, no matter how small, in causing their injuries. Accordingly, there is no genuine issue of material fact concerning even the modicum of causation FELA requires, and summary judgment was appropriate.

#### IV

Finally, plaintiffs contend that at least portions of their experts' affidavits are admissible. They argue in effect that the district court threw out the baby with the bath water, and insist that the district court was "required carefully to consider *each* claim of *each* plaintiff to determine the admissibility of expert testimony regarding that claim." Yet they point to no place in the record where a particular claim of a particular plaintiff is supported by admissible expert testimony. Instead, they merely summarize some of the exposure descriptions contained in the affidavits, some of the toxicity studies (which show that some of the

chemicals to which some of the plaintiffs were exposed can cause some of the injuries complained of), and then cite Dr. Nelson's and Dr. Hines's inadmissible conclusory opinions that workplace chemical exposure caused their injuries. Because Burlington Northern pointed out the lack of admissible evidence on the issue of causation, plaintiffs had the burden of advertising to "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Fed.R.Civ.Proc. 56(e). Plaintiffs failed to carry this burden. It is not the district court's job to sift through the record to find admissible evidence in support of a non-moving party's case.

#### V

[4] We deny plaintiffs' request that we give them still another chance to submit admissible affidavits. Parties are not permitted to file late affidavits in support of their opposition to a motion for summary judgment without invoking Fed.R.Civ.Proc. 56(f) and indicating why they cannot timely file the required affidavits. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir.1991), cert. denied, 506 U.S. 955, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992). Plaintiffs did not invoke Rule 56(f), nor have they suggested any reason for their failure to file timely, acceptable affidavits. They had two opportunities to produce affidavits, and were specifically instructed as to what these must contain. They had the additional opportunity, but did not avail themselves of it, to move for leave to produce stronger affidavits after Burlington Northern filed its motion for summary judgment. We decline to permit them to remedy their deficiency at this late stage of the proceedings.

#### CONCLUSION

To survive Burlington Northern's motion for summary judgment, plaintiffs were required to offer admissible expert testimony showing that exposure to chemicals in the workplace played some part in producing \*505 their injuries. The district court properly scrutinized the reasoning and methodology underlying the expert testimony proffered by plaintiffs, and did not manifestly err in holding it inadmissible.

**AFFIRMED.**

## All Citations

29 F.3d 499, 63 USLW 2096, 39 Fed. R. Evid. Serv. 911

## Footnotes

- 1 Even if the district court had relied exclusively on Rule 703, we would still affirm. The decision of a district court must be affirmed if correct, even if the court relied on the wrong grounds or reasons. *Brown v. Allen*, 344 U.S. 443, 459, 73 S.Ct. 397, 408, 97 L.Ed. 469 (1953); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir.1987). Plaintiffs' contention that Rule 702 cannot support the district court's decision because the court failed to make factual findings regarding its applicability is not well taken. The court made a host of factual findings (see *infra*), all of which are directly relevant to exclusion under Rule 702.
- 2 These requirements apply to all proffered expert testimony—not just testimony based on novel scientific methods or evidence. *Id.* at ----n. 11, 113 S.Ct. at 2796 n. 11.
- 3 Ellison argues that, at least in his case, the district court erred, because Dr. Hines did make a specific finding that other causes for Ellison's injuries could be ruled out. It is undisputed, however, that Dr. Hines never examined Ellison's medical records. For that reason, the district court properly excluded this testimony as lacking a basis in fact.
- 4 That FELA does not require that Burlington Northern's negligence be the sole cause of plaintiffs' injuries, see *Oglesby v. Southern Pacific Trans. Co.*, 6 F.3d 603, 608 (9th Cir.1993), is of no consequence in this regard. The district court did not insist that the affidavits rule out all other possible causes of plaintiffs' injuries. It merely took account of the fact that the experts not only failed to explain how they arrived at their conclusions, but that they evidently failed to follow generally accepted scientific procedures by neglecting to investigate any other possible causes of plaintiffs' injuries. See *Daubert*, 509 U.S. at ----, 113 S.Ct. at 2797.
- 5 For instance, Dr. Nelson's first set of affidavits states that, "It is my opinion with a reasonable degree of medical certainty that [plaintiff's injuries] were caused by his exposure to the toxic chemicals." Yet Dr. Nelson admitted that he signed these affidavits prior to reviewing any of the relevant literature, and that such review was "essential" to his evaluation of the causal link. Dr. Hines's first set of affidavits contains similarly firm conclusions.
- 6 The district court made several additional findings concerning the lack of reliability of the proffered affidavits. Because the findings already discussed are sufficient to support the district court's decision to exclude the affidavits, we do not discuss these remaining findings.
- 7 They also argue that producing specific causation evidence is impossible, citing a study that states, "it is impossible to define selective differences between the effects of various solvents." What the study actually stated, however, was that "on the basis of this study it is impossible...." That is, the authors merely noted that the methods they used were inadequate. They never asserted that no methods exist. Moreover, as Burlington Northern points out, the physicians diagnosed plaintiffs as having disorders caused by non-solvent chemicals. Plaintiffs do not attempt to explain why it might be impossible to link these chemicals to specific injuries.
- 8 *Mayhew* involved a suit brought under the Jones Act. However, the standards of liability and proof are the same under the Jones Act and FELA. *In re Hechinger*, 890 F.2d 202, 208 (9th Cir.1989), *cert. denied*, 498 U.S. 848, 111 S.Ct. 136, 112 L.Ed.2d 103 (1990).
- 9 Plaintiffs' reliance on *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 130 (7th Cir.1990), is misplaced. In *Harbin*, the plaintiffs had already proven a causal relationship between chemical exposure and their injuries. In the passages cited by plaintiffs the court is referring to the quantum of evidence required to establish that the railroad's negligence caused the exposure; it is not referring to the evidence required to show that the exposure caused the injury.

937 F.Supp. 1051  
United States District Court,  
S.D. New York.

COASTAL AVIATION, INC., Plaintiff,

v.

COMMANDER AIRCRAFT COMPANY, Defendant.

No. 92 Civ. 4229 (WCC).

|  
Aug. 28, 1996.

Distributor of aircraft brought suit against manufacturer, seeking damages for breach of alleged distributorship agreement. The District Court, William C. Conner, Senior District Judge, held that: (1) preliminary discussions and exchange of letters by parties had not resulted in formation of binding distributorship agreement; (2) in any event distributor could not recover for loss of sales of aircraft based on retail price less distributor price, due to lack of history of sales of product in question; and (3) lost profits could not be recovered as an element of consequential damages, as uncertainties as to number of aircraft which distributor would have sold had agreement been consummated precluded necessary establishment of lost profits with reasonable certainty.

Judgment for manufacturer.

West Headnotes (11)

**[1] Contracts**

🔑 What law governs

In performing “interest analysis,” to determine choice of law in breach of contract action, court should look to factors such as place of (1) contracting, (2) negotiation of contract, (3) performance, (4) location of subject matter of contract, and (5) domicile, residence, nationality, place of incorporation, and place of business of parties.

1 Cases that cite this headnote

**[2] Contracts**

🔑 Grounds of action

To succeed in breach of contract claim, under New York law, plaintiff must establish making of contract, performance of contract by plaintiff, breach of contract by defendant, and damages suffered by plaintiff.

33 Cases that cite this headnote

**[3] Contracts**

🔑 Options;rights of first refusal

“Option contract” is an agreement to hold an offer open, conferring upon optionee, for consideration paid, right to purchase at later date.

Cases that cite this headnote

**[4] Contracts**

🔑 Options;rights of first refusal

President of corporation engaged in manufacture of aircraft had not extended option to aircraft distributor to acquire distributorship for New York State; president's reference in letter to fact that he had requested vice president of sales for corporation to reserve New York and New Jersey for distributor until discussions had finished did not evince intention to be bound by promise to hold those areas open, and distributor could not reasonably rely on statement to its detriment so as to incur any damages. N.Y.McKinney's Uniform Commercial Code § 2-205; N.Y.McKinney's General Obligations Law § 5-1109.

1 Cases that cite this headnote

**[5] Contracts**

🔑 Offer and acceptance in general

President of corporation engaged in manufacture of aircraft had not made offer to aircraft distributor to enter into agreement covering sale of aircraft in southeastern United States, by writing letter indicating belief that insurance coverage could be reworded to mutual satisfaction of prospective parties and setting forth states in which distributorship would apply; pricing

considerations which had been critical in negotiations were not discussed, no agreement was ultimately reached as to insurance, which was a major concern for distributor, and from context of prior negotiations distributor was aware that it could not enter into manufacturer's distribution network without executing Dealership Agreement, which it had not done. N.Y.McKinney's Uniform Commercial Code § 2-201(1).

2 Cases that cite this headnote

**[6] Sales**

🔑 Special, Indirect, or Consequential Damages; Lost Profits

Although lost profits for breach of contract for sale of goods may be recovered as consequential damages under New York law, calculation and award of lost profits may not be based on speculation. N.Y.McKinney's Uniform Commercial Code §§ 2-713(1), 2-715(2)(a).

10 Cases that cite this headnote

**[7] Damages**

🔑 Contracts conferring exclusive privileges or restricting competition

Assuming that manufacturer of aircraft had breached sales contract with putative distributor, under which manufacturer was to provide ten aircraft, distributor could not base loss of profits claim on expected retail price of aircraft less dealer discount price; use of that damages formula presupposed existence of "market price" for product, which in turn assumed market demand, and aircraft in question was new. N.Y.McKinney's Uniform Commercial Code § 2-713.

1 Cases that cite this headnote

**[8] Damages**

🔑 Loss of profits

Under New York common law, recovery of lost profits as consequential damages for breach of contract is subject to requirement

that damages be demonstrated with certainty to have been caused by breach, alleged loss must be capable of proof with reasonable certainty, and there must be showing that particular damages were fairly within contemplation of parties to contract at time it was executed.

9 Cases that cite this headnote

**[9] Damages**

🔑 Effect of provisions of contract

Distributor of aircraft suing manufacturer for breach of putative distribution agreement failed to satisfy requirement for recovering lost profits as element of consequential damages, that liability was contemplated by parties at time of contracting; there was a disclaimer of consequential damages contained in dealership agreement under which distributor would have been bound if putative contract in fact existed.

2 Cases that cite this headnote

**[10] Damages**

🔑 Loss of profits

Distributor of aircraft suing manufacturer for breach of alleged distributorship agreement failed to satisfy requirement for consequential damages recovery, that amount of damages be set forth with reasonable certainty; experts' reports were based on speculation as to number of aircraft distributor would have sold if it had been granted distributorship, with one expert basing his conclusion on sales of 20 units or their equivalent, aircraft in question was such an upgrade of prior model as to constitute new product with no prior sales history, and distributors who were awarded distributorships claimed by suing distributor sold only two aircraft in first 18 months. N.Y.McKinney's Uniform Commercial Code § 2-715 comment.

3 Cases that cite this headnote

**[11] Damages**

🔑 Breach of contract

Failure to mitigate damages would preclude distributor of aircraft, claiming that manufacturer had breached distribution agreement covering various southeastern states, from recovering any lost profits except those arising from sales within Georgia and Alabama; while refusing to acknowledge distributorship agreement covering those states, manufacturer had made distributorship agreement offer covering other Southeastern states desired by distributor, and distributor had rejected proposal.

Cases that cite this headnote

### Attorneys and Law Firms

Law Offices of John A. Tartaglia, White Plains, NY (John A. Tartaglia, of counsel), for Plaintiff.

Peckar & Abramson, P.C., New York City (Charles E. Williams, III, of counsel), for Defendant.

### OPINION AND ORDER

WILLIAM C. CONNER, Senior District Judge.

Plaintiff Coastal Aviation Incorporated (“Coastal”) brings this action against defendant Commander Aircraft Company (“Commander”), seeking \$5,319,424 in damages arising out of an alleged breach of a contract for Coastal's exclusive dealership rights to sell Commander airplanes. This court conducted a two-day bench trial on May 21–22, 1996. This opinion constitutes the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a). For reasons discussed below, we enter judgment in favor of defendant on all claims.

### FINDINGS OF FACT

Plaintiff Coastal is a Connecticut corporation formed in 1985, with its principal place of business in Rye, New York, and is equally owned by three private investors, Rocco Genovese (“Genovese”), President;

Kurt F. Ostheimer (“Ostheimer”), Vice President and Secretary; and William H. Morton (“Morton”), Vice President and Treasurer. Coastal was formed to serve as a distributor of aircraft manufactured by Aerospatiale General Aviation (“Aerospatiale”), a subsidiary of Socata S.A., a French corporation. Coastal has one salaried employee, Bruce Dorfman (“Dorfman”), Director of Sales and Marketing.

Coastal's initial distributorship territory for Aerospatiale included New York, New Jersey, Massachusetts, Rhode Island, Vermont, New Hampshire and Maine. Tr. 36. This territory was later expanded to include Florida, Georgia and Alabama. *Id.*<sup>1</sup> Coastal represented Aerospatiale in these ten states through its association with general aviation dealers. Coastal would pass on initial leads of potential purchasers of Aerospatiale aircraft to the local dealer. The dealer would then follow-up the leads, and Coastal would help secure final sales. On this basis, Coastal and the dealer would share commissions.

Defendant Commander, a public corporation, was incorporated in Virginia in 1988, and has a principal place of business in Bethany, Oklahoma. Commander manufactures, markets and provides support services for single-engine, high-performance aircraft. The original Commander aircraft, the Commander 112, was designed by the General Aviation Division of Rockwell International Corporation (“Rockwell”) and received Federal Aviation Administration (“FAA”) approval in 1972. The Model 114 was certified in 1976 and the 114A in 1979. From 1972 to 1979, over 1,100 Model 112/114s were produced. Production was discontinued in 1979. In 1981 Rockwell sold its entire General Aviation Division to Gulfstream Aerospace Corporation. In 1985, Chrysler acquired Gulfstream Aerospace Corporation. In 1988, Chrysler/Gulfstream sold the single-engine 112/114 product line to newly formed Commander. The assets acquired by Commander included the Rockwell 112/114 design data and FAA type certificates, production tooling to fabricate and assemble the 112/114 products, and a considerable inventory of fabricated and purchased parts suitable for spares and/or new aircraft production.

Coastal accounted for between 25% and 50% of Aerospatiale's total United States sales of aviation products from 1988 to 1992, making it the largest Aerospatiale dealer of aviation products in the United States during those years. Tr. 10. Coastal sold basically

two Aerospatiale models—the Trinidad and the Tobago. Tr. 15. The Trinidad was a \*1054 single-engine, four-place, retractable-gear, low-wing model with a top speed of about 200 miles per hour, and in 1992 typically sold for \$260,000 to \$270,000. Tr. 16. The Tobago, a fixed landing gear model, sold for \$125,000 to \$150,000. *Id.*

Commander's first new production model, the 114B, like the Trinidad model TB-20, was a single-engine, four-place, retractable-gear, low-wing aircraft, with a cruising speed of 184 miles per hour. The 114B was targeted slightly below the TB-20 in price. The TB-20 came in a turbo-charged version, called the TB-21. A comparable turbo-charged version of the 114B was in its developmental stage in 1992. Coastal sold six new Trinidads in 1989; ten in 1990; seven in 1991; and two in 1992. Def. ex. A.<sup>2</sup>

According to Genovese, the 114B offered several advantageous features that were lacking in the Trinidad. For example, the 114B had more head room and allowed easier entry and exit. Tr. 21. Also, the price of the 114B was less than that of the Trinidad. Tr. 23, 75–77. Although it was not quite as fast, it had a superior finish on the outside and superior styling inside. *Id.* From a marketing standpoint, the 114B's American origin was appealing because of the perceived trend of Americans spending more money on domestic products. Tr. 23–24. On the other hand, the Trinidad had longer range, and more cabin width—albeit at the sacrifice of cabin height. Tr. 33.

The parties in this action had their introduction at least as early as 1989. Dorfman and the principals of Coastal frequently saw Matt Goodman, Commander's Vice President of Sales (“Goodman”), at various industry trade shows, such as the National Business Aircraft Association Convention. Tr. 17, 108. At that time, product liability was a big problem in the general aviation business, and, according to Genovese, many said that it was product liability which had stifled the aviation industry. *See* Tr. 17, 109. In reaction to the product liability problem, Goodman had supported the idea of leasing aircraft in an attempt to shelter Commander from such liability. Tr. 17, 109–110. Accordingly, in 1989, Goodman contacted Coastal with a product brochure and an outline of a lease proposal. Coastal was immediately interested in Commander's product.

Commander received FAA approval to manufacture and sell its newly designed 114B on May 4, 1992. By this time,

Commander had worked out its liability concerns, and, rather than leasing, began recruiting dealers to sell the new aircraft. *See* Tr. 111.

Coastal's claims against Commander arise out of this recruiting effort. On January 23, 1992 Goodman contacted Dorfman, expressing Commander's interest in selling, rather than leasing, its model 114B aircraft through a dealership network such as Coastal. Dorfman, enthusiastic about a dealership involving Commander 114Bs, provided Goodman with Coastal's record, and the two planned a meeting in New York. Shortly after the phone call, Goodman sent Dorfman Commander's standard form dealership agreement (“Dealership Agreement”) and the Commander dealer policy and procedures (“Procedures”), which contained the terms and conditions pursuant to which Commander would grant dealerships to sell 114Bs. *See* Pl. ex. 1. Subsection 1.1 of the Dealership Agreement requires that the prospective dealer satisfy the provisions of the Procedures, pay a non-refundable \$100 dealership fee, and execute and deliver the Dealership Agreement to Commander before a contract would be formed. Section 14.1 of the Dealership Agreement provides that the term of the Dealership Agreement is for three years, and section 14.2 of the Dealership Agreement provides that either party may terminate the Dealership Agreement, without cause, at any time after the eighteenth month of the term upon 30-days notice.

As planned, on February 17, 1992, Goodman and Dorfman met for breakfast in Rye, New York. At that time, Dorfman indicated that Coastal was interested in dealership territories in New York, New Jersey, Pennsylvania, Georgia, Alabama and Florida. Later that day, Genovese met with Goodman. \*1055 Both meetings focussed on territory, pricing, dealer profit margins and payment terms. *See* Tr. 112–115. The parties discussed a retail price of \$169,500 for the base aircraft. Tr. 112. Dorfman expressed some concern over Commander's 15% dealer discount, Tr. 115, which was significantly lower than the 22.5% discount Coastal received on the sale of aircraft manufactured by Aerospatiale. As for territory, Goodman told Dorfman that Montana, North Carolina, California, Arizona, Texas, Kansas, Louisiana, Ohio, Massachusetts, Oregon and Florida were available. Tr. 114. Dorfman expressed interest in two territories: (1) New York, New Jersey and Pennsylvania and (2) Georgia, Alabama, Florida, Maryland and Virginia. Tr. 115–116.

The parties agreed that ten aircraft per territory per year was a realistic sales target. Tr. 115–116.

On March 12, 1992, Morton, Genovese and Dorfman travelled to Commander's production facility in Bethany, Oklahoma to attend the "roll-out" of the 114B. *See* Tr. 122–127. During their visit, the three met with Commander's President, William Boettger ("Boettger") and Goodman to discuss terms of a possible agreement, with Coastal seeking higher profit margins than those that were discussed at the February 1992 meeting in Rye, New York. Tr. 38, 40, 125, 258. Coastal deemed it very important to convince Commander to increase the dealer discount margin beyond the 15% previously discussed with Dorfman. *See* Tr. 39, 125. Coastal introduced the idea of using deferred letters of credit ("LCs") to increase the effective dealer margin without increasing the 15% nominal margin stated in the Dealership Agreement. Tr. 40, 70, 125. As Genovese described, Coastal tried to "get a dollar value some other way that would equate to ... margin." Tr. 40. Deferred LCs provided the advantage of allowing Coastal to take delivery of an airplane as a floor model or a demonstration model to enhance marketing, while deferring payment obligations until some time after delivery. Tr. 88, 92–93, 118. Coastal had used this technique successfully with Aerospatiale, and hoped to repeat it with Commander. Tr. 91. Coastal had been able to squeeze additional margin out of its relationship with Aerospatiale also by performing its own avionic upgrades. Tr. 231.<sup>3</sup>

After the visit, Morton sent a follow-up letter dated March 18, 1992 to Boettger expressing interest in selling and supporting the 114Bs. *See* Pl. ex. 4. In particular, Morton expressed an interest in dealerships in areas where Coastal already sold (through formal or informal relationships with local dealers) Aerospatiale aircraft:

[O]ur interest would be in the states of New York, New Jersey, Pennsylvania, North Carolina, South Carolina, Georgia, Alabama and Florida. These are territories we currently work for the sale of new Aerospatiale General Aviation aircraft. Our unique showroom/sales representatives/service center systems of marketing has proven itself in the dynamics of current

market demands. We believe this infrastructure could provide immediate sales of Commander Aircraft at a critical time in your growth.

*Id.*

In response, Boettger sent a letter to Morton dated March 19, 1992, addressing the territories suggested by Morton in his letter and gross margin discounts discussed earlier at the roll-out:

We have given considerable thought to your concerns about marketing margins sufficient to make the program work. Believe me when I say the margins for 1992 are the best compromise we can offer and we still have a big job in manufacturing to achieve our internal gross margin target.

Our intent is to increase the marketing margins as fast as we can and we have committed to 1% per year for the next 5 \*1056 years. If we can move faster we will. Much of that decision hinges on our cost control and the market acceptance of the 114B.

We should get a good feel for what our 1993 price can be this Summer. Our plan is to set 1993 prices and dealer margins before 10/1/92.

[I] hope you can accept our dealer program for 1992 for what it can be in the future. We need strong dealers to achieve our full sales potential, then we can all make a good profit from the 114B. I know [Goodman] would like to have Coastal covering much of the area of interest to you. We already have commitments for Florida and Pennsylvania. I have requested [Goodman] to reserve New York and New Jersey for Coastal until we have finished our discussions.

I will be focusing on finishing up the Type Certificate details and delivery of the first airplane the next two weeks. After that, I will be available to meet with you, glean all the constructive criticism you have, and establish a Commander territory for Coastal.

Pl. ex. 5.

While Boettger and Morton were exchanging letters, Dorfman and Goodman were engaged in their own discussions. On March 19, 1992, Dorfman initiated a

call to Goodman to see if Commander had reached a decision regarding an amendment to the dealer deposit requirement in the Dealership Agreement, and utilizing deferred LCs. Tr. 129. Goodman was not able to give Dorfman a definitive answer, Tr. 129–130, but in following-up on the phone conversation, Goodman sent a letter dated March 23, 1992 to Dorfman, in which he discussed alternatives to Commander's dealer deposit and payment schedule requirement:

I have had an opportunity since our last conversation to meet with Mr. Bill Boettger and members of our Executive board concerning the possible structuring of a delayed payment program for Coastal as outlined utilizing time generated letters of Credit for aircraft purchases. Unfortunately, it does not appear that this concept of aircraft payment plan will fit our requirements at this time for the Dealer program. I am sure you can understand the need for our Dealer deposit and aircraft payment schedule as established to meet our needs during this start-up production period.

Nevertheless, I want to reiterate our sincerity in forming a mutually beneficial arrangement with Coastal for the Dealership areas which would maximize your profit potential considering the business structure which you already have in place. I hope you are able to reconsider the impact of our Dealership program on your current business plan, and that the addition of the Commander Aircraft product line would become a valuable asset to your operation. We will perform according to the Dealer Policy and Procedures as previously outlined and work toward a common goal of spreading Dealer margins as soon as market share of the Commander 114B permits. Current marketing areas available and of interest to you are: New York, New Jersey, Virginia, Maryland [,] D.C., North Carolina, South Carolina, Georgia, and Alabama. We would welcome the input from Coastal and anticipate the Commander marketing segment of your Dealership would grow along with the Commander Aircraft Company marketing plan.

Pl. ex. 6. After receiving this letter, Dorfman called Goodman, and expressed disappointment with the fact that deferred LCs would not be available. Tr. 132–133. Goodman responded that Coastal might be able to increase its effective margin with the ten percent parts override and upgrades. Tr. 133. Also, Goodman informed Dorfman that the Florida territory was being given to

Diversified Aircraft Sales (“Diversified”), a competitor. Tr. 132.

After Boettger's follow-up letter to Morton in which he stated “I have requested [Goodman] to reserve New York and New Jersey for Coastal until we have finished our discussions,” *see* Pl. ex. 5, on March 25, 1992, Goodman, without informing Boettger or anyone else at Commander, awarded New York and New Jersey (the “New York Area”) and Pennsylvania to a competitor, Braden's Flying Service (“Braden's”). *See* \*1057 Tr. 139–143. On March 26, 1992, Goodman telephoned Dorfman to let him know that Commander had awarded this territory to Braden's. Tr. 139; Pl. ex. 3. Though upset about losing the New York Area, Dorfman inquired again about Florida. Tr. 143. Goodman confirmed that Florida had been committed to Diversified. Tr. 143.

That same day, Morton telephoned Boettger to learn why the New York Area dealership had been awarded to Braden's. Tr. 269. Boettger apologized and expressed interest in doing business with Coastal in the remaining states (and the District of Columbia) in the southeast—Virginia, Maryland, District of Columbia, North Carolina, South Carolina, Georgia and Alabama.

On March 27, 1992, Dorfman called Goodman to submit an offer to become a Commander dealer in the southeast United States. Dorfman told Goodman that Coastal was prepared to make an offer for Florida, Georgia, Alabama, North Carolina, South Carolina, Virginia and West Virginia, and that Coastal would commit to take 10 aircraft in the first year, 20 in the second, and 30 in the third. Tr. 144. Goodman agreed to discuss the offer with Commander. Tr. 145.

On March 30, 1992, Goodman wrote a letter to Dorfman in response to the March 27, 1992 phone call. *See* Pl. ex. 8. The letter stated that the offer was subject to approval of a third partner of Coastal, i.e., Ostheimer. According to Genovese, Ostheimer's role was “very, very important” because his expertise was insurance and finance, and liability was a “key ... deterrent in ... general aviation.” Tr. 36. The letter summarized Commander's understanding of Coastal's potential offer:

- 1) Third partner approval from Coastal
- 2) Items 11 & 12, pertaining to insurance coverage for the dealer, reworded

- 3) First right of refusal on dealer opportunities north of New York
- 4) Commander Dealer program and deposit schedule as prescribed
- 5) 10 aircraft for year one, 20 aircraft for year two, 30 aircraft for year three, for the following marketing territory: MD, D.C., VA, NC, SC, GA, AL and subject to Florida.

Pl. ex. 8. Goodman then addressed the above five terms as follows:

I believe the items in the Dealership contract you reference in regard to paragraphs 11 & 12 pertaining to insurance coverage for the Dealership can be reworded to meet your satisfaction as well as that of Commander Aircraft Company. I have no problem with providing Coastal Aviation right of first refusal should dealership opportunities open in the New England States to the north of your location in Rye, New York.

The agreement with Diversified Aircraft Sales is complete for the marketing area of Florida. I know that this area is a very strong presence for your company and a vital marketing area to perfect the flow of product through your organization.

At this time, I would like to propose an alternative program which would give Coastal Aviation the following marketing areas:

- Maryland
- D.C.
- West Virginia
- Virginia
- North Carolina
- South Carolina
- Georgia
- Alabama

[T]he aircraft orders for this area which would be appropriate for Coastal and Commander would be 10 aircraft per year during the term of the agreement.

I look forward to working with you, and sincerely hope that we may still lay a viable framework from around which Coast[al] Aviation may effectively market the Commander product line even without the marketing area of Florida.

I await your reply....

*Id.* “Third partner approval from Coastal,” meant approval by Ostheimer. *See* Tr. 147. “Items 11 & 12 ... reworded” pertained to insurance coverage for the dealer. Tr. 147. Coastal had been concerned that the Dealership Agreement was worded so that once an aircraft was manufactured by Commander and sold to Coastal, and then delivered to a \*1058 customer, Coastal might be construed to be indemnifying the manufacturer from product liability. Tr. 147.

On the morning of April 6, 1992, while at a trade show in Florida, Dorfman called Goodman and attempted to accept the terms of the March 30, 1992 letter. Tr. 97, 223, 225. (Dorfman had expected to meet Goodman in person at the trade show to accept his purported offer of March 30, 1992, but Goodman did not attend. Tr. 225.) Dorfman testified that Goodman responded that he would call Coastal and arrange to come up the following week to bring all the documents and receive deposits for aircraft. Tr. 226. Apparently, on April 6, 1992, someone from Commander left a message with Morton regarding a problem with the purported offer. Tr. 281. Morton attempted to get in touch with Boettger, but to no avail. *See* Tr. 97–99, 278, 282. On April 7, 1992, Morton wrote to Commander, “[c]onfirming ... Dorfman's telephone call [and to] accept [the] proposal.” *See* Pl. ex. 9; Tr. 282. Morton reiterated an interest in Florida, New York, New Jersey and other parts of New England, but was willing to accept a deal involving the states (and the District of Columbia) listed in Goodman's letter dated March 30, 1992 (the “Southeast Territory”):

In referencing your letter, our territory is to include the states of Alabama, Georgia, South Carolina, North Carolina, Virginia, West Virginia, D.C. and Maryland. As you request, we accept this proposal as demonstration of “Good Faith” in the interest of building upon our longer term relationship. To this end, we are hopeful in being able to add (at some future date) the additional states as previously discussed [sic] with you, Bill Boettger and restated in the above paragraph.

After considerable expenditure of both time and money in working with your organization, we are pleased to now be a viable part of your "Marketing Department."

Pl. ex. 9.

That same day, on April 7, 1992, DeWitt Beckett ("Beckett"), a subordinate of Goodman, sent a letter to Morton, but did not refer either to Dorfman's April 6, 1992 phone call or to Morton's April 7, 1992 letter, and instead proposed new terms for a possible dealership agreement. This letter reads in relevant part as follows:

As Director of Dealer Placement and Domestic Sales, it comes to my attention of your desire to pursue a Dealership for the Commander 114B. I am cognizant of past conversations and communications with Matt Goodman and Mr. Boettger, and am apologetic that I, personally have not communicated with you directly until this time....

[Y]our presence in New York, Georgia, and Florida under other circumstances would have been a great benefit in the entire marketing effort and Dealer Network that I am trying to establish as a viable organization for the long term. As the situation stands at this time, all of the areas of your primary interest and actual physical presence are under contract with other entities.

In an effort to involve your organization in the sales of the Commander 114B the following is a proposal for your consideration and review....

**THE MARKET AREA FOR CONSIDERATION:**

The states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina, and the District of Columbia.

**NUMBER OF AIRCRAFT FOR THE TERM OF THE AGREEMENT:** Year One—six (6); Year Two—eight (8); Year Three—ten (10).

**ESTABLISHMENT OF PHYSICAL PRESENCE:**

A staffed sales office located strategically in the territory. (A location such as [a] Raleigh, NC would be considered ideal.)

**RECIPROCAL ARRANGEMENT WITH TANGENT AREAS:**

It is recommended that an arrangement be made between dealers in the tangent marketing areas to share retail leads that you may have generated in your other sales offices in those areas, so that all dealers may take advantage of the demand for 114Bs.

More specifically, this marketing area is available at this time, April 7, 1992, and \*1059 will remain open for your consideration only for the next seven days, which will bring us to April 14, 1992. I will consider this marketing area under a letter of intent until that time or your decline to consider this on the above basis.

Pl. ex. 10.

Morton sent a facsimile to Beckett that same day indicating his confusion, and reaffirmed that he had already accepted Goodman's original offer of March 30, 1992:

We are puzzled by your recent communication dated April 7, 1992 ... as we have already agreed to accept Commander Aircraft's proposal as outlined in Mat Goodman's letter of March 30, 1992.... [W]e previously had been under the impression from correspondence received from Mr. Bill Boettger on March 19, 1992 that the territories of New York and New Jersey were to be reserved for Coastal "until we had finished our discussions."

Obviously, we were shocked to learn New York and New Jersey were given to someone else....

In trying to overcome the loss of New York and New Jersey we made a proposal that included the states of Alabama, Georgia, South Carolina, North Carolina, Virginia, West Virginia, D.C., Maryland and Florida. Mat Goodman responded in writing offering us the above states, excluding Florida. His letter stated he would "await our reply." Within five (5) business days we accepted this offer—and have done so in writing. Please note our response falls well within the time limit you placed upon your recent suggestion, although Mr. Goodman's letter of March 30, 1992 had no such stipulation.

We await notification as to when we will be receiving related paperwork and first aircraft.

Pl. ex. 11.

The following day, Beckett faxed Morton, stating as follows:

In view of the communications of recent receipt it appears that you construed Mr. Goodman's conversation with Mr. Dorfman as an acceptance of a letter proposal of March 30, 1992. In fact, Mr. Goodman stated that "he didn't see why it wouldn't work, but I will know better after our meeting this morning." The meeting produced the signed contracts for the Georgia, Alabama area that I personally had negotiated and consummated during the previous number of days. Your office was notified immediately upon the evidence of those contracts including all of the areas that you had inquired about....

With further review of the situation, the communications, and the intent of all parties concerned, we hereby withdraw the letter of proposal of April 7, 1992, and any and all other communications that may be construed to be proposals. I do not believe that further pursuit of a dealership program with Coastal's involvement would be beneficial to Coastal or Commander under present circumstances....

Pl. ex. 12. This litigation followed. *See* Pl. ex. 13.

In the first eighteen months following the alleged breach, twelve new 114Bs were sold in the United States by Commander and its distributors. Def. ex. VI. Of these, two were sold in the territories sought by Coastal (both in Maryland). *Id.* At trial, Coastal sought to prove damages of lost profits through expert testimony from Walter L. Zweifler ("Zweifler"), an economist/appraiser and Richard Lomas ("Lomas"), an accountant/attorney. *See* Tr. 171–222; Pl. ex. 14 ("Zweifler Report"); Tr. 300–312; Pl. ex. 34 ("Lomas Report"). Zweifler testified that Coastal suffered \$1,350,000 in damages due to the loss of the New York Area franchise, and \$1,350,000 for the loss of the Southeast Territory franchise. Lomas testified that Coastal suffered \$1,156,440 in damages in lost profits from Commander's breach of contract to sell 114Bs for the Southeast Territory, and \$809,508 in lost profits from Commander's breach of an option contract for the New York Area.

### CONCLUSIONS OF LAW

[1] A federal court sitting in diversity must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021–22, 85 L.Ed. 1477 (1941); \*1060 *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir.1989). In New York, choice of law issues involving contractual disputes are governed by an "interest analysis." *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 137 (2d Cir.1991). "[T]he law of the jurisdiction having the greatest interest in the litigation' controls." *Id.* (quoting *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 300 N.Y.S.2d 817, 825, 248 N.E.2d 576, 581–82 (1969)). In performing this analysis, a court should look to factors such as the place of (1) contracting, (2) negotiation of the contract, (3) performance, (4) the location of the subject matter of the contract, and (5) domicile, residence, nationality, place of incorporation, and place of business of the parties. *Wm. Passalacqua Builders*, 933 F.2d at 137. *See also State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 417 (2d Cir.1990). In the instant case, both parties have assumed that New York law governs, as evidenced, for example, by reliance on New York law to support their respective contentions. *Wm. Passalacqua Builders*, 933 F.2d at 137. *See also Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 52 (2d Cir.1984) (under New York law, "in the absence of a strong countervailing public policy, the parties to litigation may consent by their conduct to the law to be applied."); *M.H. Segan Ltd. Partnership v. Hasbro, Inc.*, 924 F.Supp. 512, 522 (S.D.N.Y.1996) (same). We likewise assume that New York law governs this dispute.

Plaintiff Coastal asserts two breach of contract claims: (1) breach of an option contract for the sale of aircraft for the New York Area and (2) breach of a contract for the sale of aircraft for the Southeast Territory. Coastal seeks damages in lost profits for these purported breaches. In addition, Coastal seeks reimbursement for out-of-pocket expenses incurred when its officers travelled to the roll-out in Bethany, Oklahoma. *See* Pl. ex. 15.<sup>4</sup> At trial, Coastal submitted letters that were transmitted between the parties during negotiations. In addition, officers of Coastal testified regarding oral and written communications and negotiations that had taken place between the parties.

Finally, Coastal produced two experts (Zweifler and Lomas) who testified as to the amount of damages suffered as a result of the purported breaches. Defendant Commander cross-examined Coastal's witnesses, but produced no witnesses of its own. Commander maintains that Coastal has failed to prove that there was either an option contract for the New York Area or that there was a contract for the Southeast Territory. Commander also argues that, even assuming that Coastal has proved there was a contract for either or both of these areas, Coastal has failed to prove damages with the requisite level of certainty to recover under New York law.

### I. CONTRACT FORMATION

[2] To succeed in a breach of contract claim, four elements must be satisfied: the making of a contract, performance of the contract by the plaintiff, breach of the contract by the defendant, and damages suffered by the plaintiff. *Machine–Outils Henri Line, Ltee v. Morey Machinery, Inc.*, 1996 WL 254863, at \*6 (S.D.N.Y. May 14, 1996) (citing *John Hancock Property and Cas. Ins. Co. v. Universale Reinsurance Co.*, 147 F.R.D. 40, 46 (S.D.N.Y.1993)); *Van Brunt v. Rauschenberg*, 799 F.Supp. 1467, 1470 (S.D.N.Y.1992). Commander challenges the first and fourth elements in this action.

Basic principles of contract law and Article 2 of the Uniform Commercial Code (“UCC”) as adopted by New York govern because the overall contract as alleged was predominantly for the sale and delivery of goods. See *Long Island Lighting Co. v. Imo Indus.*, 6 F.3d 876, 887–88 (2d Cir.1993); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 742–43 (2d Cir.1979); *Machine–Outils*, 1996 WL 254863, at \*6; *St. Anne–Nackawic Pulp Co. v. Research–Cottrell, Inc.*, 788 F.Supp. 729, 734 (S.D.N.Y.1992).

#### A. THE NEW YORK AREA OPTION

We first address Coastal's claim that Commander granted it an option for the New York Area. Coastal rests this claim on Boettger's \*1061 March 19, 1992 letter indicating that Boettger had requested Goodman to reserve the New York Area for Coastal during the pendency of their negotiations. See Pl. ex. 5 (“I have requested [Goodman] to reserve New York and New Jersey for Coastal until we have finished our discussions.”).

[3] “‘An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date.’” *Kaplan v. Lippman*, 75 N.Y.2d 320, 552 N.Y.S.2d 903, 905, 552 N.E.2d 151, 153 (1990) (quoting *Leonard v. Ickovic*, 79 A.D.2d 603, 433 N.Y.S.2d 499, 500 (1980), *aff'd*, 55 N.Y.2d 727, 447 N.Y.S.2d 153, 431 N.E.2d 638 (1981)). Coastal has neither alleged nor argued that any consideration was paid for this purported option.

However, under New York law, a “firm offer” by a merchant can create an option contract enforceable against the merchant by the offeree, even in the absence of consideration:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

N.Y.U.C.C. § 2–205 (McKinney 1993).<sup>5</sup> Based on this section, Coastal argues that Boettger's letter of March 19, 1992 creates a binding option contract under New York law in favor of Coastal. We disagree.

[4] In order to establish an option under the merchant's firm offer rule, there must be an “offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open.” N.Y.U.C.C. § 2–205 (McKinney 1993) (emphasis added); see also N.Y.Gen.Oblig.Law § 5–1109 (McKinney 1989). Boettger's letter of March 19, 1992 is devoid of any offer within the meaning of section 2–205. Rather, Boettger relays a statement about a communication that occurred between him and Goodman. In so doing, Boettger merely expresses his willingness to reserve the New York Area for future discussions with Coastal in hopes of reaching an agreement for a dealership in that area. He conveys no assurance that the New York Area will be available, nor a commitment on the part of Commander to reserve the New York Area for Coastal. An enforceable legal right cannot arise in contract without the expression of

mutual consent to be bound. *Teachers Ins. and Annuity Assoc. of America v. Tribune Co.*, 670 F.Supp. 491, 497 (S.D.N.Y.1987) (Leval, J.). We conclude that his statement does not evince an intent to be bound by a promise to hold the New York Area open for Coastal. Nor can Coastal argue that it reasonably relied on this statement to its detriment or suffered any damages as a result of Boettger's statement that he had asked Goodman to reserve the New York Area for negotiations with Coastal. As such, we conclude that the evidence fails to establish the existence of an option for the sale of aircraft for a New York Area dealership.

### B. THE SOUTHEAST TERRITORY

As for Coastal's second claim, Commander asserts that Coastal's failure to execute the standard form Dealership Agreement and abide by the Procedures bars its breach of contract claim for the Southeast Territory. Under the New York statute of frauds, a contract for the sale of goods for the price of \$500 or more is not enforceable “unless there \*1062 is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.” N.Y.U.C.C. § 2–201(1) (McKinney 1993). That section further provides that the only indispensable term in such a writing is quantity. *Bazak Int'l Corp. v. Mast Indus.*, 73 N.Y.2d 113, 538 N.Y.S.2d 503, 505, 535 N.E.2d 633, 634–635 (1989).

Coastal claims that Goodman's March 30, 1992 letter constitutes a written offer for the sale of ten Commander aircraft per year during the term of the agreement. Furthermore, Coastal asserts that Dorfman accepted this offer in an April 6, 1992 telephone conversation with Goodman, and the acceptance was confirmed by Coastal in a follow-up letter from Morton dated April 7, 1992. Addressing Commander's statute of frauds defense, Judge Parker held earlier that Goodman's March 30, 1992 letter and Morton's April 7, 1992 letter presented “sufficient evidence to support a claim that a contract was formed.” *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 903 F.Supp. 591, 594 (S.D.N.Y.1995). That holding “[did] not establish as a matter of law that the contract alleged by Coastal was concluded between the parties. Instead, [the] holding mean[t] only that Coastal [was] not barred from attempting to prove that the parties entered into an official contract.” *Id.* Coastal was thus permitted to try and prove its claim that a contract was executed between the parties for the Southeast Territory. As the Second Circuit has

articulated, the intention of the parties controls contract formation:

First, if the parties intended not to be bound until they have executed a formal document embodying their agreement, they will not be bound until then; and second, the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event.

*Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir.1984) (citing *V'Soske v. Barwick*, 404 F.2d 495 (2d Cir.1968), *cert. denied*, 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969)), *cert. denied*, 469 U.S. 828, 105 S.Ct. 110, 83 L.Ed.2d 54 (1984). In *Tribune*, Judge Leval considered whether the intent to be bound was revealed by (1) the language of the agreement; (2) the context of the negotiations; (3) the existence of open terms; (4) partial performance; and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions. 670 F.Supp. at 499–503. See also *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir.1989).

[5] Upon review of testimony given at trial and evidence submitted by the parties, we now conclude that Goodman's letter of March 30, 1992, when viewed in light of the surrounding circumstances of this case, including the past dealings of the parties, does not manifest an intent to enter into a binding agreement, and therefore did not constitute an offer. Indeed, “[c]ourts must be particularly careful to avoid imposing liability where binding obligation was not intended.” *Tribune*, 670 F.Supp. at 499. “[A] primary concern for courts in such disputes is to avoid trapping parties in surprise contractual obligations that they never intended.” *Arcadian Phosphates*, 884 F.2d at 72 (quoting *Tribune*, 670 F.Supp. at 497). Although the Second Circuit has recognized that even informal agreements can be binding if the parties “merely contemplate[d] that their informal agreement would be reduced to a formal writing ...,” *Reprosystem*, 727 F.2d at 261, such is not the case here. Prior to March 30, 1992, there were discussions and negotiations concerning various issues in the Dealership Agreement, including insurance arrangements and gross margin discounts. While price is

not an essential element in the formation of a contract for the sale of goods, N.Y.U.C.C. § 2–201(1) (McKinney 1993); *Bazak*, 538 N.Y.S.2d at 505, 535 N.E.2d at 634–35, pricing was a particularly important issue, and there is no evidence that the parties had agreed upon a dealer discount. Furthermore, the insurance arrangement in the Dealership Agreement was a hurdle that was never overcome during negotiations. Indeed, Goodman begins his March 30, 1992 letter by stating the conditions subject to which a Dealership \*1063 Agreement could be executed. Although this letter did not expressly call for execution of the Dealership Agreement as a prerequisite to entering into a binding contract, Coastal should have known that it could not enter Commander's distributorship network without executing a Dealership Agreement. We conclude that Goodman's March 30, 1992 letter, especially when viewed in the context of the history of the negotiations between the parties, does not manifest an intent to enter into a binding agreement with Coastal. Although the omission of an important term or terms does not necessarily prevent a contract from arising, when the parties' actions manifest a lack of intent to contract, which we find to be the case here, no contract results.

Indeed, as soon as Coastal attempted to accept this purported offer, Commander immediately responded in writing to clarify that the March 30, 1992 letter was not a firm offer to sell aircraft to Coastal. *See* Pl. ex. 10. Therefore, even under the merchant's exception to the statute of frauds, *see* N.Y.U.C.C. § 2–201(2) (McKinney 1993), Coastal has failed to prove the existence of a contract. Because of Commander's immediate response, Coastal could not have incurred any expenses in reliance on its own April 7, 1992 letter of “confirmation” which otherwise might have bound Commander pursuant to section 2–201(2).

## II. DAMAGES

Coastal seeks damages in lost profits for Commander's failure to grant distributorships for the sale of 114Bs in the New York Area and the Southeast Territory. Even assuming that Commander breached either or both of these purported contracts, Coastal still would not be able to recover because it has failed to prove damages with the requisite level of certainty under New York law.

The damage provisions applicable to this case are sections 2–713(1) and 2–715(2)(a) of the UCC. Section 2–713 reads in pertinent part as follows:

(1) [T]he measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in [§ 2–715], but less expenses saved in consequence of the seller's breach.

N.Y.U.C.C. § 2–713(1) (McKinney 1993). Consequential damages are defined in section 2–715 as follows:

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise....

N.Y.U.C.C. § 2–715(2) (McKinney 1993). “Lost profits” are recoverable as consequential damages under sections 2–713 and 2–715. *See Jewell–Rung Agency, Inc. v. Haddad Organization, Ltd.*, 814 F.Supp. 337, 340–42 (S.D.N.Y.1993); *Texpor Traders, Inc. v. Trust Co. Bank*, 720 F.Supp. 1100, 1113 (S.D.N.Y.1989); *Larsen v. A.C. Carpenter, Inc.*, 620 F.Supp. 1084, 1131 (E.D.N.Y.1985), *aff'd*, 800 F.2d 1128 (2d Cir.1986); *Bende and Sons, Inc. v. Crown Recreation, Inc., Kiffe Products Div.*, 548 F.Supp. 1018, 1022 (E.D.N.Y.1982), *aff'd*, 722 F.2d 727 (2d Cir.1983); *Harbor Hill Lithographing Corp. v. Dittler Bros., Inc.*, 76 Misc.2d 145, 348 N.Y.S.2d 920, 923–24 (Sup.Ct.1973).

[6] [7] Although lost profits may be recovered as consequential damages under New York law, a calculation and award of lost profits may not be based on speculation. *Texpor Traders*, 720 F.Supp. at 1114; *Harbor Hill*, 348 N.Y.S.2d at 924. Where, as here, there was no existing market for 114Bs at the time of the alleged breach, even assuming there was a breach of contract, we could not simply grant Coastal damages in the amount of the difference between the expected retail price and dealer discount price for all the aircraft that Coastal alleges Commander was obliged to deliver over the life of the contract. Coastal's reliance on section 2–713 in support of this simple mathematical formula is misplaced. An award of damages under that section assumes the existence of a

“market price,” which in turn assumes a market demand. Although the \*1064 114B was an upgraded version of the predecessor 114, for all intents and purposes, the 114B was a new product with no sales history. The predecessor version was last produced in 1979, and cannot reasonably be compared to the 114B for the purpose of establishing a 1992 market demand or market price. Because no “market price” for 114Bs at the time of the alleged breach was established, we reject Coastal's claim that it is entitled to damages calculated by subtracting “contract price” from the “market price” pursuant to section 2–713. We next address whether Coastal can recover lost profits as consequential damages under section 2–715.

[8] The general UCC proof sequence for damages under that section is causation, foreseeability, certainty (reasonable or less) and mitigation. *See* N.Y.U.C.C. § 2–715 cmt. 2–4 (McKinney 1993). The injured party bears the burden of proving the first three factors, whereas establishing non-mitigation is up to the wrongdoer. *Id.* Similarly, under New York common law, the recovery of lost profits as damages for breach of contract is subject to the following requirements:

First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.... In addition, there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made.

*Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131, 132, 493 N.E.2d 234, 234–35 (1986) (per curiam) [*Kenford I*].<sup>6</sup> *See also Travellers Intern., A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1577–78 (2d Cir.1994); *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 332–34 (2d Cir.1993); *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 728–29 (2d Cir.1992); *Jewell–Rung Agency*, 814 F.Supp. at 342. In a

later decision in the *Kenford* case, the New York Court of Appeals emphasized that “damages which may be recovered by a party for breach of contract are restricted to those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed.” *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 540 N.Y.S.2d 1, 5, 537 N.E.2d 176, 179–80 (1989) [*Kenford II*]. *See also Travellers*, 41 F.3d at 1578; *Trademark Research*, 995 F.2d at 332.

Applying these factors to the present case—causation, foreseeability, and reasonable certainty of proof of damages—we find that, even assuming there was a breach of contract, plaintiff has failed to meet its burden of proving damages for lost profits.

#### A. CAUSATION

In order to recover loss of future profits as damages for breach of contract under New York law, a plaintiff must “demonstrate[ ] with certainty that such damages have been caused by the breach....” *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d at 235. There \*1065 can be no dispute that the damages claimed by Coastal for lost profits can be traced directly to Commander's alleged breach of contract.

#### B. FORESEEABILITY

[9] An award of damages for lost profits will stand only if liability for such damages was contemplated by the parties at the time of contracting. *Travellers*, 41 F.3d at 1578; *Kenford II*, 540 N.Y.S.2d at 3–4, 537 N.E.2d at 177–79; *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d at 234–35. As articulated by the New York Court of Appeals:

In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered ... as well as “what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.”

*Kenford II*, 540 N.Y.S.2d at 4, 537 N.E.2d at 179. We conclude that, even assuming a contract was formed, the parties did not contemplate that Commander would assume liability for consequential damages arising out of its failure to deliver. Paragraph 10 of the

Dealership Agreement contained the following exclusion for consequential damages:

Commander agrees to use its best efforts to satisfy and fill orders placed by Dealer. However, it is understood that lead times will vary according to manufacturing and other conditions and, consequently, any and all delivery dates communicated by Commander are mere estimates and under no circumstances shall Commander on account of late delivery o[r] non-delivery be liable to Dealer, its agents, customers or any other persons for any special or consequential damages, whether based upon lost goodwill, lost resale, lease or rental profits, work stoppage, impairment of other goods, breach of contract, negligence or such other actions as may be deemed or alleged to be the cause of a loss or damage to such a person.

Although Coastal does not allege that it executed a Dealership Agreement (and therefore does not explicitly admit that it is barred by this clause), and instead bases its claims on the letters exchanged between the parties, Coastal cannot dispute that the ultimate goal was to execute a Dealership Agreement. Coastal's awareness of and attention to the Dealership Agreement is evidenced by its attempts to amend provisions which it deemed problematic—e.g., the deposit requirement and the liability provision. At no point did Coastal express concern over the consequential damages exclusion in paragraph 10. As such, we can only conclude that neither Coastal nor Commander contemplated that Commander would assume liability for lost profits or other consequential damages for non-delivery.

### C. REASONABLE CERTAINTY OF PROOF OF DAMAGES

[10] In addition, we have found no case from a New York State court permitting a recovery of lost profits to a “new business.” The seminal case representing New York's reluctance to permit such recovery is *Cramer v.*

*Grand Rapids Show Case Co.*, 223 N.Y. 63, 119 N.E. 227 (1918). The defendant in *Cramer* breached its contract to deliver furniture to plaintiffs thereby preventing the latter from opening their ladies clothing store in a timely fashion. 223 N.Y. at 66, 119 N.E. 227. In reversing an award of lost profits, the court noted that evidence of plaintiffs' subsequent profit, earned after they were able to open their store, was insufficient proof of what their lost profits would have been had defendant not breached the contract. *Id.* at 67, 119 N.E. 227. The court implied that a new business would almost never be able to establish sufficient proof to recover lost profits. *See id.* New York was thus characterized as having a *per se* rule of non-recoverability of lost profits to a new business. *See, e.g., Manniello v. Dea*, 92 A.D.2d 426, 461 N.Y.S.2d 582, 585 (1983) (“[A] new business ... will not be allowed to recover anticipated profits since no basis exists upon which to estimate the amount of the lost profits.”).

The New York Court of Appeals has since clarified that a plaintiff seeking lost profits as damages for breach of contract must “demonstrate [ ] with reasonable certainty that \*1066 such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach....” *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d at 235. In so doing, the *Kenford I* Court reaffirmed *Cramer*'s holding, and explained that *Cramer* stood for the proposition that “[i]f it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.” *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d at 235 (citing *Cramer*, 223 N.Y. 63, 119 N.E. 227). *See also International Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 86 (2d Cir.1996) (“[T]he new business rule is not a *per se* rule forbidding the award of lost profits damages to new businesses, but rather an evidentiary rule that creates a higher ‘level of proof needed to achieve reasonable certainty as to the amount of damages.’ ”) (quoting *Travellers*, 41 F.3d at 1579).

#### 1. NEW VENTURE

Commander urges the court to apply the heightened standard of proof of lost profits enunciated in *Kenford*

*I*, arguing that Coastal's attempt to establish a distributorship for 114Bs was a "new venture." New York law imposes an especially demanding standard for computation of lost future profits in the case of a new business. *See Trademark Research*, 995 F.2d at 332; *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d at 234–35. However, an established business's expansion in an area in which it has proven its expertise does not warrant the designation of "new venture." *Care Travel Co. v. Pan American World Airways, Inc.*, 944 F.2d 983, 993–94 (2d Cir.1991). Although the 114B was a new product without prior sales history, Coastal was experienced in selling similar aircraft from the Aerospatiale line. Thus, the "new venture" label is somewhat misplaced. On the other hand, the Southeast Territory encompassed only one state (Alabama) in which Coastal had sold a new Aerospatiale aircraft comparable to the 114B. *See Def. ex. A.*<sup>7</sup>

The New York Court of Appeals has instructed that the key issue is whether damages can be proven to "reasonable certainty." *Kenford I*, 502 N.Y.S.2d at 132, 493 N.E.2d at 235. Whether a business is a "new venture" or an ongoing operation of course will affect the quantity and quality of evidence relied upon by a plaintiff to prove lost future profits with "reasonable certainty." *See id.* Rather than focus on whether Coastal should be labelled a "new venture" or an ongoing business (in any case, Coastal's contemplated 114B franchise probably is best described as a hybrid between the two), we address the issue whether plaintiff can establish lost future profits with "reasonable certainty."

## 2. PROOF OF DAMAGES

In deriving their calculations, Coastal's experts relied on assumptions as to the number of aircraft that would have been sold at assumed prices, based on market conditions at the time of the alleged breach. For example, Zweifler based his report on an assumption that Coastal would have sold the equivalent<sup>8</sup> \*1067 of twenty to thirty aircraft (per year) during the term of the Dealership Agreement. *See Pl. ex. 14*, at 2; Tr. 183. Lomas assumed that Coastal would have sold ten new aircraft per year for three years in the Southeast Territory and seven new aircraft per year in the New York Area. Coastal justifies these assumptions on the ground that, under the UCC, the measure of damages must be taken at the time of the breach. Therefore, Coastal argues, the contemplated retail

price of the aircraft and the number of aircraft targeted to be sold as of the time of the alleged breach control. Coastal asserts that the UCC does not permit a court to look at actual after-breach results of sales to discern whether or not it would have been able to sell aircraft in the number contemplated and at the targeted prices.

Commander, on the other hand, challenges Coastal's experts by attacking their assumptions regarding the number of aircraft Coastal would have sold. *See Def. ex. V1* (only twelve new 114Bs sold in the United States by Commander and its distributors during the first eighteen months of the contract period, two of which were sold in the Southeast Territory and none in the New York Area). Commander argues that the actual sales results of 114Bs provide a more accurate indicator of the demand for 114Bs and therefore a more logical source for calculating how many aircraft Coastal would have been able to sell and whether Coastal would have made any profit. *Cf. Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447, 455 (2d Cir.1977) ("[Defendant] suggests that the best way of determining profits would be to consider the profits of an existing distributorship. But it came forward with no such proof....").

Coastal responds that looking at actual sales results is misleading because plaintiff would have sold aircraft more effectively than did Commander or its distributors. Coastal points to its successful experience in selling Aerospatiales, even during low points in the market. In short, Coastal insists that its experts' assumptions as to the number and price of aircraft that would have been sold by it are a more accurate indicator of the true market for 114Bs during the contract period than the actual experience of Commander and its distributors in selling 114Bs. We do not agree.

\*1068 Absent an existing "market price," Coastal must produce some proof that it would have been able to sell 114Bs at the purported prices and in the predicted quantity. *See N.Y.U.C.C. § 2–713 cmt. 3* (McKinney 1993) ("When the current market price under this section is difficult to prove[,] the section on determination and proof of market price is available to permit a showing of a comparable market price or, where no market price is available, evidence of spot sale prices is proper."). In this case, Coastal's reliance on its experts' assumptions as to the market demand and market price for 114Bs is to no avail, particularly in light of the fact that neither expert

purported to be an expert in the demand for aircraft. Coastal emphatically rejects reliance on post-breach actual sales results as an indicator of market demand and market price. However, plaintiff has submitted no evidence nor any persuasive argument that the actual sales results of the 114Bs provide an unreliable indicator of the market demand for 114Bs. Plaintiff's sole reliance on section 2-713 to support its experts' assumptions regarding market price is fatal to its case.

Even assuming that Coastal had outstanding sales experience, we are unconvinced that plaintiff would have sold enough aircraft to earn any profit on the purported contract. The record indicates that only twelve new 114Bs were sold domestically during the eighteen months following the alleged breach, and only two in the Southeast Territory (both in Maryland). *See* Def. ex. V1. In a case such as this where the court is presented with predicting the performance of a distributorship attempting to sell a new product (even if the distributorship itself is not a new venture), we are hesitant to rely on stated assumptions as to the number of aircraft that would have been sold and the prices at which they would have been sold. Because the 114B was a new product, or at least a new model significantly upgraded from the predecessor model, no "market price" existed at the time of the alleged breach. Although the price of goods, without a "market price," may be shown by opinion as to value, *see* N.Y.U.C.C. § 2-713 cmt. 3 (McKinney 1993), neither of plaintiff's experts purported to be experts in the market demand for 114Bs and therefore neither could opine as to what price or quantity the market would have borne. Rather, we find it useful to examine the actual sales results of 114Bs in the areas that were supposed to be awarded to plaintiff. We find no support in the case law or the UCC for plaintiff's assertion that the after-breach actual sales performance of 114Bs is irrelevant. In fact, the case law suggests a contrary conclusion. *See Lee*, 552 F.2d at 455.

As for plaintiff's first expert, beyond the fact that Zweifler is not qualified to give an opinion as to the demand for 114Bs during the contract period, there is a more fundamental problem with his report. Coastal seeks damages for lost profits for an alleged breach of an option contract for the New York Area and an alleged breach of contract for the Southeast Territory, and for out of pocket costs and expenses. *See* Compl. ¶ 5. However, Zweifler's report opines as to the value of a dealership in the New

York Area and the Southeast Territory. *See* Pl. ex. 14, at 1 ("It is our opinion that [...] strictly from an economic point of view, the value of these two dealership franchises at the valuation date was in the amount of ... \$2,700,000.... Market value herein is defined as the amount at which a property ... would change hands between a willing buyer and a willing seller...."). A review of Zweifler's analysis reveals the important distinction between an opinion as to the lost profits suffered as a result of the alleged breach and an opinion as to the lost market value of a franchise.

Based on the assumed number of units sold,<sup>9</sup> the analysis assumes a 5% after-tax \*1069 profit.<sup>10</sup> Therefore, the report concludes that Coastal's lost profits were between \$150,000 (for twenty "units") and \$262,500 (for thirty "units") per year for each franchise. Even assuming that Coastal could have sold twenty "units" per year—an assumption we find highly dubious in light of the facts that the parties had discussed ten new aircraft per year and that the actual sales performance fell far short of ten new aircraft per year in either territory<sup>11</sup>—the report calculates Coastal's lost profits to be \$150,000 per year. Assuming lost profits of \$150,000 per year for each territory (the New York Area and the Southeast Territory), according to Zweifler's report, Coastal suffered a total of \$900,000 in lost profits (assuming Coastal is entitled to three years of lost profits), a far cry from the \$2,700,000 that the report concludes was lost, and an even farther cry from the \$5,319,324 that Coastal seeks in the Complaint. The \$900,000 figure is further reduced by fifty percent if the eighteen month termination clause in paragraph 10 of the Dealership Agreement applies.

A fundamental problem we find in the report is that the analysis applies a "goodwill multiple" to lost profits, and then adds a working capital figure to reach a "Total Value of Dealership." By applying a multiple to earnings, the report goes beyond calculating lost profits and begins valuing the dealership as an ongoing enterprise. However, Coastal asserts claims for lost profits, not deprivation of the dealership as an ongoing entity. Indeed, because of the termination clause in the Dealership Agreement, we doubt that Coastal could recover consequential damages for the lost value of an ongoing dealership even if such damages were alleged and sought, which they were not. Finally, the court is aware of no principle of economics that would support valuing a franchise by taking a multiple of earnings (which by itself is widely recognized and accepted

as a valuation technique) and then adding working capital to that product. Our main concern with the analysis, however, is that it purports to value a franchise, rather than calculating lost profits. To the extent that we are able to discern an opinion as to lost profits, the report supports a calculation of lost profits of \$150,000 per year per franchise—and even this calculation is based on highly optimistic and unsupported assumptions regarding sales units,<sup>12</sup> and is therefore rejected.

We next turn to Lomas's testimony in which he calculated lost profits of \$1,156,440 for the Southeast Territory, and 70% of that amount—or \$809,508—for the New York Area. *See* Pl. ex. 34; Tr. 310.<sup>13</sup> Lomas's accounting report at least addresses the proper issue—i.e., lost profits during the term of the contract, rather than the lost market value of a distributorship. *See* Pl. ex. 34. However, the report is wrought with unsupported and speculative assumptions. For the Southeast Territory, Lomas calculated \$527,940 in lost (pre-tax) profits over three years based on sales of ten new aircraft per year. The report then assumes \$577,500 earned over three years on upgrades of 77 aircraft, and adds \$51,000 for “parts override.” Lomas does not state from where he \*1070 obtained the figures to calculate the profits from the upgrades or the overrides. More importantly, Lomas is not an expert in the demand for 114Bs, and cannot support the assumption that Coastal would have sold ten aircraft per year for three years in the Southeast Territory, and seven aircraft per year in the New York Area.

In short, Coastal bases its lost profits claims on speculation regarding the number of aircraft it would have sold during the period in question. We would be inclined to grant plaintiff some leeway in producing evidence regarding the demand for 114Bs and with respect to plaintiff's ability to market the product effectively based on its skill and experience. However, based on the actual sales performance of 114Bs in the market after the alleged breach, we find it difficult to believe that plaintiff would have realized any profit on a 114B dealership. Plaintiff does not dispute the poor sales performance of 114Bs following the alleged breach. Rather, plaintiff simply asserts that it would have done a better job selling the aircraft. Despite plaintiff's experience in selling Aerospatiale aircraft, we conclude that plaintiff has failed to prove, by a preponderance of the evidence, that it would have been able to repeat its success with the 114Bs, particularly in light of the fact that Coastal enjoyed

significantly greater margins on the Aerospatiale aircraft (22.5%) than it would have on the 114Bs (15% in the first year).<sup>14</sup> Even assuming there was a contract and subsequent breach, we are unconvinced that plaintiff would have been able to sell all of the aircraft it was committed to purchase or to realize any profit. Plaintiff does not assert that it should recover any restitution or reliance damages. To award plaintiff lost profits based on the unproven assumption that it would have sold at list price every aircraft it had agreed to purchase would unjustly reward plaintiff rather than make it whole. In fact, Coastal may be fortunate not to have been obliged to purchase 114Bs for distribution in the New York Area or the Southeast Territory.

### III. Mitigation

[11] Even assuming that Coastal can prove lost profits with reasonable certainty for Commander's breach of its agreement to provide aircraft to Coastal for the Southeast Territory, Coastal's damages would be limited to lost profits associated with Georgia and Alabama. Coastal cannot dispute that, after Commander withdrew the purported March 30, 1992 offer, Commander immediately proposed an arrangement involving the Southeast Territory minus Georgia and Alabama. *See* Pl. ex. 10. Coastal cannot recover for those damages that could have been avoided had it executed a Dealership Agreement for a distributorship in the reduced territory. Instead, Coastal insisted that it had already accepted Goodman's March 30, 1992 offer for the Southeast Territory, and refused to acknowledge Beckett's abridged proposal for the remaining states, claiming that it “couldn't accept” Commander's proposal after all that had happened. *See* Tr. 285. Coastal responded to Beckett's offer with a threat that it would sue for damages if the entire Southeast Territory were not awarded, and it failed to mitigate its damages by taking what it could get.<sup>15</sup>

### CONCLUSION

For the foregoing reasons, we find in favor of defendant on all claims. Each party shall bear its own costs.

SO ORDERED.

## All Citations

937 F.Supp. 1051, 32 UCC Rep.Serv.2d 725

## Footnotes

- 1 At some point, Coastal's Aerospatale territory consisted of New York, New Jersey, Georgia, Alabama, Florida and Pennsylvania, with affiliations in North Carolina, South Carolina, Maryland, Virginia and the District of Columbia. See Pl.'s ex. 4; Tr. 150–151.
- 2 Included in the sales figures are a number of the turbo-charged version of the TB–20, noted as the TB–21.
- 3 Dorfman described avionics upgrades as a source of improving margin as follows:

It was the same radio ... whether or not we bought that radio from Commander or we bought it from an avionics shop that we worked with, and if we paid the same cost as Commander did for that product.

Obviously, Commander would mark it up to increase their profit. If we could have that extra spread, that would be a way of improving our margin. It would effectively eliminate the middleman on those components.

Tr. 233.
- 4 Notably, Coastal asserts no other claims or theories for recovering damages.
- 5 New York General Obligations Law contains a similar provision for contracts falling outside section 2–205 of the New York Uniform Commercial Code:

Except as provided in section 2–205 of the uniform commercial code with respect to an offer by a merchant to buy or sell goods, when an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.

N.Y.Gen.Oblig.Law § 5–1109 (McKinney 1989).
- 6 Coastal attempts to distinguish the instant case from *Kenford I* and its progeny by arguing that the instant case involves a contract for the sale of goods (and is therefore governed by the New York Uniform Commercial Code) rather than a contract for services (governed by common law). Coastal's attempt to rigidly delineate UCC and common law principles is misplaced. In *Jewell–Rung Agency, Inc. v. Haddad Organization, Ltd.*, 814 F.Supp. 337 (S.D.N.Y.1993) (action for breach of contract for the sale of goods), the court recognized that because of *Kenford I*'s “heightened standard of proof for new businesses ... new ventures will have difficulty demonstrating lost profits....” 814 F.Supp. at 342. See also *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720 (2d Cir.1992). We conclude that rules of law under the UCC and the common law are not mutually exclusive. In the instant case, although Coastal correctly points out that the UCC provides for lost profits as damages measured from the time of breach, such damages are only permitted to the extent that plaintiff can prove there was a market price for the undelivered goods. Coastal cannot reasonably argue, however, that there was a market price for a product that had not yet even been delivered to market or received any order for delivery. That plaintiff and defendant may have targeted a certain retail price for the aircraft is not dispositive. Because there was no market yet for the 114Bs, the principles set forth in *Kenford I* and its progeny are directly applicable to this case.
- 7 Furthermore, Coastal operated its Aerospatale franchise on greater margins than it would have under Commander's Dealership Agreement: Coastal received a 22.5% margin from Aerospatale during the entire time that Coastal served as Aerospatale's dealer. Tr. 71, 114. Obtaining sufficient margin was critical to the financial feasibility of entering into a distributorship. See Tr. 71. While Coastal had experienced profitability selling Aerospatale aircraft at 22.5%, there were times when Coastal did not realize a profit at 22.5%. Tr. 72.
- 8 In his report and on direct testimony, Zweifler uses the term “equivalency of revenue” to imply that he did make an assumption as to the number of aircraft Coastal would have sold:

A I would refer the Court to page 2 of Exhibit 14, which recapitulates the three scenarios that were developed in arriving at my opinion.

....

A In each of the scenarios a revenue estimate is made based on the equivalent—equivalency of either of new and used parts, retrofit services, and from three to five-and-a-quarter million dollars....

Q Now, did you assume a number of units and an average price per unit in performing your calculations?

A Only ... for purposes of defining the equivalency of revenues that might be earned by the company.

....

A If you go to ... the exhibit in the middle of page 2 of Plaintiff's 14, you'll see that the simple mathematics of 20 times \$150,000 equals three million.

It does not mean that I presumed that there will be 20 new aircrafts sold. It does mean that the equivalency of revenue would be earned by the company in one of several ways, either by the sale of new aircraft, the sale of traded in aircraft through it, the sale of support, parts support, and the sale of the retrofit program and add-on equipment and services.

Q [H]ow did you develop the number 20? Why did you develop 20 and what average price did you develop?

Q Number one, the price—the unit number was consistent with the history of Coastal as an Aerospatiale franchisee. It had in fact sold that number of aircraft in the past. Of course, the past is not an absolute predictor of the future.

And I had to consider the worldwide demand situation as reflected in the prices that would be charged for it and the ability of vendors to receive that money, and in doing so, from an economic point of view, I had to consider the price elasticity and the demand elasticity for an aircraft of this kind worldwide.

Q How did you do that?

A The stated price was, of course, in the record.

The question then was: Would a \$169,500 offering price be the price that would be paid by an end user/buyer if in fact it was a new aircraft we are talking about?

And would it be increased or decreased by either a discount to try to get a sale, or would it be increased by the fact that the buyer had a desire to have an immediate delivery and was prepared to pay more for it, or that the buyer was prepared to acquire add-on equipment, which is often done, or painting, or some other special service that would be attendant to the initial purchase?

Would there be the equivalency, as I said earlier, in the form of other services and parts and so on?

Tr. 182–184. The fact that Mr. Zweifler defines the revenue generating units he incorporated in his report as “the sale of new, used aircraft, parts, warranty programs and retrofit contracts,” see Pl. ex. 14, at 2, reveals that he made an assumption as to the demand for aircraft products, and the revenue that would have been generated from that demand.

9 The report does not indicate whether the assumed number of “aircraft or equivalent” sold is an annual figure or a figure for the life of the contract—three years. However, we conclude that it must be an annual figure because the analysis calculates an annual earnings figure (described as the owners' discretionary benefits per year) based on the number of units sold. Although Zweifler uses the term “equivalency of sales,” we treat this figure simply as the number of “units” sold.

10 The analysis calculates “owners' discretionary benefits,” which is defined as after-tax salaries paid to principals plus net earnings of the franchise. See Pl. ex. 14, at 2; Tr. 188, 191. We will refer to this figure as “net earnings” or “profit” because it represents the sum benefit to the principals of an enterprise, whether the benefit is taken as salary to the principal or earnings of the franchise. See Tr. 191. Based on an analysis of comparable enterprises, the report assumes earnings of 5% of revenues. Tr. 189.

11 Even taking into account Zweifler's expanded concept of “equivalency units,” 20 units per year seems unreasonably high.

12 Coastal points to various marketing projections issued by Commander in support of Zweifler's optimistic sales assumptions. However, we conclude that the actual sales performance during the contract period, as opposed to pre-breach sales predictions, is a more accurate indicator of the market demand, and therefore a more reliable figure for calculating lost profits.

13 Lomas calculated lost profits of \$1,156,440 for the Southeast Territory, see Pl. ex. 34, and testified that the lost profits for the New York Area would be 70% of the projection for the Southeast Territory. Tr. 310.

14 Even with a 22.5% gross margin on Aerospatiales, Coastal was unprofitable in 1991. See Def. ex. Y1.

15 Coastal offered no evidence regarding lost profits resulting from Commander's failure to sell 114Bs for distribution in Georgia and Alabama. See Tr. 220, 245–249.



KeyCite Yellow Flag - Negative Treatment

Distinguished by Biotronik A.G. v. Conor Medsystems Ireland, Ltd., N.Y., March 27, 2014

650 F.Supp.2d 314

United States District Court,  
S.D. New York.

COMPANIA EMBOTELLADORA  
DEL PACIFICO, S.A., Plaintiff,  
v.  
PEPSI COLA CO., Defendant.

No. 00 Civ. 7677(JSR).

|  
Sept. 8, 2009.

**Synopsis**

**Background:** Bottler brought action against beverage company for breach of contract, relating to contract giving bottler exclusive rights for bottling, sales, and distribution in certain parts of Peru, and alleging that company failed to stop, police, or otherwise prevent transshipping, i.e., sale of company's products in bottler's exclusive territory by other bottlers, distributors, or third parties. Company counterclaimed, alleging that bottler was liable for unpaid invoices for concentrate sold to it by company.

**Holdings:** On company's motion for summary judgment and bottler's motion for partial summary judgment, the District Court, Jed S. Rakoff, J., held that:

[1] opinion testimony regarding damages from lost profits, proffered by expert witness for bottler, was unreliable;

[2] bottler's claim for lost profits involved consequential damages rather than general damages, and thus, bottler was required, under New York law, to prove damages with reasonable certainty rather than merely provide a reasonable estimate, and to prove with certainty that such damages had been caused by the breach;

[3] court would not read into the contract an obligation for company to take affirmative steps to prevent other bottlers and third parties from selling company's products in bottler's exclusive territory;

[4] New York's covenant of good faith and fair dealing was inapplicable to at-will contract; and

[5] under the doctrine of international comity, district court would recognize adjudication, by Peruvian administrative agency in bottler's bankruptcy proceeding in Peru, of beverage company's claim for unpaid invoices.

Motions granted.

West Headnotes (21)

[1] **Evidence**

🔑 Necessity and sufficiency

**Evidence**

🔑 Speculation, guess, or conjecture

An expert's testimony must be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory that the testimony amounts, in essence, to an "apples and oranges" comparison. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Evidence**

🔑 Necessity and sufficiency

When an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, the opinion is unreliable, thereby requiring exclusion of the opinion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1 Cases that cite this headnote

[3] **Evidence**

🔑 Necessity and sufficiency

For expert opinion to be admissible, the expert's analysis must be reliable at every step, and although a minor flaw in an expert's reasoning will not render an expert's opinion per se inadmissible, exclusion is nevertheless warranted whenever the flaw is large enough

that the expert lacks good grounds for his or her conclusions. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1 Cases that cite this headnote

**[4] Evidence**

🔑 Damages

Opinion testimony regarding damages from lost profits, proffered by expert witness for plaintiff bottler, was unreliable and therefore would be inadmissible at trial, in action against beverage company relating to contract giving bottler exclusive rights for bottling, sales, and distribution in certain parts of Peru, which action alleged that company failed to stop, police, or otherwise prevent transshipping, i.e., sale of company's products in bottler's exclusive territory by other bottlers, distributors, or third parties; witness used sales figures for Lima, which was within bottler's exclusive territory, that were obtained from a market research firm but witness conceded that those figures understated sales volume and adjusted the figures upwards by 22.5 percent based on assertion that marketing experts and others "generally believed" that the market research firm understated market volume to such degree, market research firm did not have data for areas outside of Lima and witness therefore extended the transshipment figures to non-Lima areas by assuming that transshipment would occur in those areas in same proportion that it occurred inside Lima, witness assumed that all of the alleged transshipping would have been prevented "but for" beverage company's conduct and that bottler would have made every one of the transshipped sales, and witness calculated bottler's lost profits by applying bottler's historical profit margin. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2 Cases that cite this headnote

**[5] Evidence**

🔑 Sources of Data

Nothing requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the experts. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

Cases that cite this headnote

**[6] Damages**

🔑 Loss of profits

Under New York law, as a general matter, lost profits constitute general damages, for which plaintiff is required only to provide a "reasonable estimate" of damages before an award can be made in an action for breach of contract, when plaintiff seeks only to recover money that the breaching party agreed to pay under the contract.

5 Cases that cite this headnote

**[7] Damages**

🔑 Loss of profits

Bottler's claim for lost profits involved consequential damages rather than general damages, and thus, bottler was required, under New York law, to prove damages with reasonable certainty rather than merely provide a reasonable estimate, and to prove with certainty that such damages had been caused by the breach, in action against beverage company for breach of contract, relating to contract giving bottler exclusive rights for bottling, sales, and distribution in certain parts of Peru, which action alleged that company failed to stop, police, or otherwise prevent transshipping, i.e., sale of company's products in bottler's exclusive territory by other bottlers, distributors, or third parties; bottler was not seeking to recover money that company agreed to pay under the contract, and instead was alleging that because of company's breach it suffered lost profits on collateral business arrangements.

7 Cases that cite this headnote

**[8] Contracts**

🔑 Ambiguity in general

**Evidence**

🔑 Grounds for admission of extrinsic evidence

Under New York law, if a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence.

2 Cases that cite this headnote

**[9] Contracts**

🔑 Construction by Parties

**Evidence**

🔑 Grounds for admission of extrinsic evidence

Under New York law, in the face of an unambiguous contract, evidence of the parties' course of dealing is inadmissible, as is evidence of the unilateral expression of one party's postcontractual subjective understanding of the terms of the agreement.

1 Cases that cite this headnote

**[10] Contracts**

🔑 Trade and Business

Contract between bottler and beverage company, granting bottler exclusive rights for bottling, sales, and distribution in certain parts of Peru, by its unambiguous express terms merely prohibited company from appointing another bottler for the exclusive territory and from directly selling its beverage products in the exclusive territory, and thus, New York law prohibited the court from reading into the contract an obligation for company to take affirmative steps to prevent other bottlers and third parties from selling company's products in bottler's exclusive territory.

1 Cases that cite this headnote

**[11] Contracts**

🔑 Terms implied as part of contract

Under New York's implied covenant of good faith and fair dealing, a contracting party is prevented from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

3 Cases that cite this headnote

**[12] Contracts**

🔑 Trade and Business

Under New York law, implied covenant of good faith and fair dealing did not apply to contract between bottler and beverage company giving bottler exclusive rights for bottling, sales, and distribution in certain parts of Peru, where the contract was at-will.

1 Cases that cite this headnote

**[13] Contracts**

🔑 Acts or Omissions Constituting Breach in General

New York law does not recognize a claim for breach of an implied covenant of good faith and fair dealing in at-will contracts.

4 Cases that cite this headnote

**[14] Contracts**

🔑 Terms implied as part of contract

Under New York law, the implied covenant of good faith and fair dealing cannot be used to impose obligations that were not explicitly part of the agreement, nor to create, in essence, new, affirmative duties.

5 Cases that cite this headnote

**[15] Judgment**

🔑 Judgments of Courts of Foreign Countries

United States courts are not obliged to recognize judgments rendered by a foreign state, but may choose to give res judicata effect to foreign judgments on the basis of comity.

Cases that cite this headnote

**[16] Judgment**

🔑 Courts or Other Tribunals Rendering Judgment

**Judgment**

🔑 Finality of Determination

A bankruptcy court order allowing an uncontested proof of claim constitutes a final judgment that is a predicate for res judicata.

Cases that cite this headnote

**[17] Bankruptcy**

🔑 Cases Ancillary to Foreign Proceedings

District court was not required to give res judicata effect to order, issued by Peruvian administrative agency in bottler's bankruptcy proceedings pending in Peru, that acknowledged and recognized in the full amount, plus interest, beverage company's claim for unpaid invoices for concentrate sold to bottler, and that granted fifth priority status to company's claim.

Cases that cite this headnote

**[18] Federal Civil Procedure**

🔑 Partial summary judgment

When a party seeks partial summary judgment dismissing a portion of a particular claim, it is the claims at issue rather than the number of formal counts which determines whether summary judgment may be sought.

1 Cases that cite this headnote

**[19] Federal Civil Procedure**

🔑 Contract cases in general

For purposes of summary judgment, beverage company's counterclaim against bottler, alleging that bottler was liable for unpaid invoices for concentrate sold to it by company, was separate from its counterclaim seeking damages relating to certain marketing expenses, and thus, bottler could obtain

partial summary judgment regarding liability for unpaid invoices; the counterclaims involved entirely different questions of fact and law.

Cases that cite this headnote

**[20] Courts**

🔑 Comity between courts of different countries

Under the doctrine of international comity, the decisions of a foreign court are entitled to recognition in United States courts so long as the foreign court is a court of competent jurisdiction and the laws and public policy of the forum state and the rights of its residents will not be violated.

Cases that cite this headnote

**[21] International Law**

🔑 Public policy and comity in general

Under the doctrine of international comity, district court would recognize adjudication, by Peruvian administrative agency in bottler's bankruptcy proceeding in Peru, of beverage company's claim for unpaid invoices for concentrate sold to bottler, which adjudication granted fifth priority status to company's claim.

Cases that cite this headnote

**Attorneys and Law Firms**

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Louis M. Solomon, Michael Lazaroff, Proskauer Rose LLP, New York, NY, for Defendant.

**\*318 OPINION AND ORDER**

JED S. RAKOFF, District Judge.

Plaintiff Compania Embotelladora Del Pacifico, S.A. (“CEPSA”) seeks damages for the alleged breach by defendant Pepsi Cola Company (“PepsiCo”) of an Exclusive Bottler Appointment Agreement that appointed CEPSA as PepsiCo’s exclusive bottler for certain parts of Peru. PepsiCo, in turn, alleges that CEPSA is liable for unpaid invoices for concentrate sold to it by PepsiCo.

PepsiCo now moves to exclude the opinions and testimony of two of CEPSA’s experts, and, in a related motion, moves for summary judgment dismissing CEPSA’s sole remaining breach of contract claim. CEPSA, in turn, moves for partial summary judgment dismissing PepsiCo’s Concentrate Counterclaim. The parties submitted voluminous briefing in support of their respective motions, and on July 15, 2009 the Court heard oral argument. Upon careful consideration, all three motions are granted.

By way of background, on June 6, 1952, CEPSA and PepsiCo entered into an Exclusive Bottler Appointment Agreement (“EBA” or “Agreement”), pursuant to which PepsiCo appointed CEPSA as “its exclusive Bottler, to bottle, sell and distribute the [Pepsi-Cola] beverage” within certain territories in Peru. Declaration of Erin Durba (“Durba Decl.”) Ex. 33 ¶ 1. CEPSA agreed that it would “bottle sell and distribute the [Pepsi-Cola] beverage only in the [appointed territory],” and that it would “not, directly or indirectly, bottle, sell or distribute the Beverage in any other Territory.” *Id.* Pursuant to the EBA (and a variety of subsequent amendments thereto), PepsiCo, from 1952 until April 1999, sold soft drink concentrate to CEPSA, which then used the concentrate to create, bottle, and distribute bottled product in CEPSA’s territory. *Id.* ¶¶ 1, 2, 5; Ex. 99. The EBA, which has no definite term and is terminable at will by either party, see 12/18/08 transcript; 4/13/09 Order, does not contain any other express provision concerning PepsiCo’s obligation with respect to preventing, monitoring, policing, or controlling the sale or distribution of its product within CEPSA’s territory. *See* Durba Decl. Ex. 33.

Against this background, CEPSA here seeks to prove that PepsiCo breached the EBA’s exclusivity provision

by failing to stop, police, or otherwise prevent “transshipping,” *i.e.*, the sale of PepsiCo products in CEPSA’s exclusive territory by bottlers, distributors, or other third-parties.

In support of its claim for damages, CEPSA relies on the opinions and testimony of two expert witnesses: Graham Searles, an accountant and former general manager of a Peruvian Coca-Cola bottler, who estimates CEPSA’s damages as totaling in excess of \$236 million, Declaration of Gerald Sawczyn (“Sawczyn Decl.”) Ex. A at 1–2 (“Searles Report”), and Julio Luque, a marketing consultant, who offers certain opinions concerning the sales volume data used to calculate CEPSA’s alleged damages. Sawczyn Decl. Ex. D (“Luque Report”). PepsiCo moves to strike the opinions and testimony of both of these witnesses, arguing that neither meets the requirements of reliability and the like set forth in Rule 702, Fed.R.Evid., and in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny. The Court agrees.

[1] [2] [3] Under Fed.R.Evid. 702, an expert’s testimony, in order to be admissible, must, *inter alia*, be “based upon sufficient facts or data” and be “the product of reliable principles and methods.” Thus, an expert’s testimony must be excluded if it is \*319 “speculative or conjectural,” or if it is “based on assumptions that are so unrealistic and contradictory” that the testimony amounts, in essence, to an “apples and oranges comparison.” *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir.1996) (internal quotation marks omitted). Similarly, “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.” *Amorgianos v. Amtrak*, 303 F.3d 256, 266 (2d Cir.2002). Moreover, an expert’s analysis must be “reliable at every step,” and although “[a] minor flaw in an expert’s reasoning ... will not render an expert’s opinion per se inadmissible,” exclusion is nevertheless warranted whenever “the flaw is large enough that the expert lacks ‘good grounds’ for his or her conclusions.” *Id.* at 267 (citation omitted).

[4] Searles’ estimated damages figure, to which the Court initially turns, is calculated as follows. *First*, Searles estimates the total volume of PepsiCo products sold in Lima, Peru (which was included in CEPSA’s

exclusive territory), based on figures obtained from the market research firm Consumer Communications Research (“CCR”). Searles Report at 4. Searles concedes that these figures are inaccurate, in that they understate sales volume, but attempts to correct this inaccuracy by adjusting the data upwards by 22.5%, based on an assertion that “marketing experts and others” “generally believe” that CCR understates market volume to this degree. *Id.* *Second*, Searles subtracts the amount of CEPSA's own reported sales of PepsiCo products to determine the amount of non-CEPSA PepsiCo products transshipped into Lima. *Id.* Although CCR data is only available for the city of Lima, Searles nevertheless proceeds to extend these transshipment figures to non-Lima areas by assuming that transshipment would occur in those areas in the same proportion that it occurred inside Lima. *Id.* at 5–6. *Third*, Searles proceeds to assume that all of the alleged transshipping would have been prevented in a “but for” world, and that CEPSA would have made each and every one of those sales that were made by bottlers or distributors other than CEPSA. *Fourth*, Searles calculates CEPSA's purported lost profits on these lost sales by applying CEPSA's historical marginal profit rate. *Id.* at 6.

An even cursory review of these damages calculations demonstrates that they are based on what Searles himself concedes to be unreliable and inaccurate data, together with a series of assumptions that have no basis in fact or reality. Searles Report at 4. Indeed, Searles stated at his deposition that he was unaware of anyone who has ever relied on CCR data as a measure of market volume and that he knew of no scientific studies validating or confirming its accuracy for that purpose. Sawczyn Decl. Ex. C at 54–63.<sup>1</sup> Although Searles attempts to “correct” these inaccuracies, neither he nor CEPSA's counsel have pointed to any analysis, studies, or facts to confirm the reliability of his methods of correction. Instead, Searles merely stated at his deposition that he had “no \*320 reason to believe that it was not accurate.” *Id.* at 57–58.<sup>2</sup> Moreover, any inaccuracies in the CCR data were compounded by Searles' decision to extrapolate those figures to CEPSA's non-Lima sales territories, based on an assumption that transshipping occurred in those areas in the same proportion to CEPSA's sales as he believed it occurred in Lima. When asked to explain the basis for this assumption, Searles merely responded that “there's no reason to assume that it wasn't” in the same proportion. *Id.* at 232.

Notwithstanding these deficiencies, Searles, in his rebuttal report, compares his adjusted CCR market volume data against the sales volume for Coke products in Lima, which apparently corroborate each other. Sawczyn Decl. Ex. B (“Searles Rebutal Report”) at 4–5. Searles fails to demonstrate how this comparison bears any relevance to CCR's market volume data for PepsiCo products in Lima, and, in any event, such after-the-fact analysis is not a proper way to determine the accuracy of data that Searles already had assumed to be accurate. *See, e.g., Solorio v. Asplundh Tree Expert Co.*, 02 CV 8035, 2009 WL 755362, at \*4 (S.D.N.Y. March 23, 2009) (experts are not permitted to “reach [ ] a conclusion *before* performing the necessary calculations”) (emphasis in original).

Searles' “displacement theory” is similarly based on a series of unsupported assumptions. Specifically, as noted, Searles' damages calculations are based, in part, on an assumption that in the absence of transshipping, CEPSA would have made additional sales equal to the volume of transshipped sales. *See* Sawczyn Decl. Ex. C at 22, 26. Searles does not point to any evidence or analysis in support of this assumption, however, and instead merely states at his deposition that he “saw no reason why [transshipped product] would not have [d]isplaced CEPSA product.” *Id.* at 22–22, 26. In his rebuttal report, Searles supports his displacement theory with an opinion on “inter-brand price elasticity,” Searles Rebuttal Report at 12, but offers no calculations or analysis to support this opinion. He performed no econometric analysis and could not identify any published studies or analyses that supported his theory. Sawczyn Decl. Ex. C at 30–31, 34. Instead, he based his opinion on his “practical experience as general manager of the Coca Cola bottler.” *Id.* at 30. Such experience does not, for these purposes, come close to satisfying the requirements of *Daubert* and its progeny. *See Algarin v. Dep't of Corr.*, 460 F.Supp.2d 469, 477 (S.D.N.Y.2006) (“[a]n anecdotal account of one expert's experience, however extensive or impressive the numbers it encompasses, does not by itself equate to a methodology, let alone one generally accepted by the scientific community”).<sup>3</sup>

\*321 [5] Obviously, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the experts.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d

508 (1997). Accordingly, for each and all of the foregoing reasons, without any reliable basis for Searles' opinions, and in the face of analysis that is built upon one baseless, flawed assumption after another, PepsiCo's motion to exclude Searles' opinions and testimony is hereby granted. *See Robinson v. Sanctuary Record Groups, Ltd.*, 542 F.Supp.2d 284, 292–293 (S.D.N.Y.2008) (excluding testimony of proffered experts who “never tested their calculations as commended by Daubert, instead relying exclusively on their many faulty assumptions”).

Exclusion of Luque's opinions with regard to the accuracy of the CCR sales volume data is likewise warranted, for many of the reasons previously stated. Luque, like Searles, opines that CCR sales volume data is “reasonably accurate.” Luque Report at 4, 20. Although Luque notes that “[i]t is generally understood in the industry that the CCR Reports understated actual sales by no less than 20% to 25%,” *id.* at 4, 20, he fails to cite to a single study or report to support this claim, nor did he conduct any statistical analysis. Sawczyn Decl. Ex. F at 237–38 (“I am pretty sure of what I am saying ... I have no need to test specifically”). Luque appears to rely on the same unspecified “report” regarding CCR data that Searles did and points to several pieces of testimony that purport to support his opinions, *id.* Ex. E (“Luque Rebuttal Report”) at 8–9, but, like Searles, fails to point to any actual data or analysis to support his contention. Accordingly, without any reliable basis for Luque's opinions, such opinions must be excluded.<sup>4</sup>

Turning next to PepsiCo's motion for summary judgment dismissing CEPESA's \*322 breach of contract claim, the Court is faced with the question of whether the damages sought by CEPESA are general, thus merely requiring a “reasonable estimate” of damages before an award can be made, or instead consequential, thus requiring CEPESA to prove such damages “with reasonable certainty.” *See Tractebel Energy Mktg. v. AEP Power Mktg.*, 487 F.3d 89, 109–10 (2d Cir.2007) (citation omitted). The Court concludes that CEPESA is seeking the latter.

[6] As a general matter, “lost profits” constitute “general damages” when “the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract.” *Id.* at 109. Such damages are “the direct and probable consequence of the breach,” and amount to “precisely what the non-breaching party bargained for.” *Id.* Lost profits are properly considered

consequential damages, by contrast, “when, as a result of the breach, the non-breaching party suffers loss or profits on collateral business relationships.” *Id.* (citation omitted); *see Spang Indus., Inc. v. Aetna Cas. & Sur. Co.*, 512 F.2d 365, 368 (2d Cir.1975) (consequential damages “do not usually flow from the breach”).

[7] Here, CEPESA is plainly not seeking to recover money that PepsiCo agreed to pay under the EBA. *Cf. Tractebel*, 487 F.3d at 93, 108 & n. 19 (characterizing damages sought as “general damages” where the contract expressly provided that plaintiff would buy power from defendant and contained a formula to compensate defendant for its losses upon early termination). Instead, CEPESA is seeking to recover lost profits from lost sales to third-parties that are not governed the EBA. Such damages are properly characterized as consequential damages, because, as a result of PepsiCo's alleged breach, CEPESA suffered lost profits on collateral business arrangements (*i.e.*, sales of PepsiCo products to its customers throughout its exclusive territory). *See Care Travel Co. v. Pan Am. World Airways*, 944 F.2d 983, 994 (2d Cir.1991) (“lost profits may be recovered” under an exclusive agency agreement only if “it is ‘first [ ] demonstrated with certainty that such damages have been caused by the breach’ ”) (citation omitted); *Spark Plug Co. v. Auto. Sundries Co.*, 273 F. 74, 83 (2d Cir.1921) (in the absence of an existing resale contract, lost profits on a manufacturer's sales in its distributor's territory are consequential damages); *Evian Waters of France, Inc. v. Valley Juice Ltd., Inc.*, 90 Civ. 255, 1999 U.S. Dist. LEXIS 20542, at \*10 (D.Conn. Sept. 30, 1999) (a claim of lost profits under an exclusive distributorship agreement must be demonstrated through “competent evidence with reasonable certainty”) (applying New York law).

Because CEPESA is seeking to recover consequential damages, it is required to demonstrate “with certainty that such damages have been caused by the breach,” and that the alleged loss is “capable of proof with reasonable certainty.” *Kenford Co. v. Cty. of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 493 N.E.2d 234 (1986); *see also Nina Indus., Ltd. v. Target Corp.*, No. 04 Civ. 2540, 2005 WL 323745, at \*2 (S.D.N.Y. Feb. 8, 2005). In the absence of any admissible expert testimony concerning causation or damages, and without any evidence indicating that CEPESA would have made *any* additional sales in the absence of transshipment, CEPESA plainly falls short of this standard, and summary judgment dismissing its

breach of contract claim is thus warranted. *See Toltec Fabrics, Inc. v. August Inc.*, 29 F.3d 778, 781 (2d Cir.1994)(noting that in order to recover for lost profits, a plaintiff must point to “objective proof of the amount of that loss,” and that such “an award cannot \*323 stand if based on little more than guesswork.”) (citation and internal quotation marks omitted).

[8] [9] Even if CEPSA could point to admissible expert testimony regarding damages, or to admissible evidence capable of proving damages to a reasonable certainty, its breach of contract claim nevertheless fails as a matter of law. Under New York law (here applicable), “if ‘a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence.’ ” *Postlewaite v. McGraw–Hill, Inc.*, 411 F.3d 63, 67 (2d Cir.2005). Thus, in the face of an unambiguous contract, evidence of the parties' course of dealing is inadmissible, *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 207 (2d Cir.2005), as is evidence of “the unilateral expression of one party's postcontractual subjective understanding of the terms of the agreement.” *Murray Walter, Inc. v. Sarkisian Bros., Inc.*, 183 A.D.2d 140, 589 N.Y.S.2d 613, 616 (3d Dep't 1992).

[10] Here, as noted, the EBA expressly and unambiguously appoints CEPSA as PepsiCo's exclusive bottler with a prescribed territory in Peru, and forbids CEPSA from selling PepsiCo outside of that territory. Thus, at a bare minimum, the EBA prohibited PepsiCo from appointing another bottler to serve CEPSA's exclusive territory or selling PepsiCo product directly into that territory. CEPSA has failed to point to any evidence, however, demonstrating that PepsiCo did either.

CEPSA, though, appears to argue that the EBA somehow obligated PepsiCo to take affirmative steps to prevent other bottlers and third-parties from selling PepsiCo in CEPSA's territory. The EBA does not contain any express language concerning these obligations, however, and in the face of an unambiguous contract, the Court hereby declines to read such obligations into the EBA. *See, e.g., Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 73 (2d Cir.1979) (Mansfield, J., concurring) (noting that there was “nothing in the contract ... for an exclusive distributorship ... that obligates” the manufacturer “to police its customers in other areas or to stop them from selling or transshipping goods”); *Subaru Distribs. Corp. v.*

*Subaru of Am., Inc.*, 425 F.3d 119, 123–24 (2d Cir.2005) (an exclusive distributorship agreement between the sub-distributor and distributor did not obligate the distributor to enforce its own exclusive distributorship agreement with the manufacturer and “prevent” that manufacturer from selling products in the sub-distributor's territory); *see also Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 644–45 (3d Cir.1958) (holding that an exclusive license, standing alone, did not bar sales to a store that would resell the product within the exclusive territory of a different company, and noting that there was “no restriction against bona fide sales to an independent vendor,” even with knowledge that some products may be resold into another territory).

[11] With no express breach of any provision contained in the EBA, CEPSA's only theory of recovery must thus arise out of an allegation of breach of the implied covenant of good faith and fair dealing, pursuant to which a contracting party is prevented from doing “anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 663 N.E.2d 289 (1995). The First Amended Complaint, however, fails to allege a breach of an implied covenant of good faith and fair dealing, nor does it contain any language that could be fairly be construed as such a claim. Indeed, \*324 CEPSA's Second Claim for Relief (which includes CEPSA's breach of contract claim) merely alleges that “[p]aragraph 1 of the EBA grants CEPSA the exclusive right to bottle, sell, and distribute Pepsi's products within CEPSA's territory,” and that PepsiCo “breached its obligation to provide CEPSA's exclusive rights to sell Pepsi products in CEPSA's territory.” Compl. ¶¶ 113, 117. Although CEPSA does allege that PepsiCo “undertook to put a weakened CEPSA out of business,” and “sought to, and did, through both actions and inaction, interfere with and sabotage [CEPSA], acting in bad faith and in contravention of CEPSA's rights under the EBA,” Compl. ¶¶ 46–47, such allegations are merely vestiges of CEPSA's now-dismissed wrongful termination and tort claims and, on their face, are not tied in any way to CEPSA's breach of contract claim.

Accordingly, because CEPSA never alleged (nor sought to allege) a breach of the implied covenant of good faith and fair dealing at any point during the course of this now nine-year-old litigation, it cannot now seek to support its

case under such a theory. *See Augienello v. Coast-To-Coast Fin. Corp.*, 64 Fed.Appx. 820, 822 (2d Cir.2003) (affirming dismissal of breach of contract claim, where the complaint contained no “mention of a duty of good faith and fair dealing, or allegation that the defendants breached such a duty” and where “plaintiffs never sought leave in the district court to amend the complaint to add such a claim”); *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 170 F.R.D. 111, 119 (S.D.N.Y.1997) (noting that “[t]his Court thoroughly has examined paragraphs fifty-nine through sixty-two of plaintiffs’ Complaint and can locate no language which can be construed as ‘fairly encompassing’ a ‘breach of good faith and fair dealing’ claim,” and that “it is inappropriate to raise new claims for the first time in submissions in opposition to summary judgment”). Summary judgment in this respect is thus warranted.

**[12]** **[13]** Moreover, even if properly alleged, CEPESA’s breach of contract claim still fails, because New York law does not recognize a claim for breach of an implied covenant of good faith and fair dealing in “at-will” contracts like the one at issue here. *Cf. Nunez v. A-T Fin. Info. Inc.*, 957 F.Supp. 438, 443 (S.D.N.Y.1997) (“an obligation to abide by an implied covenant of good faith and fair dealing would be inconsistent with the employer’s unfettered right to terminate an at-will employee”); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304–05, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983). Although those cases that have addressed this issue did so when considering at-will employment contracts, their logic is equally applicable to at-will distributorship agreements like the one at issue here, because “either party has the right to take the ultimate step to render performance impossible, [and] because either party can terminate the relationship, at any time, for any reason.” *Id.* Reading an implied duty of good faith and fair dealing into the EBA would thus, in essence, cut against the terminable nature of the EBA, in direct contravention of the EBA’s unambiguous language.

**[14]** And even if such a duty could be implied into the EBA, it nevertheless cannot be used to impose “obligations that were not explicitly part of the agreement.” *Ari & Co. v. Regent Int’l Corp.*, 273 F.Supp.2d 518, 523 (S.D.N.Y.2003), or to create, in essence, new, affirmative duties (such as a duty to stop third-party transshipping) that were not expressly set forth in the contract. *See Broder v. Cablevision Sys. Corp.*, 418 F.3d

187, 199 (2d Cir.2005) (implied duty of good faith and fair dealing cannot be used to “add [ ] to the contract a \*325 substantive provision not included by the parties”); *Franconero v. Universal Music Corp.*, 02 Civ.1963, 2003 WL 22990060, at \*3 (S.D.N.Y. Dec. 19, 2003) (granting summary judgment for an alleged failure to “adequately police ‘bootlegging’ ” of records, holding that while defendant was given exclusive rights to license plaintiff’s songs, the contract was “silent as to bootlegging,” and “implied covenants cannot be asserted to create new contractual obligations”); *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F.Supp. 1504, 1519 (S.D.N.Y.1989) (refusing to “permit an implied covenant to shoehorn into [a contract] additional terms plaintiffs now wish had been included”). Here, as noted, the EBA does not impose any affirmative duty on PepsiCo other than to not appoint another bottler in CEPESA’s designated exclusive territory, and any attempt to read such a duty into the EBA would create new, unbargained-for obligations that extend well past any implied duty of good faith and fair dealing.

Accordingly, for each and all of the foregoing reasons (any one of which is alone sufficient), the Court hereby grants PepsiCo’s motion for summary judgment dismissing CEPESA’s breach of contract claim.

**[15]** **[16]** **[17]** CEPESA, in turn, moves for partial summary judgment dismissing PepsiCo’s Concentrate Counterclaim, arguing that this Court should defer to an Order issued in related bankruptcy proceedings pending in Peru that acknowledged and recognized PepsiCo’s Concentrate Claim in the full amount sought by PepsiCo, plus interest, and that granted fifth priority status to PepsiCo’s claim.<sup>5</sup> *See Declaration of Dr. Hugo Florez ¶ 5 and Ex. 1.*

**[18]** **[19]** In opposing CEPESA’s motion, PepsiCo argues that partial summary judgment is improper because PepsiCo’s Concentrate Claim is just one portion of a single claim for relief that also seeks damages relating to certain marketing expenses. When a party seeks partial summary judgment dismissing a portion of a particular claim, however, “it is the claims at issue rather than the number of formal counts which determines whether summary judgment may be sought.” *Primavera Familienstiftung v. Askin*, 130 F.Supp.2d 450, 539 (S.D.N.Y.2001); *see United States v. Kocher*, 468 F.2d 503, 509 (2d Cir.1972) (“the test [of] whether or not there are a number of different claims [is whether they] ... could have been separately enforced”)

(citation omitted); *In re Centennial Textiles*, 220 B.R. 177, 181 (S.D.N.Y.1998) (claim is separable for purposes of Rule 54(b) certification when it involves “at least some different questions of fact and law and could be separately enforced”). Here, PepsiCo's Concentrate Counterclaim involves entirely different questions of fact and law than those asserted in its Marketing Counterclaim. Accordingly, that claim is properly considered a separate “claim” for purposes of CEPESA's summary judgment motion, notwithstanding the fact that both claims are contained in a single count.

[20] As to the merits of CEPESA's motion, courts in this Circuit have long held \*326 that under the doctrine of international comity, the decisions of a foreign court are entitled to recognition in United States courts so long as “the foreign court is a court of competent jurisdiction” and “the laws and public policy of the forum state and the rights of its residents will not be violated.” *Cunard S.S. Co. v. Salen Reefer Serv.*, 773 F.2d 452, 457 (2d Cir.1985) (extending comity to Swedish bankruptcy proceedings). Indeed, in previous proceedings in this action, the Second Circuit expressly deferred to Peruvian liquidation procedures, declining to substitute its judgment for that of creditors in Peru. *CEPSA v. Pepsi Cola Co.*, 114 Fed.Appx. 423, 425–26 (2d Cir.2004) (“[w]e have ‘repeatedly noted the importance of extending comity to foreign bankruptcy proceedings’”) (citation omitted).

[21] Here, not only has PepsiCo submitted its Concentrate Claim to the Peruvian administrative agency charged overseeing CEPESA's liquidation, but also that agency has, in fact, already set forth the claim in a final judgment, detailing the existence of the claim, the principal amount due, the amount of interest, and the

priority of the claim. Thus, all that is left with respect to that claim is for the foreign bankruptcy proceeding to discharge the Concentrate Claim obligation in accordance with Peruvian bankruptcy law. Any attempt by PepsiCo in this action to obtain relief as to its Concentrate Claim would, in essence, amount to an effort to frustrate the priority of claims already established by the Peruvian courts. *See, e.g., Cunard S.S. Co.*, 773 F.2d at 458 (noting “no compelling policy reason for a general creditor ... to receive preference over other creditors”); *Ecoban Fin. Ltd. v. Grupo Acerero Del Norte, S.A. de C.V.*, 108 F.Supp.2d 349, 354 (S.D.N.Y.2000) (dismissing on comity grounds claims by a U.S. creditor after participating in a Mexican insolvency proceeding, noting that it refused to permit the U.S. creditor “to frustrate and evade foreign bankruptcy laws”). In short, because a foreign tribunal has already adjudicated PepsiCo's Concentrate Claim, PepsiCo cannot here seek to frustrate the priority of that claim in the Peruvian bankruptcy proceedings. Accordingly, CEPESA's motion for partial summary judgment dismissing PepsiCo's Concentrate Claim is hereby granted.

The parties are directed to jointly call Chambers no later than September 11, 2009, to schedule a prompt trial of PepsiCo's remaining counterclaim, the only remaining claim in this case. The Clerk of the Court is directed to close document numbers 116, 118, and 123 on the Court's docket.

SO ORDERED.

#### All Citations

650 F.Supp.2d 314, 80 Fed. R. Evid. Serv. 811

#### Footnotes

- 1 In defending the accuracy of the CCR data, CEPESA notes that such data is routinely relied on by PepsiCo and others familiar with the soft drink industry in Peru. CEPESA also contends that PepsiCo's Peruvian Country Head, Eduardo Carriquiry, endorsed the use of such data. CEPESA has failed, however, to point to any instance in which PepsiCo (or any other participant in the Peruvian soft drink industry) ever used CCR data to measure actual sales volume, as opposed to estimate relative market share or trends. *Cf. Sawczyn Decl. Ex. C* at 58, 62.
- 2 CEPESA contends that PepsiCo executives and an unspecified “report” indicated that the adjustment was appropriate, but, once again, fails to point to any actual data or analysis to support this contention. Indeed, Searles' report is notable for its lack of any regression studies, analyses, tests, or calculations confirming the validity of his assumptions. CEPESA also points to a study that purportedly confirms that 11–16% of the market was not surveyed by CCR (thus somehow providing a basis for the 22.5% adjustment), *Sawczyn Decl. Ex. E* at 8, but that study merely concluded that 84% of

consumers purchased soft drinks from the surveyed retailers, *not* that 84% of all soft drink purchases were made from those retailers. See Forbes Decl. Ex. B. At 156–57.

- 3 Indeed, at least to a certain extent, Searles' own testimony appears to contradict his own economic assumptions, in that he conceded that retailers who are given the opportunity to purchase transshipped product at a certain low price-point would likely buy more of that product than they would of CEPESA's higher priced product. See, e.g., Sawczyn Decl. Ex. C at 38.
- 4 Apparently out of a concern that the opinions of its expert witnesses would be excluded, CEPESA, in opposing PepsiCo's *Daubert* motion, submitted a declaration from Manuel Tirado, CEPESA's former General Manager and Chief Financial Officer, who seeks to offer lay testimony concerning CEPESA's claimed damages. See Declaration of Manuel Tirado. CEPESA never identified Tirado as a damages witness, however, and, in any event, nothing in his declaration indicates that his purported lay opinions concerning CEPESA's claimed damages are based on his own personal knowledge or "rationally based on [his] perception," thus demonstrating that his opinions cannot satisfy the requirements of Rules 602 and 701 for lay opinion testimony. *Id.* ¶ 5 ("I list and describe below documents from which transshipment damages can be determined"); *id.* ¶ 6 ("Based on these documents, it is clear that CEPESA has suffered quantifiable damages from transshipping. If called to testify, I am prepared to explain to the jury the damages demonstrated by these documents"); see *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir.1992) ("[w]hen a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701"). And even if Tirado could somehow demonstrate that his opinions are "rationally based" on his own perception, such opinions must still be excluded, because they are not "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed.R.Evid. 701. Indeed, Tirado's proposed damages calculations amount to nothing more than lay testimony masquerading as expert testimony. Without any indication that he possesses any specialized knowledge, and without any effort by CEPESA to qualify Tirado as an expert witness on damages, Tirado's conclusions cannot properly be considered by this Court. See *Baumgart v. Transoceanic Cable Ship Co.*, 2003 WL 22520034, at \*2–3 (S.D.N.Y.2003) (damages analyses require "specialized knowledge" of an expert).
- 5 CEPESA also argues that PepsiCo's Concentrate Counterclaim is barred under the doctrine of *res judicata*. It is well-established, however, "that United States courts are not *obliged* to recognize judgments rendered by a foreign state, but may *choose* to give *res judicata* effect to foreign judgments on the basis of comity." *Diorinou v. Mezitis*, 237 F.3d 133, 139–40 (2d Cir.2001) (emphasis in original) (citation omitted). Thus, although "a bankruptcy court order allowing an uncontested proof of claim constitutes a 'final judgment' " that is a "predicate for *res judicata*," *EDP Med. Computer Sys. v. United States*, 480 F.3d 621, 625 (2d Cir.2007), *res judicata* is not properly invoked here, where the relevant order was issued in a foreign bankruptcy proceeding.



KeyCite Yellow Flag - Negative Treatment

Distinguished by *Acme Glass Co. v. Woods-Lloyd Co.*, N.Y.A.D. 4 Dept., March 27, 1918

223 N.Y. 63, 119 N.E. 227, 1 A.L.R. 154

CAROLINE V. CRAMER et al., Respondents,

v.

GRAND RAPIDS SHOW  
CASE COMPANY, Appellant.

Court of Appeals of New York.

Submitted January 14, 1918.

Decided March 5, 1918.

CITE TITLE AS: Cramer v  
Grand Rapids Show Case Co.

### \*63 Damages

**Evidence -- Action to recover damages and expenses resulting from defendant's failure to supply furniture and fixtures for plaintiffs' store in time to begin business as planned -- Erroneous admission of evidence showing sales and profits in following year as basis for damages**

In an action to recover damages and expenses caused plaintiffs by defendant's failure to deliver furniture and fixtures for plaintiffs' store at the time agreed, so that plaintiffs were unable to open their store, as planned, in time to sell, in the proper season, goods purchased for the fall and winter trade, the trial judge charged the jury, 'If a man has arranged to start a business at a certain time and is prevented from starting it by reason of wrong or breach of contract by somebody else, he is entitled to recover whatever profits he can show he would have made during that time for the breach of contract by the other party,' and the courts below have held that plaintiffs may \*64 recover for the breach of the contract such an amount of profits as they would have made had they not been prevented from starting in business, such damages not to be based upon a business theretofore carried on but measured by profits during a period of time corresponding to the period of interruption one year later. *Held*, error; that a distinction exists between the interruption of an established business and a new venture; that the evidence of loss of profits and the submission of that question to the jury by the trial justice was in conflict with the

determination of this court. (*Witherbee v. Meyer*, 155 N. Y. 446, followed.)

*Cramer v. Grand Rapids Show Case Co.*, 165 App. Div. 942, reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 8, 1914, modifying and affirming as modified a judgment in favor of plaintiffs entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

*E. W. Personius* and *B. W. Nye* for appellant. The measure of damages adopted, viz., expected profits, was erroneous. (*Witherbee v. Meyer*, 155 N. Y. 446; 8 Am. & Eng. Ency. of Law [2d ed.], 627; 1 Sedg. on Dam. [9th ed.] 183, 197; *Central Coal & Coke Co. v. Hartman*, 111 Fed. Rep. 97; *Griffin v. Culver*, 16 N. Y. 489; *Wehle v. Haviland*, 69 N. Y. 448; *Blanchard v. Ely*, 21 Wend. 343; *Dodds v. Hakes*, 114 N. Y. 260; *Cassidy v. Le Fevre*, 45 N. Y. 562.) The plaintiffs cannot maintain this action; at best they were undisclosed principals who cannot maintain the action; and even an undisclosed agency is not established. (*Moore v. Vulcanite Co.*, 121 App. Div. 667; *Johnson v. Morgan*, 68 N. Y. 494.) *Halsey Sayles* for respondents. The measure of damages adopted, viz., loss of profits, was the correct one. (*Stevens v. Amsinck*, 149 App. Div. 220; *Wakeman v. W. & W. Mfg. Co.*, 101 N. Y. 205; \*65 *Nash v. Thousand Island Steamboat Co.*, 123 App. Div. 148; *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547.) The plaintiffs as principals have this action against defendant. (*Meeker v. Claghorn*, 44 N. Y. 349.)

HOGAN, J.

In May, 1910, the plaintiffs, residents of Watkins, Schuyler county, formed a copartnership to carry on the business of dealing in ladies' furnishings in the city of Amsterdam. The plaintiff Gurnett, though a business man, had no previous experience in that line of business. The plaintiff Cramer had taught school in Amsterdam from September, 1909, until sometime in May, 1910, when she secured employment in a department store in the city of Elmira, and worked there from May 26th, 1910, until the latter part of July following.

Early in May, 1910, the plaintiffs leased a store in the city of Amsterdam at a monthly rental of one hundred dollars a month. The store was devoid of fixtures except electric wiring. Plaintiffs, desirous of securing the necessary furniture and fixtures to carry on the business and to open the store in September, on or about June 9th, 1910, sought to procure the same from the Watkins Undertaking Company. That company, following consultation with plaintiffs and one Marks, a representative of defendant, gave to Marks a purchase order in writing dated that day, addressed to the defendant, to ship the articles of furniture therein enumerated and described as 'sold to Watkins Undertaking Company, Watkins, N. Y., ship to J. W. Gurnett, Amsterdam, N. Y.' The furniture was specified in detail, the purchase price at \$1,376.25, net fifty days, F. O. B. Grand Rapids to be delivered not later than August 15th. The contract was signed by defendant Marks, salesman, and accepted by the Watkins Undertaking Company.

About August 15th the plaintiffs were in the city of New York. They called on Marks and told him that \*66 they were in the city for the purpose of purchasing a stock of seasonable goods, which they would not purchase if they were going to be delayed in receiving the furniture. They were assured by defendant, through Marks, that the furniture would be shipped in a few days. Plaintiffs, thereupon, purchased a stock of goods suitable for the fall and winter trade at a cost of \$7,842.37 and planned to open the store in Amsterdam between September 15th and 20th. The defendant failed to ship the fixtures and furniture and this action was brought to recover damages for a breach of the contract. The amended bill of particulars of the damages claimed consists of seven separate items and in view of the evidence adduced on the trial reference to the same is material. The total amount claimed was \$6,703.62. Of that amount \$5,916 was stated as damages sustained by reason of fall and winter trade and the profits which plaintiffs otherwise would have made from the sale of goods. The balance of \$787.62 consisted of loss of rent of store, two months, \$200; temporary fixtures, \$100; interference of business, placing new furnishings, \$200; increased price for same, \$100; obligation to pay commissions, \$137.62; small items for board, \$50. The evidence fails to disclose that plaintiffs after purchase of new fixtures paid any sums therefor in excess of the amount stated in the contract to be paid, or that any amount was paid or obligated to be paid for commissions, or for board bills. Those items deducted

would leave the claim sought to be established \$5,916 for loss of profits and remaining items \$500. The jury rendered a verdict in favor of plaintiffs for \$3,310. The Appellate Division reduced the same to \$1,500, which was assented to by plaintiffs and as thus modified the judgment was affirmed.

It is apparent that the verdict largely included an allowance to plaintiffs for loss of profits. As the Appellate Division affirmed without opinion we are unable to \*67 determine the basis of the modification made by it. The recovery allowed by the modification, however, is greatly in excess of the amount of damages claimed by plaintiffs other than for loss of profits.

Upon the trial, plaintiffs, over objection and exception of defendant, were permitted to prove the amount of sales made by them and the profits thereof from September 15th to November 14th, 1911, one year subsequent to the breach of the contract, also sales made from November 14th, 1910, to April 1st, 1911, and an estimated loss of thirty-five per cent on such sales made, as well as additional facts of like nature.

The trial justice in submitting the case to the jury upon this question instructed them as follows: 'If a man has arranged to start a business at a certain time and is prevented from starting it by reason of wrong or breach of contract by somebody else, he is entitled to recover whatever profits he can show he would have made during that time for the breach of contract by the other party,' to which instruction to the jury exception was duly taken by defendant's counsel.

I have pointed out the limited business experience of plaintiffs, the fact that the enterprise was an adventure in a locality where neither one of them had before been engaged in business. No doubt the plaintiffs entertained hope that the business venture upon which they were about to embark would prove successful. Such expectation was evidently based upon a consideration of the resident population of the city of Amsterdam, the business activity of the residents of that city and the number and character of competitors in the same general line of business. Plaintiffs, however, had no assurance that the venture would not prove to be a failure. At the time the contract was made they had the lease of a vacant unfinished store. They had not as yet purchased goods, placed goods on sale or secured one customer. They had \*68 before them the labor of building up a new business.

Nevertheless, the courts below have held that plaintiffs may recover for the breach of the contract such an amount of profits as they would have made had they not been prevented from starting in business, such damages not to be based upon a business theretofore carried on but measured by profits during a period of time corresponding to the period of interruption one year later. Therein, material error was committed.

The evidence of loss of profits and the submission of that question to the jury by the trial justice was in conflict with the determination of this court in *Witherbee v. Meyer* (155 N. Y. 446) where the rule of damages is fully considered and the case of *Wakeman v. Wheeler & W. Mfg. Co.* (101 N. Y. 205), relied upon by counsel for plaintiffs, distinguished. The reasoning in the *Witherbee* case renders unnecessary additional citations from other jurisdictions or the United States Supreme Court in harmony with that decision.

A distinction exists between the interruption of an established business and a new venture. The owner of an established business may have it in his power to establish with reasonable certainty the amount of capital invested, the monthly and yearly expenses of operating his business, and the daily, monthly or yearly income he derived from it for a long time prior thereto and for the time during which

the interruption of which he complains continued, thereby furnishing a reasonably correct estimate of the nature of the legal injury and the amount of damages which resulted therefrom. While evidence of such facts may be admissible they must not be uncertain or problematical. (*Dickinson v. Hart*, 142 N. Y. 183.) The requirement imposed upon one whose business has been established and interrupted cannot be enforced as to him and made less stringent to one embarking in a new business who cannot furnish data \*69 of past business from which the fact that anticipated profits would have been realized can be legally deduced.

The conclusion reached requires a reversal of the judgment and a new trial. Upon a second trial we are of opinion without detailing the facts as they appear in the record that the question as to whether or not the Watkins Undertaking Company was a principal in the contract, or the agent of plaintiff, is a question of fact.

The judgment should be reversed, and new trial granted, costs to abide the event.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, MCLAUGHLIN and CRANE, JJ., concur.  
Judgment reversed, etc.

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KeyCite Yellow Flag - Negative Treatment

Superseded by Rule as Stated in *Kansas City Southern Railway Company v. Sny Island Levee Drainage District*, 7th Cir.(Ill.), August 3, 2016

113 S.Ct. 2786

Supreme Court of the United States

William DAUBERT, et ux., etc., et al., Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.

No. 92-102.

|

Argued March 30, 1993

|

Decided June 28, 1993.

Infants and their guardians ad litem sued pharmaceutical company to recover for limb reduction birth defects allegedly sustained as result of mothers' ingestion of antinausea drug Bendectin. The United States District Court for the Southern District of California, 727 F.Supp. 570, granted company's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, 951 F.2d 1128, affirmed. Plaintiffs filed petition for writ of certiorari, which was granted. The Supreme Court, Justice Blackmun, held that: (1) "general acceptance" is not necessary precondition to admissibility of scientific evidence under Federal Rules of Evidence, and (2) Rules assign to trial judge the task of ensuring that expert's testimony both rests on reliable foundation and is relevant to task at hand.

Vacated and remanded.

Chief Justice Rehnquist filed opinion concurring in part and dissenting in part in which Justice Stevens joined.

West Headnotes (36)

[1] **Evidence**

🔑 Results of experiments

Federal Rules of Evidence superseded *Frye* "general acceptance" test for admissibility of scientific evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

125 Cases that cite this headnote

[2] **Federal Civil Procedure**

🔑 Rules of Court in General

Supreme Court interprets legislatively enacted Federal Rules of Evidence as it would any statute.

21 Cases that cite this headnote

[3] **Evidence**

🔑 Relevancy in general

Basic standard of relevance under Federal Rules of Evidence is liberal one. Fed.Rules Evid.Rule 401, 402, 28 U.S.C.A.

83 Cases that cite this headnote

[4] **Evidence**

🔑 Results of experiments

Rigid "general acceptance" requirement for admission of scientific evidence would be at odds with "liberal thrust" of Federal Rules of Evidence and their general approach of relaxing traditional barriers to "opinion" testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

102 Cases that cite this headnote

[5] **Evidence**

🔑 Results of experiments

Trial judge is not disabled under Federal Rules of Evidence from screening purportedly scientific evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

11 Cases that cite this headnote

[6] **Evidence**

🔑 Results of experiments

Under Federal Rules of Evidence, trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

970 Cases that cite this headnote

**[7] Evidence**

🔑 Results of experiments

“Scientific,” within meaning of Federal Rule of Evidence stating that if “scientific,” technical, or other specialized knowledge will assist trier of fact to understand evidence or to determine fact in issue an expert may testify thereto, implies grounding in methods and procedures of science. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

885 Cases that cite this headnote

**[8] Evidence**

🔑 Matters involving scientific or other special knowledge in general

“Knowledge,” within meaning of Federal Rule of Evidence stating that if scientific, technical, or other specialized “knowledge” will assist trier of fact to understand evidence or to determine fact in issue an expert may testify thereto, connotes more than subjective belief or unsupported speculation. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1207 Cases that cite this headnote

**[9] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Subject of scientific knowledge need not be “known” to certainty to permit expert testimony, since, arguably, there are not certainties in science. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

125 Cases that cite this headnote

**[10] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Inference or assertion must be derived by scientific method to qualify as “scientific knowledge,” within meaning of Federal Rule of Evidence stating that if scientific, technical,

or other specialized knowledge will assist trier of fact to understand evidence or to determine fact in issue an expert may testify thereto. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

781 Cases that cite this headnote

**[11] Evidence**

🔑 Basis of Opinion

For scientific testimony to be admitted, proposed testimony must be supported by appropriate validation, in other words, “good grounds” based on what is known. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

468 Cases that cite this headnote

**[12] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Requirement under Federal Rule of Evidence that expert's testimony pertain to “scientific knowledge” establishes standard of evidentiary reliability. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

617 Cases that cite this headnote

**[13] Evidence**

🔑 Results of experiments

In case involving scientific evidence, evidentiary reliability will be based upon scientific reliability. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

105 Cases that cite this headnote

**[14] Evidence**

🔑 Results of experiments

Condition for admission of scientific evidence or testimony under Federal Rule of Evidence, that evidence or testimony assist trier of fact to understand evidence or to determine fact in issue, goes primarily to relevance. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

417 Cases that cite this headnote

**[15] Evidence**

🔑 Results of experiments

In determining admissibility of scientific evidence or testimony, scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

71 Cases that cite this headnote

**[16] Evidence**

🔑 Results of experiments

“Helpfulness” standard under Federal Rule of Evidence for admissibility of scientific evidence or testimony requires valid scientific connection to pertinent inquiry as precondition to admissibility. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

176 Cases that cite this headnote

**[17] Evidence**

🔑 Matters of opinion or facts

Unlike ordinary witness, expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. Fed.Rules Evid.Rules 701–703, 28 U.S.C.A.

245 Cases that cite this headnote

**[18] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Presumably, relaxation under Federal Rules of Evidence of usual requirement of first-hand knowledge when there is testimony by expert is premised on assumption that expert's opinion will have reliable basis in knowledge and experience of his discipline. Fed.Rules Evid.Rules 701–703, 28 U.S.C.A.

1134 Cases that cite this headnote

**[19] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Faced with proffer of expert scientific testimony, trial judge must determine at outset whether expert is proposing to testify to (1) scientific knowledge that (2) will assist trier of fact to understand or determine fact in issue; preliminary assessment must be made of whether reasoning or methodology underlying testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to facts in issue. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

5525 Cases that cite this headnote

**[20] Evidence**

🔑 Determination of question of competency

Preliminary questions concerning qualification of person to be witness, existence of privilege, or admissibility of evidence should be established by preponderance of proof. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

31 Cases that cite this headnote

**[21] Evidence**

🔑 Results of experiments

Requirements for admissibility of scientific testimony or opinion under Federal Rule of Evidence do not apply specially or exclusively to unconventional evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

19 Cases that cite this headnote

**[22] Evidence**

🔑 Scientific facts and principles

Scientific theories that are so firmly established as to have obtained status of scientific law, such as laws of thermodynamics, properly are subject to judicial notice. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

20 Cases that cite this headnote

**[23] Evidence**

🔑 Basis of Opinion

Definitive checklist or test does not exist in making preliminary assessment of whether reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to facts in issue. Fed.Rules Evid.Rule 104(a), 28 U.S.C.A.

3706 Cases that cite this headnote

**[24] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Ordinarily, key question to be answered in determining whether theory or technique is scientific knowledge that will assist trier of fact, and, thus, whether expert testimony is admissible, will be whether theory or technique can be, and has been, tested. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

1908 Cases that cite this headnote

**[25] Evidence**

🔑 Matters involving scientific or other special knowledge in general

In determining whether theory or technique is scientific knowledge that will assist trier of fact, and, thus, whether expert testimony is admissible, is whether theory or technique has been subjected to peer review and publication. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

2770 Cases that cite this headnote

**[26] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Publication of theory or technique, which is but one element of peer review, is not sine qua non of admissibility of expert testimony; publication does not necessarily correlate with reliability, and, in some instances, well-grounded but innovative theories will not

have been published. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

1189 Cases that cite this headnote

**[27] Evidence**

🔑 Matters involving scientific or other special knowledge in general

Fact of publication of theory or technique, or lack thereof, in peer-review journal will be relevant, though not dispositive, consideration in assessing scientific validity of particular technique or methodology on which expert opinion is premised; submission to scrutiny of scientific community is component of “good science,” in part because it increases likelihood that substantive flaws in methodology will be detected. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

2761 Cases that cite this headnote

**[28] Evidence**

🔑 Matters involving scientific or other special knowledge in general

In determining admissibility of expert opinion regarding particular scientific technique, court ordinarily should consider known or potential rate of error, and existence and maintenance of standards controlling technique's operation. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

3052 Cases that cite this headnote

**[29] Evidence**

🔑 Matters involving scientific or other special knowledge in general

“General acceptance” of scientific theory or technique can have bearing in determining admissibility of expert testimony. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

296 Cases that cite this headnote

**[30] Evidence**

🔑 Results of experiments

Widespread acceptance of scientific theory or technique can be important factor in ruling particular evidence admissible, and known technique that has been able to draw only minimal support within community may properly be viewed with skepticism. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

136 Cases that cite this headnote

**[31] Evidence**

🔑 Results of experiments

Inquiry envisioned by Federal Rule of Evidence pertaining to admission of scientific testimony and evidence is flexible one. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

17 Cases that cite this headnote

**[32] Evidence**

🔑 Results of experiments

Overarching subject of Federal Rule of Evidence on admission of scientific testimony and evidence is scientific validity, and, thus, evidentiary relevance and reliability, of principles that underlie proposed submission. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

257 Cases that cite this headnote

**[33] Evidence**

🔑 Results of experiments

Focus of Federal Rule of Evidence on admission of scientific testimony and evidence must be solely on principles and methodology, not on conclusions that they generate. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

322 Cases that cite this headnote

**[34] Evidence**

🔑 Determination of question of competency

Judge assessing proffer of expert's scientific testimony under Federal Rule of Evidence on testimony by experts should also be mindful of other applicable rules, including rule on expert opinions based on otherwise

inadmissible hearsay, rule allowing court to procure assistance of expert of its own choosing, and rule permitting exclusion of relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury. Fed.Rules Evid.Rules 403, 702, 703, 706, 28 U.S.C.A.

591 Cases that cite this headnote

**[35] Federal Civil Procedure**

🔑 Scintilla of evidence

**Federal Civil Procedure**

🔑 Weight and sufficiency

In event that trial court concludes that scintilla of scientific evidence presented supporting a position is insufficient to allow reasonable juror to conclude that position more likely than not is true, court remains free to direct verdict, and likewise to grant summary judgment. Fed.Rules Civ.Proc.Rules 50(a), 56, 28 U.S.C.A.; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

206 Cases that cite this headnote

**[36] Federal Civil Procedure**

🔑 Rules of Court in General

Federal Rules of Evidence are designed not for exhaustive search for cosmic understanding but for particularized resolution of legal disputes.

22 Cases that cite this headnote

**\*\*2789 Syllabus\***

**\*579** Petitioners, two minor children and their parents, alleged in their suit against respondent that the children's serious birth defects had been caused by the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted respondent summary judgment based on a well-credentialed expert's affidavit concluding, upon reviewing the extensive published scientific literature on the subject,

that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. Although petitioners had responded with the testimony of eight other well-credentialed experts, who based their conclusion **\*\*2790** that Bendectin can cause birth defects on animal studies, chemical structure analyses, and the unpublished “reanalysis” of previously published human statistical studies, the court determined that this evidence did not meet the applicable “general acceptance” standard for the admission of expert testimony. The Court of Appeals agreed and affirmed, citing *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014, for the rule that expert opinion based on a scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community.

*Held:* The Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial. Pp. 2792–99.

(a) *Frye*'s “general acceptance” test was superseded by the Rules' adoption. The Rules occupy the field, *United States v. Abel*, 469 U.S. 45, 49, 105 S.Ct. 465, 467, 83 L.Ed.2d 450, and, although the common law of evidence may serve as an aid to their application, *id.*, at 51–52, 105 S.Ct., at 468–469, respondent's assertion that they somehow assimilated *Frye* is unconvincing. Nothing in the Rules as a whole or in the text and drafting history of Rule 702, which specifically governs expert testimony, gives any indication that “general acceptance” is a necessary precondition to the admissibility of scientific evidence. Moreover, such a rigid standard would be at odds with the Rules' liberal thrust and their general approach of relaxing the traditional barriers to “opinion” testimony. Pp. 2792–94.

(b) The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to “scientific ... knowledge,” since the adjective “scientific” implies a grounding in science's methods and procedures, while the word “knowledge” connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony “assist the trier of fact to understand the

evidence or to determine a fact in issue” goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility. Pp. 2794–96.

(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. Pp. 2796–98.

(d) Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising “general acceptance” standard, is the appropriate means by which evidence based on valid principles may be challenged. That even limited screening by the trial judge, on occasion, will prevent the jury from hearing of authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes. Pp. 2798–99.

951 F.2d 1128 (CA9 1991), vacated and remanded.

**\*\*2791** BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I and II–A, and the opinion of the Court with respect to Parts II–B, II–C, III, and IV, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. —.

#### Attorneys and Law Firms

**\*581** Michael H. Gottesman, Washington, DC, for petitioners.

Charles Fried, Cambridge, MA, for respondent.

### Opinion

582 \*582 Justice BLACKMUN delivered the opinion of the Court.

In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial.

#### I

Petitioners Jason Daubert and Eric Schuller are minor children born with serious birth defects. They and their parents sued respondent in California state court, alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription antinausea drug marketed by respondent. Respondent removed the suits to federal court on diversity grounds.

After extensive discovery, respondent moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does. In support of its motion, respondent submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances.<sup>1</sup> Doctor Lamm stated that he had reviewed all the literature on Bendectin and human birth defects—more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (*i.e.*, a substance capable of causing malformations in fetuses). On the basis of this review, Doctor Lamm concluded that maternal use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.

583 \*583 Petitioners did not (and do not) contest this characterization of the published record regarding Bendectin. Instead, they responded to respondent's motion with the testimony of eight experts of their own, each of whom also possessed impressive credentials.<sup>2</sup> These experts had concluded that Bendectin can cause birth defects. Their conclusions were based upon “*in vitro*” (test tube) and “*in vivo*” (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the

structure of the drug and that of other substances known to cause birth defects; and the “reanalysis” of previously \*\*2792 published epidemiological (human statistical) studies.

The District Court granted respondent's motion for summary judgment. The court stated that scientific evidence is admissible only if the principle upon which it is based is “sufficiently established to have general acceptance in the field to which it belongs.” 727 F.Supp. 570, 572 (S.D.Cal.1989), quoting *United States v. Kilgus*, 571 F.2d 508, 510 (CA9 1978). The court concluded that petitioners' evidence did not meet this standard. Given the vast body of epidemiological data concerning Bendectin, the court held, expert opinion which is not based on epidemiological evidence 584 \*584 is not admissible to establish causation. 727 F.Supp., at 575. Thus, the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioners had relied could not raise by themselves a reasonably disputable jury issue regarding causation. *Ibid.* Petitioners' epidemiological analyses, based as they were on recalculations of data in previously published studies that had found no causal link between the drug and birth defects, were ruled to be inadmissible because they had not been published or subjected to peer review. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed. 951 F.2d 1128 (1991). Citing *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community. 951 F.2d, at 1129–1130. The court declared that expert opinion based on a methodology that diverges “significantly from the procedures accepted by recognized authorities in the field ... cannot be shown to be ‘generally accepted as a reliable technique.’ ” *Id.*, at 1130, quoting *United States v. Solomon*, 753 F.2d 1522, 1526 (CA9 1985).

The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F.2d, at 1130–1131. Those courts had found unpublished reanalyses “particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had undergone full scrutiny from the scientific community.” *Id.*, at 1130. Contending

that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." *Id.*, at 1131. The 585 \*585 court concluded that petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

We granted certiorari, 506 U.S. 914, 113 S.Ct. 320, 121 L.Ed.2d 240 (1992), in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony. Compare, *e.g.*, *United States v. Shorter*, 257 U.S.App.D.C. 358, 363–364, 809 F.2d 54, 59–60 (applying the "general acceptance" standard), cert. denied, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987), with *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (CA3 1990) (rejecting the "general acceptance" standard).

## II

### A

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, *Problems, Cases, and Materials on Evidence* 649 (1983). Although under increasing attack of late, the rule continues to be followed by a \*\*2793 majority of courts, including the Ninth Circuit.<sup>3</sup>

The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared:

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages 586 \*586 is difficult to

define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*" 54 App.D.C., at 47, 293 F., at 1014 (emphasis added).

Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid.*

[1] The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion.<sup>4</sup> 587 \*587 Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence.<sup>5</sup> We agree.

[2] [3] We interpret the legislatively enacted Federal Rules of Evidence as we would any statute. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163, 109 S.Ct. 439, 446, 102 L.Ed.2d 445 (1988). Rule 402 provides the baseline:

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, \*\*2794 by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

"Relevant evidence" is defined as that which has "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." Rule 401. The Rule's basic standard of relevance thus is a liberal one.

*Frye*, of course, predated the Rules by half a century. In *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, *id.*, at 49, 105 S.Ct., at 467, but, quoting Professor Cleary, the Reporter, 588 \*588 explained that the common law nevertheless could serve as an aid to their application:

“ ‘In principle, under the Federal Rules no common law of evidence remains. “All relevant evidence is admissible, except as otherwise provided....” In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.’ ” *Id.*, at 51–52, 105 S.Ct., at 469.

We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. *Id.*, at 50–51, 105 S.Ct., at 468–469. In *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), on the other hand, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.

[4] Here there is a specific Rule that speaks to the contested issue. Rule 702, governing expert testimony, 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.”

Nothing in the text of this Rule establishes “general acceptance” as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a “general acceptance” standard. The drafting history makes no mention of *Frye*, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion

testimony.” *Beech Aircraft Corp. v. Rainey*, 488 U.S., at 169, 109 S.Ct., at 450 (citing Rules 701 to 705). See also Weinstein, \*589 Rule 702 of the Federal Rules of Evidence is 589Sound; It Should Not Be Amended, 138 F.R.D. 631 (1991) (“The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts”). Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “ ‘general acceptance,’ ” the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made “general acceptance” the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.<sup>6</sup>

## B

[5] [6] That the *Frye* test was displaced by the Rules of Evidence does not mean, \*\*2795 however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.<sup>7</sup> Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

[7] [8] [9] [10] [11] [12] [13] The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. “*If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue*” an expert “may testify *thereto*.” (Emphasis added.) The subject of an expert's testimony must 590 \*590 be “scientific ... knowledge.”<sup>8</sup> The adjective “scientific” implies a grounding in the methods and procedures of science. Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation. The term “applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.” Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be “known” to a certainty; arguably, there are no certainties in science. See, e.g., Brief for Nicolaas Bloembergen et al. as *Amici Curiae* 9 (“Indeed, scientists

do not assert that they know what is immutably ‘true’—they are committed to searching for new, temporary, theories to explain, as best they can, phenomena”); Brief for American Association for the Advancement of Science et al. as *Amici Curiae* 7–8 (“Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement” (emphasis in original)). But, in order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability.<sup>9</sup>

[14] [15] [16] 591 \*591 Rule 702 further requires that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” This condition goes primarily to relevance. “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” 3 Weinstein & Berger ¶ 702[02], p. 702–18. See also *United States v. Downing*, 753 F.2d 1224, 1242 (CA3 1985) (“An additional consideration \*\*2796 under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute”). The consideration has been aptly described by Judge Becker as one of “fit.” *Ibid.* “Fit” is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. See Starrs, *Frye v. United States Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, 26 *Jurimetrics J.* 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific “knowledge” about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702’s “helpfulness” 592 \*592 standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

[17] [18] That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of firsthand knowledge—a rule which represents “a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information,’ ” Advisory Committee’s Notes on Fed. Rule Evid. 602, 28 U.S.C.App., p. 755 (citation omitted)—is premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.

[19] [20] [21] [22] [23] Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),<sup>10</sup> whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.<sup>11</sup> This entails a preliminary assessment of whether the reasoning or methodology \*593 underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

[24] Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” Green 645. See also C. Hempel, *Philosophy of Natural Science* 49 (1966) \*\*2797 (“[T]he statements constituting a scientific explanation must be capable of empirical test”); K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) (“[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability”) (emphasis deleted).

[25] [26] [27] Another pertinent consideration is whether the theory or technique has been subjected

to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* 61–76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 *JAMA* 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of “good science,” in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, *Reliable Knowledge: An Exploration* 594 \*594 of the *Grounds for Belief in Science* 130–133 (1978); Relman & Angell, *How Good Is Peer Review?*, 321 *New Eng.J.Med.* 827 (1989). The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

[28] Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F.2d 348, 353–354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, see *United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979).

[29] [30] Finally, “general acceptance” can yet have a bearing on the inquiry. A “reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.” *United States v. Downing*, 753 F.2d, at 1238. See also 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and “a known technique which has been able to attract only minimal support within the community,” *Downing*, 753 F.2d, at 1238, may properly be viewed with skepticism.

[31] [32] [33] The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.<sup>12</sup> Its overarching subject is the scientific validity \*595 and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

[34] Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible \*\*2798 hearsay are to be admitted only if the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....” Judge Weinstein has explained: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” Weinstein, 138 F.R.D., at 632.

### III

[35] We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses apprehension that abandonment of “general acceptance” as the exclusive requirement for admission will result in a “free-for-all” in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. \*596 In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not

is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56. Cf., e.g., *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (CA6) (holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury), cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (CA5 1989) (reversing judgment entered on jury verdict for plaintiffs because evidence regarding causation was insufficient), modified, 884 F.2d 166 (CA5 1989), cert. denied, 494 U.S. 1046, 110 S.Ct. 1511, 108 L.Ed.2d 646 (1990); Green 680–681. These conventional devices, rather than wholesale exclusion under an uncompromising “general acceptance” test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

[36] Petitioners and, to a greater extent, their *amici* exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of “invalid” evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. See, e.g., Brief for Ronald Bayer et al. as *Amici Curiae*. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest 597 \*597 for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic \*\*2799 insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.<sup>13</sup>

#### IV

To summarize: “General acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on “general acceptance,” as gauged by publication and the decisions of other courts. Accordingly, \*598 the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Chief Justice REHNQUIST, with whom Justice STEVENS joins, concurring in part and dissenting in part. The petition for certiorari in this case presents two questions: first, whether the rule of *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923), remains good law after the enactment of the Federal Rules of Evidence; and second, if *Frye* remains valid, whether it requires expert scientific testimony to have been subjected to a peer review process in order to be admissible. The Court concludes, correctly in my view, that the *Frye* rule did not survive the enactment of the Federal Rules of Evidence, and I therefore join Parts I and II–A of its opinion. The second question presented in the petition for certiorari necessarily is mooted by this holding, but the Court nonetheless proceeds to construe Rules 702 and 703 very much in the abstract, and then offers some “general observations.” *Ante*, at 2796.

“General observations” by this Court customarily carry great weight with lower federal courts, but the ones offered here suffer from the flaw common to most such observations—they are not applied to deciding whether particular testimony was or was not admissible, and therefore they tend to be not only general, but vague and abstract. This is particularly unfortunate in a case such as this, where the ultimate legal question depends on an appreciation of one or more bodies

of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their *amici*. Twenty-two *amicus* briefs have been filed in the case, and indeed the Court's opinion contains no fewer than 37 citations to *amicus* briefs and other secondary sources.

599 \*599 The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language—the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how Rule 703 should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

But even if it were desirable to make “general observations” not necessary to decide \*\*2800 the questions presented, I cannot subscribe to some of the observations made by the Court. In Part II–B, the Court concludes that reliability and relevancy are the touchstones of the admissibility of expert testimony. *Ante*, at 2794–95. Federal Rule of Evidence 402 provides, as the Court points out, that “[e]vidence which is not relevant is not admissible.” But there is no similar reference in the Rule to “reliability.” The Court constructs its argument by parsing the language “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, ... an expert ... may testify thereto....” Fed.Rule Evid. 702. It stresses that the subject of the expert's testimony must be “scientific ... knowledge,” and points out that “scientific” “implies a grounding in the methods and procedures of science” and that the word “knowledge” “connotes more than subjective belief or unsupported speculation.” *Ante*, at 2794–95. From this it concludes that “scientific knowledge” must be “derived by the scientific method.” *Ante*, at 2795. Proposed testimony, we are told, must be supported by “appropriate validation.” *Ante*, at 2795. Indeed, in footnote 9, the Court decides that “[i]n a case involving scientific evidence, evidentiary reliability \*600 will be based upon *scientific validity*.” *Ante*, at 2795, n. 9 (emphasis in original).

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of “technical or other specialized knowledge”—the other types of expert knowledge to which Rule 702 applies—or are the “general observations” limited only to “scientific knowledge”? What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase “scientific, technical, or other specialized knowledge” be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received? The Court speaks of its confidence that federal judges can make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Ante*, at 2796. The Court then states that a “key question” to be answered in deciding whether something is “scientific knowledge” “will be whether it can be (and has been) tested.” *Ante*, at 2796. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the “‘criterion of the scientific status of a theory is its falsifiability, or refutability, or testability,’ ” *Ante*, at 2796–97.

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its “falsifiability,” and I suspect some of them will be, too.

I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think 601 \*601 it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.

## All Citations

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## Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Doctor Lamm received his master's and doctor of medicine degrees from the University of Southern California. He has served as a consultant in birth-defect epidemiology for the National Center for Health Statistics and has published numerous articles on the magnitude of risk from exposure to various chemical and biological substances. App. 34–44.
- 2 For example, Shanna Helen Swan, who received a master's degree in biostatistics from Columbia University and a doctorate in statistics from the University of California at Berkeley, is chief of the section of the California Department of Health and Services that determines causes of birth defects and has served as a consultant to the World Health Organization, the Food and Drug Administration, and the National Institutes of Health. *Id.*, at 113–114, 131–132. Stuart A. Newman, who received his bachelor's degree in chemistry from Columbia University and his master's and doctorate in chemistry from the University of Chicago, is a professor at New York Medical College and has spent over a decade studying the effect of chemicals on limb development. *Id.*, at 54–56. The credentials of the others are similarly impressive. See *Id.*, at 61–66, 73–80, 148–153, 187–192, and Attachments 12, 20, 21, 26, 31, and 32 to Petitioners' Opposition to Summary Judgment in No. 84–2013–G(I) (SD Cal.).
- 3 For a catalog of the many cases on either side of this controversy, see P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 1–5, pp. 10–14 (1986 and Supp.1991).
- 4 See, e.g., Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 Nw.U.L.Rev. 643 (1992) (hereinafter Green); Becker & Orenstein, *The Federal Rules of Evidence After Sixteen Years—the Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo.Wash.L.Rev. 857, 876–885 (1992); Hanson, *James Alphonzo Frye is Sixty–Five Years Old; Should He Retire?*, 16 West.St.U.L.Rev. 357 (1989); Black, *A Unified Theory of Scientific Evidence*, 56 Ford.L.Rev. 595 (1988); Imwinkelried, *The “Bases” of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C.L.Rev. 1 (1988); *Proposals for a Model Rule on the Admissibility of Scientific Evidence*, 26 *Jurimetrics J.* 235 (1986); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half–Century Later*, 80 Colum.L.Rev. 1197 (1980); *The Supreme Court, 1986 Term*, 101 Harv.L.Rev. 7, 119, 125–127 (1987).
- Indeed, the debates over *Frye* are such a well-established part of the academic landscape that a distinct term—“*Frye*-ologist”—has been advanced to describe those who take part. See Behringer, *Introduction, Proposals for a Model Rule on the Admissibility of Scientific Evidence*, 26 *Jurimetrics J.* 237, 239 (1986), quoting Lacey, *Scientific Evidence*, 24 *Jurimetrics J.* 254, 264 (1984).
- 5 Like the question of *Frye*'s merit, the dispute over its survival has divided courts and commentators. Compare, e.g., *United States v. Williams*, 583 F.2d 1194 (CA2 1978) (*Frye* is superseded by the Rules of Evidence), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979) with *Christophersen v. Allied–Signal Corp.*, 939 F.2d 1106, 1111, 1115–1116 (CA5 1991) (en banc) (*Frye* and the Rules coexist), cert. denied, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992), 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[03], pp. 702–36 to 702–37 (1988) (hereinafter Weinstein & Berger) (*Frye* is dead), and M. Graham, *Handbook of Federal Evidence* § 703.2 (3d ed. 1991) (*Frye* lives). See generally P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 1–5, at 28–29 (citing authorities).
- 6 Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).
- 7 THE CHIEF JUSTICE “do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility,” *post*, at 2800, but would neither say how it does so nor explain what that role entails. We believe the better course is to note the nature and source of the duty.

- 8 Rule 702 also applies to “technical, or other specialized knowledge.” Our discussion is limited to the scientific context because that is the nature of the expertise offered here.
- 9 We note that scientists typically distinguish between “validity” (does the principle support what it purports to show?) and “reliability” (does application of the principle produce consistent results?). See Black, 56 Ford.L.Rev., at 599. Although “the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen’s kick,” Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 256 (1986), our reference here is to *evidentiary* reliability—that is, trustworthiness. Cf., e.g., Advisory Committee’s Notes on Fed.Rule Evid. 602, 28 U.S.C.App., p. 755 (“ [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact’ is a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information’ ” (citation omitted)); Advisory Committee’s Notes on Art. VIII of Rules of Evidence, 28 U.S.C.App., p. 770 (hearsay exceptions will be recognized only “under circumstances supposed to furnish guarantees of trustworthiness”). In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.
- 10 Rule 104(a) provides:  
“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.” These matters should be established by a preponderance of proof. See *Bourjaily v. United States*, 483 U.S. 171, 175–176, 107 S.Ct. 2775, 2778–2779, 97 L.Ed.2d 144 (1987).
- 11 Although the *Frye* decision itself focused exclusively on “novel” scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.
- 12 A number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors. See, e.g., *Downing*, 753 F.2d, at 1238–1239 (on which our discussion draws in part); 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42 (on which the *Downing* court in turn partially relied); McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L.Rev. 879, 911–912 (1982); and Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 231 (1983) (statement by Margaret Berger). To the extent that they focus on the reliability of evidence as ensured by the scientific validity of its underlying principles, all these versions may well have merit, although we express no opinion regarding any of their particular details.
- 13 This is not to say that judicial interpretation, as opposed to adjudicative factfinding, does not share basic characteristics of the scientific endeavor: “The work of a judge is in one sense enduring and in another ephemeral.... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine.” B. Cardozo, *The Nature of the Judicial Process* 178, 179 (1921).

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S.D.N.Y., June 1, 2016

2004 WL 1574629

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.

DUPONT FLOORING SYSTEMS, INC., Plaintiff,

v.

DISCOVERY ZONE, INC., Defendant.

No. 98 Civ. 5101(SHS).

|  
July 14, 2004.

### OPINION & ORDER

STEIN, J.

\*1 Dupont Flooring Systems, Inc. brought this action in 1998 to recover \$1.1 million allegedly due to it by Discovery Zone, Inc. as a result of a breach of contract. Discovery Zone counter-sued on six causes of action alleging, *inter alia*, the destruction of its business and lost profits resulting from Dupont's failure to perform under the contract. Plaintiff now moves pursuant to Fed.R.Civ.P. 56 for summary judgment dismissing Discovery Zone, Inc.'s fifth counter-claim for destruction of business and second and sixth counter-claims sounding in fraud. For the reasons set forth below, plaintiff's motion is granted.

#### I. Background

Discovery Zone was a Delaware corporation that owned and operated more than 300 "pay-for-play children's entertainment centers" called "FunCenters." (Def. 56.1 State. ¶ 3). In March 1996, Discovery Zone went into Chapter 11 bankruptcy and emerged in 1997. (Def. 56.1 State. ¶ 36). In 1998, this action was initiated by plaintiff, and in 1999 Discovery Zone again went into Chapter 11 bankruptcy, and subsequently entered Chapter 7 liquidation.

Before entering bankruptcy in 1999 Discovery Zone filed counter-claims in this action seeking to recover \$9 million in damages based on Dupont's alleged failure to perform

adequately pursuant to a contract by which Dupont was to install flooring in certain of the FunCenters. In 2001, Discovery Zone amended its counter-claims to seek over \$20 million in damages caused by the destruction of its business.

A. *Discovery Zone's Emergence from Bankruptcy in 1997*  
Discovery Zone emerged from its first bankruptcy in 1997 with a plan to reopen remodeled FunCenters with certain features that had not been present in the original stores (Def. 56.1 State. ¶ 4; Fontak Aff. ¶ 16), including laser tag and karaoke facilities. Discovery Zone also planned to improve the quality of food served and increase food sales revenues by installing Pizza Hut franchises at the centers. (Not. Mot., Exh. F, ("Nicholson Depo."), p. 14). Discovery Zone also reduced the number of stores in its chain from 326 to 205. (Def. 56.1 State. ¶ 3). Because Discovery Zone's most lucrative season typically extended from Christmas day through April, Discovery Zone planned to remodel prior to December 25, 1997. (Def. 56.1 State. ¶¶ 3, 4, 36). Discovery Zone hired David Nicholson in 1997 as Vice President of Design and Construction to oversee the implementation of the renovation plans for the FunCenters. (Def. 56.1 State. ¶ 8).

The remodeling project was scheduled to take place in three phases. (Plt. 56.1 State. ¶ 9; Nicholson Depo. p. 49). The first phase was to include the installation of the "soft play" equipment. During the second phase, the FunCenters would be closed for the heavy construction. In the third and final phase—the phase that involved Dupont—the flooring and other incidentals would be completed. (*Id.*).

The third phase included Discovery Zone's plan to install a special type of rubber flooring manufactured by Gerbert Limited in three areas. (Def. 56.1 State. ¶¶ 5–7; Fontak Aff. ¶ 22, Exh. F, 93–94). The first area would be a laser tag room that would require drywall partitions extending to the ceiling and rubber flooring. (Def. 56.1 State. ¶ 5). The panels were to be moveable, and therefore installed on top of the flooring, so that the room could be reconfigured to create different courses for laser tag. (Def. 56.1 State. ¶ 6). Additionally, the same rubber flooring would be installed in both the "toddler area" and in the area for older children, known as the "cage." (Def. 56.1 State. ¶ 7).

#### B. *Negotiations between Dupont and Discovery Zone*

\*2 The negotiations between Dupont and Discovery Zone were initiated in October of 1997 when Nicholson called Ronald Cassin, Vice President of Dupont. (Def. 56.1 State. ¶ 8; Fontak Aff. 137). Discovery Zone claims that Cassin “falsely represented to Mr. Nicholson at that time that Dupont was a national organization of many years experience that could immediately address the flooring work at all of the Discovery Zone fun centers ...” when in fact Dupont had only come into existence that year. (Def. 56.1 State. ¶ 8). Discovery Zone further alleges that Cassin sent Discovery Zone a list of forty-six national retail chains and falsely claimed that he had “national contracts” with those chains. (Def. 56.1 State. ¶ 9; Discovery Zone Aff. Opp., Exh. 3).

Subsequently, Nicholson and Cassin met in White Plains, New York. (Def. 56.1 State. ¶ 11). According to Dupont, at that meeting, Nicholson told Dupont that Discovery Zone had already hired architects, general contractors and suppliers, and that Dupont would only be responsible for installing “Gerbert rubber flooring” and vinyl tile, in coordination with those other parties. (Fontak Aff. Exh. M, “Master Flooring Installation Proposal”).

According to Discovery Zone, at that meeting Dupont was told the scope of the renovation project and “the critical nature of having the work completed by December 22, 1997, the related advertising schedule, that time was of the essence in the performance of the work, the anticipated quantity of new flooring material involved, and the types of flooring involved.” (Def. 56.1 State. ¶ 11). Discovery Zone claims that Dupont made further false representations about its ability to manage the project at the meeting in White Plains. (*Id.*; Def. 56.1 State. ¶ 38).

#### C. The Flooring Installation Contract

On October 26, 1997, Nicholson signed a flooring installation agreement prepared by Cassin. (Fontak Aff. Exh. M, “Master Flooring Installation Proposal”). The Master Flooring Installation Proposal (“Flooring Installation Plan”) describes the duties that Dupont contracted to perform. In that agreement, Dupont agreed to “manage, supervise and perform all aspects of the flooring project, including the demolition of the old flooring system and installation of the new flooring system, all in conjunction with Discovery Zone’s General Contractors, Architect and Material Suppliers.” (Def. 56.1 State. ¶ 13; Fontak Aff. Exh. M.). The plan provided

that Dupont would be involved in this work at 180 of the 205 Discovery Zone locations. (Fontak Aff. Exh. M).

The Master Flooring Installation Proposal establishes a “cost-plus” pricing method whereby Dupont was to be paid for the cost of labor, materials and installation plus an additional 10% for overhead and 22% for profit and Dupont was to submit an estimate particular to each location before beginning work. (Fontak Aff. Exh. M).

Subsequent to that agreement, Dupont sent out a memorandum to its branch offices stating that it needed to complete the work in the Discovery Zone FunCenters by December 22, 1997, and that all work would be completed within two weeks of commencement. (Def. 56.1 State. ¶ 15; Def. Aff. Opp., Exh. 5, 6).

\*3 On November 19, Discovery Zone, Dupont and other parties involved in the renovation of the FunCenters met in Chicago to discuss the project. (Def. 56.1 State. ¶ 16). Discovery Zone alleges that Dupont was further made aware at that meeting that Dupont controlled the construction schedule because it had to be the first party to complete its work before other elements of the project could be completed. (*Id.*). At that meeting, Dupont was also made aware of the importance of finishing the project before Christmas because Discovery Zone expected to have its highest revenues in the first quarter of the following year, and because Discovery Zone was scheduling an advertising campaign to coordinate with the start of the year, the FunCenter re-openings, and certain movie openings. (Def. 56.1 State. ¶ 17).

#### D. The Construction

Dupont hired David Alpy as Sales Account Manager to take charge of the installation program. (Def. 56.1 State. ¶ 18). Discovery Zone alleges that Alpy promised he would complete construction on 100 FunCenters by December 1997. (*Id.*). In December, general contractors had begun working on 109 FunCenters (Def. 56.1 State. ¶ 19), and those locations were available to Dupont and “over half had flooring material on hand at that time for Dupont.” (Def. 56.1 State. ¶ 19). Thus, Discovery Zone alleges that Dupont could have begun flooring installation in at least fifty locations in December. However, Discovery Zone alleges that Dupont only began construction on twelve locations before 1998. (Def. 56.1 State. ¶ 19). By February 1998, Discovery Zone alleges that over 100 stores were available for Dupont

to commence work, but that only twenty-two renovation projects had been commenced by Dupont. (Def. 56.1 State. ¶ 20).

The parties further agree that Discovery Zone was responsible for at least some of that delay. Nicholson of Discovery Zone testified that in December 1997, he felt “there were enough mitigating circumstances with respect to supply and with respect to drawings that [Dupont] could be excused for the lack of installed flooring at a lot of the Funcenters” prior to 1998. (Fontak Aff. Exh. H at 187).

Sometime in February 1998, Dupont halted work because of unpaid bills, and then discovered after an internal audit that the bill it had submitted to Discovery Zone was inflated by 10%. (Whitfield Aff. ¶¶ 41–42). Discovery Zone alleges that this temporary halt in the work caused further damages.

Dupont made representations in March and April of 1998 that all construction would be finished in May of that year. (Def. 56.1 State. ¶ 28). Those representations also turned out to be false because work had not even begun on forty-three locations in May 1998. (Def. 56.1 State. ¶ 29). Where work had begun, it was, according to Discovery Zone, “deficient at virtually all locations.” (Def. 56.1 State. ¶ 29).

#### *E. Lost Profit and Destruction of Business Damages*

\*4 Discovery Zone claims that Dupont's failure to complete the flooring installations had disastrous consequences for it including causing unsafe conditions, unsatisfactory building inspections and costly changes to the construction plans. (Def. 56.1 State. ¶ 24). One of those changes was that the laser tag particle boards were installed directly into the floors, and therefore could not be moved, contrary to the project design. (Def. 56.1 State. ¶ 25). Another negative impact was that the Discovery Zone customer base was depleted by the ongoing unavailability or incomplete state of FunCenters, and this allegedly caused damages to the reputation of the company. (Def. 56.1 State. ¶ 26).

Discovery Zone experienced an increase in income for the first quarter of 1998 (Def. 56.1 State. ¶ 32), which it attributes to the advertising campaign it had launched to coincide with the completion of renovations. After that first quarter, revenues began to decrease again. (*Id.*). Discovery Zone attributes that decrease to customer

base erosion as customers realized that construction was not completed and that the FunCenters were in “deplorable condition.” (Def. 56.1 State. ¶ 32). Discovery Zone's income did not increase again until the Spring of 1999. (*Id.*). Discovery Zone alleges that if Dupont had completed its work, Discovery Zone would have enjoyed increasing revenues, and would not have entered bankruptcy. (Def. 56.1 State. ¶ 33). Because the other contractors performed in a timely fashion, Dupont was to blame for construction delays. (Def. 56.1 State. ¶ 34).

Discovery Zone alleges that the damages can be calculated with reasonable certainty because in the Chapter 11 bankruptcy, Discovery Zone closed 105 “under performing” FunCenters, and that the 205 that remained open had successful track records prior to that bankruptcy.

Dupont submitted, as attachments to its motion for summary judgment, two documents prepared for Discovery Zone that indicate various causes of its financial failure. First is Discovery Zone's Form 10K for the year ending in December 1997, which was submitted to the Securities and Exchange Commission, and includes statements indicating that the profitability of Discovery Zone remained uncertain for the upcoming year: “The Company's future revenues will depend to a significant extent upon its ability to respond to changes in consumer tastes. The performance of individual FunCenters may be affected by a variety of local factors....” (Plt. 56.1 State. ¶ 20). Among the factors that Discovery Zone listed as causing uncertainty were the tastes of local customers and the competition in the market for family leisure spending. (*Id.*).

Dupont also provided an investment solicitation memorandum, prepared by the investment bank Ladenburg Thalmann & Co. Inc., that listed factors that had affected Discovery Zone's profitability. (Not.Mot., Exh. J). That publication indicates that customers did not perceive Discovery Zone's services to be a good value, and attributes this to two factors: (1) competitors offered “pay-as-you-go” options, while Discovery Zone charged a flat-rate entrance fee, and (2) Discovery Zone increased its prices between twenty-five and forty percent in 1998. To address the negative public perception of Discovery Zone's pricing, the memorandum states that Discovery Zone planned to return to “more competitive pricing” and thereby rebuild attendance. (Not. Mot. Exh J., p.

30). The report also attributed the financial difficulties in 1998 to “significant cost overruns and store disruptions resulting from the inadequate planning and execution of the renovations. This, coupled with 25% to 40% increases in the price of general admissions in the renovated stores, resulted in negative attendance trends after the first quarter of 1998.” (*Id.* p. 2). Also, Dupont has submitted to the Court with its summary judgment motion customer complaint records indicating that at least some of the disappointed customers complained about a variety of issues such as quality of food, length of the games, prices, and scheduling issues. (Fontak Aff. Exh. C).

#### F. Procedural History

\*5 As set forth above, Dupont brought this action to recover \$1.1 million for unpaid flooring services provided by it to Discovery Zone. After Discovery Zone entered bankruptcy, the action was dismissed without prejudice by U.S. District Court Judge John Martin in April 1999. Discovery Zone was permitted to amend its Answer and Counter-Claims in 2001, and discovery proceedings recommenced in 2002. In 2003, this action was officially reopened.

In its Amended Answer and Counter-Claims, filed in 2001, Discovery Zone asserted new counter-claims seeking more than \$20 million in damages for destruction of business and lost profits. Dupont now seeks summary judgment in its favor on those claims pursuant to Fed.R.Civ.P. 56.

## II. Discussion

### A. Summary Judgment Standard

Summary judgment may be granted “only when the moving party demonstrates that ‘there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir.1995) (quoting Fed.R.Civ.P. 56(c)); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). The Court must “view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when ‘no reasonable trier of fact could find in favor of the nonmoving party.’” *Allen*, 64 F.3d at 79 (citation omitted) (quoting *Lund's, Inc. v. Chem. Bank*, 870 F.2d 840, 844 (2d Cir.1989)).

Though the non-movant enjoys the benefit of all reasonable inferences drawn in its favor, to survive a motion for summary judgment, the non-movant may not rest upon the mere allegations in its pleadings but “must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In short, a nonmoving party must set forth sufficient evidence supporting its version of “the claimed factual dispute ... to require a jury or judge to resolve the parties' differing versions of the truth at trial.” *Id.* at 249 (internal citations omitted).

### A. Discovery Zone Has Not Shown It Is Entitled to Damages for the Destruction of its Business

This action is before this Court on diversity jurisdiction, and therefore the substantive law of New York will apply. Typically, in a breach of contract action where one party breaches a construction contract, the other party is entitled to “the market price of completing or correcting the performance.” *Bellizzi v. Huntley Estates, Inc.*, 3 N.Y.2d 112, 115–16, 143 N.E.2d 802, 164 N.Y.S.2d 395 (1957); *Halsey v. Connor*, 287 A.D.2d 597, 731 N.Y.S.2d 760, 761 (2d Dep't 2001). Here, Discovery Zone seeks additional damages because it alleges that Dupont is liable for the lost profits flowing from the destruction of Discovery Zone's entire business.

In order to recover damages for the destruction of business resulting from a contractual breach, a party must show three things: (1) “it must be demonstrated with certainty that such damages have been caused by the breach,” (2) “the alleged loss must be capable of proof with reasonable certainty,” and (3) “there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made .” *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 502 N.Y.S.2d 131, 132 (1986) (Kenford I); *see also Ashland Mgt. v. Janien*, 82 N.Y.2d 395, 624 N.E.2d 1007, 604 N.Y.S.2d 912 (1993); *Route 7 Mobil Inc. v. Machnick Builders Ltd.* 296 A.D.2d 809, 810, 745 N.Y.S.2d 336, 338 (3d Dep't 2002). Discovery Zone fails to satisfy the requirements set forth in *Kenford I* as a matter of law.

#### 1. Discovery Zone Cannot Demonstrate that Its Destruction of Business Damages Have Been Caused by Dupont's Breach

\*6 In order to recover damages due to the destruction of business, Discovery Zone must show that Dupont's failure to perform the flooring contract was the cause of Discovery Zone's damages. The harm must be "directly traceable" to the breach; the damages cannot be the result of other intervening causes. *Kenford I*, 67 N.Y.2d at 261.

The evidence submitted by both parties make it manifest that a farrago of factors contributed to construction delays, and Discovery Zone's eventual financial failure. Dupont was one of many contractors, as Discovery Zone concedes. Moreover, Discovery Zone was only able to provide to Dupont a maximum of fifty-five FunCenters that were ready for flooring installation before Christmas. (See e.g., *Nicholson Aff.*, p. 17). Thus, Dupont was not solely responsible for the fact that the renovations had not been completed by Christmas of 1997, so that the advertising campaign could coordinate with the opening of the improved facilities.

In fact, Nicholson of Discovery Zone testified that he did not hold Dupont responsible for the failure to install flooring until sometime after January 1998 in part because of Nicholson's own failure to obtain construction permits. (*Id.*). He further testified at his deposition that he assigned Dupont less than 75% of the blame associated with the failure to complete construction on the approximately 100 stores that were made available to it. (*Nicholson Aff.* p. 17–18). Nicholson, and information contained in a document prepared by Discovery Zone, indicate that at least some blame lay with the manufacturer of the flooring materials, Gerbert. (*Nicholson Aff.* p. 17; *Aff. Opp. Exh.* 11). Customer complaints also indicate that a certain amount of the customer dissatisfaction that Discovery Zone alleges stemmed from the incomplete renovations was in fact caused by the nature and quality of services offered by Discovery Zone. (*Fontak Aff. Exh. C.*).

Moreover, Discovery Zone itself perceived that its financial difficulties stemmed in part from price increases that were implemented in 1998 at the renovated centers as Ladenburg Thalmann reported in the investment solicitation memorandum prepared in 1998: "Attendance rates at Discovery Zone's FunCenters have steadily declined over the last several years due to a number of factors, including Discovery Zone's inability to invest in new entertainment offerings and marketing and its inability to complete the renovation of its stores. Additionally, the Company believes that the increase in

general admission prices has had a negative impact on overall admissions. Management believes that a reduction in the admission price should increase attendance levels which, in turn, would result in higher food, game and retail purchases." (*Fontak Aff.*, Exh. J, p. 6).

In similar actions, the New York courts have refused to award damages for lost profits due to a defendant's delay in completing construction where a plaintiff was unable to prove that the delay in construction caused the lost profits. For example, in *Teramo v O'Brien-Sheipe Funeral Home*, 283 A.D.2d 635, 637, 725 N.Y.S.2d 87, 90 (2d Dep't 2001) the Appellate Division held that "defendant's unsubstantiated claim that it lost business due to delay in completing construction of the extension to the funeral home is too speculative to allow recovery." See also *Movitz v. First Nat'l Bank*, 148 F.3d 760 (7th Cir.1998).

\*7 Discovery Zone relies largely on inapposite and distinguishable cases in making its claim that it can prove that Dupont's breaches destroyed Discovery Zone's business. For example, in *Perini Corp. v Great Bay Hotel & Casino, Inc.*, 129 N.J. 479, 499–500, 610 A.2d 364, 374 (1992), the causation of lost profits was clear because there was one contractor responsible for the job; in contrast, Dupont was not the only contractor working in the FunCenters.

Therefore, Discovery Zone has not shown that a material issue of fact exists as to whether it can prove that Dupont's failure to install flooring in a timely fashion caused Discovery Zone's reentry into bankruptcy.

## 2. Discovery Zone Cannot Prove Its Losses with Reasonable Certainty

Before a party can recover lost profits, the amount of lost profits must be proven with "reasonable certainty," although they do not have to be proven with "mathematical precision." See *Ashland Mgmt Inc. v. Janien*, 82 N.Y.2d at 403. The lost profits cannot be "merely speculative, possible or imaginary." *Kenford I*, 67 N.Y.2d at 261.

Additionally, a stricter standard is applied to a "new business" attempting to demonstrate lost profits: "Evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate." *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir.2000); *Kenford I*, 67 N.Y.2d at 261.

Discovery Zone did not have one profitable quarter from 1995–1997. While Discovery Zone was not a “new” business in 1997, it was emerging from bankruptcy, streamlining its operations, and preparing to enter a new market with newly remodeled stores, new prices, and new services. It was also trying to enter new segments of the market by appealing to older children with laser tag and karaoke. Moreover, after bankruptcy, Discovery Zone had closed one third of its facilities. It could not have accurately predicted how successful its new business strategies would be. *Cf. Coastal Aviation, Inc. v. Commander Aircraft Co.* 937 F.Supp. 1051, 1070 (S.D.N.Y.1996).

Discovery Zone fails to establish, as a new business, or otherwise, any reliable measure of its lost profits. Courts repeatedly have rejected claims for lost profits that rest on a “series of assumptions and projections.” *Kidder, Peabody & Co., Inc. v. IAG Intern. Acceptance Group N.V.*, 28 F.Supp.2d 126, 133–134 (S.D.N.Y.1998); *see also Summit Tax Exempt L.P. II v. Berman*, No. 88 Civ. 5839, 1989 WL 152796 (S.D.N.Y. July 19, 1989); *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326 (2d Cir.1993) (lost profit claim could not have been proven as a matter of law because it was a “network of conjecture” despite the fact that “proof of lost profits was notably voluminous.”).

Discovery Zone claims at least \$20 million in damages for the destruction of its business. It also seeks to recover, in addition to lost profits, damages for “lost business opportunity, media and advertising costs, extended overhead, escalation costs, costs of storing equipment and materials, interest and financing costs, and depreciation, and other consequential damages including loss of good will, damages to Discovery Zone's business reputation and ultimately the complete loss of business.” (Am. Ans. and Counter–Claims, p. 17). Of the total damage, Discovery Zone alleges that \$7,691,391 of lost profits was caused by its inability to implement a new pricing structure. (Nicholson Aff. p. 19). To support that claim, Discovery Zone presents various records of revenues by store. (Aff.Opp.Exh. 18).

\*8 Discovery Zone provides the testimony of Nicholson and Whitfield, former Discovery Zone employees, to support the contention that Discovery Zone would have been profitable. (Whitfield Aff, Nicholson Aff.).

Essentially, those two former Discovery Zone employees testified that after the advertising campaign in the first quarter of 1998, profits began to increase. However “as the customer base recognized that Discovery Zone's stores during this time were in deplorable condition and Discovery Zone was unable to keep its commitments to its customers due to the stalled refurbishing project, in or about the 17<sup>th</sup> week of 1998, the revenue declined as compared to the same periods in 1997. Indeed it was not until the spring of 1999—after construction—that the income for the first time exceeded the previous year's income. By then, it was too late and Discovery Zone was essentially bankrupt.” (Nicholson Aff. ¶ 56). Discovery Zone further alleges that it spent \$3,325,000 on media purchases and did not realize the benefit of 65% of that spending, but provides no specific method whereby it arrived at the figure of 65%. (Nicholson Aff. p. 19). Whitfield stated that the planned cost of the advertising program was “somewhere over nine million dollars” but does not state what portion of that was actually spent. (Whitfield Aff. ¶ 25).

Aside from figures indicating increased sales in the first quarter of every year, Discovery Zone has not provided any information to support its conjectures about how the timing of advertising and construction would have operated to create a positive customer reaction. Discovery Zone has not provided the analysis of any expert who actually calculated economic harm caused by Dupont; it is unclear which assumptions were used in arriving at the \$20 million lost profits figure.

At a minimum, a number of obvious assumptions are necessary to support Discovery Zone's claim that it would have been profitable if Dupont had completed construction in a timely fashion. In general, lost profits could not be determined without assuming that Discovery Zone's post-bankruptcy reorganization plan would have been successful, and an assumption would further have to be made as to how successful it would have been. A calculation of lost profits would necessarily include projections about the numbers of customers who would have used Discovery Zone's facilities, the prices they would have paid, the impact of the economy and the competition on Discovery Zone's business and Discovery Zone's ability to attract customers who did not prefer the competitors' pay-as-you-go model of service. Further, it requires projections about those customers' food and retail purchases. It would also require information about

the profitability of the few stores Discovery Zone did complete in time, and the stores that Discovery Zone did not work in at all, so that the profitability of those stores could be subtracted from the damages. None of that exists in this record.

\*9 As set forth above, Discovery Zone has no ability to provide reliable profit information based on past earnings. It has failed to present any method of calculating future earnings based on its own sales. Moreover, Discovery Zone's claim of entitlement to lost profits cannot fall within the precedent of the few cases where new businesses have been awarded lost profits based on the earnings of comparable third parties in the same industry because Discovery Zone could not present information of comparable competitors' profitability. *See Care Travel Co., Ltd. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 994–95 (2d Cir.1991), *Travellers Int'l v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1579 (2d Cir.1994); *Americana Fabrics, Inc. v. Liebhardt Mills, Inc.*, 2000 WL 245889, \*2 (S.D.N.Y.2000). Discovery Zone used a different pricing structure than its competitors, and therefore no such comparison is possible. (Exh. J p. 4 “Discovery Zone's closest national competitor, CEC Entertainment, Inc., ... has an in-store focus on food and game revenue, and does not charge a general admission fee.”).

Discovery Zone has only provided a conclusory allegation that it would have made a profit had Dupont not breached the contract and it has failed to support its lost profits calculation with anything but conjecture. Discovery Zone has, in sum, failed as a matter of law to prove its losses with reasonable certainty.

### 3. Lost Profits and Destruction of Business Damages Were Not Within the Reasonable Contemplation of the Parties

It is a bedrock principle of contract law that a breaching party is only responsible for consequential damages flowing from a breach of contract to the extent those damages are within the contemplation of the parties at the time of contracting, or are reasonably foreseeable. *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854); *see also Kenford Company, Inc. v. Erie*, 73 N.Y.2d 312, 316–17, 537 N.E.2d 176, 177, 540 N.Y.S.2d 1, 2 (1989) (“Kenford II”).

Thus, before Discovery Zone is entitled to survive Dupont's motion for summary judgment, it must show that a material issue of fact exists as to whether

lost profit and destruction of business damages were within the “reasonable contemplation” of the parties. “In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered ... as well as ‘what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.’” *Kenford II*, 73 N.Y.2d at 319 (cited in *Coastal Aviation, Inc. v. Commander Aircraft Co.* 937 F.Supp. 1051, 1065 (S.D.N.Y.1996).

While Discovery Zone alleges that Dupont knew that time was of the essence in the completion of the contract and that the target completion date for the project was Christmas, 1997, Discovery Zone has not presented any evidence to indicate that it could make a showing at trial that the parties contemplated that a failure to perform would threaten the entire Discovery Zone business. Where a construction contract states that the work must be performed by a date certain, that is insufficient to show that the parties contemplated potential economic loss caused by delays as a basis for damages. *See Maimis Knox Group, Ltd. v. Grand Central Zocalo, LLC*, 5 A.D.3d 129, 771 N.Y.S.2d 888, 2004 N.Y. Slip Op. 01339 (1st Dep't, Mar. 2, 2004). There is no evidence of discussions on the subject in the contract negotiations, nor in the contract itself. Thus Discovery Zone has not shown that the lost profit damages were contemplated. *See Maimis–Knox*, 771 N.Y.S.2d 888.

\*10 Discovery Zone cites cases where courts have awarded lost profits damages based on similar failures to complete construction; however, Discovery Zone's reliance is misplaced because in cases such as *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 604 N.Y.S.2d 912 (1993) and *Harbor Hill Lithographing Corp. v. Dittler Bros.*, 76 Misc.2d 145, 348 N.Y.S.2d 920 (Nassau Co., 1973) the consequential damages flowing from a breach were explicitly contemplated by the parties. Here, there is no indication that Dupont could reasonably foresee destruction of business or lost profits resulting from its failure to install flooring materials in accordance with the contract, nor is there any indication that Dupont agreed to accept responsibility for such damages when it agreed to perform work for Discovery Zone.

*B. The Fraud Claim Is Impermissibly  
Duplicative of the Breach of Contract Claim*

In the second and sixth counter-claims, Discovery Zone alleges that Dupont engaged in actionable fraud when it misrepresented its ability to perform the contract in order to induce Discovery Zone to enter into that contract. Specifically, Discovery Zone alleges that Dupont intentionally misrepresented its ability to complete the work in a timely fashion by claiming to be a national contractor when in fact Dupont was not established as a national flooring installer, had only been formed in 1997, and had no national contacts. Discovery Zone further alleges that if it had known that Dupont lacked a national presence and did not have the experience to coordinate the renovation project, it would not have entered the contract. Pursuant to New York law, “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” *ClarkFitzpatrick, Inc. v. Long Island RR Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 656, 516 N.E.2d 190, 193 (N.Y.1987)); see also *Bridgestone/Firestone*, 98 F.3d 13, 20 (2d Cir.1996); *Multi-Juice, S.A. v. Snapple Beverage Corp.*, 2003 WL 1961636, at \*4 (S.D.N.Y.).

Therefore, in order to bring a claim for fraud based on a misrepresentation supporting a claim for breach of contract, a plaintiff must either: “(i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.” *Bridgestone/Firestone*, 98 F.3d at 20; *John Paul Mitchell Sys. v. Quality King Distrib., Inc.*, No. 99 Civ. 9905, 2001 WL 910405, at \*4 (S.D.N.Y. Aug. 13, 2001).

Discovery Zone has not seriously contended that it is entitled to damages under the first or third methods set forth in *Bridgestone/Firestone*; it has not alleged that Dupont owed it a legal duty separate from the contract for flooring, and it has not alleged that it is due the type of special damages that are not recoverable in breach of contract, and that entitle it to pursue a fraud claim. The damages alleged by Discovery Zone are unlike those sought in cases such as *Lam v. Am. Exp. Co.* 265 F.Supp.2d 225 (S.D.N.Y.2003) where the plaintiff was entitled to pursue a cause of action for fraud where misrepresentation caused harms that were extraneous to the contract, and not recoverable in a breach of contract

action. All of Discovery Zone's alleged injuries can be remedied through damages available for the breach of contract action against Dupont.

\*11 Discovery Zone primarily attempts to demonstrate an entitlement to bring a tort claim based on the second category of actionable fraud set forth in *Bridgestone/Firestone*—“a fraudulent misrepresentation collateral or extraneous to the contract”—based on Dupont's representations that it had a “national presence” and had experience in installing flooring. Thus, the question is whether those alleged misrepresentation was “collateral or extraneous” to the flooring and carpeting agreements.

“[A] valid fraud claim may be premised on misrepresentations that were made before the formation of the contract and that induced the plaintiff to enter the contract.” See e.g. *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F.Supp.2d 609, 616 (S.D.N.Y.2003) (citing *Cohen v. Koenig*, 25 F.3d 1168, 1173 (2d Cir.1994)); *Vtech Holdings Ltd. v. Lucent Technologies, Inc.*, 172 F.Supp.2d 435, 439 (S.D.N.Y.2001)(citing *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 434 (2d Cir.1995); *Rocanova v. Equitable Live Assurance Soc'y of the United States*, 83 N.Y.2d 603, 614, 612 N.Y.S.2d 211, 211 (1997)).

For example, in *First Bank of the Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 292, 690 N.Y.S.2d 17, 21 (1999), plaintiff's fraud claim survived alongside its contract claim because defendants mischaracterized facts about loans sold to the plaintiff. In a similar case, *Stewart v. Jackson & Nash*, 976 F.2d 86, 89 (2d Cir.1992), the U.S. Court of Appeals for the Second Circuit allowed a fraud claim to survive alongside a breach of contract claim where the law firm hiring the plaintiff falsely induced him to accept their offer of employment by making a collateral false statement that it served a particular client and was developing a practice in an area of law in which the plaintiff specialized.

Generally, for a misrepresentation of present fact to give rise to a claim for fraudulent inducement, it must be collateral or extraneous to the contract, and it must be made to induce a party to enter the contract. See e.g., *Cougar Audio, Inc. v. Reich*, No. 99 Civ. 4498, 2000 WL 420546, at \*6 (S.D.N.Y.2000). For example, a promise to promote a prospective employee after hiring, which was not included in the employment contract, was an integral part of that employee's inducement to enter the

contract, and therefore gave rise to a separate claim for fraudulent inducement. See *Hirsch v. Columbia University, College of Physicians and Surgeons*, 293 F.Supp.2d 372, 380 (S.D.N.Y.2003).

A representation that in essence is merely a promise to perform under the contract is different from a misrepresentation inducing a party to enter a contract, and is not actionable in fraud. *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 250 N.E.2d 214, 302 N.Y.S.2d 799 (1969); see also *Deutsche Asset Mgmt, Inc. v. Callaghan*, No. 01 Civ.4426 2004 WL 758303, at \*10 (April 7, 2004); *Slapshot Beverage Co., Inc. v. Southern Packaging Mach., Inc.*, 980 F.Supp. 684, 690 (E.D.N.Y.1997); *RollsRoyce Motor Cars, Inc. v. Schudroff*, 929 F.Supp. 117, 123 (S.D.N.Y.1996).

\*12 The various misrepresentations that Dupont allegedly made were not “collateral or extraneous to the contract.” Promises “such as representations of expertise and resources, are not considered collateral to the contract because they ‘simply underscore the defendant’s purported intention and ability to perform the contract’ and are thus ‘simply part and parcel of the intention to perform.’” *John Paul Mitchell Sys.*, 2001 WL 910405, at \*4 (citing *Crabtree*, 776 F.Supp. at 162–63. For example, in *Rolls Royce*, where the false statements concerned the defendant’s ability to pay the sums due under the contract,

thus its ability to perform, there was no cause of action for fraud. *Rolls–Royce Motor Cars, Inc. v. Schudroff*, 929 F.Supp. 117, 124 (S.D.N.Y.1996).

### III. Conclusion

Discovery Zone has failed to meet its burden as a non-movant of showing any material issue of fact that, if resolved in its favor, would entitle it to recover destruction of business and lost profit damages at trial. As set forth above, the second and six causes of action, seeking to recover for fraudulent inducement, are impermissibly duplicative of the breach of contract claims. Discovery Zone also fails to raise an issue of fact on its claim for destruction of business damages and lost profits because it has presented no method of calculating the value of the business, nor has it indicated that it can refute Dupont’s showing that a variety of causes contributed to Discovery Zone’s eventual bankruptcy. Accordingly, Dupont’s motion for summary judgment dismissing the second, fifth and sixth counter-claims is granted in whole.

SO ORDERED:

### All Citations

Not Reported in F.Supp.2d, 2004 WL 1574629



KeyCite Yellow Flag - Negative Treatment

Not Followed on State Law Grounds Conception and Rosario Acosta v. Shell Western Exploration and Production, Inc., N.M., March 3, 2016

118 S.Ct. 512

Supreme Court of the United States

GENERAL ELECTRIC  
COMPANY, et al., Petitioners,

v.

Robert K. JOINER, et ux.

No. 96–188.

|  
Argued Oct. 14, 1997.|  
Decided Dec. 15, 1997.

City's electrician, who suffered from lung cancer, brought state court action against manufacturer of polychlorinated biphenyls (PCBs) and manufacturers of electrical transformers and dielectric fluid, alleging strict liability, negligence, fraud, and battery. Manufacturers removed action to federal court. The United States District Court for the Northern District of Georgia, 864 F.Supp. 1310, Orinda D. Evans, J., excluded testimony of electrician's experts and granted defendants' motion for summary judgment. Electrician appealed. The Eleventh Circuit Court of Appeals, Barkett, Circuit Judge, 78 F.3d 524, reversed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) "abuse of discretion" standard applied to District Court's decision to exclude scientific evidence; (2) District Court did not abuse its discretion in excluding expert testimony based on studies indicating that infant mice developed cancer after receiving massive doses of PCBs; and (3) District Court did not abuse its discretion in excluding expert testimony based on epidemiological studies.

Reversed and remanded.

Justice Breyer concurred and filed opinion.

Justice Stevens concurred in part, dissented in part, and filed opinion.

West Headnotes (17)

**[1] Federal Courts**

🔑 Taking case or question from jury; judgment as a matter of law

Abuse of discretion is the proper standard of review of district court's evidentiary rulings.

295 Cases that cite this headnote

**[2] Federal Civil Procedure**

🔑 Reception of Evidence

**Federal Courts**

🔑 Admission or exclusion in general

Cases arise where it is very much a matter of discretion with district court whether to receive or exclude evidence; but appellate court will not reverse in such case, unless the ruling is manifestly erroneous.

75 Cases that cite this headnote

**[3] Evidence**

🔑 Matters involving scientific or other special knowledge in general

**Evidence**

🔑 Necessity and sufficiency

Fact that *Frye* test governing admission of expert scientific evidence was displaced by Rules of Evidence does not mean that Rules themselves place no limits on admissibility of purportedly scientific evidence; nor is trial judge disabled from screening such evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

20 Cases that cite this headnote

**[4] Evidence**

🔑 Matters involving scientific or other special knowledge in general

**Evidence**

🔑 Necessity and sufficiency

Under Federal Rules of Evidence, trial judge must ensure that any and all scientific testimony or evidence admitted is not only

relevant, but reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

172 Cases that cite this headnote

**[5] Evidence**

🔑 Matters involving scientific or other special knowledge in general

**Evidence**

🔑 Necessity and sufficiency

While Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the “gatekeeper” role of trial judge in screening such evidence. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

232 Cases that cite this headnote

**[6] Federal Courts**

🔑 Expert evidence and witnesses

In applying “abuse of discretion” review to rulings regarding admissibility of scientific testimony, court of appeals may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

98 Cases that cite this headnote

**[7] Federal Courts**

🔑 Expert evidence and witnesses

Alleged fact that grant of summary judgment on basis of inadmissibility of expert scientific testimony was “outcome determinative” as to products liability action did not compel finding that it should have been subjected to a more searching standard of review than “abuse of discretion” standard. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

122 Cases that cite this headnote

**[8] Federal Civil Procedure**

🔑 Presumptions

On motion for summary judgment, disputed issues of fact are resolved against moving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

20 Cases that cite this headnote

**[9] Federal Civil Procedure**

🔑 Presumptions

Question of admissibility of expert testimony is not issue of fact that, when disputed, is resolved against moving party on motion for summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

33 Cases that cite this headnote

**[10] Federal Courts**

🔑 Expert evidence and witnesses

Question of admissibility of expert testimony is reviewable under “abuse of discretion” standard. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

210 Cases that cite this headnote

**[11] Federal Courts**

🔑 Expert evidence and witnesses

Court of Appeals applied wrong standard in reviewing grant of summary judgment in favor of manufacturers in products liability action, when Court applied “stringent” review based on its holding that rules governing admissibility of expert testimony displayed a preference for admissibility; such standard failed to give district court the deference that is the hallmark of abuse of discretion review. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Fed.Rules Evid.Rule 702, 28 U.S.C.A.

130 Cases that cite this headnote

**[12] Evidence**

🔑 Medical testimony

**Evidence**

🔑 Experiments and results thereof

District Court did not abuse its discretion in excluding expert scientific testimony, offered by electrician as evidence that his cancer resulted from exposure to polychlorinated biphenyls (PCBs), based on studies indicating that infant mice developed cancer after receiving massive doses of PCBs injected directly into their peritoneums or stomachs; electrician was adult human being with far less alleged exposure to PCBs, and he developed different type of cancer than that developed by mice. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

57 Cases that cite this headnote

[13] Evidence

🔑 Medical testimony

Evidence

🔑 Experiments and results thereof

District Court did not abuse its discretion in excluding expert scientific testimony, offered by electrician as evidence that his cancer resulted from exposure to polychlorinated biphenyls (PCBs), based on epidemiological study involving workers who had been exposed to PCBs; authors of study were unwilling to say that PCB exposure had caused workers' cancer. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

49 Cases that cite this headnote

[14] Evidence

🔑 Medical testimony

Evidence

🔑 Experiments and results thereof

District Court did not abuse its discretion in excluding expert scientific testimony, offered by electrician as evidence that his cancer resulted from exposure to polychlorinated biphenyls (PCBs), based on epidemiological study involving workers who had worked at PCB production plant; increase of incidence of cancer among workers was not statistically significant, and study did not suggest link between increase and exposure to PCBs. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

64 Cases that cite this headnote

[15] Evidence

🔑 Medical testimony

Evidence

🔑 Experiments and results thereof

District Court did not abuse its discretion in excluding expert scientific testimony, offered by electrician as evidence that his cancer resulted from exposure to polychlorinated biphenyls (PCBs), based on epidemiological study involving workers who had been exposed to mineral oil; study made no mention of PCBs. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

35 Cases that cite this headnote

[16] Evidence

🔑 Medical testimony

Evidence

🔑 Experiments and results thereof

District Court did not abuse its discretion in excluding expert scientific testimony, offered by electrician as evidence that his cancer resulted from exposure to polychlorinated biphenyls (PCBs), based on epidemiological study involving workers who had been exposed to PCBs and had seen statistically significant increase in lung cancer deaths; workers had been exposed to numerous potential carcinogens. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

230 Cases that cite this headnote

[17] Evidence

🔑 Sources of Data

District court is not required to admit opinion evidence which is connected to existing data only by ipse dixit of the expert; court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1813 Cases that cite this headnote

**\*\*514 Syllabus \***

**\*136** After he was diagnosed with small-cell lung cancer, respondent Joiner and his wife (hereinafter jointly respondent) sued in Georgia state court, alleging, *inter alia*, that his disease was “promoted” by his workplace exposure to chemical “PCB’s” and derivative “furans” and “dioxins” that were manufactured by, or present in materials manufactured by, petitioners. Petitioners removed the case to federal court and moved for summary judgment. Joiner responded with the depositions of expert witnesses, who testified that PCB’s, furans, and dioxins can promote cancer, and opined that Joiner’ exposure to those chemicals was likely responsible for his cancer. The District Court ruled that there was a genuine issue of material fact as to whether Joiner had been exposed to PCB’s, but granted summary judgment for petitioners because (1) there was no genuine issue as to whether he had been exposed to furans and dioxins, and (2) his experts’ testimony had failed to show that there was a link between exposure to PCB’s and small-cell lung cancer and was therefore inadmissible because it did not rise above “ subjective belief or unsupported speculation.” In reversing, the Eleventh Circuit applied “a particularly stringent standard of review” to hold that the District Court had erred in excluding the expert testimony.

*Held:*

1. Abuse of discretion—the standard ordinarily applicable to review of evidentiary rulings—is the proper standard by which to review a district court’s decision to admit or exclude expert scientific evidence. Contrary to the Eleventh Circuit’s suggestion, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, did not somehow alter this general rule in the context of a district court’s decision to exclude scientific evidence. *Daubert* did not address the appellate review standard for evidentiary rulings at all, but did indicate that, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than did pre-existing law, they leave in place the trial judge’s “gatekeeper” role of screening such evidence to ensure that it is not only relevant, but

reliable. *Id.*, at 589, 113 S.Ct., at 2794–2795. A court of appeals applying “abuse-of-discretion” review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it. Compare **\*137** *Beech Aircraft Corp. v. Rainey*, 488 U.S. 137, 153, 172, 109 S.Ct. 439, 451, 102 L.Ed.2d 445, with *United States v. Abel*, 469 U.S. 45, 54, 105 S.Ct. 465, 470, 83 L.Ed.2d 450. This Court rejects Joiner’s argument that because the granting of summary judgment in this case was “outcome determinative,” it should have been subjected to a more searching standard of review. On a summary judgment motion, disputed issues of fact are resolved against the moving party—here, petitioners. But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard. In applying an overly “stringent” standard, the Eleventh Circuit failed to give the trial court the deference that is the hallmark of abuse-of-discretion review. P. 517.

2. A proper application of the correct standard of review indicates that the District Court did not err in excluding the expert testimony at issue. The animal studies cited by respondent’s experts were so dissimilar to the facts presented here—*i.e.*, the studies involved infant mice that developed alveologenic adenomas after highly concentrated, massive doses of PCB’s were injected directly into their peritoneums or stomachs, whereas Joiner was an adult human whose small-cell carcinomas allegedly resulted from exposure on a much smaller scale—that it was not an abuse of discretion for the District Court to have rejected the experts’ reliance on those studies. Nor did the court abuse its discretion in concluding that the four epidemiological studies on which Joiner relied were not a sufficient basis for the experts’ opinions, since the authors of two of those studies ultimately were unwilling to suggest a link between increases in lung cancer and PCB exposure among the workers they examined, the third study involved exposure to a particular type of mineral oil not necessarily relevant here, and the fourth involved exposure to numerous potential carcinogens in addition to PCB’s. Nothing 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. Pp. 517–519.

3. These conclusions, however, do not dispose of the entire case. The Eleventh Circuit reversed the District Court’s

conclusion that Joiner had not been exposed to furans and dioxins. Because petitioners did not challenge that determination in their certiorari petition, the question whether exposure to furans and dioxins contributed to Joiner's cancer is still open. P. 519.

78 F.3d 524, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, AND BREYER JJ., joined. BREYER, J., filed a concurring opinion, \*138 *post*, p. 520. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 521.

### Attorneys and Law Firms

Steven R. Kunej, Washington, DC, for petitioner.

Lawrence G. Wallace, Washington, DC, for United States as amicus curiae.

Michael H. Gottesman, for respondents.

### Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). We hold that abuse of discretion is the appropriate standard. We apply this standard and conclude that the District Court in this case did not abuse its discretion when it excluded certain proffered expert testimony.

## I

Respondent Robert Joiner began work as an electrician in the Water & Light Department of Thomasville, Georgia (City), in 1973. This job required him to work with and around the City's electrical transformers, which used a mineral-oil-based dielectric fluid \*\*516 as a coolant. Joiner often had to stick his hands and arms into the

fluid to make repairs. The fluid would sometimes splash onto him, occasionally getting into his eyes and mouth. In 1983 the City discovered that the fluid in some of the transformers was contaminated with polychlorinated biphenyls (PCB's). PCB's are widely considered to be hazardous to human health. Congress, with limited exceptions, banned the production and sale of PCB's in 1978. See 90 Stat.2020, 15 U.S.C. § 2605(e)(2)(A).

Joiner was diagnosed with small-cell lung cancer in 1991. He<sup>1</sup> sued petitioners in Georgia state court the following year. Petitioner Monsanto manufactured PCB's from 1935 to 1977; petitioners General Electric and Westinghouse Electric manufactured transformers and dielectric fluid. In his complaint Joiner linked his development of cancer to his exposure to PCB's and their derivatives, polychlorinated dibenzofurans (furans) and polychlorinated dibenzodioxins (dioxins). Joiner had been a smoker for approximately eight years, his parents had both been smokers, and there was a history of lung cancer in his family. He was thus perhaps already at a heightened risk of developing lung cancer eventually. The suit alleged that his exposure to PCB's "promoted" \*140 his cancer; had it not been for his exposure to these substances, his cancer would not have developed for many years, if at all.

Petitioners removed the case to federal court. Once there, they moved for summary judgment. They contended that (1) there was no evidence that Joiner suffered significant exposure to PCB's, furans, or dioxins, and (2) there was no admissible scientific evidence that PCB's promoted Joiner's cancer. Joiner responded that there were numerous disputed factual issues that required resolution by a jury. He relied largely on the testimony of expert witnesses. In depositions, his experts had testified that PCB's alone can promote cancer and that furans and dioxins can also promote cancer. They opined that since Joiner had been exposed to PCB's, furans, and dioxins, such exposure was likely responsible for Joiner's cancer.

The District Court ruled that there was a genuine issue of material fact as to whether Joiner had been exposed to PCB's. But it nevertheless granted summary judgment for petitioners because (1) there was no genuine issue as to whether Joiner had been exposed to furans and dioxins, and (2) the testimony of Joiner's experts had failed to show that there was a link between exposure to PCB's and small-cell lung cancer. The court believed that the testimony of respondent's experts to the contrary did not

rise above “subjective belief or unsupported speculation.” 864 F.Supp. 1310, 1326 (N.D.Ga.1994). Their testimony was therefore inadmissible.

The Court of Appeals for the Eleventh Circuit reversed. 78 F.3d 524 (1996). It held that “[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge’s exclusion of expert testimony.” *Id.*, at 529. Applying that standard, the Court of Appeals held that the District Court had erred in excluding the testimony of Joiner’s expert witnesses. The 141 \*141 District Court had made two fundamental errors. First, it excluded the experts’ testimony because it “drew different conclusions from the research than did each of the experts.” The Court of Appeals opined that a district court should limit its role to determining the “legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing expert opinions.” *Id.* at 533. Second, the District Court had held that there was no genuine issue of material fact as to whether Joiner had been exposed to furans and dioxins. This was also incorrect, said the Court of Appeals, because testimony in the record supported the proposition that there had been such exposure.

We granted petitioners’ petition for a writ of certiorari, 520 U.S. 1114, 117 S.Ct. 1243, 137 L.Ed.2d 325 (1997), and we now reverse.

## \*\*517 II

Petitioners challenge the standard applied by the Court of Appeals in reviewing the District Court’s decision to exclude respondent’s experts’ proffered testimony. They argue that that court should have applied traditional “abuse-of-discretion” review. Respondent agrees that abuse of discretion is the correct standard of review. He contends, however, that the Court of Appeals applied an abuse-of-discretion standard in this case. As he reads it, the phrase “particularly stringent” announced no new standard of review. It was simply an acknowledgment that an appellate court can and will devote more resources to analyzing district court decisions that are dispositive of the entire litigation. All evidentiary decisions are reviewed under an abuse-of-discretion standard. He argues, however, that it is perfectly reasonable for

appellate courts to give particular attention to those decisions that are outcome determinative.

[1] [2] [3] [4] We have held that abuse of discretion is the proper standard of review of a district court’s evidentiary rulings. *Old Chief v. United States*, 519 U.S. 172, 174 n. 1, 117 S.Ct. 644, 647 n. 1, 136 L.Ed.2d 574 (1997); *United States v. Abel*, 469 U.S. 45, 54, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984). Indeed, our cases on 142 \*142 the subject go back as far as *Spring Co. v. Edgar*, 99 U.S. 645, 658, 25 L.Ed. 487 (1879), where we said that “[c]ases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.” The Court of Appeals suggested that *Daubert* somehow altered this general rule in the context of a district court’s decision to exclude scientific evidence. But *Daubert* did not address the standard of appellate review for evidentiary rulings at all. It did hold that the “austere” *Frye* standard of “general acceptance” had not been carried over into the Federal Rules of Evidence. But the opinion also said:

“That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” 509 U.S., at 589, 113 S.Ct., at 2794–2795 (footnote omitted).

[5] [6] [7] [8] [9] [10] Thus, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the “gatekeeper” role of the trial judge in screening such evidence. A court of appeals applying “abuse-of-discretion” review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it. Compare *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 451, 102 L.Ed.2d 445 (1988) (applying abuse-of-discretion review to a lower court’s decision to exclude evidence), with *United States v. Abel*, *supra*, at 54, 105 S.Ct., at 470 (applying abuse-of-discretion review to a lower court’s decision to admit evidence). We likewise reject respondent’s argument that because the granting of summary judgment in this case 143 \*143 was “outcome determinative,” it should have

been subjected to a more searching standard of review. On a motion for summary judgment, disputed issues of fact are resolved against the moving party—here, petitioners. But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard.

**[11]** We hold that the Court of Appeals erred in its review of the exclusion of Joiner's experts' testimony. In applying an overly "stringent" review to that ruling, it failed to give the trial court the deference that is the hallmark of abuse-of-discretion review. See, e.g., *Koon v. United States*, 518 U.S. 81, 98–99, 116 S.Ct. 2035, 2046–2047, 135 L.Ed.2d 392 (1996).

### III

We believe that a proper application of the correct standard of review here indicates that the District Court did not abuse its **\*\*518** discretion. Joiner's theory of liability was that his exposure to PCB's and their derivatives "promoted" his development of small-cell lung cancer. In support of that theory he proffered the deposition testimony of expert witnesses. Dr. Arnold Schecter testified that he believed it "more likely than not that Mr. Joiner's lung cancer was causally linked to cigarette smoking and PCB exposure." App. 107. Dr. Daniel Teitelbaum testified that Joiner's "lung cancer was caused by or contributed to in a significant degree by the materials with which he worked." *Id.*, at 140.

Petitioners contended that the statements of Joiner's experts regarding causation were nothing more than speculation. Petitioners criticized the testimony of the experts in that it was "not supported by epidemiological studies ... [and was] based exclusively on isolated studies of laboratory animals." 3 Record, Doc. No. 46 (Defendants' Joint Memorandum in Support of Summary Judgment 3). Joiner responded by claiming that his experts had identified "relevant animal studies which support their opinions." 4 Record, Doc. No. 53 (Plaintiffs' Brief in Opposition to Defendants' 144 **\*144** Motion for Summary Judgment 47). He also directed the court's attention to four epidemiological studies<sup>2</sup> on which his experts had relied.

**[12]** The District Court agreed with petitioners that the animal studies on which respondent's experts relied did

not support his contention that exposure to PCB's had contributed to his cancer. The studies involved infant mice that had developed cancer after being exposed to PCB's. The infant mice in the studies had had massive doses of PCB's injected directly into their peritoneums<sup>3</sup> or stomachs. Joiner was an adult human being whose alleged exposure to PCB's was far less than the exposure in the animal studies. The PCB's were injected into the mice in a highly concentrated form. The fluid with which Joiner had come into contact generally had a much smaller PCB concentration of between 0-to-500 parts per million. The cancer that these mice developed was alveogenic adenomas; Joiner had developed small-cell carcinomas. No study demonstrated that adult mice developed cancer after being exposed to PCB's. One of the experts admitted that no study had demonstrated that PCB's lead to cancer in any other species.

Respondent failed to reply to this criticism. Rather than explaining how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies, respondent chose "to proceed as if the only issue [was] whether animal studies can ever be a proper foundation for an expert's opinion." 864 F.Supp., at 1324. Of course, whether animal studies can ever be a proper foundation for an expert's opinion was not the issue. The issue was whether *these* experts' opinions were sufficiently supported by the animal studies on which they purported to rely. The studies were so dissimilar to the facts presented in this litigation **\*145** that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them.

**[13]** The District Court also concluded that the four epidemiological studies on which respondent relied were not a sufficient basis for the experts' opinions. The first such study involved workers at an Italian capacitor<sup>4</sup> plant who had been exposed to PCBs. Bertazzi, Riboldi, Pesatori, Radice, & Zocchetti, *Cancer Mortality of Capacitor Manufacturing Workers*, 11 *American Journal of Industrial Medicine* 165 (1987). The authors noted that lung cancer deaths among ex-employees at the plant were higher than might have been expected, but concluded that "there were apparently no grounds for associating lung cancer deaths (although increased above expectations) and exposure in the plant." *Id.*, at 172. Given that Bertazzi et al. were unwilling to say that PCB exposure had caused cancer among the workers they examined, their study did

not support the experts' conclusion that Joiner's exposure to PCB's caused his cancer.

[14] The second study followed employees who had worked at Monsanto's PCB production plant. J. Zack & D. Musch, Mortality \*\*519 of PCB Workers at the Monsanto Plant in Sauget, Illinois (Dec. 14, 1979) (unpublished report), 3 Record, Doc. No. 11. The authors of this study found that the incidence of lung cancer deaths among these workers was somewhat higher than would ordinarily be expected. The increase, however, was not statistically significant and the authors of the study did not suggest a link between the increase in lung cancer deaths and the exposure to PCB's.

[15] [16] The third and fourth studies were likewise of no help. The third involved workers at a Norwegian cable manufacturing company who had been exposed to mineral oil. Ronneberg, Andersen, & Skyberg, Mortality and Incidence of Cancer Among Oil-Exposed Workers in a Norwegian Cable Manufacturing Company, 45 British Journal of Industrial \*146 Medicine 595 (1988). A statistically significant increase in lung cancer deaths had been observed in these workers. The study, however, (1) made no mention of PCB's and (2) was expressly limited to the type of mineral oil involved in that study, and thus did not support these experts' opinions. The fourth and final study involved a PCB-exposed group in Japan that had seen a statistically significant increase in lung cancer deaths. Kuratsune, Nakamura, Ikeda, & Hirohata, Analysis of Deaths Seen Among Patients with Yusho—A Preliminary Report, 16 Chemosphere, Nos. 8/9, p. 2085 (1987). The subjects of this study, however, had been exposed to numerous potential carcinogens, including toxic rice oil that they had ingested.

[17] Respondent points to *Daubert*'s language that the “focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” 509 U.S., at 595, 113 S.Ct., at 2797. He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing 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. See *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (C.A.6), cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992). That is what the District Court did here, and we hold that it did not abuse its discretion in so doing.

We hold, therefore, that abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence. We further hold that, because it was within the District Court's discretion to conclude that the studies upon which the experts relied were not 147 \*147 sufficient, whether individually or in combination, to support their conclusions that Joiner's exposure to PCB's contributed to his cancer, the District Court did not abuse its discretion in excluding their testimony. These conclusions, however, do not dispose of this entire case.

Respondent's original contention was that his exposure to PCB's, furans, and dioxins contributed to his cancer. The District Court ruled that there was a genuine issue of material fact as to whether Joiner had been exposed to PCB's, but concluded that there was no genuine issue as to whether he had been exposed to furans and dioxins. The District Court accordingly never explicitly considered if there was admissible evidence on the question whether Joiner's alleged exposure to furans and dioxins contributed to his cancer. The Court of Appeals reversed the District Court's conclusion that there had been no exposure to furans and dioxins. Petitioners did not challenge this determination in their petition to this Court. Whether Joiner was exposed to furans and dioxins, and whether if there was such exposure, the opinions of Joiner's experts would then be admissible, remain open questions. We accordingly reverse the judgment of the Court of Appeals and remand this case for proceedings consistent with this opinion.

*It is so ordered.*

\*\*520 Justice BREYER, concurring.

The Court's opinion, which I join, emphasizes *Daubert*'s statement that a trial judge, acting as “gatekeeper,” must “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Ante*, at 517 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993)). This requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer—particularly when a case arises in an area where the science itself is tentative or 148 \*148 uncertain, or where testimony about general risk levels in human beings or animals is offered to prove individual causation. Yet, as *amici* have pointed out, judges are not scientists and do not have the scientific training that can facilitate the making of such decisions. See, e.g., Brief for Trial Lawyers for Public Justice as *Amicus Curiae* 15; Brief for New England Journal of Medicine et al. as *Amici Curiae* 2 (“Judges ... are generally not trained scientists”).

Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the “gatekeeper” duties that the Federal Rules of Evidence impose—determining, for example, whether particular expert testimony is reliable and “will assist the trier of fact,” Fed. Rule Evid. 702, or whether the “probative value” of testimony is substantially outweighed by risks of prejudice, confusion or waste of time, Fed. Rule Evid. 403. To the contrary, when law and science intersect, those duties often must be exercised with special care.

Today's toxic tort case provides an example. The plaintiff in today's case says that a chemical substance caused, or promoted, his lung cancer. His concern, and that of others, about the causes of cancer is understandable, for cancer kills over one in five Americans. See U.S. Dept. of Health and Human Services, National Center for Health Statistics, Health, United States 1996–97 and Injury Chartbook 117 (1997) (23.3% of all deaths in 1995). Moreover, scientific evidence implicates some chemicals as potential causes of some cancers. See, e.g., U.S. Dept. of Health and Human Services, Public Health Service, National Toxicology Program, 1 Seventh Annual Report on Carcinogens, pp. v–vi (1994). Yet modern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate 149 \*149 strong financial incentives to reduce, or to eliminate, production, points toward the

right substances and does not destroy the wrong ones. It is, thus, essential in this science-related area that the courts administer the Federal Rules of Evidence in order to achieve the “end [s]” that the Rules themselves set forth, not only so that proceedings may be “justly determined,” but also so “that the truth may be ascertained.” Fed. Rule Evid. 102.

I therefore want specially to note that, as cases presenting significant science-related issues have increased in number, see Judicial Conference of the United States, Report of the Federal Courts Study Committee 97 (Apr. 2, 1990) (“Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation”), judges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence. Among these techniques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks. See J. Cecil & T. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706, pp. 83–88 (1993); J. Weinstein, Individual Justice in Mass Tort Litigation 107–110 (1995); cf. Kaysen, In Memoriam: Charles E. Wyzanski, Jr., 100 Harv.L.Rev. 713, 713–715 (1987) (discussing a judge's use of an economist as a law clerk in \*\*521 *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (Mass.1953), aff'd, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954)).

In the present case, the New England Journal of Medicine has filed an *amici* brief “in support of neither petitioners nor respondents” in which the Journal writes:

“[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be 150 \*150 strongly encouraged to make greater use of their inherent authority ... to appoint experts .... Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.” Brief, *supra*, at 18–19.

Cf. Fed. Rule Evid. 706 (court may “on its own motion or on the motion of any party” appoint an expert to serve

on behalf of the court, and this expert may be selected as “agreed upon by the parties” or chosen by the court); see also Weinstein, *supra*, at 116 (a court should sometimes “go beyond the experts proffered by the parties” and “utilize its powers to appoint independent experts under Rule 706 of the Federal Rules of Evidence”). Given this kind of offer of cooperative effort, from the scientific to the legal community, and given the various Rules-authorized methods for facilitating the courts' task, it seems to me that *Daubert*'s gatekeeping requirement will not prove inordinately difficult to implement, and that it will help secure the basic objectives of the Federal Rules of Evidence, which are, to repeat, the ascertainment of truth and the just determination of proceedings. Fed. Rule Evid. 102.

Justice STEVENS, concurring in part and dissenting in part.

The question that we granted certiorari to decide is whether the Court of Appeals applied the correct standard of review. That question is fully answered in Parts I and II of the Court's opinion. Part III answers the quite different question whether the District Court properly held that the testimony of plaintiff's expert witnesses was inadmissible. Because I am not sure that the parties have adequately briefed that question, or that the Court has adequately explained why the Court of Appeals' disposition was erroneous, I do not join Part III. Moreover, because a proper answer to that question requires a study of the record that can be 151 \*151 performed more efficiently by the Court of Appeals than by the nine Members of this Court, I would remand the case to that court for application of the proper standard of review.

One aspect of the record will illustrate my concern. As the Court of Appeals pointed out, Joiner's experts relied on “the studies of at least thirteen different researchers, and referred to several reports of the World Health Organization that address the question of whether PCBs cause cancer.” 78 F.3d 524, 533 (C.A.11 1996). Only one of those studies is in the record, and only six of them were discussed in the District Court opinion. Whether a fair appraisal of either the methodology or the conclusions of Joiner's experts can be made on the basis of such an incomplete record is a question that I do not feel prepared to answer.

It does seem clear, however, that the Court has not adequately explained why its holding is consistent with Federal Rule of Evidence 702,<sup>1</sup> as interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).<sup>2</sup> In general, scientific testimony that is both relevant and reliable must be admitted and testimony that is irrelevant or unreliable \*\*522 must be excluded. *Id.*, at 597, 113 S.Ct., at 2798–2799. In this case, the District Court relied on both grounds for exclusion.

The relevance ruling was straightforward. The District Court correctly reasoned that an expert opinion that exposure \*152 to PCB's, “furans” and “dioxins” together may cause lung cancer would be irrelevant unless the plaintiff had been exposed to those substances. Having already found that there was no evidence of exposure to furans and dioxins, 864 F.Supp. 1310, 1318–1319 (N.D.Ga.1994), it necessarily followed that this expert opinion testimony was inadmissible. Correctly applying *Daubert*, the District Court explained that the experts' testimony “manifestly does not fit the facts of this case, and is therefore inadmissible.” 864 F.Supp., at 1322. Of course, if the evidence raised a genuine issue of fact on the question of Joiner's exposure to furans and dioxins—as the Court of Appeals held that it did—then this basis for the ruling on admissibility was erroneous, but not because the District Judge either abused her discretion or misapplied the law.<sup>3</sup>

The reliability ruling was more complex and arguably is not faithful to the statement in *Daubert* that “[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” 509 U.S., at 595, 113 S.Ct., at 2797–2798. Joiner's experts used a “weight of the evidence” methodology to assess whether Joiner's exposure to transformer fluids promoted his lung cancer.<sup>4</sup> They did not suggest that any 153 \*153 one study provided adequate support for their conclusions, but instead relied on all the studies taken together (along with their interviews of Joiner and their review of his medical records). The District Court, however, examined the studies one by one and concluded that none was sufficient to show a link between PCB's and lung cancer. 864 F.Supp., at 1324–1326. The focus of the opinion was on the separate studies and the conclusions of the experts, not on the experts' methodology. *Id.*, at 1322 (“Defendants ... persuade the court that Plaintiffs' expert

testimony would not be admissible ... by attacking the conclusions that Plaintiffs' experts draw from the studies they cite”).

Unlike the District Court, the Court of Appeals expressly decided that a “weight of the evidence” methodology was scientifically acceptable.<sup>5</sup> To this extent, the Court of Appeals' opinion is persuasive. It is not intrinsically “unscientific” for experienced professionals to arrive at a conclusion by weighing all available scientific evidence—this is not the sort of “junk science” with which *Daubert* was concerned.<sup>6</sup> After all, as *Joiner* points out, the Environmental Protection Agency (EPA) uses the same methodology to assess risks, albeit using a somewhat \*\*523 different threshold than that required in a trial. Brief for Respondents 40–41 (quoting 154 \*154 EPA, Guidelines for Carcinogen Risk Assessment, 51 Fed.Reg. 33992, 33996 (1986)). Petitioners' own experts used the same scientific approach as well.<sup>7</sup> And using this methodology, it would seem that an expert could reasonably have concluded that the study of workers at an Italian capacitor plant, coupled with data from Monsanto's study and other studies, raises an inference that PCB's promote lung cancer.<sup>8</sup>

The Court of Appeals' discussion of admissibility is faithful to the dictum in *Daubert* that the reliability inquiry must focus on methodology, not conclusions. Thus, even though I fully agree with both the District Court's and this Court's explanation of why each of the studies on which the experts relied was by itself unpersuasive, a critical question remains unanswered: when qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible?

*Daubert* quite clearly forbids trial judges to assess the validity or strength of an expert's scientific conclusions, which is a matter for the jury.<sup>9</sup> Because I am persuaded 155 \*155 that the difference between methodology and conclusions is just as categorical as the distinction between means and ends, I do not think the statement that “conclusions and methodology are not entirely distinct from one another,” *ante*, at 519, is either accurate or helps us answer the difficult admissibility question presented by this record.

In any event, it bears emphasis that the Court has not held that it would have been an abuse of discretion to admit the expert testimony. The very point of today's holding is that the abuse-of-discretion standard of review applies whether the district judge has excluded or admitted evidence. *Ante*, at 517. And nothing in either *Daubert* or the Federal Rules of Evidence requires a district judge to reject an expert's conclusions and keep them from the jury when they fit the facts of the case and are based on reliable scientific methodology.

Accordingly, while I join Parts I and II of the Court's opinion, I do not concur in the judgment or in Part III of its opinion.

#### All Citations

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#### Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Joiner's wife was also a plaintiff in the suit and is a respondent here. For convenience, we refer to respondent in the singular.
- 2 Epidemiological studies examine the pattern of disease in human populations.
- 3 The peritoneum is the lining of the abdominal cavity.
- 4 A capacitor is an electrical component that stores an electric charge.
- 1 Rule 702 states: “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.”

- 2 The specific question on which the Court granted certiorari in *Daubert* was whether the rule of *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923), remained valid after the enactment of the Federal Rules of Evidence, but the Court went beyond that issue and set forth alternative requirements for admissibility in place of the *Frye* test. Even though the *Daubert* test was announced in dicta, see 509 U.S., at 598–601, 113 S.Ct., at 2799–2800 (REHNQUIST, C.J., concurring in part and dissenting in part), we should not simply ignore its analysis in reviewing the District Court's rulings.
- 3 Petitioners do not challenge the Court of Appeals' straightforward review of the District Court's summary judgment ruling on exposure to furans and dioxins. As today's opinion indicate, *ante*, at 519, it remains an open question on remand whether the District Court should admit expert testimony that PCB's, furans, and dioxins *together* promoted Joiner's cancer.
- 4 Dr. Daniel Teitelbaum elaborated on that approach in his deposition testimony: “[A]s a toxicologist when I look at a study, I am going to require that that study meet the general criteria for methodology and statistical analysis, but that when all of that data is collected and you ask me as a patient, Doctor, have I got a risk of getting cancer from this?’ That those studies don’t answer the question, that I have to put them all together in my mind and look at them in relation to everything I know about the substance and everything I know about the exposure and come to a conclusion. I think when I say, ‘To a reasonable medical probability as a medical toxicologist, this substance was a contributing cause,’ ... to his cancer, that that is a valid conclusion based on the totality of the evidence presented to me. And I think that that is an appropriate thing for a toxicologist to do, and it has been the basis of diagnosis for several hundred years, anyway.” Supp.App. to Brief for Respondents 19.
- 5 The court explained: “Opinions of any kind are derived from individual pieces of evidence, each of which by itself might not be conclusive, but when viewed in their entirety are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply.” 78 F.3d 524, 532 (C.A.11 1996).
- 6 An example of “junk science” that should be excluded under *Daubert* as too unreliable would be the testimony of a phrenologist who would purport to prove a defendant’s future dangerousness based on the contours of the defendant’s skull.
- 7 See, e.g., Deposition of Dr. William Charles Bailey, Supp. App. to Brief for Respondents 56 (“I’ve just reviewed a lot of literature and come to some conclusions...”).
- 8 The Italian capacitor plant study found that workers exposed to PCB's had a higher-than-expected rate of lung cancer death, though “ ‘the numbers were small [and] the value of the risk estimate was not statistically significant.’ ” 864 F.Supp. 1310, 1324 (N.D.Ga.1994). The Monsanto study also found a correlation between PCB exposure and lung cancer death, but the results were not statistically significant. *Id.*, at 1325. Moreover, it should be noted that under Georgia law, which applies in this diversity suit, Joiner need only show that his exposure to PCB's “ ‘promoted’ ” his lung cancer, not that it was the sole cause of his cancer. Brief for Respondents 7, n. 16 (quoting Brief for Appellants in No. 94–9131 (C.A.11), pp. 7–10).
- 9 The Court stated in *Daubert*: “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.... Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. Rule Civ. Proc. 56.... These conventional devices, rather than wholesale exclusion under an uncompromising general acceptance test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.” 509 U.S., at 596, 113 S.Ct., at 2798.

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

15 N.Y.3d 590, 941 N.E.2d 727, 915  
N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

\*\*1 John Giordano, Appellant

v

Market America, Inc., et al., Respondents.

Court of Appeals of New York

Argued October 13, 2010

Decided November 18, 2010

CITE TITLE AS: Giordano v Market Am., Inc.

### SUMMARY

Proceeding, pursuant to [NY Constitution, article VI, § 3 \(b\) \(9\)](#) and Rules of the Court of Appeals ([22 NYCRR](#)) § 500.27, to review a question certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: “1. Are the provisions of [N.Y. C.P.L.R. § 214-c\(4\)](#) providing for an extension of the statute of limitations in certain circumstances limited to actions for injuries caused by the latent effects of exposure to a substance? 2. Can an injury that occurs within 24 to 48 hours of exposure to a substance be considered ‘latent’ for these purposes? 3. What standards should be applied to determine whether a genuine issue of material fact exists for resolution by a trier of fact as to whether ‘technical, scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff’s] injury’ was ‘discovered, identified or determined’ for [N.Y. C.P.L.R. § 214-c\(4\)](#) purposes?”

### HEADNOTES

[Limitation of Actions](#)

[Toxic Torts](#)

[CPLR 214-c \(4\)](#) Limited to Actions for Injuries Caused by Latent Effects of Exposure to Substance

(1) The provisions of CPLR 214-c (4), which extends the statute of limitations for certain tort victims who do not, for some time, know the cause of their injuries, are limited to actions for injuries caused by the latent effects of exposure to a substance. Subdivision (2) of CPLR 214-c, providing a statute of limitations that runs from the date the injury was, or should have been, discovered, is expressly restricted to cases of injury “caused by the latent effects of exposure to any substance or combination of substances,” and subdivision (3) of that same section, relating to notice of claim requirements, contains an identical restriction. CPLR 214-c (4) requires the plaintiff or claimant to allege and prove that he or she has otherwise satisfied the requirements of subdivisions (2) and (3). Since subdivisions (2) and (3) require that the claim or action be one for injury “caused by the latent effects” of exposure, subdivision (4), on its face, also imposes a latency requirement. Even if subdivision (4) could be read otherwise—if it could be read as creating an independent exception to the general three-year statute of limitations, not one dependent on the provisions of subdivisions (2) and (3)—such a reading would be inconsistent with the statute’s history and purpose.

[Limitation of Actions](#)

[Toxic Torts](#)

“Latent Effects” Defined

(2) An injury that occurs within hours of exposure to a substance can be considered “latent” for purposes of the application of CPLR 214-c (4), which \*591 extends the statute of limitations for certain tort victims who do not, for some time, know the cause of their injuries. Using the word “latent,” defined in the dictionary as “not now visible, obvious, active, or symptomatic,” to describe a condition that exists only for hours puts no strain on its literal meaning. Moreover, although it might intuitively seem, in interpreting CPLR 214-c (4), that so brief a period of latency should be disregarded as insignificant, even a brief period of

**Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)**

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

latency can be important when the problem is one of determining an injury's cause—the problem with which CPLR 214-c (4) is concerned. Cases where a toxin's effects are latent for hours are much more likely than those in which there is no latency period to present the problem addressed by CPLR 214-c (4), and it is entirely plausible that several hours' delay in the manifestation of symptoms could lead to a delay of years in detecting an injury's cause.

**Limitation of Actions**

**Toxic Torts**

When Sufficient Information to Ascertain Cause of Injury Has Been Discovered, Identified or Determined

(3) For purposes of the application of CPLR 214-c (4), which extends the statute of limitations for certain tort victims who do not, for some time, know the cause of their injuries, “technical, scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff's] injury” is “discovered, identified or determined” within the meaning of the statute when the existence of the causal relationship is generally accepted within the relevant technical, scientific or medical community. The statute refers to the time when information is sufficient for the technical, medical or scientific community “to ascertain” the cause of an injury—not the time when a reasonable layperson or lawyer could “ascertain” the cause without consulting an expert. With respect to the level of certainty implied by the word “ascertain,” a causal relationship will be sufficiently ascertained for CPLR 214-c (4) purposes at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts.

**RESEARCH REFERENCES**

Am Jur 2d, Limitation of Actions §§ 144, 179, 180, 182.

Carmody-Wait 2d, Limitation of Actions §§ 13:74, 13:75, 13:216, 13:286–13:288.

McKinney's, CPLR 214–c.

NY Jur 2d, Limitations and Laches §§ 140, 259, 262.

Siegel, NY Prac §§ 40, 43.

**ANNOTATION REFERENCE**

See ALR Index under Limitation of Actions.

**FIND SIMILAR CASES ON WESTLAW**

Database: NY-ORCS

Query: limitation /s latent /2 effect /3 exposure & toxic /3 tort

**POINTS OF COUNSEL**

*Pollack Pollack Isaac & DeCicco*, New York City (*Brian J. Isaac* of counsel), and *Sanders Sanders Block Woycik Viener & \*592 Grossman, P.C.*, Mineola (*Martin Block* of counsel), for appellant. Triable issues of fact prevent summary resolution of the issue of untimeliness and the complaint should not be dismissed; CPLR 214-c (4) does not require a finding of latency; latency can be present where the injury occurs 24 to 48 hours after exposure to a substance; the proof in the scientific community is equivocal concerning the relationship between exposure to a substance and an injury, making summary dismissal of the complaint under the statute inappropriate. (*Giuffrida v Citibank Corp.*, 100 NY2d 72; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *Zuckerman v City of New York*, 49 NY2d 557; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395; *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931; *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96; *Rotuba Extruders v Ceppos*, 46 NY2d 223; *Andre v Pomeroy*, 35 NY2d 361; *Matter of Ocean Hill-Brownsville Governing Bd. v Board of Educ. of City of N. Y.*, 30 AD2d 447.)

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

*Fiedelman & McGaw*, Jericho (*Andrew J. Zajac* and *Neil L. Coscio* of counsel), and *Mound Cotton Wollan & Greengrass*, New York City (*Amy J. Kallal* and *Ellen G. Margolis* of counsel), for Market America, Inc., respondent.

I. CPLR 214-c (4) is limited to actions for injuries caused only by the latent effects of exposure to a substance. (*Blanco v American Tel. & Tel. Co.*, 90 NY2d 757; *Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson*, 100 NY2d 202; *Matter of New York County DES Litig.*, 89 NY2d 506; *Jensen v General Elec. Co.*, 82 NY2d 77; *Bano v Union Carbide Corp.*, 361 F3d 696; *Pompa v Burroughs Wellcome Co.*, 259 AD2d 18; *Enright v Eli Lilly & Co.*, 77 NY2d 377; *Rangolan v County of Nassau*, 96 NY2d 42; *Gonzalez v Iocovello*, 93 NY2d 539; *Mark G. v Sabol*, 93 NY2d 710.)

II. An injury that occurs within 24 to 48 hours of exposure to a substance cannot be considered “latent” for purposes of CPLR 214-c. (*In re Ephedra Prods. Liab. Litig.*, 393 F Supp 2d 181; *Bano v Union Carbide Corp.*, 361 F3d 696; *Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson*, 100 NY2d 202; *Manhattanville Coll. v James John Romeo Consulting Engr., P.C.*, 5 AD3d 637; *Dabb v NYNEX Corp.*, 262 AD2d 1079; *Di Marco v Hudson Val. Blood Servs.*, 147 AD2d 156; *Urie v Thompson*, 337 US 163; *Prego v City of New York*, 147 AD2d 165; *Asher v Unarco Material Handling, Inc.*, 596 F3d 313; *Pretus v Diamond Offshore Drilling, Inc.*, 571 F3d 478.) III. The degree of knowledge required to be “sufficient to ascertain” the cause of an injury is not medical or scientific certainty but, \*593 rather, a probable causal connection. (*Pompa v Burroughs Wellcome Co.*, 259 AD2d 18; *Whitney v Agway, Inc.*, 238 AD2d 782; *Matott v Ward*, 48 NY2d 455.) IV. The relevant group that must possess the “technical, scientific or medical” knowledge is the scientific, technical or medical community, not a plaintiff and his or her attorneys. (*Freier v Westinghouse Elec. Corp.*, 303 F3d 176; *Matter of New York County DES Litig.*, 89 NY2d 506; *MRI Broadway Rental v United States Min. Prods. Co.*, 92 NY2d 421; *Pompa v Burroughs Wellcome Co.*, 259 AD2d 18; *Lonis v Norman's Roofing & Siding Co.*, 306 AD2d 922; *Water Auth. of W. Nassau County v Lockheed*

*Martin Corp.*, 276 AD2d 624; *Annunziato v City of New York*, 224 AD2d 31.)

*Post & Post, LLC*, Berwyn, Pennsylvania (*Edward J. Stolarski, Jr.*, of counsel), for Chemins Company, Inc., respondent.

I. The findings of Judge Rakoff, that the effects of ephedra are immediate—occurring within 24 to 48 hours—and are therefore patent, are well founded and should not be disturbed. (*Bano v Union Carbide Corp.*, 361 F3d 696; *In re Ephedra Prods. Liab. Litig.*, 393 F Supp 2d 181; *Matter of New York County DES Litig.*, 89 NY2d 506; *Jensen v General Elec. Co.*, 82 NY2d 77; *Anderson v Bessemer City*, 470 US 564; *Zervos v Verizon N.Y., Inc.*, 252 F3d 163; *United States v United States Gypsum Co.*, 333 US 364; *Martin v City of Cohoes*, 37 NY2d 162; *United States v United States Smelting Refining & Mining Co.*, 339 US 186; *Campbell ex rel. Campbell v Metropolitan Prop. & Cas. Ins. Co.*, 239 F3d 179.) II. CPLR 214-c (4) is to be read in conjunction with the provisions of CPLR 214-c and requires that a plaintiff's manifestation of injury from exposure to a substance be latent in order for CPLR 214-c (4) to apply. (*Bano v Union Carbide Corp.*, 361 F3d 696; *Matter of New York County DES Litig.*, 89 NY2d 506.) III. The knowledge of the general scientific and/or medical communities, and not the knowledge of the plaintiff himself, is the recognized standard in New York to determine whether sufficient information exists to link plaintiff's injury with the substance at issue. (*Freier v Westinghouse Elec. Corp.*, 303 F3d 176; *Pompa v Burroughs Wellcome Co.*, 259 AD2d 18; *In re Ephedra Prods. Liab. Litig.*, 393 F Supp 2d 181.)

## OPINION OF THE COURT

Smith, J.

The United States Court of Appeals for the Second Circuit has asked us three questions about the interpretation of CPLR 214-c (4), which extends the statute of limitations for \*\*2 certain \*594 tort victims who do not, for some time, know the cause of their injuries. We answer the questions by holding that:

**Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)**

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

(1) the provisions of [CPLR 214-c \(4\)](#) are limited to actions for injuries caused by the latent effects of exposure to a substance;

(2) an injury that occurs within hours of exposure to a substance can be considered “latent” for these purposes; and

(3) “technical, scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff’s] injury” is “discovered, identified or determined” within the meaning of the statute when the existence of the causal relationship is generally accepted within the relevant technical, scientific or medical community.

**I**

Plaintiff suffered a series of strokes in March of 1999. The strokes were caused, we assume for present purposes, by ephedra, a substance contained in a dietary supplement that plaintiff had been using for about two years. Ephedra causes in some users a short-term elevation in blood pressure, heart rate or both, and a temporary constriction of certain blood vessels. This effect, which increases the risk of stroke, typically occurs within a few hours after ephedra is consumed.

Neither plaintiff nor the doctors who treated him for his strokes knew at the time that ephedra was to blame. When they could, or reasonably should, have known of the causal connection is disputed. The United States District Court for the Southern District of New York has found that studies published as early as 1996 suggested a link between ephedra and stroke, but that as late as 2005 scientific evidence did not establish the link “with any degree of medical or scientific ‘certainty’ ” (*In re Ephedra Prods. Liab. Litig.*, 598 F Supp 2d 535, 536 [SD NY 2009]).

Plaintiff claims that he became aware of a possible link between ephedra and stroke in February 2003, when news reports suggested that the sudden death of a major league baseball player might have been caused by ephedra. On July 28, 2003—about four

years, four months after his strokes—plaintiff sued the distributor of the product he had taken in New York State Supreme Court. The case was removed to federal court, the manufacturer of the product was added as a defendant, and the case was consolidated with other ephedra-related litigation in the Southern District of New York.

\*595 Defendants moved to dismiss the case as barred by the statute of limitations, relying on [CPLR 214 \(5\)](#), which imposes a three-year limitation period, with certain exceptions, on “an action to recover damages for a personal injury.” It is undisputed that the claim is barred by [CPLR 214 \(5\)](#) unless it is saved by the exception in [CPLR 214-c \(4\)](#), which we quote in the next section of this opinion.

Defendants' statute of limitations motion generated a series of opinions in the District Court and the Second Circuit. Initially, the District Court granted the motion to dismiss (*In re Ephedra Prods.*, 2006 WL 944705, 2006 US Dist LEXIS 18691 [SD NY 2006]). Plaintiff appealed to the Second Circuit, which remanded the case for determination of an issue the District Court had not reached (*Giordano v Market Am., Inc.*, 289 Fed Appx 467 [2d Cir 2008]). Following the District Court's ruling on that issue (*In re Ephedra Prods. Liab. Litig.*, 598 F Supp 2d 535 [SD NY 2009]), the Second Circuit certified to us the three questions that we now address (*Giordano v Market Am., Inc.*, 599 F3d 87 [2d Cir 2010]).

**II**

Directly in issue here is subdivision (4) of [CPLR 214-c](#), which refers to subdivisions (2) and (3) of the same section. The text of the three relevant subdivisions is:

“2. Notwithstanding the provisions of [section 214](#), the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

“3. For the purposes of sections fifty-e and fifty-i of the general municipal law, section thirty-eight hundred thirteen of the education law and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented within a specified \*596 period of time after the claim or action accrued, a claim or action for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property shall be deemed to have accrued on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier.

“4. Notwithstanding the provisions of subdivisions two and three of this section, where the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have \*\*3 been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided, however, if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two or three of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that

he has otherwise satisfied the requirements of subdivisions two and three of this section.”

The three questions that the Second Circuit has asked us are:

“1. Are the provisions of [N.Y. C.P.L.R. § 214-c\(4\)](#) providing for an extension of the statute of limitations in certain circumstances limited to actions for injuries caused by the latent effects of exposure to a substance?

“2. Can an injury that occurs within 24 to 48 hours of exposure to a substance be considered ‘latent’ for these purposes?

“3. What standards should be applied to determine whether a genuine issue of material fact exists for resolution by a trier of fact as to whether ‘technical, \*597 scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff’s] injury’ was ‘discovered, identified or determined’ for [N.Y. C.P.L.R. § 214-c\(4\)](#) purposes?” (599 F3d at 101.)

We answer yes to both of the first two questions; thus, our answers are favorable to defendants on question one but to plaintiff on question two. We answer question three by saying, as we explain more fully below, that the test is one of general acceptance in the relevant technical, scientific or medical community.

Question One: Is the statute limited to injuries caused by latent effects?

([1]) [CPLR 214-c](#) (2), providing a statute of limitations that runs “from the date of discovery of the injury . . . or from the date when . . . such injury should have been discovered,” is expressly restricted to cases of injury “caused by the latent effects of exposure to any substance \*\*4 or combination of substances.” [CPLR 214-c](#) (3), relating to notice of claim requirements, contains an identical restriction. The Second Circuit’s first question is, in essence, whether the same restriction is incorporated into [CPLR 214-c](#) (4), governing

**Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)**

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

cases in which “discovery of the cause of the injury” was allegedly delayed. We conclude that it is.

CPLR 214-c (4) mentions “subdivisions two and three of this section” three times. The third mention, we conclude, answers the Second Circuit's question: “[T]he plaintiff or claimant shall be required to allege and prove . . . that he has otherwise satisfied the requirements of subdivisions two and three of this section.” Since subdivisions (2) and (3) require that the claim or action be one for injury “caused by the latent effects” of exposure, subdivision (4), on its face, also imposes a latency requirement.

Even if subdivision (4) could be read otherwise—if it could be read as creating an independent exception to the general three-year statute of limitations, not one dependent on the provisions of subdivisions (2) and (3)—such a reading would be inconsistent with the statute's history and purpose. CPLR 214-c was enacted in 1986 to give relief to plaintiffs in certain toxic tort cases. Its legislative history, which we discussed in *Matter of New York County DES Litig.* (89 NY2d 506, 513-514 [1997]), shows that it was intended to overrule decisions in which we had held that toxic tort claims accrued upon exposure, even \*598 though the illness resulting from that exposure might be long delayed (see e.g. *Fleishman v Lilly & Co.*, 62 NY2d 888 [1984]; *Schwartz v Heyden Newport Chem. Corp.*, 12 NY2d 212 [1963]). The Legislature's concern when it enacted the statute was the problems raised by toxic tort cases in which the latency of a substance's effect could prevent the plaintiff from bringing a timely lawsuit.

Plaintiff stresses that the word “latent” does not appear in CPLR 214-c (4). Indeed, the words “exposure to any substance” do not appear there either. But the whole point of CPLR 214-c was to deal with substance exposure cases. No other kind of case is discussed in the legislative history, and the Governor, when he signed the bill, identified it as the “Toxic Tort Bill” (see Public Papers of Governor Cuomo, *Governor Approves Toxic Tort Bill* [July 30, 1986]). It can hardly be argued, and plaintiff does not argue, that CPLR 214-c (4)

extends beyond substance exposure cases—that for example, it would benefit a plaintiff injured by a hit and run driver or an unidentified falling object. It is thus undisputed that the words “exposure to any substance” in subdivisions (2) and (3) are incorporated into subdivision (4) of CPLR 214-c. We see no possible reading of the statute under which those words are incorporated but the word “latent” is not.

Question Two: Can an effect that appears within a matter of hours be considered “latent”?

([2]) While we think it clear that CPLR 214-c (4) is limited to injuries from “latent effects,” whether effects that are concealed only briefly count as “latent” is a harder question. The Second Circuit's question to us implies that the harmful effects of ephedra show themselves \*\*5 within “24 to 48 hours of exposure.” Opinions of the District Court suggest that the time may be even shorter—a matter of a “few hours” (*In re Ephedra Prods. Liab. Litig.*, 393 F Supp 2d 181, 193 [SD NY 2005]; see also *In re Ephedra Prods.*, 2006 WL 944705, \*1, 2006 US Dist LEXIS 18691, \*3). This discrepancy need not concern us, because we conclude that even effects concealed for a few hours may be “latent” within the meaning of the statute.

The dictionary definition of “latent” is “not now visible, obvious, active, or symptomatic” (Merriam-Webster's Collegiate Dictionary 702 [11th ed 2003]). Using that word to describe a condition that exists only for hours puts no strain on its literal meaning. But in interpreting this statute, it might intuitively seem that so brief a period of latency should be disregarded as \*599 insignificant—that, as the District Court put it in its opinion granting defendants' motion to dismiss, to treat the stroke-causing effects of ephedra as latent “would effectively eliminate the statute's limitation to ‘latent effects’ ” (*In re Ephedra Prods.*, 2006 WL 944705, \*1, 2006 US Dist LEXIS 18691, \*4). In fact, however, even a brief period of latency can be important when the problem is one of determining an injury's cause—the problem with which CPLR 214-c (4) is concerned.

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

Perhaps the task, often confronted by doctors or scientists, of finding a causal connection between exposure to a toxic substance and an injury is never an easy one. It is certainly less difficult, however, when the effect of the toxic substance can be seen immediately—when, for example, someone breaks out in a rash as soon as his skin touches a suspected toxin. Or, to suggest an example closer to this case, if plaintiff had suffered symptoms of a stroke at once upon swallowing a pill containing ephedra, his chances and those of his doctors of inferring the causal link would have been immeasurably better. Indeed, if that had occurred, it seems highly likely that plaintiff could have discovered the cause of his injury within the normal three-year limitation period. But because his symptoms showed themselves hours later, it may have been very hard to say whether ephedra and the strokes were causally connected.

Thus cases where a toxin's effects are latent for hours are much more likely than those in which there is no latency period to present the problem addressed by CPLR 214-c (4): a difficulty in promptly learning the cause of an injury. It is entirely plausible that several hours' delay in the manifestation of symptoms could lead to a delay of years in detecting an injury's cause. It thus seems reasonable that the authors of CPLR 214-c (4) would have considered even a few hours of latency enough to justify the extension of the statute of limitations authorized by that subdivision.

Defendants, and our dissenting colleagues, argue otherwise, contending that, as we said in *New York County DES*, the legislative history of CPLR 214-c shows that the Legislature that enacted it was concerned with long-term latency—with plaintiffs who were unaware that they had been injured “until after the limitations period had expired” (89 NY2d at 514 [internal quotation marks omitted]). There is no doubt that the problem of injuries that go \*\*6 undiscovered for years was the Legislature's primary concern. But that was not its sole concern, for if it was there was no need to enact subdivision (4) of \*600 CPLR 214-c at all. That subdivision benefits only those plaintiffs and claimants who,

having already discovered they were injured, have not discovered “the cause of the injury.” A few hours of latency might well cause a plaintiff to be in such a predicament—as plaintiff here says he was.

Defendants, and the dissenters, argue in substance that the benefits of CPLR 214-c (4) should be afforded only to those plaintiffs and claimants who also benefit from CPLR 214-c (2) or (3)—i.e., those who cannot discover their injury within the limitations period. But the statute does not say that, and we see no reason to read it in that way. Defendants' and the dissent's reading would produce anomalous results. Those who benefit from subdivisions (2) and (3) may bring suits or make claims many years, even decades, after their exposure to a substance. For such plaintiffs and claimants, it is undisputed, the already-long delay can be extended by subdivision (4) for up to another six years (five years from the discovery of the injury to the discovery of its cause, plus another year to sue or file a claim). But defendants and the dissenters would deny the benefit of subdivision (4) to plaintiffs, like the present one, whose injuries are discovered within hours of exposure—even though subdivision (4) would effectively require those plaintiffs to sue no more than six years after that exposure.

In other words, for plaintiffs like the present one, subdivision (4) would replace the three-year tort statute of limitations with at most a six-year statute—an extension less generous to plaintiffs, and risking less hardship to defendants, than the indefinite extensions that can result from long-term latency. Defendants and the dissent would have us read the statute to countenance extremely old claims, but to bar relatively fresh ones. We reject that reading.

Question Three: What standards apply to the issue of when sufficient information “to ascertain the cause” of an injury has been “discovered, identified or determined”?

The Second Circuit's third question arises from CPLR 214-c (4)'s requirement that plaintiff “allege and prove that technical, scientific or medical

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined” before the expiration of the otherwise-applicable limitation period. That question calls on us to resolve two possible ambiguities noted by both the District Court and the Second Circuit: Is it the plaintiff and his lawyers or the technical, scientific or medical community that must be able to \*601 “ascertain the cause of his injury”? And what level of certainty is implied by the word “ascertain”? Both aspects of this question have been previously addressed by New York courts.

([3]) As to the first of them, we said in *New York County DES*: “It is apparent from the over-all statutory plan . . . that only the technical knowledge of the scientific and medical communities [was] to be considered in determining whether the injured's delay following the discovery of injury should be excused” \*\*7 (89 NY2d at 515). We now reaffirm that the statute refers to the time when information is sufficient for the technical, medical or scientific community “to ascertain” the cause of an injury. It is not reasonable to extend the statute of limitations until the time when a reasonable layperson or lawyer could “ascertain” the cause without consulting an expert—in many cases, that time might never come. Plaintiff suggests that the statute of limitations in his case did not begin to run until the relevant scientific findings were publicized in the non-expert community, but the statute's language does not create a “publicity” test. We see no unfairness in requiring that injured people who want to protect their rights seek out expert advice, rather than waiting for the media to bring a possible cause of the injury to their attention.

The other aspect of the Second Circuit's third question—the issue of what level of certainty “to ascertain” implies—is not one we have previously discussed. We generally agree, however, with the Appellate Division's comments on that issue in *Pompa v Burroughs Wellcome Co.* (259 AD2d 18 [3d Dept 1999]). The statute “does not require medical certainty or information sufficient to prevail at trial, but does entail showing that sufficient information

and knowledge existed to enable the medical or scientific community to ascertain the probable causal relationship between the substance and plaintiff's injury” (*id.* at 24).

Making the Appellate Division's “probable causal relationship” test a bit more specific, we hold that the test is one of general acceptance of that relationship in the relevant technical, scientific or medical community. That test is familiar to New York lawyers and judges. Our courts follow *Frye v United States* (293 F 1013 [DC Cir 1923]) in making “general acceptance” the test for admitting expert testimony about scientific principles or discoveries (see *People v LeGrand*, 8 NY3d 449, 457 [2007]; *People v Wesley*, 83 NY2d 417, 422 [1994]). Thus, under our holding today a causal relationship will be sufficiently ascertained for CPLR 214-c (4) purposes at, but not before, the \*602 point at which expert testimony to the existence of the relationship would be admissible in New York courts.

The above, we believe, answers the Second Circuit's third question: “What standards should be applied?” We have not been asked to, and do not, apply those standards to the facts of this case. The federal courts dealing with this and related cases are more familiar than we with the science relating to the effects of ephedra, and are thus better able to perform that task.

Accordingly, the first and second questions should be answered in the affirmative, and the third question should be answered in accordance with this opinion.

Read, J. (dissenting). The majority opines that “effects [of an exposure to substances] concealed for a few hours may be ‘latent’ ” for purposes of CPLR 214-c because “even a brief period of latency can be important when the problem is one of determining an injury's cause” (majority op at 598, 599). In effect, the majority defines effects as “latent” so long as symptoms do not appear “as soon as [someone's] skin touches a suspected toxin” or “at once upon swallowing a pill” (*id.* at 599). And

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

whatever “as soon as” and “at once” may mean, it would seem to be something less than the 24 to 48 hours referred to in the second certified question. This approach finds no support in the statutory text or legislative history, which uniformly demonstrate that [section 214-c](#) was intended to relieve the plight of plaintiffs who became sick long after their *initial* exposure to a toxic substance, which is when their causes of action would otherwise accrue.

I

A latent disease is generally understood to be an illness that does not manifest clinically diagnosable symptoms until years after initial exposure to the disease-causing agent (*see e.g.* David Schottenfeld and Joanna F. Haas, *Carcinogens in the Workplace*, in *Cancer Causing Chemicals*, at 23 [N. Irving Sax ed 1981]). And as we have recounted numerous times, the Legislature enacted [CPLR 214-c](#) to “overcome the effect of a line of Court of Appeals decisions,” beginning with [Schmidt v Merchants Despatch Transp. Co.](#) (270 NY 287 [1936]), which held that the claims of plaintiffs suffering from latent diseases “accrue [d] upon ‘impact’ or exposure even though the resulting illness [might not have been] manifested for a long time thereafter” (\*603 [Matter of New York County DES Litig.](#), 89 NY2d 506, 513 [1997] [emphasis added]; *see also* [Snyder v Town Insulation](#), 81 NY2d 429, 433 [1993] [noting that *Schmidt* and its progeny addressed the “question of how accrual should be determined when an injury was latent and went undiscovered until long after exposure” (emphasis added)]; [Consorti v Owens-Corning Fiberglas Corp.](#), 86 NY2d 449, 454 [1995] [reviewing history of Court’s adherence to “the *Schmidt* rule fixing the occurrence of tortious injury as the date when the toxic substance *invades or is introduced into the body*” (emphasis added)]). As a result of the *Schmidt* rule, the three-year statute of limitations in [CPLR 214](#) (5) lapsed before these plaintiffs even became aware they were sick.

To remedy this injustice, the Legislature adopted [CPLR 214-c](#), which replaced the *Schmidt* rule in such cases with a rule of accrual keyed to

“the discovery of the manifestations or symptoms of the latent disease that the harmful substance produced” ([Matter of New York County DES Litig.](#), 89 NY2d at 514). [Section 214-c](#), adopted as a part of a larger tort reform package (L 1986, ch 682), reflected numerous compromises. In particular, the bills passed by the Assembly in the run-up to the Legislature’s adoption of [CPLR 214-c](#) invariably provided for accrual not only upon discovery of the injury, but also upon discovery of the injury’s cause. For example, in 1984 the Assembly passed Assembly Bill A3547-A, which called for commencement of an action for personal injuries attributable to the latent effects of exposure to a substance “within two years from the date \*8 of discovery of the illness or injury, or the date of death, or the discovery of the cause of such injury, illness, or death, whichever is later” (emphases added). By contrast, the Senate majority’s versions of a time-of-discovery rule did not require discovery of causation before the statute of limitations would begin to run (*see generally* Steven L. White, Note, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 *Fordham Urb L J* 113, 154-160 [1984-1985]).

The Legislature ultimately compromised on this issue and adopted related time-of-discovery provisions for actions brought by plaintiffs to recover for latent injuries, [CPLR 214-c](#) (2) and (4). [CPLR 214-c](#) (2) enacts a three-year statute of limitations commencing upon a plaintiff’s discovery (actual or constructive) of latent injuries from exposure to a substance. This provision assumes that the plaintiff knows the cause of the injuries at the time they are discovered—i.e., become manifest (*see generally* \*604 [Matter of New York County DES Litig.](#), 89 NY2d at 513 [“That [CPLR 214-c](#) (2)’s reference to ‘discovery of the injury’ was intended to mean discovery of the condition on which the claim was based and nothing more is . . . apparent from the legislative history of the provision”]).

[Section 214-c](#) (4), which “has to be read in conjunction with subdivision 2” (McLaughlin,

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C214-c:4, at 634 [1990 ed]; see also *New York Adopts a "Discovery" Rule for Exposure Cases—And Even Offers a Short Time in Which to Revive Expired Claims*, Siegel, NY St L Dig, No. 321, at 1 [Sept. 1986]), specifies that if the cause of the injury is discovered less than five years after the injury is suffered, the plaintiff may commence an action within one year after identifying the cause. In order to take advantage of section 214-c (4), however, the plaintiff must show that there was insufficient medical or scientific information available to make out the injury's cause within the three-year period otherwise prescribed in CPLR 214-c (2) (see *id.* [commenting that "(t)he issues of causation and knowledge on which this alternative time measure depends will often generate heavy fact disputes . . . likely to be intertwined with the merits"]).

The majority acknowledges that "[t]here is no doubt that the problem of injuries that go undiscovered for years was the Legislature's primary concern," but then adds that this was not the Legislature's

"sole concern, for if it was there was no need to enact subdivision (4) of CPLR 214-c at all. That subdivision benefits only those plaintiffs . . . who, having already discovered they were injured, have not discovered 'the cause of the injury.' A few hours of latency might well cause a plaintiff to be in such a predicament" (majority op at 599-600).

As Judge McLaughlin (coincidentally a member of the Second Circuit panel in this case) observed, "[i]t need not be said that [CPLR 214-c (4)] is a complicated statute," which "reeks of the midnight oil of political compromise. And the draftsmanship cannot be described \*\*9 as commendable" (McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C214-c:4, at 635 [1990 ed]). There is no suggestion in the statutory text or the legislative history or the contemporary commentary, however, that the Legislature adopted section 214-c (4) \*605 to address any effects of

exposure to substances so long as the cause was difficult to figure out when the injuries became manifest, as the majority concludes. Rather, the Legislature was concerned only with the latent effects of exposure—i.e., latent diseases triggered by (but manifest well after) an initial (and sometimes prolonged) exposure to a toxic substance. Section 214-c (2) and (4) simply represent the compromise struck by the Assembly and the Senate to reconcile their differing time-of-discovery rules for latent diseases, previously discussed.

The majority further speculates that "it seems reasonable that the authors of CPLR 214-c (4) would have considered even a few hours of latency enough to justify the extension of the statute of limitations authorized by that subdivision" (majority op at 599). If this was part of the authors' design, they kept it well hidden. The statute's legislative history evidences only a desire to enact a time-of-discovery rule for plaintiffs afflicted with latent diseases, such as workers exposed to asbestos or the adult daughters of mothers who ingested DES during pregnancy, not a free-floating intention to alter the accrual rule in every case where a disease's etiology is difficult to divine.

## II

In this case, the scientific evidence does not provide a sound basis for a jury to conclude that plaintiff's strokes were a latent effect of his exposure to dietary supplements containing ephedra. At least, this is what I glean from the District Court's opinion addressing general causation (see *In re Ephedra Prods. Liab. Litig.*, 393 F Supp 2d 181 [SD NY 2005]), handed down in the consolidated ephedra litigation, and the same Judge's later decision concluding that this plaintiff's lawsuit was time-barred.

Ephedra is a plant that contains several chemically related biologically active substances known as ephedrine alkaloids. The ephedra products at issue in the consolidated litigation combined ephedra with caffeine, and were marketed to consumers seeking weight loss, increased energy and improved

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

athletic performance (*id.* at 185-186). The District Court Judge conducted a *Daubert* hearing to assess, as particularly relevant here, whether evidence might be introduced at trial that dietary supplements containing ephedra/ephedrine cause strokes.

After a two-week evidentiary hearing at which various scientists testified as generic experts for plaintiffs and the defense, the District Court Judge concluded that none of plaintiffs' experts would be permitted to testify "with any \*606 degree of medical or scientific 'certainty' " that ephedra causes strokes (*id.* at 187). He did, however, also rule that some of plaintiffs' experts would be permitted to testify (based on such things as animal studies, analogous human studies, and plausible theories of the biological mechanisms involved) that there was a reliable basis to \*\*10 believe that ephedra might be a contributing cause of strokes in people with, for example, high blood pressure or a genetic sensitivity to ephedra—provided that such experts qualified their testimony with the acknowledgment that none of this had been the subject of a definitive study and might in the future be disproved (*id.* at 186-187).

The biologically plausible theory about how ephedra might cause injury—one of the factors that persuaded the District Court Judge to allow some of plaintiffs' generic experts to offer an opinion that ephedra might be a contributing cause of strokes in susceptible individuals—was that ephedra was known to "stimulate cardiovascular activity and constrict blood vessels, thereby increasing stress on the heart and circulatory system" (*id.* at 194; see also *id.* at 192 n 8 [discussing hypothesis that heart attacks, strokes or sudden death might be triggered by the coincidence of peak events, such as transient peak blood pressure due to other causes, occurring at the same time as peak ephedrine blood level]). The Judge also noted that ephedra is short-acting (*id.* at 193).

The District Court Judge subsequently dismissed plaintiff's complaint as time-barred under CPLR 214-c. He specifically commented that

"evidence admitted during the Court's extensive *Daubert* hearings showed that ephedra acts within a few hours to cause a *transitory elevation* of blood pressure and heart rate and a *temporary constriction* of certain blood vessels. . . . Experts designated by [plaintiff] have submitted reports stating that *these immediate effects* of ephedra may likely be a contributing cause of stroke in some people" (*In re Ephedra Prods.*, 2006 WL 944705, \*1, 2006 US Dist LEXIS 18691, \*3-4 [SD NY 2006] [emphases added]).

He then cited a decision by the Second Circuit holding that an injury manifest "within a few weeks" after exposure to a toxic substance was latent and therefore governed by section 214-c (2006 WL 944705 at \*1, 2006 US Dist LEXIS 18691 at \*4). The \*607 Judge observed, however, that "[b]y contrast" with this decision, "researchers in a study of ephedra and stroke . . . did not consider stroke patients to have been relevantly exposed . . . unless they used [ephedra] within three days before their stroke"; and that "indeed, because of ephedra's short-acting properties, the researchers studied strokes that occurred within 24 hours after using ephedra." (*Id.*) He therefore concluded that "[t]o hold § 214-c applicable to a stroke allegedly caused by ephedra would effectively eliminate the statute's limitation to 'latent effects.'" (*Id.*)

In other words, based upon scientific evidence adduced at the *Daubert* hearing and credited by the District Court Judge, he concluded that any stroke attributable to ephedra would have been caused by an exposure occurring shortly (24 hours to three days) beforehand. This is because ephedra is short-acting and its effects transitory, not permanent; therefore, it is not biologically plausible for plaintiff's strokes to have been caused by his initial exposure to ephedra, or the cumulative effect of his exposures over time. As a result, plaintiff's strokes were not a latent disease within the meaning of section 214-c (4). \*\*11

Plaintiff's attorney argues in his reply brief that "assuming latency is a requirement for applying

Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

[CPLR 214-c (4)], same is present because the stroke resulted from ingestion of the product over time”; and that “plaintiff did become ill after using Ephedra based products for two years.” \* In other words, he proposes that it was, in fact, plaintiff’s initial and repeated exposures to ephedra over a two-year period which rendered him susceptible to a stroke by effecting permanent physiological change, presumably by creating a condition of permanently elevated blood pressure. I simply do not think the District Court Judge accepted as reasonably based on good science the notion that ephedra might act on the human body to cause a stroke in this manner (*see e.g.* 393 F Supp 2d at 194 [noting three points on which the scientific evidence is “sparse and inconclusive”]). If I am wrong about that, I would agree with plaintiff that section 214-c (4) governs the timeliness of his cause of action, and \*608 that this would be the case whether he suffered a stroke 24 hours or 24 years after he last ingested ephedra.

### III

The majority’s interpretation of section 214-c (4)—divorcing it from whether the exposure to a substance may have caused a latent disease and focusing solely on the lapse of time from last exposure to manifestation of illness—creates a number of practical problems. The Second Circuit asked if injuries occurring within 24 to 48 hours after exposure to a substance were “latent” within the meaning of section 214-c. In response, the majority holds that “an injury that occurs *within hours* of exposure to a substance can be considered ‘latent’ for these purposes” (majority op at 594 [emphasis added]). Is “within hours” the same as 24 to 48 hours, or is it a shorter period of time? What about 12 hours? Eight hours? Presumably, “within hours” must mean at least two hours, or does it? Is this purely a legal judgment, or is scientific evidence relevant? When an effect occurs “within hours” of exposure to a substance, does it matter whether a scientist would consider such an effect to be latent?

The majority acknowledges that a disease is not latent if symptoms appear “as soon as” or “at

once” upon exposure. Indeed, the majority almost has to make this concession or it would be even more obvious than it already is that section 214-c (4) now covers lawsuits relating to the “effects”—not just the “latent” effects—of exposure to a substance, despite the majority’s answer to the first certified question. But what do “as soon as” or “at once” mean in this context? Most substances that are ingested, for example, are not instantaneously absorbed. \*\*12 Does whether an injury is latent depend upon scientific evidence about how quickly a substance is taken up in the body or reaches a certain concentration in the blood?

It is difficult to predict the practical effects of the majority opinion. Certainly we now have a six-year statute of limitations in New York, running from the date an injury becomes manifest, for every purported side effect of a drug or other substance that may be ingested, subject to the restrictions in section 214-c (4)—the five-year and one-year limits and the necessity for proof about the state of medical or scientific evidence at the relevant time. Because there is no reason to believe that the Legislature had any such result in mind when it enacted CPLR 214-c (4), I respectfully dissent.

\*609 Chief Judge Lippman and Judges Ciparick and Jones concur with Judge Smith; Judge Read dissents in a separate opinion in which Judges Graffeo and Pigott concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

### FOOTNOTES

**Giordano v Market Am., Inc., 15 N.Y.3d 590 (2010)**

941 N.E.2d 727, 915 N.Y.S.2d 884, 2010 N.Y. Slip Op. 08382

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Footnotes

- \* Plaintiff's attorney does not indicate how frequently plaintiff may have ingested ephedra over a two-year period. The District Court Judge noted that the label on one of the ephedra products did not state any maximum period for continuing the daily "suggested use" of up to 96 milligrams, while a competing product recommended a maximum daily dosage for a healthy adult of no more than 100 milligrams in a 24-hour period for not more than 12 weeks ([393 F Supp 2d at 194 n 10](#)).

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Declined to Extend by Washington v. Kellwood Co., S.D.N.Y., April 21, 2015

2010 WL 4892646

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.

HO MYUNG MOOLSAN, CO. LTD., Plaintiff,  
v.  
MANITOU MINERAL WATER, INC., Defendant.

No. 07 Civ. 07483(RJH).

|  
Dec. 2, 2010.

### MEMORANDUM OPINION AND ORDER

RICHARD J. HOLWELL, District Judge.

\*1 Plaintiff, Ho Myung Moolsan (“Moolsan”), a South Korean mineral water reseller, brought this breach of contract action against defendant Manitou Mineral Water (“Manitou”), a mineral water manufacturer based out of Colorado and New York. At trial ending November 1, 2010, a unanimous jury returned a verdict for defendant on liability for all claims. This opinion sets forth the Court's reasoning for the following rulings made before and during trial:

1. Prior to trial, plaintiff alleged that the United Nations Convention on Contracts for the International Sale of Goods applied to this action. Because the parties consented by their litigation conduct to apply New York law, the Court applied New York law to the case.

2. Plaintiff alleged that the contract in question was an output contract. Defendant countered that the contract was an installment contract. Because the Court found that the contract authorized delivery by separate lots, the Court agreed with defendant that the contract was an installment contract.

3. Prior to trial, defendant moved *in limine* to preclude plaintiff from introducing the testimony or report of their damages expert, Don Smith. Smith's report calculated plaintiff's lost profits to be over \$133 million. Because the

report was speculative and unreliable, usurped the role of the jury, or was not a proper subject for expert testimony, the Court excluded the report and precluded Smith from testifying.

4. At trial, defendant objected to plaintiff's offer of PX 90A.14. This exhibit consisted of documents purportedly summarizing plaintiff's sales activity in Korea. Because the offered documents were admittedly created not during the period of sales but instead after litigation began and were inherently unreliable, and because underlying documents allegedly establishing sales were in existence but never produced during discovery, the Court excluded PX 90A.14.

5. At the close of plaintiff's case, defendant moved under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law that plaintiff could not establish lost profits. Because plaintiff presented no admissible expert testimony going to lost profits and because plaintiff's remaining documents going to lost profits (PX 90A.15) were speculative and unreliable sales projections, the Court ruled that plaintiff could not establish lost profits.

6. Faced with the Court's ruling that it could not recover lost profits, plaintiff sought to recover those precluded damages as “lost sales.” Because the Court could find no authority distinguishing the two for the purpose of plaintiff's damages claim, the Court ruled that plaintiff could not recover “lost sales.”

7. Plaintiff sought to recover, as compensatory damages, \$500,000 it allegedly paid and lost under the contract but that defendant claimed it never received. Because that \$500,000 loss was not proximately caused by defendant's breach of contract, the Court precluded plaintiff from seeking to recover that \$500,000 from defendant.

\*2 8. During defendant's case, plaintiff moved to amend its complaint under Federal Rules of Civil Procedure 15(a) and 15(b) to add claims for fraud in the inducement of the contract and for negligent misrepresentation. Because these issues were not raised in the pleadings or pre-trial order, were not tried with the parties' consent, and had already been disposed of, and because any amendment would have been futile, the motion was denied.

## DISCUSSION

### I. New York Law Applies To This Action

Plaintiff filed its initial six count complaint on August 20, 2007. (Compl. at 14.) The relevant count for breach of contract was explicitly brought [u]nder [s]tate [l]aw. (Compl. at 11.) In unsuccessfully seeking a preliminary injunction, plaintiff relied exclusively on New York law. (See, e.g., Pl.s Mem. dated Oct. 10, 2007.) And on appeal of this Courts denial of its motion for a preliminary injunction, plaintiff again relied upon New York law. See *Ho Myung Moolsan Co. Ltd. v. Manitou Mineral Water, Inc.*, 316 Fed. Appx. 40 (2d Cir.2009). Thereafter, plaintiff was granted leave to amend its complaint and, once again, alleged breach of contract “[u]nder [s]tate [l]aw.” (First Amend. Compl. at 15.) Nevertheless, following the close of discovery, plaintiff moved for summary judgment on its amended complaint, alleging for the first time that the United Nations Convention on Contracts for the International Sale of Goods (CISG) governed the dispute. (Pl.s Mot. for Summ. J. dated Dec. 30, 2009, attach. 2 at 6–7.) On June 29, 2010, the Court, applying New York law denied plaintiffs motion and granted defendants motion for summary judgment on all claims except for plaintiffs breach of contract claim. (Order of June 25, 2010 at 1–2.)

In its proposed final pretrial order, plaintiff again asserted that the CISG applied. Defendant objected, arguing that plaintiff had consented to the application of New York law. Defendant cited *Walter E. Heller Co. v. Video Innovations, Inc.*, 730 F.2d 50 (2d Cir.1984) to support this contention. That case found that though a lease stated it was to be interpreted under Illinois law, the district courts application of New York law was not error because in the court below and in their original briefs in this Court, the parties relied primarily upon New York authorities to support their respective contentions. *Video Innovations*, 730 F.2d at 52. In other words, the parties to litigation [had] consent[ed] by their conduct to the law to be applied [namely, New York law despite the contracts Illinois choice of law clause]. *Id.*; see also *In re Cross Media Marketing Corp.*, 367 B.R. 435, 453 (Bankr.S.D.N.Y.2007) (finding New York law consented to on all of the state law causes of action alleged [because] [n]one of the parties raised any choice of law issues in the pleadings [and] ... [f]or the most part, the parties briefed the issues applying New York law.).

The Court applied New York law to this dispute because, as demonstrated above, plaintiff had relied exclusively on New York law, and not the CISG, until after the close of discovery. Most importantly, plaintiff alleged, and retained after amending its pleading, a claim for Breach of Supply Agreement *Under State Law*. (Compl. at 11 (emphasis added); First Amend Compl. at 15 (emphasis added).) While application of the CISG may have been appropriate, plaintiff by its actions had consented to the application of the N.Y.U.C.C. and it was far too late to withdraw that consent without undue prejudice to defendant. Moreover, as plaintiff expressly admitted that the CISG and the N.Y.U.C.C. were in all material respects the same, and that the only difference was in the notice requirement before bringing suit, (Tr. of Hrg of Oct. 21, 2010 at 12), it seems that even had the Court applied the CISG, the course of the case would not have changed.

### II. The Contract Was An Installment Contract

\*3 The parties signed a contract for the sale of mineral water on December 1, 2005. (Def.s Trial Ex. 1) Under the Contract, defendant agreed to sell a distribution right for its mineral water to plaintiff for \$500,000 and agreed to sell mineral water to plaintiff at \$1 per one-liter bottle. (*Id.* 3, 5.) Plaintiff also made an advance payment of \$1 million for mineral water inventory. (*Id.* 3.) The contract was to run for five years. (*Id.* 4.) After the first year, plaintiff was required to make minimum yearly orders of \$1 million worth of water. (*Id.*) Plaintiff was additionally required to place its orders, in writing, normally 3 months in advance. (*Id.* 5.) And payment on orders was also to be made in advance. (*Id.* 4) Plaintiff argued that this writing constituted an output contract while defendant argued it was an installment contract.

Generally, a contract is void under the Uniform Commercial Code if it does not specify a quantity term. N.Y.U.C.C. 2–201 cmt. 1. A minimum quantity term, like the \$1 million minimum for years two-through-five in the contract in question in this case, is satisfactory. *Corning Inc. v. VWR Int'l, Inc.*, No. 05–CV–6532 CJS, 2007 WL 841780, at \*6 (W.D.N.Y.2007) (citing *Nora Beverages, Inc. v. Perrier Group of America, Inc.*, 164 F.3d 736, 749 (2d Cir.1998)). When a contract contains a quantity term but allows for delivery in separate lots separately accepted, it is an installment contract. N.Y.U.C.C. 2–612(1); *Stinnes Interoil, Inc. v. Apex Oil Co.*, 604 F.Supp. 978, 979–81 (S.D.N.Y.1985). A breach of the entire contract occurs only when a non-conformity or default

with respect to one or more installments substantially impairs the value of the whole contract. N.Y.U.C.C. 2-612(3). This standard for determining breach differs from that for single-lot contracts in that, for the latter, if the goods or the tender of delivery fail in any way to conform to the contract, a breach has occurred and a buyer may reject the goods and cease performing under the contract. N.Y.U.C.C. 2-601; *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Finance Corp.*, 567 F.Supp.2d 579, 592 n.93 (S.D.N.Y.2008). Additionally, a breach of an individual installment occurs when the default in question substantially reduces or impairs the value, to the buyer, of that shipment. *Arkla Energy Resources v. Roye Realty Developing Corp.*, 9 F.3d 855, 862-63 (10th Cir.1993); 15 Williston on Contracts 45:22.

As this district has recognized, the definition of an installment contract includes coverage of installment deliveries tacitly authorized by the circumstances or by the option of either party. N.Y.U.C.C. 2-612 cmt. 1; see *Fashionwear (PVT) Ltd. v. Regatta (U.S.A.) LLC*, No. 03 Civ. 5597(JFK), 2006 WL 695256, at \*3 n.1 (S.D.N.Y. March 17, 2006). Each delivery of a separate lot need not even be separately paid for. N.Y.U.C.C. 2-612 N.Y. annot. 1. Additionally, a contract that:

provides that deliveries are to be made only at times authorized and chosen by the buyer, without specifying the times for delivery, may also properly be treated as an installment contract under the Code ... since the uncertainty of when and if the buyer will request delivery does not change the essential character of the contract.

\*4 15 Williston on Contracts 45:2 (4th ed.2010). Finally, the lack of a regular shipment schedule does not preclude a contracts characterization as an installment contract. *Id.*

Contracts that lack quantity terms but instead specify quantity based on the output of a seller, on the other hand, are also valid. N.Y.U.C.C. 2-306(1) An output contract is one that measures quantity by the output of the seller ... as may occur in good faith, except that no quantity unreasonably disproportionate to any ... normal or otherwise comparable prior output ... may be tendered or demanded. *Id.*; 3 Williston on Contracts 7:12 (4th ed. 2010) ( [A]greements by a seller to sell all the goods or

services he may produce to a buyer in exchange for the buyers agreement to purchase them are known as output contracts. Because the quantity term of an output contract varies, the test to determine breach centers on the parties good faith in producing or accepting amounts of the product in question. See N.Y.U.C.C. 2-306 cmt. 3.

The contract at issue in this case is clearly not an output contract. Defendants output does not set the contracts quantity term and defendant was not entitled to force plaintiff to accept shipments of water beyond the minimum one million bottles required to be purchased each year after the first. Moreover, the fact that defendant was likely to allocate virtually all of its capacity to filling plaintiffs orders, at least until year two when a second production line was installed, does not create an output contract in the absence of an enforceable obligation by plaintiff to accept defendants production.

The contract here is a hybrid installment-requirements contract. In the first year no minimum quantity of orders was required and the contract contained no quantity term. Instead, as both parties stated in deposition testimony, the contract called for defendant to fill whatever quantities plaintiff ordered. (Kim Dep. at 163, 171-173; Kwon Dep. at 67.) Thus in the first year the contract was a requirements contract. However, the contract's first year ended on December 1, 2006 and the alleged breach in this case occurred in the spring of 2007. After the first year, the contract required a minimum quantity of orders of \$1 million worth of water every year. In other words, during the operative period, the contract did contain a quantity term. Because delivery would only follow separate advance orders, placed by plaintiff at its discretion, after the first year the contract was an installment contract.

### III. The Smith Report Was Inadmissible

Plaintiff retained Don Smith, president of American Consulting Group, as an expert to opine on several points of contract interpretation as well as on plaintiffs measure of damages. (Pl.s Original Trial Ex. 90 (Smith Report or the Report) at 2.) Smiths Report concluded that plaintiff was not required to send formal purchase orders to defendant; that the contract was an exclusive output contract; that defendant violated plaintiffs exclusivity and trademark rights; that plaintiff did not require defendant to ship it half-liter bottles of water (as opposed to liter bottles); and that plaintiff suffered over \$133

million lost profits due to defendants breach. (*Id.* at 3–9.) Defendant contended that the first and second conclusions reached questions of contract interpretation improper for expert testimony; that the third conclusion was a legal opinion also improper for expert testimony; that the fourth conclusion was a question of fact to be decided by the jury; and that the fifth conclusion was based on unsupported speculative assumptions. (Def.s Mot. In Limine To Exclude The Testimony of Don Smith dated Sept. 20, 2010 (Def.s Smith Motion) at 4–6.) Plaintiff responded that the credibility of Smiths damages calculation was for the jury to decide and that his other conclusions were simply the facts upon which Smith relied to reach his damages calculation. (Pl.s Oppn To Def.s Motion To Exclude Testimony Of Don Smith dated Sept. 27, 2010 (Pl.s Mot. In Limine Oppn) at 3.)

\*5 Rule 702 provides:

[If] 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.

Fed.R.Evid. 702. Moreover, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Fed.R.Evid. 704(a).

District court judges must ensure the reliability and relevancy of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Relevance turns on whether the testimony would assist the trier of fact in determining whether some consequential fact is more or less probable. Fed.R.Evid. 401; *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) (explaining that a study of the moons phases might help determine whether a certain night was dark but not whether someone was unusually disposed to behave irrationally).

To ensure reliability the court must make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire*, 526 U.S. at 152. The court has broad discretion regarding both *whether* testimony is reliable and *how* to test that testimony's reliability. *Id.* The district court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. Fed.R.Evid. 702 Advisory Committees Note. At the same time, Rule 702 is not meant to exclude all imperfect expert testimony; [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *Daubert*, 509 U.S. at 596. However, [t]he trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. Fed.R.Evid. 702 Advisory Committees Note. Finally, expert testimony must not simply address lay matters which the jury is capable of understanding on its own. *In re Fosamax Products Liability Litig.*, 645 F.Supp.2d 164, 173 (S.D.N.Y.2009) ([T]he testimony is not helpful if it usurp[s] ... the role of the jury in applying [the] law to the facts before it.) (internal quotation marks and citation omitted); *see also United States v. Mejia*, 545 F.3d 179, 194 (2d. Cir.2008) (Testimony is properly characterized as expert only if it concerns matters that the average juror is not capable of understanding on his or her own.); *United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir.1994) (A district court may commit manifest error by admitting expert testimony where the evidence impermissibly mirrors the testimony offered by fact witnesses, or the subject matter of the experts testimony is not beyond the ken of the average juror.)

#### A. Smiths First Four Opinions Were Inadmissible

\*6 Smiths first opinion was that the contract did not require plaintiff to place separate and formal orders for mineral water shipments. (Smith Report at 3.) Smiths evidence supporting that opinion was (1) that the contract provided for shipments of one million bottles per year; (2) that defendant had already been paid for one million bottles; (3) that defendant was behind in their contractually-defined shipments; (4) that defendant was frequently informed of the need for more shipments; (5) that plaintiff expected monthly shipments

of 83,000 bottles; (6) that defendant did not provide those shipments; and (7) that plaintiffs president was frustrated. (*Id.* at 3–4.)

The contract states:

4) [Plaintiff] will have contract period of 5 years. After 1 year from the business commencement, orders for one million dollar or more must be placed, each year. As a general rule, inventory payment of [defendants] Water will be paid in advance.

5) [Plaintiff] will need to place its orders, in writing, normally 3 months in advance. Ex-factory price is determined at U.S. \$1 per 1L bottle.

(Def.s Trial Ex. 1.) Smiths contention that defendant was behind its contractually-defined shipments was thus baseless; the contract defines no shipment requirement. As to the remaining contentions, evaluating their truth requires no specialized knowledge and such evidence was therefore not the proper subject of expert testimony. The determinations of whether defendant was informed of the need for more shipments, whether plaintiff expected more shipments, or whether plaintiffs president was frustrated by the lack of more shipments did not require the assistance of an expert on contract construction. These were factual issues that were to be determined by evaluation of the evidence and witnesses at trial. Because the opinion misstated facts as well as usurped the jurys role, Smiths testimony on this point was excluded.

Smiths second opinion, that the contract required exclusive dealing and provision to plaintiff of 100 percent of factory output, (Smith Report at 5), was also excluded. His factual basis for the opinion, language in the earlier 2004 contracts that the Court ruled were admissible only to provide background, did not exist. Despite Smiths claim that they did, none of the contracts in question contained the word exclusive, any word derived therefrom, or any language of exclusivity. (*See* Pl.s Trial Ex. 2, Pl.s Trial Ex. 3, Def.s Trial Ex. 1.) Because Smiths first and second pieces of evidence as to why the contracts created exclusive dealerships for 100 percent output were predicated on indisputably false claims, that evidence could not bolster his conclusions reliability.

Smiths third element of evidence was his contention that paying cash to obtain a distributorship strongly supports that plaintiffs were the exclusive distributor

and/or had a 100 output contract. (Smith Report at 53). This statement, however, based solely on Smiths experience and expertise, (*Id.* at 53 n.10), could not be accepted as reliable. The entirely unsupported statement demonstrated no intellectual rigor and was not grounded in any authority. The Report provided no basis for testing the statement other than the Courts own research and the Court could find no law saying that merely paying money to obtain a distributorship creates an exclusive distributorship and/or a 100 percent output contract.

\*7 Smiths fourth piece of evidence was defense counsels admission that, as a practical matter, almost 100 percent of output would be sold to plaintiffs. (*Id.* at 54.) That admission, however, was entirely mischaracterized. Defense counsel was explaining that *despite that* virtually 100 percent of output would be allocated to the contract, the contract *was not* an output contract and *did not* require exclusivity. (Tr. of Conference of Oct. 22, 2007 at 12.)

Smiths third opinion was that defendant violated plaintiffs exclusivity and trademark rights. (*Id.* at 6–7.) As to the exclusivity rights, Smiths opinion was entirely predicated on the fact, (Pl.s Mot. In Limine Oppn at 3), that the contract created an exclusive distributorship. (Smith Report at 6.) Considering, as demonstrated above, that Smiths opinion that that relationship existed was unfounded, this opinion also lacked reliability. As to the trademark rights, how advertisements in New Jersey affected water sales in Korea was unclear. (*See Id.* at 7.)<sup>1</sup> However, should it have been true that defendant used plaintiffs trademark in some unlawful manner, then an experts opinion as to whether that infringement cost plaintiff sales might have been relevant to plaintiffs measure of damages. But because the Court found that Smiths fifth opinion, that placing plaintiffs economic loss at \$133 million, was unreliable, the Court excluded this testimony as well. Any relevance the evidence had on damages could easily have come in through fact witnesses.<sup>2</sup>

Smiths fourth opinion that plaintiff did not demand that defendant provide half-liter bottles instead of full-liter bottles was also excluded. (Smith Report at 8.) The opinion was based entirely on examinations of plaintiffs sales and marketing plans and of deposition testimony. (*Id.*) Reaching it required no specialized knowledge and usurped the jurys role as fact-finder. *See Fosamax*, 645 F.Supp.2d at 173. Furthermore, an expert witness is

prohibited from testifying on matters beyond the scope of the expertise for which he was retained because of the obvious danger of wrongly swaying the jury. *See Mejia*, 545 F.3d at 192. Smith was retained to opine on contract construction, marketing, and economic loss issues. The questions whether plaintiff did or did not make this request, and how strong that request was or was not, were irrelevant to those opinions.

#### B. Smiths Damages Calculation Was Excluded

Smiths final opinion was that plaintiff suffered \$133,293,878 in economic losses due to defendants breach. (Smith Report at 9.) Each bit of evidence Smith cited in reaching that figure was, however, speculative, contradictory, or unreliable.

First, Smith assumed (1) that plaintiffs shipment requirements would increase from one million per year in the first year to three million in the fifth, and (2) that the parties would have renewed the contract for five additional years. Smith had no evidence whatsoever that the contract would be so renewed, and Smiths opinion on the shipment increase contradicted his evidence for his first opinion that formal purchase orders were not necessary (that being that the contract called for a shipment requirement of exactly one million bottles per year). (*Id.* at 3, 9.) Second, Smiths anticipation of demand growth from one to three million bottles of water per year was doubtful when of the around 300,000 bottles provided under the contract in the first year, only half were actually sold while the other half were given away for free, and sales were made only by salesmen going door-to-door. (Dep. of Jeong Hee Kim, President of Ho Myung Moolsan, dated August 20, 2008 at 110–12.) Third, Smiths allegation that after achieving this success in Korea plaintiff would take the mineral water markets of the United States and Mexico by storm was supported by no cited authority and seemed unreasonable considering the weakness of plaintiffs sales in Korea. (Smith Report at 11.) Fourth, as a start-up company pursuing a new business venture, [e]vidence of lost profits ... receives greater scrutiny because there is no track record upon which to base an estimate. *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir.2000). Indeed, lost profits calculations for new ventures that rest on a series of assumptions and projections are generally unreliable. *See Dupont Flooring Systems, Inc. v. Discovery Zone Inc.*, No. 98 Civ.

5101(SHS), 2004 WL 1574629, at \*7 (S.D.N.Y. July 14, 2004).<sup>3</sup>

\*8 Fifth and most importantly, and precisely because new ventures lost profits claims must be judged with special scrutiny, that Smiths Report relied on no documentary evidence of any actual sales compelled the Court to exclude this testimony. Under the N.Y.U.C.C., an aggrieved buyer may recover lost profits as consequential damages under section 2–715. *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F.Supp. 1051, 1063 (S.D.N.Y.1996). To be recoverable, however, these losses must have been (1) caused by seller's default, (2) contemplated by the parties, and (3) provable with reasonable certainty. *Id.* at 1064. The third element requires that “the damages may not be merely speculative, possible or imaginary, but must be reasonably certain.” *Id.* at 1066 (quoting *Kenford Co., Inc. v. Erie County*, 493 N.E.2d 234, 235 (N.Y.1986)). Specifically, “[buyer] must produce some proof that it would have been able to sell [the product] at the purported prices and in the predicted quantity.” *Id.* at 1068. Sales records and data are acceptable proof. *Id.* A court should be “hesitant[, however,] to rely on stated assumptions as to the [amount of product] that would have been sold and the prices at which they would have been sold.” *Id.* Though lost profits calculations may, in part, rely on assumptions based on documentary support, experts' opinions on such calculations are excludable when “wrought with unsupported and speculative assumptions” of future prices, sales figures, and transactions undertaken between and individually by the parties with no documentary bases. *Id.* at 1068–70. Indeed, “[t]o award [a buyer] lost profits based on the unproved assumption that it would have sold at list price [all product] it had agreed to purchase would unjustly reward [that buyer] rather than make it whole.” *Id.* at 1070.

Here plaintiff offered no documentary evidence establishing that it made even a single sale. At the final pretrial conference the Court asked plaintiff's counsel no fewer than seven times for sales figures, revenue lines, or business ledgers. (Tr. of Hr'g of Oct. 21, 2010 at 32–35.) At best, plaintiff's counsel offered *projections* of sales. (*See Id.* at 32.) Counsel additionally explained that bookkeeping standards and practices in Korea differ from United States standards. (*Id.* at 33.) However, to the Court's simple question of: “What exhibit [does plaintiff] have that establishes the sale?” counsel answered, “Judge, I'm not

able to specifically point to any document.” (*Id.* at 34.) Furthermore, counsel continued to offer non-responsive answers to the Court’s inquiries into (1) the markup from a \$1 per bottle purchase price to a \$15 resale price (in other words a markup of fifteen-hundred percent), and (2) the fact that other mineral water was selling in Korea for \$0.60 to \$1.10. Counsel stated that the sales price used by Smith to calculate lost profits was, unsurprisingly, the plaintiff’s sales price. (*Id.* at 38.) And counsel stated that plaintiff’s water was priced twenty-five hundred to thirteen-hundred percent higher than other mineral water on the Korean market because its water was matched by “no other water in the world.” (*Id.* at 37.) In other words, plaintiff’s counsel could, like Smith, point to no documentary evidence attesting to the Report’s reliability. With such a lack of foundation, including a lack of any independent research, Smith’s Report stood for nothing more than the Court’s characterization of it as: “My client tells me I can sell three million bottles and get fifteen dollars a bottle .” (*Id.* at 39.)

\*9 If plaintiff were an established company pursuing business for which it had extensive experience or records of sales, Smith’s conclusions regarding lost profits might have satisfied reliability. But because (1) the requirements for proving a new ventures economic losses are more strict; (2) the entire predicate for Smith’s lost profits opinion was already excluded as unreliable, contradictory, or improper for expert testimony; and (3), the Report was based on no evidence of any actual sales activity; the Court excluded Smith’s ultimate opinion that plaintiff lost \$133 million in profits due to defendant’s alleged breach.<sup>4</sup>

**IV. Plaintiffs Exhibit PX 90A.14,  
Compiled Of Documents Prepared  
After Litigation Began, Was Excluded**

Plaintiff offered its original exhibit 90A.14 to support its lost profits claim. The exhibit consisted of five pages of documents. The first, bates stamped 165, was a sales plan chart for the years 2006–2010. (Pl.’s Original Trial Ex. 90A.14 at 1 (“Doc.165”).) The second, page-numbered 167, purported to be plaintiff’s parent company’s sales status of purchased mineral water. (*Id.* at 2 (“Doc.167”).) The third, page-numbered 166, purported to be plaintiff’s sales plan and expenses post–2006. (*Id.* at 3 (“Doc.166”).) The fourth, bates stamped 167, was a Korean-language version of Doc. 167; and the fifth, bates stamped 166, was a Korean-language version of Doc. 166. (*See id.* at 4–5.)

A document prepared after the events leading to the litigation took place, and for litigation purposes, without any independent indication of reliability, is often inherently unreliable and may be excluded. *See Broga v. Northeast Utilities*, 315 F.Supp.2d 212, 228 (D.Conn.2004). Business records specifically, though admissible hearsay, may be excluded when their source, information, or method of preparation appears unreliable. Fed.R.Evid. 803(6).

Doc. 165 was entitled “Sales Plan” and contained a chart of sales numbers, broken down by month, from 2006 through 2010. (Doc. 165.) Because the chart extended at least three years after litigation began, at least the majority of it appeared to be projections or plans, and not records of sales actually made. Furthermore, plaintiff admitted that only half of the 300,000 bottles provided under the contract were actually sold. Thus, the 2006 and 2007 stated sales figures, 1,000,000 and 1,596,672 respectively, must have also been projections rather than records. (*Id.*) Below those numbers, a line of text stated: “ESTIMATED TOTAL LOSS FROM SALES: \$ 80,349,304.00”. (*Id.*) At trial, out of the jury’s presence, the Court questioned plaintiff’s counsel as to that bottom line. (Tr. of Trial of October 25, 2010 at 86–87.) Plaintiff’s counsel admitted that that line was placed in the document after litigation began, and that the document containing the original chart was not produced. (*Id.* at 87–88.) The Court thus excluded Doc. 165 as unreliable in both that it was prepared after litigation began and in that it appeared to contain no factual matter recording sales that actually occurred.

\*10 Doc. 167 was excluded for much the same reasons. Plaintiff’s counsel conceded that document was a summary, prepared after litigation began, supposedly based on “voluminous” sales documents that still existed in Korea. (*Id.* at 104–06) This admission was somewhat perplexing considering defense counsel’s pre-trial requests, made at least twice in writing, for documents either establishing actual sales or going to plaintiff’s damages calculation. (*See* Defendant’s First Request For Production Of Documents dated Dec. 27, 2007 ¶ 36; Letter of Defense Counsel Michael J. Stacchini dated Sept. 3, 2008 ¶ 18.) The “voluminous” sales records, however, were never produced. Because Doc. 167 seemed to be a summary, prepared after litigation began, of sales records that themselves clearly would have been responsive to

defendant's discovery requests yet were not produced, the Court excluded this document.

Doc. 166 was excluded for the same reasons as Doc. 167. The Court noted additionally, however, that a legal fee figure was written directly on this document under the heading "Expenses." (Tr. of Trial of October 26, 2010 at 106.) When questioned, plaintiff's counsel admitted that that figure represented his fees for this litigation. (*Id.*) Therefore the document, even facially, was prepared after litigation began.

#### V. Defendant's Rule 50(a) Motion That Plaintiff Cannot Establish Lost Profits Was Granted

Federal Rule of Civil Procedure 50(a) allows a party to move for judgment as a matter of law on a particular issue. After the opposing party has rested its case, the movant requests a judicial determination that the opposing party cannot make a claim on a specific issue when taking all facts presented by the opposing party as true. Fed.R.Civ.P. 50(a). The court must find that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-movant] on the issue." *Id.*

As stated above, the lost profits of a new business venture must be established with an especially high level of certainty. *Schonfeld*, 218 F.3d at 172 (2d Cir.2000). A plaintiff claiming lost profits must "produce some proof that it would have been able to sell [the product] at the purported prices and in the predicted quantity." *Coastal Aviation*, 937 F.Supp. at 1068. Though records of actual sales can be proof going to lost profits, courts cannot rely merely on assumptions as to sales' quantity and price. *Id.*

Plaintiff could offer no expert testimony going to its lost profits claim. Plaintiff was thus forced to rely on its documentary evidence and its fact witnesses to establish those losses' existence. When offering testimony helpful to the jury and based on personal knowledge, company management may express lay opinions regarding the existence and the amount of lost profits. *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp.2d 310, 342 (S.D.N.Y.2010). At the same time, the witness must be able to point to objective bases for his opinions. *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F.Supp.2d 314, 321 n.4 (S.D.N.Y.2009). The Second Circuit has not articulated a clear standard in this regard, but the cases cited, and others, suggest that at a minimum

the witness must be able to point to some sales data or independent market report indicating that the business venture could make sales and be profitable. Other circuits, moreover, have employed a similar standard. *See U.S. Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687, 689 (8th Cir.2009) (finding no error in the district court's exclusion of the company president's lost profits testimony, based only on the company's own sales projections); *Von Der Ruhr v. Immtech Int'l Inc.*, 570 F.3d 858, 861–63, 866 (7th Cir.2009) (finding no error in the district court's exclusion of the company president's lost profits testimony and in that court's preclusion of plaintiff's lost profits theory because the testimony merely stated an expectation of future profits without any data or analysis for support).

\*11 Plaintiff's evidence going to lost profits, offered through their witness Jeong Hee Kim, president of the company, consisted of wildly speculative sales projections and was supported neither by data of actual sales nor by independent market research. Kim testified that plaintiff planned to sell its customers each two bottles of \$15 mineral water, in a highly competitive market where other mineral water seemed to be selling for between \$0.60 and \$1.10, every day, apparently *ad infinitum*, by going door-to-door and explaining the waters medicinal properties. (Tr. of Trial of October 26, 2010 at 143–45; Kim. Dep. at 108–12; Pl.'s Original Trial Ex. 90A attach. 5; Pl.'s Trial Ex. 90A.15.) This "plan" served as the basis for all of plaintiff's sales charts and projections. Plaintiff did not, however, provide a single document firmly establishing that it made even one sale. Indeed, as mentioned above plaintiff's counsel admitted he could not "specifically point" to any document confirming a single sale. (Tr. of Hr'g of Oct. 21, 2010 at 34.) Based on this record consisting solely of speculation and projection, the Court could not take as especially certain either the existence or the amount of plaintiff's lost profits. A reasonable jury not having sufficient evidence to find for plaintiff on its lost profits claim, the Court granted defendant's Rule 50(a) motion for judgment as a matter of law on that issue.

Plaintiff pointed the Court to the Wrongdoer Rule. This principle states that a party in breach of contract cannot escape damages because the amount of damages is uncertain. *Boyce v. Soundview Tech. Grp. Inc.*, 464 F.3d 376, 392 (2d Cir.2006); *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir.1977). When a plaintiff proves a breach and provides a reasonable estimate of the damages that flowed from

the breach, the burden is on defendant to overcome any uncertainty and establish a more definite damages amount. *Boyce*, 464 F.3d at 392. However, in a lost profits scenario, because the existence of damages is in question instead of the amount of damages, the wrongdoer rule applies *only after* plaintiff has established the damages existence with the requisite level of certainty. *Schonfeld*, 218 F.3d at 174–75. Thus the burden to clarify any uncertainty as to the damages amount would have shifted to defendant if, and only if, plaintiff had established with an especially high level of certainty and based on documentary evidence that it suffered lost profits. See *Point Productions A.G. v. Sony Music Entertainment, Inc.*, 215 F.Supp.2d 336, 346 n.5 (S.D.N.Y.2002). Because plaintiff here had not proved the existence of lost profits, defendant had no burden to clarify those losses amount and the Courts granting of defendants Rule 50(a) motion on lost profits was not disturbed.

#### **VI. Plaintiffs Application To Seek Lost Sales Damages Was Denied**

After ruling that plaintiff was unable to prove lost profits as a matter of law, the Court requested that plaintiff provide a statement of the damages it was still seeking. Plaintiff provided the Court with a Statement and Computation of Damages seeking (1) amounts prepaid under the contract, and (2) a range of *lost sales* between A. \$2,494,000.00 for 10 containers ordered through July 2007; or B. \$60,000,000.00 for four years of contract term, through this year, at the rate of one million minimum bottles at \$15 .00 per bottle. (Pl.s Statement of Damages dated Oct. 28, 2010 at 1 (emphasis in original).)

\*12 The Court could find no authority, and plaintiff provided none, stating that lost sales refers to anything different from lost profits or that those concepts would be analyzed in a different manner. Therefore, for the same reasons that the Court precluded plaintiff from seeking lost profits, the Court precluded plaintiff from seeking any damages of lost sales.

#### **VII. Plaintiff Was Precluded From Seeking To Recover The \$500,000 It Claims It Paid To Mr. Young–Gil Jee Pursuant To The Contract**

Plaintiff included in its Statement of Damages calculations \$2 million for on [sic] money prepaid. (Pl.s Statement of Damages dated Oct. 28, 2010 at 1.) This amount apparently included \$1 million plaintiff paid for the right

to resell water in Korea.<sup>5</sup> Defendant claimed, however, to have received only \$500,000 for the distribution right. And plaintiff has represented that it gave a \$2 million total payment to one Mr. Young–Gil Jee, an agent of the sole shareholder of plaintiff company. (Compl. in *Ho Myung Moolsan v. Young–Gil Jee*, 07 CV 4004(DMC) (D.N.J.2007) 24.) Plaintiff represented that Jee embezzled the difference of \$500,000. (*Id.*)

The Court ruled that of the \$500,000 allegedly stolen by Jee, plaintiff was entitled to no recovery from defendant. The Court allowed testimony concerning the non-operative contracts and transactions made between plaintiff and Jee and between Jee and defendant for background purposes only. (Tr. of Hrg of Oct. 21, 2010 at 27.) The Court stated numerous times that the issue for trial was defendants alleged breach of contract and not the fraud perpetuated by plaintiffs agent. (*Id.* at 25, 27.) Indeed, plaintiffs counsel agreed to offer evidence pertaining to the stolen \$500,000 only to show how much value we paid for the water rights. (*Id.* at 19.) And to the Courts statement, [Y]oure not seeking the recover that allegedly fraudulent payment of \$500,000 from [defendant], plaintiffs counsel answered, No. (*Id.*)

Moreover, as a matter of law, defendant cannot be held responsible for the stolen \$500,000. The current action was for breach of contract. Contract damages are those proximately caused by the breach. In other words, damages, including consequential damages, must be natural and reasonably foreseeable results of the breach. See *Marjan Intl Corp. v. V.K. Putnam, Inc.*, No. 92 Civ. 8531(BN), 1993 WL 541204, at \*11 (S.D.N.Y.1993); 24 Williston on Contracts 64:12 (4th ed.).

The contract breach alleged in this case occurred sometime in the early months of 2007. But Jees theft occurred in December 2004. (Compl. in *Ho Myung Moolsan v. Young–Gil Jee*, 07 CV 4004(DMC) (D.N.J.2007) 24.) In other words, the theft occurred over a year before the breach. That the loss of funds due to the theft could have been caused by the breach thus was highly unlikely. Indeed, had the contract never been breached and had these parties never found themselves in litigation, plaintiff would still have lost the stolen \$500,000 due to Jees fraud. In other words, the alleged breach of contract had no effect on the loss of the \$500,000 in question.

\*13 Furthermore, proximate causation requires that the damages be reasonably foreseeable and that imposing liability be fair. *In re Terrorist Attacks on September 11, 2001*, — F.Supp.2d —, No. 03 MDL 1570(GBD), 2010 WL 2484411, at \*28 (S.D.N.Y.2010); 24 Williston on Contracts 64:12 (4th ed). To have found defendant liable for any of the missing \$500,000 would have been to hold defendant liable for the wrongful actions of the agent of plaintiffs shareholder. But the machinations of plaintiffs owners agent seem entirely unforeseeable to defendant, and indeed perhaps foreseeable to plaintiff. To hold defendant liable for Jees fraud would have been entirely unfair considering both that unforeseeability and that defendant was not implicated in the alleged fraud. Because of that lack of proximate cause, plaintiff could not seek recovery of the \$500,000 stolen by Jee from defendant.

**VIII. Plaintiffs Motion To Amend Its Complaint To Include Claims For Fraud In The Inducement And For Negligent Misrepresentation Was Denied**

During trial plaintiff moved under Federal Rules of Civil Procedure 15(a) and 15(b) to amend its complaint to include claims for fraud in the inducement of the contract and for negligent misrepresentation. These proposed amendments were based on certain answers elicited by plaintiff's counsel through his cross examination of defendant's witness Mr. Nam-in Jhon.

As a preliminary matter, plaintiff's motion under Rule 15(a) was denied because that rule only allows amendments proposed before trial begins. Plaintiff's motion under Rule 15(b) was also denied. Rule 15(b) reads in pertinent part:

When an issue not raised by the pleadings is tried by the parties express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.

Fed.R.Civ.P. 15(b)(2). Plaintiff appeared to argue implied consent: this testimony was played out in front of the Court and the jury ..., defendant knew or had to have known [of the testimony subject matter] ... [and][t]he

testimony developed today has always been available to the defendant. (Pl.s Mot. To Amend Its Complaint dated Oct. 27, 2010 at 2–3.) Rule 15(b) motions are intended to correct the theory of an existing claim and not to assert new and different claims. *Timex Licensing Corp. v. Advance Watch Co., Ltd.*, No. 3:07-cv-01731 (VLB), 2010 WL 3169342, at \*2 (D.Conn. Aug. 10, 2010). In other words, Rule 15(b) is meant to allow the pleadings to conform to issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record. *Browning Debenture Holders Committee v. DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir.1977). A partys implied consent can be found in, for example, actually litigating an issue, prompting witness testimony on the issue, briefing the issue, or raising the issue at oral argument. *See, e.g., McQueen-Starling v. UnitedHealth Group, Inc.*, 654 F.Supp.2d 154, 168 (S.D.N.Y.2009); *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir.2010); *Timex*, 2010 WL 3169342, at \*3.<sup>6</sup>

\*14 When a partys implied consent is based on evidence presented at trial, that consent requires ongoing discussion of that issue at trial or unobjected introduction of evidence on the point by the opposing party. *Christoforou v. Cadman Plaza North, Inc.*, No. 04 CV 08403(KMW), 2009 WL 723003, at \*5 (S.D.N.Y. Mar. 19, 2009). The Second Circuit warns, however, that district courts should be cautious in inferring consent due to notice and procedural due process requirements. *Id.* at \*6 (citing *Grand Light Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir.1985)). Thus a partys alleged consent by failure to object only arises when, in addition to being unobjected-to, the issue in question was raised in a sufficiently clear and unambiguous way. *Id.* (citing *Luria Bros. Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1089–90 (2d Cir.1986)). Consent is not implied through an alleged understanding between the parties or through, for example, statements in responsive Local Rule 56.1 Statements. *Id.* Indeed, a Rule 15(b) motion on a collateral issue based on implied consent is a *narrow exception* to the established procedural principle that a partys failure to include a legal theory ... in the pre-trial order results in its subsequent abandonment or waiver. *Id.* (citing *Kozera v. Intl Bhd. of Elec. Workers, AFL-CIO*, 230 F.Supp.2d 413, 416 n.3 (S.D.N.Y.2002)). Presumably, then, an adverse witnesss answer on cross examination, given after an overruled objection, and without any indication whatsoever that the questioning

lawyer is raising or intends to raise the unpleaded legal claim, does not operate as a consent to try that issue.

In this case, plaintiffs counsel questioned one of defendants witnesses, Jhon, as to the amount of water defendants factory was producing. (Tr. of Trial of Oct. 27 at 299–301.) The questioning occurred in plaintiffs attempt to prove that defendant breached the contract by failing to fill certain orders. That defendant allegedly made misrepresentations as to the plants capacity at the time the contract was negotiated was neither clearly nor unambiguously raised, nor indeed raised at all either in plaintiff counsels presentation or in the pre-trial order. Thus defendants implied consent was lacking.

The Court denied plaintiffs motion for additional reasons.

First, the factual basis for the claims was flawed. Plaintiff contended these claims arose at trial because Jhon testified to certain factory problems causing defendants production capacity to be limited to approximately 65,000 bottles per month or 780,000 per year. (Pl.s Mot. To Amend Its Complaint dated Oct. 27, 2010 at 2.) This statement arguably gave rise to claims for fraud in the inducement and for negligent misrepresentation because, though plaintiff mentioned it nowhere in the motion, defendant allegedly knew it could not meet the contracts one-million bottle-per-year minimum production requirement. But the contract contained no such requirement for the first year, only for years two through five. Any plant and machinery problems defendant had during the first year of production did not preclude defendants from producing future contract minimums, particularly in light of defendants plans to install a second production line.

\*15 Second, no evidence had been presented regarding many of the elements of plaintiffs new claims.<sup>7</sup> Accordingly, since plaintiff could not establish a claim of either fraud in the inducement or negligent misrepresentation the amendment would have been futile and was denied for this reason as well. *Ho Myung Moolsan*

#### Footnotes

- 1 The pages of deposition testimony cited by Smith were not provided in any submission from either party.
- 2 Defendant of course was not being sued for trademark infringement but for breach of contract.
- 3 The critical newness is not of the business itself or of the logistical foundations for sales, but for the attempt to sell a new product. *Coastal Aviation Inc. v. Commander Aircraft Co.*, 937 F.Supp. 1051, 1068 (S.D.N.Y.1996).

*Co. Ltd. v. Manitou Mineral Water, Inc.*, 665 F.Supp.2d 239, 250 (S.D.N.Y.2009).

Third, the fraud in the inducement claim had been alleged, and disposed of twice in this litigation. Plaintiff's original complaint contained a claim for fraud in the inducement of the contract based on defendant's representations, made before the contract was executed, "that [defendant] [was] fully capable of providing as much water as plaintiff [ ] required for sale and distribution anywhere including the United States and Korea." (Compl.¶ 44.) Plaintiff claimed then that this was fraud because defendant withheld its knowledge that it "did not have a water production plant that was viable." (*Id.* ¶ 45.) The Court dismissed the claim because plaintiff failed to plead fraud with the particularity required by Fed.R.Civ.P. 9(b). (Order of Dec. 20, 2007 at 1; Tr. of Conf. of Dec. 20, 2007 at 4.) Thereafter, plaintiff again attempted to plead fraud in the inducement by amending its complaint. By order dated September 29, 2009, Magistrate Judge Pitman denied the motion as futile. Beyond (1) lacking the requisite particularity; (2) failing to show falsity; (3) failing to show reliance; and (4) failing to show damages; the court additionally found that the fraud in the inducement claim was merely a masquerading breach of contract claim. *Ho Myung Moolsan*, 665 F.Supp.2d at 253–54. Plaintiffs final attempt at trial to assert a fraudulent indirect claim fails for the same reasons.

## CONCLUSION

The Court thus disposed of the issues presented above for the reasons stated above.

SO ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2010 WL 4892646, 73 UCC Rep.Serv.2d 313

- 4 After the Courts decision to preclude Smiths Report, plaintiff moved for reconsideration. Plaintiff argued, again, that an expert may rely on assumptions in reaching his conclusions. Plaintiff also referred the Court to several documents, prepared *after* the events leading to this litigation occurred, purporting to be sales projections. Beyond doubt, an expert may rely on assumptions. The Courts reason for denying Smiths Report was not that it relied on assumptions, but that those assumptions were entirely unfounded and unreliable, and that that reliance was therefore misplaced. Moreover, and as explained more extensively below, the documents provided with plaintiffs motion were themselves unreliable and provided no support for Smiths assumptions. Plaintiff did not identify any controlling law or facts that the Court overlooked in reaching its decision to exclude Smiths testimony. Therefore plaintiffs motion for reconsideration was denied. See *Finkelstein v. Mardkha*, 518 F.Supp.2d 609, 611 (S.D.N.Y.2007).
- 5 The contract requires plaintiff to pay \$500,000 for the right to resell or distribute water in Korea and \$1 million as an advance on water shipments. (Def.'s Trial Ex. 1.) In two earlier non-operative versions of the contract (versions signed not by plaintiff and defendant but by defendant and Mr. Jee, an agent of plaintiff company's sole shareholder) the payment for the distribution right was stated first as \$500,000, and later as \$1 million. (Pl.'s Trial Exs. 3A & 2A.)
- 6 Plaintiff made no claim that defendant *expressly* consented to try the issue and indeed no such consent appears anywhere in the record.
- 7 Fraud in the inducement of a contract requires: (1) that the defendant made a representation; (2) as to a material existing fact; (3) which was false; (4) and known to be false by the defendant; (5) that the representation was made for the purpose of inducing the plaintiff to rely upon it; and (6) that the plaintiff reasonably did so rely; (7) in ignorance of its falsity; (8) to his injury. *Rojo v. Deutsche Bank*, No. 06 Civ. 13574(HB), 2010 WL 2560077 at \*4 n .8 (S.D.N.Y. June 23, 2010). Negligent misrepresentation requires that: (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment. *Travelers Cas. Sur. Co. v. Dormitory Authority—State of New York*, — F.Supp.2d —, No. 07 Civ. 6915(DLC), 2010 WL 3199861, at \*8 n.18 (S.D.N.Y. Aug. 11, 2010).

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Complex Litigation

# Judicial 'Gatekeeping' of Experts Has Impact

Michael Hoenig, New York Law Journal

October 14, 2016

A hat-tip to noted Kentucky trial lawyer, John L. Tate, whose article in the October 2016 issue of Law Journal Newsletters' "Product Liability Law & Strategy" newsletter is titled, "Do Daubert Motions Really Work?"<sup>1</sup> Tate, a member of that newsletter's Board of Editors, reports on the results of two sizable studies gauging the relative effectiveness of Daubert motions challenging the reliability of proffered experts. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, was the 1993 decision by the U.S. Supreme Court that ushered in a robust era of judicial "gatekeeping" and required that scientific expert testimony had to be "not only relevant but reliable."

Then, in 1997, the Supreme Court issued its decision in *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997), holding that a district court could exclude opinion evidence "that is connected to existing data only by the ipse dixit of the expert." (Ipsa dixit refers to an assertion made but not proved). Thus, when there is "too great an analytical gap between the data and the opinion proffered," the court may exclude the opinion. *Joiner*, 522 U.S. at 146. In the decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), two years later, the Supreme Court confirmed that the judicial gatekeeping obligation applied not only to testimony based on scientific knowledge but also to testimony involving technical and other specialized knowledge. Reliability of the expert's methodology was a key. And, in *Weisgram v. Marley Co.*, 528 U.S. 440, 442 (2000), the Supreme Court said that expert evidence must meet "exacting standards of reliability." Federal Evidence Rule 702 changes and the Advisory Committee note reflect these rulings.<sup>2</sup>

The foregoing developments seem weighty enough on paper. Further, experienced litigators surely have engaged in Daubert motion practice witnessing dispositive consequences from time to time. But, comprehensively speaking and across the board, has *Daubert* gatekeeping had a profound impact? That is the question Tate's article addressed, particularly in the wake of the two massive studies issued, respectively, in October 2015 and May 2016. The first study is by the Searle Civil Justice Institute of the Law & Economics Center at George Mason School of Law. The title is "Timing and Disposition of Daubert Motions in Federal District Courts: An Empirical Examination." [<http://bit.ly/2c4szHc>] This report covers the years 2003 to 2014 and examined the outcomes in some 2,127 Daubert motions from 91 federal district courts.

The second (May 2016) study was issued by PriceWaterhouseCoopers (PWC) and is titled, "Daubert Challenges to Financial Experts" [<http://pwc.to/2bQPmFz>], discussing trends and Daubert outcomes for the years 2000 to 2015 involving motions focused on financial experts in some 2,014 cases. Tate's article duly notes that the two studies are "remarkable for the number of decisions analyzed by the researchers." The PWC study on outcomes regarding financial experts is, as Tate helpfully observes (and cites), a follow-up to PWC's report in 2014 analyzing 7,299 cases involving financial expert testimony. [See <http://pwc.to/2cq57F3>] These large data sets result in some informative analyses.

## Success Rates

Tate highlights some findings in the Searle Civil Justice study. Thus, the vast majority of Daubert motions—some 71 percent—were made by defendants while plaintiffs made 29 percent. Further, nearly half of the cases involved multiple Daubert motions (averaging some 2.1 motions per case). Nearly two-thirds of the motions challenged medical or technical opinions. "Medical" experts (e.g., physicians, psychologists, toxicologists, etc.) made up 31 percent of the Daubert challenges. Engineering witnesses were the target 24 percent of the time, and accountants at 10 percent.<sup>3</sup>

As for success rates, defendants' likelihood of at least a partial grant of their motions was over 50 percent for five lawsuit categories (antitrust, contracts, torts, civil rights, RICO and consumer credit). For a so-called "full grant," i.e., a ruling giving the moving party all the relief requested by the motion, defendants won 25 percent of the time.<sup>4</sup> When plaintiffs moved on Daubert grounds, they also did well (some 40 percent obtaining some relief and 18 percent getting a "full grant.") Plaintiffs scored their best results in real property and contracts cases.<sup>5</sup>

The PWC study on Daubert challenges to financial experts, says Tate, confirms that "the most common reason" for excluding financial opinion testimony is "lack of reliability." Out of 2,014 cases analyzed, 896 cases resulted in partial or complete exclusion of financial testimony, an average exclusion rate of 44 percent. The percent partially or wholly excluded in product liability cases was 48 percent; in securities litigation, 47 percent; intellectual property, 49 percent; and bankruptcy, 47 percent.<sup>6</sup> Of the Daubert financial expert rulings appealed (some 64 appeals), a significant majority were upheld by the appellate court. (89 percent where the testimony was allowed by the trial judge; 80 percent where it was at least partially excluded).<sup>7</sup>

Even without the benefit of statistical analyses of large data sets of cases, litigators can readily see from individual cases that judicial screening of experts pursuant to *Daubert's* reliability criteria operates with considerable impact. But this does not happen automatically. Well-crafted motions are critical.

## Talc Powder

One can see dynamics of intensive judicial gatekeeping in a New Jersey state court's dismissal, on Sept. 2, of two lawsuits claiming that Johnson & Johnson's talc-based product (J&J's Baby Powder) caused the plaintiffs to develop ovarian cancer. The decision throwing the cases out is called *Carl v. Johnson & Johnson*.<sup>8</sup> The two dismissed claims are part of a deluge of more than 1,000 lawsuits filed in federal and state courts claiming defendant's talcum powder caused cancer. Two juries in St. Louis earlier this year sided with plaintiffs there and rendered large damage awards.

In the Carl case, however, New Jersey Superior Court (Atlantic County) Judge Nelson Johnson examined the expert evidence offered by each side because defendants had filed a motion to bar the testimony of plaintiffs' experts and, if this application were granted, also moved for summary judgment. Judge Johnson stated the question before the court: "Have plaintiffs shown that their experts' theories of causation are sufficiently reliable as being based on a sound, adequately-founded scientific methodology, to wit, that they are based upon methods upon which experts in their field would reasonably rely in forming their own (possibly different) opinions about the cause(s) of each plaintiff's ovarian cancers?"

The court acknowledged its role as a "gatekeeper" who must assess "whether or not the hypotheses of causation advanced by plaintiffs' experts are sufficiently reliable to be presented to a jury." The court conducted a hearing, after earlier examining reports, abstracts of epidemiology studies and peer-reviewed articles. Over 100 treatises relating to talc, cancer and miscellaneous related scientific

issues were reviewed by the court prior to and during the hearing. The court attached to its opinion Appendices A through E cataloguing a portion of the articles discussed at the hearing together with public pronouncements by agencies possessing authoritative knowledge on cancer.

The court focused on the experts' methodological deficiencies. For example, one "dazzling" expert witness for the plaintiff, Dr. Graham Colditz, could not explain the biological mechanism for how talc causes cancer. Thus, his opinion was an ipse dixit and had "all the earmarks of a made-for-litigation presentation."

The court concluded that, though eminently qualified, the experts' areas of scientific inquiry, reasoning and methodology "are slanted away from objective science and towards advocacy." The opinions failed to demonstrate "that the data or information used were soundly and reliably generated and are of a type reasonably relied upon by comparable experts." Accordingly, defendants' motions to bar the experts' testimony and for summary judgment were granted.

### **Endnotes:**

1. 35 LJM's Product Liability Law & Strategy, No. 4, pp. 3-5 (Oct. 2016).
2. For a comprehensive discussion on these and post-Daubert decisions, see my chapter, "Gatekeeping: Reliability of Expert Testimony Under Daubert (And Frye)", in the N.Y. State Bar Ass'n Book, Preparing For And Trying The Civil Lawsuit, vol. 2, chapt. 14, pp. 14-3 to 14-115 (2016 revision). For a helpful, handy guide on how to successfully use expert witnesses, see T. Budd, E. Cottle & C. Hutchinson, "Expert Witness Answer Book, 2016" (PLI), which contains extensive information on Daubert considerations in question-and-answer format.
3. See Tate, supra n. 1, at p. 3; Searle Report, at pp. 6-7.
4. See Searle Report, at pp. 8-9; Tate, supra n. 1, at p. 4.
5. Searle Report, at pp. 8-9; Tate, supra n. 1, at p. 4.
6. Tate, supra n. 1, at pp.4-5; PWC Report, at pp. 28-19 (and figure 7).
7. Tate, supra n. 1, at p. 5; PWC study, at p. 35 (and figure 15).
8. 2016 N.J. Super. Unpub. LEXIS 2102 (N.J. Super. Ct. Sept. 2, 2016).

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*Michael Hoenig is a member of Herzfeld & Rubin.*

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KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Ashland Management Inc. v. Janien, N.Y., November 22, 1993

67 N.Y.2d 257, 493 N.E.2d 234, 502 N.Y.S.2d 131

Kenford Company, Inc., Plaintiff,  
and Dome Stadium, Inc., Appellant,

v.

County of Erie et al., Respondents.

Court of Appeals of New York

57

Argued March 18, 1986;

decided May 6, 1986

CITE TITLE AS: Kenford Co. v County of Erie

### SUMMARY

Appeal from so much of an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered April 12, 1985, as modified, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Erie County, upon a verdict rendered at a Trial Term (Irving Fudeman, J.), *inter alia*, awarding plaintiff Dome Stadium, Inc. (DSI) the principal sum of \$25,643,229 against defendants. The modification consisted of, *inter alia*, setting aside that portion of the verdict which awarded DSI money damages for loss of prospective profits during the 20-year period of a proposed management contract and dismissing DSI's cause of action therefor.

*Kenford Co. v County of Erie*, 108 AD2d 132, affirmed.

### HEADNOTES

Damages

Lost Profits

Loss of Profits Not in Contemplation of Parties--Proof with Reasonable Certainty--"Rational Basis" Test

([1]) In an action for breach of contract, plaintiff Dome Stadium, Inc. (DSI) may not recover loss of prospective profits for its contemplated 20-year operation of a domed stadium which was to be constructed by defendant County of Erie. Although loss of future

profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law, DSI's proof does not satisfy the requirement that liability for loss of profits over a 20-year period was in the contemplation of the parties at the time of the execution of the basic contract or at the time of its breach. Further, despite the massive quantity of expert proof submitted by DSI, the ultimate conclusions are still projections, and as employed in the present day commercial world, subject to adjustment and modification; the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty. Moreover, the "rational basis" test for the calculation of lost profits enunciated in *Perma Research & Dev. Co. v Singer Co.* (542 F2d 111, *cert denied* 429 US 987) is rejected.

### TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Damages, §§26-29, 171 *et seq.* \*258

NY Jur 2d, Contracts, §282 *et seq.*; Damages, § 19.

### ANNOTATION REFERENCES

Vendor and purchaser: Recovery for loss of profits from contemplated sale or use of land, where vendor fails or refuses to convey. 11 ALR3d 719.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance. 17 ALR2d 1300.

### POINTS OF COUNSEL

*Victor T. Fuzak, Paul I. Perlman and Benjamin M. Zuffranieri, Jr.*, for appellant.

I. Plaintiff's proof was so compelling and conclusive as to overcome even the excessive burden of convincing a jury of Erie County taxpayers to render a substantial verdict against their County. II. Violating prescribed review standards and limitations, the court below has deprived Dome Stadium, Inc. (DSI) of its constitutional rights to trial by jury. (*Cohen v Hallmark Cards*, 45 NY2d 493; *Tripoli v Tripoli*, 83 AD2d 764; *Alfieri v Lewis Gen. Tires*, 62 AD2d 1135; *Boyle v Gretch*, 57 AD2d 1047;

*Kimberly-Clark Corp. v Power Auth.*, 35 AD2d 330; *Dobess Realty Corp. v City of New York*, 79 AD2d 348; *Terpening Trucking Co. v City of Fulton*, 46 AD2d 992; *Di Bernardo v Gunneson*, 65 AD2d 828; *Lee v Seagram & Sons*, 552 F2d 447.) III. The court below unaccountably ignored the rationale and holding of *DeLong v County of Erie* (89 AD2d 376, *aff'd* 60 NY2d 296 [1983]). (*Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205.) IV. DSI provided a rationale, and indeed peremptory, basis for the jury's determination of lost profits. (*Spitz v Lesser*, 302 NY 490; *Contemporary Mission v Famous Music Corp.*, 557 F2d 918.)

V. The court below ignored the concessions and tacit admissions of defendants' own witnesses that DSI had proven a rational basis for the assessment of its damages.

VI. The court below premised its nullification of the jury verdict on misperceptions of clear and unquestioned record proof. (*Goldman Theatres v Lowe's, Inc.*, 69 F Supp 103, 164 F2d 1021, 334 US 811; *Broadway Photoplay Co. v World Film Corp.*, 225 NY 104; *Bernstein v Meech*, 130 NY 354; *Moss v Tompkins*, 69 Hun 288, 144 NY 659.)

VII. The court below's "one variable" reading of the cases is inaccurate and untenable. (*DeLong v County of Erie*, 89 AD2d 376; *Autowest, Inc. v Peugeot, Inc.*, 434 F2d 556; *For Children v Graphics Intl.*, 352 F Supp 1280; \*259 *Lexington Prods. v B. D. Communications*, 677 F2d 251; *Bloor v Falstaff Brewing Corp.*, 601 F2d 609; *Lee v Seagram & Sons*, 552 F2d 447; *Perma Research & Dev. Co. v Singer Co.*, 402 F Supp 881, 542 F2d 111, 429 US 987; *Contemporary Mission v Famous Music Corp.*, 557 F2d 918; *Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205; *Lakota Girl Scout Council v Havey Fund-Raising Mgt.*, 519 F2d 634.) VIII. The evidence of lost profits damages was legally sufficient to support the jury verdict in favor of DSI. (*Perma Research & Dev. Co. v Singer Co.*, 402 F Supp 881, 542 F2d 111, 429 US 987; *Bloor v Falstaff Brewing Corp.*, 454 F Supp 258, 601 F2d 609; *Lee v Seagram & Sons*, 552 F2d 447; *Autowest, Inc. v Peugeot, Inc.*, 434 F2d 556; *Riley v General Mills*, 226 F Supp 780, 346 F2d 68; *Borne Chem. Co. v Dictrow*, 85 AD2d 646; *Draft Sys. v Rimar Mfg.*, 524 F Supp 1049, 688 F2d 820; *Western Geophysical Co. v Bolt Assoc.*, 584 F2d 1164.) IX. The court below minority opinion evidences a determination to afford the County preferred treatment. *John H. Stenger, Timothy C. Leixner and Joseph M. Finnerty* for respondents.

I. The dismissal of the lost profits claims of plaintiff DSI by the court below should be affirmed. (*Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205; *Cramer v*

*Grand Rapids Show Case Co.*, 223 NY 63; *Banker's Trust Co. v Steenburn*, 95 Misc 2d 967, 70 AD2d 786; *Manniello v Dea*, 92 AD2d 426; *Sam & Mary Hous. Corp. v Jol/Sal Mkt. Corp.*, 121 Misc 2d 434, 100 AD2d 901, 62 NY2d 941; *Hughes v Nationwide Mut. Ins. Co.*, 98 Misc 2d 667; *Palmer v Connecticut Ry. Co.*, 311 US 544; *Lee v Seagram & Sons*, 552 F2d 447; *Blum v Fresh Grown Preserve Corp.*, 292 NY 241.) II. The courts below erred in denying judgment to defendants and in granting summary judgment to plaintiffs on issues of liability. (*Austrian Lance & Stewart v Jackson*, 50 AD2d 735; *Ferro v Bersani*, 78 AD2d 1010, 59 NY2d 899; *Kulaga v State of New York*, 37 AD2d 58, 31 NY2d 756; *Maguire Leasing Corp. v Falb & Co.*, 49 AD2d 540; *Murphy v Erie County*, 28 NY2d 80; *Schuylkill Fuel Corp. v B. & C. Nieberg Realty Corp.*, 250 NY 304; *Gilberg v Barbieri*, 53 NY2d 285; *Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481; *Griffen v Keese*, 187 NY 454; *New York, New Haven & Hartford R. R. Co. v Village of New Rochelle*, 29 Misc 2d 195.)

## OPINION OF THE COURT

Per Curiam

The issue in this appeal is whether a plaintiff, in an action \*260 for breach of contract, may recover loss of prospective profits for its contemplated 20-year operation of a domed stadium which was to be constructed by defendant County of Erie (County).

On August 8, 1969, pursuant to a duly adopted resolution of its legislature, the County of Erie entered into a contract with Kenford Company, Inc. (Kenford) and Dome Stadium, Inc. (DSI) for the construction and operation of a domed stadium facility near the City of Buffalo. The contract provided that construction of the facility by the County would commence within 12 months of the contract date and that a mutually acceptable 40-year lease between the County and DSI for the operation of said facility would be negotiated by the parties and agreed upon within three months of the receipt by the County of preliminary plans, drawings and cost estimates. It was further provided that in the event a mutually acceptable lease could not be agreed upon within the three-month period, a separate management contract between the County and DSI, as appended to the basic agreement, would be executed by the parties, providing for the operation of the stadium facility by DSI for a period of 20 years from the completion of the stadium and its availability for use.

Although strenuous and extensive negotiations followed, the parties never agreed upon the terms of a lease, nor did construction of a domed facility begin within the one-year period or at any time thereafter. A breach of the contract thus occurred and this action was commenced in June 1971 by Kenford and DSI.

Prolonged and extensive pretrial and preliminary proceedings transpired throughout the next 10 years, culminating with the entry of an order which affirmed the grant of summary judgment against the County on the issue of liability and directed a trial limited to the issue of damages (*Kenford Co. v County of Erie*, 88 AD2d 758, lv dismissed 58 NY2d 689). The ensuing trial ended some nine months later with a multimillion dollar jury verdict in plaintiffs' favor. An appeal to the Appellate Division resulted in a modification of the judgment. That court reversed portions of the judgment awarding damages for loss of profits and for certain out-of-pocket expenses incurred, and directed a new trial upon other issues (*Kenford Co. v County of Erie*, 108 AD2d 132). On appeal to this court, we are concerned only with that portion \*261 of the verdict which awarded DSI money damages for loss of prospective profits during the 20-year period of the proposed management contract, as appended to the basic contract. That portion of the verdict was set aside by the Appellate Division and the cause of action dismissed. The court concluded that the use of expert opinion to present statistical projections of future business operations involved the use of too many variables to provide a rational basis upon which lost profits could be calculated and, therefore, such projections were insufficient as a matter of law to support an award of lost profits. We agree with this ultimate conclusion, but upon different grounds.

Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes (*Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205). In addition, there must be a showing that the particular damages were fairly within the

contemplation of the parties to the contract at the time it was made (*Witherbee v Meyer*, 155 NY 446). If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty (*Cramer v Grand Rapids Show Case Co.*, 223 NY 63; 25 CJS, Damages, § 42 [b]).

These rules must be applied to the proof presented by DSI in this case. We note the procedure for computing damages selected by DSI was in accord with contemporary economic theory and was presented through the testimony of recognized experts. Such a procedure has been accepted in this State and many other jurisdictions (*see, De Long v County of Erie*, 60 NY2d 296). DSI's economic analysis employed historical data, obtained from the operation of other domed stadiums and related facilities throughout the country, which was then applied to the results of a comprehensive study of the marketing prospects for the proposed facility in the Buffalo area. The quantity of proof is massive and, unquestionably, represents business and industry's most advanced and sophisticated \*262 method for predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by DSI in support of its attempt to establish, with reasonable certainty, loss of prospective profits. Nevertheless, DSI's proof is insufficient to meet the required standard.

The reason for this conclusion is twofold. Initially, the proof does not satisfy the requirement that liability for loss of profits over a 20-year period was in the contemplation of the parties at the time of the execution of the basic contract or at the time of its breach (*see, Chapman v Fargo*, 223 NY 32; 36 NY Jur 2d, Damages, §§ 39, 40, at 66-70). Indeed, the provisions in the contract providing remedy for a default do not suggest or provide for such a heavy responsibility on the part of the County. In the absence of any provision for such an eventuality, the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject. The evidence here fails to demonstrate that liability for loss of profits over the length of the contract would have been in the contemplation of the parties at the relevant times.

Next, we note that despite the massive quantity of expert proof submitted by DSI, the ultimate conclusions are still projections, and as employed in the present day commercial world, subject to adjustment and modification. We of course recognize that any projection cannot be absolute, nor is there any such requirement, but it is axiomatic that the degree of certainty is dependent upon known or unknown factors which form the basis of the ultimate conclusion. Here, the foundations upon which the economic model was created undermine the certainty of the projections. DSI assumed that the facility was completed, available for use and successfully operated by it for 20 years, providing professional sporting events and other forms of entertainment, as well as hosting meetings, conventions and related commercial gatherings. At the time of the breach, there was only one other facility in this country to use as a basis of comparison, the Astrodome in Houston. Quite simply, the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty.

The economic facts of life, the whim of the general public \*263 and the fickle nature of popular support for professional athletic endeavors must be given great

weight in attempting to ascertain damages 20 years in the future. New York has long recognized the inherent uncertainties of predicting profits in the entertainment field in general (*see, Broadway Photoplay Co. v World Film Corp.*, 225 NY 104) and, in this case, we are dealing, in large part, with a new facility furnishing entertainment for the public. It is our view that the record in this case demonstrates the efficacy of the principles set forth by this court in *Cramer v Grand Rapids Show Case Co.* (223 NY 63, *supra*), principles to which we continue to adhere. In so doing, we specifically reject the “rational basis” test enunciated in *Perma Research & Dev. Co. v Singer Co.* (542 F.2d 111, *cert denied* 429 US 987) and adopted by the Appellate Division.

Accordingly, that portion of the order of the Appellate Division being appealed from should be affirmed.

Chief Judge Wachtler and Judges Meyer, Alexander, Titone and Kane\* concur in Per Curiam opinion; Judges Simons, Kaye and Hancock, Jr., taking no part.

Order insofar as appealed from affirmed, with costs.

\*264

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#### Footnotes

\* Designated pursuant to NY Constitution, article VI, § 2.



KeyCite Yellow Flag - Negative Treatment

Superseded by Statute as Stated in *Rivera v. State*, Del.Supr., November 10, 2010

119 S.Ct. 1167

Supreme Court of the United States

KUMHO TIRE COMPANY, LTD., et al., Petitioners,

v.

Patrick CARMICHAEL, etc., et al.

No. 97–1709.

Argued Dec. 7, 1998.

Decided March 23, 1999.

Plaintiffs brought products liability action against tire manufacturer and tire distributor for injuries sustained when right rear tire on vehicle failed. The United States District Court for the Southern District of Alabama, No. 93–0860–CB–S, 923 F.Supp. 1514, Charles R. Butler, J., granted summary judgment for defendants, and plaintiffs appealed. The Court of Appeals for the Eleventh Circuit, 131 F.3d 1433, reversed and remanded. Defendants filed application for writ of certiorari. The Supreme Court, Justice Breyer, held that: (1) *Daubert's* “gatekeeping” obligation, requiring an inquiry into both relevance and reliability, applies not only to “scientific” testimony, but to all expert testimony; (2) when assessing reliability of engineering expert's testimony, trial court may consider the *Daubert* factors to the extent relevant; and (3) trial court did not abuse its discretion in its application of *Daubert to exclude* tire failure analyst's expert testimony that particular tire failed due to manufacturing or design defect.

Reversed.

Justice Scalia filed concurring opinion in which Justice O'Connor and Justice Thomas joined.

Justice Stevens filed opinion concurring in part and dissenting in part.

West Headnotes (7)

**[1] Evidence**

🔑 Matters involving scientific or other special knowledge in general

**Evidence**

🔑 Necessity and sufficiency

*Daubert's* “gatekeeping” obligation, requiring an inquiry into both relevance and reliability, applies not only to “scientific” testimony, but to all expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

4020 Cases that cite this headnote

**[2] Evidence**

🔑 Necessity and sufficiency

When assessing the reliability of an engineering expert's testimony, the trial court may consider the *Daubert* factors to the extent relevant, which will depend upon the nature of the issue, the expert's particular expertise, and the subject of his testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2858 Cases that cite this headnote

**[3] Evidence**

🔑 Matters involving scientific or other special knowledge in general

**Evidence**

🔑 Necessity and sufficiency

Objective of *Daubert's* “gatekeeping” requirement is to ensure the reliability and relevancy of expert testimony; it is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3735 Cases that cite this headnote

**[4] Evidence**

🔑 Necessity and sufficiency

Trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1333 Cases that cite this headnote

**[5] Federal Courts**

🔑 Expert evidence and witnesses

Court of Appeals is to apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert testimony, and when it reviews the trial court's decisions about how to determine reliability as to its ultimate conclusion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

617 Cases that cite this headnote

**[6] Evidence**

🔑 Determination of question of competency

Whether *Daubert's* specific factors are, or are not, reasonable measures of expert's reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. Fed.Rules Evid.Rules 102, 702, 28 U.S.C.A.

920 Cases that cite this headnote

**[7] Evidence**

🔑 Cause and effect

Trial court did not abuse its discretion in its application of *Daubert* to exclude tire failure analyst's expert testimony that particular tire failed due to manufacturing or design defect, on grounds that methodology employed by analyst in analyzing the data obtained in his visual and tactile examination of tire in question was unreliable, even though court did not doubt analyst's qualification as expert, where there was no evidence that other experts in the industry used analyst's particular approach with regard visual and

tactile examinations of tires, analyst's own testimony cast doubt upon reliability of both his theory and his proposition about significance of visual inspection of tire in question, and tire bore some of marks that analyst said indicated abuse, rather than defect. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

446 Cases that cite this headnote

**\*\*1169 Syllabus\***

**\*137** When a tire on the vehicle driven by Patrick Carmichael blew out and the vehicle overturned, one passenger died and the others were injured. The survivors and the decedent's representative, respondents here, brought this diversity suit against the tire's maker and its distributor (collectively Kumho Tire), claiming that the tire that failed was defective. They rested their case in significant part upon the depositions of a tire failure analyst, Dennis Carlson, Jr., who intended to testify that, in his expert opinion, a defect in the tire's manufacture or design caused the blowout. That opinion was based upon a visual and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms indicating tire abuse, the tire failure of the sort that occurred here was caused by a defect. Kumho Tire moved to exclude Carlson's testimony on the ground that his methodology failed to satisfy Federal Rule of Evidence 702, which says: "If scientific, technical, or other specialized knowledge will assist the trier of fact ..., a witness qualified as an expert ... may testify thereto in the form of an opinion." Granting the motion (and entering summary judgment for the defendants), the District Court acknowledged that it should act as a reliability "gatekeeper" under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469, in which this Court held that Rule 702 imposes a special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but reliable. The court noted that *Daubert* discussed four factors—testing, peer review, error rates, and "acceptability" in the relevant scientific community—which might prove helpful in determining the reliability of a particular scientific theory or technique, *id.*, at 593–594, 113 S.Ct. 2786, and found that those factors argued against the reliability of Carlson's methodology. On the

plaintiffs' motion for reconsideration, the court agreed that *Daubert* should be applied flexibly, that its four factors were simply illustrative, and that other factors could argue in favor of admissibility. However, the court affirmed its earlier order because it found insufficient indications of the reliability of Carlson's methodology. In reversing, the Eleventh Circuit held that the District Court had erred as a matter of law in applying *Daubert*. Believing that *Daubert* was limited to the scientific context, 138 \*138 the court held that the *Daubert* factors did not apply to Carlson's testimony, which it characterized as skill or experience based.

*Held:*

1. The *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists. Pp. 1174–1176.

(a) The *Daubert* “gatekeeping” obligation applies not only to “scientific” testimony, but to all expert testimony. Rule 702 does not distinguish between “scientific” knowledge and “technical” or “other specialized” knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule's word “knowledge,” not the words (like “scientific”) that modify that word, that establishes a standard of evidentiary reliability. 509 U.S., at 589–590, 113 S.Ct. 2786. *Daubert* referred only to “scientific” knowledge because that was the nature of the expertise there at issue. *Id.*, at 590, n. 8, 113 S.Ct. 2786. Neither is the evidentiary rationale underlying *Daubert's* “gatekeeping” determination limited to “scientific” knowledge. Rules 702 and 703 grant all expert witnesses, not just “scientific” ones, testimonial latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline. *Id.*, at 592, 113 S.Ct. 2786. Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a “gatekeeping” obligation depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge, since there is no clear line dividing the one from the others and no convincing need to make such distinctions. Pp. 1174–1175.

\*\*1170 (b) A trial judge determining the admissibility of an engineering expert's testimony *may* consider one or more of the specific *Daubert* factors. The emphasis on the word “*may*” reflects *Daubert's* description of the

Rule 702 inquiry as “a flexible one.” 509 U.S., at 594, 113 S.Ct. 2786. The *Daubert* factors do *not* constitute a definitive checklist or test, *id.*, at 593, 113 S.Ct. 2786, and the gatekeeping inquiry must be tied to the particular facts, *id.*, at 591, 113 S.Ct. 2786. Those factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. Some of those factors may be helpful in evaluating the reliability even of experience-based expert testimony, and the Court of Appeals erred insofar as it ruled those factors out in such cases. In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability. Pp. 1175–1176.

(c) A court of appeals must apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert 139 \*139 testimony. *General Electric Co. v. Joiner*, 522 U.S. 136, 138–139, 118 S.Ct. 512, 139 L.Ed.2d 508. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. See *id.*, at 143, 118 S.Ct. 512. The Eleventh Circuit erred insofar as it held to the contrary. P. 1176.

2. Application of the foregoing standards demonstrates that the District Court's decision not to admit Carlson's expert testimony was lawful. The District Court did not question Carlson's qualifications, but excluded his testimony because it initially doubted his methodology and then found it unreliable after examining the transcript in some detail and considering respondents' defense of it. The doubts that triggered the court's initial inquiry were reasonable, as was the court's ultimate conclusion that Carlson could not reliably determine the cause of the failure of the tire in question. The question was not the reliability of Carlson's methodology in general, but rather whether he could reliably determine the cause of failure of *the particular tire at issue*. That tire, Carlson conceded, had traveled far enough so that some of the tread had been worn bald, it should have been taken out of service, it had been repaired (inadequately) for punctures, and it bore some of the very marks that he said indicated, not a defect, but abuse. Moreover, Carlson's own testimony cast considerable doubt upon the

reliability of both his theory about the need for at least two signs of abuse and his proposition about the significance of visual inspection in this case. Respondents stress that other tire failure experts, like Carlson, rely on visual and tactile examinations of tires. But there is no indication in the record that other experts in the industry use Carlson's *particular* approach or that tire experts normally make the very fine distinctions necessary to support his conclusions, nor are there references to articles or papers that validate his approach. Respondents' argument that the District Court too rigidly applied *Daubert* might have had some validity with respect to the court's initial opinion, but fails because the court, on reconsideration, recognized that the relevant reliability inquiry should be "flexible," and ultimately based its decision upon Carlson's failure to satisfy either *Daubert's* factors or *any other* set of reasonable reliability criteria. Pp. 1176–1179.

131 F.3d 1433, reversed.

BREYER, J., delivered the opinion of the Court, Parts I and II of which were unanimous, and Part III of which was joined by REHNQUIST, C.J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, \*\*1171 and GINSBURG, 140 \*140 JJ. SCALIA, J., filed a concurring opinion, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 1179. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 1179.

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#### Opinion

141 \*141 Justice BREYER delivered the opinion of the Court.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the

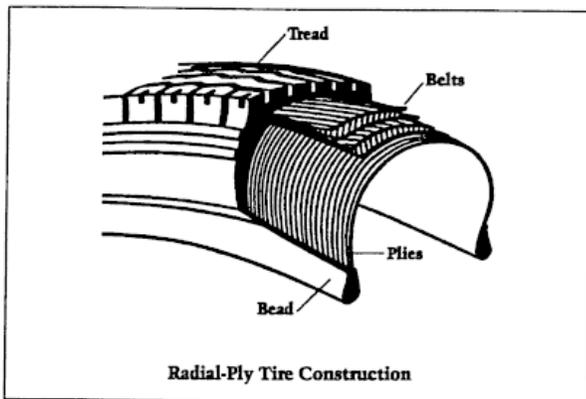
task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*, at 597, 113 S.Ct. 2786. The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.*, at 593–594, 113 S.Ct. 2786.

This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert's* general holding—setting forth the trial judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. 142 \*142 Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination). Applying these standards, we determine that the District Court's decision in this case—not to admit certain expert testimony—was within its discretion and therefore lawful.

#### I

On July 6, 1993, the right rear tire of a minivan driven by Patrick Carmichael blew out. In the accident that followed, one of the passengers died, and others were severely injured. In October 1993, the Carmichaels brought this diversity suit against the tire's maker and its distributor, whom we refer to collectively as Kumho Tire, claiming that the tire was defective. The plaintiffs rested their case in significant part upon deposition testimony provided by an expert in tire failure analysis, Dennis Carlson, Jr., who intended to testify in support of their conclusion.

Carlson's depositions relied upon certain features of tire technology that are not in dispute. A steel-belted radial tire like the Carmichaels' is made up of a "carcass" containing many layers of flexible cords, called "plies," along which (between the cords and the outer tread) are laid steel strips called "belts." Steel wire loops, called "beads," hold the cords together at the plies' bottom edges. An outer layer, called the "tread," encases the carcass, and the entire tire is bound together in rubber, through the application of heat and various chemicals. See generally, e.g., J. Dixon, *Tires, Suspension and Handling* 68–72 (2d ed.1996). The bead of the tire sits upon a "bead seat," which is part of the wheel assembly. That assembly contains a "rim flange," which extends over the bead and rests against the side of the 143 \*143 tire. See M. Mavrigian, *Performance Wheels & Tires* 81, 83 (1998) (illustrations).



\*\*1172 Carlson's testimony also accepted certain background facts about the tire in question. He assumed that before the blowout the tire had traveled far. (The tire was made in 1988 and had been installed some time before the Carmichaels bought the used minivan in March 1993; the Carmichaels had driven the van approximately 7,000 additional miles in the two months they had owned it.) Carlson noted that the tire's tread depth, which was  $11/32$  of an inch when new, App. 242, had been worn down to depths that ranged from  $3/32$  of an inch along some parts of the tire, to nothing at all along others. *Id.*, at 287. He conceded that the tire tread had at least two punctures which had been inadequately repaired. *Id.*, at 258–261, 322.

Despite the tire's age and history, Carlson concluded that a defect in its manufacture or design caused the blowout. He rested this conclusion in part upon three premises which,

144 \*144 for present purposes, we must assume are not in dispute: First, a tire's carcass should stay bound to the inner side of the tread for a significant period of time after its tread depth has worn away. *Id.*, at 208–209. Second, the tread of the tire at issue had separated from its inner steel-belted carcass prior to the accident. *Id.*, at 336. Third, this "separation" caused the blowout. *Ibid.*

Carlson's conclusion that a defect caused the separation, however, rested upon certain other propositions, several of which the defendants strongly dispute. First, Carlson said that if a separation is *not* caused by a certain kind of tire misuse called "overdeflection" (which consists of underinflating the tire or causing it to carry too much weight, thereby generating heat that can undo the chemical tread/carcass bond), then, ordinarily, its cause is a tire defect. *Id.*, at 193–195, 277–278. Second, he said that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain physical symptoms. These symptoms include (a) tread wear on the tire's shoulder that is greater than the tread wear along the tire's center, *id.*, at 211; (b) signs of a "bead groove," where the beads have been pushed too hard against the bead seat on the inside of the tire's rim, *id.*, at 196–197; (c) sidewalls of the tire with physical signs of deterioration, such as discoloration, *id.*, at 212; and/or (d) marks on the tire's rim flange, *id.*, at 219–220. Third, Carlson said that where he does not find *at least two* of the four physical signs just mentioned (and presumably where there is no reason to suspect a less common cause of separation), he concludes that a manufacturing or design defect caused the separation. *Id.*, at 223–224.

Carlson added that he had inspected the tire in question. He conceded that the tire to a limited degree showed greater wear on \*\*1173 the shoulder than in the center, some signs of "bead groove," some discoloration, a few marks on the rim flange, and inadequately filled puncture holes (which can also cause heat that might lead to separation). \*145 *Id.*, at 256–257, 258–261, 277, 303–304, 308. But, in each instance, he testified that the symptoms were not significant, and he explained why he believed that they did not reveal overdeflection. For example, the extra shoulder wear, he said, appeared primarily on one shoulder, whereas an overdeflected tire would reveal equally abnormal wear on both shoulders. *Id.*, at 277. Carlson concluded that the tire did not bear at least two of the four overdeflection symptoms, nor was there any less obvious cause of separation; and since neither

overdeflection nor the punctures caused the blowout, a defect must have done so.

Kumho Tire moved the District Court to exclude Carlson's testimony on the ground that his methodology failed Rule 702's reliability requirement. The court agreed with Kumho that it should act as a *Daubert*-type reliability "gatekeeper," even though one might consider Carlson's testimony as "technical," rather than "scientific." See *Carmichael v. Samyang Tires, Inc.*, 923 F.Supp. 1514, 1521–1522 (S.D.Ala.1996). The court then examined Carlson's methodology in light of the reliability-related factors that *Daubert* mentioned, such as a theory's testability, whether it "has been a subject of peer review or publication," the "known or potential rate of error," and the "degree of acceptance ... within the relevant scientific community." 923 F.Supp., at 1520 (citing *Daubert*, 509 U.S., at 589–595, 113 S.Ct. 2786). The District Court found that all those factors argued against the reliability of Carlson's methods, and it granted the motion to exclude the testimony (as well as the defendants' accompanying motion for summary judgment).

The plaintiffs, arguing that the court's application of the *Daubert* factors was too "inflexible," asked for reconsideration. And the court granted that motion. *Carmichael v. Samyang Tires, Inc.*, Civ. Action No. 93–0860–CB–S (S.D.Ala., June 5, 1996), App. to Pet. for Cert. 1c. After reconsidering the matter, the court agreed with the plaintiffs that *Daubert* should be applied flexibly, that its four factors were 146 \*146 simply illustrative, and that other factors could argue in favor of admissibility. It conceded that there may be widespread acceptance of a "visual-inspection method" for some relevant purposes. But the court found insufficient indications of the reliability of

"the component of Carlson's tire failure analysis which most concerned the Court, namely, the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis." *Id.*, at 6c.

It consequently affirmed its earlier order declaring Carlson's testimony inadmissible and granting the defendants' motion for summary judgment.

The Eleventh Circuit reversed. See *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (1997). It "review[ed] ... *de novo*" the "district court's legal decision to apply *Daubert*."

*Id.*, at 1435. It noted that "the Supreme Court in *Daubert* explicitly limited its holding to cover only the 'scientific context,' " adding that "a *Daubert* analysis" applies only where an expert relies "on the application of scientific principles," rather than "on skill- or experience-based observation." *Id.*, at 1435–1436. It concluded that Carlson's testimony, which it viewed as relying on experience, "falls outside the scope of *Daubert*," that "the district court erred as a matter of law by applying *Daubert* in this case," and that the case must be remanded for further (non-*Daubert*-type) consideration under Rule 702. 131 F.3d, at 1436.

Kumho Tire petitioned for certiorari, asking us to determine whether a trial court "may" consider *Daubert*'s specific "factors" when determining the "admissibility of an engineering expert's testimony." Pet. for Cert. i. We granted certiorari in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon "scientific" knowledge, but rather upon "technical" or "other specialized" \*147 knowledge. Fed. Rule Evid. 702; compare, *e.g.*, *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990–991 (C.A.5 1997), with, *e.g.*, \*\*1174 *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518–1519 (C.A.10), cert. denied, 519 U.S. 1042, 117 S.Ct. 611, 136 L.Ed.2d 536 (1996).

## II

### A

[1] In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony ... is not only relevant, but reliable." 509 U.S., at 589, 113 S.Ct. 2786. The initial question before us is whether this basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony. See Brief for Petitioners 19; Brief for Respondents 17.

For one thing, Rule 702 itself says:

"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.”

This language makes no relevant distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In *Daubert*, the Court specified that it is the Rule’s word “knowledge,” not the words (like “scientific”) that modify that word, that “establishes a standard of evidentiary reliability.” 509 U.S., at 589–590, 113 S.Ct. 2786. Hence, as a matter of language, the Rule applies its reliability standard to all “scientific,” “technical,” or “other specialized” matters within its scope. We concede that the Court in *Daubert* referred only to “scientific” knowledge. But as the Court there said, it referred to “scientific” \*148 testimony “because that [wa]s the nature of the expertise” at issue. *Id.*, at 590, n. 8, 113 S.Ct. 2786.

Neither is the evidentiary rationale that underlay the Court’s basic *Daubert* “gatekeeping” determination limited to “scientific” knowledge. *Daubert* pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the “assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.” *Id.*, at 592, 113 S.Ct. 2786 (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to “scientific” ones.

Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases. Cf. Brief for National Academy of Engineering as *Amicus Curiae* 9 (scientist seeks to understand nature while the engineer seeks nature’s modification); Brief for Rubber Manufacturers Association as *Amicus Curiae* 14–

16 (engineering, as an “ ‘applied science,’ ” relies on “scientific reasoning and methodology”); Brief for John Allen et al. as *Amici Curiae* 6 (engineering relies upon “scientific knowledge and methods”).

Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called “general truths derived from ... specialized experience.” Hand, \*149 Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L.Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert’s testimony often will rest “upon an experience confessedly foreign in kind to [the jury’s] own.” *Ibid.* The trial judge’s effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate \*\*1175 that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

We conclude that *Daubert*’s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, “establishes a standard of evidentiary reliability.” 509 U.S., at 590, 113 S.Ct. 2786. It “requires a valid ... connection to the pertinent inquiry as a precondition to admissibility.” *Id.*, at 592, 113 S.Ct. 2786. And where such testimony’s factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has “a reliable basis in the knowledge and experience of [the relevant] discipline.” 509 U.S., at 592, 113 S.Ct. 2786.

## B

Petitioners ask more specifically whether a trial judge determining the “admissibility of an engineering expert’s testimony” may consider several more specific factors that *Daubert* said might “bear on” a judge’s gatekeeping determination. Brief for Petitioners i. These factors include:

—Whether a “theory or technique ... can be (and has been) tested”;

—Whether it “has been subjected to peer review and publication”;

—Whether, in respect to a particular technique, there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation”; and

150— \*150 Whether the theory or technique enjoys “ ‘general acceptance’ ” within a “ ‘relevant scientific community.’ ” 509 U.S., at 592–594, 113 S.Ct. 2786.

Emphasizing the word “may” in the question, we answer that question yes.

[2] Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. See, e.g., Brief for Stephen N. Bobo et al. as *Amici Curiae* 23 (stressing the scientific bases of engineering disciplines). In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise. See Brief for United States as *Amicus Curiae* 18–19, and n. 5 (citing cases involving experts in drug terms, handwriting analysis, criminal *modus operandi*, land valuation, agricultural practices, railroad procedures, attorney’s fee valuation, and others). Our emphasis on the word “may” thus reflects *Daubert*’s description of the Rule 702 inquiry as “a flexible one.” 509 U.S., at 594, 113 S.Ct. 2786. *Daubert* makes clear that the factors it mentions do *not* constitute a “definitive checklist or test.” *Id.*, at 593, 113 S.Ct. 2786. And *Daubert* adds that the gatekeeping inquiry must be “ ‘tied to the facts’ ” of a particular “case.” *Id.*, at 591, 113 S.Ct. 2786 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (C.A.3 1985)). We agree with the Solicitor General that “[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” Brief for United States as *Amicus Curiae* 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

\*151 *Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*’s general acceptance factor help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

\*\*1176 At the same time, and contrary to the Court of Appeals’ view, some of *Daubert*’s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert’s experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

We must therefore disagree with the Eleventh Circuit’s holding that a trial judge may ask questions of the sort *Daubert* mentioned only where an expert “relies on the application of scientific principles,” but not where an expert relies “on skill- or experience-based observation.” 131 F.3d, at 1435. We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match.

[3] [4] 152 \*152 To say this is not to deny the importance of *Daubert*’s gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in *Daubert*, the particular

questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.

[5] [6] The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." 522 U.S., at 138–139, 118 S.Ct. 512. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for \*153 153 "truth" and the "jus[t] determin[ation]" of proceedings. Fed. Rule Evid. 102. Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. See *Joiner, supra*, at 143, 118 S.Ct. 512. And the Eleventh Circuit erred insofar as it held to the contrary.

### III

[7] We further explain the way in which a trial judge "may" consider *Daubert's* factors by applying these considerations to the case at hand, a matter that has been briefed exhaustively by the parties and their 19 *amici*. The District Court did not doubt Carlson's qualifications, which included a masters degree in mechanical engineering, 10 years' work at Michelin

America, Inc., and testimony as a tire failure consultant in other tort cases. Rather, it excluded the testimony because, despite those qualifications, it initially \*\*1177 doubted, and then found unreliable, "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis." Civ. Action No. 93–0860–CB–S (S.D.Ala., June 5, 1996), App. to Pet. for Cert. 6c. After examining the transcript in "some detail," 923 F.Supp., at 1518–1519, n. 4, and after considering respondents' defense of Carlson's methodology, the District Court determined that Carlson's testimony was not reliable. It fell outside the range where experts might reasonably differ, and where the jury must decide among the conflicting views of different experts, even though the evidence is "shaky." *Daubert*, 509 U.S., at 596, 113 S.Ct. 2786. In our view, the doubts that triggered the District Court's initial inquiry here were reasonable, as was the court's ultimate conclusion.

For one thing, and contrary to respondents' suggestion, the specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused 154 \*154 the tire's tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson's particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*. That matter concerned the likelihood that a defect in the tire at issue caused its tread to separate from its carcass. The tire in question, the expert conceded, had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that the expert said indicated, not a defect, but abuse through overdeflection. See *supra*, at 1172; App. 293–294. The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation.

Nor was the basis for Carlson's conclusion simply the general theory that, in the absence of evidence of abuse, a defect will normally have caused a tire's separation. Rather, the expert employed a more specific theory to establish the existence (or absence) of such abuse. Carlson testified precisely that in the absence of *at least two* of four signs of abuse (proportionately greater tread wear on the shoulder; signs of grooves caused by the beads; discolored

sidewalls; marks on the rim flange), he concludes that a defect caused the separation. And his analysis depended upon acceptance of a further implicit proposition, namely, that his visual and tactile inspection could determine that the tire before him had not been abused despite some evidence of the presence of the very signs for which he looked (and two punctures).

For another thing, the transcripts of Carlson's depositions support both the trial court's initial uncertainty and its final conclusion. Those transcripts cast considerable doubt upon the reliability of both the explicit theory (about the need for two signs of abuse) and the implicit proposition (about the significance of visual inspection in this case). Among other things, the expert could not say whether the tire had traveled \*155 more than 10, or 20, or 30, or 40, or 50 thousand miles, adding that 6,000 miles was "about how far" he could "say with any certainty." *Id.*, at 265. The court could reasonably have wondered about the reliability of a method of visual and tactile inspection sufficiently precise to ascertain with some certainty the abuse-related significance of minute shoulder/center relative tread wear differences, but insufficiently precise to tell "with any certainty" from the tread wear whether a tire had traveled less than 10,000 or more than 50,000 miles. And these concerns might have been augmented by Carlson's repeated reliance on the "subjective[ness]" of his mode of analysis in response to questions seeking specific information regarding how he could differentiate between a tire that actually had been overdeflected and a tire that merely looked as though it had been. *Id.*, at 222, 224–225, 285–286. They would have been further augmented by the fact that Carlson said he had inspected the tire itself for the first time the morning of his first deposition, and then only for a few hours. (His initial conclusions were based on photographs.) *Id.*, at 180.

**\*\*1178** Moreover, prior to his first deposition, Carlson had issued a signed report in which he concluded that the tire had "not been ... overloaded or underinflated," not because of the absence of "two of four" signs of abuse, but simply because "the rim flange impressions ... were normal." *Id.*, at 335–336. That report also said that the "tread depth remaining was  $\frac{3}{32}$  inch," *id.*, at 336, though the opposing expert's (apparently undisputed) measurements indicate that the tread depth taken at various positions around the tire actually ranged from  $\frac{5}{32}$  of an inch to  $\frac{4}{32}$  of an inch, with the tire apparently

showing greater wear along *both* shoulders than along the center, *id.*, at 432–433.

Further, in respect to one sign of abuse, bead grooving, the expert seemed to deny the sufficiency of his own simple visual-inspection methodology. He testified that most tires have some bead groove pattern, that where there is reason 156 \*156 to suspect an abnormal bead groove he would ideally "look at a lot of [similar] tires" to know the grooving's significance, and that he had not looked at many tires similar to the one at issue. *Id.*, at 212–213, 214, 217.

Finally, the court, after looking for a defense of Carlson's methodology as applied in these circumstances, found no convincing defense. Rather, it found (1) that "none" of the *Daubert* factors, including that of "general acceptance" in the relevant expert community, indicated that Carlson's testimony was reliable, 923 F.Supp., at 1521; (2) that its own analysis "revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*," App. to Pet. for Cert. 4c; and (3) that the "parties identified no such factors in their briefs," *ibid.* For these three reasons *taken together*, it concluded that Carlson's testimony was unreliable.

Respondents now argue to us, as they did to the District Court, that a method of tire failure analysis that employs a visual/tactile inspection is a reliable method, and they point both to its use by other experts and to Carlson's long experience working for Michelin as sufficient indication that that is so. But no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience. Nor does anyone deny that, as a general matter, tire abuse may often be identified by qualified experts through visual or tactile inspection of the tire. See Affidavit of H.R. Baumgardner 1–2, cited in Brief for National Academy of Forensic Engineers as *Amicus Curiae* 16 (Tire engineers rely on visual examination and process of elimination to analyze experimental test tires). As we said before, *supra*, at 1977, the question before the trial court was specific, not general. The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors "in deciding the particular issues in the case." 4 J. McLaughlin, Weinstein's Federal Evidence ¶ 702.05[1], p. 702–33 (2d ed.1998); see also Advisory 157 \*157 Committee's Note on Proposed Fed. Rule Evid. 702, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and

Evidence: Request for Comment 126 (1998) (stressing that district courts must “scrutinize” whether the “principles and methods” employed by an expert “have been properly applied to the facts of the case”).

The particular issue in this case concerned the use of Carlson's two-factor test and his related use of visual/tactile inspection to draw conclusions on the basis of what seemed small observational differences. We have found no indication in the record that other experts in the industry use Carlson's two-factor test or that tire experts such as Carlson normally make the very fine distinctions about, say, the symmetry of comparatively greater shoulder tread wear that were necessary, on Carlson's own theory, to support his conclusions. Nor, despite the prevalence of tire testing, does anyone refer to any articles or papers that validate Carlson's approach. Cf. Bobo, *Tire Flaws and Separations, in Mechanics of Pneumatic Tires* 636–637 (S. Clark ed.1981); C. Schnuth, R. Fuller, G. Follen, G. Gold, & J. Smith, *Compression Grooving and Rim Flange Abrasion as Indicators of Over-Deflected Operating Conditions in Tires*, presented to Rubber Division of the American Chemical Society, Oct. 21–24, 1997; J. Walter & R. Kiminecz, *Bead \*\*1179 Contact Pressure Measurements at the Tire-Rim Interface*, presented to the Society of Automotive Engineers, Inc., Feb. 24–28, 1975. Indeed, no one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion here. Of course, Carlson himself claimed that his method was accurate, but, as we pointed out in *Joiner*, “nothing 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.” 522 U.S., at 146, 118 S.Ct. 512.

158 \*158 Respondents additionally argue that the District Court too rigidly applied *Daubert's* criteria. They read its opinion to hold that a failure to satisfy any one of those criteria automatically renders expert testimony inadmissible. The District Court's initial opinion might have been vulnerable to a form of this argument. There, the court, after rejecting respondents' claim that Carlson's testimony was “exempted from *Daubert*-style scrutiny” because it was “technical analysis” rather than “scientific evidence,” simply added that “none of the four admissibility criteria outlined by the *Daubert* court are satisfied.” 923 F.Supp., at 1521. Subsequently,

however, the court granted respondents' motion for reconsideration. It then explicitly recognized that the relevant reliability inquiry “should be ‘flexible,’ ” that its “ ‘overarching subject [should be] ... validity’ and reliability,” and that “*Daubert* was intended neither to be exhaustive nor to apply in every case.” App. to Pet. for Cert. 4c (quoting *Daubert*, 509 U.S., at 594–595, 113 S.Ct. 2786). And the court ultimately based its decision upon Carlson's failure to satisfy either *Daubert's* factors or any other set of reasonable reliability criteria. In light of the record as developed by the parties, that conclusion was within the District Court's lawful discretion.

In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case. The District Court did not abuse its discretionary authority in this case. Hence, the judgment of the Court of Appeals is

*Reversed.*

Justice SCALIA, with whom Justice O'CONNOR and Justice THOMAS join, concurring.

I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to 159 \*159 abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky. Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.

Justice STEVENS, concurring in part and dissenting in part.

The only question that we granted certiorari to decide is whether a trial judge “[m]ay ... consider the four factors set out by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), in a Rule 702 analysis of admissibility of an engineering expert's testimony.” Pet. for Cert. i. That

question is fully and correctly answered in Parts I and II of the Court's opinion, which I join.

Part III answers the quite different question whether the trial judge abused his discretion when he excluded the testimony of Dennis Carlson. Because a proper answer to that question requires a study of the record that can be performed more efficiently by the Court of Appeals than by the nine Members of this Court, I would remand the case to the Eleventh Circuit to perform that task. There are, of course, exceptions to most rules, but I firmly believe that it is neither fair to litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition. See *General Electric Co. v. Joiner*, 522 U.S. 136, 150–151, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)

**\*\*1180** (STEVENS, J., concurring in part and dissenting in part).

Accordingly, while I do not feel qualified to disagree with the well-reasoned factual analysis in Part III of the Court's opinion, I do not join that Part, and I respectfully dissent from the Court's disposition of the case.

#### All Citations

526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238, 67 USLW 4179, 50 U.S.P.Q.2d 1177, 29 Env'tl. L. Rep. 20,638, 50 Fed. R. Evid. Serv. 1373, Prod.Liab.Rep. (CCH) P 15,470, 99 Cal. Daily Op. Serv. 2059, 1999 Daily Journal D.A.R. 2645, 12 Fla. L. Weekly Fed. S 141

#### Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by *Best v. Lowe's Home Centers, Inc.*, 6th Cir. (Tenn.), April 16, 2009

151 F.3d 269

United States Court of Appeals,  
Fifth Circuit.

Bob T. MOORE; Susan Moore,  
Plaintiffs–Appellants Cross–Appellees,

v.

ASHLAND CHEMICAL INC.; Ashland Oil  
Inc., Defendants–Appellees Cross–Appellants,

and

Dow Corning Corporation;  
Cdc Services, Inc., Defendants.

No. 95–20492.

|

Aug. 14, 1998.

|

Rehearing Denied Sept. 18, 1998.

Worker filed toxic tort action against chemical manufacturer. The United States District Court for the Southern District of Texas, Maryrose Milloy, United States Magistrate Judge, excluded the worker's expert testimony. Worker appealed. The Court of Appeals, 126 F.3d 679, reversed and remanded. Rehearing en banc was granted. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that the district court did not abuse its discretion in excluding the worker's proffered expert testimony about causation.

Affirmed.

King, Circuit Judge, concurs in the result reached by the majority.

Benavides, Circuit Judge, filed a specially concurring opinion.

Dennis, Circuit Judge, with whom Parker and Stewart, Circuit Judges, join, filed a dissenting opinion.

## West Headnotes (9)

**[1] Federal Courts**

🔑 Expert evidence and witnesses

Abuse of discretion standard of review applies to district court's admission or exclusion of expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

17 Cases that cite this headnote

**[2] Evidence**

🔑 Necessity and sufficiency

Party seeking to have district court admit expert testimony must demonstrate that expert's findings and conclusions are based on scientific method, and, therefore, are reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

106 Cases that cite this headnote

**[3] Evidence**

🔑 Necessity and sufficiency

Five non-exclusive and flexible factors to be considered by district court in deciding whether to admit expert testimony include whether expert's theory can be or has been tested, whether theory has been subject to peer review and publication, known or potential rate of error of technique or theory when applied, existence and maintenance of standards and controls, and degree to which technique or theory has been generally accepted in scientific community. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

119 Cases that cite this headnote

**[4] Evidence**

🔑 Necessity and sufficiency

District court must make preliminary assessment of whether proffered expert testimony or methodology underlying testimony is scientifically valid and whether that reasoning or methodology can be applied to facts in issue, as part of *Daubert*

analysis. Fed.Rules Evid.Rules 104(a), 702, 28 U.S.C.A.

230 Cases that cite this headnote

**[5] Evidence**

🔑 Necessity and sufficiency

Party seeking to have district court admit expert testimony must demonstrate that expert's findings and conclusions are based on the scientific method, and, therefore, are reliable, by showing some objective, independent validation of expert's methodology; expert's assurances that he has used generally accepted scientific methodology is insufficient. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

211 Cases that cite this headnote

**[6] Evidence**

🔑 Necessity and sufficiency

Proponent of expert testimony need not prove that expert's testimony is correct, but she must prove by preponderance of evidence that testimony is reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

324 Cases that cite this headnote

**[7] Evidence**

🔑 Necessity and sufficiency

Courts must resolve cases on the basis of scientific knowledge that is currently available and not wait for future scientific investigation; however, scientific opinion, to have evidentiary relevance and reliability, must be based on scientifically valid principles. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

10 Cases that cite this headnote

**[8] Evidence**

🔑 Medical testimony

District court did not abuse its discretion in excluding expert's testimony about causal relationship between worker's exposure to

industrial chemicals and his pulmonary illness; expert had never treated patient with similar exposure to chemical, manufacturer's material data safety sheet was of limited value to expert, and expert apparently relied on short time between worker's exposure to chemical and his breathing difficulties. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

37 Cases that cite this headnote

**[9] Evidence**

🔑 Medical testimony

District court was entitled to conclude that worker's personal habits and medical history made expert's theory of causation of worker's breathing difficulties after exposure to chemical even more unreliable and, thus, to conclude that expert's opinion was inadmissible; worker had been moderate to heavy smoker for twenty years, he had just recovered from pneumonia shortly before his contact with chemicals and he had history of asthma. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

29 Cases that cite this headnote

Appeals from the United States District Court for the Southern District of Texas.

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Before KING, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges. \*

### Opinion

W. EUGENE DAVIS, Circuit Judge:

In this toxic tort case, we consider whether the district court abused its discretion in excluding the opinion of a physician on the causal relationship between Plaintiff's exposure to industrial chemicals and his pulmonary illness. We find no abuse of discretion and affirm.

#### I.

Bob T. Moore was employed as a delivery truck driver for Consolidated Freightways, Inc. ("Consolidated"), a motor freight company. On the morning of April

23, 1990, Moore delivered several drums of chemicals manufactured by Dow Corning Corp. ("Dow") to Ashland Chemical Inc.'s ("Ashland") terminal in Houston. When Moore opened the back door of his trailer, he smelled a chemical odor that caused him to suspect that a drum was leaking. Moore and the Ashland plant manager, Bart Graves, identified two leaking drums and removed them from the trailer. Mr. Graves contacted Dow and requested cleanup instructions and a copy of the material safety data sheet ("MSDS") for the spilled chemicals. The MSDS identified the contents of the leaking drum and health hazards associated with the contents.<sup>1</sup> The \*272 MSDS stated that the chemical solution included hazardous ingredients, most notably Toluene. It warned that depending upon the level and duration of the exposure to fumes from the chemicals, irritation or injury to various organs, including the lungs, could result.

After Moore and Graves obtained cleanup instructions, they put the leaking drums into larger salvage drums. Moore and another Consolidated employee then proceeded to place absorbent material on the spilled chemicals, sweep them up, and dispose of them. The men were engaged in this cleanup for forty-five minutes to an hour. After the cleanup, Moore returned to the Consolidated terminal. At trial, he testified that about an hour after finishing the cleanup, he began experiencing symptoms, including dizziness, watery eyes, and difficulty in breathing. However, Moore was able to drop off another Consolidated trailer as requested by his supervisor.

When he completed this delivery, Moore returned to Consolidated's terminal and told his supervisor that he was sick. The supervisor sent Moore to the company doctor. The next day, Moore saw his family physician. After two to three weeks of treatment by the family physician, Moore placed himself under the care of a Dr. Simi, a pulmonary specialist. Dr. Simi released Moore to return to work on the 11th day of June, 1990. After working several days, Moore terminated his employment due to difficulty breathing. On three occasions in the summer of 1990, Moore also consulted Dr. Daniel E. Jenkins, a pulmonary specialist. Dr. Jenkins diagnosed Moore's condition as reactive airways dysfunction syndrome ("RADS"), an asthmatic-type condition. In November of 1990, Moore consulted another pulmonary specialist, Dr. B. Antonio Alvarez,

who became his primary treating physician. Dr. Alvarez confirmed Dr. Jenkins's diagnosis and treated Moore for RADS.

Moore reported to his physicians that he had smoked approximately a pack of cigarettes a day for approximately twenty years, and he continued to smoke at the time of trial. He also reported that on April 23, 1990, when he was exposed to the Dow chemical, he had just returned to work following a bout with pneumonia. Moore also related a history of childhood asthma to his treating physician.

Moore and his wife filed suit against Ashland Chemical, Inc., Ashland Oil, Inc., and others, primarily on grounds that Ashland was negligent in insisting that Moore expose himself to vapors created by the chemical spill. More specifically, Moore complained that Ashland's employee, Bart Graves, should have permitted Moore to return to Consolidated's terminal where other employees could have cleaned up the spill. He also complained that Graves did not permit him to use a respirator during the cleanup. Ashland removed the suit to federal court on the basis of diversity jurisdiction.

After extensive discovery and motion practice dealing particularly with whether Moore's expert physicians, Dr. Jenkins and Dr. Alvarez, would be permitted to testify, the case proceeded to trial before a jury. At the conclusion of the trial, the jury answered the following interrogatory in the negative: "Do you find, from a preponderance of the evidence, that the negligence, if any, of the person named below proximately caused the injury in question: ... (b) Ashland Chemical, Inc. and/or Ashland Oil, Inc.?" Thereafter, the district court entered a take nothing judgment against Moore. On appeal, a divided panel of this Court concluded that the district court had erred in refusing to allow Dr. Jenkins, one of Moore's experts, to give an opinion on the cause of Moore's illness, and reversed the district court's judgment and remanded the case for a new trial. *Moore v. Ashland Chem., Inc.*, 126 F.3d 679 (5th Cir.1997). We granted rehearing to \*273 consider this case en banc and to clarify the standards district courts should apply in determining whether to admit expert testimony.

## II.

In this appeal we focus on the trial court's refusal to permit one of Moore's medical witnesses, Dr. Daniel E. Jenkins, to give an opinion on the cause of Moore's illness. Some factual and procedural background is necessary to understand the arguments of the parties.

Moore sought to call two medical witnesses, Dr. Jenkins and Dr. Antonio Alvarez. Dr. Jenkins, a well-qualified medical specialist, was certified by the American Board of Internal Medicine in 1947. He also had special training and taught in the fields of pulmonary disease, allergy, and environmental medicine.<sup>2</sup> Dr. Jenkins saw Moore on three occasions. He examined Moore, performed a series of tests, and reviewed Moore's medical records. He concluded that Moore was suffering from RADS. Based upon his examination and tests, Dr. Jenkins expressed the opinion that Moore's RADS had been caused by Moore's exposure to vapors from the chemical spill at Ashland's facility in April of 1990. We will discuss later in more detail the reasons Dr. Jenkins assigned for his opinion. Generally, he relied upon the MSDS, which warned that exposure to the Toluene solution could be harmful to the lungs, his examination and test results, and the close, temporal connection between Moore's exposure to the Toluene solution and the onset of symptoms.

Dr. Alvarez, who was a former student of Dr. Jenkins, agreed with Dr. Jenkins about the cause of Moore's RADS. Dr. Alvarez was Moore's primary treating physician. In addition to the reasons relied on by Dr. Jenkins, Dr. Alvarez supported his theory of causation with a report of a study on RADS co-authored by Dr. Stuart Brooks that he found in a medical magazine.<sup>3</sup> One case study in the report involved a clerk who was exposed to a Toluene mixture in a small, enclosed room for two and one-half hours. Dr. Jenkins initially stated in his deposition that he knew of no reported literature that supported his causation opinion. During his *in limine* testimony outside the presence of the jury at trial, Dr. Jenkins, for the first time, pointed to the Brooks study relied on by Dr. Alvarez.

Dr. Jenkins admitted that Moore was his first RADS patient with a history of exposure to Toluene. He had conducted no research on this subject. Dr. Jenkins had previously treated other patients whose RADS he attributed to exposure to chemicals that were known to irritate the airways. However, he conceded that the chemicals involved with these previous patients were

stronger and more irritating than the Toluene solution to which Moore was exposed. Dr. Jenkins made no attempt to explain how any of the other chemicals that he believed caused RADS in his earlier patients had properties similar to the Dow Toluene solution.

The district court, after reviewing Dr. Jenkins's deposition and listening to his *in limine* testimony, decided to exclude his causation opinion. The court did permit Dr. Jenkins to testify about his examination of Moore, the tests he conducted, and the diagnosis he reached. The only feature of Dr. Jenkins's testimony the court excluded was his opinion that the Toluene solution caused Moore's RADS. The district court concluded that Dr. Jenkins had no scientific basis for this opinion, that it was not sufficiently reliable under Fed.R.Evid. 702, and that it would be inconsistent with the court's gatekeeper role under *Daubert* to admit this opinion.

**\*274** The district court decided to admit Dr. Alvarez's causation opinion even though it was essentially identical to Dr. Jenkins's proffered opinion. The district court was apparently convinced that Dr. Alvarez's opinion linking the RADS to Moore's exposure to the Toluene solution was more reliable than Dr. Jenkins's opinion because Dr. Alvarez had been the treating physician, and also because he had relied from the outset on the Brooks study and therefore had some support from the scientific literature for his conclusion. In view of the verdict, the Defendants do not challenge the district court's decision to admit Dr. Alvarez's opinion. Thus, the propriety of this ruling is not presented to us for review.

The single defense expert, Dr. Robert Jones, was the third medical witness to testify. Based upon his review of the medical records, Dr. Jones concluded that Moore did not have RADS; rather, according to Dr. Jones, Moore suffered from a form of bronchial asthma. Dr. Jones further testified that the evidence in the case was insufficient to allow him to conclude that Moore's exposure to Toluene caused his pulmonary problems. Dr. Jones's conclusion was reinforced by Moore's medical history, which included conditions that Dr. Jones thought were much more likely triggering agents for RADS. These conditions included Moore's history as a heavy smoker for approximately twenty years, his history of asthma, and his recent bout with pneumonia. Dr. Jones also testified that the scientific literature revealed that Toluene and similar substances have a low potential for causing lung injury

except when encountered in such high dosages that the person is overcome and passes out.

With this background, we now turn to the issue presented by this appeal: whether the district court erred in excluding Dr. Jenkins's causation testimony.

### III.

#### A.

[1] Fortunately, the Supreme Court recently resolved a disagreement among the circuits about the standard for reviewing a district court's admission or exclusion of expert testimony. In *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), the Court held that we should review such decisions for an abuse of discretion. In evaluating whether the district court abused its discretion in excluding Dr. Jenkins's testimony on causation, the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Joiner* control our analysis.

[2] In *Daubert*, the lower courts considered the admissibility of expert testimony on medical causation. The expert witnesses sought to testify that ingestion of Bendectin, a prescription anti-nausea drug, by several mothers caused birth defects in their children. The lower courts excluded the evidence on the basis that the experts' methodology was not generally accepted in the scientific community and had not been subjected to peer review. The Supreme Court, speaking through Justice Blackmun, first concluded that the "*Frye* doctrine,"<sup>4</sup> requiring that a theory be generally accepted in the scientific community before it can be the basis of an expert's opinion, was not a controlling principle in federal trials. *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2794. Justice Blackmun then turned to Rule 702 of the Federal Rules of Evidence<sup>5</sup> and the proper test for admissibility of scientific evidence.

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To **\*275**

the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. “*If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue*” an expert “*may testify thereto.*” The subject of an expert’s testimony must be “scientific ... knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science. Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation. The term “applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.” Webster’s Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be “known” to a certainty; arguably, there are no certainties in science. But, in order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability.

*Daubert*, 509 U.S. at 589–90, 113 S.Ct. at 2794–95 (emphasis in original) (internal citations omitted).

[3] The Court stated further that:

Rule 702 further requires that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” This condition goes primarily to relevance. “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.”

*Id.* at 591, 113 S.Ct. at 2795 (citation omitted). The Court then proceeded to enumerate a five-factor, non-exclusive, flexible test for district courts to consider when assessing whether the methodology is scientifically valid or reliable. These factors include: (1) whether the expert’s theory can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of a technique or theory when

applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community. *Id.* at 593–95, 113 S.Ct. at 2796–97.<sup>6</sup>

The Supreme Court concluded by pointing out that important differences exist between truthseeking in the courtroom and in the laboratory:

Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role \*276 for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.

*Daubert*, 509 U.S. at 597, 113 S.Ct. at 2798–99. The Court remanded the case to permit the lower courts to evaluate their rulings in light of the multi-factor, flexible test it had just announced.

[4] Procedurally, *Daubert* instructs us that the district court must determine admissibility under Rule 702 by following the directions provided in Rule 104(a).<sup>7</sup> Rule 104(a) requires the judge to conduct preliminary fact-finding and to make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592–93, 113 S.Ct. at 2796.

[5] [6] Thus, the party seeking to have the district court admit expert testimony must demonstrate that the expert’s findings and conclusions are based on

the scientific method, and, therefore, are reliable. This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient. See *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir.1995) (on remand). The proponent need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable. See *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir.1994); see also 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1229–40 (7th ed.1998).

[7] In sum, the law cannot wait for future scientific investigation and research. We must resolve cases in our courts on the basis of scientific knowledge that is currently available. The inquiry authorized by Rule 702 is a flexible one; however, a scientific opinion, to have evidentiary relevance and reliability, must be based on scientifically valid principles.

Last term, in *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), the Supreme Court gave us helpful insight into the application of the *Daubert* principles. In *Joiner*, the plaintiff sued, claiming that his small-cell lung cancer was caused by his exposure to polychlorinated biphenyls (“PCBs”) in the workplace. The plaintiff offered expert testimony to establish his causation theory. The district court ruled that the testimony was scientifically unreliable and refused to admit the proffered evidence. The Eleventh Circuit Court of Appeals reversed and held that the simple abuse of discretion standard of review did not apply to the ruling; rather, “a particularly stringent standard of review” applied “to the trial judge's exclusion of expert testimony” that resulted in the dismissal of the suit. *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir.1996). The Supreme Court reversed, holding that the usual abuse of discretion standard generally applied to evidentiary rulings also applied to the admission or exclusion of expert testimony. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). The Supreme Court's treatment of several of *Joiner*'s arguments is instructive to both trial courts and courts of appeals in the area of admissibility of expert testimony.

The Court emphasized that a district court, while acting as a gatekeeper for expert evidence, must evaluate whether

there is an adequate “fit” between the data and the opinion proffered. *Joiner*, 118 S.Ct. at 519. One of the bases for the experts' causation opinion in *Joiner* was animal studies on the effects on rats injected with large doses of PCBs. In analyzing *Joiner*'s argument, the Court observed that

[r]ather than explaining how and why the experts could have extrapolated their opinions from these seemingly far-removed animal studies, respondent chose to proceed as if the only issue [was] whether animal studies can ever be a proper foundation for \*277 an expert's opinion. Of course, whether animal studies can ever be a proper foundation for an expert's opinion was not the issue. The issue was whether these experts' opinions were sufficiently supported by the animal studies on which they purported to rely. The studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court [sic] to have rejected the experts' reliance on them.

*Id.* at 518 (internal quotation and citation omitted).

The Court next considered four published epidemiological studies on which the proffered experts relied to determine whether they provided a sufficient basis for the experts' opinion. The Court observed that the authors of the first two studies, while finding that the rate of cancer deaths among former employees at plants where workers were exposed to PCBs was higher than might have been expected, nevertheless concluded that “there were apparently no grounds for associating lung cancer deaths (although increased above expectations) and exposure in the plant.” *Joiner*, 118 S.Ct. at 518 (citation omitted). The Court concluded that given that the authors of the article were “unwilling to say that PCB exposure had caused cancer among the workers they examined, their study did not support the experts' conclusion that *Joiner*'s exposure to PCBs caused his cancer.” *Id.* at 518.<sup>8</sup> The Court next referred to the two remaining studies, one of which made no mention of PCBs and the other in which the PCB-exposed group had also been subjected to additional potential carcinogens. The Court observed

that the district court was entitled to conclude that these studies were likewise no help to the experts in supporting their opinions. *Id.* at 519.

The Court concluded its discussion of Joiner's arguments as follows:

Respondent points to *Daubert*'s language that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which 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. That is what the District Court did here, and we hold that it did not abuse its discretion in so doing.

*Joiner*, 118 S.Ct. at 519 (internal citations omitted).

## B.

[8] With this background, we turn to the record evidence in this case to apply the Supreme Court's directives in *Daubert* and *Joiner*, and to determine whether the district court abused its discretion in excluding Dr. Jenkins's testimony.

Dr. Jenkins pointed to the following support for his causation conclusion: (1) the MSDS from Dow warned that exposure to fumes from the Toluene solution could cause injury to the lungs; (2) Moore had an onset of symptoms shortly after his exposure to the Toluene solution; (3) although Dr. Jenkins did not initially rely on the Brooks article, when it was called to his attention at trial by counsel, he did claim to have knowledge of the article and stated that he had relied on it; (4) his training and experience; and (5) his examination and test results.

The district court was entitled to conclude that the above bases for Dr. Jenkins's opinion were individually and

collectively inadequate under *Daubert*. First, Dr. Jenkins's training and experience and his examination and tests, items 4 and 5 above, were obviously \*278 important to his diagnosis. However, Dr. Jenkins gave no reason why these items were helpful in reaching his conclusion on causation. He admitted that he had never previously treated a patient who had been exposed to a similar Toluene solution. Dr. Jenkins was a highly qualified pulmonary specialist, but, as the Seventh Circuit observed in *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir.1996), "[u]nder the regime of *Daubert* a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Id.* at 318 (internal citation omitted).

With respect to the Brooks article, item 3 above, the authors made it clear that their conclusions were speculative because of the limitations of the study. Also, in the single study involving exposure to Toluene fumes, the level and duration of the exposure was several times greater than Moore's exposure.

The bases for Dr. Jenkins's causation opinion are therefore reduced to the following: (1) the Dow MSDS from which Dr. Jenkins could have gleaned that the contents of the drum were irritating to the lungs at some level of exposure; and (2) the relatively short time between Moore's exposure to the chemicals and the onset of his breathing difficulty.

The district court was entitled to find that the Dow MSDS had limited value to Dr. Jenkins. First, Dr. Jenkins admitted that he did not know what tests Dow had conducted in generating the MSDS. Second, and perhaps more importantly, Dr. Jenkins had no information on the level of exposure necessary for a person to sustain the injuries about which the MSDS warned. The MSDS made it clear that the effects of exposure to Toluene depended on the concentration and length of exposure.

The district court was also correct in viewing with skepticism Dr. Jenkins's reliance on the temporal proximity between the exposure and injury. *Cavallo v. Star Enter.*, 892 F.Supp. 756 (E.D.Va.1995), *aff'd. in part*, 100 F.3d 1150 (4th Cir.1996), contains a helpful discussion of this issue. In that case, the plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors. The proffered expert relied

substantially on the temporal proximity between exposure and symptoms. The court concluded that this reliance was “not supported by appropriate validation” as required by *Daubert*, and was “ultimately unreliable.” 892 F.Supp. at 773. The court observed that although “there may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology,” this was not such a case. *Id.* at 773–74. The court pointed out that the plaintiff in *Cavallo* was not doused with jet fuel and that there was no mass exposure of jet fuel to many people who in turn suffered similar symptoms. In the absence of an established scientific connection between exposure and illness, or compelling circumstances such as those discussed in *Cavallo*, the temporal connection between exposure to chemicals and an onset of symptoms, standing alone, is entitled to little weight in determining causation.<sup>9</sup>

Dr. Jenkins offered no scientific support for his general theory that exposure to Toluene solution at any level would cause RADS. Because he had no accurate information on the level of Moore's exposure to the fumes, Dr. Jenkins necessarily had no support for the theory that the level of chemicals to which Moore was exposed caused RADS.<sup>10</sup> Dr. Jenkins made no attempt to explain his conclusion by asserting that the Toluene solution \*279 had properties similar to another chemical exposure to which RADS had been scientifically linked. Several post-*Daubert* cases have cautioned about leaping from an accepted scientific premise to an unsupported one. *See Wheat v. Pfizer, Inc.*, 31 F.3d 340, 343 (5th Cir.1994); *see also Braum v. Lorillard Inc.*, 84 F.3d 230, 235 (7th Cir.1996); *Daubert*, 43 F.3d at 1319; *Cavallo*, 892 F.Supp. at 769. To support a conclusion based on such reasoning, the extrapolation or leap from one chemical to another must be reasonable and scientifically valid. *See Daubert*, 43 F.3d at 1319–20; *Cavallo*, 892 F.Supp. at 769.

In the end, Dr. Jenkins was relegated to his fall-back position that *any* irritant to the lungs could cause RADS in a susceptible patient. Dr. Jenkins cited no scientific support for this theory. None of *Daubert*'s factors to assess whether the opinion was based on sound scientific principles was met. Dr. Jenkins's theory had not been tested; the theory had not been subjected to peer review or publication; the potential rate of error had not been determined or applied; and the theory had not been

generally accepted in the scientific community. In sum, Dr. Jenkins could cite no scientific support for his conclusion that exposure to any irritant at unknown levels triggers this asthmatic-type condition. Under the *Daubert* regime, trial courts are encouraged to exclude such speculative testimony as lacking any scientific validity.

[9] The district court was also entitled to conclude that Moore's personal habits and medical history made Dr. Jenkins's theory even more unreliable. Moore had been a moderate to heavy smoker for twenty years. In addition, he had just recovered from pneumonia shortly before his contact with the chemicals. Finally, Moore had suffered from asthma (a condition very similar to RADS) in his youth.

In sum, the district court did not abuse its discretion in finding that the “analytical gap” between Dr. Jenkins's causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide. The district court was entitled to conclude that Dr. Jenkins's causation opinion was not based on scientific knowledge that would assist the trier of fact as required by Rule 702 of the Federal Rules of Evidence.

## CONCLUSION

*Daubert* and its progeny give the district court discretion to “keep the gate” for the purpose of admitting or excluding opinion testimony. In this case, the district court did not abuse that discretion in concluding that the causation evidence proffered by Dr. Jenkins should be excluded. It was within the judge's discretion to conclude that Dr. Jenkins's testimony was not grounded in science as required by *Daubert* and its progeny, and, therefore, was not sufficiently reliable for the jury to consider. We therefore affirm the judgment of the district court.

AFFIRMED.

KING, Circuit Judge, concurs in the result reached by the majority.

BENAVIDES, Circuit Judge, specially concurring:  
Although I join both the reasoning and result of the majority opinion, I write separately to reiterate that, under

*General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), the issue before us is whether the magistrate judge abused her discretion in excluding the testimony of Dr. Jenkins. While I believe this case to be a close one, I must agree that the magistrate judge acted within her discretion in excluding Dr. Jenkins's proffered testimony. It does not follow from this, however, that she would have abused her discretion by admitting the proffered testimony. On the contrary, had she admitted the testimony, I would likewise be of the opinion that she acted within her discretion. I do not read the majority opinion to require otherwise.

DENNIS, Circuit Judge, with whom PARKER and STEWART, Circuit Judges, join, dissenting:  
I respectfully dissent.

The majority *en banc* opinion (1) conflicts with the view of other circuits, a state court of last resort, and scholarly commentary, in \*280 holding that (a) a clinical medical expert cannot express an opinion as to a causal relationship between a chemical compound and a plaintiff's disease, although the opinion is based on the sound application of generally accepted clinical medical methodology, unless the causal link is confirmed by hard scientific methodology as per the *Daubert* factors<sup>1</sup>, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); (b) the temporal relationship between chemical exposure and symptoms of disease are to be accorded little weight by courts in assessing an expert's determination of causation with either clinical medical or hard science methodology; (c) even when an expert has hard scientific support for a general causal relationship between a chemical compound and a particular disease, his opinion of a specific causal relationship between the compound and an individual's disease is "suspect" unless the expert also has scientifically accurate data as to the level of that person's exposure to the chemical compound; (2) conflicts with Supreme Court decisions by conducting a *de novo* trial of the preliminary assessment hearing on the record, substituting its own erroneous ruling and reasons for those of the district court, and disregards the district court's errors of law, clearly erroneous factual findings, and abuse of discretion.

1.

After *Daubert*, federal courts have become balkanized on important questions that confront federal trial judges daily, e.g., whether *Daubert* applies outside the field of hard science; if so, whether *Daubert*'s gatekeeping function applies to the admission of any or all of the other types of expert testimony; if so, whether application of the *Daubert* "factors" is required in the admission of any or all testimony based on knowledge not derived by hard scientific methodology. Even before the present *en banc* circuit opinion there was a clear and present need for the Supreme Court to clarify whether and, if so, how, *Daubert* applies to expert testimony based on knowledge derived by disciplines or sources other than the hard sciences. *E.g.*, 29 Charles A. Wright and Victor J. Gold, FEDERAL PRACTICE AND PROCEDURE § 6266 (1997); 2 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 702.5, pp. 22–26 (Supp.1998).

(a)

The majority opinion represents an eccentric additional fragmentation of the *Daubert* picture that underscores the need for Supreme Court guidance. This circuit now takes the position that a clinical medical expert, correctly using and applying generally accepted clinical medical methodology, may not express an opinion as to whether a particular chemical compound caused, aggravated, or contributed to a person's disease or disorder unless that opinion is corroborated by hard scientific methodology that passes muster under a rigid application of the *Daubert* factors.

The majority's rule applies even to single plaintiff negligence actions that do not involve substances alleged to cause diseases in large numbers of persons or diseases having long latency periods. The *en banc* majority opinion emanates from a case in which a single plaintiff claims to have developed a reactive airways disorder as a result of a defendant's negligence in causing him to clean up a spillage of a chemical compound without taking any safety precautions. The defendant refused to provide the plaintiff with a respirator or to measure the air contamination with a safety meter although the defendant had both devices ready at hand. The plaintiff was required to work in and

around an enclosed 28-foot trailer for about an hour in cleaning up the spilled chemical compound.

**\*281** Unlike many toxic torts situations, in Mr. Moore's case there was not a long latency period between the onset of symptoms and the chemical compound gases that were alleged to have caused his illness. The onset of the plaintiff's respiratory disease occurred less than an hour after his exposure during his clean up of the chemical compound. He immediately sought emergency medical treatment, which included being given oxygen, and he has been under treatment for his respiratory disease ever since. The particular circumstances of the plaintiff's inhalation injury, combined with the fact that so few humans have ever been subjected to a similar exposure to the chemical compound involved, obviously impacted on the manner in which the plaintiff could prove causation. The quantity of persons who sustain this type of exposure was simply too small for a plaintiff to be able to provide epidemiological, animal testing or other hard scientific evidence linking the particular chemical compound to reactive airways disease. See *Zuchowicz v. United States*, 140 F.3d 381, 385-86 (2nd Cir.1998)(described *infra*).

Although the *en banc* majority recognizes that cases involving chemical compounds which have not been subjected to hard scientific testing must be timely resolved and cannot await the fortuity of relevant scientific experimentation, the majority nevertheless insists that every admissible medical causation opinion in a chemical injury case must have a hard science, *Daubert* factor related basis. If such hard scientific data is not available, the majority decrees, a plaintiff must face trial or the defendant's summary judgment motion without a medical causation expert witness.<sup>2</sup>

**\*282** The majority opinion creates a schism between this court and other circuits and a state court of last resort and disregards the teachings of federal evidence law scholars.

The Second, Fourth, and Third Circuits have held that a clinical physician may, consistently with *Daubert*, express an opinion, based on clinical medical methodology generally accepted within that discipline, that a particular toxic substance caused the patient's disease or death, without hard scientific corroboration under an inflexible application of the *Daubert* factors.

The Second Circuit in *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2nd Cir.1995), rejected the defendant's argument for exclusion of a clinical physician's opinion, as scientifically unfounded, that glue fumes caused the plaintiff's respiratory symptoms and throat polyps. The doctor's opinion was based entirely upon his use of clinical medical methodology, without any hard science or strict *Daubert* factor related basis. The doctor could not point to a single piece of medical literature that said that glue fumes cause throat polyps. In describing the doctor's use of clinical medical methodology as vouching for the reliability of his opinion, the court stated:

[Dr.] Fagelson based his opinion on a range of factors, including his care and treatment of McCullock; her medical history (as she related it to him and as derived from a review of her medical and surgical reports); pathological studies; review of Fuller's MSDS; his training and experience; use of a scientific analysis known as differential etiology (which requires listing possible causes, then eliminating all causes but one); and reference to various scientific and medical treatises. Disputes as to the strength of his credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony. *Id.* at 1044.

In *Zuchowicz v. United States*, 140 F.3d 381 (2nd Cir.1998), the Second Circuit reaffirmed its holding in *McCullock*. The *Zuchowicz* court approved the admission of a pulmonary medical expert's opinion that a negligent overdose of Danocrine had been responsible for the pulmonary disease related death of the plaintiff's wife. The doctor based his opinion on the temporal relationship between the overdose and the start of the disease, the deceased's apparent good health prior to the overdose, and the differential etiology method of excluding other possible causes. *Id.* at 385. He also testified that Mrs. Zuchowicz's illness was similar in onset, timing and course of development to other cases of pulmonary diseases known to have been caused by other classes of drugs. *Id.* at

385–86. There had been no scientific tests to determine the effects of dosages at the level received by Mrs. Zuchowicz, and the doctor's opinion as to medical causation, based solely on clinical medical methodology, was not confirmed by any hard science or strict *Daubert* factor evidence. See also *Ambrosini v. Labarraque*, 101 F.3d 129, 138 (D.C.Cir.1996)(stating that the fact that a case may be the first of its type should not prevent a plaintiff's doctor from testifying as to causation).

Similarly, the Fourth Circuit in *Benedi v. McNeil–P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir.1995), upheld the plaintiff's recovery for severe liver damage resulting from his use of Extra–Strength Tylenol contemporaneously with alcohol due to the manufacturer's negligent failure to warn. The Court of Appeals rejected McNeil's argument that the medical causation testimony of the plaintiff's clinical physicians based on the methodology of their discipline, such as the microscopic appearance of his liver, the Tylenol found in his blood, the history of several days of using Tylenol and alcohol, the liver enzyme blood level, and the lack of evidence of a viral or other cause of liver failure, was unreliable because they did not have or rely on epidemiological data. The *Benedi* court stated: “We will not declare [the clinical medicine] methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients.” *Id.*; see also, *Maryland Casualty Co. v. Therm–O–Disc, Inc.*, 137 F.3d 780, 785 (4th Cir.1998)(“[T]his circuit has taken the position that the *Daubert* court ‘was not formulating a rigid test or checklist,’ and was ‘relying \*283 instead on the ability of federal judges to properly determine admissibility.’ ”)(citing and quoting *Benedi*, 66 F.3d at 1384).

The Third Circuit in *In Re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir.1994) held that a clinical physician's methodology of differential diagnosis was sufficiently reliable to support the admissibility of that expert's opinion that polychlorinated biphenyls (PCBs) caused specific plaintiffs' illnesses. The *Paoli* court, heeding *Daubert*'s admonition that the inquiry as to whether a particular technique or method is reliable is a flexible one, *id.* at 742, reasoned that “differential diagnosis can be considered to involve the testing of a falsifiable hypothesis (e.g. that PCBs caused a plaintiff's cancer) through an attempt to rule out alternative causes,” and although it “involves assessing causation with respect to a particular individual[,] [t]his merely makes it a

different type of science than science designed to produce general theories; it does not make it unreliable science.” *Id.* at 758. Moreover, the *Paoli* court concluded that a clinical physician's performance of standard diagnostic techniques provides prima facie evidence that a doctor has considered alternative causes and has attempted to test his or her initial hypothesis as to cause. *Id.*

The Court of Criminal Appeals of Texas, a state court of last resort, in *Nenno v. State*, 970 S.W.2d 549, 1998 WL 331283 (Tex.Crim.App. June 24, 1998) (“This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.”), in reviewing the defendant's capital murder conviction and death sentence, held that the trial court did not err in finding reliable and admitting the state's future dangerousness expert's opinion that the defendant would be a threat to society. The expert, an FBI agent who specialized in studying the sexual victimization of children, based his opinion on his study of over 1,000 cases, personal interviews with inmates convicted of child sex offenses, examination of inmates' psychological records, and study of the facts of the offenses involved. The *Nenno* court rejected the defendant's argument that the expert's opinion was not reliable because it did not rely on criteria substantially identical to the *Daubert* factors. Instead, the *Nenno* court concluded that “the four factors listed in *Daubert* do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary, depending upon the field of expertise.” *Id.* at 561 (citing the panel opinion in the present case, *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679, 685–689 (5th Cir.1997)).

Although the *Nenno* decision did not involve the testimony of a clinical physician as to cause of disease in a specific person, the court relied directly upon the *Moore* panel decision and its underlying principle that the reliability of an expert witness's opinion ordinarily should be judged by whether it is soundly grounded in the methodology of the expert's discipline. Thus, *Nenno*, which permits experts to predict the future causation of criminal harm by a specific person without the support of any hard scientific, strict *Daubert* factor type methodology, is at odds with the premise of the present *en banc* majority opinion.

In similar manner, additional federal circuit decisions conflict in principle with the *en banc* majority opinion's

insistence on an inflexible, unthinking application of the *Daubert* factors to expert opinions based on knowledge and methodology outside the realm of hard science. *E.g.*, *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir.1996)(“Social science testimony, like other expert testimony ... must be tested to be sure that the person possesses genuine expertise in a field and that her testimony adheres to the same standards of intellectual rigor that are demanded in her professional work.”) (internal quotation marks and brackets omitted); *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir.1995)(clinical physician's opinion that patient's inhalation of manganese caused patient's manganese encephalopathy was reliable although based only on patient history, laboratory studies of manganese levels in patient's body and work clothes, clinical examinations, a series of MRIs, and other doctors' reports); *United States v. Jones*, 107 F.3d 1147 (6th Cir.1997)(although *Daubert*'s gatekeeper function is applicable to all expert \*284 testimony, the *Daubert* factors do not extend outside the hard scientific orbit to handwriting experts); *see also Tassin v. Sears, Roebuck and Co.*, 946 F.Supp. 1241, 1247–48 (M.D.La.1996)(holding that for an expert's opinion to be considered reliable he must use the methodology of experts in his particular field).

The majority's opinion requiring a rigid, mechanical application of the *Daubert* factors beyond the ambit of the hard sciences also conflicts with the views of leading scholars, jurists and practitioners.<sup>3</sup> For example, the report of the American College of Trial Lawyers on Standards and Procedures For Determining the Admissibility of Expert Evidence After *Daubert*, 157 F.R.D. 571 (1994) recognizes that the basic *Daubert* requirement that a trial judge determine whether a proffer of expert testimony is reliable or valid applies to all forms of expert testimony and that the particular expert at issue should have her methodology, i.e. the validity of her opinion, judged by the principles applicable to “that particular field.” *Id.* at 577. In regard to the specific *Daubert* factors which the majority so rigidly applies, the American College of Trial Lawyers' report concludes that:

... Justice Blackmun's “general observations” about the factors that a federal judge ought to consider in evaluating the soundness of scientific methodology, set forth in part II–C of his opinion, are specifically aimed at the evaluation of scientific testimony. Of

course, some of these factors may be highly relevant to an evaluation of certain types of non-scientific expert evidence. For example, whether the proffered methodology can be and has been tested may very well be pertinent to an examination of non-scientific but “technical” expert evidence. Peer review and publication may be an important factor with respect to testimony involving social sciences. And the “general acceptance” of a methodology within a particular discipline will be crucial in many cases. *The point is that any one of Justice Blackman's four factors may or may not have applicability to proffers of non-scientific expert evidence. The inquiry to be made concerns the fundamental principles by which the validity of a methodology is to be judged in the particular field of knowledge. Id.* (footnotes omitted)(emphasis added)

Leading federal evidence commentators have noted that the *Daubert* opinion is ambiguous and has given rise to a number of interpretations. *E.g.* 29 Charles A. Wright and Victor J. Gold, FEDERAL PRACTICE AND PROCEDURE § 6266 (1997). They observe that at its narrowest *Daubert* can be read to \*285 allow judges to exercise a significant gatekeeping function only in the case of expert testimony in the hard sciences based on novel theories and methodologies. *Id.* at 289. They further state that the broadest reading of *Daubert* is that it applies to all reliability issues presented by all expert testimony. *Id.* at 290. In rejecting the broadest view, Wright and Gold state:

This broadest interpretation of *Daubert* should be rejected. As noted above, it is inconsistent with both policy and precedent to make the admissibility of all expert testimony depend upon a showing that the expert's testimony is completely reliable in every respect. Since *Daubert* does not explicitly take such a position, and nothing in the Evidence Rules compels it, it seems unlikely that the Court intended such a departure from past practice. In overturning *Frye*, it is unlikely that the Court in *Daubert* sought to make the admission of scientific evidence harder. *Id.* at 290–91 (footnotes omitted).

Professor Michael Graham contends that *Daubert* boxes the courts into working within a structure that has not functioned as anticipated by the Supreme Court and can fairly be said to not have functioned well at all. 2 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE, § 702.5, pp. 22–26 (Supp.1998). Graham strongly advises against a rigid application of the *Daubert* factors and suggests that:

Until the *Daubert* box is removed, on balance, it is suggested that *Daubert*'s gatekeeping language should be held by lower courts to apply to “scientific” evidence only. This interpretation is most consistent with the plain meaning of the opinion and the clear choice for liberalization if liberal admissibility is in fact the goal. Most importantly, nonapplication of judicial gatekeeping to “technical or other specialized knowledge” would prevent the hardship incurred by many plaintiffs in product liability litigation. Such an interpretation also avoids unthinking application of the four *Daubert* factors as well as the alternative trying process of developing a list of factors for determining whether a construction worker with 30 years of reinforced concrete experience is testifying to an explanative theory that is sufficiently trustworthy. *Id.* at 25–26.

In *Daubert*, the Supreme Court stated: “The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.” *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786. The *en banc* majority opinion, however, heedless of *Daubert*'s precept, and unmindful of the other circuits' unanimous adoption of a flexible approach in applying the *Daubert* factors, holds that district courts in this circuit must unthinkingly and rigidly apply the *Daubert* factors in assessing the reliability of a clinical physician's opinion as to the causal relationship between an individual's exposure to a chemical or substance and that person's disease or medical disorder.<sup>4</sup> This means, of course, that in cases such as the present one, in which the association between

a specific chemical compound and a particular disease has not yet been, and perhaps never will be, subjected to hard science investigation, that the plaintiff will be unable to present any expert testimony that his or her exposure to the chemical compound was the probable medical cause of his or her disease.

The *en banc* majority adopts a mechanistic interpretation of the *Daubert* factors that threatens to require the exclusion from evidence of vast numbers of clinical medical opinions, although they are generally accepted as trustworthy by physicians practicing in their fields, and, until the majority's decision today, were routinely accepted as reliable by our courts both before and after *Daubert*. See *Carroll v. Morgan*, 17 F.3d 787, 789–90 (5th Cir.1994). Disturbingly, the majority does not explain the reasons for its deviation from the other circuits or its departure from the prior precedent and practice in our courts. Ironically, the majority's divergence occurs in a rather run-of-the-mill setting, a case involving a clinical physician's opinion, based on generally accepted clinical methodology, as to the cause of a non-catastrophic disease following a person's episodic and traumatic occupational exposure to a chemical compound. Unlike *Daubert*, and other highly publicized toxic torts cases, the present case does not involve “junk science,” or purportedly hard scientific opinions, based on epidemiological and animal studies not generally accepted in their discipline, as to the surreptitious causal relationship between drugs or other substances and catastrophic systemic diseases or disorders such as cancer and birth defects.

(b)

Having depleted the ranks of medical causation experts available to plaintiffs suffering non-catastrophic chemical exposure injuries, the majority adds insult to injury by casting doubt on the importance of a principal element used by both hard scientific and clinical medical experts in determining whether there is a causal relationship between an individual's exposure to a substance and his or her disease viz., the temporal relationship between the person's exposure and the development of symptoms or signs of disease. The majority asserts that in the absence of an established scientific connection between exposure and illness or compelling circumstances, the temporal connection between exposure to chemicals and an onset of symptoms is entitled to little weight in determining

causation. Maj. Op. at p. 278. This dictum conflicts with the great weight of scientific and judicial authority.

In the sphere of hard science, the opinion of an expert who opines that exposure to a compound caused a person's disease is "based on an assessment of the individual's exposure, including the amount, *the temporal relationship between the exposure and disease*, and exposure to other disease-causing factors." Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, p. 205 (1994)(emphasis added). The temporal relationship may either support or contradict causation. "In most *acute* injuries, there is a short time period between cause and effect. However, in some situations, the length of basic biological processes necessitates a longer period of time between initial exposure and the onset of observable disease." *Id.* at 207. Moreover, temporal relationship is one of the seven factors that an epidemiologist considers in determining whether the association between an agent and a disease is causal. *Id.* at 161.

Courts and commentators have also recognized that the fact that an individual's symptoms followed an appropriate time after exposure is an important consideration in determining causation. *E.g.*, *Kannankeril v. Terminix Int'l., Inc.*, 128 F.3d 802, 805, 809 (3rd Cir.1997); *Zuchowicz*, 140 F.3d at 385 (affirming the admissibility of an expert whose "conclusion was based on the temporal relationship between the overdose and the start of disease and the differential etiology method of excluding other possible causes."); 1 Margie Searcy-Alford, A GUIDE TO TOXIC TORTS § 10.03[2], p. 10-69 (1998)("The fact that the symptoms follow an appropriate time after exposure does not prove causation, but it is an important consideration."); Stephen A. Saltzburg et al., FEDERAL RULES OF EVIDENCE MANUAL at \*287 1233-1234 (7th ed.1998); see *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir.1995); 3 Stuart M. Speiser et al., THE AMERICAN LAW OF TORTS § 11.27, at 465 (1986).

The district court case relied on by the majority, *Cavallo v. Star Enter.*, 892 F.Supp. 756 (E.D.Va.1995), is distinguishable in numerous respects and does not support the majority's assertion that temporal relationship is entitled to "little weight" in the absence of compelling circumstances. In *Cavallo*, the plaintiff's exposure occurred in the open parking lot of a shopping

mall during a five minute period at a distance of 500 feet from the source of the jet fuel fumes, the chemical substance at issue; she did not seek medical assistance until nine days later for her symptoms that resulted in an initial diagnosis of "conjunctivitis, or eye redness;" her experts did not have even a rough idea of the amount of her exposure; and there was no showing that the fumes the plaintiff inhaled from the defendant's alleged negligent spillage were actually more dense than the ordinary daily atmosphere in the shopping mall near defendant's petroleum distribution, mixing and transfer terminal. Significantly, Cavallo's experts did not have a material safety data sheet (MSDS) or full knowledge of some of the chemicals inhaled and, more importantly, they did not reliably use or apply the methodology of their own disciplines.

In sum, the *Cavallo* court ruled the experts' opinions inadmissible because their opinions were based almost exclusively on a very tenuous temporal and spatial connection between exposure and symptoms and because they significantly departed from the accepted toxicology methodology, while the defendant's toxicology expert followed the generally accepted methodology of that discipline. *Id.* at 763, 773. Moreover, the *Cavallo* court never said that, in the absence of compelling circumstances, a temporal relationship is "entitled to little weight." Instead, that court merely observed that there may be instances where the temporal connection is so compelling as to dispense with the need for toxicologists to rely on the standard methodology of their discipline. *Id.* at 773.

(c)

As a coup de grace to inhalation injury claimants, the majority indicates that, if a plaintiff's expert does not have scientifically accurate measurements of the level of the plaintiff's exposure, "his causation opinion [will be] suspect even if he ha[s] scientific support for the position that the [chemical compound] could cause [the plaintiff's disease]." Maj. Op. at p. 278 n. 9. The majority downplays the lethal swath of its new rule by suggesting that it applies here because of "the paucity of the facts Dr. Jenkins had available about the level of Mr. Moore's exposure." But the truth is that Dr. Jenkins had better information about the nature of the substances, the level of exposure, and its duration than experts in most inhalation accident cases.<sup>5</sup>

“Only rarely are humans exposed to chemicals in a manner that permits a quantitative determination of adverse outcomes. [ ] Human exposure occurs most frequently in occupational settings where workers are exposed to industrial chemicals like \*288 lead or asbestos; however, even under these circumstances, it is usually difficult, if not impossible, to quantify the amount of exposure.” Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, p. 187 (1994). Consequently, the majority's rule will apply in virtually all inhalation cases to exclude the opinions of plaintiffs' experts as to specific medical causation even if they are fortunate enough to have hard science data supporting a general causal relationship or association between the chemical compound and the disease involved. The majority does not have even a paucity of authority to support this extra, gratuitous ratcheting down of inhalation accident victims' chances of recovery.

## 2.

The majority has conducted a trial de novo of the district court's preliminary assessment of whether the reasoning and methodology underlying Dr. Jenkins' testimony was reliable, substituting its own erroneous judgment and reasoning for that of the trial judge, rather than reviewing the district court's rulings and reasoning for abuse of discretion, *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997), clearly erroneous factual findings, *Bourjaily v. United States*, 483 U.S. 171, 181, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), and errors of law, *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)(“A district court by definition abuses its discretion when it makes an error of law”).

In the district court proceedings, the defendants objected to the introduction of Dr. Jenkins' opinion as to the diagnosis and cause of Mr. Moore's disease on the grounds that the doctor lacked hard scientific support that the chemical compound involved could cause reactive airways disease. The district court admitted Dr. Jenkins' opinion that Mr. Moore had reactive airways disease but excluded Dr. Jenkins' opinion that the disease had been specifically caused by exposure to the chemical compound involved because Dr. Jenkins had not presented any hard scientific support for a general causal link or association between that particular compound and that particular disease.<sup>6</sup>

The majority opinion retries the preliminary assessment of Dr. Jenkins' proffer de novo and concludes that (1) the district court was “entitled to conclude” that (a) Dr. Jenkins had not explained in sufficient detail how his differential diagnosis or etiology and his training and experience were helpful in reaching his conclusion on causation; (b) the MSDS had limited value in supporting Dr. Jenkins' opinion because he did not know what tests Dow had conducted in preparing the MSDS or what level of exposure was necessary for a person to sustain the injuries warned of in the MSDS; (c) Mr. Moore's asthma in his youth, history of smoking and recovery from pneumonia shortly before his exposure made Dr. Jenkins' opinion even more unreliable; and (d) the “analytical gap” between Dr. Jenkins's causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide; and (2) Dr. Jenkins did not explain precisely how the irritating properties in the compound described by the MSDS were similar to those in other chemicals or compounds that had been linked with reactive airways disease.

Dr. Jenkins testified that he did not know what tests Dow had performed in preparing the MSDS warnings of the hazards of the chemical compound. The district court commented on this fact but based its ruling on the lack of hard scientific support for the doctor's clinical medical opinion, not on his \*289 lack of knowledge of Dow's testing. The MSDS was introduced without objection and referred to in testimony by the experts on both sides, none of whom professed to have any knowledge of Dow's MSDS-related testing. The record clearly demonstrates that Dr. Jenkins used the MSDS only for the same purpose as did the other experts, merely as a source of information as to the kinds of chemicals in the compound to which Mr. Moore had been exposed. Thus, the district court evidently gave no weight to the experts' lack of knowledge of Dow's testing, and if it did find any relevance in this fact, it would have been clearly erroneous in doing so. *See Moore*, 126 F.3d at 701.

The district court, moreover, did not base its decision on many of the findings and reasons that the majority now attributes to it. Neither the defendant nor the district court found any fault with Dr. Jenkins' qualifications<sup>7</sup>, experience, testimony regarding the similarity of irritating chemical properties, or his proper performance of differential etiology to eliminate alternative causes of

Mr. Moore's disease. Because the defendant did not object to Dr. Jenkins' opinion on these grounds or question him on these points and the district court did not base its ruling on them, these issues should not be raised *sua sponte* by this court. The performance of physical examinations, taking of medical histories, and employment of reliable laboratory tests provide significant evidence of a reliable differential diagnosis and prima facie evidence that a doctor has considered alternative causes and has attempted to test his or her initial hypothesis as to cause. See *Paoli*, 35 F.3d at 759. The failure of the defendant or the district court to ask for, or the doctor's failure to volunteer, further elaboration on how each differential diagnosis test is designed to eliminate each alternative cause of disease or a chemistry professor's exegesis on the structure and composition of each chemical identified as having similar irritating properties, does not afford a proper basis for an appellate trial de novo on the record of the district court's preliminary assessment hearing.

Likewise, the defendants did not contend, and the trial judge did not rule, that Dr. Jenkins' opinion was inadmissible because of Mr. Moore's childhood asthma, smoking or pneumonia. Dr. Jenkins concluded that the exposure to the chemical compound triggered Mr. Moore's reactive airways disease after taking these and all other relevant factors into consideration. The plaintiff is not required to prove that the exposure was the exclusive cause of the disease. It is well settled in Texas and elsewhere that a defendant takes the plaintiff as he finds him. *Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex.1988)(citing *Driess v. Friederick*, 73 Tex. 460, 11 S.W. 493, 494 (1889)); *Mondragon v. Austin*, 954 S.W.2d 191, 194 (Tex.Ct.App.1997); see *Maurer v. United States*, 668 F.2d 98, 99–100 (2nd Cir.1981)(“It is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim. The defendant takes the plaintiff as he finds him.”); W. Page Keeton, et al., PROSSER AND KEETON ON TORTS § 43 at 291–92 (5th ed.1984).

The majority's most blatant addition of its own ex post facto finding and rationale in an effort to bolster the

district court's ruling, however, is its erroneous claim that the district \*290 court found “that the ‘analytical gap’ between Dr. Jenkins's causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide.” Maj. Op. p. 279. The district court made no such finding. The term “analytical gap,” comes from the Supreme Court's *Joiner* opinion of 1997, see 118 S.Ct. at 519, and does not appear in the district court's 1995 ruling in the present case.<sup>8</sup> Moreover, as explained above, the district court based its decision on the same erroneous theory as the majority's primary rationale, i.e., that a clinical medical physician cannot express an admissible opinion, regardless of how soundly he or she relies on and applies well settled clinical medical methodology, unless the opinion is further supported by hard science, rigid *Daubert* factor type data.

### Conclusion

In the final analysis, this case presents the legal question of the proper interpretation of Federal Rule of Evidence 702 and *Daubert* in cases involving expert witness proffers based on knowledge beyond the realm of hard scientific knowledge. Indeed, the majority *en banc* opinion is far too “rulefied” for anyone to seriously contend that it does not set broad, eccentric precedents that will profoundly affect the trials and outcomes in substantial numbers of future cases involving injuries and diseases alleged to have been caused by exposure to chemical compounds. The *en banc* majority, in my opinion, makes several errors of law, the most serious of which is its holding that a clinical medical expert, whose opinion is based on a sound application of the principles and methodology of his or her discipline, cannot reliably testify as to the causal relationship between and individual's exposure to a chemical compound and his or her subsequent onset of symptoms and disease. As a result of this error of law and others, the *en banc* opinion subverts the liberal thrust of the Federal Rules of Evidence and the principles enunciated in *Daubert* by locking the gate on causation evidence derived through the principles and methodology of clinical medicine.

### All Citations

151 F.3d 269, 49 Fed. R. Evid. Serv. 1325

## Footnotes

- \* POLITZ, Chief Judge, is recused.
- 1 The MSDS provided, in part, as follows:  
MATL NAME: DOW CORNING(R) 1-2531 RELEASE COATING  
....  
SECTION II—HAZARDOUS INGREDIENTS AS DEFINED IN 29 CFR 1910.1200 ...  
TOLUENE ...  
SOLVENT NAPHTHA, PETROLEUM, LIGHT ALIPHATIC ...  
ISOBUTYLISOBUTYRATE  
PROPYLENE GLYCOL METHYL ETHER ...  
SECTION III—EFFECTS OF OVEREXPOSURE  
...  
INHALATION: SHORT VAPOR EXPOSURE MAY CAUSE DROWSINESS AND IRRITATE NOSE AND THROAT. VAPORS MAY INJURE BLOOD, LIVER, LUNGS, KIDNEYS, AND NERVOUS SYSTEM. DEGREE OF EFFECTS DEPENDS ON CONCENTRATION AND LENGTH OF EXPOSURE.  
...  
COMMENTS: PROLONGED TOLUENE OVEREXPOSURE MAY INJURE BLOOD, LIVER, LUNGS, KIDNEYS, AND NERVOUS SYSTEM AND MAY AGGRAVATE EXISTING EYE, SKIN, AND RESPIRATORY DISORDERS.
- 2 The Defendants agree that Dr. Jenkins's qualifications are outstanding. He served residencies in internal medicine, tuberculosis, and chest disease and allergy, and was certified by the American Board of Internal Medicine in 1947. After serving as Chief Resident in Medicine and Assistant Professor of Medicine and Physician in Charge of the Tuberculosis and Chest Unit at the University of Michigan Medical School from 1943 to 1947, he spent forty-four years on the faculty at Baylor Medical School. In 1991, he went into practice in Houston with a group of physicians specializing in respiratory ailments.
- 3 Stuart M. Brooks, M.D. et al., *Reactive Airways Dysfunction Syndrome (RADS)*, 88 CHEST 376 (1985).
- 4 *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).
- 5 Fed.R.Evid. 702 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.
- 6 The panel majority took the position that because Dr. Jenkins's causation opinion was not predicated on "hard science," it was therefore not subject to *Daubert*'s standards for admissibility. We disagree. *Daubert* and *Joiner* both involved questions of medical causation. As one of the scientists who filed an amicus brief, Professor Alvan R. Feinstein, stated: "In other words, determining the etiology of a disease—its cause—involves the same scientific exercise, whether the decision is made by a clinician, an epidemiologist, or other scientist." Brief of Dr. Feinstein, Sterling Professor of Medicine and Epidemiology at the Yale University School of Medicine and author and co-author of more than 375 peer-reviewed articles and five scientific texts, including *Clinical Judgment*.  
In any event, in this Circuit an opinion is governed by Fed.R.Evid. 702 and *Daubert*, even though the opinion is not grounded in "hard science," assuming such a distinction exists. In *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir.1997), we rejected the position that application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely on experience or training. *Id.* at 988–90.
- 7 Fed.R.Evid. 104(a) provides:  
Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).
- 8 This analysis by the Supreme Court is particularly relevant to our case. The Brooks study relied upon by Dr. Jenkins suffered from the same self-doubts as the studies in *Joiner*. Dr. Brooks was unable to reach any conclusions based on his isolated studies.
- 9 See also *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607 (7th Cir.1993); 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1233–34 (7th ed.1998).
- 10 Given the paucity of facts Dr. Jenkins had available about the level of Moore's exposure to the Toluene solution, his causation opinion would have been suspect even if he had scientific support for the position that the Toluene solution could cause RADS in a worker exposed to some minor level of the solution. Under *Daubert*, "any step that renders the

analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir.1994) (emphasis in original).

1 Evidently, the majority interprets the final *Daubert* factor, "general acceptance," to mean acceptance within a relevant "hard scientific" community. For it is undisputed that the methods and techniques used by Dr. Daniel Jenkins to determine that Mr. Moore's RADS had been caused by his exposure to the chemical compound, i.e. history taking, physical examinations, differential etiology (conducting tests to eliminate other diagnoses and causes of the patient's disease), and review of other physicians' reports were generally accepted within the doctor's own clinical medical disciplines of pulmonary and environmental medicine.

2 In *Daubert*, the Court stated:

Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are correct will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786.

The majority *en banc* opinion quotes this passage at page 275–276 and proceeds to stand it on its head on page 276, interpreting the Supreme Court's words as supporting the majority's proposition that although hard scientific proof of medical causation will not always be available in chemical injury cases, the cases must be quickly resolved; therefore, in chemical injury cases, if the plaintiff can produce only clinical medical experts whose opinions are based solely on well accepted clinical medicine methodology, they must face trial without a medical causation expert witness.

The *Daubert* Court neither expressed nor implied such a draconian rule. Being confronted with a case involving the admissibility of hard science epidemiological expert opinions, not generally accepted in that field, proffered to prove that Bendectin could have caused birth defects in children whose mothers used the drug, the Court concluded that the evidence could not be excluded under the *Frye* rule which was superseded by the Federal Rules of Evidence, but that the trial judge as gatekeeper must determine that the hard science evidence proffered is not only relevant but also reliable as based on a sound application of the methodology of the expert's discipline and suggested several ways, based on basic elements of hard science methodology, that a party who proffers an expert who proposes to testify to a hard scientific opinion can show that the opinion is reliable or, reciprocally, that a court can use to test the opinion's reliability.

These ways of testing or showing reliability of hard scientific opinions have become known as the "*Daubert* factors." But the Court did not intend to require that these gauges of reliability be applied monolithically to all expert testimony. When the expert does not propose to testify to an opinion based on hard scientific methodology, the Court indicated that the reliability of his opinion should be assessed according to the methodology of the expert's own discipline. The *Daubert* court did not indicate, and this court is not called upon to decide, what a trial court should do if it is confronted by proffers of experts who propose to testify to directly conflicting opinions as to medical causation, one based on hard scientific methodology and the other based on clinical medical methodology. In such a case, it is likely that the trial court should find the clinical medical expert's opinion unreliable if it fails to take into account and distinguish the hard scientific expert's opinion and its basis in hard scientific data, if the court finds the latter to be reliable. The *Daubert* Court did not suggest, however, that the Federal Rules of Evidence authorize a federal court to formulate a rule, as the *en banc* majority has done, that, in effect, bars a clinical physician from expressing an opinion as to the probable chemical causation of a disease in a specific individual until the existence of a general causal relationship has been confirmed by the use of hard scientific methodology.

3 In addition to the views expressed by commentators and practitioners, Stephen A. Saltzburg, et al. 2 FEDERAL RULES OF EVIDENCE MANUAL at 1250–1251 (7th ed.1998) reports that:

The Advisory Committee on Evidence Rules has made a determination that Rule 702 should be amended in light of *Daubert* and its progeny. The Advisory Committee has prepared a working draft for an amended 702, which, at this writing, has yet to receive final approval from the Committee. The working draft, which is adapted from a proposal by Professor Michael Graham, reads as follows:

Testimony providing scientific, technical or other specialized information, in the form of an opinion, or otherwise, may be permitted if:

(1) the information is based upon adequate underlying facts, data or opinions;

- (2) the information is based upon a methodology either (a) established to have gained widespread acceptance in the particular field to which the explanative theory belongs, or (b) shown to possess indicia of trustworthiness;
- (3) the methodology has been applied reliably to the facts of the case;
- (4) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information; and
- (5) the information will assist the trier of fact to understand the evidence or to determine a fact in issue.

While the language set forth above is still in development, the Advisory Committee has agreed upon some general substantive points. First, the gatekeeper standards of Rule 702 must apply to all expert testimony. .... Second, the reliability standards must apply not only to the theory or methodology used by the expert, but also to the application of that theory or methodology in the specific case.... Third, it does not pay to get too detailed about the factors that a Trial Judge should use in assessing reliability.... The risk of leaving out important reliability factors is especially great because experts in different fields will necessarily use different methodologies, and it would be very difficult to describe an all-inclusive list of reliability factors that would cover the testimony of all experts.

- 4 The panel opinion in the present case, *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679 (5th Cir.1997), consistently with the foregoing authorities, concluded that: (1) the basic principles of the Federal Rules of Evidence recognized in *Daubert* apply to the admission or exclusion of every type of expert testimony; (2) a trial judge, therefore, must assess every proffer of expert testimony to determine whether it is relevant to the case and a reliable application of the principles and methodology of that expert's discipline; (3) the Supreme Court in *Daubert* interpreted "scientific knowledge" under Federal Rule of Evidence 702, for purposes of that case, to mean knowledge obtained and tested by the scientific method, i.e., "hard" scientific knowledge; (4) accordingly, the *Daubert* court indicated that a trial court should assess the reliability of expert testimony professedly based on "hard" scientific knowledge using several factors, the "*Daubert* factors," which are "hard" science methods or techniques; (5) clinical medicine (as opposed to research and laboratory medical science) is not, strictly speaking, a "hard" scientific discipline; its goals, subject matter, conditions of study, and well developed, sui generis methodology are quite different from that of purely "hard" science and its methodology; (6) Consequently, a trial judge assessing the reliability of the proffer of a clinical physician's expert testimony based on clinical medical knowledge, without purporting to be based on hard scientific methodology, should determine whether it is a sound application of the knowledge, principles and methodology of clinical medicine; (7) In the present case, the district court committed an error of law by rigidly applying the "*Daubert* factors" and excluding the expert clinical physician's opinion because the doctor did not have any "hard" scientific data to support his clinical medical opinion.

- 5 As explained by the panel opinion:

From Moore's history that Dr. Jenkins had taken, he had information that before the exposure Moore was in good health, that two 400 pound drums of the chemicals had begun leaking in the back of Moore's truck at some time before his arrival at Ashland, that Moore's rig consisted of a diesel tractor and a 28 foot enclosed trailer, that after the discovery of the leakage upon arrival at Ashland the drums were allowed to continue to leak inside the trailer with the doors shut for another 45 minutes until the Ashland supervisor told Moore to remove them, that at this point the 400 pound drums had become light enough to allow Moore and others to roll them manually out onto the dock, that Moore and a co-employee worked in and around the trailer for about 45 to 60 minutes sprinkling "Absorbo" over the contaminated areas sweeping the saturated material into shovels, removing the materials from the trailer, and shoving the leaking drums into salvage drums, that Moore finished the cleanup at Ashland about 11:00 a.m., that Moore began to experience tightness of chest at about 11:45 a.m., that as his symptoms were continuing to worsen Moore consulted the company doctor who put him on "oxygen and inhalants." *Moore*, 126 F.3d at 702.

From this information, Dr. Jenkins was able to roughly estimate that Mr. Moore had been exposed to possibly "200 parts per million or higher" of the chemical compound. *Id.* at 695.

- 6 Dr. Jenkins performed a physical examination, took a detailed medical history, observed Moore on three occasions, reviewed the MSDS prepared by Dow Corning, and performed a series of tests on Moore including pulmonary function tests, a bronchodilator test, a spirometry test, a plethysmographic test, a lung volume determination, an intrapial gas distribution test, a diffusion test, an arterial bloods test, a mechanics test, X-rays, and laboratory tests. Dr. Jenkins reviewed the medical records and reports of a bronchodilator test performed by Dr. Simi two to three weeks after the accident that showed severe airways obstruction. Additionally, Dr. Jenkins reviewed a report of an allergy test performed by Dr. Alvarez, which ruled out allergic or immunologic disease and confirmed RADS. Finally, Dr. Jenkins also relied upon the temporal proximity between the exposure to the chemicals at the Ashland facility and the onset of symptoms.
- 7 The majority opinion fails to point out that Dr. Jenkins' qualifications were never an issue at any point in these proceedings. In fact, Dr. Jenkins was more than eminently qualified to render an opinion in this matter as a brief summary of his

education, training and experience reveals. Dr. Jenkins received his medical degree from the University of Texas in 1940, received training at the University of Michigan Hospital as an intern, resident in Tuberculosis and Chest Disease and resident in Allergy in 1940–45, served as Instructor and Chief Resident in Medicine and Assistant of Medicine and Physician in charge of the Tuberculosis and Chest Unit, University of Michigan Medical School, 1943 to 1947, was certified by the American Board of Internal Medicine in 1947, served in various capacities as a professor at Baylor College of Medicine from 1947–91 where from 1947–74 he was chief of the Pulmonary Disease Section and from 1975–91 chief of environmental medicine. Additionally, in the course of over fifty years of practicing medicine, Dr. Jenkins has examined and evaluated over 100 persons for injuries occurring from exposure to various chemical compounds in an occupational setting.

- 8 In *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), the Supreme Court held that abuse of discretion, rather than the particularly stringent standard of review applied by the court of appeals in that case, is the proper standard by which to review a district court's decision to admit or exclude scientific evidence. The plaintiff Joiner proffered expert testimony based on hard science methodology, animal and epidemiological studies, to prove that the defendants' PCBs and related products had caused his lung cancer. "Joiner's experts used a 'weight of the evidence' methodology to assess whether Joiner's exposure to transformer fluids promoted his lung cancer. They did not suggest that any one study provided adequate support for their conclusions, but instead relied on all the studies taken together (along with their interviews of Joiner and their review of his medical records)." *Id.*, 118 S.Ct. at 521 (Stevens, J. concurring in part and dissenting in part) (footnote omitted). The district court examined the studies and excluded the experts' opinions on the ground that none of the studies was sufficient alone to show a link between PCBs and lung cancer.

The Supreme Court held that the district court did not abuse its discretion in excluding the experts' testimony on grounds that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions. The Supreme Court remarked that "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* at 519.

In the present case, there was no "analytical gap" between Dr. Jenkins' data and his opinion that Mr. Moore's exposure caused his disease. In fact, the district court allowed Dr. Alvarez to use the identical data to express the same opinion. It is easy to see that the district court's decision in *Joiner* was reasonable and not an abuse of discretion because the plaintiff himself conceded that there was an analytical gap between each one of his expert's studies and the conclusion that PCBs caused his cancer. He argued, although unsuccessfully, however, that every analytical gap could be bridged if all of the experts' studies were considered in combination. In the present case, the district court excluded Dr. Jenkins' opinion simply because he did not have any hard scientific support for his clinical medical opinion, not because of a gap in reasoning. Dr. Jenkins' clinical medical opinion was, in fact, snugly based on the sound application of the well accepted methodology of his discipline. Thus, *en banc* the majority itself is simply attempting to bridge too great an analytical gap by trying to stretch *Joiner* to cover the present case.

People v Middleton, 54 N.Y.2d 42 (1981)

429 N.E.2d 100, 444 N.Y.S.2d 581

54 N.Y.2d 42, 429 N.E.2d 100, 444 N.Y.S.2d 581

The People of the State of  
New York, Respondent,  
v.  
Lymus Middleton, Appellant.

Court of Appeals of New York  
Argued September 14, 1981;  
decided October 27, 1981

CITE TITLE AS: People v Middleton

### SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 10, 1980, which affirmed a judgment of the Supreme Court (Morris Goldman, J., at trial and sentence; James J. Leff, J., at suppression hearing), rendered in New York County upon a verdict convicting defendant of manslaughter in the first degree.

Defendant, a hospital maintenance employee whose supervisor was found on the floor of his office and pronounced dead soon thereafter, was arraigned the next morning on a felony complaint. Four days later his attorney demanded a preliminary hearing, which was several times adjourned on the representation by the People that the case was being prepared for presentation to the Grand Jury. An autopsy made by the medical examiner revealed five distinct bite marks on the victim's back and the People's motion for an order directing defendant to submit to an examination of his mouth and the making of a cast or mold by a dentist associated with the office of the chief medical examiner was granted over defendant's objections that the Supreme Court was without jurisdiction; that the People failed to establish probable cause that the defendant committed the crime, and that the examination would violate defendant's Fifth Amendment rights against self incrimination. The

dental examination and casting took place and defendant was subsequently indicted by the Grand Jury. No pretrial motion for suppression of the bite mark evidence was ever made, but the trial court denied defendant's motion to strike the dentist's testimony on the ground that it lacked scientific validity, and to dismiss the indictment for insufficiency of evidence on the ground that the dentist's testimony should not have been submitted to the Grand Jury. The Appellate Division affirmed the suppression court's findings, holding \*43 the bite mark order proper notwithstanding that there had not yet been a preliminary probable cause hearing or an indictment, because defendant was under arrest and in custody.

The Court of Appeals affirmed, holding, in an opinion by Judge Meyer, that the Supreme Court had jurisdiction to issue the dental examination order; that whether the order was improper absent a showing of probable cause was not preserved for review, and that the bite mark evidence was admissible as reliable, upon a proper foundation.

[People v Middleton, 76 AD2d 762](#), affirmed.

### HEADNOTES

[Crimes](#)

[Identification of Defendant](#)

[Evidence of Bite Marks](#)

([1]) The reliability of bite mark evidence as a means of identification is sufficiently established in the scientific community to make such evidence admissible in a criminal case, without separately establishing scientific reliability in each case, but subject to the establishment by foundation evidence of the authenticity of the materials used and propriety of the procedure followed in the particular case and to cross-examination intended to test the reliability of the conclusion reached in that case; under the circumstances herein, accepted techniques were employed by the experts in reaching the conclusion that the bite marks on the decedent's back were made by defendant's teeth;

**People v Middleton, 54 N.Y.2d 42 (1981)**

429 N.E.2d 100, 444 N.Y.S.2d 581

moreover, the Supreme Court had jurisdiction to direct that a mold or cast of the defendant's teeth be taken, such order having been made in furtherance of a Grand Jury investigation, even though defendant had been arraigned in criminal court and there had not yet been a preliminary probable cause hearing or an indictment. Furthermore, defendant, having failed to challenge the admissibility of the bite mark evidence on Fourth Amendment grounds by pretrial motion, or even during the trial (see CPL 710.40), may not point to the fact that the probable cause issue was raised in another context earlier in the proceeding as preserving the evidence question.

**POINTS OF COUNSEL**

*Harvey J. Michelman* and *Perry S. Reich* for appellant.

I. The impressions made of appellant's teeth were inadmissible at trial. (*Gerstein v Pugh*, 420 US 103; *Schmerber v California*, 384 US 757; *Fisher v United States*, 425 US 391; Matter of *Barber v Rubin*, 72 AD2d 347; Matter of *Mackell v Palermo*, 59 Misc 2d 760; Matter of *Alphonso C. [Morgenthau]*, 50 AD2d 97, 38 NY2d 923; Matter of *District Attorney of Kings County v Angelo G.*, 48 AD2d 576, 38 NY2d 923; *People v Vega*, 50 AD2d 1103; Matter of *Mollis v Cawse*, 38 Misc 2d 179.) II. Appellant should be \*44 given the opportunity to establish that the statements taken from him were obtained during a period of illegal detention. (*People v Misuis*, 47 NY2d 979; *People v Dunaway*, 38 NY2d 812, 61 AD2d 299, 44 NY2d 930, revd *sub nom. Dunaway v New York*, 442 US 200; *People v Thomas*, 50 NY2d 467; *People v Morales*, 42 NY2d 129, 434 US 1018; *People v Patterson*, 39 NY2d 288, affd *sub nom. Patterson v New York*, 432 US 197.)

*Robert M. Morgenthau*, District Attorney (*Victoria Lea Smith* and *Robert M. Pitler* of counsel), for respondent.

I. Defendant's guilt was proved beyond a reasonable doubt. II. Defendant was arrested on the basis of probable cause. Also, he waived the

right to judicial review of the issue and has not preserved the issue for appeal. (*People v Patterson*, 39 NY2d 288, affd *sub nom. Patterson v New York*, 432 US 197; *People v Samuels*, 49 NY2d 218; *Dunaway v New York*, 442 US 200; *United States v Tucker*, 610 F2d 1007; *People v Thomas*, 50 NY2d 467.) III. Defendant's incarceration between arrest and indictment was lawful, hence the dental impressions obtained during that time were not the fruit of an illegal detention. Also, the dental impressions were obtained independently of any alleged illegality in the detention and so were not suppressible as fruit of the detention. (*People v Olivo*, 52 NY2d 309; *Wong Sun v United States*, 371 US 471; *United States v Rowell*, 612 F2d 1176; *United States v Jarvis*, 560 F2d 494, 435 US 934.) IV. The issuance of the dental examination order was a valid exercise of statutory and constitutional powers of the Supreme Court. (*People v Darling*, 50 AD2d 1038; *People v Perri*, 72 AD2d 106, 53 NY2d 957; Matter of *Hynes v Lerner*, 44 NY2d 329; Matter of *District Attorney of Kings County v Angelo G.*, 48 AD2d 576, 38 NY2d 923; *Katz v United States*, 389 US 347; *United States v Dionisio*, 410 US 1; *United States v Mara*, 410 US 19; *United States v Holland*, 378 F Supp 144, affd *sub nom. Appeal of Ehly*, 506 F2d 1050, 420 US 994; *People v Allah*, 84 Misc 2d 500.) V. The bite mark evidence was properly admitted as reliable scientific evidence which has been recognized as such by the releva (*People v Goldfaden*, 52 AD2d 790; *People v Allweiss*, 48 NY2d 40; *People v Leone*, 25 NY2d 511; \*45 *Lindsay v People*, 63 NY 143; *People v Rivera*, 75 AD2d 1027, 51 NY2d 775; *People v Jackson*, 71 AD2d 1065.)

**OPINION OF THE COURT**

Meyer, J.

The reliability of bite mark evidence as a means of identification is sufficiently established in the scientific community to make such evidence admissible in a criminal case, without separately establishing scientific reliability in each case, but subject, of course, to the establishment by foundation evidence of the authenticity of the

**People v Middleton, 54 N.Y.2d 42 (1981)**

429 N.E.2d 100, 444 N.Y.S.2d 581

materials used and propriety of the procedure followed in the particular case and to cross-examination intended to test the reliability of the conclusion reached in that case. The order of the Appellate Division should, therefore, be affirmed.

Defendant Middleton worked in the maintenance engineering department at Mount Sinai Hospital in New York City. His supervisor, Gladstone Scale, was found on the floor of his office on December 16, 1976 at about 9:30 P.M. and pronounced dead at 10:00 P.M. Defendant was arraigned at 9:00 A.M. the next morning on a felony complaint. Four days thereafter his attorney demanded a preliminary hearing pursuant to [CPL 180.60](#). The hearing was several times adjourned on the representation of the People that the case was being prepared for presentation to the Grand Jury.

Autopsy made by the chief medical examiner, Dr. Dominick Di Maio, revealed five distinct bite marks on Scale's back. Though the matter was then still pending in the Criminal Court, the People by motion returnable January 10, 1977 in Supreme Court sought an order directing defendant to submit to examination of his mouth and the making of a cast or mold by Dr. Lowell J. Levine, a dentist associated with the office of the chief medical examiner. Defendant's attorney opposed that motion on the grounds that the Supreme Court was without jurisdiction, that the People had failed to establish probable cause to believe defendant had committed the crime, and that the examination and casting would violate defendant's Fifth Amendment rights. Those objections having been overruled, the examination and casting took place and the Grand Jury after presentation to it \*46 of that as well as other evidence indicted. A motion addressed to the sufficiency of the Grand Jury minutes was then made and denied for failure to make the requisite factual showing that there was reasonable cause to believe the evidence before the Grand Jury insufficient. Several months thereafter, defendant's attorney sought suppression of admissions made by defendant in a statement to the District Attorney during the early morning hours of December 17, 1976, and, after hearing, that motion was denied.

No pretrial motion for suppression of the bite mark evidence was ever made.

During the course of the trial defendant argued for suppression of the casts of defendant's teeth on the ground that the order for the taking of them violated defendant's "Fifth and Fourteenth Amendment rights against self-incrimination", for a hearing with respect to the reliability of testimony concerning bite marks and for the exclusion of Dr. Levine's testimony on the latter ground. At the end of the People's case defendant moved to strike Dr. Levine's testimony on the ground that it lacked scientific validity, and to dismiss the indictment for insufficiency of evidence on the ground that Dr. Levine's testimony should not have been submitted to the Grand Jury. The Trial Judge ruled that no hearing on reliability was required in light of decisions and literature on the subject, that the suppression motion was governed by the order for examination of defendant and the taking of a cast as the law of the case, and the sufficiency of the indictment, by the denial of so much of the omnibus motion as sought inspection of the Grand Jury minutes.

Convicted of manslaughter in the first degree after a jury trial, defendant appealed to the Appellate Division, First Department, which, affirming the suppression court's findings, held defendant's statements to the District Attorney voluntary, and the bite mark order proper notwithstanding that there had not yet been a preliminary probable cause hearing or an indictment, because defendant was under arrest and in custody, his arrest having been based upon evidence and information which clearly amounted to probable cause to arrest. On appeal by permission to this court defendant argues, with respect to the bite mark evidence, \*47 (1) that the Supreme Court was without jurisdiction to make the order requested, (2) that the order was in any event improper absent a showing of probable cause, and (3) that in any event the evidence should have been excluded because its reliability had not been established either generally or with respect to the comparisons to which Dr. Levine testified. For the reasons hereafter stated, we disagree with the first

**People v Middleton, 54 N.Y.2d 42 (1981)**

429 N.E.2d 100, 444 N.Y.S.2d 581

and third contentions, and find that the second was not properly preserved.

**I**

When the application was made for an order permitting examination and the taking of bite impressions, defendant had been arraigned and preliminary hearing had been adjourned for presentation of the matter to the Grand Jury. The Supreme Court has the authority to issue an order in furtherance of a Grand Jury investigation even though no arrest or indictment has yet occurred (Matter of [District Attorney of Kings County v Angelo G.](#), 48 AD2d 576, app dsmd 38 NY2d 923; see [People v Perri](#), 72 AD2d 106, 112, affd 53 NY2d 957). Nor was it ousted of jurisdiction because defendant had been arraigned in Criminal Court, for [CPL 10.10 \(subd 3, par f\)](#) recognizes the authority of a Supreme Court Justice to sit “as a local criminal court”, subdivision 3 of section 10.30 of that law gives a superior court Judge sitting as a local criminal court preliminary jurisdiction, and subdivision 2 of that section makes the preliminary jurisdiction of a local criminal court “subject to divestiture thereof in any particular case by the superior courts and their grand juries.” Whether the Supreme Court order be regarded as made by that court sitting as a local criminal court or by a superior court in aid of a Grand Jury proceeding it was, therefore, properly made.<sup>1</sup>

**II**

The People advance several reasons why the Fourth \*48 Amendment issue is not properly before us. They argue first from the fact that defendant was arraigned and held without bail and the presumption of regularity that, defendant having failed to supply the arraignment minutes, it must be presumed that probable cause was found on arraignment. The difficulty with that argument is that the People do not contest that a preliminary hearing request was made after arraignment and was adjourned rather than denied as it would have been had probable cause been found as the result of an evidentiary hearing at arraignment.

More fruitful is the People's second argument that, though, as defendant's motion to suppress his statements shows, he was familiar with the general rule ([CPL 710.40](#)) that a motion to suppress evidence be made prior to trial, no such motion was here made. Though [CPL 710.40 \(subd 4\)](#) permits such a motion to be made during trial under proper circumstance and defendant did, just before Dr. Levine testified, move to suppress the bite mark evidence, he did so on Fifth Amendment grounds and made no mention of probable cause or the Fourth Amendment. Defendant seeks to circumvent that omission by pointing to his objection, made to and tacitly overridden by the Judge who heard the motion to examine and take impressions of his mouth, that the court was without authority to grant such an order until probable cause had been shown. That ruling, says defendant, became the law of the case and preserved the Fourth Amendment issue for him. The short answer is that by failing to challenge the admissibility of the bite mark evidence on Fourth Amendment grounds, defendant waived any objection on that score. The purpose of the procedure established by CPL article 710 is not only to protect the defendant against the use against him of illegally obtained evidence but also to give the People the opportunity, by showing the information in the possession of the police at the time the evidence was obtained, to contest the claim of illegality. Had defendant sought by pretrial motion (and even during trial, if the Trial Judge found the delay not unreasonable) to suppress the evidence on Fourth Amendment grounds and had the suppression Judge then ruled \*49 that the earlier ruling was the law of the case, the issue would have been preserved, not because of the contention advanced on the prior motion, but because it had been again advanced with respect to the admission of the evidence. But a defendant may not, having failed to object to the admission of evidence on Fourth Amendment grounds, point to the fact that the issue had been raised in some other context earlier in the proceeding as preserving the evidence question (see [People v Miguel](#), 53 NY2d 920, 922; [People v Gates](#), 24 NY2d 666, 670). To

**People v Middleton, 54 N.Y.2d 42 (1981)**

429 N.E.2d 100, 444 N.Y.S.2d 581

hold otherwise would lend an unwarranted degree of gamesmanship to the trial process.

**III**

Identification through configuration of and marks upon teeth has long been permitted in New York (*Lindsay v People*, 63 NY 143, 152 [1875]). Bite mark evidence, however, requires comparison of impressions made upon a victim's body with a suspect's dentition as a means of identifying him as the perpetrator of a crime. Defendant argues that the procedure, while it may be a valid means of excluding suspects from consideration, has not been sufficiently accepted by the scientific community to permit its use as a means of identifying a perpetrator.<sup>2</sup> But the test is not whether a particular procedure is unanimously indorsed by the scientific community, but whether it is generally acceptable as reliable. The techniques employed (photography, freezing of tissue specimens, the taking of dental molds, visual observation) are accepted and approved by the majority of the experts in the field (see, e.g., Beckstead, Ronson & Giles, Review of Bite Mark Evidence, 99 J Am Den Assn 69 et. seq.; Harvey, Dental Identification and Forensic Odontology [1976]; and MacDonald, Bite Mark Recognition and Interpretation, 14 J Forens Science Soc 229 [1974]; cf. Moenssens & Inbau, Scientific Evidence in Criminal Case, ch 16 [2d ed, 1978]). The reliability of the procedures has, moreover, been accepted by \*50 all of the appellate courts that have addressed the issue (see, e.g., *State v Garrison*, 120 Ariz 255; *People v Slone*, 76 Cal App 3d 611; *People v Watson*, 75 Cal App 3d 384; *People v Marx*, 54 Cal App 3d 100; *People v Milone*, 43 Ill App 3d 385; *Niehaus v State*, 265 Ind 655, cert den 434 US 902; *State v Peoples*, 227 Kan 127; *State v Kleypas*, 602 SW2d 863 [Mo]; *State v Sager*, 600 SW2d 541 [Mo], cert den 450 US 910; *State v Temple*, 302 NC 1; *State v Routh*, 30 Ore App 901; *United States v Holland*, 378 F Supp 144, affd *sub nom.* Appeal of Ehly, 506 F2d 1050, cert den *sub nom.* Ehly v United States, 420 US 994; *State v Jones*, 273 SC 723; *Patterson v State*, 509 SW2d 857 [Tex]; and see Ann., 77 ALR3d 1122). It was not error, therefore, for the Trial

Judge, without a hearing concerning the scientific principles involved, to hold the evidence generally reliable (*People v Magri*, 3 NY2d 562, 566).

The only remaining question, then, is whether the accepted techniques were employed by the experts in this case in reaching the conclusion that the bite marks on the decedent's back were made by defendant's teeth. Dr. Di Maio testified that there were fresh hemorrhages beneath the bite marks on Scale's back indicating that they had been made no longer than three hours before death, that he first photographed and measured the bite mark areas and then removed the skin and nailed the pieces to a board in conformance with the measurements taken and placed them in a deep freeze. Approximately one week later, when Dr. Levine examined the specimens, Dr. Di Maio found little or no variation in the specimens before and after freezing.

Dr. Levine testified, with a reasonable degree of medical certainty, that the bite wounds had been inflicted by defendant. Conceding that the accuracy of the comparison could be affected by the quality of the specimen, the number of marks on the skin and distortions in the skin, Dr. Levine noted that segments of the 12 teeth identifiable from the five wounds were perfectly consistent with defendant's teeth, that indeed he could find no inconsistency despite the fact that teeth have unique characteristics of arrangement, shape, angle and size, and that the odds against the characteristics found identifying defendant \*51 being duplicated in any other person's mouth were "astronomical". While the weight of that evidence was, of course, for the jury there clearly was proper foundation for its admissibility.

For the foregoing reasons, the order of the Appellate Division should be affirmed.

Chief Judge Cooke and Judges Jasen, Gabrielli, Jones and Wachtler concur; Judge Fuchsberg taking no part.

Order affirmed. \*52

People v Middleton, 54 N.Y.2d 42 (1981)

429 N.E.2d 100, 444 N.Y.S.2d 581

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#### Footnotes

- 1 The conclusion reached makes it unnecessary to consider the People's argument (supported not by their affidavit on the motion in question, but by an affidavit made some nine months later in answer to a speedy trial motion) that the application was first made to and granted by the criminal court and that it was defendant who refused to comply with that order and sought to have the issue determined by the Supreme Court.
- 2 He points to Glaister, *Medical Jurisprudence and Toxicology* (13th ed, 1973); Fernhead, *Factors for Forensic Odontology* (1 *Med Science Law* 273); and Note, *Admissibility of Bite Mark Evidence* (51 *So Cal L Rev* 309), in this respect.

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**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

 KeyCite Yellow Flag - Negative Treatment  
Disagreed With by [State v. Coon](#), Alaska, March 5, 1999  
83 N.Y.2d 417, 633 N.E.2d 451,  
611 N.Y.S.2d 97, 62 USLW 2655

The People of the State of  
New York, Respondent,

v.

George Wesley, Appellant.

Court of Appeals of New York  
18

Argued January 12, 1994;  
Decided March 29, 1994

CITE TITLE AS: [People v Wesley](#)

**SUMMARY**

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered October 22, 1992, which affirmed (1) a judgment of the Albany County Court (Joseph Harris, J.; *see*, [140 Misc 2d 306](#)), rendered upon a verdict convicting defendant of murder in the second degree, rape in the first degree, attempted sodomy in the first degree and burglary in the second degree, and (2) an order of that court (Joseph Harris, J.), denying a motion by defendant pursuant to [CPL 440.10](#) to vacate the judgment of conviction.

[People v Wesley](#), 183 AD2d 75, affirmed.

**HEADNOTES**

[Crimes](#)  
[Evidence](#)

DNA Identification Tests

([1]) The standard to be used in determining whether novel DNA profiling evidence was properly admissible at defendant's trial is whether

the reliability of DNA evidence was generally accepted by the relevant scientific community at the time of the proceedings. DNA profiling evidence is today generally accepted as reliable by the relevant scientific community. Here, defendant's 1989 conviction for murder in the second degree and related crimes after a jury trial at which DNA profiling evidence was admitted is affirmed, with three Judges finding that the DNA profiling evidence was properly admitted at defendant's trial and two Judges finding that the admission of such DNA evidence was erroneous, but that the error was harmless beyond a reasonable doubt in the unusual circumstances of this case.

**TOTAL CLIENT SERVICE  
LIBRARY REFERENCES**

[Am Jur 2d, Expert and Opinion Evidence, § 42.](#)

[Carmody-Wait 2d, Presentation of Case §§ 56:41-56:43.](#)

[NY Jur 2d, Evidence and Witnesses, §432.](#)

**ANNOTATION REFERENCES**

[Admissibility of DNA identification evidence. 84 ALR4th 313. \\*418](#)

**POINTS OF COUNSEL**

*Roger M. Fritts, Public Defender of Albany County, Albany (Douglas P. Rutnik and Jeanne M. Heran of counsel), for appellant.*

I. The trial court erred in determining the DNA fingerprint evidence to be admissible after a *Frye* hearing. (*Frye v United States*, 293 F 1013; *People v Seda*, 139 Misc 2d 834; *Selkowitz v County of Nassau*, 45 NY2d 97; *Ellis v Thomas*, 84 App Div 626; *People v Wesley*, 140 Misc 2d 306.)

II. The prosecutor used a peremptory challenge in a discriminatory manner against Mr. Foulks. (*Batson v Kentucky*, 476 US 79; *People v Lawson*, 145 AD2d 991; *People v Mitchell*, 145 AD2d 967;

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

*People v Stevens*, 145 AD2d 925; *People v Bessard*, 148 AD2d 49.)

III. The trial court erred in its denial of defendant-appellant's postconviction motion pursuant to CPL 440.10 (1) (g). (*People v Powell*, 96 AD2d 610.)

IV. The lower courts erred in determining that defendant-appellant was competent to exercise a valid waiver. (*People v Williams*, 62 NY2d 285; *People v Bruce*, 62 AD2d 1073; *People v Miles*, 115 AD2d 962.)

V. The Court is asked to determine whether under the standards set forth in *Frye v United States* and *People v Middleton* the courts below improperly allowed into trial the results of forensic DNA testing using the Restriction Fragment Length Polymorphism (RFLP) technique. (*Frye v United States*, 293 F 1013; *People v Hughes*, 59 NY2d 523; *People v Middleton*, 54 NY2d 42.)

VI. The courts below improperly prevented defense counsel from producing newly discovered evidence in support of the postconviction motion consolidated herein on appeal. (*People v Castro*, 144 Misc 2d 956.)

*Sol Greenberg*, District Attorney of Albany County, Albany (*George H. Barber* of counsel), for respondent.

I. Following a *Frye* hearing, the trial court properly determined that the DNA fingerprint evidence was admissible. (*Frye v United States*, 293 F 1013; *People v Middleton*, 54 NY2d 42; *People v Wesley*, 140 Misc 2d 306; *People v Hughes*, 59 NY2d 523; *People v Mohit*, 153 Misc 2d 22; *People v Shi Fu Huang*, 145 Misc 2d 513; *People v Castro*, 144 Misc 2d 956; *United States v Jakobetz*, 955 F2d 786; *People v Crimmins*, 36 NY2d 230.)

II. The People had a neutral reason for excluding juror Foulks and there are no facts in any way indicating that said juror was excluded because of his race. (*Batson v Kentucky*, 476 US 97; *People v Bessard*, 148 AD2d 49; *People v Brooks*, 79 NY2d 1043.)

III. Appellant's point III is beyond this Court's jurisdiction and is without any supporting evidence. (**\*419** *People v Castro*, 144 Misc 2d 956; *People v Crimmins*, 38 NY2d 407.)

IV. Evidence fully supported the holding by Judge Harris that defendant understood *Miranda* as administered.

*Robert T. Johnson*, District Attorney of Bronx County, Bronx (*Peter D. Coddington* and *Nikki Kowalski* of counsel), for The District Attorneys Association of the State of New York, *amicus curiae*.

DNA evidence should be admissible in New York courts. (*Frye v United States*, 293 F 1013; *People v Middleton*, 54 NY2d 42; *People v Wesley*, 183 AD2d 75; *People v Loliscio*, 187 AD2d 172; *People v Mohit*, 153 Misc 2d 22; *People v Shi Fu Huang*, 145 Misc 2d 513; *People v Dabbs*, 154 Misc 2d 671; *United States v Jakobetz*, 955 F2d 786; *People v Castro*, 144 Misc 2d 956; *People v Keene*, 156 Misc 2d 108.)

*G. Oliver Koppell*, Attorney-General, Albany (*Richard H. Girgenti*, *Jerry Boone*, *Peter H. Schiff* and *M. Dawn Herkenham* of counsel), for the Division of Criminal Justice Services, *amicus curiae*.

I. State and Federal courts overwhelmingly have found forensic DNA analysis scientifically acceptable and reliable, and, therefore, held its results admissible as evidence. (*United States v Jakobetz*, 955 F2d 786; *Frye v United States*, 293 F 1013; *Ernst v Ace Motor Sales*, 550 F Supp 1220, 720 F2d 661; *United States v Williams*, 583 F2d 1194; *United States v Two Bulls*, 918 F2d 56, 925 F2d 1127; *Daubert v Merrell Dow Pharms.*, 509 US \_\_\_, 113 S Ct 2786.)

II. Under the *Frye* rule the recognized standard for determining the admissibility of new scientific techniques in New York, forensic DNA analysis evidence is properly admissible. (*Frye v United States*, 293 F 1013; *People v Forte*, 279 NY 204; *Matter of Sowa v Looney*, 23 NY2d 329; *People v Middleton*, 54 NY2d 42; *People v Hughes*, 59 NY2d 523; *People v Mooney*, 76 NY2d 827; *People v Canady*, 173 AD2d 313, 78 NY2d 963; *People v Crosby*, 116 AD2d 731, 67 NY2d 941; *People v Seda*, 139 Misc 2d 834; *People v Wesley*, 140 Misc 2d 306, 183 AD2d 75.)

*Barry C. Scheck*, New York City, *Lawrence Vogelmann*, *Ellen Yaroshefsky* and *Peter Neufeld* for Cardozo Criminal Law Clinic, *amicus curiae*.

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

I. The Court below did not use the correct legal standard to assess the admissibility of the DNA evidence in this case. (*People v Middleton*, 54 NY2d 42; *People v Hughes*, 59 NY2d 523; *People v Leone*, 25 NY2d 511; *People v Allweiss*, 48 NY2d 40; *Daubert v Merrell Dow Pharms.*, 509 US \_\_\_, 113 S Ct 2786; *People v Campbell*, 73 NY2d 481; *People v Freeland*, 68 NY2d 699; *People v Mertz*, 68 NY2d 136; *People v \*420 v Todd*, 38 NY2d 755; *United States v Two Bulls*, 918 F2d 56.)

II. Two methods used by Lifecodes in this case--one to declare a DNA “match” and another to calculate the statistical significance of the purported “match”--have been rejected as unreliable by the relevant scientific communities and forensic DNA laboratories, including Lifecodes itself.

III. The method used by Lifecodes to calculate the statistical frequency and express the statistical significance of the data presented at trial is not generally accepted to the scientific community. (*Daubert v Merrell Dow Pharms.*, 509 US \_\_\_, 113 S Ct 2786.)

IV. Appellant's conviction should be reversed, or remanded for a hearing, because his counsel at trial and on appeal provided ineffective assistance in violation of appellant's rights under the New York and Federal Constitutions.

V. Judge Harris should have recused himself from sitting at the trial and from deciding appellant's postconviction DNA motions in light of his improper public remarks expressing an opinion about the case at legislative hearings.

**OPINION OF THE COURT**

Smith, J.

The primary issues on this appeal are whether DNA profiling evidence is admissible in this State and, if so, whether it should have been admitted against defendant in this case. Because such evidence has been accepted and found reliable by the relevant scientific community and because no error was committed in the circumstances of this case, we affirm.

**FACTS**

Defendant appeals, by permission of a Judge of this Court, from an order affirming his conviction for murder in the second degree, rape in the first degree, attempted sodomy in the first degree and burglary in the second degree. On September 15, 1987, 79-year-old Helen Kendrick was found dead in her apartment in the City of Albany. The investigation of her death focused on defendant when caseworkers from the Albany City Hostel, an organization which served developmentally disabled persons, during a routine check of defendant's apartment, found a bloodstained T-shirt with gray and white hairs on it, bloodstained underwear and bloodstained sweatpants. Both defendant and the deceased were clients of the organization.

Even without the DNA profiling evidence, proof of defendant's \*421 guilt is compelling. The day after the victim's body was found, defendant told a social worker that he did not know the decedent, even though he had visited her in her apartment only three days before. During questioning by one of the detectives, defendant gave at least three conflicting accounts of how his shirt became bloodied. Defendant also gave an implausible account of how the decedent sustained her injuries. According to a detective, defendant stated that he “tripped” the decedent and she fell to the floor. Defendant noticed blood on the floor so he attempted to check her pulse by feeling in her vaginal area. Because he could not detect a pulse in the victim, he moved toward her chest area and attempted CPR. Unsuccessful in that attempt, he picked her up, thereby staining his clothes with her blood, dropped her to the floor, placed her face down and left the apartment. Defendant volunteered that he “didn't choke her” although the detective never mentioned that she was choked. Defendant also offered that he did not have sexual intercourse with the victim although the detective made no mention of a sexual crime. Defendant told the detective, “I didn't do it. I turned my head when somebody else did it.”

In addition, a microscopist testified that nylon from the carpet in the decedent's apartment was

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
on the decedent's dress and on defendant's T-shirt, underpants and sweatpants. She testified that fibers from a blanket in defendant's bedroom were located on the decedent's dress and underpants and on defendant's T-shirt and underpants as well.

**THE DNA ISSUE**

As stated, the primary issue on this appeal is the introduction of DNA profiling evidence. Such evidence, consisting of unique genetic characteristics belonging to an individual, can provide strong evidence of a person's presence at and participation in a criminal act. In this case, DNA comparison was made of a bloodstain taken from defendant's T-shirt, hair follicles taken from the deceased and blood drawn from the defendant. The conclusion was that the DNA print pattern on the defendant's T-shirt matched the DNA print pattern from the deceased and that the DNA print pattern from the blood of the defendant was different from that of the decedent.

Prior to the trial, a hearing was held to determine whether or not the DNA evidence proffered should be admissible. Following that hearing the trial court ruled the evidence admissible and the defendant was convicted at a subsequent \*422 trial (140 Misc 2d 306). The Appellate Division affirmed (183 AD2d 75).

Because the issue here is novel, we will discuss (1) the standard to be used in determining admissibility, (2) the use of DNA evidence in this case and (3) whether the standard was met here.<sup>1</sup>

**THE STANDARD OF ADMISSIBILITY**

It should be emphasized that the inquiry here is into the reliability of the DNA evidence at the time of the proceedings in this case in 1988 and 1989. The DNA evidence was presented as novel scientific evidence requiring a determination as to its reliability (see, *People v Magri*, 3 NY2d 562, 565-566 [approving the use of radar in speed detection]; *People v Middleton*, 54 NY2d 42, 49-50 [holding that identification through bite marks

is accepted by the scientific community]). While foundation concerns itself with the adequacy of the specific procedures used to generate the particular evidence to be admitted, the test pursuant to *Frye v United States* (293 F 1013) poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Only that *Frye* question is before us. The issues of a proper foundation and of the adequacy of laboratory procedures here are not before us, though some of the arguments made by the parties appear not to make this distinction.

In determining whether the DNA profiling evidence was properly admissible, attention must focus on the acceptance of such evidence as reliable by the relevant scientific community. The long-recognized rule of *Frye v United States* (*supra*) is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has “gained general acceptance” in its specified field. In *Frye* (*supra*, at 1014) the court stated:

“Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle \*423 or discovery, the thing from which the deduction is made must be *sufficiently established to have gained general acceptance in the particular field in which it belongs*” (emphasis supplied).

The *Frye* court rejected evidence that a person's truthfulness could be determined by a study of systolic blood pressure.

This Court has noted that the particular procedure need not be “unanimously indorsed” by the scientific community but must be “generally acceptable as reliable” (see, *People v Middleton*, 54 NY2d 42, 49, *supra*).<sup>2</sup> Thus, the issue here

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
concerns the acceptance by the relevant scientific  
community of the reliability of DNA evidence.

**THE USE OF DNA EVIDENCE IN THIS CASE**

Prior to the trial in this case, a *Frye* hearing was held to determine whether the relevant scientific community had accepted DNA evidence as reliable. The trial court found that DNA evidence was accepted as reliable. Lifecodes Corporation (Lifecodes) was then asked to perform DNA fingerprint identification on items of biological evidence in this case. Specifically, Lifecodes was asked to analyze a bloodstain on a T-shirt belonging to defendant, hair follicles which were taken from the victim, and whole blood that was drawn from the defendant. At trial, after the *Frye* hearing had been held and the trial court had found DNA evidence to be reliable and in order to lay a foundation for its admission at trial, Dr. Michael Baird, Director of Forensic and Paternity Testing at Lifecodes, explained how each piece of evidence was analyzed. He stated that, in each instance, DNA was extracted from the nucleus of a cell and purified to get a fairly pure DNA sample, free of contaminants. Using a restrictive enzyme that recognizes a particular sequence of DNA, the DNA was then cut into shorter pieces. Agarose gel was then used to separate the \*424 DNA pieces by length. The DNA pieces were then stained with ethidium bromide to permit increased visibility using ultraviolet light and to determine whether the separation by size was correctly done. Thereafter, the DNA was split into single strands and transferred from the gel to a nylon membrane. Next, a DNA probe,<sup>3</sup> which had been labelled with radioactive phosphate, was applied to the nylon membrane, causing the probe to bind with the complementary, single-stranded pieces of DNA. Any DNA probe that did not bind, as well as any excess DNA, were washed away. The nylon membrane was then placed on a piece of X-ray film and the pieces of the DNA probe that had been bonded to the membrane were revealed. The X-ray film, now referred to as an autorad, was then analyzed and compared with a known sample. This process is referred to as autoradiography. Dr.

Baird concluded that the DNA print pattern that was generated from the bloodstain on the T-shirt matched the DNA print pattern from the victim's hair follicles, and that pattern was different from the DNA pattern from defendant's blood.

**APPLICATION OF THE  
STANDARD TO THE FACTS HERE**

Contrary to the contentions of the defendant, DNA profiling evidence is generally accepted as reliable by the relevant scientific community and was so accepted at the time of the *Frye* hearing in 1988. There was sufficient evidence in the record to support the hearing court's determination on general reliability as a matter of law and, second, the determination comported with generally accepted scientific authority (*see, People v Hughes, 59 NY2d 523, 543; see also, People v Taylor, 75 NY2d 277, 286*).

The testimony in this case met the applicable standard of reliability. Several experts, including Dr. Sandra Nierzwicki-Bauer, Dr. Richard John Roberts, Dr. Michael Baird, and Dr. Kenneth Kidd, testified to the acceptance of DNA profiling evidence by the relevant scientific community and to its reliability, as well as to the reliability of the procedures used by Lifecodes.<sup>4</sup> \*425

We hold that since DNA evidence was found to be generally accepted as reliable by the relevant scientific community and since a proper foundation was made at trial, DNA profiling evidence was properly admitted at trial. It was admitted under customary foundation principles. The foundation included testimony that the appropriate steps were taken in analyzing the DNA evidence and an analysis and explanation of the assumptions underlying the probability calculations (*see, United States v Jakobetz, 955 F2d 786, 799-800*). The foundation did not and should not include a determination of the court that such evidence is true. That function should be left to the jury (*see, United States v Jakobetz, 955 F2d, at 796-797*).

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

With respect to the assertion in the concurring opinion that the prosecution did not show that the relevant scientific community had accepted Lifecodes' protocols for determining a match, it is clear that the testimony supported the conclusion that the procedures used by Lifecodes were generally accepted by the scientific community. The defendant did not raise the specific problem of matching at the *Frye* hearing, through its expert testimony or examination of the prosecution's experts.

Moreover, the record supports the view that visual matching was accepted by the scientific community in 1988. "The use of simple visual comparisons to determine whether two prints match is widespread in biology and appears to be well-accepted, even though it relies, to some extent, on the analyst's subjective judgment" (Thompson and Ford, *DNA Typing: \*426 Acceptance and Weight of the New Genetic Identification Tests*, 75 Va L Rev 45, 75 [1989]). According to the Thompson and Ford article, which was written around the same time the trial court decided this case, the Lifecodes test had been admitted in 22 criminal trials by October of 1988. The same article made the observation that matching could be done either visually or by machine:

"The final step in RFLP analysis is to compare two DNA prints to see if they match, and therefore could have originated in the same individual. In most cases, DNA prints are simply eyeballed to see whether they match. The comparison can also be done by machines, which read DNA prints and convert each print into a numerical code. Numerical codes can be compared with one another by computer to determine the degree to which two prints match. Moreover, the use of numerical codes makes possible the creation or large computerized data bases of DNA prints which can be searched to find a match for a given specimen" (*id.*, at 74-75).

It should be noted that novel scientific evidence may be admitted without any hearing at all by the trial court (*see, e.g., Matter of Lahey v Kelly*, 71 NY2d 135; *People v Middleton*, 54 NY2d 42,

*supra*). Moreover, the modern trend in the law of evidence has been away from imposing a special test on scientific evidence and toward using the "traditional standards of relevancy and the need for expertise" (1 McCormick, *Evidence* § 203, at 873-874 [4th ed 1992]).

Thus, the general reliability of DNA matching was established at the hearing. The *Frye* test--the sole issue before us--requires no more, despite the new and more stringent requirements that would be added under the test proposed by the concurring opinion. It is important to note that some of defendant's other objections, which were made at the *Frye* hearing but not at trial, are actually matters going to trial foundation or the weight of the evidence, both matters not properly addressed in the pretrial *Frye* proceeding.

As to the procedures used by Lifecodes, the only expert witness for the defense on this issue, Dr. Neville Colman, opined that the procedures, methodology, and quality control used by Lifecodes were inadequate to assure the accuracy and reliability of its testing results. However, three of the prosecution's \*427 expert witnesses, Dr. Richard J. Roberts, Dr. Kenneth K. Kidd, and Dr. Sandra Nierzwicki-Bauer, reviewed Lifecodes' written laboratory protocols and concluded that the practices and procedures used by Lifecodes in its DNA fingerprinting were generally accepted by the scientific community as accurate, reliable and appropriate.<sup>5</sup>

Dr. Michael Baird, who is responsible for Lifecodes' standards of quality control, testified that Lifecodes' quality control program (1) analyzes the quality of the DNA that has been isolated from a piece of evidence to make sure that DNA is of appropriate quality for fingerprinting tests, (2) examines the enzyme digestion to make sure that the correct digestion and fragmentation has taken place, (3) evaluates the DNA fragment separation, the DNA probe and data analysis, and (4) monitors the maintenance of equipment being

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
used throughout the test, as well as the preparation  
of any reagents.

As for peer review of Lifecodes' procedures in performing DNA fingerprint testing, even the defense expert agreed that no peer review articles have discredited the RFLP procedures used by Lifecodes.

Defendant's challenges to the population studies relied on by Lifecodes to estimate the probability of a coincidental match<sup>6</sup> go not to admissibility, but to the weight of the evidence, which should be left to the trier of fact (*see, United States v Jakobetz, 955 F.2d 786, 796-797, supra*). These challenges were never made by the defendant at trial. Such challenges were, however, made at the *Frye* hearing and were answered by the prosecution. To the extent the defendant at the *Frye* hearing focused on the inadequacy of the DNA population studies done by Lifecodes as indicative of the unreliability of DNA evidence in general, defendant did not prevail. Once there was testimony as to the reliability of the \*428 statistical population studies, the trial court was justified in admitting that testimony. Assuming that the defendant had presented evidence of the inadequacy of those studies, defendant would have been entitled to have the jury consider them, not exclude their admissibility entirely. In any event, the record before us indicates that defendant's challenge to Lifecodes' population studies lacks merit.

Dr. Richard Borowsky, who was called as a witness for the defense, testified that the population genetics studies performed by Lifecodes were inadequate, and in many ways incorrect. Specifically, Dr. Borowsky stated that the data base used was too small to obtain a Hardy-Weinberg equilibrium<sup>7</sup> or linkage disequilibrium.<sup>8</sup> On the other hand, Dr. Kidd stated that in his opinion, and in the opinion of the scientific community in general, the data base used by Lifecodes was sufficiently large for such experiments, and a review of the data submitted by Lifecodes regarding its population genetics study revealed no linkage

disequilibrium. Furthermore, Dr. Kidd testified that since there are individual genotypes that have been observed to occur more frequently than expected and others that have been observed to occur less frequently than expected, an adjustment in the claimed mean power of certainty of identification should be made. He opined that the adjustment warranted was much less than a factor of 10, but gave the amount as "the largest estimate" of a possible deviation. A factor of 10 reduced the mean power of certainty of identification for American blacks from 1 in 1.4 billion to 1 in 140 million and for Caucasoids from 1 in 840 million to 1 in 84 million. Here, statistical evidence was admitted based upon expert testimony as to its reliability.

Finally, no support exists in the record for defendant's claim that Lifecodes may have tried to correct "bandshifting" in this case.

After the *Frye* inquiry, the issue then shifts to a second phase, admissibility of the specific evidence--i.e., the trial foundation--and elements such as how the sample was acquired, whether the chain of custody was preserved and how \*429 the tests were made. This distinct voir dire foundation is presented at the trial and is the same as that applied to all evidence, not just to scientific evidence. This was not part of the *Frye* hearing or ruling and was not addressed by the trial court here. Indeed, Lifecodes had not completed all the testing here at the time of the *Frye* hearing. Once *Frye* has been satisfied, the question is "whether the accepted techniques were employed by the experts in this case" (*People v Middleton, 54 NY2d, at 50*). The focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial. The trial court determines, as a preliminary matter of law, whether an adequate foundation for the admissibility of this particular evidence has been established.

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

At trial, the prosecution laid a foundation for the introduction of DNA evidence, but the defendant made no objection at trial that a proper foundation was lacking. Once the *Frye* reliability and the trial foundation have been established, the evidence is admissible. At this third stage, the jury is left to hear the testimony and consider the weight of the evidence--i.e., "possible infirmities in the collection and analysis of data" (1 McCormick, Evidence § 203, at 877 [4th ed 1992]; *People v Middleton, supra*, at 51).

**CPL ARTICLE 440 MOTION**

Defendant contends that the trial court erred in denying his CPL 440.10 (1) (g) motion to vacate the judgment of conviction based on newly discovered evidence that would have dictated a more favorable result for him at trial. According to defendant, Lifecodes' practice of visually matching bands on autorads, rather than using a computer digitized apparatus to declare matches that fell within three-standard deviations of error, rendered the results of DNA forensic testing performed by that company unreliable under New York State law. Defendant asserted further that he would have received a more favorable verdict if the autorads used by Lifecodes had been produced, and if defense experts, who were unavailable at the time of the trial, had been permitted to properly examine the actual sizing reports. Defendant's assertions were based on another case, *People v Castro* (144 Misc 2d 956), which was decided after County Court decided this case.

Defendant's reliance on *Castro* is misplaced. In that case, the court concluded that there is general scientific acceptance \*430 of the theory underlying DNA identification, and that DNA forensic identification techniques and experiments are generally accepted in the scientific community and can produce reliable results. As for the techniques utilized in that case, however, the court concluded that Lifecodes failed in several major respects to use the generally accepted scientific techniques and experiments for obtaining reliable results, within a reasonable degree of scientific

certainty. In this case, the evidence at both the *Frye* hearing and at trial was that the procedures used by Lifecodes met standards of scientific acceptance and reliability.

We have examined defendant's remaining arguments and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be affirmed.

**APPENDIX**

**THE NATURE OF DNA  
PROFILING EVIDENCE**<sup>9</sup>

Deoxyribonucleic acid (DNA) is a molecule that is present in every cell of the body that contains a nucleus. DNA is identical in every cell of the human body. It is the chemical dispatcher of genetic information and is composed of a double helix, which resembles a spiral staircase or a twisted ladder. The DNA molecule consists of repeated sequences of phosphate and deoxyribose sugar along each strand of the helix. Four types of organic bases, adenine (A), thymine (T), cytosine (C), and guanine (G), are attached to the deoxyribose sugar-phosphate groups on each strand,<sup>10</sup> and the bases on each strand bond in pairs (base pairs) to form the rungs of the double-stranded helix. Due to the chemical composition of these bases, only A from one strand and T from the other strand can bond together (i.e., A-T, T-A), and only G from one strand and C from the other strand can bond together (i.e., G-C, C-G). The unique order, or sequence, of the base pairs along the double helix determines the structure of proteins and the regulation of cell activities.

In human beings, DNA is found in all body cells except red \*431 blood cells,<sup>11</sup> and each body cell contains the same DNA. An individual's entire complement of DNA, the genome, exists in that individual's chromosomes, which are threadlike microscopic bundles consisting of a complex of

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
nucleic acids and proteins found in each body cell.<sup>12</sup> Generally, humans have 46 chromosomes, including a pair of chromosomes that determine the sex of the individual and 22 pairs of autosomes (a total of 44), which are chromosomes that are not involved in sex determination. Individuals receive 22 autosomes plus one X sex chromosome from their mothers, and 22 autosomes plus either an X or a Y sex chromosome from their fathers.

As stated, an individual's chromosomes contain his or her genome. Genes, which are DNA segments or sequences that are responsible for producing a particular product or function, and of which an individual's genome is comprised, reside in the chromosomes. For example, individuals have genes that are responsible for producing eyes, ears, and hands. The physical site of a gene on a chromosome is the locus. Each gene is situated at a specific locus on a specific chromosome, and each chromosome contains many loci occupied by different genes. Human beings inherit half of their genes from their mother and the other half from their father.

Alternative genes, such as genes for brown hair or genes for red hair, at a particular locus, are called alleles.<sup>13</sup> At each locus, an individual may have two identical alleles (e.g., two alleles for brown hair) or two different alleles (e.g., one allele for brown hair and one allele for red hair). An individual who has two identical alleles at a particular locus is said to be homozygous for that particular locus, and an individual who has two different alleles at a particular locus is said to be heterozygous for that locus. Each individual has, at most, two alleles at a given locus--one from the mother and one from the father.

Although an individual has, at most, two alleles at a given locus, many different alleles can exist for the same locus \*432 within a given population. When multiple alleles exist at a particular locus, the genetic variant is referred to as a polymorphism. Polymorphisms are simply the genetic differences among members of a population, and are caused by

the variations in base sequences in the DNA in the population.

The genome of an individual consists of approximately 3.3 billion base pairs, of which only 3 million base pairs differ from one individual to another.<sup>14</sup> It is these areas where the base pairs differ among individuals that provide the basis for DNA identification and have great significance for DNA forensic analysis.

DNA fingerprint identification tests allow scientists to look at the DNA from an individual, or a piece of evidence, and compare it with other DNA. Recently, DNA profiling identification tests have been conducted in laboratories in the United States. Commercial laboratories, such as Lifecodes, Cellmark Diagnostics Corporation and Cetus Corporation, offer DNA testing. In addition, government laboratories, such as laboratories within the Federal Bureau of Investigation and the Federal Drug Enforcement Administration, also perform DNA testing.

The primary technique for DNA testing is Restriction Fragment Length Polymorphism (RFLP) and analysis, which is referred to in the scientific community as Southern Blotting. The Southern Blotting technique detects specific DNA fragments so that a particular gene may be isolated from a sample of DNA and compared with a known sample of DNA. A brief summary of this procedure follows.

(1) Using chemical enzymes, the DNA to be examined is extracted from the evidentiary sample and then purified.

(2) The extracted DNA is then cut into fragments at specific sites by the use of restrictive enzymes known as restriction endonucleases. The restriction endonucleases recognize certain sequences of base pairs along the DNA, and cut the DNA every time it finds the appropriate sequence to produce discrete fragments known as RFLPs. Using different

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
enzymes leads to different DNA patterns for the same individual.

(3) The RFLPs are placed into a semisolid matrix, called an agarose gel, which is then electrically polarized to sort the RFLPs by length so that they can be measured. To accomplish this step, known as “gel electrophoresis,” the agarose gel is \*433 placed into a weak electric field, positive at one end and negative at the other. The RFLPs are placed at the negative end of the electric field and, because of their net negative charge, the RFLPs migrate toward the positive end of the field. The distance travelled will depend on the length of the RFLPs. The longer ones migrate more slowly than, and do not travel as far as, the shorter ones. The RFLPs are then separated and sorted according to length.

(4) The sorted RFLPs are chemically split, or denatured, into two separate strands. The single strands are then transferred from the agarose gel onto a nylon membrane, known as a nitrocellulose sheet, where they become permanently fixed in their respective positions according to length on the membrane. The membrane is now known as a “Southern Blot.”

(5) The Southern Blot is then placed in a solution containing short single strands of known sequences of base pairs in DNA fragments, called genetic probes. The genetic probes are tagged with a radioactive marker and are used to bond or hybridize with RFLPs on the Southern Blot that contain the complement of that particular core sequence, or variable number tandem repeats to form hybridized polymorphic segments. The radioactive marker determines the position of the genetic probes after they bond with their complementary, single-stranded RFLPs, and facilitates the visualization of the particular RFLP to which the genetic probe is bonded. Any excess DNA is washed away.

It is at this point that any match is made. In his testimony Dr. Michael Baird explained this process and compared it to putting a key into a lock.

“THE WITNESS: ... [T]he DNA probe identifies a particular fragment, which is done in a fashion where there is a matching of sequence or pairing, almost like a lock and key type idea, in that the only right size lock will accept the right size key. If the key, which you can think of as the probe, is a different size, it will not be accommodated by that particular lock. I mean, it's a very simplistic way to look at it. But it's a very precise fit, in terms of the probe and DNA that is being analyzed.”

(6) The radioactively marked nylon membrane, with the hybridized polymorphic segment, is then placed on a piece of X-ray film, where the radioactive probes expose the film at \*434 their respective locations. Dark bands, which resemble bar codes on grocery items, appear on the X-ray film where the radioactive probes have bonded to the RFLPs, producing the DNA print. The position of each dark band indicates the location of a polymorphic segment on the blot. The location of the polymorphic segment indicates the length of the DNA fragment that contains the segment.

Among humans, there are some sections in DNA in which the precise sequence of base pairs appears in the same order from one person to the next. These are segments in DNA that have the information for proteins that are absolutely essential for bodily functions. However, there are other segments in DNA, polymorphic regions, e.g., genes for eye color, that vary from one person to another. It is these DNA segments that are important for testing. Because these DNA segments may differ a great deal among the population, one can look at individuals in the population and determine whether they have the same DNA segments or whether they have different, polymorphic DNA segments. Usually, individuals have polymorphic segments. In individuals, the length of the DNA fragments that contain the polymorphic DNA segments varies. Thus, the bands on the DNA prints of individuals tend to differ. The choice of restrictive enzymes and genetic probes will also affect the DNA banding pattern of each individual's DNA sample. Thus, the above process may

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

be repeated using different probes and different enzymes.

(7) The dark bands on the DNA prints are then studied to determine if a match exists between a known sample (e.g., from a crime suspect) and an unknown sample (e.g., from a crime scene or victim). Both visual studies and computer imaging analysis are done to determine whether a match exists. A match exists when the sizes and number of the detected RFLPs in the known and unknown samples are indistinguishable within a permissible degree of error.

(8) Once a match is declared, the DNA prints are again studied to determine the frequency with which a specific allele occurs within a specific population. Population genetics is concerned with allele frequency in a particular population.

Over a two-year period, Lifecodes performed population genetic studies using DNA probes that recognize five hypervariable loci in the human genome (D2S44, D14S1, D14S13, D17S79, and DXYS14). DNA from approximately 900 unrelated individuals, subdivided into three ethnic groups (African \*435 Americans, Caucasoids, and Hispanics) were isolated and successfully hybridized to each DNA probe. The number of distinct DNA fragments identified for each of these regions varied from 30 to more than 80. The allele frequency distribution was determined for each locus. The results showed statistically significant differences, between ethnic groups, in some loci (D2S44, D14S1 and D14S13) but not in others (D17S79 and DXYS14). Overall, the studies concluded that there is a mean power of certainty of identification of 1 in 840 million for Caucasoids and 1 in 1.4 billion for American blacks. Before the population genetics studies were admitted into evidence in this trial, the over-all claimed mean power of identification was reduced by a factor of 10 in order to eliminate any possible Hardy-Weinberg equilibrium or linkage disequilibrium.

Chief Judge Kaye

(Concurring). We conclude that it was error to admit the DNA bloodstain analysis evidence in this case. We nevertheless agree that defendant's conviction should be affirmed, because that evidence comprised only a minor part of the People's case. Although the result is unaffected, we write separately out of concern, for future cases, that the principles governing admission of novel scientific evidence be correctly articulated and applied.

Lest we add to rather than ameliorate confusion, we begin by stating points on which the Court is unanimous.

The Court agrees unanimously that where the scientific evidence sought to be presented is novel, the test is that articulated in *Frye v United States* (293 F 1013, 1014), in essence whether there is general acceptance in the relevant scientific community that a technique or procedure is capable of being performed reliably (*People v Middleton*, 54 NY2d 42, 49).<sup>1</sup> In the present case, such an inquiry required assessment of whether the technique employed in forensic DNA analysis had gained scientific acceptance--that is, whether the six steps of the Restriction Fragment Length Polymorphic (RFLP) procedure, the procedure for declaring that two samples of DNA were identical (step seven), and assessment of the significance of a "match" (step eight) were generally accepted as reliable by experts in the field.

The Court is unanimous, moreover, in concluding that three \*436 inquiries are involved in the consideration of novel scientific evidence. The first--the *Frye* hearing--asks whether, theoretically, the accepted techniques, when performed as they should be, generate results generally accepted as reliable within the scientific community. Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered. Courts thereafter may

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

take judicial notice of reliability of the general procedure.

Next, a foundational inquiry must be satisfied before such evidence is placed before the jury: in each case the court must determine that the laboratory actually employed the accepted techniques. This foundational inquiry also goes to admissibility of the evidence, not simply its weight (*People v Middleton*, 54 NY2d, at 45, 50, *supra*).<sup>2</sup> Finally, infirmities in collection and analysis of the evidence not affecting its trustworthiness go to weight, to be assessed by the jury.<sup>3</sup>

Where we part company with our colleagues is in the application of these principles. We do not agree that the eight steps of forensic analysis, then in its infancy, were shown to have been accepted as reliable within the scientific community. Rather, the standard for general acceptance of the new techniques was seen as commensurate with the standards adopted by Lifecodes, the commercial laboratory hired to conduct the actual tests and which virtually occupied the field of forensic DNA analysis. Additionally, the hearing court made very clear to the parties in its *Frye* decision that it \*437 considered only the theory of forensic DNA analysis as going to admissibility, and relegated the remaining questions for weighing by the jury, including such foundational inquiries as whether Lifecodes' methodology and procedures were adequate to assure the reliability and accuracy of the results (140 Misc 2d 306, 317; *see also*, 183 AD2d 75, 78). In our view admission of this evidence was error.

**THE FRYE HEARING IN THIS CASE**

The *Frye* hearing in this case was virtually the first in the Nation to consider whether forensic application of DNA analysis had been generally accepted as reliable. While the mere fact that a court is the first to evaluate novel scientific evidence does not mean the evidence is unreliable, it increases the task of the hearing court. If no court opinions, texts, laboratory standards or scholarly articles have been

issued on the technique-- the types of materials relevant to a determination of general acceptability (*Matter of Lahey v Kelly*, 71 NY2d 135, 144; *People v Middleton*, 54 NY2d 42, 50, *supra*; *People v Leone*, 25 NY2d 511, 516-517; *People v Magri*, 3 NY2d 562)--the court may, as it did here, take the testimony of expert witnesses.<sup>4</sup>

The People offered detailed testimony concerning the RFLP procedure--an accepted procedure for separating strands of DNA and locating their unique fragments--which had been in use for research and diagnostic purposes long before its forensic application was proposed. Dr. Kenneth Kidd and Dr. Richard Roberts, experts in molecular biology and population genetics, and Dr. Sandra Nierzwicki-Bauer, a molecular biologist specializing in the study of blue-green algae, vouched on \*438 behalf of the People for the reliability of RFLP procedure. None of these witnesses, however, was expert in forensic DNA analysis.

In defining the relevant scientific field, the court must seek to comply with the *Frye* objective of containing a consensus of the scientific community. If the field is too narrowly defined, the judgment of the scientific community will devolve into the opinion of a few experts. The field must still include scientists who would be expected to be familiar with the particular use of the evidence at issue, however, whether through actual or theoretical research (Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum L Rev 1197, 1209-1210).

Focusing on DNA profiling in the forensic setting is crucial because "DNA fingerprinting is far more technically demanding than DNA diagnostics," particularly in the art of declaring a "match" between samples (Lander, *DNA Fingerprinting on Trial*, 339 Nature 501). Traditional RFLP procedure was developed to enable scientists to identify the DNA structure contained within a particular sample, and had been in use for more than a decade at the time of this hearing. Its forensic

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
application--comparison of DNA between two or more samples, one from an unknown source--is far more susceptible to error (*id.*). Techniques must be adapted to the special requirements of crime scene samples, which are subject to contamination that can confuse results. Moreover, steps seven and eight--the steps unique to forensic analysis of DNA--were truly novel.

The theoretical use of DNA profiling as a method for identifying perpetrators of crimes was first posited in 1985 in a series of articles by British researchers (Jeffreys, Wilson and Thein, *Hypervariable Minisatellite Regions in Human DNA*, 314 *Nature* 67-69; Jeffreys, Wilson and Thein, *Individual-Specific "Fingerprints" of Human DNA*, 316 *Nature* 76; Gill, Jeffreys and Werrett, *Forensic Application of DNA 'Fingerprints'*, 318 *Nature* 577). By 1988, the only practitioners of the technique in this country were the commercial laboratories Cellmark (founded by Dr. Jeffreys), Cetus and Lifecodes, which began forensic analysis just one year before the hearing in this case. Little peer review of their techniques had taken place by 1988 because these enterprises endeavored to keep their methods secret to protect their proprietary interests. According to the defense witness Dr. Neville Colman, the \*439 procedures were still so new that there had not yet been efforts in the field to "validate by replication" the methods employed at Lifecodes; there had been neither refutation nor support of the technique in the professional literature.<sup>5</sup>

The point of noting controversy about the reliability of the forensic technique is not for our Court to determine whether the method was or was not reliable in 1988, but whether there was consensus in the scientific community as to its reliability. The *Frye* test emphasizes "counting scientists' votes, rather than on verifying the soundness of a scientific conclusion." (*Jones v United States*, 548 A2d 35, 42 [DC Ct App]; accord, *State v Montalbo*, 73 Haw 130, 828 P2d 1274, 1279.) Where controversy rages, a court may conclude that no consensus has been reached. Here,

however, the problem was more subtle: absence of controversy reflected not the endorsement perceived by our colleagues, but the prematurity of admitting this evidence. Insufficient time had passed for competing points of view to emerge.<sup>6</sup>

The inquiry into forensic analysis of DNA in this case also demonstrates the "pitfalls of self-validation by a small group" (Hoeffel, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 *Stan L Rev* 465, 502, citing Black, *A Unified Theory of Scientific Evidence*, 56 *Fordham L Rev* 595, 625). Before bringing novel evidence to court, proponents of new techniques must subject their methods to the scrutiny of fellow scientists, unimpeded by commercial concerns (Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons From the "DNA War"*, 84 *Crim L & Criminology* 22, 95). \*440

A *Frye* court should be particularly cautious when--as here--"the supporting research is conducted by someone with a professional or commercial interest in the technique" (Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 *Colum L Rev* 1197, 1213). DNA forensic analysis was developed in commercial laboratories under conditions of secrecy, preventing emergence of independent views. No independent academic or governmental laboratories were publishing studies concerning forensic use of DNA profiling. The Federal Bureau of Investigation did not consider use of the technique until 1989. Because no other facilities were apparently conducting research in the field, the commercial laboratory's unchallenged endorsement of the reliability of its own techniques was accepted by the hearing court as sufficient to represent acceptance of the technique by scientists generally. The sole forensic witness at the hearing in this case was Dr. Michael Baird, Director of Forensics at Lifecodes laboratory, where the samples were to be analyzed. While he assured the court of the reliability of the forensic application of DNA, virtually the sole publications on forensic use of

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

DNA were his own or those of Dr. Jeffreys, the founder of Cellmark, one of Lifecodes' competitors. Nor had the forensic procedure been subjected to thorough peer review.

The absence of agreed-upon standards and laboratory protocol for the conduct of a technique can also serve to establish that the technique has not yet gained general acceptance (*People v Leone*, 25 NY2d 511, *supra*). Here, no laboratory conducting DNA analysis had been accredited for that purpose. As early as 1984, the Legislature set standards, in the Family Court Act, for admissibility of blood genetic marker tests. Analysis of DNA samples considered on the question of paternity--where laboratories must also declare that two samples "match"--must be shown to have been performed in accordance with proper procedures by a laboratory authorized by the Commissioner of Health to conduct such tests ([Family Ct Act §§ 418, 532](#)). As of July 1992, however, no laboratory, including Lifecodes, had yet been authorized by the Commissioner of Health to conduct DNA testing (*Matter of S.L.B. v K.A.*, 155 Misc 2d 458, 459). The defense introduced testimony from Dr. Anne Willey of the Department of Health establishing that no licensing or certification standards governing DNA profiling evidence had yet been developed in New York State, although discussions were ongoing. Lifecodes was licensed only \*441 to conduct genetic tests of amniotic fluid. As defendant pointed out to the hearing court, the evidence proffered against him to prove murder would not have been admissible in this State on the question of paternity.

The opinions of two scientists, both with commercial interests in the work under consideration and both the primary developers and proponents of the technique, were insufficient to establish "general acceptance" in the scientific field (*People v Leone*, 25 NY2d 511, 514, *supra*). The People's effort to gain a consensus by having their own witnesses "peer review" the relevant studies in time to return to court with supporting testimony was hardly an appropriate substitute for the thoughtful exchange of ideas in an unbiased scientific community envisioned

by *Frye*. Our colleagues' characterization of a dearth of publications on this novel technique as the equivalent of unanimous endorsement of its reliability ignores the plain reality that this technique was not yet being discussed and tested in the scientific community.<sup>7</sup>

The hearing court also erred in failing to scrutinize the seventh and eighth steps of forensic DNA analysis pursuant to *Frye* standards. Our colleagues obscure this shortcoming by focusing on the wealth of evidence establishing the reliability of the first six steps of forensic analysis (the RFLP procedure)--a question that was not even disputed at the hearing. It is the absence of evidence concerning accepted standards for steps seven and eight that compels me to conclude admission of this evidence was error.

It is the declaration of a match between two samples of DNA, depicted on two separate autorads, that distinguishes forensic use of DNA from traditional, research-based application of RFLP procedure. The only evidence offered on this point was, again, the testimony of Dr. Michael Baird, who \*442 testified as to how a Lifecodes technician would visually compare the bands on two autorads to determine if they were the same. During the testimony of Dr. Borowsky, the court had the following exchange with the District Attorney:

"Let me ask you this. Let's just keep on this field. Is there some person who looks at the autorad, gentlemen, and says 'All right, this is included, this one is not included?' or is the autorad read by computer or some kind of machine?"

"DISTRICT ATTORNEY: It's read by a person.

"THE COURT: It's read by a person?"

"DISTRICT ATTORNEY: Yes.

"THE COURT: All right. And a person with what expertise?"

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

“DISTRICT ATTORNEY: Well, Dr. Balasz from Lifecodes, who's a Ph.D., he has read the auto[rads].”

The People presented no evidence as to whether this was the procedure generally accepted as reliable in determining whether two DNA samples match beyond Dr. Baird's broad assertion that it was. Given the testimony from Dr. Borowsky indicating that autorad readings could lead to highly subjective results, it cannot be said that the People met their burden of clearly establishing that there were generally accepted procedures for “reading” autorads in the scientific community.

Moreover, we can take note that the “visual” matching technique was rejected as unreliable once it came to the attention of neutral peers in the scientific community (National Research Council, DNA Technology in Forensic Science [“NRC Report”] § 2.3.5).<sup>8</sup> We now know that “visual matches” \*443 must be confirmed by a computerized measurement of the apparently matching bands. Only if these bands fall within certain defined parameters, called a “match window,” will a match be declared (Attorney-General's *amicus* brief, at 20). Moreover, band appearance and position may be altered by testing conditions, environmental factors or sample contamination, compelling scientists to employ a wide “latitude of acceptance” to account for discrepancies between prints and to permit declaration of a match even where bands are not identical. This creates a danger that DNA prints of different individuals will be mistakenly declared to match, and no formal standards existed for declaring a match in 1988 (Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Techniques*, 75 Va L Rev 45, 87-89 [1989]).

The People's failure to adduce evidence on the matching standards was pointed out by the defense at the hearing. In the course of examining Lifecodes' methods for assessing the statistical significance of a match, the defense witness Dr. Richard

Borowsky, a population geneticist, repeatedly questioned the criteria employed by Lifecodes for determining that two autorads “matched.” Defense counsel emphasized that “the way they read” autorads raises issues relevant to the reliability of the testing and that a negative result “may be just a matter of interpretation.” Dr. Borowsky specifically cautioned that “the probability of error” in evaluating the frequency with which a particular gene will appear on an autorad band “has not been evaluated by the scientific community,” and declared that “interpretation is as much a part of the print test as the molecular biology.”

Our colleagues' conclusion that the reliability of the procedures employed in the instant case had been satisfactorily established overlooks that the samples had not been tested at the time of the *Frye* hearing, and the autoradiographs never examined prior to their admission at trial. Establishing a proper foundation requires at a minimum a determination that the autoradiographs were of a quality susceptible to interpretation (*People v Castro*, 144 Misc 2d 956, 967, 973-979), an inquiry that was here foreclosed by the court's erroneous determination in its *Frye* decision that all questions as to how a sample was tested go to weight, not admissibility.

Defendant also challenged the reliability of step eight, application of statistical methods to determine the significance \*444 of a “match.” In its written decision, the court summarized what it saw as part of “[t]he defense attack”: “that Lifecodes' population studies are inadequate to establish a claimed power of identity for its results under the laws of population genetics” (140 Misc 2d, at 317). Dr. Borowsky sought to evaluate independently the autorads which comprised the population genetics database, warning that the absence of standards in the field led to subjective results.

Step eight is an integral part of DNA forensic analysis. Indeed, evidence of a “match” is virtually meaningless without resort to the statistical interpretation; population genetics is arguably

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655  
the most crucial step of the analysis. It is the area of greatest controversy among the experts.<sup>9</sup> Whether the statistical technique employed by the laboratory meets the standards in the field and is capable of producing reliable results goes directly to admissibility. The hearing court erroneously characterized these concerns as affecting only the weight of the population genetics evidence.

We therefore conclude that the court erred in holding that DNA forensic analysis was generally accepted as reliable in 1988.

**HARMLESS ERROR**

Because of the overwhelming evidence of defendant's guilt, we join in affirming defendant's conviction in this instance where it can fairly be said that use of DNA evidence was harmless beyond a reasonable doubt (*People v Crimmins*, 36 NY2d 230, 237). At the time the People raised the possibility of introducing DNA evidence, they apparently hoped tests would establish that semen found on the body of the deceased originated from defendant, establishing his guilt of her sexual assault. It is unclear why the court instigated a *Frye* hearing \*445 before these tests had even been conducted, for it turned out that the DNA tests on the semen sample were inconclusive. While evidence concerning the source of the semen would have been probative, it never materialized and was not introduced at trial.

Instead, the People presented evidence that DNA contained in blood found on defendant's shirt matched that of the deceased and was not defendant's. This evidence added nothing to the People's case, however, since defendant admitted that he had been at the deceased's apartment at the time of her death and touched her body, albeit in an attempt to revive her (majority opn, at 421). Moreover, independent forensic analysis of fibers found at the crime scene also established that defendant had been present at the apartment. The DNA evidence, therefore, was simply cumulative on this point, as both parties acknowledged on summation:

“[DEFENDANT'S LAWYER]: What does [the DNA evidence] establish? That Helen Kendrick's blood was on George Wesley's T-shirt. That's all it establishes. It establishes nothing else. What it establishes is exactly what George Wesley admitted, that he was there. ...

“[DISTRICT ATTORNEY]: In this case, as it turns out, [the DNA evidence's] significance is perhaps less than we anticipated, because it's unquestioned that the victim's blood is on the defendant's clothing.”

**FUTURE USE OF  
FORENSIC DNA ANALYSIS**

We join our colleagues in concluding that RFLP-based forensic analysis is today generally accepted as reliable. We know that, in principle, DNA polymorphisms provide a reliable method of comparing samples, that other than identical twins, each person has unique DNA, and that the current laboratory procedures for detecting DNA sequence variations are fundamentally sound. While the general acceptability of these techniques is no longer an open question, and trial courts may take judicial notice of their reliability, the adequacy of the methods used to acquire and analyze samples must be resolved case by case. As new forensic procedures are developed, *Frye* hearings will have to be conducted to assess the reliability of those methods.

The NRC panel called for formal quality-control programs \*446 in all laboratories, called on Congress to require external accreditation and proficiency testing of laboratories by a governmental body, and recommended the establishment of a National Committee on Forensic DNA Typing to provide scientific and technical advice on new methods of DNA typing and related issues as they arise (Annas, *Setting Standards for the Use of DNA-Typing Results in the Courtroom--The State of the Art*, 326 N Eng J of Med 1641, 1642). Such a call is a useful reminder, even in 1994. As the NRC recommended:

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

“[f]orensic DNA analysis should be governed by the highest standards of scientific rigor in analysis and interpretation. Such high standards are appropriate for two reasons: the probative power of DNA typing can be so great that it can outweigh all other evidence in a trial; and the procedures for DNA typing are complex, and judges and juries cannot properly weigh and evaluate conclusions based on differing standards of rigor.” (NRC § 2.1.)

Accordingly, we would affirm defendant's conviction, but only because, in the unusual circumstances of this case, the erroneous admission

of the DNA evidence was harmless beyond a reasonable doubt.

Judges Simons and Bellacosa concur with Judge Smith; Chief Judge Kaye concurs in result in a separate opinion in which Judge Ciparick concurs; Judges Titone and Levine taking no part.

Order affirmed. \*447

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**Footnotes**

- 1 The nature of the DNA evidence sought to be admitted is contained in an Appendix.
- 2 [Daubert v Merrell Dow Pharms.](#), (509 US \_\_\_, 113 S Ct 2786) is not applicable here. In that case the United States Supreme Court held that, at least in Federal courts, the rule of [Frye v United States](#) (293 F 1013, *supra*) was superseded by the Federal Rules of Evidence, particularly rule 702 which allows the court to permit testimony concerning scientific or technical evidence if such evidence will aid the fact finder in understanding the evidence or determining a fact in issue ([Fed Rules Evid, rule 702](#)). The Court noted the rigidity of the “general acceptance” rule in contrast to the “liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to “opinion “ testimony’ ” (*see, Daubert v Merrell Dow Pharms.*, 509 US \_\_\_, \_\_\_, 113 S Ct 2786, 2794, *supra*, quoting [Beech Aircraft Corp. v Rainey](#), 488 US 153, 169).
- 3 In analyzing the evidence, Lifecodes used three different DNA probes, one for each evidentiary sample.
- 4 Dr. Sandra Nierzwicki-Bauer received a Ph.D. in Microbiology from the University of New Hampshire and was an Assistant Professor of Biology at Rensselaer Polytechnic Institute. Her expertise was in molecular biology and molecular genetic techniques.  
Dr. Richard John Roberts received a Ph.D. in Organic Chemistry from the University of Sheffield, in England, and was an Assistant Director for Research at the Cold Spring Harbor Laboratory in Suffolk County. He was a molecular biologist and had done research on restriction enzymes.  
Dr. Michael Baird was the Director of Paternity and Forensic Evaluation at Lifecodes Corporation. He has a Ph.D. in Genetics from the University of Chicago. His specialty was genetic testing.  
Dr. Kenneth Kidd was a Professor of Human Genetics, Psychiatry and Biology at the Yale University School of Medicine. He was trained as a geneticist, had experience in population genetics and had done research in RFLP studies (The “[u]se of DNA restriction fragment length polymorphisms for gene mapping and for population studies”).  
Dr. Neville Colman holds a medical degree and a Ph.D. and is certified by the American Board of Pathology as a clinical pathologist. He is an Associate Professor of Pathology at the Mount Sinai School of Medicine in New York City and Director of the Blood Bank and Hematology Laboratory at the Veterans Administration Medical Center in Bronx County.
- 5 In reaching his conclusion that Lifecodes’ DNA fingerprinting process was accepted by the scientific community, Dr. Kidd not only reviewed Lifecodes’ written laboratory protocols, but also visited Lifecodes’ laboratory and observed a portion of each step in the process.
- 6 Generally, statistical probability studies are admitted as part of the DNA proof in a case. At least one court has, however, precluded such evidence even though DNA evidence of a match was allowed. In [Rivera v](#)

People v Wesley, 83 N.Y.2d 417 (1994)

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

[State \(840 P2d 933 \[Wyo\]\)](#) the Supreme Court of Wyoming upheld a conviction for first degree sexual assault and the introduction of DNA profiling evidence. In referring to statistical probability population studies, the court found that the better practice was that they not be admitted. Their admission in the case was held not to be reversible error.

- 7 A Hardy-Weinberg equilibrium is a test performed on a sample of a large, random, interbreeding population, whereby one compares the frequencies of alleles or genes in a population with the frequencies with which one would expect to find in the individuals.
- 8 Linkage disequilibrium is a phenomenon whereby a specific allele of one locus becomes associated with another locus on the same chromosome with a frequency greater than expected by chance.
- 9 Sources: US Congress, Office of Technology Assessment, Genetic Witness: Forensic Uses of DNA Tests, at 3-6, 41-50; Prescott, Harley, Klein, Microbiology, at 236-307 (2d ed).
- 10 The unit of DNA consisting of one of the four bases attached to the deoxyribose sugar-phosphate group is called a nucleotide.
- 11 In addition to red blood cells, human blood contains other cells, such as white blood cells, which contain DNA.
- 12 A person's DNA is the same regardless of the biological sample-- blood, hair, flesh--from which it is taken. The genome of an individual does not vary from cell to cell, except in sperm and egg cells, which have half the complement of DNA present in other body cells.
- 13 The differences in alleles is explained by the difference in the ways the base pairs (A-T, T-A, C-G, G-C) arrange themselves along the DNA molecule.
- 14 Identical twins have the same DNA composition.
- 1 Even the new Federal test articulated in [Daubert v Merrell Dow Pharms.](#) (509 US \_\_\_, 113 S Ct 2786) would require proof of reliability of novel scientific evidence.
- 2 We disagree with the conclusion of the court in [People v Castro](#) (144 Misc 2d 956, 959) that the foundational inquiry is part of a special "DNA Frye test." Our cases have always required a foundational inquiry before scientific evidence can be admitted (see, e.g., [People v Middleton](#), 54 NY2d, at 45, *supra*), even after a particular technique has passed out of the "twilight zone" of "novel" evidence that is the subject of *Frye* and is judicially noticed as reliable (see, [People v Knight](#), 72 NY2d 481, 487 [radar speed detection]; [People v Campbell](#), 73 NY2d 481, 485 [blood alcohol content test]; [People v Mertz](#), 68 NY2d 136, 148 [same]; [People v Freeland](#), 68 NY2d 699, 701 [same]; [Pereira v Pereira](#), 35 NY2d 301, 307 [polygraph test used for investigative purposes]). While the *Frye* hearing and foundational inquiry may proceed simultaneously, in the present case the *Frye* inquiry was conducted before any samples were taken, so that a foundational inquiry was not possible at that time.
- 3 Brief gaps in the chain of custody, for example, may not affect trustworthiness of the test results, while challenges to the forensic laboratory analysis may go to the heart of reliability of results and require preclusion (Imwinkelreid, [The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis](#), 69 Wash U LQ 19, 27).
- 4 It is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique. Premature acceptance of "revolutionary" forensic techniques has led to wrongful conviction (see, Giannelli, [The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later](#), 80 Colum L Rev 1197, 1224-1225 [discussing belated discovery of inaccuracy of paraffin test]; Neufeld and Colman, *When Science Takes the Witness Stand*, 262 [No. 5] Scientific Am 46 [discussing belated discovery of inaccuracy of gunpowder detection test]). In [People v Leone](#) (25 NY2d 511, 517-518, *supra*) we also warned against introduction of scientific evidence before its general reliability have been resolved in the scientific community, because " 'the value of the test ... could easily become the question in the trial rather than that person's guilt or credibility' " (quoting [People v Davis](#), 343 Mich 348, 372, 72 NW2d 269, 282). Surely this case is an example of such diversion of focus.
- 5 The earliest law review study of forensic DNA profiling, however, completed about the same time as the decision on the suppression motion in this case, warned that "[u]nforeseen exceptions to the test's reliability are already beginning to surface" and that it was not yet ready for *Frye* scrutiny, citing concerns raised by Dr.

**People v Wesley, 83 N.Y.2d 417 (1994)**

633 N.E.2d 451, 611 N.Y.S.2d 97, 62 USLW 2655

Alec Jeffreys himself (Burk, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 *Jurimetrics* 455, 468, 470, n 68 [summer 1988]).

- 6 In the six years between the *Frye* hearing in this case and our review of it, debate within the scientific community has exploded about forensic application of DNA analysis. In New York, the Governor's Panel on Forensic DNA Analysis issued an interim report in September 1989 (Poklemba Report) with recommendations for a model program. No final recommendations have yet been issued. In April 1992, the National Research Council (NRC) issued its report, *DNA Technology in Forensic Science*, initiated in January 1990. In fall 1993, the NRC announced its intention to issue an amended report with modified recommendations.
- 7 While DNA evidence had been admitted in some criminal cases by mid-1988, the defense in this case was the very first to "mount ... a serious challenge to DNA typing" (Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 *Va L Rev* 45, 46, n 4). Contrary to the observations of our colleagues, therefore (majority opn, at 426), the fact that Lifecodes DNA evidence had been admitted without objection prior to the time of the hearing in this case was of little significance. This is particularly so since Dr. Michael Baird was also the witness vouching for the reliability of the unopposed Lifecodes evidence in those cases as well (Thompson and Ford, *op. cit.*, 75 *Va L Rev* 45, 49, n 20). The mere fact that the same assertions he made here had been repeated elsewhere--without challenge--did not render those statements more reliable.
- 8 Because the question of admissibility of novel evidence is one of law, our determination on appeal should acknowledge when subsequent developments have cast doubt upon the result of the *Frye* hearing (see, e.g., *People v Hughes*, 59 NY2d 523, 543; *People v Taylor*, 75 NY2d 277; *People v Williams*, 6 NY2d 18, 26; *People v Magri*, 3 NY2d 562, 566). Defendant unsuccessfully brought a motion pursuant to CPL 440.10 (1) (g) to vacate the conviction on April 18, 1990, alleging that the technique for declaring a "match" employed in 1988 had been proven unreliable. Indeed, the slip opinion-- relying on 1990 and 1993 texts describes step seven as including both visual studies and computer imaging analysis. No such evidence was before the hearing court when it passed on the techniques at issue; it dispensed with this crucial phase of determining that an autoradiograph is suitable for analysis, and that two samples match, in just one sentence: "When comparing two DNA fragment patterns ... one simply looks to see where the probe 'landed' " (140 *Misc 2d* 306, 317).
- 9 Some jurisdictions have barred DNA evidence altogether because of the uncertainty of the statistical significance of a match (*Commonwealth v Curnin*, 409 *Mass* 218, 565 *NE2d* 440, 443; *Ex parte Perry*, 586 *So 2d* 242, 254 [Ala]; *People v Barney*, 8 *Cal App 4th* 798, 10 *Cal Rptr 2d* 731, 742). Others have simply barred any statistical evidence of a match, while allowing testimony that the DNA test did not exclude the defendant as a suspect (*Prater v State*, 307 *Ark* 180, 820 *SW2d* 429; *State v Bible*, 175 *Ariz* 549, 858 *P2d* 1152; *State v Pennell*, 584 *A2d* 513 [Del]; *State v Schwartz*, 447 *NW2d* 422 [Minn]; *State v Houser*, 241 *Neb* 525, 490 *NW2d* 168; *State v Vandebogart*, 136 *NH* 365, 616 *A2d* 483; *State v Anderson*, 115 *NM* 433, 853 *P2d* 135; *Rivera v State*, 840 *P2d* 933 [Wyo]; *United States v Porter*, 618 *A2d* 629 [DC Ct App]).

Rodriguez v. Ford Motor Co., 17 A.D.3d 159 (2005)

792 N.Y.S.2d 468, Prod.Liab.Rep. (CCH) P 17,430, 2005 N.Y. Slip Op. 02767

17 A.D.3d 159

Supreme Court, Appellate Division,  
First Department, New York.

Alida RODRIGUEZ, Plaintiff–Appellant,  
v.

FORD MOTOR COMPANY,  
Defendant–Respondent,  
Peter Nyiri, et al., Defendants.

April 12, 2005.

**Synopsis**

**Background:** Pedestrian, who suffered severe injuries when vehicle pinned him against wall, sued manufacturer of the vehicle, alleging that it accelerated due to malfunction in its electronic throttle control system. The Supreme Court, Bronx County, [Stanley Green, J.](#), granted manufacturer's motion to admit into evidence various governmental reports relating to sudden acceleration, and to exclude proposed expert testimony and proof of purported similar occurrences. Pedestrian appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that pretrial rulings were not appealable.

Appeal dismissed.

West Headnotes (5)

**[1] Appeal and Error**

🔑 [Particular Orders or Rulings Reviewable in General](#)

Evidentiary ruling made before trial is generally reviewable only in connection with appeal from judgment rendered after trial.

[7 Cases that cite this headnote](#)

**[2] Appeal and Error**

🔑 [Relating to Witnesses, Depositions, Affidavits or Discovery](#)

Pre-trial rulings granting defendant's motion to admit into evidence various governmental reports relating to sudden acceleration, and to exclude proposed expert testimony and proof of purported similar occurrences, were nonappealable; orders did not limit legal theory of liability case.

[3 Cases that cite this headnote](#)

**[3] Evidence**

🔑 [Automobile Cases](#)

Trial court did not improvidently exercise its discretion in barring plaintiff's proposed expert witness on ground that his purported transient signal theory had no basis in scientific fact, where theory had never been examined by witness's engineering peers, much less widely accepted in scientific community.

[1 Cases that cite this headnote](#)

**[4] Evidence**

🔑 [Matters Involving Scientific or Other Special Knowledge in General](#)

**Evidence**

🔑 [Necessity and Sufficiency](#)

Expert should generally be permitted to offer opinion on matter involving professional or scientific knowledge not within range of ordinary training or intelligence, but in order for particular scientific principle, or particularly novel theory, to be considered sufficiently reliable to serve as basis for expert's opinion, it must first be shown to have general acceptance in relevant field.

Rodriguez v. Ford Motor Co., 17 A.D.3d 159 (2005)

792 N.Y.S.2d 468, Prod.Liab.Rep. (CCH) P 17,430, 2005 N.Y. Slip Op. 02767

[Cases that cite this headnote](#)

[5] Evidence

🔑 [Other Injuries or Accidents from Same or Similar Causes](#)

In action alleging that automobile accelerated due to malfunction in its electronic throttle control system, trial court properly rejected plaintiff's alleged proof of similar prior incidents, absent showing that relevant conditions of subject accident and previous one were substantially the same.

[Cases that cite this headnote](#)

Attorneys and Law Firms

**\*\*469** Murray & Murray Co., L.P.A., Sandusky, OH ([Mary S. O'Neill](#) of counsel), for appellant.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York ([Elliott J. Zucker](#) of counsel), for respondent.

[BUCKLEY, P.J.](#), [MAZZARELLI, MARLOW, SULLIVAN, JJ.](#)

Opinion

**\*159** Appeals from orders, Supreme Court, Bronx County (Stanley Green, J.), entered September 15 and November 6, 2003, which respectively granted the motion by defendant Ford Motor Company to exclude certain expert testimony, granted Ford's motion to admit into evidence governmental studies of sudden acceleration, denied plaintiff's motion to exclude reference to 1989 and 2000 reports by the National Highway and Traffic Safety Administration (NHTSA), and denied plaintiff's motion to offer evidence of similar occurrences while granting Ford's motion to exclude proof of such incidents, unanimously dismissed, without costs, as taken from nonappealable papers. Appeal from order, same court and Justice, entered

September 15, 2003, which granted, in part, Ford's motion to preclude claims that it had defrauded NHTSA, unanimously dismissed, without costs, as abandoned.

The now deceased defendant Nyiri is alleged to have put his car into reverse gear and smashed it into a building, pinning the plaintiff pedestrian against a wall and causing severe injuries. There is strong evidence that Nyiri was intoxicated at the time. Nevertheless, he sought to **\*\*470** attribute the mishap to an automobile defect. Plaintiff subsequently made Ford Motor Company, the designer and manufacturer of the vehicle, the principal defendant in this lawsuit. It is plaintiff's position that the automobile accelerated due to a malfunction in its electronic throttle control system.

[1] [2] At the start of trial but prior to jury selection, both sides made a number of motions for rulings on evidentiary matters. Ford moved to exclude the testimony of plaintiff's proposed expert on the ground that his purported transient signal theory **\*160** had no basis in scientific fact. Following a *Frye* hearing (*see Frye v. United States*, 293 F. 1013 [D.C.Cir.1923] ), the court granted Ford's motion to exclude plaintiff's expert testimony. Ford also successfully moved to bar plaintiff from introducing proof of allegedly similar incidents of sudden acceleration, and to admit various reports by governmental agencies, both here and abroad. Dissatisfied with these in-limine rulings, plaintiff chose to abort the trial and pursue this consolidated appeal. However, an evidentiary ruling made before trial is generally reviewable only in connection with an appeal from the judgment rendered after trial (*see Weatherbee Constr. Corp. v. Miele*, 270 A.D.2d 182, 705 N.Y.S.2d 222 [2000]). Thus, the orders granting Ford's motion to admit into evidence various governmental reports relating to sudden acceleration, and to exclude the proposed expert testimony and proof of purported similar occurrences, are nonappealable. Contrary to plaintiff's argument, this appeal does not fall within the exception to the rule (*see Matter of City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77, 783 N.Y.S.2d 75 [2004] ) because the orders

Rodriguez v. Ford Motor Co., 17 A.D.3d 159 (2005)

792 N.Y.S.2d 468, Prod.Liab.Rep. (CCH) P 17,430, 2005 N.Y. Slip Op. 02767

being challenged do not limit the legal theory of the liability case.

[3] [4] [5] Were we to reach these issues on the merits, we would find no error. In that regard, the trial court properly barred plaintiff's proposed expert witness since it is well settled that the admissibility and bounds of expert testimony rest primarily within the sound discretion of the trial court (*see Price v. New York City Hous. Auth.*, 92 N.Y.2d 553, 558, 684 N.Y.S.2d 143, 706 N.E.2d 1167 [1998] ). An expert should generally be permitted to offer an opinion on a matter involving professional or scientific knowledge not within the range of ordinary training or intelligence, but in order for a particular scientific principle—or a particularly novel theory—to be considered sufficiently reliable to serve as the basis for an expert's opinion, it must first be shown to have general acceptance in the relevant field (*see People v. Lee*, 96 N.Y.2d 157, 162, 726 N.Y.S.2d 361, 750 N.E.2d 63 [2001]; *People v. Wesley*, 83 N.Y.2d 417, 422–423, 611 N.Y.S.2d 97, 633 N.E.2d 451 [1994] ). Prior to granting Ford's request to exclude plaintiff's expert from testifying about his transient

signal theory, the court conducted a lengthy hearing on the proposed evidence, where it was clearly revealed that the theory propounded had never been examined by the witness's engineering peers, much less widely accepted in the scientific community. Thus, the exclusion of such expert testimony was not an improvident exercise of discretion. The court also appropriately rejected plaintiff's alleged proof of similar prior incidents in the absence of a showing that “the relevant conditions of the subject accident and the previous one were substantially the same” (*Hyde v. County of Rensselaer*, 51 N.Y.2d 927, 929, 434 N.Y.S.2d 984, 415 N.E.2d 972 [1980]; *see also Sawyer v. Dreis & Krump Mfg. Co.*, 67 N.Y.2d 328, 336, 502 N.Y.S.2d 696, 493 N.E.2d 920 [1986] ).

**\*\*471 \*161** We have considered plaintiff's other arguments and find them unavailing.

**All Citations**

17 A.D.3d 159, 792 N.Y.S.2d 468, Prod.Liab.Rep. (CCH) P 17,430, 2005 N.Y. Slip Op. 02767

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816 F.2d 843

United States Court of Appeals,  
Second Circuit.

S & K SALES CO., Appellee,  
v.  
NIKE, INC., Appellant.

No. 745, Docket 86-7949.

|  
Argued Jan. 28, 1987.

|  
Decided April 6, 1987.

Diversity action was brought against manufacturer for its participation in breach of fiduciary duty by former sales representative of sales company. The United States District Court for the Southern District of New York, Robert J. Ward, J., denied manufacturer's motion for judgment withstanding the verdict after verdict in favor of sales company, and manufacturer appealed. The Court of Appeals, Oakes, Circuit Judge, held that: (1) evidence supported finding of manufacturer's "knowing participation" in representative's breach of his fiduciary duty; (2) verdict of \$1,050,000 in compensatory damages was not excessive; and (3) failure of sales company to comply with state business licensing requirements did not require dismissal.

Affirmed.

West Headnotes (14)

[1] **Fraud**

 Intent

**Fraud**

 Defenses

Under New York law, tort of participation in a fiduciary's breach of duty did not require proof of intent to harm fiduciary's principal, and manufacturer was therefore not entitled to assert "justification" or "business purpose" defense to allegation of participation in

sales representative's breach of duty to sales company; clarifying *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237.

49 Cases that cite this headnote

[2] **Federal Civil Procedure**

 Particular Issues and Cases

Trial court's jury charge, as a whole, correctly conveyed to jury that "knowing participation" was essential element of claim, under New York law, of participation in breach of fiduciary duty and, despite submission of instruction that jury could find manufacturer liable if it found out that manufacturer "knowingly accepted" benefits of sales representative's breach of a fiduciary duty, charge did not set forth any factual scenario that would have allowed jury to find manufacturer liable solely on a "knowing acceptance" theory, and thus was not prejudicial to manufacturer.

28 Cases that cite this headnote

[3] **Fraud**

 Weight and Sufficiency

Ample evidence supported jury conclusion that manufacturer participated in sales representative's breach of fiduciary duty to sales company, under New York law, where manufacturer entered into agreement with representative even though it knew he was employed by sales company, sent misleading termination letters to sales company at request of representative, and authorized representative to offer employment to other sales company employees.

Cases that cite this headnote

[4] **Labor and Employment**

 Instructions

Instruction that "every employee must act with the utmost good faith and loyalty in performing his duty" adequately set out law concerning duty of employee for purpose of

New York claim of participation in breach of employee's fiduciary duty.

9 Cases that cite this headnote

**[5] Labor and Employment**

🔑 Rights of Employer as to Torts by Employee in General

There was no support for contention that sales representative made full disclosure of his relations with manufacturer as required under New York law for consent by his employer to his self-dealing.

1 Cases that cite this headnote

**[6] Labor and Employment**

🔑 Fiduciary Duty

Under New York law, acts by an employee that would otherwise constitute a breach of fiduciary duty would not be a breach if done with the employer's knowledge and consent.

8 Cases that cite this headnote

**[7] Damages**

🔑 Preventing or Delaying Performance of Contract with Third Person

Under New York law, fact that agreement between manufacturer and sales company was terminable without cause did not preclude sales company's recovery of damages for its termination as result of manufacturer's participation in breach of fiduciary duty by sales representative.

3 Cases that cite this headnote

**[8] Damages**

🔑 Preventing or Delaying Performance of Contract with Third Person

**Damages**

🔑 Injuries Affecting Limited or Special Rights or Interests

Manufacturer which knowingly participated in sales representative's breach of trust in his duty to sales company was liable, under

New York law, for damages sustained as proximate result of the wrongful conduct, and lost profits were an appropriate measure of those damages.

7 Cases that cite this headnote

**[9] Damages**

🔑 Loss of Profits

Evidence that in first fiscal year after manufacturer terminated agreement with sales company sales dropped almost \$14,000,000, supported claim, under New York law, of profits lost due to manufacturer's participation in breach of sales representative's fiduciary duty.

3 Cases that cite this headnote

**[10] Damages**

🔑 Loss of Profits

Estimation of sales company's future profits lost due to manufacturer's participation in sales representative's breach of fiduciary duty to sales company was not purely speculative, where estimate was adopted by manufacturer's own national sales manager.

3 Cases that cite this headnote

**[11] Damages**

🔑 Loss of Profits

Projections of manufacturer's sales over five-year period, based on ten percent per year sales increase, was relevant and probative of sales company's damages for profits lost due to manufacturer's participation in sales representative's breach of fiduciary duty to sales company, in light of company's typically long-standing relations with its clients and lack of evidence that manufacturer would have terminated agreement without manufacturer's participation in sales representative's disloyal acts.

2 Cases that cite this headnote

**[12] Damages****🔑 Questions for Jury**

Jury presented with different approaches to calculating sales company's net loss based on manufacturer's participation in breach of fiduciary duty was within its rights in disregarding manufacturer's fixed-cost analysis, in light of manufacturer's expert's admission of weakness of that method of calculation.

1 Cases that cite this headnote

**[13] Damages****🔑 Particular Cases**

Award of \$1,050,000 in compensatory damages to sales company for manufacturer's participation in breach of fiduciary duty was not excessive, in light of evidence as to amount of loss suffered by sales company and likelihood that company would have continued its relationship with manufacturer but for the disloyal acts.

2 Cases that cite this headnote

**[14] Federal Civil Procedure****🔑 Stay**

Stay of judgment on verdict in favor of foreign corporation pending its compliance with New York business licensing requirements appropriately balanced state interest with federal interest in efficient disposition of diversity cases involving interstate commerce, and dismissal of action for noncompliance was not required. N.Y.McKinney's Business Corporation Law §§ 1312, 1312(a).

11 Cases that cite this headnote

**Attorneys and Law Firms**

\*844 Winthrop J. Allegaert, New York City (Thomas I. Sheridan, III, Matthew Mosner, Richard O'Neil & Allegaert, New York City, of counsel), for appellant.

Edward Friedman, New York City (Robert D. Kaplan, Friedman & Kaplan, New York City, of counsel), for appellee.

Before OAKES, MESKILL and MAHONEY, Circuit Judges.

**Opinion**

OAKES, Circuit Judge:

In this diversity action Nike, Inc., appeals from a judgment entered in the United States District Court for the Southern District of New York, Robert J. Ward, Judge, following a jury trial in which Nike was found liable to S & K Sales Co. ("S & K") for either participating in or knowingly accepting the benefits of a breach of fiduciary duty owed to S & K by a former employee, Norman Johnson. The jury awarded S & K \$1,050,000 in compensatory damages and \$5,000 in punitive damages. Judge Ward subsequently denied Nike's motion for judgment notwithstanding the verdict, and Nike filed a timely notice of appeal. We affirm.

S & K, a California corporation with its principal place of business in Greenwich, Connecticut, represents some eighty clients in the sale of consumer products to military exchanges. Through its approximately one hundred salaried salespeople located world- \*845 wide, S & K sells both "hard goods," such as electronics, housewares, and food, and "soft goods," primarily apparel and footwear, to military exchanges or commissaries where they are purchased by present and retired American servicemen and their families. S & K's revenues, consisting primarily of commissions from its clients, totalled \$9,524,000 in the fiscal year ended June 30, 1984, only \$2,000 more than in the previous fiscal year.

Nike, Inc., formerly known as Blue Ribbon Sports, is an Oregon corporation with its principal place of business in Beaverton, Oregon. A well-known manufacturer of athletic footwear and apparel, Nike sells its goods to wholesalers and retailers both directly and through sales representatives. In fiscal year 1984, Nike employed approximately 4,000 people, and had domestic sales in excess of \$700 million.

In September 1975, S & K hired Norman Johnson, a former employee, to head S & K's Haviland Fashions division ("Haviland"), which was being established to

specialize in the sale of soft goods. As early as March 1978, Johnson wrote to Nike to solicit its business for Haviland. On August 31, 1978, Nike and Haviland entered into an agreement under which Haviland was to represent Nike in sales to the military market in the eastern United States. When Richard Steinberg, owner and president of S & K, learned of this contract, he instructed Johnson to terminate it because of a conflict Steinberg perceived in Haviland's representing both Nike and Wilson Sporting Goods ("Wilson"), an established client. Johnson accordingly informed Nike of Steinberg's decision, and in a letter to Steinberg dated October 11, 1978, Nike terminated its contract with Haviland.

Several weeks after Steinberg's decision, Johnson himself called Nike to state that in his opinion it was a mistake for Haviland to have turned down Nike's business. He proposed that he individually should act as Nike's sales representative using employees not connected with Haviland. Nike agreed, and on October 1, 1978, ten days before its contract with Haviland was formally terminated, entered into a sales representative agreement with Johnson that was identical to the previous contract with Haviland. Neither Johnson nor Nike ever made this agreement known to S & K or Haviland, and subsequent to the agreement Johnson ceased all sales efforts on behalf of Wilson even though Wilson continued as an S & K client. Nike's commission checks were made payable to and were cashed by Johnson individually until June 1980.<sup>1</sup>

In December 1979, Wilson ended its relationship with S & K and Steinberg asked Johnson to try to get the Nike account back. Johnson, without disclosing the existence of his agreement with Nike, told Steinberg in March 1980 that he had managed to get the Nike account back but that Nike had refused to sign a written contract. Johnson then gave S & K a photocopy of two people shaking hands with the label, "Handshake Agreement with BRS, Inc. Nike Shoes. At this time BRS will not enter into a written agreement." Johnson subsequently informed Nike that Wilson had been terminated and that Haviland staff would begin servicing Nike's account. He later requested that Nike make its commission checks out to himself and Haviland jointly.

This arrangement continued through July 1981, when S & K reorganized its sales force to abandon Haviland's specialization on soft good sales and instead to allow all

sales personnel to sell both hard and soft goods. In the wake of this reorganization, and even though S & K had adjusted his compensation, Johnson approached Ladd Lonnquist, Nike's national sales manager, and told him that he was considering leaving Haviland and proposed that Nike terminate S & K and appoint Johnson as the exclusive Nike agent to the military. At Lonnquist's suggestion, on August 14, 1981, Johnson sent Nike a "Personal & Confidential" proposal to this effect, stating that he was prepared to resign \*846 from Haviland, start a separate agency, and "assume the responsibilities of a 'Nike Head Rep.'" In this letter Johnson also estimated Nike's future sales volume and suggested the possibility of hiring two Nike employees for his new Nike agency.

Johnson's proposal was well received at Nike. In September 1981 Johnson met with a Nike national accounts manager, Kenya Strader, and gave her a draft of a letter addressed to Norman Johnson, as vice president of Haviland Fashions, terminating S & K as Nike's representative. As he gave Strader the letter he explained that "he indeed was vice president of Haviland Fashions," that he wanted to start his own agency, and that "this letter would make it easier for him if [Nike] terminated [its] relationship with Haviland Fashions in lieu of him resigning." With Lonnquist's approval, Strader then signed the letter without revision, dated it September 28, 1981, and sent it to Johnson. When he received this letter, Johnson told Steinberg that Haviland had been terminated because Nike wanted to use its own employees as representatives to the military market. Johnson indicated that he hoped to persuade Nike to reverse this decision, but at no point revealed that he himself had requested that Nike send the termination letter.

Johnson next met with Lonnquist in January 1982 after becoming concerned by Nike's failure to take concrete action on his proposal. At this meeting they discussed the proposal, but Lonnquist balked at Johnson's attempt to procure a higher rate of commission. Johnson then proposed that Nike sign him on as a Nike-exclusive head representative for all military sales, with support from Haviland employees. Lonnquist agreed to this, and on February 2, 1982, wrote to Johnson and enclosed a formal sales representative agreement (the "1982 Agreement"), which Johnson signed individually.

In the meantime, Johnson had told Steinberg that he had gotten Nike back for S & K and that S & K would now handle Nike world-wide. Steinberg authorized Johnson to sign a contract with Nike on S & K's behalf, and Johnson forwarded to Steinberg a copy of Lonnquist's February 2 letter and the signed agreement. Steinberg objected to the facts that the agreement was in Johnson's name only and that Nike's commission checks were being made payable to Johnson. Johnson replied that Lonnquist felt "more comfortable" with Johnson's name on the documents, but assured Steinberg that the names would be changed. These changes were never made. Beginning in February 1982, though, S & K employees began representing Nike to the military world-wide. Through July 1983, Johnson endorsed Nike's commission checks over to S & K. Thereafter he deposited the checks in his own account and drew checks on this account made payable to S & K.

In April 1984, Johnson again submitted a written proposal to Nike that Nike terminate its relationship with S & K and use instead as its military representative a new independent agency to be established by Johnson. Six of the eight individuals whom Johnson proposed to hire for his new agency were current S & K employees, a fact of which Nike was aware. Johnson predicted in his proposal that his new agency would dramatically increase Nike's military sales from a 1983 level of \$16 million to \$23.7 million in 1985, and he requested that Nike consider an increase in commission rates on the agency's sales. Johnson also sent to Nike a draft of a letter addressed to himself terminating S & K's relationship with Nike, as he had done in 1981.

Nike again reacted favorably to Johnson's proposal. Nike's marketing director for apparel tentatively approved the proposal and forwarded Johnson's draft termination letter to Nike's national sales manager with a note indicating that the letter was "to be followed with [Johnson's] *rehire* as a Nike guy" (emphasis in original). On April 25, 1984, Nike sent a revised letter to Johnson stating that the 1982 Agreement with Johnson would be terminated on May 31, 1984, "[a]s a result of certain internal decisions regarding the distribution of our products." The letter clearly implied that Johnson's relationship \*847 with Nike was also ending, although Nike was aware that Johnson, but not S & K, would continue to deal with Nike.

While still an S & K employee, Johnson met again with Nike executives in Oregon on May 3, 1984, after telling Steinberg's secretary that he would be away "fishing" for a few days. There Nike told Johnson that they had decided to establish an in-house agency with a sales staff of ten to be headed by Johnson. Johnson agreed. Several days later Nike authorized Johnson to offer employment to S & K employees on Nike's behalf, and Johnson accordingly made offers to three S & K employees during the first two weeks of May. A Nike internal memorandum dated May 8, 1984, stated that Nike was "hiring Norm Johnson and his associates to work our military accounts. They formally [*sic*] worked for S & K Company which represents many various product lines."

On Monday, May 7, Johnson called Steinberg to tell him of Nike's termination letter. Without disclosing his role in the termination or Nike's offer of employment, Johnson suggested that he might seek to accept a job with Nike. Johnson and Steinberg met on May 10, and Johnson indicated that he had an offer from Nike and would accept it. On May 18, 1984, Johnson again phoned Steinberg and formally resigned. He confirmed his resignation in a memorandum dated May 30, 1984. Nike terminated its contract the following day, and on June 1, 1984, the three S & K employees to whom Johnson had made offers became Nike employees.

S & K filed its complaint in this action twenty-one days later, initially seeking damages and injunctive relief on claims of participation in a breach of fiduciary duty, unfair competition, tortious interference with contract, and misappropriation of trade secrets. At trial, S & K proceeded solely on its theory that Nike had participated in and knowingly accepted the benefits of Johnson's breach of fiduciary duty to his employer, S & K. After a seven-day trial, the jury returned a special verdict for S & K, finding specifically that Johnson had breached his duty of loyalty to S & K, that Nike had participated in or knowingly accepted the benefits of the breach, and that S & K was financially injured by Nike's conduct to the tune of \$1,050,000 in compensatory damages. The jury also found Nike liable for an additional \$5,000 in punitive damages. On a separate issue relating to a pretrial motion to dismiss the complaint that Nike had made on the basis of S & K's failure to comply with N.Y.Bus.Corp.L. § 1312,<sup>2</sup> the jury also found that S & K had been engaged in permanent, regular, and continuous business in New York state between 1968 and 1985. Judge Ward

later denied Nike's motion for judgment notwithstanding the verdict or a new trial, but stayed execution of the judgment pending submission of proof that S & K is in full compliance with section 1312 of the New York Business Corporation Law. Nike now appeals.

## DISCUSSION

[1] In *Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1115 (2d Cir.1986), we set out the “well settled” elements of a New York claim for inducing or participating in a breach of fiduciary duty:<sup>3</sup>

The claimant must prove (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or \*848 participated in the breach, and (3) that the plaintiff suffered damages as a result of the breach. Our recognition of this claim in *Whitney* and in prior cases, see *e.g.*, *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1074 (2d Cir.1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978), is based upon the New York courts' longstanding acceptance of the principle that “[a]ny one who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust.” *Wechsler v. Bowman*, 285 N.Y. 284, 291, 34 N.E.2d 322, 326 (1941); *Rosen v. Rosen*, 78 A.D.2d 911, 912, 432 N.Y.S.2d 921, 923 (3d Dep't 1980); *Cornale v. Stewart Stamping Corp.*, 129 N.Y.S.2d 808, 814 (Sup.Ct.1954). Nike argues that the district court erred in refusing to instruct the jury that wrongful intent is an essential element of the tort of participation in a breach of fiduciary duty. It supports this contention with citations to cases involving intentional interference with contractual relations, *e.g.*, *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956), a tort that in *Whitney*, 782 F.2d at 1115, we stated was “analogous” to a participation claim. See also *Restatement (Second) of Agency* § 312 (1958). But the fact that other torts requiring proof of wrongful intent are analogous does not mean that they are identical. As the New York Court of Appeals noted in *Wechsler*, the gravamen of the claim of participation in a breach of fiduciary duty is the “knowing participation,” 285 N.Y. at 291, 34 N.E.2d at 326, of the third party in the fiduciary's breach of trust. See also *Whitney*, 782 F.2d at 1115, 1117; *Newburger, Loeb & Co.*, 563 F.2d at 1074; *Rosen*, 78 A.D.2d at

912, 432 N.Y.S.2d at 923; *Cornale*, 129 N.Y.S.2d at 814; *Restatement (Second) of Torts* § 874 comment c (1977) (a third party who “knowingly assists” a fiduciary in a breach of trust is liable for the harm caused); *cf. id.* § 876(b) (third party is liable for giving “substantial assistance or encouragement” to the tortfeasor's breach of duty). It is true that in some of the cases cited above the third party's actions were sufficiently egregious that an intent to injure the principal or beneficiary could be inferred, see, *e.g.*, *Whitney*, 782 F.2d at 1116, but in none of them was the factfinder required to do more than find that the third party knew of the breach of duty and participated in it. *Cf. American Republic Insurance Co. v. Union Fidelity Life Insurance Co.* 470 F.2d 820, 824-26 (9th Cir.1972) (third party who knew or should have known of breach of duty cannot “remain silent and accept benefits derived from the activities of” the disloyal employees). See also *Restatement (Second) of Agency* § 313(1).

Nike's reliance on *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237 (1954), is misplaced. In *Duane Jones*, the Court of Appeals considered a claim that Burke, an officer of a third party company, had conspired with a disloyal employee to destroy the plaintiff's business. At trial the jury expressly found that the third party company had not participated in the conspiracy, but that Burke had. The Court of Appeals upheld the Appellate Division's reversal of the jury's finding that Burke had participated in the conspiracy. The court concluded from several factors, including the absence of a “desire to injure plaintiff's business” and the fact that neither Burke nor his company “made any profit or received any financial advantage” from the employee's breach of duty, that Burke had not participated in the alleged conspiracy to destroy the plaintiff's business. 306 N.Y. at 194-95, 117 N.E.2d at 248-49. *Duane Jones*, which on its face deals with a claim different from the participation claim alleged here, stands at most for the proposition that a third party's wrongful intent may be indicative of “participation.” The case does not stand for the proposition that such intent is a necessary prerequisite to a finding of participation.

In line with its argument on intent, Nike contends that the district court should either have found as a matter of law or have instructed the jury that Nike could not be found liable unless it acted *solely* out of a malicious intent to harm S & K. Again, Nike supports this contention with citations \*849 to cases involving intentional torts other than the participation claim raised here. *E.g.*, *Marcella*

v. *ARP Films Inc.*, 778 F.2d 112, 119 (2d Cir.1985) (prima facie tort); *Alvord & Swift v. Stewart M. Muller Construction Co.*, 46 N.Y.2d 276, 281-82, 385 N.E.2d 1238, 1241, 413 N.Y.S.2d 309, 312 (1978) (intentional interference with contractual relations). Nike's request for an instruction on this "justification" or "business purpose" defense was properly denied, for, as we have indicated above, the tort of participation in a fiduciary's breach of duty simply does not require proof of an intent to harm.

[2] Somewhat more substantial is Nike's claim that the court erred by instructing the jury that it could find Nike liable if it found that Nike "participated in Johnson's breach of his duty of loyalty, or that Nike knowingly accepted the benefits of Johnson's breach of his duty of loyalty." (Emphasis added.) Nike objects to the court's use of the disjunctive and argues that it cannot be found liable for mere knowing acceptance of benefits. We recognize that the instruction might have been better phrased, as did Judge Ward in his decision on the motion for judgment notwithstanding the verdict, but we do not find that the court's charge was sufficiently confusing or prejudicial to warrant reversal. See *National Railroad Passenger Corp. v. One 25,900 Square Foot Parcel of Land*, 766 F.2d 685, 688 (2d Cir.1985) (new trial will be granted "because of an error in the jury instructions only if, based on a review of the record as a whole, ... the error was prejudicial"). We reach this conclusion for two reasons.

First, although *Wechsler* and *Whitney* do not use the term "knowing acceptance," its use is supported by the Ninth Circuit's decision in *American Republic Insurance Co. v. Union Fidelity Life Insurance Co.*, 470 F.2d 820 (9th Cir.1972). There the court found Union Fidelity liable to its competitor, American Republic, for the acts of American employees who accepted positions with Union and then, before terminating their relationship with American, solicited other coworkers to leave with them and used American's customer lists to solicit business for Union. Finding that "Union was, or should have been, aware that [these activities] were going on," the court concluded that "Union could not remain silent and accept benefits derived from the activities of" the disloyal employees. *Id.* at 824; see also *Restatement (Second) of Agency* § 312 comment d ("The principal has ... rights against one who, knowing of the contract of employment, employs the agent and benefits from the employment.").

We recognize that most authorities on the participation claim indicate that the third party's degree of involvement in the fiduciary's breach of duty must amount to "knowing participation," *Whitney*, 782 F.2d at 1115; *Wechsler*, 285 N.Y. at 291, 34 N.E.2d at 326, "knowing assistance," *Restatement (Second) of Torts* § 874 comment c, or "substantial assistance or encouragement," *id.* § 876(b). Nonetheless, we find that even if the district court's instruction was wrong to imply that Nike might be liable for mere "knowing acceptance of benefits," Nike could not have been prejudiced because the charge as a whole correctly conveyed to the jury the proper standard and emphasized the element of "participation" as the essence of the claim. After making the participation or knowing acceptance charge, the court went on to instruct the jury as to the specific factual findings that could lead them to find for S & K.<sup>4</sup> These instructions make clear that \*850 each such factual finding would support the conclusion that Nike participated in Johnson's breach and the conclusion that Nike accepted the benefits of that breach. At no time did the court set forth any factual scenario that would have allowed the jury to find Nike liable only on a knowing acceptance theory. Taken as a whole, then, the court's instructions did not "confuse or mislead the jury as to the principles of law that apply to the facts." *National Railroad Passenger Corp.*, 766 F.2d at 688.

[3] Moreover, there is ample evidence from which the jury could have concluded that Nike participated in Johnson's breach of duty to S & K. Specifically, the evidence showed that in 1978 Nike executives entered into an agreement with Johnson even though they knew he was an S & K employee and that S & K itself had requested the termination of its Nike contract because of the conflict with Wilson. In 1981 and again in 1984, Nike accepted Johnson's proposals that it terminate S & K's relationship with Nike and substitute Johnson or his own agency as Nike's military sales representative. Indeed, Nike aided Johnson by sending misleading termination letters for the sole reason that Johnson requested them. In 1984, Nike not only acted upon Johnson's proposal to terminate S & K, but also authorized Johnson to make offers of employment on Nike's behalf to other S & K employees at a time when Nike knew that Johnson was still an S & K employee and that S & K was unaware of the real reasons for Nike's termination. In light of this evidence, we agree with the district court's conclusion that as early as 1978 "there were red flags flying all over the place," *Whitney*, 782 F.2d at 1116, concerning the propriety of Johnson's

actions. The jury could properly have concluded that Nike knowingly participated in Johnson's breach of duty to S & K by virtue of its confidential business arrangements with Johnson that were fundamentally in conflict with Johnson's obligations as an S & K employee. Accordingly, we find that the district court's instructions on the requisite degree of Nike's involvement in Johnson's disloyal acts did not prejudice Nike and therefore provide no grounds for reversing the judgment below.

[4] [5] [6] Nike next argues that the court below erred by not charging the jury on whether S & K consented to Johnson's division of his loyalty between S & K and Nike. In particular, Nike challenges both the court's use of the word "utmost" rather than "undivided" to describe Johnson's duty to S & K, and its rejection of Nike's proposed charge on S & K's consent to Johnson's actions. These claims are meritless. The court's instruction that "[e]very employee must act with the utmost good faith and loyalty in performing his duty" is lifted almost verbatim from *Duane Jones*, 306 N.Y. at 188, 117 N.E.2d at 245, and is consistent with the standard set forth in relevant cases. *E.g.*, *Westwood Chemical Co. v. Kulick*, 570 F.Supp. 1032, 1036 (S.D.N.Y.1983) ("utmost good faith and loyalty"); *AGA Aktiebolag v. ABA Optical Corp.*, 441 F.Supp. 747, 754 (E.D.N.Y.1977) (same); *Cornale*, 129 N.Y.S.2d at 815 ("utmost good faith"). It was, therefore, not erroneous for the court to charge the jury on Johnson's duty of utmost good faith. Nor was it error for the court to reject Nike's proposed charge on consent. Nike requested an instruction that Steinberg's knowledge that Johnson's name, not S & K's, was on the 1982 Agreement with Nike was enough to establish S & K's consent to Johnson's "divided" loyalty. But as this court noted in *Renz v. Beeman*, 589 F.2d 735, 744 (2d Cir.1978), *cert. denied*, \*851 444 U.S. 834, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979), a breach of trust case to be sure, consent to self-dealing by a fiduciary must be "clearly proved" and "made with a full knowledge of all the material particulars and circumstances." *See also Restatement (Second) of Agency* § 392 comment b (fiduciary must disclose all relevant facts, including "prior relations" with the third party). There is simply no support in the record for the contention that Johnson made the full disclosure of his relations with Nike that is a prerequisite of any consent by S & K to his disloyal activities. Additionally, Nike's contention that the jury charge on consent was inadequate is belied by the record; several times the court instructed the jury that acts by an employee that would otherwise constitute a breach

of fiduciary duty would not be a breach if done with the employer's knowledge and consent. In light of the evidence presented at trial, and taking the court's instructions as a whole, we cannot say that the jury charge was erroneous.

[7] Nike launches several attacks on the district court's award of damages. It argues first that it could not be liable in damages for breaking the 1982 Agreement because that agreement was terminable on thirty days' notice. As Judge Ward rightly noted, though, the fact that the agreement was terminable without cause is irrelevant when "the conduct alleged breaches a legal duty which exists 'independent of contractual relations between the parties.'" *Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 (2d Cir.1980) (quoting *Channel Master Corp. v. Aluminum Limited Sales, Inc.*, 4 N.Y.2d 403, 408, 151 N.E.2d 833, 836, 176 N.Y.S.2d 259, 263 (1958)). Here, the duty breached by Johnson and participated in by Nike was clearly different from and independent of any duties under the 1982 Agreement. Thus, once it is established that the agreement was terminated as a result of Nike's participation in Johnson's breach, S & K was entitled to recover for its loss. *See Whitney*, 782 F.2d at 1115 (plaintiff is entitled to recover for "any damage" caused); *see also Restatement (Second) of Torts* § 874 & comment c.

[8] Nike's second argument is that the court erred in allowing S & K to recover its lost profits. The essence of Nike's argument is drawn from the trust law principle that a "transferee with notice" of a fiduciary's breach is liable only for restoration of the trust property received or restitution of the value of the property or benefits received. *See, e.g., Restatement (Second) of Trusts* § 291 (1959). However, as Nike itself points out in its brief, a third person who knowingly participates in a breach of trust "is liable to the beneficiary for any loss caused by the breach of trust." *Id.* § 326; *see also Whitney*, 782 F.2d at 1115; *Rosen*, 78 A.D.2d at 912, 432 N.Y.S.2d at 923; *Cornale*, 129 N.Y.S.2d at 814; *Restatement of Restitution* § 138(2) (1937). *Ballantine v. Ferretti*, 28 N.Y.S.2d 668 (Sup.Ct.1941), on which Nike relies heavily, is not to the contrary. There, the court stated that "[m]ere knowledge of [a conspiracy to breach a fiduciary duty], or even acquiescence therein ..., does not make the doer of [an act which aids the conspiracy] jointly and severally liable for all damage resulting from the conspiracy." *Id.* at 691. But, as Nike admits, a defendant who was found to have knowingly participated in the breach was held liable "for all damages which his acts caused." *Id.* at 690.

Here, where the essence of S & K's claim was that Nike participated in Johnson's breach and where there was ample evidence from which the jury could infer that Nike had in fact participated in the breach, the court was correct to instruct the jury that it could "award such damages as will reasonably compensate [S & K] for such injury and damage as you find ... that [S & K] has sustained as a proximate result of Norman Johnson's and Nike's wrongful conduct." And the court correctly charged that lost profits were an appropriate measure of the damages suffered by S & K. *See, e.g., American Republic Insurance Co.*, 470 F.2d at 827 (upholding lost profits award against third party participant); *Westwood Chemical Co.*, 570 F.Supp. at 1037 (damages from employees' breach of duty include lost profits); *Duane Jones*, 306 N.Y. at 192, 117 N.E.2d at 247 (lost profits from diverted accounts recoverable \*852 by beneficiary); *cf. Financial Programs, Inc. v. Falcon Financial Services, Inc.* 371 F.Supp. 770, 777-78 (D.Ore.1974) (lost profits recoverable against third party who participated in employees' unfair competition against employer).

[9] Nike contends also that S & K failed to prove that it lost any profits, that S & K's reduced expenses and new business more than offset its loss of income derived from Nike sales, and that the compensatory damages were excessive. In reviewing these claims we keep in mind that under New York law while S & K is required to establish with certainty that it suffered some loss, it need not prove the amount of loss with certainty. *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir.1977). Rather, S & K need only provide the jury with a sound basis for approximating with reasonable certainty the profits lost as a result of Johnson's and Nike's actions. *Id.*; *Westwood Chemical Co.*, 570 F.Supp. at 1038 n. 3; *Duane Jones*, 306 N.Y. at 192, 117 N.E.2d at 247-48; *Wolf Street Supermarkets, Inc. v. McPartland*, 108 A.D.2d 25, 33-34, 487 N.Y.S.2d 442, 449 (4th Dep't 1985).

We agree first of all with the district court's conclusion that S & K was damaged by termination of the 1982 Agreement as a result of Johnson's and Nike's acts. Nike's assertion that the proof of any lost profits was purely speculative, *see Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 235, 502 N.Y.S.2d 131, 132 (1986), is belied by the evidence. In the calendar year ending December 31, 1983, Nike's sales to the military through S & K amounted to about \$16.3 million, with S & K earning commissions from Nike of approximately \$357,000 or 2.2%. In the first

fiscal year after Nike terminated the 1982 Agreement, S & K's exchange division sales dropped almost \$14 million, with a corresponding drop in commissions. This clearly is evidence from which the jury could have concluded that S & K had in fact been damaged by Nike's termination of S & K.

[10] [11] Nike's primary objection is to the way in which S & K's estimated lost profits were presented to the jury. In particular, Nike argues that S & K's projections of future Nike sales were much too high, and that its projections of future Nike-related expenses were too low. But as the district court pointed out, there were two base figures from which the jury could have calculated S & K's lost profits. The first was the undisputed evidence of S & K's sales and commissions on Nike products for the last full year of sales under the 1982 Agreement. The second basis was the \$24 million estimate of fiscal year 1985 sales made by Johnson in his 1984 proposal to Nike and adopted by Nike's own national sales manager in an internal memorandum to Nike executives. While this \$24 million projection for 1985 may seem high in light of sales under the 1982 Agreement, Nike's claim that it is purely speculative has a hollow ring when a high-level Nike executive experienced in sales found the projection sufficiently credible to approve the termination of S & K and the establishment of a Nike military sales representative. Thus, it was not erroneous to allow the \$24 million figure to be presented to the jury, nor for S & K to show that that sales level would have resulted in roughly \$600,000 in commissions in 1985. In addition, we agree with the district court that S & K's projection of Nike sales over a five-year period, based upon a 10% per year sales increase, was relevant and probative in light of S & K's typically longstanding relations with its clients and the lack of evidence that Nike would have terminated S & K even without Nike's participation in Johnson's disloyal acts.

[12] We also reject Nike's contentions regarding the inclusion of S & K's costs and expenses in the calculation of lost profits. As we have noted, "in arriving at a determination of damages for a defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, and the defendant is only chargeable with the net loss." \*853 *Stern v. Satra Corp.*, 539 F.2d 1305, 1311-12 (2d Cir.1976). Here, to arrive at its estimate of its lost profits, S & K reduced its projected commissions by the salaries and

expenses it saved as a result of losing Nike's business and by the commissions it expected to earn from sales of Puma products, a line that S & K acquired after Nike's termination. Nike complains that S & K inadequately proved its variable costs of handling Nike's products. But we see no reason to overturn the district court's rejection of Nike's proposed "fixed-cost" calculations when Nike's own expert conceded that a fixed-cost analysis, which assumes that each account should bear its pro rata share of total expenses in proportion to its share of total sales, would be inaccurate without incorporating other factors such as the cost of producing Nike sales relative to that of other accounts. The witness preferred his prepared analysis of S & K expenses based upon the reduction in S & K's variable costs caused by Nike's termination. But even then he admitted that his calculations of S & K's savings from losing Nike were based on unproven assumptions about the number of sales positions S & K could have eliminated after the loss of the Nike account. Indeed, the expert's assumptions were partially contradicted by another Nike witness, Fields, who admitted that S & K could not have laid off additional regional sales personnel after Nike's termination without impairing the representation of S & K's other clients. All in all, the jury was presented with different approaches toward calculating S & K's net loss with reasonable certainty and the jury was clearly within its rights to disregard, as it apparently did, Nike's fixed-cost analysis, particularly in light of its admitted weaknesses.

[13] In its remaining challenge to the jury's award of compensatory damages, Nike argues that the award of \$1,050,000 was so large "that it would be a 'denial of justice to permit it to stand.'" *Mileski v. Long Island Rail Road Co.*, 499 F.2d 1169 1173 (2d Cir.1974). We disagree. We have held that where, as here, the trial judge has let the verdict stand, we will "order a new trial only when the verdict is irrational or so high as to shock the judicial conscience, rendering it an abuse of discretion not to set it aside." *Batchkowsky v. Penn Central Co.*, 525 F.2d 1121, 1124 (2d Cir.1975). The district court's conclusion that the \$1,050,000 award was "substantial but not excessive" is supported by the evidence presented at trial as to the

amount of the loss suffered by S & K and the likelihood that S & K would have continued its relationship with Nike but for the disloyal acts of Johnson and Nike's participation in those acts. The district court did not abuse its discretion in allowing the verdict to stand.

[14] Nike's final contention is that S & K's suit should have been dismissed because S & K failed to comply with New York Business Corporation Law § 1312(a), *see note 2 supra*, while it allegedly did business in New York during 1968-1985. However, as the district court noted, there is no evidence that S & K was acting fraudulently in 1985 when it finally did apply for authorization to do business in New York, although the court did conclude that the 1985 application wrongly stated that S & K had not been doing business from 1968 to 1985. Both parties admit that failure to comply with section 1312 is not a jurisdictional impediment. *Tri-Terminal Corp. v. CITC Industries, Inc.*, 78 A.D.2d 609, 609, 432 N.Y.S.2d 184, 185 (1st Dep't 1980). *Tri-Terminal* makes it clear that an appropriate remedy for a section 1312 violation is a conditional dismissal or stay of the action pending cure of the violation. However, in *In re Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp.*, 550 F.2d 1320 (2d Cir.1977), we read the Supreme Court's holding in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 95 S.Ct. 260, 42 L.Ed.2d 195 (1974), for the proposition that a state "door closing" statute, such as section 1312(a), "may not impede a diversity action concerning interstate or foreign commerce ... brought in a federal court." 550 F.2d at 1326. Here, when a full and fair trial of the issues has already taken place, the district court's imposition of a stay of judgment thus appropriately balances the state interest in enforcing its business licensing requirements with the federal interest in \*854 efficient disposition of federal diversity cases involving interstate commerce.

Judgment affirmed.

#### All Citations

816 F.2d 843

#### Footnotes

1 Nike does not contest on appeal that Johnson was in breach of his fiduciary and contractual duties to S & K.

2 N.Y.Bus.Corp.L. § 1312 provides as follows:

(a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has

paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation.

(b) The failure of a foreign corporation to obtain authority to do business in this state shall not impair the validity of any contract or act of the foreign corporation or the right of any other party to the contract to maintain any action or special proceeding thereon, and shall not prevent the foreign corporation from defending any action or special proceeding in this state.

3 The parties appear to agree that New York law governs the transaction.

4 The court's charge was as follows:

If upon all the evidence you find that Nike was aware that Johnson was an S & K employee but nevertheless accepted and acted upon Johnson's encouragement to terminate its business relationship with the plaintiff and to use Johnson as its representative to the military, you may conclude that the defendant participated in *and* accepted the benefits of Johnson's breach of duty.

If, on the other hand, you conclude that the defendant did not know that Johnson was an S & K employee at the time it terminated its business relationship with S & K and offered Johnson a position as a Nike employee, then you may find that defendant did not participate in Johnson's breach of duty *and* did not knowingly accept the benefits of that breach.

The parties agree that in early May, 1984, the defendant authorized Norman Johnson to offer employment on defendant's behalf to Karen Westmoreland, Mitch Fields, and Gina Stafford. If you conclude that at the time defendant authorized Johnson to make these offers it knew that Johnson, Westmoreland, Fields and Stafford were employees of plaintiff S & K, you may find that defendant participated in *and* accepted the benefits of Johnson's breach of duty. If you find that defendant did not know that Johnson was an S & K employee, you may find that defendant did not participate in or accept the benefits of Johnson's breach. (Emphasis added.)



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by Phillips v. Carlton Energy Group, LLC, Tex., May 8, 2015

218 F.3d 164

United States Court of Appeals,  
Second Circuit.

Reese SCHONFELD, individually and derivatively  
as shareholder of International News Network,  
Inc., Plaintiff–Counter–Defendant–Appellant,

v.

Russ HILLIARD, Les Hilliard and  
International News Network, Inc.,  
Defendants–Counter–Claimants–Appellees.

Docket No. 99–7852.

|

Argued: March 16, 2000.

|

Decided: July 5, 2000.

Shareholder of closely-held cable television corporation brought derivative suit alleging that other shareholders' breach of oral agreement to fund interim agreement led to corporation's breach of that agreement and to loss of exclusive cable television programming license. The United States District Court for the Southern District of New York, Mukasey, J, 62 F.Supp.2d 1062, granted summary judgment dismissing all claims, with exception of fraud claim, which court limited to out-of-pocket damages. The Court of Appeals, McLaughlin, Circuit Judge, held that: (1) lost profits could not be recovered for breach of promise to fund proposed cable television channel; (2) consequential damages could be recovered for market value of lost supply agreements; (3) there was sufficient proof of such damages; but (4) punitive damages were not recoverable.

Affirmed in part, reversed in part, vacated and remanded.

West Headnotes (35)

[1] **Damages**

🔑 Loss of profits

Under New York law, in action for breach of contract, plaintiff is entitled to recover lost

profits only if he can establish both existence and amount of such damages with reasonable certainty.

34 Cases that cite this headnote

[2] **Damages**

🔑 Loss of profits

Under New York law, lost profits need not be proven with mathematical precision, but they must be capable of measurement based upon known reliable factors without undue speculation.

18 Cases that cite this headnote

[3] **Damages**

🔑 Loss of profits

Under New York law, evidence of lost profits from new business venture receives greater scrutiny because there is no track record upon which to base estimate.

18 Cases that cite this headnote

[4] **Damages**

🔑 Loss of profits

Under New York law, projections of future profits based upon multitude of assumptions that require speculation and conjecture and few known factors do not provide requisite certainty for award of lost profits from new business venture.

19 Cases that cite this headnote

[5] **Damages**

🔑 Breach of contract

Under New York law, plaintiff seeking damages for lost profits must prove that lost profit damages were within contemplation of parties when contract was made.

19 Cases that cite this headnote

[6] **Damages**

🔑 Under circumstances within contemplation of parties

Under New York law, party breaching contract is liable for those risks foreseen or which should have been foreseen at time contract was made; where contract is silent on the subject, court must take “common sense” approach, and determine what parties intended by considering nature, purpose and particular circumstances of contract known by parties as well as what liability defendant fairly may be supposed to have assumed consciously.

17 Cases that cite this headnote

**[7] Damages**

🔑 Breach of contract

**Damages**

🔑 Loss of profits

Under New York law, lost profits could not be recovered for breach of promise to fund proposed cable television channel that would have distributed British Broadcasting Corporation (BBC) international news programming in United States; channel would have been new business, neither existence nor amount of lost profits could be proven with reasonable certainty, and lost profits were not within contemplation of parties.

20 Cases that cite this headnote

**[8] Damages**

🔑 Amount of damages

“Wrongdoer rule” provides that when existence of damage is certain, and only uncertainty is as to its amount, burden of uncertainty as to amount of damage is upon wrongdoer.

12 Cases that cite this headnote

**[9] Damages**

🔑 General and special damage

In an action for breach of contract, plaintiff may seek two distinct categories of damages:

(1) “general” or “market” damages; and (2) “special” or “consequential” damages.

20 Cases that cite this headnote

**[10] Damages**

🔑 Mode of estimating damages in general  
“General damages” for breach of contract seek to compensate plaintiff for value of performance promised.

19 Cases that cite this headnote

**[11] Damages**

🔑 Failure to deliver property

When promised performance is delivery of goods, general damages are measured by difference between contract price and market value of goods at time of breach.

3 Cases that cite this headnote

**[12] Damages**

🔑 Mode of estimating damages in general  
“Special damages” or “consequential damages” seek to compensate plaintiff for additional losses, other than value of promised performance, that are incurred as result of defendant's breach.

37 Cases that cite this headnote

**[13] Damages**

🔑 Mode of estimating damages in general

When defendant's conduct results in loss of income-producing asset with ascertainable market value, most accurate and immediate measure of damages is market value of asset at time of breach, not lost profits that asset could have produced in future.

26 Cases that cite this headnote

**[14] Damages**

🔑 Loss of or injury to property

**Damages**

🔑 Value of property

As with all consequential damages, plaintiff seeking damages for loss of income-producing asset must prove that liability for loss of the asset was within contemplation of parties at time contract was made, and asset's value should be proven with reasonable certainty.

2 Cases that cite this headnote

**[15] Damages**

🔑 Loss of or injury to property

Liability for loss of exclusive cable television programming license was clearly within contemplation of parties to oral promise to fund agreements wherein license was granted, as required, under New York law, to recover consequential damages for loss of income producing asset.

Cases that cite this headnote

**[16] Damages**

🔑 Mode of estimating damages in general

So long as asset lost due to defendant's breach of contract has determinable market value, plaintiff may seek to recover that value whether asset is tangible or intangible property or almost any kind of contract right.

12 Cases that cite this headnote

**[17] Damages**

🔑 Failure to Perform in General

Exclusive cable television programming license was valuable income-producing asset, loss of which could support recovery, under New York law, of consequential damages for breach of oral promise to fund agreements wherein license was granted.

1 Cases that cite this headnote

**[18] Damages**

🔑 Failure to Perform in General

When defendant's breach of contract deprives plaintiff of asset, courts look to compensate plaintiff for "market value" of asset, in

contradistinction to any peculiar value the object in question may have had to the owner.

7 Cases that cite this headnote

**[19] Damages**

🔑 Mode of estimating damages in general

Under New York law, "fair market value" of unique or intangible asset, for purpose of damages calculation for breach of contract, is price at which property would change hands between willing buyer and willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

12 Cases that cite this headnote

**[20] Damages**

🔑 Breach of contract

**Evidence**

🔑 Sales of other property in general

**Evidence**

🔑 Personal property

When defendant's breach of contract deprives plaintiff of asset, for which no prior sales history is available, under New York law, experts may give their opinion of asset's value, and evidence of sales of comparable assets may be introduced in calculating damages.

3 Cases that cite this headnote

**[21] Evidence**

🔑 Value of personal property

Under New York law, when defendant's breach of contract deprives plaintiff of asset, owner of asset may testify as to its market value, for purposes of damages calculation, if he is sufficiently qualified.

5 Cases that cite this headnote

**[22] Damages**

🔑 Amount of damages

**Damages**

🔑 Breach of contract in general

When defendant's breach of contract deprives plaintiff of asset, recent sale price for the subject asset, negotiated by parties at arm's length, is "best evidence" of its market value, for purposes of damages calculation; once plaintiff has produced such evidence, burden is on defendant to demonstrate special circumstances which would negate relevance of prior arm's-length purchase price.

14 Cases that cite this headnote

**[23] Evidence**

🔑 Acts or Conduct

Under New York law, in breach of contract action, price at which party offered to sell subject property in unsuccessful transaction may be introduced as party admission when offered against that party.

1 Cases that cite this headnote

**[24] Damages**

🔑 Breach of contract

Under New York law, if sale price offered as evidence against defendant by plaintiff is contained in contract that was negotiated by parties at arm's length, it remains admissible even though transaction contemplated by contract was never completed if: (1) performance promised is not yet due under contract and parties still intend to perform, or (2) transaction contemplated under contract would have occurred but for defendant's actions or interference of third-party.

Cases that cite this headnote

**[25] Damages**

🔑 Contracts conferring exclusive privileges or restricting competition

Market value of 20-year exclusive license for distribution of British Broadcasting Corporation (BBC) international news programming in United States had to be determined, in breach of contract action, by using hypothetical sale construct, because there was no standardized market or exchange

where such contract rights could have been sold.

1 Cases that cite this headnote

**[26] Federal Courts**

🔑 Expert evidence and witnesses

Court of Appeals reviews district court's decision to exclude expert testimony for abuse of discretion, mindful that mistake of law is automatically such an abuse.

1 Cases that cite this headnote

**[27] Evidence**

🔑 Personal property

When defendant's breach of contract deprives plaintiff of income-producing asset, plaintiff may offer expert testimony as to value of asset, notwithstanding that it rests, in part, on asset's ability to produce profits in future.

1 Cases that cite this headnote

**[28] Evidence**

🔑 Cost of property and amount received in general

Agreement to purchase cable television corporation's programming rights under its agreement for exclusive license for distribution of British Broadcasting Corporation (BBC) international news programming in United States was competent evidence of market value of latter agreement, for purposes of damages calculation; although price may have been unique to particular buyer and transaction was complex, agreement clearly established price at which defendants were willing to sell their programming rights.

2 Cases that cite this headnote

**[29] Evidence**

🔑 Statements as to particular facts in general

Price set forth in agreement to purchase cable television corporation's programming

rights under its agreement for exclusive license for distribution of British Broadcasting Corporation (BBC) international news programming in United States was admissible against defendants as party admission.

1 Cases that cite this headnote

**[30] Evidence**

🔑 Sales of other property in general

Evidence of sale prices negotiated at arm's length for purchase of "comparable" property is admissible as evidence of market value of property at issue in breach of contract action.

5 Cases that cite this headnote

**[31] Evidence**

🔑 Difference in time of sale

Under New York law, changes in March and December agreements for exclusive license for distribution of British Broadcasting Corporation (BBC) international news programming in United States were not so drastic that value of December agreement could not be ascertained, for purposes of damages calculation, by taking original purchase price and adjusting it.

1 Cases that cite this headnote

**[32] Damages**

🔑 Breach of contract in general

Agreement to purchase cable television corporation's programming rights under its agreement for exclusive license for distribution of British Broadcasting Corporation (BBC) international news programming in United States, for total purchase price of \$700,000 cash upon signing of other agreements, \$1 million in annual installments of \$100,000 paid over ten years and 5% equity interest in buyer's two BBC channels, was sufficiently certain to support its use as benchmark for value of rights purchased.

Cases that cite this headnote

**[33] Fraud**

🔑 Difference between value and price paid

Under New York law, measure of damages for fraud is governed by "out-of-pocket" rule which permits recovery for plaintiff's reliance interest, including damages incurred by passing up other business opportunities.

5 Cases that cite this headnote

**[34] Corporations and Business Organizations**

🔑 Damages or amount of recovery

Under New York law, shareholders' alleged failure to fund interim agreement, which led to corporation's breach of that agreement and to loss of exclusive cable television programming license, was not sufficiently egregious or willful to warrant imposition of exemplary damages even under standards applicable to ordinary fraud claims; nor was there evidence of self-dealing or malicious conduct.

5 Cases that cite this headnote

**[35] Federal Courts**

🔑 Grounds for sustaining decision not relied upon or considered

**Federal Courts**

🔑 Issues or questions not passed on below

Although Court of Appeals may affirm district court's decision on theory not considered below, preferred practice is to remand such issues for consideration by district court in first instance, particularly when such theories have been briefed and argued only cursorily in Court of Appeals.

9 Cases that cite this headnote

**Attorneys and Law Firms**

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James P. Murphy, Murphy, Kirkpatrick & Fain, PLLP, Billings, Mont. (Allen P. Rosiny, New York, NY, of counsel), for Defendant–Counter–Claimant–Appellee Les Hilliard.

Before: McLAUGHLIN, SACK and KATZMANN, Circuit Judges.

McLAUGHLIN, Circuit Judge:

### BACKGROUND

This case involves a closely-held cable television corporation that imploded just as it was about to launch its flagship channel. In 1988, brothers Russ and Les Hilliard formed International News Network, Inc. (“INN”) to distribute a British news and information channel in the United States (the “Channel”). Prior to this ambitious venture, the Hilliard brothers owned small mid-western cable television companies with an aggregate of only 66,000 subscribers.

To secure large-scale expertise and prestige, INN brought in Reese Schonfeld, a founder and former President of Cable News Network (“CNN”)—initially as a consultant, and later as a shareholder—to help INN negotiate with the British Broadcasting Corporation (the “BBC”) for a programming license. INN also retained Daniels & Associates (“Daniels”), the nation's leading financial services company for the cable industry, to prepare a business plan and to drum up investors.

In February 1994, the Hilliards and Schonfeld executed a written Shareholders' Agreement whereby each became a one-third shareholder in INN in return for a \$10,000 capital contribution. In addition, the Hilliards, who had each already lent \$300,000 to INN, agreed to lend up to another \$350,000 to INN if necessary to meet its obligations to the BBC. In lieu of a further cash contribution, Schonfeld agreed to invest his time and effort.

\*169 The Shareholders' Agreement confirmed the parties' understanding that INN itself would not operate the Channel. Instead, INN would invest in a yet-to-be-formed operating entity. INN's shareholders, if they chose, could increase their personal stakes in the Channel by making additional cash investments in the separate operating entity. The agreement said nothing about the percentage of profits that INN, or any other equity investor, would receive from the Channel's operation.

Although the Shareholders' Agreement provided for a two-member board of directors (one chosen by Schonfeld, the other by the Hilliards), no board members were formally designated. It appears, however, that Schonfeld assumed the three roles of director, President and CEO of INN. Russ Hilliard acted as the other director. Les Hilliard apparently played no role in INN, other than investor.

The final piece of the puzzle fell into place on March 4, 1994, when the BBC granted INN a 20-year exclusive license to distribute its news and information programming in a 24-hour format, commencing not later than February 1995 (the “March Supply Agreement”). The agreement provided for INN's assignment of the benefits and privileges of the agreement to the yet-to-be-formed operating entity upon written consent of the BBC, whose consent would not be unreasonably withheld. The BBC retained its right, however, to withhold consent to any delegation of INN's duties under the contract.

As INN's first step to implement the March Supply Agreement, and based on assumptions and figures provided by the Hilliards and Schonfeld, Daniels prepared a revised business plan for INN (the “INN Business Plan”). Schonfeld and Russ Hilliard used this revised plan to attract investors.

Soon after the execution of the March Supply Agreement, Cox Cable Communications (“Cox”), one of the largest cable operators in the United States, entered the picture. Cox wanted to launch two BBC channels in the United States—one with news and the other with entertainment programming. However, because of INN's exclusive programming rights, Cox would be unable to operate the news channel. Accordingly, Cox offered to purchase INN's contract rights for \$1.7 million cash (\$700,000 at closing and \$100,000/year for ten years thereafter), plus

a 5% equity interest in both of Cox's proposed BBC channels.

Finding Cox's offer reasonable, INN entered into a letter agreement with Cox on June 2, 1994 accepting the proposed terms of sale (the "Cox Agreement"). Under the Cox Agreement, Cox retained the right to buy out INN's 5% interest in the BBC channels in their tenth year of operations. The price that Cox agreed to pay for that interest was 20% of the tenth-year gross revenues of both channels. The parties agreed to enter into certain "definitive" agreements (*i.e.*, a Shareholders' Agreement, Buy-Out Agreement and consulting agreement for Schonfeld) once they received final approval from the BBC.

In light of the Cox negotiations, INN and the BBC agreed to temporarily suspend the March Supply Agreement. This, in turn, required a postponement in the Channel's launch date for several months.

Although the BBC had approved all financial aspects of the Cox deal, in August 1994, the BBC, on behalf of Cox, requested an extension of time to work out certain editorial issues concerning the proposed entertainment channel. Having decided to pursue the profits from the Channel themselves rather than selling out to Cox, the Hilliards denied this request. Schonfeld reluctantly agreed to abort the Cox deal.

In October 1994, the FCC promulgated a new rule allowing cable operators to charge an increased per-channel monthly rate for up to six new channels as of January 1, 1995. To take advantage of this window of opportunity, INN asked the BBC to accelerate the launch date of the Channel.

\*170 INN and the BBC signed an "Interim Agreement," effective December 14, 1994, in which the BBC agreed to provide provisional programming as early as possible, and to develop an "Americanized" programming format to become available to INN no later than December 31, 1995 under a revised 20-year supply agreement (the "December Supply Agreement"). In consideration for the interim programming feed, INN agreed to pay the BBC approximately \$20 million in installments beginning January 3, 1995. The BBC retained the right to terminate the Interim Agreement if, by January 31, 1995, INN had failed to get letters indicating an intent to carry the

Channel from cable systems with an aggregate of at least 500,000 subscribers. The December Supply Agreement also: (1) capped INN's initial capital contribution to the operating entity at 15%; and (2) gave the BBC a non-dilutable 20% equity interest in the operating entity.

According to three witnesses—Richard Blumenthal (INN's attorney), Schonfeld and Mark Young (a representative of the BBC)—Russ Hilliard repeatedly promised orally that he and his brother would personally fund the Interim Agreement. These promises were allegedly made to induce Schonfeld and the BBC to abandon the March Supply Agreement and enter into the Interim and December Supply Agreements despite the fact that INN did not yet have the cash available to make the necessary payments to the BBC. Schonfeld and Blumenthal testified in depositions that the Hilliards said they planned to invest up to \$20 million in the operating entity as financing for the BBC payments. However, there is no oral or written agreement memorializing the precise amount promised, or defining the liabilities and remedies of the parties in the event of the Hilliards' failure to fund.

By mid-January 1995, the Hilliards had provided none of the promised funding and INN was in default under the Interim Agreement. In February 1995, the parties met in New York to discuss the situation. Russ Hilliard did not deny that he and his brother had promised to fund the Interim Agreement. He claimed, however, that funding had been withheld because INN was having difficulty obtaining cable operator support. Rather than suing the Hilliards and INN for breach of contract, the BBC offered a chivalrous solution: in exchange for the dissolution of both the Interim and December Supply Agreements, the BBC agreed to release the Hilliards and INN from any and all claims arising out of their breach of the oral agreement and Interim Supply Agreement.

Schonfeld alleges that the Hilliards never really intended to fund the Interim Agreement themselves. He claims that, all along, they had been unsuccessfully attempting to get the money from William Bresnan, the CEO of Bresnan Communications (which is 80% owned by TCI Cable). Russ Hilliard has admitted in deposition testimony that: (1) the funds he had promised were supposed to come from Bresnan or TCI, not from himself and his brother; and (2) he knew the BBC would never have signed the Interim Agreement had it known the truth (*i.e.*, would never have

agreed to make the Interim Agreement contingent on funding from Bresnan or TCI).

In April 1995, Schonfeld commenced this diversity action in the United States District Court for the Southern District of New York (Mukasey, *J.*). Schonfeld alleged derivative claims on behalf of INN for: (1) fraud; (2) breach of contract; (3) promissory estoppel; (4) breach of the fiduciary duties of loyalty and care; and (5) mismanagement and waste of corporate assets. He also advanced personal claims for: (1) breach of contract; (2) promissory estoppel; and (3) breach of the fiduciary duties of loyalty and care.

In a nutshell, Schonfeld alleged that the Hilliards induced him and INN to abandon the March Supply Agreement and enter into the Interim and December Supply Agreements by falsely representing their intention to personally fund the Interim \*171 Agreement. He alleged that the Hilliards' breach of this oral agreement to fund led directly to INN's breach of the Interim Agreement and subsequent loss of the December Supply Agreement.

The damages requested by Schonfeld fall under three distinct categories: (1) lost profits that INN would have received had the Channel been successfully launched; or (2) in the alternative, the market value of the lost supply agreements ("lost asset" damages); and (3) punitive damages (solely in connection with his fraud and breach of fiduciary duty claims).

After discovery, the Hilliards moved for summary judgment arguing that, under governing New York law, Schonfeld could not establish lost profits or lost asset damages, and was not entitled to punitive damages. The Hilliards also contended that the oral promise to fund the Interim Agreement was unenforceable because it was too indefinite and not in writing.

To establish lost profit damages, Schonfeld relied on: (1) INN's Business Plan; (2) the revenues projected by Cox in connection with its own proposed BBC news channel; (3) the BBC's, the Hilliards' and Schonfeld's "belief" that the proposed operating entity would be profitable; and (4) the reports and deposition testimony of two damage experts—Donald Curtis and William Grimes.

Donald Curtis, a certified public accountant at Deloitte & Touche LLP, testified that damages from lost profits were between \$112 to \$269 million. Curtis based these figures on the revenue and expense projections contained in the INN Business Plan. William Grimes, a cable industry executive, testified to the assured success of the Channel by comparing it to other cable channels such as CNN and The Learning Channel. The defendants moved to preclude the testimony of these experts for failure to meet the scientific reliability standards set forth in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its progeny.

With respect to lost asset damages, Schonfeld relied entirely on the purchase price contained in the Cox Agreement to establish the market value of the March and December Supply Agreements. Calculating a present value for the portion of the purchase offer that comprised a 5% equity interest in the Cox channels, and adding this amount to the cash portion of the offer, Curtis concluded that the total purchase price agreed to in the Cox Agreement was \$17.13 million.

Relying on *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 235, 502 N.Y.S.2d 131, 132 (1986) ("*Kenford I*"), the district court held that Schonfeld could not prove, with reasonable certainty, the existence or amount of damages for lost profits. With respect to Curtis's expert testimony, the district court noted that "the technique used probably would not survive a *Daubert* inquiry." The court, however, declined to exclude the evidence under *Daubert* because it had already held that Schonfeld failed to establish a foundation for the existence of damages for lost profits.

Finding Schonfeld's claims for lost asset damages to be nothing more than a "back door" attempt to recover lost profits, and again relying on *Kenford I*, the district court held that Schonfeld could not establish lost asset damages with reasonable certainty because the value of the supply agreements also depended on their ability to generate profits. In addition, the district court held that Schonfeld had failed to establish that the supply agreements were "recoverable assets." All expert testimony proffered to establish their market value was, therefore, excluded as irrelevant.

Finally, the court ruled that, as a matter of law, Schonfeld was not entitled to punitive damages.

Accordingly, the district court granted summary judgment dismissing all claims, with the exception of the fraud claim (which the court limited to out-of-pocket \*172 damages of \$15,000). The ground for the sweeping dismissal was that Schonfeld had failed to demonstrate any damages. The defendants' arguments concerning the enforceability of the alleged oral contract were not addressed. *See Schonfeld v. Hilliard*, 62 F.Supp.2d 1062 (S.D.N.Y.1999).

Plaintiff, Schonfeld, now appeals, arguing that the district court erred by: (1) excluding the expert testimony offered to support his claim for lost asset damages; (2) dismissing all claims (other than fraud) for failure to establish the existence of, or entitlement to, the damages sought; and (3) limiting his recovery under the fraud claim to \$15,000.

For the reasons set forth below, we affirm in part, reverse in part, vacate and remand.

## DISCUSSION

We review a district court's grant of summary judgment *de novo*, drawing all inferences and resolving all ambiguities in favor of the non-movant. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 332 (2d Cir.2000). Summary judgment is proper only if the admissible evidence establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The issues before us on appeal are whether Schonfeld adduced sufficient evidence to establish the existence of damages for lost profits or lost assets, and his entitlement to punitive damages.

### I. Lost Profits

Schonfeld argues that the district court erred by dismissing his damage claims for lost profits. We agree with the district court.

[1] [2] [3] [4] In an action for breach of contract, a plaintiff is entitled to recover lost profits only if he can establish both the existence and amount of such damages with reasonable certainty. *See Kenford I*, 67 N.Y.2d at 261, 493 N.E.2d at 235, 502 N.Y.S.2d at 132.

"[T]he damages may not be merely speculative, possible or imaginary." *Id.* Although lost profits need not be proven with "mathematical precision," they must be "capable of measurement based upon known reliable factors without undue speculation." *Ashland Mgt. Inc. v. Janien*, 82 N.Y.2d 395, 403, 624 N.E.2d 1007, 1010, 604 N.Y.S.2d 912, 915 (1993). Therefore, evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate. *See Kenford I*, 67 N.Y.2d at 261, 493 N.E.2d at 235, 502 N.Y.S.2d at 132. Projections of future profits based upon "a multitude of assumptions" that require "speculation and conjecture" and few known factors do not provide the requisite certainty. *Id.*, 67 N.Y.2d at 262, 493 N.E.2d at 236, 502 N.Y.S.2d at 133.

[5] [6] The plaintiff faces an additional hurdle: he must prove that lost profit damages were within the contemplation of the parties when the contract was made. *See Ashland Mgt.*, 82 N.Y.2d at 403, 624 N.E.2d at 1010, 604 N.Y.S.2d at 915. "The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made." *Id.* Where the contract is silent on the subject, the court must take a "common sense" approach, and determine what the parties intended by considering "the nature, purpose and particular circumstances of the contract known by the parties ... as well as what liability the defendant fairly may be supposed to have assumed consciously." *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 319, 537 N.E.2d 176, 179, 540 N.Y.S.2d 1, 4 (1989) ("*Kenford II* ") (internal quotation marks and citation omitted); *accord Ashland Mgt.*, 82 N.Y.2d at 404, 624 N.E.2d at 1011, 604 N.Y.S.2d at 916.

The district court found Schonfeld's lost profit claims "highly analogous" to those raised in *Kenford I*. We do too. In *Kenford I*, Erie County had entered into a \*173 contract with the Kenford Company, Inc. and Dome Stadium, Inc. ("DSI") for the construction and operation of a domed stadium. 67 N.Y.2d at 260, 493 N.E.2d at 234, 502 N.Y.S.2d at 131. In exchange for the donation of the land, the contract provided that the County would begin construction within 12 months of the contract date and that, upon its completion, the County would enter into a 20-year management agreement with DSI. *See id.*, 67 N.Y.2d at 260, 493 N.E.2d at 234-35, 502 N.Y.S.2d at 131-32. DSI sued the County for breach of contract when construction was not timely commenced, seeking lost

profits that it would have received under the management agreement. *See id.*, 67 N.Y.2d at 260, 493 N.E.2d at 234, 502 N.Y.S.2d at 131. The Court of Appeals held that DSI could not recover lost profits because their existence could not be proven with sufficient certainty. *See id.*, 67 N.Y.2d at 262–63, 493 N.E.2d at 236, 502 N.Y.S.2d at 133.

[7] Here, the district court concluded that the Channel was a new entertainment venture similar to the proposed stadium in *Kenford I*. The operating entity's profits, the court noted, “were purely hypothetical, stemming from the sale of untested programming to a hypothetical subscriber base, sold to advertisers at a hypothetical price and supported by hypothetical investors and carriers.” *Schonfeld*, 62 F.Supp.2d at 1079. After reviewing the seemingly endless list of assumptions upon which Schonfeld's expert relied in determining lost profits, the court held that Schonfeld could establish neither the existence nor the amount of lost profits with reasonable certainty. The court also concluded that lost profits were not within the contemplation of the parties. We fully agree with the district court's analysis.

#### A. *The Channel's Status as a “New Business”*

To evade the *Kenford I* analysis, Schonfeld argues that the district court should not have characterized the Channel as a “new business.” He emphasizes that he and the Hilliard brothers were experienced cable channel operators and BBC news programming has been distributed around the world for many years. Accordingly, he claims that the Channel is more analogous to the introduction in *Ashland* of a new but tested investment strategy by an existing financial management corporation with an extensive customer base. This argument is unpersuasive.

It is undisputed that the Channel's operating entity never saw the light of day. Had the entity been created, it would have introduced first an existing product, BBC international news programming, and then a *new product*, the “Americanized” version, into a *new market*, the United States. In addition, the Channel had no established customer base. The Hilliards had only 66,000 subscribers and Russ Hilliard testified that they were having trouble finding the 500,000 subscribers necessary to preclude the BBC from terminating the March Supply Agreement. Finally, the Hilliards, Schonfeld and the BBC had never jointly operated a cable channel, so there is no historic record of operations from which lost profits

could be projected. Therefore, the district court correctly determined that the Channel would have been a new business.

#### B. *Reasonable Certainty of Lost Profits*

Schonfeld contends that the existence of lost profits was sufficiently established by the evidence that Cox, Schonfeld, the Hilliards and the BBC all *believed* that profits from the Channel were reasonably certain. However, “[t]he entrepreneur's ‘cheerful prognostications’ are not enough.” 1 *Dobbs Law of Remedies* § 3.4. Further, Cox's profit projections for the international news channel were based on Cox's *own* existing cable operations. INN and the non-existent operating entity had no such established operations. Indeed, Schonfeld's expert, Curtis, admitted that if Cox's projected costs replaced those in INN's \*174 Business Plan, the Channel would be doomed as “a lost venture.”

In addition, the district court properly held that Curtis's projections based on INN's Business Plan are legally insufficient. These projections presume that: (1) an operating entity would have been formed and operated for 20 years; (2) an estimated \$44 million in pre-launch financing would have been raised; (3) the hypothetical subscriber levels would have been reached; (4) carriage agreements would have been entered; (5) advertisers would have been found at the assumed rates; (6) all projected expenses would have proved correct; (7) marketing costs would have remained constant and expenditures would have been sufficient to attract and maintain subscriber interest; and (8) the type and amount of equity interest held by each investor, including INN, would have been determined in the manner alleged by Schonfeld. Curtis was unaware that some cable owners are paid to carry a channel and admitted that, if the Channel's operating entity had to pay for carriage, it would not survive.

Subject as they are to the changing whims and artistic tastes of the general public, claims for profits lost in unsuccessful entertainment ventures have received a chilly reception in the New York courts. *See Kenford I*, 67 N.Y.2d at 262–63, 493 N.E.2d at 236, 502 N.Y.S.2d at 133; Melvin Simensky, *Determining Damages for Breach of Entertainment Agreements*, 8 Ent. and Sports Law. 1, 12–13 (1990) (collecting cases). Curtis believes he adjusted his profit figures to take such factors into account by providing for a 25% variance on the projected cash flows

of the operating entity. In his deposition, he stated that he chose the 25% variance based on his experience with the cable industry. However, Curtis failed to establish that this variance would adequately account for any inaccuracies in the revenue and expense assumptions discussed above as well as any changes in consumer demand for British-style news reporting.

Indeed, Curtis failed to account for the effects of *any* general market risks on the Channel's probability of success. These risks include: (1) the entry of competitors; (2) technological developments; (3) regulatory changes; or (4) general market movements. As the district court correctly noted, “[f]ailure to control for adverse market conditions allows the false inference that plaintiff's venture was an assured success.” *Schonfeld*, 62 F.Supp.2d at 1074. Therefore, the court properly held that Schonfeld failed to establish a foundation for the existence of lost profits.<sup>1</sup>

In addition, Grimes's testimony regarding likely profits based on his comparisons to existing cable channels was properly rejected. It rested on a foundation of sand. Schonfeld failed to establish the high degree of correlation between INN or the non-existent operating entity and the proffered firms (in terms of, *inter alia*, investors, management and cost structures) upon which the probative quality of this evidence depends. *See, e.g., S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 852 (2d Cir.1987) (evidence concerning parent corporation admissible with respect to subsidiary); 3 *Dobbs Law of Remedies* at § 13.4(3) (profits of another entity are relevant if “plaintiff's business bears a close comparison” to the proposed business, “the products or services involved are standardized,” and the profits “do not depend heavily on local or personal management skills”).

[8] Schonfeld contends that the district court ignored the “wrongdoer rule” which Schonfeld believes required that the burden of uncertainty as to the amount of damages be shifted to the Hilliards. The “wrongdoer rule,” however, is not that broad. It provides that, “*when the existence of damage is certain, and the only uncertainty is as to its amount, ... the \*175 burden of uncertainty as to the amount of damage is upon the wrongdoer.*” *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir.1977) (emphasis supplied). The rule does not apply here for the simple reason that the *existence*

of lost profit damages cannot be established with the requisite certainty. *See id.*

### C. *The Contemplation of the Parties*

Finally, Schonfeld maintains that he adduced sufficient evidence to establish that liability for lost profits was within the parties' contemplation at the time the Hilliards promised to fund the Interim Agreement. He contends that this case is similar to *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2d Cir.1994) where we upheld an award of lost profits when TWA breached its duty of good faith and fair dealing under a joint venture agreement with Travellers to market Travellers' getaway packages. We disagree.

In *Travellers*, the plaintiff was seeking to recover profits that would have been realized under the very contract that the defendant was accused of breaching. Further, we noted that TWA had “near exclusive control” over the marketing of the getaway packages and, therefore, the profitability of the business. *Id.*, 41 F.3d at 1578. Thus, when it renewed its contract with Travellers, it “fairly may be supposed to have assumed consciously that lost profits damages would be an appropriate remedy” or at least “to have warranted Travellers reasonably to suppose that TWA had assumed such liability.” *Id.* (internal quotation marks and citation omitted).

Our case is distinguishable in several respects. Schonfeld is not seeking profits that would have accrued under the alleged oral agreement to fund, or even under the Interim Agreement. Rather, Schonfeld wants to recover lost profits that INN or a non-existent operating entity might have received from the operation of the Channel. Further, the profitability of the Channel was highly uncertain when the Hilliards promised to fund the Interim Agreement. Nor did they exercise “near exclusive control” over the profitability of the venture. In light of “the nature, purpose and particular circumstances of the contract known by the parties,” by orally promising to provide up to \$20 million to fund the Interim Agreement, the Hilliards cannot “be supposed to have assumed” liability for approximately \$269 million in lost profits that might have been garnered in the future by a non-existent operating entity. *Kenford II*, 73 N.Y.2d at 319, 537 N.E.2d at 179, 540 N.Y.S.2d at 4.

\* \* \*

For all the foregoing reasons, we affirm the district court's grant of summary judgment dismissing all claims insofar as they seek damages for lost profits.

## II. Lost Asset Damages

### A. Distinction Between Damages for the Market Value of a Lost Income-Producing Asset and Lost Profits that Could Have Been Derived Therefrom

Schonfeld faults the district court for: (1) failing to distinguish his claims for the market value of the lost supply agreements from his request for lost profits; and (2) dismissing his lost asset claims. Schonfeld is correct.

[9] [10] [11] In an action for breach of contract, a plaintiff may seek two distinct categories of damages: (1) “general” or “market” damages; and (2) “special” or “consequential” damages. See 3 Dan B. Dobbs, *Dobbs Law of Remedies* § 12.2(3) (1993). A plaintiff is seeking general damages when he tries to recover “the value of the very performance promised.” *Id.* General damages are sometimes called “market” damages because, when the promised performance is the delivery of goods, such damages are measured by the difference between the contract price and the market value of the goods at the time of the breach. See *id.* at § 12.4.

[12] “Special” or “consequential” damages, on the other hand, seek to compensate a plaintiff for additional losses (other than the value of the promised performance) that are incurred as a result of the defendant's breach. See *id.* at § 12.2(3). The type of consequential damages most often sought is lost operating profits of a business. See *id.* However, lost profits are not the only kind of consequential damages. A defendant's breach of contract may also cause a plaintiff to lose an asset that was in its possession prior to the breach. See *id.* at §§ 12.4(1) and 12.4(4). In some instances, the asset lost is an *income-producing* asset, the fair market value of which may be based, in whole or in part, on a buyer's projections of what income he could derive from the asset in the future. See *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 496 (2d Cir.1995); *Sharma v. Skaarup Ship Mgt. Corp.*, 916 F.2d 820, 825–26 (2d Cir.1990). Damages seeking to recover the market value for a lost income-producing asset have sometimes been referred to as “hybrid” damages. See 3 *Dobbs Law of Remedies* at § 12.2(3).

Although lost profits and “hybrid” lost asset damages are both consequential, rather than general, in nature, courts have universally recognized that they are separate and distinct categories of damages. See *Indu Craft*, 47 F.3d at 496; *ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F.Supp.2d 416, 420 n. 3 (S.D.N.Y.1999) (recognizing distinction but rejecting market value theory on ground that it was not introduced until six days before trial).

[13] When the defendant's conduct results in the loss of an income-producing asset with an ascertainable market value, the most accurate and immediate measure of damages is the market value of the asset at the time of breach—not the lost profits that the asset could have produced in the future. See *Sharma*, 916 F.2d at 825; 1 *Dobbs Law of Remedies* at § 3.3(7) (Market value damages are “based on future profits as estimated by potential buyers who form the ‘market’ ” and “reflect the buyer's discount for the fact that the profits would be postponed and ... uncertain.”).

Applying these principles to Schonfeld's claims, it is clear that he is seeking two separate and distinct categories of consequential damages: (1) lost profits; and (2) “hybrid” damages for the market value of a lost income-producing asset. As we have already noted, *supra*, Schonfeld cannot recover the consequential damages he seeks for lost profits. However, this holding in no way impairs his ability to establish his claim for “hybrid” damages seeking the market value of the lost supply agreements. See *Indu Craft*, 47 F.3d at 495–96 (damages for market value of business are recoverable even though plaintiff's lost profits claim was too speculative).

Relying on *Kenford I*, the district court held that Schonfeld's lost asset claims were indistinguishable from DSI's claims for profits that it could have earned under the stadium management contract. The court's reliance on *Kenford I*, however, was misplaced. In *Kenford I*, DSI never sought to recover damages for the market value of the management agreement—damages that in that instance would have been general damages because the very performance promised was the execution of the agreement. For whatever reason, the only damages sought by DSI were consequential damages for lost profits. Thus, *Kenford I* does not stand as a bar to Schonfeld's seeking to recover the market value of the supply agreements.

We therefore turn to the proof necessary to recover “hybrid” consequential damages measured by the market value of a lost income-producing asset.

*B. Proof Requirements for  
“Hybrid” Consequential Damages*

**[14]** Some of the confusion in this area is traceable to the law of evidence. The \*177 same kind of market-value proof is sometimes required to prove general damages as to prove “hybrid” damages for the loss of an income-producing asset. But the two remain analytically distinct. *See 3 Dobbs Law of Remedies* at §§ 12.2(3), 12.4(7). Like lost profits, “hybrid” damages are one step removed from the naked performance promised by the defendant; and their existence and extent depend on the individual circumstances of the plaintiff. *See id.* at §§ 12.2(3) and 12.4(5). Therefore, as with all consequential damages, a plaintiff must prove that liability for the loss of the asset was within the contemplation of the parties at the time the contract was made, and the asset's value should be proven with reasonable certainty. *See Indu Craft*, 47 F.3d at 496.

The market value of an income-producing asset is inherently less speculative than lost profits because it is determined at a single point in time. It represents what a buyer is willing to pay for *the chance* to earn the speculative profits. Therefore, it is appropriate to apply these proof requirements more leniently than is the case with proof of lost profits. *See 3 Dobbs Law of Remedies* at § 12.2(3).

*1. Contemplation of the Parties*

**[15]** Although not expressly stated by Russ Hilliard at the time the oral promise to fund the Interim Agreement was made, the Hilliards' liability for the loss of both the Interim and December Supply Agreements was clearly within the contemplation of all the parties. *See Ashland Mgt.*, 82 N.Y.2d at 403, 624 N.E.2d at 1010, 604 N.Y.S.2d at 915. Indeed, Schonfeld introduced Russ Hilliard's own testimony acknowledging that the BBC would not have agreed to enter into the Interim and December Supply Agreements had the Hilliards not promised to fund the Interim Agreement.

Thus, the only remaining issues with respect to Schonfeld's claims for lost asset damages are whether he can establish

both their existence and their amount with reasonable certainty.

*2. Certainty of Lost Asset Damages*

Schonfeld correctly argues that the district court erred in holding that: (1) he failed to establish that the March and December Supply Agreements were valuable, “recoverable” assets; and (2) even if they were, he could not establish their market values with reasonable certainty.

*a. “Recoverable” Assets*

**[16]** The goal of awarding damages for the market value of a lost asset is “to make sure the defendant's tort or contract breach does not leave the plaintiff with assets or net worth less than that to which she is entitled.” 1 *Dobbs Law of Remedies* at § 3.3(3). Therefore, so long as the lost asset has a determinable market value, a plaintiff may seek to recover that value whether the asset is “tangible or intangible property or almost any kind of contract right.” *Id.* A supply contract, for instance, is a form of intangible property that has an ascertainable value. *See 87 N.Y. Jur.2d Property* § 3 (1990); *Ambrose v. Commissioner*, 15 T.C.M. (CCH) 643 (1956) (valuation of wine supply agreement as a corporate asset); *see also Bailey v. Commissioner*, 993 F.2d 288 (2d Cir.1993) (valuation of partnership's contract rights to receive film royalties).

**[17]** It is undisputed that the March and December Supply Agreements, wherein the BBC granted INN a 20-year exclusive programming license, were INN's most valuable assets.<sup>2</sup> Indeed, Russ Hilliard and Bruce Dickenson of Daniels testified that, other than the cash in its bank account, the supply agreements were the *only* valuable assets that INN possessed. \*178 Russ Hilliard also conceded that: (1) Schonfeld and the BBC would not have agreed to abandon the March Supply Agreement and enter into the Interim and December Supply Agreements had the Hilliards not promised to fund the Interim Agreement; and (2) INN lost the December Supply Agreement, in part, as a result of the Hilliards' failure to fund. We conclude that Schonfeld has established the existence of lost asset damages with the requisite certainty.

b. *Competent Evidence of Market Value*

**[18]** When a defendant's breach of contract deprives a plaintiff of an asset, the courts look to compensate the plaintiff for the "market value" of the asset "in contradistinction to any peculiar value the object in question may have had to the owner." John D. Calamari and Joseph M. Perillo, *The Law of Contracts* § 14–12 (3d ed.1987). Although it is easier to determine an asset's market value when it is actively traded on a standardized exchange or commodities market, an asset does not lose its value simply because no such market exists. *See id.* Admittedly, in such instances, "the determination of a market value involves something of a fiction." *Id.*; *see American Soc'y of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir.1990) (hereinafter "ASCAP"); 1 *Dobbs Law of Remedies* at § 3.5 (market value "is not an existing fact but a legal construct or even a convention"); Charles T. McCormick, *Handbook on the Law of Damages* § 44 (1935) (without a standardized market, "'market value' becomes an inference as to the action of an imaginary purchaser.").

**[19]** In determining the market value of unique or intangible assets, New York courts have embraced the hypothetical market standard enunciated by the Supreme Court in *United States v. Cartwright*, 411 U.S. 546, 551, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973): "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *See, e.g., Nestle Holdings, Inc. v. Commissioner*, 152 F.3d 83, 88 (2d Cir.1998) (trademark); *ASCAP*, 912 F.2d at 569 (music license); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981). *See also* 1 *Dobbs Law of Remedies* at § 3.5; Calamari and Perillo, *The Law of Contracts* at § 14–12.

**[20]** If no prior sales history is available, experts may give their opinion of the asset's value; and evidence of sales of comparable assets may be introduced. *See ASCAP*, 912 F.2d at 569–71 (music license); *Robbins v. Frank Cooper Assocs.*, 14 N.Y.2d 913, 200 N.E.2d 860, 252 N.Y.S.2d 318 (1964) (television show format); *Central Dover Dev. Corp. v. Town of Dover*, 255 A.D.2d 542, 680 N.Y.S.2d 668, 669 (2d Dep't 1998) (mineral rights); *Gilroy v. American Broad. Co.*, 47 A.D.2d 728, 728, 365 N.Y.S.2d 193, 194

(1st Dep't 1975) (literary character); 58 N.Y. Jur.2d *Evid.* § 695 (1986); Calamari and Perillo, *The Law of Contracts* at § 14–13.

**[21]** If he is sufficiently qualified, even an asset's owner may testify as to its market value. *See Ostano Commerzanstalt v. Telewide Sys., Inc.*, 880 F.2d 642, 647 (2d Cir.1989) (fifty percent shareholder of plaintiff corporation testified regarding market value damages in action for breach of film licensing contract); *Chamberlain v. Dunlop*, 126 N.Y. 45, 53, 26 N.E. 966, 967 (1891); *Gilroy*, 47 A.D.2d at 728, 365 N.Y.S.2d at 194.

**[22]** If, fortunately, the asset at issue has a sales history, then despite the lack of a traditional market, it is easier for the court to determine the asset's market value as of the time it was lost. Indeed, it is well-established that a recent sale price for the subject asset, negotiated by parties at arm's length, is the "best evidence" of its market value. \*179 *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 741–42, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *accord Silverman v. Commissioner*, 538 F.2d 927, 932 n. 7 (2d Cir.1976); *W.T. Grant Co.*, 52 N.Y.2d at 511, 420 N.E.2d at 960, 438 N.Y.S.2d at 768; *see also Grill v. United States*, 157 Ct.Cl. 804, 303 F.2d 922, 927 (Ct.Cl.1962) (distribution rights to the film "Gone with the Wind").

Once a plaintiff has produced such evidence, the burden is on the defendant to demonstrate "special circumstances which would negate [the relevance] of a prior arm's-length purchase price." *Shapiro v. State*, 61 A.D.2d 852, 853, 401 N.Y.S.2d 921, 922 (3d Dep't 1978); *see Plaza Hotel Assocs. v. Wellington Assocs., Inc.*, 37 N.Y.2d 273, 278, 333 N.E.2d 346, 349, 372 N.Y.S.2d 35, 40 (1975) (price agreed upon in arm's-length transaction "should be accorded significance of the highest rank as a determiner of the value of the property, unless explained away as abnormal in some fashion").

**[23]** Although the "sale price rule" is usually seen only in the context of completed transactions, the price at which a party offered to sell the subject property in an unsuccessful transaction nevertheless may be introduced as a party admission when offered against that party. *See McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 178, 186, 159 N.E. 902, 903, 905 (1928); *Hewitt v. State*, 37 Misc.2d 634, 637, 235 N.Y.S.2d 481, 484 (Ct.Cl.1962); *Petition of Union Free Sch. Dist. No. 3 of Town of Huntington, County of Suffolk*, 225 N.Y.S.2d 430, 432

(Sup.Ct.1962), *aff'd*, 19 A.D.2d 859, 245 N.Y.S.2d 993 (2d Dep't 1963); 57 N.Y. Jur.2d *Evid.* §§ 235, 294 (1986); Calamari and Perillo, *The Law of Contracts* at § 14–13 (applying rule in breach of contract actions).

[24] Furthermore, if the sale price offered as evidence against the defendant by the plaintiff is contained in a contract that was negotiated by the parties at arm's length, it remains admissible even though the transaction contemplated by the contract was never completed if: (1) the performance promised is not yet due under the contract and the parties still intend to perform, *see Garland Properties, Inc. v. Assessor of City of Elmira*, 40 A.D.2d 566, 567, 334 N.Y.S.2d 52, 53 (3d Dep't 1972); or (2) the transaction contemplated under the contract would have occurred but for the defendant's actions or the interference of a third-party. *See Novack v. State*, 61 A.D.2d 288, 292, 402 N.Y.S.2d 457, 460 (3d Dep't 1978); 57 N.Y. Jur.2d *Evid.* § 232 (1986).

[25] Schonfeld is attempting to establish the market value of INN's 20-year exclusive BBC programming license which was embodied in both the March and December Supply Agreements. The market for these assets comprises all U.S. cable operators. However, because there is no standardized market or exchange where INN could have sold its contract rights, their market value must be determined by using the hypothetical sale construct. Therefore, the district court erred to the extent that it based its decisions to dismiss claims and to exclude evidence in the court's belief that: (1) no real market exists for the sale of BBC programming rights; and (2) any alleged value would be “based on a hypothetical resale” of the programming rights to a third party whose valuations would be “highly dependent on the unique characteristics of the hypothetical buyer.” *Schonfeld*, 62 F.Supp.2d at 1080, 1081.

As evidence of the market value of the supply agreements, Schonfeld relied on the purchase price set in the Cox Agreement. He also introduced expert testimony regarding the value of the 5% equity portion of the purchase price. Schonfeld argues that the district court erred by: (1) holding that the Cox Agreement is insufficient evidence of market value because it was contingent on BBC approval, never final, and based in part on revenue projections that were “unique to Cox;” and (2) excluding the expert testimony offered as to the value established by the Cox Agreement.

\*180 The Hilliards contend that the district court was right. In addition, they argue that the Cox Agreement should be disregarded as abnormal because the supply agreements contained numerous limitations and obligations (*i.e.*, INN had to obtain its own investment capital, carriage and advertising agreements and the agreement would expire within one year if certain investment and distribution levels were not reached) with no guaranteed revenue stream. We disagree.

(i) *Curtis's Expert Testimony*

[26] We review the district court's decision to exclude expert testimony for an abuse of discretion, mindful that a mistake of law is automatically such an abuse. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 202 (2d Cir.1999).

[27] The district court excluded all expert testimony proffered by Schonfeld in support of his claims for lost asset damages on the grounds that it was “irrelevant and speculative.” It was irrelevant, said the court, because Schonfeld had failed to establish that the supply agreements were even “recoverable assets.” This holding, as previously held, was based on an error of law. In addition, Schonfeld is entitled to offer expert testimony as to the value of an income-producing asset, notwithstanding that it rests, in part, on the asset's ability to produce profits in the future. *See ASCAP*, 912 F.2d at 569–71; Calamari and Perillo, *The Law of Contracts* at § 14–13.

Accordingly, we hold that the district court improperly excluded Curtis's expert testimony with regard to the market value of the supply agreements.

(ii) *Admissibility of the Cox Agreement*

[28] We also conclude that the Cox Agreement is competent evidence of the market values of the March and December Supply Agreements. Indeed, using the Cox Agreement as a benchmark, Schonfeld will likely be able to establish their market values with reasonable certainty on remand.

First, it is undisputed that the Cox Agreement was negotiated at arm's length and that Cox is a well-informed leader in the cable television industry. Although the Hilliards prefer to refer to the agreement reached with Cox as "the Cox offer," Cox's offer to purchase INN's programming rights was memorialized in a contract dated June 2, 1994, that was signed by INN. Further, the Cox Agreement established a price at which Cox agreed to buy and, more importantly, INN agreed to sell INN's programming rights under the March Supply Agreement. Therefore, Schonfeld offered what we consider "the best evidence" of the market value of the March Supply Agreement. *Silverman*, 538 F.2d at 932.

It is true that the sale anticipated by the Cox Agreement never occurred and was "subject to the BBC not voicing objections," the approval of Cox's board of directors, and the receipt of a non-binding letter of its intent to invest from TCI Cable. However, Schonfeld introduced evidence that the conditions could have been met, and the deal could have gone through, had the Hilliards agreed to grant an extension of time to work out the few remaining issues. Therefore, the district court should have "placed considerable weight" on the Cox Agreement as evidence of the value of the March Supply Agreement. *Garland Properties, Inc.*, 40 A.D.2d at 567, 334 N.Y.S.2d at 53 (where satisfaction of contingencies in the contract "created no serious problem," the court properly "allow[ed] proof of the facts and circumstances of the prospective sale, ... [and placed] considerable weight thereon as evidence of the value of the property"); see also *Novack*, 61 A.D.2d at 292, 402 N.Y.S.2d at 460; 57 N.Y. Jur.2d *Evid.* § 232 (1986).

[29] Even if the deal with Cox would not have gone through had the Hilliards \*181 granted Cox the extension of time, the Cox Agreement clearly establishes the price at which the Hilliards were willing to sell their rights under the March Supply Agreement. Therefore, under the rules of evidence, the price set forth in the Cox Agreement is admissible against the Hilliards as a party admission. See *McAnarney*, 247 N.Y. at 178, 186, 159 N.E. at 903, 905; *Hewitt*, 37 Misc.2d at 637, 235 N.Y.S.2d at 484; *Petition of Union Free Sch. Dist.*, 225 N.Y.S.2d at 432; 57 N.Y. Jur.2d *Evid.* §§ 235, 294; Calamari and Perillo, *The Law of Contracts* at § 14–13.

The Hilliards argue that the purchase price contained in the Cox Agreement should be disregarded as "unique to

Cox" because Cox had an established cable network and a pre-existing relationship with the BBC. They contend that the supply agreements would not have the same value to any other purchaser because of their complexity and the substantial limitations and obligations, both financial and promotional, contained therein. This argument is unpersuasive and contrary to New York law.

In *Plaza Hotel Assocs.*, the defendant had previously paid \$3.6 million to buy an option to purchase a one-half undivided interest in the land under the Plaza Hotel. In determining the value of the land, the trial court disregarded the price established by the arm's-length option purchase because "the nature of the transaction and the varied interests of the parties were so unusual that the purchase price could not be relied upon and ... even the option itself was not ordinary." *Id.*, 37 N.Y.2d at 277–78, 333 N.E.2d at 349–50, 372 N.Y.S.2d at 39–40. Rejecting the argument (identical to that made by the Hilliards), the Court of Appeals affirmed the Appellate Division's reversal of the trial court. The Court held that, "[d]espite the seemingly complicated terms of the agreements, ... we do not share the belief that the complexities were so unusual as to take the case outside the scope of the general rule" that a purchase price set in the course of an arm's-length transaction is evidence of the highest rank to determine property value. *Id.*

Cox's resources and business position are not determinative of whether the Cox Agreement is competent evidence of the market value of the supply agreements. Any offer is *by definition* unique to the purchaser because the value of an asset to the purchaser depends on the purchaser's needs, resources and circumstances. The value placed on an asset by a purchaser, however, does not become evidence of the asset's market value unless it is also the price at which a reasonably informed seller is willing to sell the asset. Here, Cox "was obviously aware of the conditions and restriction found [in the March Supply Agreement], but nonetheless it agreed upon a price that it thought reasonable under the circumstances." *Id.* Further, it was a price at which INN was willing to sell its rights.

Based on the Court of Appeals' definition of market value, it does not matter that the BBC's total package deal with Cox (or any other buyer for that matter) would materially differ from the BBC's deal with INN. Every cable operator has a unique cost structure, revenue flow and relationship with the BBC. *Absent an agreed upon sales price*, an expert

would have to testify as to: (1) all the relevant factors that a cable operator would consider in determining what to offer INN for its contract rights (such as the terms of the purchaser's possible deal with the BBC); and (2) the factors that INN would consider in deciding at what price to sell. But here, we are fortunate to *have an agreed upon sales price* which, under New York law, is competent evidence of market value despite the complex nature of the transaction.

[30] Finally, the Hilliards argue that, even if the Cox Agreement is competent evidence of the market value of the March Supply Agreement, it is not admissible to establish the market value of the December Supply Agreement because of material \*182 differences in the terms. However, evidence of sale prices negotiated at arm's length for the purchase of "comparable" property is admissible as evidence of the market value of the property at issue. *See ASCAP*, 912 F.2d at 569–71; Calamari and Perillo, *The Law of Contracts* at § 14–13.

[31] Moreover, the price set forth in the Cox Agreement was what Cox was willing to pay to ensure that INN could not compete with its BBC news channel for twenty years. The 20-year right to exclusive programming remained constant despite the financial changes in the two agreements. Therefore, the Cox Agreement is still relevant and competent evidence of the market value of the December Supply Agreement. *See ASCAP*, 912 F.2d at 570–71 (holding that although "courts do not permit psychoanalysis of buyers in comparable transactions to explore the complex mental processes that affected their decision finally to agree on a price," the district court properly admitted evidence of buyer intent to evaluate the weight to be afforded evidence of comparable sales). The changes in the agreements were not "so drastic that the value of the [December Supply Agreement] could not be ascertained by taking the original purchase price and adjusting it." *Shapiro*, 61 A.D.2d at 853, 401 N.Y.S.2d at 922. It is for the jury to decide what effect the change in terms would have had on the Cox Agreement, and Schonfeld should be able to introduce expert testimony on this issue.

### c. *The Value Established by the Cox Agreement*

The only remaining issue is whether the market values for the March and December Supply Agreements can

be established with reasonable certainty using the Cox Agreement as a benchmark. Or simply put, what was the purchase price that INN agreed to accept in the Cox Agreement? The agreement provided that the total purchase price would be paid as follows: (1) \$700,000 cash upon the signing of the definitive agreements required by the Cox Agreement; (2) \$1 million (in annual installments \$100,000) paid over ten years; and (3) a 5% equity interest in Cox's two BBC channels.

The district court held that, "[a]lthough the offer proposed an up-front payment, most of INN's compensation was contingent on the revenue generated by the two proposed channels in the tenth year of operations" and such revenue forecasts are "insufficient to prove damages with reasonable certainty." *Schonfeld*, 62 F.Supp.2d at 1080. Ultimately, the district court "excluded as irrelevant and speculative" all expert testimony proffered in support of Schonfeld's claims for lost asset damages and dismissed all claims insofar as they sought to recover such damages. *See id.* at 1081. In so holding, the district court applied an improper "all or nothing" approach with respect to the Cox Agreement, *i.e.*, if the *entire* purchase price established by the Cox Agreement cannot be determined with reasonable certainty, then Schonfeld cannot establish the market value of the supply agreements.

However, if he can successfully establish the Hilliards' liability, Schonfeld is entitled, as a matter of law, to recover market value damages *to the extent* that they can be proven with reasonable certainty. Further, pursuant to the "wrongdoer rule," where, as here, "the existence of damage is certain, and the only uncertainty is as to its amount, ... the burden of uncertainty as to the amount of damage is upon the wrongdoer." *Contemporary Mission, Inc.*, 557 F.2d at 926. Therefore, the burden of uncertainty here is upon the Hilliards. *See Indu Craft*, 47 F.3d at 496 (applying wrongdoer rule to plaintiff's claim for market value of lost ongoing business as consequential damages).

[32] In light of the Cox Agreement, a reasonable jury could find that INN's programming rights were worth at least \$700,000 plus the present value of \$1 million paid over ten years, for a total of \*183 approximately \$1.39 million.<sup>3</sup> In addition, the Cox Agreement provides sufficient information to calculate a dollar value for the 5% equity portion of the purchase price. Cox retained the right to buy out INN's 5% interest in the tenth year of operations at a price of 20% of the tenth-year

gross revenues of both channels. Incorporated into the Cox Agreement by reference are revenue projections for the news channel made by Cox that were previously forwarded to INN.<sup>4</sup> Therefore, on remand, Schonfeld ought to be able to establish, with reasonable certainty, the total amount that Cox was willing to pay and INN was willing to accept for the March Supply Agreement on June 2, 1994.

Using the purchase price contained in the Cox Agreement as a benchmark, Schonfeld may introduce expert testimony on remand as to the market values of the March and December Supply Agreements as of the dates on which they were caused to be abandoned or lost. The Hilliards, of course, may introduce evidence with respect to the *weight* to be accorded the Cox Agreement and may offer independent evidence with respect to the market values of the March and December Supply Agreements.

\* \* \*

[33] For the foregoing reasons, the district court erred when it: (1) excluded the expert testimony offered in support of Schonfeld's claims for market value damages; and (2) granted summary judgment dismissing Schonfeld's claims insofar as they sought to recover the market value of the December Supply Agreement. In addition, to the extent that Schonfeld seeks to recover the market value of the March Supply Agreement in connection with his fraud claim, that claim was improperly limited to \$15,000. "Under New York law, the measure of damages for fraud is governed by the 'out-of-pocket' rule which permits recovery for a plaintiff's reliance interest," including damages incurred by "passing up other business opportunities." *Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 793 n. 6 (2d Cir.1986) (internal quotation marks and citations omitted). Therefore, Schonfeld may seek to recover the market value of the March Supply Agreement which INN abandoned in reliance on the Hilliards' promises. *See id.*, 787 F.2d at 793 (noting that fraud claims are properly alleged, and are not merely contract claims in disguise when "the injury alleged [i]s the detriment actually suffered by the plaintiff rather than the value of what defendant promised").

### III. Punitive Damages

Schonfeld argues that the district court erred by dismissing his claims for punitive damages in connection with his fraud and breach of fiduciary duty causes of action on the ground that Schonfeld failed to establish that the defendant's conduct caused public harm. Even if Schonfeld is correct regarding the public harm requirement, we affirm the district court's dismissal of Schonfeld's claims insofar as they seek punitive damages.

In *Rocanova v. Equitable Life Assurance Soc'y of the United States*, 83 N.Y.2d 603, 634 N.E.2d 940, 612 N.Y.S.2d 339 (1994), the Court of Appeals held that, in order to recover punitive damages for breach of contract, a plaintiff must establish that the defendant's conduct: (1) is actionable as an independent tort; (2) was sufficiently egregious; and (3) was directed not only against the plaintiff, but was part of a pattern of behavior aimed at the public generally. *See* \*184 *id.*, 83 N.Y.2d at 613, 634 N.E.2d at 944, 612 N.Y.S.2d at 343. The Court of Appeals has since suggested that these requirements are applicable whenever an action "has its genesis in the contractual relationship between the parties." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316, 662 N.E.2d 763, 767, 639 N.Y.S.2d 283, 287 (1995).

Relying on pre-*Rocanova* cases, Schonfeld argues that the public harm requirement is not applicable to claims for fraud or breach of fiduciary duty. *See, e.g., Giblin v. Murphy*, 73 N.Y.2d 769, 536 N.Y.S.2d 54, 532 N.E.2d 1282 (1988) (punitive damages properly awarded in action for breach of contract and fraud despite absence of public harm where defendant recklessly and repeatedly breached their fiduciary duties and conducted an "out-and-out fraud"); *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 509 (2d Cir.1991) (holding in action for fraud, breach of fiduciary duty, breach of contract and unjust enrichment that, "[u]nder New York law, punitive damages are appropriate in cases involving gross, wanton or willful fraud or other morally culpable conduct ... [which] need not be directed at the general public") (internal quotation marks and citations omitted).

[34] We need not decide whether the "public harm" requirement set forth in *Rocanova* applies to claims for fraud or breach of fiduciary duty, however, because we agree with the district court that the defendants' alleged conduct was not "sufficiently egregious" or "willful" to warrant the imposition of exemplary damages even under the standards applicable to ordinary fraud claims. Nor

is there evidence of self-dealing or malicious conduct. Indeed, as a result of the dissolution of the Interim and December Supply Agreements, the Hilliards collectively lost almost \$800,000. Accordingly, we affirm the district court's dismissal of Schonfeld's claims for fraud and breach of fiduciary duty insofar as they seek punitive damages.

#### IV. Defendants' Additional Arguments on Appeal

The Hilliards argue that we should nevertheless affirm the district court's grant of summary judgment because the oral promise to fund is unenforceable. The bases for this contention are twofold: (1) the alleged promise was so indefinite that there could not have been a "meeting of the minds;" and (2) the promise is not in writing as is necessary to modify the Shareholders' Agreement and is also required by the New York Statute of Frauds.

[35] Both of these grounds were briefed by the parties below, but the district court elected not to address them. Although we are empowered to affirm a district court's decision on a theory not considered below, it is our distinctly preferred practice to remand such issues for consideration by the district court in the first instance. This is particularly appropriate when, as here, such theories have been briefed and argued only cursorily in

this Court. *See Thompson v. County of Franklin*, 15 F.3d 245, 253 (2d Cir.1994). We therefore remand to allow the district court to consider these arguments in the first instance.

### CONCLUSION

We have considered the parties' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the grant of the appellees' motion for summary judgment dismissing appellant's claims insofar as they seek damages for lost profits and punitive damages, REVERSE the grant of the appellees' motion for summary judgment dismissing appellant's claims insofar as they seek damages for the market value of the supply agreements and limiting appellant's fraud claim to \$15,000, VACATE the judgment entered below dismissing Counts II through X of the Amended Complaint and REMAND \*185 for further proceedings consistent with this opinion.

#### All Citations

218 F.3d 164

#### Footnotes

- 1 For this reason, the district court did not, and we need not, reach the issue of whether Curtis's expert testimony should be excluded under *Daubert* and its progeny.
- 2 Properly parsed, Schonfeld seeks to recover the market value of the lost December Supply Agreement in connection with his breach of contract, promissory estoppel, breach of fiduciary duty and corporate waste and mismanagement claims. He seeks to recover the market value of the March Supply Agreement in connection with his fraud claim.
- 3 Curtis calculated the present value of \$1 million paid over ten years to be \$687,000.
- 4 The district court acknowledged that certain aspects of the Cox projections "arguably render them more certain than the INN forecast." *Schonfeld*, 62 F.Supp.2d at 1080. For instance, "Cox has a record of expenses, an established management and a ready distribution system for new programming" and revenues only had to be projected ten (rather than twenty) years into the future. *Id.*

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by *Gussack Realty Co. v. Xerox Corp.*, 2nd Cir.(N.Y.),  
August 22, 2000

104 F.3d 940  
United States Court of Appeals,  
Seventh Circuit.

James J. SHEEHAN, Plaintiff-Appellant,  
v.  
DAILY RACING FORM,  
INCORPORATED, Defendant-Appellee.

No. 96-2123.

|  
Argued Dec. 5, 1996.

|  
Decided Jan. 15, 1997.

|  
Rehearing Denied Feb. 25, 1997.

Employee brought age discrimination action against his former employer. The United States District Court for the Northern District of Illinois, Paul E. Plunkett, J., entered summary judgment for employer, and appeal was taken. The Court of Appeals, Posner, Chief Judge, held that listing of birth dates cannot, without more, be evidence of age discrimination.

Affirmed.

West Headnotes (4)

[1] **Federal Civil Procedure**

 Employees and Employment  
Discrimination, Actions Involving

Plaintiff can avert summary judgment for defendant in employment discrimination case either by putting in enough evidence, whether direct or circumstantial, of discriminatory motivation to create triable issue or by establishing prima facie case under *McDonnell Douglas*.

38 Cases that cite this headnote

[2] **Civil Rights**

 Particular Cases and Contexts

Listing of birth dates cannot, without more, be evidence of age discrimination; age is a salient characteristic that is used to “place” someone we don't know and there is no implication of discriminatory motive in the use of age as identifying characteristic.

3 Cases that cite this headnote

[3] **Evidence**

 Experiments and Results Thereof

**Federal Civil Procedure**

 Admissibility

Expert's statistical analysis of the list of 17 employees whom office head wanted the company to retain when the office was closed would not have been admissible at trial and, thus, was entitled to zero weight in considering whether to grant employer's motion for summary judgment on employee's ADEA claim; expert's omission of individuals from the sample tested was arbitrary, expert failed to correct for any potential explanatory variables other than age, and expert ignored fact that the 17 employees held a variety of jobs. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

72 Cases that cite this headnote

[4] **Civil Rights**

 Particular Cases

Employee who did not show that job for which he was competing went to younger person did not establish prima facie case of age discrimination; worker who was selected for the position was not only better qualified than employee, but also older than employee.

8 Cases that cite this headnote

### Attorneys and Law Firms

\*940 H. Candace Gorman (argued), Gregory X. Gorman, Gorman & Gorman, Chicago, IL, for plaintiff-appellant.

Damon E. Dunn (argued), Levin & Funkhouser, Chicago, IL, for defendant-appellee.

Before POSNER, Chief Judge, and ESCHBACH and EVANS, Circuit Judges.

### Opinion

POSNER, Chief Judge.

[1] A plaintiff can avert summary judgment for the defendant in an employment discrimination case either by putting in enough evidence, whether direct or circumstantial, of discriminatory motivation to create a triable issue or by establishing a prima facie case under the *McDonnell Douglas* formula. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff in this case tried both ways of staving off summary judgment, but failed in each.

\*941 James Sheehan was an assistant editor in the Chicago office of the *Daily Racing Form*, which made him the number three man after Shulman, the head of the office, and McEvoy, the editor of the Chicago edition. Sheehan's specialty was layout, and he was good at it. He also functioned as McEvoy's number two man. "Layout" means fitting together the articles in a newspaper or other publication so that each page looks neat and well designed. When done by hand, as Sheehan did it, layout requires a good deal of skill, which Sheehan is admitted to have. As part of the acquisition of the already-computerized publisher of another racing sheet, however, the defendant decided to convert to a computerized system of publishing. Layout would be done by computer ("electronic pagination") and editions for different cities would be made up in one place and distributed electronically for printing locally. As a result of the substitution of computers for human labor, the Chicago edition of the *Daily Racing Form* would cease to be published in Chicago, and this portended the eventual closing of the Chicago office as publishing became consolidated in fewer offices. Not only would fewer workers be required but their tasks would be different. Tasks such as layout formerly done by hand would now

be computerized and this meant that employees such as Sheehan who had performed those tasks by hand would have to be trained to do them by computer. Their old skills might not be transferable, in just the same way that a skilled portrait painter might prove not to be a skilled photographer. Sheehan had no experience with computers, but along with other employees of the Chicago office he was given several weeks of training. In 1993, when the Chicago office was closed, Sheehan, aged 54, was among the employees of the office who were discharged rather than transferred to other offices of the company.

Sheehan relies on just two pieces of evidence to establish a prima facie case of discrimination by the conventional, or as it is more commonly but confusingly called the "direct," method. (The confusion lies in the fact that the direct method may employ circumstantial evidence along with or for that matter in place of "direct" evidence, *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994), which in an employment discrimination case would normally require an admission.) Both pieces of evidence derive from the same document, a list that Shulman sent to company headquarters almost a year before the Chicago office closed. It is a list of the 17 employees of the office-including Sheehan-whom Shulman wanted the company to retain when the office was closed. Each entry gives the name, job title, date of birth, date of appointment to current job, union affiliation, likely willingness to relocate (on a scale of 1 to 10), and a brief evaluation. Sheehan's entry, which is typical, reads: "Jim Sheehan-Ass't Turf Editor, 3/28/39, 6/9/90, Independent, -8-. Good layout and design. Dedicated perfectionist." Actually the list has 18 rather than 17 entries, the eighteenth being Bob Sebring, about whom the memo states: "I have omitted Bob Sebring, Director of Operations, from the foregoing as his value to us is obvious." Of the 17 persons on the list (that is, excluding Sebring), 11 were 48 years old or older and of these only 2 were retained. Six were 42 or younger (there were none between 42 and 48) and all of those were asked to remain. Of the 18-that is, if Sebring is included-12 were 48 or older and 3 of those were retained. Sebring was in his fifties, as was Shulman himself-and since he was the boss of the office about to be closed his head too was potentially on the chopping block, so maybe the list was implicitly a list of 19, not 17. An affidavit by a statistician hired by the plaintiff as an expert witness states that the probability that the retentions in the list of 17 are uncorrelated with age is less than 5 percent. The plaintiff argues that the

affidavit, in combination with the fact that the list contains the age (more precisely, the birth date, from which age can of course be readily computed) of each of the employees on the list, establishes a jury issue of age discrimination.

[2] We cannot agree. The listing of birth dates cannot without more be thought evidence of age discrimination. E.g., *Timm v. Mead Corp.*, 32 F.3d 273, 276 (7th Cir.1994); *Gustovich v. AT & T Communications, Inc.*, 972 F.2d 845, 848-49 (7th Cir.1992) (per curiam); \*942 *Armbruster v. Unisys Corp.*, 32 F.3d 768, 780-81 (3d Cir.1994); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir.1991). Age, like sex, is a salient characteristic-information that we use to “place” someone we don't know, to help form a picture in our mind of the person. Newspapers when reporting on someone not well known to the public invariably report the person's name and indicate (if the first name doesn't make it obvious) the person's sex. Age or date of birth is required on drivers' licenses and countless other official and unofficial documents and applications. There is no implication of discriminatory motive in the use of age as an identifying characteristic. And remember that the entire list of 17 is of the people whom Shulman thought the company should retain. It is not as if he had been identifying the ones he thought should be retained, and the ones he thought should be discharged, by age and inviting his bosses to make their cuts accordingly.

[3] Equally without evidentiary significance is the statistical analysis of the list of 17; indeed, the analysis was not even admissible under the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), governing the admissibility of expert testimony, which requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting. E.g., *Braun v. Lorillard Inc.*, 84 F.3d 230, 234-35 (7th Cir.1996); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir.1996); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316-19 (9th Cir.1995); cf. *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir.1989). Although the expert used standard statistical methods for determining whether there was a significant correlation between age and retention for the 17 persons on the list, see Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* 157 (1990) (Fisher's exact test), the omission of Sebring and Shulman from the sample tested

was arbitrary. The expert should at least have indicated the sensitivity of his analysis to these omissions. More important is the expert's failure to correct for any potential explanatory variables other than age. Completely ignored was the more than remote possibility that age was correlated with a legitimate job-related qualification, such as familiarity with computers. Everyone knows that younger people are on average more comfortable with computers than older people are, just as older people are on average more comfortable with manual-shift cars than younger people are. Three weeks of training might go some distance toward closing the computer-literacy gap, yet it would be more surprising than otherwise if so short a period of training could close the gap completely. The expert could easily have inquired about the feasibility of ascertaining through discovery the history of the use of computers by each of the employees on the list of 17.

What is more, he ignored the fact that the 17 employees held a variety of jobs. Some were unionized workers with no supervisory responsibilities. There were only 2 supervisors-McEvoy and Sheehan, and the former, who was even older than Sheehan, was nevertheless retained. Of the 19 who should have been on the list, 4 were supervisors (Shulman, Sebring, McEvoy, and Sheehan) and the 3 *oldest* were retained.

The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age-his equating a simple statistical correlation to a causal relation (“of course, if age had no role in termination, we should expect that equal proportions of older and younger employees would be terminated”-true only if no other factor relevant to termination is correlated with age)-indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside of the context of litigation. In litigation an expert may consider (he may have a financial incentive to consider) looser standards to apply. Since the expert's statistical study would not have been admissible at trial, it was entitled to zero weight in considering whether to grant or deny summary judgment.

[4] That leaves the *McDonnell Douglas* approach to be considered. The approach was not designed for a situation in which job requirements change, although maybe it can \*943 be adapted to it. The assumption behind the approach in a case of termination is that the plaintiff was doing fine in his job, lost it, and was replaced by someone

younger, or white, or male, or not handicapped, etc. When the job disappears for reasons unrelated to discrimination—and there is no suggestion that the defendant decided to computerize its operations in order to get rid of its older workers, or for any other reason unrelated to bona fide business considerations—the *McDonnell Douglas* approach has itself to be reconfigured, if not indeed abandoned. Perhaps the way to preserve it here is to recast this case as a hiring case. Sheehan's job—assistant editor with primary responsibility for manual layout—disappeared. It was replaced by a job called “Associate Editor” (Sheehan's job title had been “Assistant Turf Editor”) in the defendant's Lexington, Kentucky office, in which publication functions formerly performed in Chicago and elsewhere were consolidated. That job went to McEvoy. No surprise there: McEvoy had lost his job as editor of the Chicago edition, now defunct, and had done very well in his computer training and was therefore a natural for assignment to a similar position. Since McEvoy was not only better but older than Sheehan, Sheehan cannot satisfy the second step of *McDonnell Douglas*—the step of proving (in an age discrimination case) that the job for which he was competing went to a younger person. (And not just a day or two younger, either, but *substantially* younger. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, ---, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996).)

The 5 persons on the list of 17 who were younger than Sheehan and were retained (a sixth declined the new job he was offered) were given jobs different from the Associate

Editor's job that was the counterpart of Sheehan's old job. The fact that younger workers on the list of 17 were retained in other jobs says no more about discrimination than if an automotive engineer fired by General Motors allegedly on grounds of age pointed out that GM had a 17-year-old in its mail room. One of the 5, it is true, received a job as Page Editor, and Sheehan claims that he was more qualified for it. His briefs in this court, however, do not discuss the requirements of the job, let alone show that he was more qualified to perform the duties of the job than the person who got it. According to the defendant's uncontradicted submission, the Page Editor was to be a kind of one-man publishing band, who would rewrite articles, enter them together with racing data in the computer, compose an edition, and dispatch it for printing. Sheehan presented no evidence that he was well suited for this demanding and specialized job. He argues that he *must* be, since as McEvoy's deputy in Chicago he supervised the workers who did the various components of the new Page Editor's job. But of course a supervisor is not automatically qualified to do all his subordinates' jobs. Most executives could not switch places with their secretaries.

AFFIRMED.

#### All Citations

104 F.3d 940, 72 Fair Empl.Prac.Cas. (BNA) 1390, 69 Empl. Prac. Dec. P 44,442

 KeyCite Yellow Flag - Negative Treatment  
Declined to Follow by Reilly v. Gould, Inc., M.D.Pa., May 28, 1997

855 F.2d 1188

United States Court of Appeals,  
Sixth Circuit.

Woodrow STERLING, et al., Plaintiffs–Appellees,

v.

VELSICOL CHEMICAL  
CORPORATION, Defendant–Appellant.

No. 86–6087.

|  
Argued Dec. 8, 1987.

|  
Decided Aug. 29, 1988.

|  
Rehearing and Rehearings En  
Banc Denied Oct. 20, 1988.

Class action was brought against chemical corporation for personal injuries and property damage resulting to residents who lived near corporation's chemical waste burial site. The United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, 647 F.Supp. 303, entered judgment in favor of plaintiffs. Corporation appealed. The Court of Appeals, Ralph B. Guy, Jr., Circuit Judge, held that: (1) district court had subject matter jurisdiction, and (2) district court erred in attributing all of representative plaintiffs' alleged injuries to drinking or otherwise using contaminated water.

Affirmed in part, reversed in part and remanded.

Nanthaniel R. Jones, Circuit Judge, filed a concurring opinion.

West Headnotes (37)

**[1] Federal Courts**

 Pleadings

Each plaintiff in a class action individually must allege a claim in excess of \$10,000 for there to be federal jurisdiction.

26 Cases that cite this headnote

**[2] Federal Civil Procedure**

 Time for instituting proceedings

A judgment may be vacated at any time, even on appeal, for lack of subject matter jurisdiction.

4 Cases that cite this headnote

**[3] Federal Courts**

 Objections, Proceedings, and Determination

Once defendant challenged district court's jurisdiction with respect to amount in controversy for each class member, district court was not required to make immediate determination of sufficiency of each claim; rather, method and time table for deciding motion was left to trial judge's sole discretion. Fed.Rules Civ.Proc.Rule 12(b, d), 28 U.S.C.A.

7 Cases that cite this headnote

**[4] Federal Courts**

 Particular Cases, Claim or Value

In determining whether dismissal is justified for lack of jurisdictional amounts, sums posited by plaintiffs, provided they are made in good faith, control unless it appears to a legal certainty that their claims are, in actuality, for less.

1 Cases that cite this headnote

**[5] Federal Courts**

 Objections, Proceedings, and Determination

Defendant in class action failed either to assert that plaintiffs proffered bad-faith damage claims or to set forth any basis for justifying its allegation that plaintiffs' claims were for less than jurisdictional amount of \$10,000; accordingly, defendant was not entitled to dismissal of action on grounds of lack of subject matter jurisdiction.

4 Cases that cite this headnote

**[6] Federal Civil Procedure**

🔑 Common interest in subject matter, questions and relief; damages issues

In mass tort accidents, factual and legal issues of defendant's liability do not dramatically differ from one plaintiff to the next and no matter how individualized issue of damages may be, issues may be reserved for individual treatment with question of liability tried as a class action; consequently, mere fact that damage questions peculiar to each individual member of class remain after common questions of defendant's liability have been resolved does not dictate conclusion that class action is impermissible. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

252 Cases that cite this headnote

**[7] Federal Civil Procedure**

🔑 Discretion of court

**Federal Courts**

🔑 Class actions

District court retains broad discretion in determining whether action should be certified as class action, and its decision, based upon particular facts of case, should not be overturned absent showing of abuse of discretion. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

31 Cases that cite this headnote

**[8] Federal Civil Procedure**

🔑 Particular Classes Represented

District court did not abuse its discretion in certifying action against chemical corporation for personal injuries and property damage resulting to residents who lived near corporation's chemical waste burial site as a class action, although each plaintiff may have sustained a different amount of damages; almost identical evidence would be required to establish level and duration of chemical contamination, causal connection between

plaintiffs' consumption of contaminated water and type of injuries allegedly suffered, and defendant's liability. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

61 Cases that cite this headnote

**[9] Federal Courts**

🔑 Findings

If district court's account of evidence is plausible in light of record viewed in its entirety, Court of Appeals may not reverse it, even though Court of Appeals is convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

Cases that cite this headnote

**[10] Federal Courts**

🔑 Punitive damages

**Federal Courts**

🔑 Torts in general

A district court's ultimate and subsidiary findings concerning causation, negligence, nuisance, trespass, actual damages, and punitive damages are all factual determinations included within scope of rule providing that finding is clearly erroneous when, although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

1 Cases that cite this headnote

**[11] Evidence**

🔑 Results of experiments

Failure of residents, who brought action against chemical corporation for personal injuries and property damage resulting from corporation's chemical waste burial site, to incorporate selected well samplings conducted after 1978 did not invalidate their water computing model which residents contended showed that they were exposed to significant levels of contaminants as

early as 1970; plaintiffs carefully devised, calibrated, and tested model, based upon physical data generated by corporation's own consultants, to determine physical and chemical characteristics beneath landfill and properly formulated various components of model and utilized all relevant data.

1 Cases that cite this headnote

## [12] Negligence

🔑 Requisites, Definitions and Distinctions

Question of proximate cause is always to be determined on facts of each case.

2 Cases that cite this headnote

## [13] Evidence

🔑 Cause and effect

### Water Law

🔑 Evidence

### Water Law

🔑 Damages

District court did not abuse its discretion in making determination that chemical corporation's chemical waste burial site was proximate cause of contamination of residents' water supply and had capacity to cause personal injuries and property damage to residents who lived near site given expert testimony, numerous studies, and extent of literature presented, but district court erred in attributing all of representative residents' alleged injuries to drinking or otherwise using water contaminated by site; medical testimony that ingesting contaminated water "possibly," "may have," "might have," or "could have" caused injuries did not constitute same level of proof as a conclusion by a reasonable medical certainty.

26 Cases that cite this headnote

## [14] Federal Courts

🔑 Determination of damages, costs, or interest;remittitur

If negligence plaintiff fails to establish sufficient causation between defendant's acts

and specific injury, Court of Appeals may remand entire award to exclude that portion of award, if any, attributed to that specific injury for which proof is lacking.

5 Cases that cite this headnote

## [15] Damages

🔑 Personal Injuries and Physical Suffering

### Federal Courts

🔑 Review dependent on mode of trial in lower court

In seeking damages for actual physical injuries, plaintiff must prove to a reasonable medical certainty that injuries were caused by defendant's acts or omissions and to that extent, an award is not insulated from review merely because trial court refrains from particularizing basis of general injury award.

2 Cases that cite this headnote

## [16] Evidence

🔑 Cause and effect

A physician's testimony that resident's environmental exposure to chemical, which leached into drinking water from nearby chemical waste burial site, was reasonable and probable cause for resident's kidney cancer was sufficient medical proof that injuries were caused by ingesting contaminated water.

2 Cases that cite this headnote

## [17] Damages

🔑 Personal Injuries and Physical Suffering

Residents living near chemical waste burial site failed to prove to a reasonable medical certainty that their optic atrophy and neuritis were caused by ingesting or otherwise using water which had been contaminated by site; no physician diagnosed or testified to a reasonable medical certainty that residents' difficulties were caused by exposure to contaminated water.

11 Cases that cite this headnote

**[18] Damages**

🔑 Disease resulting from injury

Where basis for awarding damages in negligence action is potential risk of susceptibility to future disease, predicted future disease must be medically reasonably certain to follow from existing present injury.

8 Cases that cite this headnote

**[19] Damages**

🔑 Disease resulting from injury

While it is unnecessary that medical evidence conclusively establish with absolute certainty that future disease or condition will occur, in order to recover damages for potential risk of susceptibility to future disease, mere conjecture or even possibility does not justify trial court awarding damages for future disability which may never materialize.

6 Cases that cite this headnote

**[20] Damages**

🔑 Disease resulting from injury

Residents living near chemical corporation's chemical waste burial site were not entitled to recover damages for enhanced risk of liver and kidney disease and cancer due to their exposure to chemical wastes which leached into drinking water; increased risk for susceptibility to cancer and other diseases of only 25 to 30% did not constitute reasonable medical certainty but only a mere possibility or speculation of future injury.

8 Cases that cite this headnote

**[21] Damages**

🔑 Mental suffering and emotional distress

Residents who lived near chemical corporation's chemical waste site were entitled to recover damages for fear of increased risk of cancer and other diseases; residents produced evidence that they personally suffered from reasonable fear of contracting cancer or some other disease in the future as

a result of ingesting chemicals which leached into drinking water from waste site.

3 Cases that cite this headnote

**[22] Damages**

🔑 Discretion as to amount of damages

Amount of damage award in personal injury action is for jury or, in nonjury case, trial judge who heard evidence.

Cases that cite this headnote

**[23] Federal Civil Procedure**

🔑 Amount of Recovery

**Federal Courts**

🔑 Damages or Other Monetary Relief

Absent showing of bias, passion, or corruption, excessiveness of verdict is left to trial court's discretion, and appellate court will only consider whether trial court abused that discretion by granting awards so large as to shock judicial conscience.

2 Cases that cite this headnote

**[24] Federal Courts**

🔑 Matters or evidence considered

**Federal Courts**

🔑 Torts in general

When considering whether personal injury award is excessive, Court of Appeals views awards in other cases, as well as nature and extent of injuries.

Cases that cite this headnote

**[25] Damages**

🔑 Excessive damages in general

Awards of damages ranging from \$50,000 to \$250,000 for residents' fear of increased risk of cancer and other diseases due to ingestion of drinking water contaminated by chemical corporation's waste site were excessive, particularly where residents failed to prove that they had a significant increased risk of contracting cancer and other diseases.

4 Cases that cite this headnote

**[26] Evidence**

🔑 Medical testimony

Testimony of immunologist and pediatrician as to damage to immune system of residents, who ingested drinking water contaminated by nearby chemical waste site, was inadmissible in personal injury and property damage action; testimony was based on clinical ecological tests which had been rejected by professional societies as unproven methodology lacking any scientific basis in either fact or theory. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

23 Cases that cite this headnote

**[27] Evidence**

🔑 Cause and effect

Resident, who ingested drinking water contaminated by nearby chemical waste site, could not recover damages for learning disorder arising out of impairment to immune system; sole evidence allegedly linking learning problems to chemical exposure was offered by clinical ecologist but ecologist performed no scientific test to determine source of resident's learning disorder and provided no medical basis justifying conclusion that learning disorder was caused by ingesting or using contaminated water.

7 Cases that cite this headnote

**[28] Damages**

🔑 Other particular cases

Although consumption of water contaminated by nearby chemical waste site may have been an unnerving occurrence, it did not rise to the level of type of psychologically traumatic event which entitled residents living nearby site to recover damages for posttraumatic stress disorder under Tennessee law.

4 Cases that cite this headnote

**[29] Nuisance**

🔑 Persons entitled to sue

Individuals who did not live near chemical waste site could not recover damages under Tennessee law for injuries sustained in connection with contact with site, on basis of nuisance theory.

1 Cases that cite this headnote

**[30] Damages**

🔑 Loss of earnings, services, or consortium

**Damages**

🔑 Impairment of earning capacity

Those who drank water contaminated by nearby chemical waste site were not entitled to recover damages for lost wages and earning capacity; one person failed to produce income tax forms or any figures of annual income for years during which he lived by site and years for which he claimed disability, and the other person produced no evidence as to lifetime earning capacity for normal person of same age and socioeconomic condition and failed to prove that his learning disability, which constituted single most important factor contributing to loss of earning capacity, was proximately caused by ingestion or other usage of contaminated water or his mother's ingestion of contaminated water during term of her pregnancy.

Cases that cite this headnote

**[31] Damages**

🔑 Permanent and continuing injuries

Owner of property near chemical waste site, whose home well water was contaminated after chemical waste leached from site into local aquifer, was entitled to recover \$48,492.50 for damage to property which represented difference in market value before and after commission of tort which allegedly reduced value of property.

1 Cases that cite this headnote

**[32] Federal Courts**

🔑 Interest

In diversity case, federal court is bound by state law on question of prejudgment interest.

4 Cases that cite this headnote

**[33] Interest**

🔑 Torts;wrongful death

District court did not abuse its discretion in awarding prejudgment interest under Tennessee law on its award of compensatory damages to residents for some property damage claims which arose in connection with contamination of drinking water by nearby chemical waste site.

2 Cases that cite this headnote

**[34] Interest**

🔑 Torts;wrongful death

Residents living by chemical waste site were only entitled under Tennessee law to prejudgment interest on property damage claims beginning from date that chemical company's tortious conduct effectively operated to destroy or diminish resale value, rental value, or personal use or enjoyment of property.

3 Cases that cite this headnote

**[35] Interest**

🔑 Torts;wrongful death

Residents, who were injured when they drank water contaminated by nearby chemical waste site, were not entitled under Tennessee law to prejudgment interest on compensatory awards for physical or emotional damages.

1 Cases that cite this headnote

**[36] Damages**

🔑 Particular cases in general

Punitive damages should not have been assessed against chemical corporation, whose chemicals from chemical waste site leached

into drinking water, for conduct during course of personal injury and property damage litigation in the absence of evidence that defense was conducted in bad faith.

Cases that cite this headnote

**[37] Damages**

🔑 Grounds for Exemplary Damages

It was within district court's discretion in personal injury and property damage action to consider defendant's disregard of state law in making award of punitive damages.

2 Cases that cite this headnote

**Attorneys and Law Firms**

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James S. Wilder, III, Somerville, Tenn., Sidney Gilreath, Knoxville, Tenn., Anson M. Keller (argued), Bethesda, Md., for plaintiffs-appellees.

Before LIVELY, JONES, and GUY, Circuit Judges.

**Opinion**

RALPH B. GUY, Jr., Circuit Judge, on rehearing.

A number of persons, including these plaintiffs, who either lived or owned property near defendant's landfill, brought a class action for personal injuries and property damage resulting from hazardous chemicals leaking from the landfill and contaminating the local water supply. The district court held the corporation liable upon legal theories of strict liability, common law negligence, trespass, and nuisance. The court awarded five representative members of the class compensatory damages for their personal injuries, as well as property damages, plus prejudgment interest on the entire award. The district court further held the corporation liable to the class as a whole for punitive damages.

Upon a review of the lengthy record in this difficult case, we find that the district court properly held Velsicol liable to the five representative plaintiffs but erred in the nature and amount of the damage awards. Accordingly, we affirm in part, reverse in part, and remand with directions for recalculation of some of the damages.

## I.

### FACTS

In August, 1964, the defendant, Velsicol Chemical Corporation (Velsicol), acquired 242 acres of rural land in Hardeman County, Tennessee. The defendant used the site as a landfill for by-products from the production of chlorinated hydrocarbon pesticides at its Memphis, Tennessee, chemical manufacturing facility. Before Velsicol purchased the landfill site and commenced depositing any chemicals into the ground, it neither conducted hydrogeological studies to assess the soil composition underneath the site, the water flow direction, and the location of the local water aquifer, nor drilled a monitoring well to detect and record any ongoing contamination. From October, 1964, to June, 1973, the defendant deposited a total of 300,000 55-gallon steel drums containing ultrahazardous liquid chemical waste and hundreds of fiber board cartons containing ultrahazardous dry chemical waste in the landfill.<sup>1</sup>

Shortly after Velsicol began its disposal operations at the landfill site, local residents and county, state, and federal authorities became concerned about the environmental impact of the defendant's activities. As a result of this concern, the United States Geological Survey (USGS), in 1967, \*1193 prepared the first of several reports on the potential contamination effects of the chemicals deposited into the landfill up to that time. The 1967 report indicated that chlorinated hydrocarbons had migrated down into the subsoil and had contaminated portions of the surface and subsurface environment adjacent to the disposal site. While the chemicals had not reached the local water aquifer, the USGS concluded that both the local and contiguous ground water were in danger of contamination.<sup>2</sup> Subsequent to publication of the 1967 USGS report, Velsicol expanded the size of the landfill disposal site from twenty to forty acres.

State authorities increasingly became concerned about the defendant's disposal of ultrahazardous chemicals at the

site.<sup>3</sup> In 1972, the state filed an administrative action to close the landfill because the chlorinated hydrocarbons buried at the site allegedly were contaminating irreparably the subsurface waters. The state ordered Velsicol to cease disposal of all toxic chemicals by August 21, 1972, and all other chemicals by June 1, 1973.

In 1976, three years after the state permanently closed the landfill disposal site, the USGS, in conjunction with state authorities, commenced updating the 1967 USGS report. One major concern, which gave rise to the new USGS study, was the possibility of the chemicals migrating toward wells utilized by local residents. In 1978, the USGS issued a written report detailing the 1976 update of the 1967 report. The 1978 report found that the water table of the local aquifer was highly contaminated. The 1978 USGS report also indicated that the local aquifer moved toward the northwest, north, and northeast, rather than just toward the east as earlier indicated in the 1967 USGS report. Consequently, residents' wells, which were previously presumed safe from contamination, were now potentially polluted. In view of the continued complaints by numerous local residents, the Department of Health conducted further well water sampling tests in 1978. These tests revealed the presence of certain chlorinated hydrocarbons in numerous wells. Additionally, in 1978, the state, the USGS, the EPA, and Velsicol all commenced numerous extensive ground water surveys of the site and surrounding area. The surveys collectively identified twelve to fifteen drinking water wells, which were adjacent to the site, as contaminated with high levels of chlorinated hydrocarbons. Specifically, the surveys established that six of these wells were contaminated by carbon tetrachloride in excess of 100 parts per billion and high amounts of chloroform. The users of these wells, and all wells within 1,000 acres around the landfill site, were advised to stop using them for any purpose.<sup>4</sup>

In 1978, forty-two plaintiffs sued Velsicol in the Circuit Court of Hardeman County, Tennessee, on behalf of themselves and all others similarly situated for damages and injunctive relief. The complaint sought \$1.5 billion in compensatory damages and \$1 billion in punitive damages. The defendant removed the action to the United States District Court for the Western District of Tennessee, alleging diversity of citizenship and the requisite amount in controversy. Shortly after removal, all but fifteen of the original forty-two plaintiffs

settled their claims. Plaintiffs' counsel filed an amended complaint for damages and injunctive \*1194 relief and added forty-seven new plaintiffs to the original lawsuit pursuant to Fed.R.Civ.P. 20(a). The complaint sought relief for involuntary exposure to certain chemical substances known to cause cancer, affect the central nervous system and permanently damage other organs of the human body, and for loss of value to their real property in the region affected by the chemicals. Additionally, seven individual civil actions involving fourteen plaintiffs were instituted against Velsicol alleging that the defendant negligently disposed of toxic chemical wastes. The district court, on its own motion and over the defendant's objection, certified a Fed.R.Civ.P. 23(b)(3) class action thereby consolidating the separate lawsuits. Thereafter, the plaintiffs' counsel filed a list of class action participants. At this time, the district court directed the plaintiffs' counsel to designate five representative plaintiffs whose claims were to be tried in the first instance to establish liability and damages on their individual claims, liability to the entire class, and punitive damages, if any. The class action proceeded to trial with the five representative plaintiffs proposed by the plaintiffs' counsel (Steven Sterling, Daniel Johnson, Curry Ivy, James Wilbanks, and James Maness, Jr.).

After a bench trial of the five claims, the district court found Velsicol liable to the plaintiffs on legal theories of strict liability, common law negligence, trespass, and nuisance. The court concluded that the defendant's hazardous chemicals, which escaped from its landfill and contaminated plaintiffs' well water, were the proximate cause of the representative plaintiffs' injuries. The district court awarded the five individuals compensatory damages totalling \$5,273,492.50 for their respective injuries, plus prejudgment interest dating back to July, 1965, of \$8,964,973.25. All damages, except for \$48,492.50 to one plaintiff for property damage claims, were awarded for personal injuries. The district court also awarded \$7,500,000 in punitive damages to the class as a whole. The court deferred to individual hearings, to be held after trial, the issues of causation and injury of any other persons purporting to be members of the class entitled to share in this award.

On appeal, the defendant argues that the district court lacked subject matter jurisdiction over the class members and impermissibly certified the case as a class action. The defendant further argues the district court erred in finding

that the plaintiffs were exposed to its chemicals and that there was a causal connection between their exposure, if any, and their resultant injuries. Accordingly, the defendant asserts the district court improperly awarded compensatory damages to the plaintiffs for their alleged injuries. Defendant also asserts that prejudgment interest on the compensatory award and punitive damages should not have been awarded. We address the defendant's arguments *seriatim*.

## II.

### SUBJECT MATTER JURISDICTION

The defendant argues that the district court lacked subject matter jurisdiction over all but two of the representative class plaintiffs. Velsicol states the remaining three representative plaintiffs, and all other putative class members, never formally filed any pleadings specifically alleging and justifying that the amount of controversy between each of them and the defendant exceeded \$10,000. Velsicol further asserts that, once it challenged the district court's jurisdiction over these plaintiffs, the court was obligated to consider immediately the sufficiency of each plaintiff's claim and dismiss all of those plaintiffs unable to demonstrate a valid claim at that time.

In the instant case, Velsicol filed two separate Fed.R.Civ.P. 12(b)(1) dismissal motions prior to trial. Defendant moved to dismiss all absent plaintiffs who, though they received class action notification, failed to comply with the class certification order and allege claims in excess of the requisite jurisdictional amount. The defendant also moved to dismiss those plaintiffs who subsequently joined in the class action pursuant to Fed.R.Civ.P. 20(a) but failed to assert claims in excess of \$10,000 each. The plaintiffs' counsel responded \*1195 that all of the representative class plaintiffs and designated class members each asserted a claim in excess of the requisite amount. Counsel reasoned that each of the original plaintiffs claimed an amount far in excess of \$10,000 in the *ad damnum* clause of their amended complaint. Therefore, each of the remaining plaintiffs, who became part of the class action by not opting out, adopted the *ad damnum* provision.

At a pretrial hearing, the district court decided that the defendant's motion as to the representative class members would be determined at trial and deferred the decision as

to all other class members until a later date.<sup>5</sup> The trial commenced on June 21, 1982. In a September 16, 1985 consent order, which recertified the class and identified 128 individuals including the five representative plaintiffs as members of the class, the court stated that:

recertification and reduction of the number in a class merely constitutes a *prima facie* finding by this Court that those persons named ... can in good faith state a claim in excess of \$10,000.

Subsequently, the court held in its August 1, 1986 opinion that the proper pleadings, jurisdictional amount, and notice requirements of the representative class members had been properly complied with in all respects and were indicative of the remaining party plaintiffs' claims. Each of the representative plaintiffs were awarded compensatory damages far in excess of \$10,000.

[1] [2] [3] [4] [5] Defendant properly argues that, in accordance with *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), and *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir.1976), *appealed on other grounds*, 718 F.2d 789 (6th Cir.1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984), each plaintiff in a class action individually must allege a claim in excess of \$10,000. Likewise, a judgment may be vacated at any time, even on appeal, for lack of subject matter jurisdiction. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C.Cir.), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984); *Basso v. Utah Power & Light Co.*, 495 F.2d 906 (10th Cir.1974); *Canadian Indemnity Co. v. Republic Indemnity Co.*, 222 F.2d 601 (9th Cir.1955). However, defendant erroneously asserts that once it challenges the district court's jurisdiction with respect to the amount in controversy for each class member, the court must make an immediate determination of the sufficiency of each claim. Fed.R.Civ.P. 12(d) provides that:

The defenses specifically enumerated (1)–(7) in subdivision (b) of this rule, whether made in a pleading or by motions ... shall be heard and determined before trial on application of any party *unless the court orders that the hearing and determination thereof be deferred until the trial.*

(Emphasis added). The method and timetable for deciding a Rule 12(b) motion under Rule 12(d) is left to the sole discretion of the trial judge who may defer that determination until trial. In response to defendant's Rule 12(b) motions, the plaintiffs' counsel repeatedly asserted that each class member alleged a claim in excess of the requisite jurisdictional amount. In determining whether a dismissal is justified for lack of the jurisdictional amounts, the sums posited by the plaintiffs, provided they are made in good faith, control unless it appears to a legal certainty that their claims are, in actuality, for less. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938). Velsicol failed either to assert that the plaintiffs proffered bad faith damage claims or \*1196 to set forth any basis for justifying its allegation that the plaintiffs' claims were for less than the jurisdictional amount. Rather, Velsicol charges the district court with "policing" the sufficiency of each plaintiff's claim. Absent some apparent reason for delving into the substance of the plaintiffs' posited claims, the district court is not saddled with such an affirmative obligation. The district court stated, in both its consent order and subsequent opinion, that each of the representative and remaining putative class members posited good faith claims in excess of \$10,000. Consequently, while it might have been preferable to have addressed the defendant's dismissal motions far earlier in the course of the proceeding, we cannot say that the district court improperly exercised its jurisdiction over the representative and remaining class members.<sup>6</sup>

### III.

#### CLASS ACTION CERTIFICATION

Velsicol argues that the district court improperly certified this case as a Fed.R.Civ.P. 23(b)(3) class action because common questions of law or fact did not predominate over individual questions. As to the requirements necessary for certification of a Rule 23(b)(3) class action, the district court held in its February 12, 1981 certification order that (1) the class was so large that joinder of all members was impractical (Rule 23(a)(1)), (2) there were questions of law or fact common to the class (Rule 23(a)(2)), (3) representative claims were typical of the claims of the class (Rule 23(a)(3)), and (4) the representative parties would fairly and adequately protect the interests of the class (Rule 23(a)(4)). The court further found that questions

of law or fact common to the members of the class predominated over any questions affecting only individual members and that a class action would be superior to other available methods for the fair and efficient adjudication of the controversy (Rule 23(b)(3)).<sup>7</sup>

[6] The procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense. *See, e.g., Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D.Fla.1973), *aff'd without opinion*, 507 F.2d 1278 (5th Cir.1975); *Buford v. American Finance Co.*, 333 F.Supp. 1243 (N.D.Ga.1971). *See also* Fed.R.Civ.P. 1. However, the problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents.<sup>8</sup> While some courts have adopted this justification in refusing to certify such accidents as class actions,<sup>9</sup> numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct.<sup>10</sup> In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

[7] The district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion. *See Hopper v. Schweiker*, 596 F.Supp. 689 (M.D.Tenn.1984), *aff'd*, 780 F.2d 1021 (6th Cir.1985), *cert. denied*, 475 U.S. 1111, 106 S.Ct. 1522, 89 L.Ed.2d 920 (1986); *Kentucky Educators Public Affairs Council v. Kentucky Registry of Election Finance*, 677 F.2d 1125 (6th Cir.1982); *Cross v. National Trust Life Insurance Co.*, 553 F.2d 1026 (6th Cir.1977). In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber

common issues, the district court should properly question the appropriateness of a class action for resolving the controversy. However, where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.

[8] In the instant case, each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of ingesting or otherwise using the contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered, and the defendant's liability. The single major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. To this extent, a class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts. The district court clearly did not abuse its discretion in certifying this action as a Rule 23(b)(3) class action. However, individual members of the class still will be required to submit evidence concerning their particularized damage claims in subsequent proceedings.

#### \*1198 IV.

##### PROXIMATE CAUSATION

The main thrust of Velsicol's argument on appeal is that there was insufficient evidence to support a finding of causation between its disposal of toxic chemicals and plaintiffs' injuries. Velsicol further argues that the various types of injuries identified by the district court were based upon impermissibly speculative and conjectural evidence.

[9] [10] In accordance with Fed.R.Civ.P. 52(a), a finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Oregon State Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 698, 96 L.Ed. 978 (1952); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). However, if the district court's account of the evidence is plausible in light of the record viewed in its

entirety, we may not reverse it even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949). Indeed, the reviewing court oversteps the bounds of its duty under Fed.R.Civ.P. 52(a) if it undertakes to duplicate the role of the lower court. *Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). A district court's ultimate and subsidiary findings concerning causation,<sup>11</sup> negligence,<sup>12</sup> nuisance,<sup>13</sup> trespass,<sup>14</sup> actual damages,<sup>15</sup> and punitive damages,<sup>16</sup> are all factual determinations included within the scope of Rule 52(a). This is even clearer when the trial involves technical or scientific issues.<sup>17</sup>

Velsicol argues that proof of the plaintiffs' exposure to its chemicals and the causal connection between that exposure, if any, and their subsequent injuries impermissibly was based upon insufficient evidence. Specifically, the defendant asserts that there was no evidence that two known carcinogens (carbon tetrachloride and chloroform) were in the plaintiffs' wells in the late 1960's and early 1970's when they allegedly were consuming the contaminated water. To overcome this lack of evidence, Velsicol contends that the plaintiffs introduced into evidence an invalid water computing model that erroneously concluded that the plaintiffs were exposed to significant levels of contaminants as early as 1970.<sup>18</sup> By extrapolation, the plaintiffs' \*1199 model purported to show that dramatically high concentrations of carbon tetrachloride and chloroform were in the plaintiffs' wells as early as 1970 and, therefore, that the plaintiffs had been exposed to the chemical contaminants in sufficiently high dosages for a prolonged period of time sufficient to cause their resultant injuries.

[11] On appeal, the defendant not only questions the validity of ground water modeling techniques in general, but also argues that plaintiffs' particular model fatally failed to utilize all of the relevant data. We reject both of Velsicol's arguments. Numerous courts have validated water modeling techniques to predict past levels of contamination in drinking water where the model was both properly conceived and constructed. See e.g., *Anderson v. W.R. Grace & Co.*, 628 F.Supp. 1219 (D.Mass.1986). The plaintiffs carefully devised, calibrated, and tested their model, based upon

physical data generated by Velsicol's own consultants, to determine the physical and chemical characteristics beneath the landfill. They properly formulated the various components of the model (the determination of transmissivity, the infiltration rate, the water table configuration, the porosity, the dispersion coefficient, and the ground water velocity) and utilized all relevant data. The plaintiffs' failure to incorporate selected well samplings conducted after 1978 necessarily does not invalidate their model and the conclusions to be drawn therefrom.

In 1978, the EPA tested nineteen of twenty-two domestic wells (not including four USGS wells) for chemical contamination. After 1978, only one of the five wells from which the representative plaintiffs drank or otherwise used water and seven of the nineteen remaining wells were ever again tested. Data showing the level of chemical contamination of these remaining wells was available only upon a limited and sporadic basis. While the plaintiffs did not incorporate these post-1978 well samplings into their model, they thoroughly reviewed and utilized the data to confirm the water table contour component of their model. Plaintiffs also did not utilize soil column studies, such studies having been abandoned by Velsicol itself and found non-credible by the district court. However, the plaintiffs utilized all other relevant data including, but not limited to, the 1964 Rima Study, the 1978 Sprinkle Study, the data generated by the State of Tennessee in 1970, all the information generated by AWARE, and all of the monitoring information by Velsicol, the State of Tennessee, and the EPA. Because the district court carefully considered the plaintiffs' model, including its components and the data it utilized, we cannot say that it erred in using the model in concluding that Velsicol's chemicals contaminated the plaintiffs' wells as early as 1970.

[12] Next, Velsicol argues there was insufficient evidence to prove causation between plaintiffs' ingestion, if any, of Velsicol's chemicals and their alleged resultant injuries. The question of proximate cause is always to be determined on the facts of each case. See *Wooten v. United States*, 574 F.Supp. 200 (W.D.Tenn.1982), *aff'd*, 722 F.2d 743 (6th Cir.1983); *Ricker v. Zinser Textilmaschinen GmbH.*, 506 F.Supp. 3 (E.D.Tenn.1978), *aff'd*, 633 F.2d 218 (6th Cir.1980); *Wyatt v. Winnebago Industries*, 566 S.W.2d 276 (Tenn.App.1977); *Mullins v. Seaboard Coastline Railway*, 517 S.W.2d 198

(Tenn.App.1974); *Carney v. Goodman*, 38 Tenn.App. 55, 270 S.W.2d 572 (1954). On the basis of expert testimony (consisting of treating physicians, medical specialists, scientists, psychiatrists, clinical psychologists, engineers, hydrologists, and the plaintiffs themselves), numerous studies, and extensive literature, the district court concluded that Velsicol's chemicals and the duration of the plaintiffs' exposure to them were *capable* of causing the types \*1200 of injuries alleged by the plaintiffs. The court also concluded that all of the five representative plaintiffs' presently ascertainable and reasonably anticipated future injuries were proximately caused by ingesting or otherwise using the contaminated water.<sup>19</sup>

Thus, the court, as is appropriate in this type of mass tort class action litigation, divided its causation analysis into two parts. It was first established that Velsicol was responsible for the contamination and that the particular contaminants were *capable* of producing injuries of the types allegedly suffered by the plaintiffs. Up to this point in the proceeding, the five representative plaintiffs were acting primarily in their representative capacity to the class as a whole. This enabled the court to determine a kind of generic causation—whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged. This still left the matter of *individual* proximate cause to be determined. Although such generic and individual causation may appear to be inextricably intertwined, the procedural device of the class action permitted the court initially to assess the defendant's potential liability for its conduct without regard to the individual components of each plaintiff's injuries. However, from this point forward, it became the responsibility of each individual plaintiff to show that his or her specific injuries or damages were proximately caused by ingestion or otherwise using the contaminated water. We cannot emphasize this point strongly enough because generalized proofs will not suffice to prove individual damages. The main problem on review stems from a failure to differentiate between the general and the particular. This is an understandably easy trap to fall into in mass tort litigation. Although many common issues of fact and law will be capable of resolution on a group basis, individual particularized damages still must be proved on an individual basis.

To the extent that the plaintiffs seek damages for their bodily injuries, they must prove to a “reasonable

medical certainty,” though they need not use that specific terminology, that their ingestion of the contaminated water caused each of their particular injuries. See *Thompson v. Underwood*, 407 F.2d 994 (6th Cir.1969); *Maryland Casualty Co. v. Young*, 211 Tenn. 1, 362 S.W.2d 241 (1962). This standard implicates the qualifications of the witnesses testifying, the acceptance in the scientific community of their theories, and the degree of certainty as to their conclusions. This standard is of particular importance when dealing with injuries or diseases of a type that may inflict society at random, often with no known specific origin. On numerous occasions, the Tennessee Supreme Court has addressed the degree of certainty of medical testimony required to establish a causal connection between a plaintiff's injuries and a defendant's tortious conduct. See e.g., \*1201 *Lindsey v. Miami Development Corp.*, 689 S.W.2d 856 (Tenn.1985); *Owens Illinois, Inc. v. Lane*, 576 S.W.2d 348 (Tenn.1978); *P & L Construction Co. v. Lankford*, 559 S.W.2d 793 (Tenn.1978); *Laughlin Clinic, Inc. v. Henley*, 208 Tenn. 252, 345 S.W.2d 675 (1961); *Lynch v. LaRue*, 198 Tenn. 101, 278 S.W.2d 85 (Tenn.1955). Whereas numerous jurisdictions have rejected medical experts' conclusions based upon a “probability,” a “likelihood,” and an opinion that something is “more likely than not” as insufficient medical proof, the Tennessee courts have adopted a far less stringent standard of proof and have required only that the plaintiffs prove a causal connection between their injuries and the defendant's tortious conduct by a preponderance of the evidence. While, in accordance with Tennessee common law, plaintiffs' proof by a reasonable medical certainty requires them only to establish that their particular injuries more likely than not were caused by ingesting the contaminated water, their proofs may be neither speculative nor conjectural. Medical testimony that ingesting the contaminated water “possibly,” “may have,” “might have,” or “could have” caused the plaintiffs' presently ascertainable or anticipated injuries does not constitute the same level of proof as a conclusion by a reasonable medical certainty. Although it is argued that a lesser standard of proof allocates loss on a socially acceptable basis, it is the province of the state legislatures to make such changes as they have done in some areas by establishing “no-fault” or other alternate systems.

[13] While upon review of the record in its entirety we cannot say that the district court abused its discretion in making its determination of the proximate causation

between Velsicol's chemical dumping operations, the resultant contamination of the plaintiffs' water supply and the capacity of the contaminated water to cause the harms alleged, we find the district court erred in attributing all of the representative plaintiffs' alleged injuries to drinking or otherwise using the contaminated water. We, therefore, address each category of the district court's damage award.<sup>20</sup>

## V.

### COMPENSATORY DAMAGES

Velsicol argues that, even assuming proof of a proximate causation, the district court improperly awarded the five representative plaintiffs compensatory damages for their respective injuries and disabilities. The five representative plaintiffs, their exposure to Velsicol's chemicals, and their respective injuries are as follows:

*Steven Sterling:* Plaintiff Sterling, who was born December 25, 1922, in Hardeman County, Tennessee, utilized a well adjacent to his residence (Sterling well) for drinking purposes until November, 1977, and for all other purposes until November, 1978. During that time, he claimed to have drunk between ten and twelve glasses of the well water each day. He observed that, beginning in 1975, the well water developed a distinct odor, a bad taste, and contained an oily substance. Sterling testified that after ingesting, and otherwise using, the well water for a prolonged period of time, he suffered from headaches, nervousness, stomach and chest pains, shortness of breath, ringing in his ears, fatigue, loss of appetite and weight, nausea, coughing, vomiting, and peripheral neuropathy. Sterling further testified that he suffered from an enlarged liver with abnormal hepatic function, and an eighty percent reduction in his kidney function. Additionally, he developed emphysema in early 1976. Sterling was a heavy smoker for over forty-five years and previously worked in a cotton mill.

*James Wilbanks:* Plaintiff Wilbanks, who was born in Walton, Mississippi, on June 15, 1931, lived in a mobile home with his family across from the Velsicol landfill from 1968 through 1971. During that time period, both Wilbanks and his family used \*1202 water from a well adjacent to his property for drinking and bathing purposes (Tavern well). Beginning in 1971, Wilbanks commuted to work and used water at a tavern located across from

the Velsicol landfill until it was closed and the well was capped in 1972. Thereafter, he used water obtained from two other wells for drinking and bathing purposes until 1978 (Sterling well and Rosetta Brooks well). Wilbanks testified that he suffered from headaches, dizziness, fatigue, nausea, vomiting, numbness, nervousness, ringing in his ears, shortness of breath, skin irritation, partial loss of eyesight including optic atrophy and neuritis, and peripheral neuropathy. Wilbanks lost his left kidney in 1981 due to cancer and suffers from emphysema.

*Curry Ivy:* Plaintiff Ivy, who was born on January 3, 1926, in Chester County, Tennessee, drank contaminated water from three wells (Rosetta Brooks well, Velsicol Farm well, and Tavern well). He moved from the area in 1972. Ivy also was exposed to the ultrahazardous liquid and dry chemicals from January, 1972, through June, 1973, while he was employed by Velsicol to transport chemicals from its plant in Memphis, Tennessee, to its landfill in Hardeman County, Tennessee. Ivy testified that he suffered from headaches, dizziness, nausea, vomiting, nervousness, shortness of breath, fatigue, partial loss of eyesight including optic nerve neuritis and nerve dysfunction, and peripheral neuropathy. Ivy further testified that he suffered from liver and kidney damage and severe emphysema. Ivy's medical history prior to drinking, or otherwise using, any contaminated well water included ulcers, stomach problems, severe emphysema, partial loss of vision, a heart attack, and various psychological problems. Ivy was a heavy smoker and previously worked in a cotton mill.

*Daniel Johnson:* Plaintiff Johnson, who was born May 18, 1938, in Algoma, Mississippi, lived in Hardeman County from 1976 through 1978. During that time, Johnson and his family used water from a well adjacent to his property (Johnson well) for drinking and bathing purposes. Johnson testified that he suffered from headaches, loss of balance, fatigue, nausea, vomiting, numbness, nervousness, skin irritation, coughing, and partial loss of eyesight including optic nerve dysfunction. Johnson further testified that he suffered liver and kidney damage. Additionally, the Missouri Department of Health certified that, as of 1980, he was totally disabled and unable to continue employment as a result of psychological injuries. Johnson's wife and daughter developed breast and uterus tumors. Mrs. Johnson previously suffered from fibrocystic disease.

*James Maness, Jr.*: Plaintiff Maness, who was born on September 1, 1976, drank and was bathed in water obtained from two wells (Sterling well and Mosier well) until approximately 1978. Additionally, while Maness' mother was pregnant, she drank water obtained from the same wells. Maness allegedly suffered from frequent headaches, dizziness, nose bleeds, sore throat, nausea, and frequent vomiting. Additionally, Maness suffered from

severe allergies, epilepsy, diabetes, blood discrasias, and an abnormally enlarged liver.

Based upon these findings, the district court awarded the five representative plaintiffs compensatory damages for the following injuries:

	<i>Sterling</i>	<i>Wilbanks</i>	<i>Ivy</i>	<i>Johnson</i>	<i>Maness</i>
Extent of Injury and Disability, Including Increased Risk of Cancer and Disease	\$ 150,000	\$150,000	\$ 75,000	\$ 150,000	\$ 250,000
Immune System Impairment	75,000	75,000	75,000	150,000	500,000
Post-Traumatic Stress Disorder	50,000	25,000	50,000	250,000	—
Fear of Increased Risk of Cancer and Disease	75,000	100,000	50,000	250,000	250,000
Physical Pain Emotional Suffering	125,000	250,000	50,000	125,000	150,000
Impaired Quality of Life	150,000	75,000	50,000	100,000	500,000
Real Property	48,492.50	—	—	—	—
Lost Wages Earning Capacity	—	—	—	250,000	500,000
Learning Disorders	—	—	—	—	150,000
<b>TOTAL:</b>	<b>\$673,492.50</b>	<b>\$675,000</b>	<b>\$350,000</b>	<b>\$1,275,000</b>	<b>\$2,300,000</b>

**\*1203 A. Extent of Injury and Disability**

Velsicol asserts there was insufficient medical proof of the causal connection between ingestion of contaminated water and certain injuries. First, we focus upon that portion of the award attributed to the plaintiffs' actual physical injuries and then upon the portion of the award attributed to their increased susceptibility to cancer and other diseases.

**1. Presently Ascertainable Injuries**

As a portion of its award for the extent of their injuries and disabilities proximately caused by ingesting the contaminated water, the district court awarded the

five representative plaintiffs damages for their presently ascertainable injuries. In its opinion and order granting judgment to the plaintiffs, with respect to plaintiffs Sterling, Johnson, and Maness, the district court merely referred to the "extent of [their] injury and disability" without further indicating which specific injuries were included in this category. However, the district court clarified the basis of its award by adopting and incorporating into its opinion findings of fact submitted by the plaintiffs' counsel. By adopting such findings, the court credited plaintiffs' evidence that plaintiffs Sterling, Johnson, and Maness each suffered from kidney and liver damage and numerous central nervous system injuries. In its opinion and order with respect to plaintiff Wilbanks, the court referenced the "loss of one kidney already to

cancer and optic atrophy and neuritis” as some of the elements of its award and, with respect to plaintiff Ivy, the court referenced “optic atrophy and neuritis” as some of the elements of its award. The court further adopted the plaintiffs' proposed findings to the effect that plaintiffs Wilbanks and Ivy also suffered from kidney and liver damage and numerous central nervous system injuries.

**[14]** **[15]** In seeking damages for actual physical injuries, a plaintiff must prove to a reasonable medical certainty that his or her injuries were caused by a defendant's acts or omissions. To this extent, an award is not insulated from review merely because the trial court refrains from particularizing the basis of a general injury award. If, for example, a plaintiff fails to establish sufficient causation between a defendant's acts and a specific injury, we may, nonetheless, remand the entire award to exclude that portion of the award, if any, attributed to that specific injury for which proof is lacking.

**[16]** Velsicol specifically avers that the plaintiffs failed to prove to a reasonable medical certainty that Wilbanks' kidney cancer, all of the plaintiffs' loss of kidney and liver functions and central nervous system injuries, and Wilbanks' and Ivy's optic atrophy and neuritis were caused by ingesting contaminated water. With respect to Wilbanks' kidney cancer, plaintiffs' testifying physician, Dr. Rhamy, stated that “based upon a reasonable medical certainty ... its more likely [that Wilbanks' kidney cancer] was caused by the chemicals...” While Dr. Rhamy conceded that “[n]o one knows what causes cancer of the kidney,” his testimony that Wilbanks' environmental exposure to carbon tetrachloride was the reasonable and probable cause for his kidney cancer constitutes sufficient medical proof. The plaintiffs' testifying physicians, Drs. Balistreri, Clark, Rhamy, and Rodricks, further testified to a reasonable medical certainty that each of the plaintiff's loss of kidney and liver functions and \*1204 central nervous system disorders were caused by their exposure to the contaminated water.

**[17]** However, the plaintiffs failed to prove to a reasonable medical certainty that either Wilbanks' or Ivy's optic atrophy and neuritis were caused by ingesting or otherwise using the contaminated water. While plaintiffs' own expert neuroophthamologist, Dr. Drewery, stated that Ivy's eye problems and his exposure to carbon tetrachloride were causally related and that his reduction in visual acuity and visual field were compatible with

toxic exposure, Dr. Drewery, based upon his own tests, concluded that Ivy did not have optic atrophy. Indeed, no physician diagnosed Ivy as suffering from optic atrophy. Dr. Drewery's statement that he was unable to “uncover any ... other medically probable explanation for Mr. Ivy's visual problems than chemical exposure,” when considered in view of his negative diagnosis, and Dr. Rhamy's observation that Ivy had a paleness of the optic disc (which Dr. Drewery did not observe) does not constitute sufficient medical proof. Similarly, no physician diagnosed or testified to a reasonable medical certainty that Wilbanks' visual difficulties were caused by his exposure to contaminated water. While plaintiffs Johnson's, Maness', and Sterling's presently ascertainable injuries were all sufficiently substantiated by competent medical testimony, the district court's award to plaintiffs Wilbanks and Ivy is remanded for recalculation to exclude that portion of the award attributed to the specific injuries we have found to be unsupported by sufficient medical proof.

## 2. Increased Risk of Cancer and Other Diseases

Plaintiffs sought to recover damages for the prospect that cancer and other diseases may materialize as a result of their exposure.<sup>21</sup> The district court awarded the five representative plaintiffs damages predicated upon their being at risk for, or susceptible to, future disease.

**[18]** **[19]** Where the basis for awarding damages is the potential risk of susceptibility to future disease, the predicted future disease must be medically reasonably certain to follow from the existing present injury. While it is unnecessary that the medical evidence conclusively establish with absolute certainty that the future disease or condition will occur, mere conjecture or even possibility does not justify the court awarding damages for a future disability which may never materialize. Tennessee law requires that the plaintiff prove there is a reasonable medical certainty that the anticipated harm will result in order to recover for a future injury. *See Thompson v. Underwood*, 407 F.2d 994 (6th Cir.1969); *Maryland Casualty Co. v. Young*, 211 Tenn. 1, 362 S.W.2d 241 (1962); *see also Shelton v. College Station*, 765 F.2d 456 (5th Cir.1985). Therefore, the mere increased risk of a future disease or condition resulting from an initial injury is not compensable. While neither the Tennessee courts,<sup>22</sup> nor this court, has specifically addressed damage awards for increased risk \*1205 or susceptibility to cancer

and kidney and liver diseases, numerous courts have denied recovery where plaintiffs alleged they might suffer from these future diseases or conditions as a result of existing injuries. For example, in *Ayers v. Jackson*, 189 N.J.Super. 561, 461 A.2d 184 (1983), 325 county residents alleged that toxic wastes leaked through the municipal landfill and contaminated their well water. Plaintiffs' experts testified the ground water was contaminated with numerous known carcinogenic chemicals including benzene, acetone, and chloroform. Plaintiffs argued they suffered from a present condition of enhanced risk of kidney and liver disease and cancer from ingesting the contaminated well water. The *Ayers* court held that damages were not recoverable for such prospective consequences where the plaintiffs' proofs did not establish that they would in the future, to a reasonable medical certainty, suffer from such injury. The court observed that all individuals who were exposed to the well water contamination were at an increased risk of developing cancer and liver and kidney damage. However, the court noted that because plaintiffs' experts could not formulate a quantitative measure to a reasonable medical certainty of excess kidney, liver, and cancer risk, it was left to speculation as to possible consequences of the ingestion of the alleged carcinogens on the future health of each plaintiff. Similarly, in *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *reconsideration denied*, 797 F.2d 256 (5th Cir.1986) (en banc), a plaintiff who was accidentally drenched with chemicals containing known carcinogens, sued for damages including compensation for the increased risk that he would develop cancer in the future as a result of his exposure. The court concluded that because he did not allege with medical certainty that he would develop cancer in the future, he did not state a claim. The court reasoned that plaintiff's increased risk of cancer was not presently compensable because he could not show that the toxic exposure would more probably than not lead to cancer. *See also Herber v. Johns-Manville Sales Corp.*, 785 F.2d 79 (3d Cir.1986); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J.Super. 556, 495 A.2d 495 (1985) (plaintiffs' claims for enhanced risk of cancer from asbestos exposure denied where plaintiffs' expert unable to state to a reasonable medical certainty that plaintiffs would get cancer in the future); *Briggs v. New York Central Hudson River Railroad*, 177 N.Y. 59, 69 N.E. 223 (1903) (kidney problems resulting from spinal injury found to be conjectural and speculative and not a basis of award for damages).

[20] In the instant case, the district court found an increased risk for susceptibility to cancer and other diseases of only twenty-five to thirty percent. This does not constitute a reasonable medical certainty, but rather a mere possibility or speculation. Indeed, no expert witnesses ever testified during the course of trial that the five representative plaintiffs had even a probability—i.e., more than a fifty percent chance—of developing cancer and kidney or liver disease as a result of their exposure to defendant's chemicals.

For the foregoing reasons, the district court's award of compensatory damages to each of the five representative plaintiffs is remanded for recalculation to exclude that portion of the damage award attributed to increased susceptibility to cancer and other diseases.

B. Fear of Increased Risk of Cancer and Other Diseases  
Velsicol next argues that the district court erroneously awarded the five representative plaintiffs compensatory damages or, in the alternative, excessive damages for fear of increased risk of contracting cancer and other diseases.<sup>23</sup> Mental distress, \*1206 which results from fear that an already existent injury will lead to the future onset of an as yet unrealized disease, constitutes an element of recovery only where such distress is either foreseeable or is a natural consequence of, or reasonably expected to flow from, the present injury. *See Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, *reh'g denied*, 5 N.Y.2d 793, 180 N.Y.S.2d 1025, 154 N.E.2d 581 (1958); *Jones v. United Railroads of San Francisco*, 54 Cal.App. 744, 202 P. 919 (1921). However, damages for mental distress generally are not recoverable where the connection between the anxiety and the existing injury is either too remote or tenuous. *See, e.g., Howard v. Mt. Sinai Hospital*, 63 Wis.2d 515, 217 N.W.2d 383 (1974). While there must be a reasonable connection between the injured plaintiff's mental anguish and the prediction of a future disease, the central focus of a court's inquiry in such a case is not on the underlying odds that the future disease will in fact materialize. To this extent, mental anguish resulting from the chance that an existing injury will lead to the materialization of a future disease may be an element of recovery even though the underlying future prospect for susceptibility to a future disease is not, in and of itself, compensable inasmuch as it is not sufficiently likely to occur. In the context of certain types of injuries

and exposures to certain chemicals, cancerphobia has been one basis of claims for mental anguish damages.<sup>24</sup>

In Tennessee, damages for fear arising from an increased risk of disease are recoverable. *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn.1982). In *Laxton*, the plaintiffs' water supply was contaminated by the carcinogens chlordane and heptachlor when defendant serviceman sprayed the exterior of plaintiffs' house for termites. The Department of Water Quality Control told plaintiffs to cease using the water for any purpose and to obtain a new water source. As a result of ingesting the contaminated water for over a period of eight months, the plaintiffs worried about their health and the health of their children. The court awarded the plaintiffs \$6,000 each for their mental suffering resulting from their reasonable apprehension of the harmful effects to their own and their children's health due to consuming or otherwise using the contaminated water. The *Laxton* court noted that the period of "mental anguish" deserving compensation was confined to the time between the discovery of ingestion of toxic substances and the determination that puts to rest the fear of future injury.

[21] In the instant case, the plaintiffs' fear clearly constitutes a present injury. Each plaintiff produced evidence that they personally suffered from a reasonable fear of contracting cancer or some other disease in the future as a result of ingesting Velsicol's chemicals. Consistent with the extensive line of authority in both Tennessee and other jurisdictions, we cannot say that the district court erred in awarding the five representative plaintiffs damages for their reasonable fear of increased risk of cancer and other diseases.

\*1207 [22] [23] [24] In the alternative, Velsicol asserts that the district court awarded excessive damages to the plaintiffs. The amount of the damage award in a personal injury action is for the jury or, in a non-jury case, the trial judge who heard the evidence. Absent a showing of bias, passion, or corruption, excessiveness of a verdict is left to the trial court's discretion. The appellate court will only consider whether the trial court abused that discretion by granting awards so large as to shock the judicial conscience. *See Stengel v. Belcher*, 522 F.2d 438 (6th Cir.1975), *cert. dismissed*, 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976); *Kroger Co. v. Rawlings*, 251 F.2d 943 (6th Cir.1958); *Olson v. Sharpe*, 36 Tenn.App. 557, 259 S.W.2d 867, *cert. denied*, Tenn.S.Ct. (1953); *Yellow*

*Cab Co. v. Pewitt*, 44 Tenn.App. 572, 316 S.W.2d 17, *cert. denied*, Tenn.S.Ct. (1958). When considering whether an award is so excessive, this court considers other awards in other cases, as well as the nature and extent of the injuries. *Martin v. Southern Railway*, 225 Tenn. 77, 463 S.W.2d 690 (1971); *France v. Newman*, 35 Tenn.App. 486, 248 S.W.2d 392 (1951), *cert. denied*, Tenn.S.Ct. (1952).

[25] The evidence credited by the court shows that each of the plaintiffs suffered from, and should be compensated for, a reasonable fear of contracting cancer or some other diseases in the future. The only issue is the amount of reasonable compensation. In *Laxton*, the court limited the amounts of recovery to \$6,000 for each plaintiff's reasonable fear of future disease from ingesting known carcinogens over an extended period of time. In the instant case, the district court awarded plaintiffs damages ranging from \$50,000 to \$250,000. We find these awards to be excessive, particularly where plaintiffs failed to prove at trial that they have a significant increased risk of contracting cancer and other diseases. Upon a review of the opinion and the adopted findings of fact, we are unable to find any basis upon which the district court differentiated its damage awards to each plaintiff for his or her fear of increased risk of cancer and other diseases. The *Laxton* court awarded each plaintiff \$6,000 for his or her fear of increased susceptibility to cancer from consuming known carcinogens for a duration of eight months. Using *Laxton* as a guidepost, we, accordingly, vacate the district court's award and award each of the five representative plaintiffs damages based upon the duration of their exposure to the contaminated water. Plaintiff Johnson, who was exposed to the chemicals for a period of approximately two years, is awarded \$18,000 versus the district court's award of \$250,000; plaintiff Maness, who was exposed for approximately three years (two years during infancy and approximately one year while his mother was exposed to the chemicals during pregnancy), is awarded \$27,000 versus the district court's award of \$250,000; plaintiff Ivy, who was exposed for approximately four years, is awarded \$36,000 versus the district court's award of \$50,000; plaintiff Wilbanks, who was exposed for approximately six years, is awarded \$54,000 versus the district court's award of \$100,000; and plaintiff Sterling, who was exposed for approximately eight years, is awarded \$72,000 versus the district court's award of \$75,000.

C. Immune System Impairment and Learning Disorders

[26] Velsicol argues that the district court erroneously awarded all of the plaintiffs damages for alleged impairment to their immune systems and to plaintiff Maness for his additional learning disorders due to his immune system impairment. Velsicol specifically alleges that the court improperly admitted and relied upon testimony which purported to show Velsicol's chemicals harmed plaintiffs' immune systems because the principles upon which the experts based their conclusions were not in conformity to a generally accepted explanatory theory.

The admissibility of expert testimony is governed by Fed.R.Evid. 702 which 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 \*1208 as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In accordance with Rule 702, a four-part test must be met to uphold the admission of "expert testimony": (1) a qualified expert (2) testifying on a proper subject (3) which is in conformity to a generally accepted explanatory theory (4) the probative value of which outweighs its prejudicial effect. *United States v. Kozminski*, 821 F.2d 1186, 1194 (6th Cir.), cert. granted on other grounds, 484 U.S. 894, 108 S.Ct. 225, 98 L.Ed.2d 185 (1987); *United States v. Brown*, 557 F.2d 541 (6th Cir.1977); *United States v. Green*, 548 F.2d 1261 (6th Cir.1977). With respect to the third criterion, the principles upon which the scientific evidence is based must be sufficiently established to have gained wide acceptance in the field to which it belongs. As we reasoned in *United States v. Brown*:

There are good reasons why not every ostensibly scientific technique should be recognized as the basis for expert testimony. Because of its apparent objectivity, an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact. In addition, it is difficult to rebut such an opinion except by other experts or by cross-examination based on a thorough

acquaintance with the underlying principles. In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts.

557 F.2d at 556, quoting *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019, 96 S.Ct. 456, 46 L.Ed.2d 391 (1975). A review of the record reveals that plaintiffs failed to meet the third criterion of the test.

Plaintiffs' testifying expert immunologist, Dr. Levin, and testifying pediatrician, Dr. Crook, stated that, on the basis of clinical ecological tests, Velsicol's chemicals damaged plaintiffs' immune systems.<sup>25</sup> Clinical ecology is premised on a belief that exposure to a number of factors including, but not limited to, anxiety, radiation, certain chemicals, and even some common household substances can cause dysregulation of the immune system. Treatment for immune system dysregulation consists of rigid diet and environmental control. The leading professional societies in the specialty of allergy and immunology, the American Academy of Allergy and Immunology (AAAI) and the California Medical Association (CMA), have rejected clinical ecology as an unproven methodology lacking any scientific basis in either fact or theory. According to the AAAI, "[t]he theoretical basis for ecologic illness in the present context has not been established as factual, nor is there satisfactory evidence to support the actual existence of 'immune system dysregulation' or maladaptation." *Position Statements: Clinical Ecology*, 78 J. Allergy Clinical Immunology, 269, 270 (Aug. 1986). The CMA concludes that there is "[n]o convincing evidence ... that the diagnostic tests employed are efficacious and reliable or that the treatments used are effective." *Clinical Ecology—A Critical Appraisal*, W.J. of Med., 239, 243 (Feb. 1986). While numerous other professional organizations and societies, such as the American Medical Association, the American Board of Allergy and Immunology, and the American Academy of Otolaryngic Allergy, have not discredited completely the potential usefulness of clinical ecology,

few have endorsed either its scientific methodology or the results of any experiments conducted under the guise of clinical ecology. Indeed, plaintiffs' experts neither performed nor could identify any \*1209 studies of the effects of carbon tetrachloride or chloroform on the immune system. In reaching their conclusions of immune system dysregulation, plaintiffs' experts neither personally examined or interviewed plaintiffs, nor performed the requisite medical tests. The experts based their opinions upon certain blood tests, which revealed a higher than normal white blood cell count, and the plaintiffs' medical histories supplied by their attorneys. Without the requisite clinical tests and a widely accepted medical basis for reaching its conclusions, plaintiffs' experts' opinions are insufficient to sustain plaintiffs' burden of proof that the contaminated water damaged their immune system.

[27] The record reveals that plaintiff Maness was borderline retarded and suffered from a severe learning disorder. The sole evidence allegedly linking Maness' learning problems to his chemical exposure was offered by clinical ecologist, Dr. Crook. Dr. Crook testified that Maness' and his mother's ingestion of toxic chemicals "so compromised his resistance that it set him up for a variety of health problems"—in essence immune system dysregulation. Dr. Crook based his conclusions on two examinations in which he determined Maness' physical condition was normal and Maness' general medical history which was provided by his grandmother. He performed no scientific tests to determine the source of Maness' learning disorder. Despite the testimony of other physicians which attributed Maness' learning disorder to other factors, Dr. Crook dismissed the evidence reasoning that "those physicians are unaware of the role of chemical sensitivity in triggering health problems ... I feel I have knowledge of [Maness] that they don't have." Despite his personal speculations, Dr. Crook provided no medical basis justifying his conclusion that Maness' learning disorder was caused by ingesting or otherwise using the contaminated water.

Accordingly, we reverse the district court's award of damages to all of the plaintiffs for immune system impairment and to plaintiff Maness for his learning disorder arising out of impairment to his immune system.

#### D. Post-Traumatic Stress Disorder

Velsicol argues that the district court improperly awarded four of the five representative plaintiffs damages for post-

traumatic stress disorder (PTSD). Both this court and the courts of Tennessee are familiar with, and have awarded compensatory damages for, PTSD. *See, e.g., Richardson v. Heckler*, 750 F.2d 506 (6th Cir.1984); *Crump v. B & P Construction Co.*, 703 S.W.2d 140 (Tenn.1986); *State v. Spawr*, 653 S.W.2d 404 (Tenn.1983). On appeal, Velsicol specifically argues that the plaintiffs failed to prove the requisite elements of PTSD.

As medically defined, PTSD concerns the development of characteristic symptoms following a psychologically traumatic event generally outside the range of usual human experience. A PTSD diagnosis, according to the American Psychiatric Association definition as relied upon by plaintiffs' experts, requires the satisfaction of all four of the following criteria:

A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.

B. Reexperiencing of the trauma as evidenced by at least one of the following:

- (1) recurrent and intrusive recollections of the event
- (2) recurrent dreams of the event
- (3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus

C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:

- (1) markedly diminished interest in one or more significant activities
- (2) feeling of detachment or estrangement from others
- (3) constricted affect

D. At least two of the following symptoms that were not present before the trauma:

- \*1210 (1) hyperalertness or exaggerated startle response
- (2) sleep disturbance

- (3) guilt about surviving when others have not, or about behavior required for survival
- (4) memory impairment or trouble concentrating
- (5) avoidance of activities that arouse recollection of the traumatic event
- (6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 236, 238 (3d ed. 1980). Upon review of the record and relevant case authority, we find plaintiffs failed to meet the requisite criteria for a PTSD diagnosis.

[28] Plaintiffs' drinking or otherwise using contaminated water, even over an extended period of time, does not constitute the type of recognizable stressor identified either by professional medical organizations or courts. Examples of stressors upon which courts have based awards for PTSD include rape, assault, military combat, fires, floods, earthquakes, car and airplane crashes, torture, and even internment in concentration camps, each of which are natural or man-made disasters with immediate or extended violent consequences. *See, e.g., Smith v. Smith*, 830 F.2d 11 (2d Cir.1987); *Howard v. Chesapeake & Ohio Railway*, 812 F.2d 282 (6th Cir.), *cert. denied*, 484 U.S. 820, 108 S.Ct. 78, 98 L.Ed.2d 40 (1987); *Bode v. Pan American World Airways*, 786 F.2d 669 (5th Cir.1986); *Richardson v. Secretary of Health and Human Services*, 8 Soc.Sec.Rep.Ser. 156, 750 F.2d 506 (6th Cir.1984). Whereas consumption of contaminated water may be an unnerving occurrence, it does not rise to the level of the type of psychologically traumatic event that is a universal stressor. A plaintiff's claim that a particular event or series of events caused him PTSD must be subjected to the closest scrutiny. The court must demand that a plaintiff produce sufficient authority that the particular event constitutes a "recognized stressor" or a psychologically traumatic event which would produce significant symptoms of distress in almost everyone experiencing such an event. In the instant case, the plaintiffs produced none, and this court can identify no relevant authority that the consumption of contaminated water is a recognized stressor upon which an award of PTSD can rest. Additionally, plaintiffs' experts presented no evidence establishing that any of the plaintiffs were, in fact, "retraumatized" through recurrent and intrusive

recollections or dreams of drinking the contaminated water. Plaintiff Johnson's nightmares about "what was happening to [his] children and [constant preoccupation] with what their condition was and ... might be in the future" merely describe his reasonable fear of increased risk of cancer and other diseases. Since each plaintiff failed to satisfy all of the criteria necessary for a diagnosis of PTSD, we reverse the district court's award of damages.

#### E. Impaired Quality of Life

[29] Velsicol argues that the district court erred in awarding three non-resident representative plaintiffs damages for impaired quality of life based upon a nuisance theory. Velsicol specifically alleges that plaintiffs Ivy and Maness, who were never residents of the affected area, and plaintiff Wilbanks, who relocated before state authorities counselled residents to locate an alternative water source, were not entitled to this category of damages as they had no standing to bring a nuisance action. In awarding plaintiffs damages for impaired quality of life, the district court stated in pertinent part:

[I]t is well settled and a traditional principle of law, that damages for anxiety, discomfort and other distress are recoverable in a nuisance action. In other words, such claims are an incidental element of damages to the property damages recoverable when a nuisance is created.

....

One of the prime reasons a nuisance is actionable is that it adversely affects the occupants' right to enjoy the property. \*1211 In the case of a residence, the life of the occupants is disrupted. *In a sense, then, although a nuisance is a property action, its gravamen is the disruption of the lives and well being of the residents.* The residents may recover damages for the disruption in the quality of their lives caused by the wrongdoing of defendants. It is well-settled that disruption and inconvenience, in addition to the mental injury are compensable [sic] items in a nuisance action. Simply put, plaintiffs may testify to, and recover damages for, the disruption in their everyday lives and the inconvenience caused by their lack of a potable water supply.

647 F.Supp. at 321 (emphasis added) (citations omitted).

While Tennessee recognizes impairment of enjoyment of life as an element of intangible damages, *Martin v.*

*Southern Railway*, 225 Tenn. 77, 463 S.W.2d 690 (1971); *Dixie Feed & Seed Co. v. Byrd*, 52 Tenn.App. 619, 376 S.W.2d 745 (1963), cert. denied, Tenn.S.Ct., cert. denied, 379 U.S. 15, 85 S.Ct. 147, 13 L.Ed.2d 84 (1964), the court may not award this category of damages to non-residents on the theory of a nuisance action. Courts that have awarded damages on this basis have properly limited their award to residents of the area affected by the nuisance. See *Kornoff v. Kingsbury Cotton Oil Co.*, 45 Cal.2d 265, 288 P.2d 507 (1955); *Nailor v. C.W. Blakeslee & Sons, Inc.*, 117 Conn. 241, 167 A. 548 (1933); *Dixon v. New York Trap Rock Corp.*, 293 N.Y. 509, 58 N.E.2d 517 (1944), reh'g denied, 294 N.Y. 654, 60 N.E.2d 385 (1945); *Riblet v. Spokane-Portland Cement Co.*, 45 Wash.2d 346, 274 P.2d 574 (1954). The district court erred in awarding damages to non-resident plaintiffs on the basis of a nuisance theory. Accordingly, we reverse the district court's award of damages for impairment of quality of life to plaintiffs Ivy, Maness, and Wilbanks.

#### F. Lost Wages and Earning Capacity

[30] Velsicol argues that the district court erroneously awarded damages to plaintiffs Johnson and Maness for lost wages and earning capacity as such award was impermissibly based upon speculation. Without any discussion whatsoever of either the basis for or the calculations involved, the district court awarded plaintiffs Johnson and Maness \$250,000 and \$500,000 respectively for lost wages and earning capacity. With respect to Johnson, the extent of plaintiff's proof consisted of his income tax forms from 1972–1975 and the Missouri Division of Family Services' certification that, as of 1980, Johnson was no longer able to continue gainful employment. Plaintiff failed to produce income tax forms or any figures of his annual income for the years during which he lived in Hardeman County, Tennessee, and the years for which he claimed disability. With respect to Maness, plaintiff produced no evidence as to the lifetime earning capacity of a “normal” person of Maness' age and socioeconomic condition. Moreover, Maness failed to prove that his learning disability, which constitutes the single most important factor contributing to his loss of earning capacity, was proximately caused by his ingestion or other usage of the contaminated water or his mother's ingestion of the contaminated water during the term of her pregnancy. Indeed, for neither Johnson nor Maness did the plaintiffs set forth any basis for the amount of damages sought for lost wages and earning capacity.

While Tennessee compensates victims for the loss of the capacity to earn, *Thompson v. National Railroad Passenger Corp.*, 621 F.2d 814 (6th Cir.), cert. denied, 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497 (1980); *Southern Coach Lines, Inc. v. Wilson*, 31 Tenn.App. 240, 214 S.W.2d 55, cert. denied, Tenn.S.Ct. (1948), a plaintiff must produce the best evidence available to offer a reasonable basis for estimating the extent of his loss. *Western Sizzling, Inc. v. H.A. Harris*, No. 85, 741 S.W.2d 334 (Tenn.App.1987). We set forth the formula for determining the amount of an award for loss of earning capacity in *Imperial Oil, Ltd. v. Drlik*, 234 F.2d 4 (6th Cir.), cert. denied, 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (1956):

One who is injured in his person by the wrongful act of another may recover loss \*1212 of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and *the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident.*

*Id.* at 11 (emphasis added).

While an award of damages can never be based upon conjecture and speculation, *Redbud Cooperative Corp. v. Clayton*, 700 S.W.2d 551 (Tenn.App.1985); *Maple Manor Hotel, Inc. v. Metropolitan Government of Nashville and Davidson County*, 543 S.W.2d 593 (Tenn.App.1975), where it is shown the plaintiff suffered an injury because of defendant's conduct, mere uncertainty as to the amount of damages sought will not prevent recovery if the evidence is of such certainty as to enable the trier of fact to make a fair and reasonable assessment of damages. *Wilson v. Farmers Chemical Association*, 60 Tenn.App. 102, 444 S.W.2d 185 (1969). To this extent, there exists a clear distinction between the measure of proof necessary to establish that the plaintiff suffered some injury and the measure of proof necessary to enable the trier of fact to assign an amount of damages due as a result of the injury. *Stevens v. Moore*, 24 Tenn.App. 61, 139 S.W.2d 710 (1940). However, the amount of damages must be susceptible of ascertainment by some method other than

by mere conjecture or surmise and by reference to some fairly definite standards. In assessing a plaintiff's lost wages and earning capacity, the court should consider, among other characteristics, the plaintiff's record of employment, avenues of occupation open to him, and his physical capacity to perform his job at the time he was injured and thereafter. *Clinchfield Railroad v. Forbes*, 57 Tenn.App. 174, 417 S.W.2d 210 (1966), cert. denied, Tenn.S.Ct. (1967). In the instant case, plaintiffs produced no evidence whatsoever from which the court could have made a reasonable determination of the amount of lost wages for plaintiff Johnson, and the impairment of projected future earnings for both plaintiffs. Accordingly, as the plaintiffs failed in their burden of proof to present sufficient evidence to substantiate the amount of damages sought, we reverse the district court's award of loss of wages and impaired earning capacity to plaintiffs Johnson and Maness.

#### G. Diminution of Property Value

[31] Velsicol asserts that the district court erred in finding that the current value of one of the representative plaintiff's property was limited to its value as that of timberland. Velsicol asserts that, given the fact that the plaintiff continues living on the property and that the county tax assessor devalued the property by only twenty-eight percent, meant the property had a higher value. Velsicol further asserts that the district court's formula for calculating the diminution of property value for all property owners in the putative class was arbitrary and impermissibly speculative. We disagree with the defendant's contentions.

The district court found that the value of all property within one mile of Velsicol's landfill, the "contaminated zone," had been rendered valueless except for \$275 per acre for timber bearing potential; the value of all property outside of the "contaminated zone" but within two miles of the landfill, the "affected zone," had been reduced fifty percent over its timberland value; and the value of all property outside the "affected zone" but within three miles of the landfill, the "tertiary zone," had been reduced ten percent over its timberland value. Sterling, who owned both a home and a rental property in the "contaminated zone," was the only plaintiff owning an identifiable interest in real estate within a three-mile radius of Velsicol's landfill. Based upon the difference in the market value of Sterling's 15.3 acres of residential and rental property before and after Velsicol's chemicals

contaminated the area surrounding his properties, the district court awarded him \$48,492.50.

Under Tennessee law, the measure of damages for injury to realty is the difference \*1213 in market value before and after the commission of the tort allegedly reducing the value of the realty. See *Walton-McDowell Co. v. Jackson*, 5 Tenn.Civ.App. 324 (1914); see also 9 Tenn.Juris. Damages § 16 n. 3. The plaintiffs' expert witnesses, James Murdaugh (a real estate appraiser), Joseph Jones (a local bank president), and William Kail (a regional mortgage company vice-president), testified that the market value of a given piece of property is based upon a fully informed arm's-length buyer and seller and available financing to purchase the property. Murdaugh testified that the value of Sterling's property, and all property within the "contaminated zone," was rendered valueless, except for its potential timberland value, and that properties in the "affected zone" and "tertiary zone" declined in value. Jones and Kail testified that their respective institutions would be unwilling to provide any financing for properties within one mile of the landfill site, and only limited financing to properties within three miles of the landfill, since they may be unable to recoup their investment in case of foreclosure. The fact that Sterling retained his properties is irrelevant since he would be unable to sell his property and few, if any, potential buyers even could consider purchasing the property as they would have great difficulty in locating the requisite financing. Additionally, when Sterling contested the county tax appraiser's assessment of his property, the Tennessee State Board of Equalization reversed the appraiser's assessment and assessed Sterling's property as valueless. We find that the district court properly valued Sterling's property and, moreover, properly differentiated the value of property within the separate "zones" in recognition of the diminution of the value of property within a certain proximity to Velsicol's landfill.

#### VI.

##### PREJUDGMENT INTEREST

[32] [33] Velsicol asserts that the district court erred not only in awarding prejudgment interest on its award of compensatory damages to the plaintiffs for their personal injuries and property damage claims, but also in using July, 1965, as the date from which prejudgment interest, if any, should accrue. In a diversity case, a federal court

is bound by state law on the question of prejudgment interest. See *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Glens Falls Insurance Co. v. Danville Motors, Inc.*, 333 F.2d 187 (6th Cir.1964). Tennessee Code Annotated § 47-14-123 provides in pertinent part:

Pre-judgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws as of April 1, 1979 may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of the maximum effective rate of ten percent (10%) per annum....

(Emphasis added). While statutory law does not provide for it, in accordance with common law the trier of fact may, in his discretion, award prejudgment interest on a claim for loss or injury to property even where the claim is not certain and is unliquidated. See, e.g., *Irving Pulp & Paper, Ltd. v. Dunbar Transfer & Storage Co.*, 732 F.2d 511 (6th Cir.1984); *Farmers Chemical Association v. Maryland Casualty Co.*, 421 F.2d 319 (6th Cir.1970); *Johnson v. Tennessee Farmers Mutual Insurance Co.*, 556 S.W.2d 750 (Tenn.1977); *B.F. Myers & Sons, Inc. v. Evans*, 612 S.W.2d 912 (Tenn.App.1980). While the district court did not abuse its discretion in awarding Sterling prejudgment interest on his property damage claim, it erred in using July, 1965, as the date from which to calculate the accrual of interest.

[34] Prejudgment interest on a property damage award accrues from the date that the defendant's tortious conduct effectively operates to destroy or diminish either the resale value, the rental value, or even the personal use and enjoyment of the plaintiff's property. See, e.g., *Louisville & Nashville Railroad v. W.A. Fort*, 112 Tenn. 432, 80 S.W. 429 (1903); *City of Columbia v. Lentz*, 39 Tenn.App. 350, 282 S.W.2d 787 (1955). Determining the date \*1214 from which prejudgment interest should accrue is not a question of when, in hindsight, a defendant's tortious conduct commenced but, rather, when its conduct actually operated to depreciate the plaintiff's property value. Prejudgment interest serves to compensate the plaintiff for the loss of potential resale income, rents, or personal enjoyment of property suffered as a result of the defendant's tortious conduct

prior to judgment. To award prejudgment interest when the plaintiff has suffered no such loss would constitute an impermissible recovery. The district court posed four potential dates prior to selecting July, 1965, as the appropriate date from which prejudgment interest should accrue upon Sterling's property damage claim: (1) October, 1964—the date Velsicol commenced depositing chemical waste into the landfill; (2) July, 1965—the date the Department of Health, Education and Welfare informed the Tennessee Stream Pollution Control Board that, while it had no intentions of conducting an independent ground water study, various federal and state agencies had identified that low concentrations of the chemicals Endrin (0.23 ppb) and Dieldrin (0.12 ppb) had seeped from Velsicol's landfill into Sterling's well; (3) 1969—the date the plaintiffs' water computing model predicted that high concentrations of the chlorinated hydrocarbons, carbon tetrachloride, and chloroform had seeped into and contaminated Sterling's well; and (4) 1974—the date Velsicol's water computing model predicted that high concentrations of these chlorinated hydrocarbons had seeped into and contaminated Sterling's well. While there is evidence that low concentrations of Velsicol's chemicals seeped into Sterling's well in July, 1965, and that even higher concentrations of Velsicol's chemicals seeped into Sterling's well as early as 1969, there is no evidence that this chemical contamination resulted in a depreciation in either the market resale or rental value of Sterling's property prior to 1978. The only evidence of when the chemical contamination of Sterling's well actually affected the marketability of his property was proffered by the plaintiffs' expert witness, James Murdaugh (a real estate appraiser), who testified:

It's my opinion in the market research that I did at the courthouse that the effect of the property damage occurred somewhere around 1978, the latter part of '78 to '79. Primarily it became—the public became aware of it when it became public knowledge, when the report was filed and it was made available for people to the general public.

Accordingly, the district court's award of prejudgment interest on Sterling's property damage claim is remanded to determine the date, not earlier than January 1, 1978, when the public sufficiently became aware of the chemical contamination of Sterling's well so as to effectively depreciate the market resale or rental value of his property. To the extent that other class members present property damage claims, the district court further

is instructed to ascertain when the chemical contamination of that particular class member's property served to depreciate its market resale or rental value in setting an accrual date for an award, if any, of prejudgment interest.

[35] With regard to the district court's award of prejudgment interest for the representative plaintiffs' personal injuries, no statutory or common law in Tennessee provides for prejudgment interest on compensatory awards for physical or emotional damages.<sup>26</sup> It is a longstanding principle of Tennessee common law that prejudgment interest cannot be awarded on personal injury claims. In \*1215 Louisville & Nashville Railroad v. Wallace\*, 91 Tenn. 35, 17 S.W. 882 (1891), the Supreme Court of Tennessee refused to affirm a prejudgment interest award, finding that personal injury damages are defined as and are limited to "pain, suffering, and disability to date of judgment and prospectively beyond, it is intended to be and is the full measure of recovery and cannot be supplemented by the new element of damages for detention of this sum from the date of the injury." *Id.* at 37, 17 S.W. at 883. The Tennessee Supreme Court held that personal injury cases are not governed by the same rule as that involving the destruction, conversion, or misappropriation of property where prejudgment interest may be awarded in the court's discretion:

[S]uch rule applies alone to such cases, and *not to that of personal injury*, which does not cease when inflicted, and is not susceptible of definite and accurate computation. It never creates a debt, nor becomes one until it is judicially ascertained and determined. Only from that time can it draw interest, *and interest as damages cannot at any preceding time be added to it without changing and superadding a new element—never given in this State....* *Id.* at 38, 17 S.W. at 883 (emphasis added).

The *Wallace* decision has not been overruled nor has its result been changed by statute. Plaintiffs' policy argument that the *Wallace* rule, which denies the recovery of prejudgment interest on personal injury awards, should no longer stand is more appropriately made before the Tennessee courts or the state legislature. Accordingly, we reverse the district court's award of prejudgment interest on any of the compensatory damage awards for personal injuries as there is no common law or statutory authority to make such an award.

## VII.

### PUNITIVE DAMAGES

Lastly, Velsicol argues that the district court erred in awarding the entire class punitive damages on the grounds of Velsicol's conduct during the course of litigation, upon the baseless conclusion it willfully and wantonly violated state law in disposing its chemicals, and before determining compensatory damages to the entire class.<sup>27</sup>

In awarding punitive damages, the district court stated in pertinent part:

The Court has concluded that a single award of punitive damages is appropriate and should be awarded in this case. The Court finds this decision appropriate, because it has heard all of the evidence on all of the significant issues that can be presented for decision in this class action. The Court finds Velsicol's actions in locating, creating, maintaining and operating its chemical waste burial site constituted gross negligence and a wilful and wanton disregard for the health and well being of plaintiffs and the adjacent environment. This is particularly true when the Court considers Velsicol's superior knowledge about chemicals used in its manufacturing process.

647 F.Supp. at 307. The district court noted there were at least three possible justifications for such an award and then based the award upon a portion of the profits Velsicol earned as a result of utilizing the landfill rather than incinerating the chemicals.

In assessing its award of punitive damages, the district court stated:

\*1216 [V]elsicol's actions in creating, maintaining and operating its chemical waste burial site, with superior knowledge of the highly toxic and harmful nature of the chemical contaminants it disposed of therein, and specifically its failure to immediately cease dumping said toxic chemicals after being warned by several state

and federal agencies ... constituted gross, wilful and wanton disregard for the health and well-being of the plaintiffs, and therefore is supportive of an award of punitive and exemplary damages.

The Court further concludes that Velsicol's attempt to allege that plaintiffs were guilty of assuming the risk, or were guilty of contributory negligence is without factual basis and so outrageous as to subject the defendant to punitive damages.

In addition the Court further finds that Velsicol has also attempted to shift the liability and causation for the psychological disorders suffered by the plaintiffs to the local, state and federal authorities, claiming that the defendant cooperated with them in their attempts to monitor the situation and persuade Velsicol to limit its activities. They contend that news coverage of this case specifically caused the post-traumatic stress disorder. The Court concludes that these attempts by Velsicol are also so outrageous that punitive damages should be imposed.

647 F.Supp. at 323–24.

Punitive damages are allowed under Tennessee law and are given in excess of, and in addition to, compensatory damages. They are awarded in cases involving fraud, malice, gross negligence, or oppression, *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.W. 557 (1899), or where a wrongful act is done with a bad motive or recklessly as to imply a disregard of social obligation, *Stapp v. Black*, 14 Tenn.App. 153 (1931), or where there is such willful misconduct as to raise a presumption of conscious indifference. *Honaker v. Leonard*, 325 F.Supp. 212 (E.D.Tenn.1971); *Inland Container Corp. v. March*, 529 S.W.2d 43 (Tenn.1975). In the state of Tennessee, punitive damages are not recoverable as a matter of right, but are within the sound discretion of the trial judge. We will not reverse an award of punitive damages without proof of an abuse of discretion. Moreover, in reviewing a trial court's justification for awarding such damages, we view the record in its entirety rather than each particular factor in isolation. The theory behind awarding punitive damages is not to compensate an injured plaintiff for personal injury but to punish a defendant and deter him from committing acts of similar nature. *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn.1978); *Booth v. Kirk*, 53 Tenn.App. 139, 381 S.W.2d 312 (1963).

[36] While the court may award punitive damages when a party's conduct during the course of litigation is either frivolous or in bad faith, *Reynolds v. Pegler*, 223 F.2d 429 (2d Cir.1955); *Universal City Studios, Inc. v. Nintendo Co.*, 797 F.2d 70 (2d Cir.), cert. denied, 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed.2d 581 (1986), a review of the entire record does not suggest that defendant's conduct warranted such punitive sanctions. Unlike *Universal City Studios*, in which the Second Circuit held punitive damages were appropriate where defendant threatened suit alleging trademark infringement despite a prior judicial holding that its trademark was in the public domain, Velsicol's defenses during the course of litigation did not constitute an abuse of process.

There is no evidence that Velsicol's defense was contrived in bad faith. In deciding whether counsel's positions at trial warrants awarding punitive damages, too strict a standard might unduly chill an attorney's advocacy, especially for those advancing unpopular arguments. This determination requires sensitivity on the part of the court. See, e.g., *Blake v. National Casualty Co.*, 607 F.Supp. 189 (C.D.Cal.1984). Velsicol's conduct in the instant case is an impermissible basis in and of itself for awarding punitive damages.

[37] There is, however, evidence supporting the district court's determination that Velsicol violated state law in establishing, utilizing, and refusing to cease disposal \*1217 operations at the landfill disposal site. It was within the district court's discretion to consider defendant's disregard of state law in making its award. Lastly, the district court need not defer its award of punitive damages prior to determining compensatory damages for the entire class of 128 individuals. So long as the court determines the defendant's liability and awards representative class members compensatory damages, the district court may in its discretion award punitive damages to the class as a whole at that time. Because the district court erred in awarding punitive damages, in part, upon the positions taken by Velsicol at trial, we remand for recomputation of punitive damages.

For the foregoing reasons, we AFFIRM IN PART, REVERSE IN PART, and REMAND for recalculation of damages.

NATHANIEL R. JONES, Circuit Judge, concurring.

While concurring in the judgment and much of the reasoning of the majority, I must write separately to set out my view of the appropriate degree of proof on damages. The majority concludes that certain of plaintiffs' alleged injuries were *not* proven to a reasonable medical certainty. Accordingly, the majority would remand for recalculation of the damage awards to exclude those portions of the awards attributed by the district court to injuries the majority finds unsupported by sufficient medical testimony.

My difficulty with the majority's treatment of the damages issue is the overly rigid way in which it applies the conceded legal standard of proof of a reasonable medical certainty. The majority correctly states that before there can be recovery, causation must be shown to a reasonable medical certainty. This court pointed that out in *Thompson v. Underwood*, 407 F.2d 994 (6th Cir.1969). However in *Thompson* we noted that this was a "general rule" and, further, that the substance of a doctor's testimony should not be disregarded "merely because he fails to use the magic words 'reasonable medical certainty.'" *Id.* at 997.

There were several descriptive terms used by the medical experts in this case, though I acknowledge the absence of the magic words "reasonable medical certainty." However, if, as this court held in *Thompson*, the requirement is general and magic words are not necessary,

the district court, as the fact finder, is free to reach Rome by an alternate route, so long as there is proof of exposure to the chemicals and of various injuries. The sufficiency of that proof, I would leave to the trier of fact, be it a judge or a properly instructed jury. It seems to me that the general standard of proof can be met, on a *prima facie* basis, where the record contains expert testimony on the chemicals and its properties, and proof of exposure to the chemicals supported by some medical testimony. It seems to me that at this point a rebuttable presumption of proximate causation ought to arise. The failure of the defendant to rebut this presumption would then give rise to a conclusion of reasonable medical certainty.

On remand, I would not foreclose the district court from engaging in burden shifting as discussed above, if it finds that the record as a whole demonstrates a rebuttable presumption of proximate causation for the injuries allegedly attributable to defendant's chemicals. In the event the defendant fails to rebut the presumption, the fact finder may find that the presumption becomes conclusive.

#### All Citations

855 F.2d 1188, 27 ERC 1985, 55 USLW 2719, 11 Fed.R.Serv.3d 213, 18 Env'tl. L. Rep. 20,978, 19 Env'tl. L. Rep. 20,404, 26 Fed. R. Evid. Serv. 1037

#### Footnotes

- 1 The district court concluded that spent hydrocarbons buried at the landfill disposal site included not only chlorobenzene, hexachlorobutadiene, hexachloroethane, hexachlorononbornadiene, naphthalene, tetrachloroethylene, toluene, hexachlorocyclopentadiene, and benzene, but also the known carcinogens carbon tetrachloride and chloroform. The drums and cartons containing these chemicals were deposited in trenches that were 15 feet deep and 12 to 15 feet wide and covered with approximately 3 feet of soil. Velsicol took no precautions to insure the drums from bursting and, invariably, some of the drums would leak their contents into the soil. Furthermore, the trenches were neither lined nor covered with any impermeable material to prevent the chemical waste from leaking into the soil. Velsicol eventually placed a clay cap over the landfill site in 1980 only after state authorities threatened a lawsuit over the imminent danger the landfill posed to the environment. 647 F.Supp. 303, 360–61, 366–71, 430–35.
- 2 However, the 1967 USGS report erroneously concluded that, even once the chemicals reached the local aquifer, there was no danger of contamination to any existing domestic wells because the local aquifer moved to the east while the limited residential development in the area was located west. In actuality, the water aquifer flowed in a northwesterly direction.
- 3 Although Velsicol's increased operations at the landfill greatly concerned state officials, prior to 1972, they had no authority to stop Velsicol's activities. However, commencing on July 1, 1972, the Tennessee Solid Waste Management Act, Tenn.Code Ann. §§ 68–31–101 to 117, vested state officials with the authority to limit, and in some circumstances indefinitely suspend, the disposal of chemical waste at existing sites.

4 Although numerous wells were ultimately contaminated and many of these wells were closed by the state authorities, only five wells, for the purpose of the trial, were of major importance because it was from these wells that five representative members of the subsequently filed class action obtained their water.

5 At the pretrial hearing, the district court stated in pertinent part:

[I]t also seems to me that it is not necessary at this point for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that that's a matter that might well come up at some point down the road after the initial phase of the case is tried.... [W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point....

6 Haunted by the specter of protracted trials and in an effort to better serve judicial economy, courts are increasingly experimenting with utilizing representative plaintiffs for determining a defendant's liability to the class as a whole in mass, complex, toxic tort cases. All of this experimentation occurs amid questions about the effectiveness of the representative plaintiffs' approach in accomplishing the goal of setting benchmarks for settlement. However, as this debate continues, courts increasingly are required to establish a criterion for selecting such representatives. There are essentially four basic approaches to selecting representative plaintiffs: plaintiffs' counsel selects all representatives; each side selects an equal number of representatives; plaintiffs' counsel or both sides nominate plaintiffs and the judge selects the representatives; or representatives are randomly selected from established categories of plaintiffs. However, because Velsicol does not raise the manner in which the five individuals were selected to serve as representative plaintiffs to determine its liability to the class as a whole, we do not consider this issue on appeal.

7 In its September 29, 1986 order, the court stated in pertinent part:

Early on in this case, because of the sheer magnitude of this litigation, the claims of five representative plaintiffs, whose claims are fairly representative of the claims of the class as a whole, were selected for trial. It was decided all claims would be tried by the court in this phase of the trial and final judgment entered on all of the claims of the five representative plaintiffs.... This approach was adopted by the Court as the only reasonable way for the Trial Court to manage in an efficient way the complex factual and legal issues presented by this mind-boggling class action lawsuit.

8 The Advisory Committee Note to the 1966 Revision of Rule 23(b)(3) provided:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Adv.Comm.Note, 39 F.R.D. 69, 103 (1966).

9 See *In re N. Dist. of California Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir.1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *McDonnell Douglas Corp. v. United States Dist. Court*, 523 F.2d 1083 (9th Cir.1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D.Pa.1980); *Yandle v. PPG Indus.*, 65 F.R.D. 566 (E.D.Tex.1974); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D.Pa.), *appeal dismissed*, 505 F.2d 729 (3d Cir.1974); *Daye v. Pennsylvania*, 344 F.Supp. 1337 (E.D.Pa.1972), *aff'd*, 483 F.2d 294 (3d Cir.1973), *cert. denied sub nom. Meyers v. Pennsylvania*, 416 U.S. 946, 94 S.Ct. 1956, 40 L.Ed.2d 298 (1974).

10 See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir.1987); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied sub nom. Stover v. Rau*, 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1982); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D.C.Mass.1979); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D.Ky.1977), *mandamus denied*, 588 F.2d 543 (6th Cir.1978); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D.Fla.1973); *aff'd without opinion*, 507 F.2d 1279 (5th Cir.1975).

11 See *Irving Pulp & Paper v. Dunbar Transfer & Storage Co.*, 732 F.2d 511 (6th Cir.1984); *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352 (6th Cir.1978); *Downs v. United States*, 522 F.2d 990 (6th Cir.1975); *Gowdy v. United States*, 412 F.2d 525, 532-33 (6th Cir.), *cert. denied*, 396 U.S. 960, 90 S.Ct. 437, 24 L.Ed.2d 425 (1969).

12 See *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784 (6th Cir.1984); *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775 (8th Cir.1976); *Spector v. Mermelstein*, 485 F.2d 474 (2d Cir.1973); *Uttinger v. United States*, 432 F.2d 485 (6th Cir.1970); *Pierce v. New York Central R.R.*, 409 F.2d 1392 (6th Cir.1969); *Ferguson v. Prudential Ins. Co.*, 399 F.2d 47 (6th Cir.1968).

13 See, e.g., *Bostick v. Smoot Sand & Gravel Corp.*, 260 F.2d 534 (4th Cir.1958).

- 14 See *MacDonnell v. Capital Co.*, 130 F.2d 311 (9th Cir.1942); *Brandt v. Robertson*, 266 F.2d 456 (D.C.Cir.1959); *McComb v. McCormack*, 159 F.2d 219 (5th Cir.1947).
- 15 See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Gibbs v. United States*, 599 F.2d 36 (2d Cir.1979); *Smith v. Manausa*, 535 F.2d 353 (6th Cir.1976).
- 16 See, e.g., *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir.1969), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2162, 26 L.Ed.2d 542 (1970).
- 17 See *Nyyssonen v. Bendix Corp.*, 342 F.2d 531 (1st Cir.), *cert. denied*, 382 U.S. 847, 86 S.Ct. 63, 15 L.Ed.2d 86 *reh'g denied*, 382 U.S. 934 (1965); *Radio Corp. of America v. Philco Corp.*, 275 F.Supp. 172 (D.N.J.1967).
- 18 In actuality, both the plaintiffs and defendant utilized the same water computer model, namely the Trescott, Pinder and Larson model, to trace the level of chemical contamination. The dramatic differences between the plaintiffs' and the defendant's water models were due to different assumptions concerning the contaminant loading rates and porosity. If one chooses a high rate of porosity, the model will make it appear that the chemicals arrive and leave quickly with a very high level for a short period of time. If a low rate of porosity is used, there is a more insidious level of exposure over a longer period of time that cannot be predicted by odor or taste. The district court rejected the defendant's water model as inaccurately underrepresenting the extent of chemical contamination in the ground water supply. In refuting the defendant's model, the court reasoned that Velsicol had failed to factor in the massive dumping of liquid waste, the ponding of water in the trenches, and the draw down on the aquifer caused by new homes.
- 19 Of the eleven chemicals contaminating plaintiffs' well water, the reported physiological and psychological effects of five of these chemicals was of particular importance:
- Carbon tetrachloride*: The principal acute effects of ingesting or inhaling carbon tetrachloride are liver and kidney necrosis and dysfunction, and depression of the central nervous system. Exposure also produces alterations in the activity of the liver microsomal enzyme system, development of fatty liver, liver enlargement, and changes in blood enzyme. Carbon tetrachloride is a well-documented carcinogen.
- Chloroform*: Inhalation of large doses of chloroform can result in narcosis, anesthesia, gastrointestinal upset, cardiac sensitization, and damage to the kidney and liver. Chronic exposure to chloroform most typically results in liver damage.
- Chlorobenzene*: Chlorobenzene is a central nervous system depressant which causes symptoms typical of its anesthetic effect. Exposure to this chemical may cause headaches, upper respiratory tract irritation, eye irritation, numbness and eventual loss of consciousness.
- Tetrachloroethylene*: Exposure to tetrachloroethylene produces effects primarily on the nervous system, including unconsciousness, dizziness, headache, vertigo or light narcosis. Other effects occur in the liver, mucous membranes, eyes, lungs, kidney, heart and skin.
- Hexachloroethane*: Exposure to this chemical causes eye irritation, including the inability to close the eyelid, tearing, inflammation, and visual intolerance to light.
- 20 On appeal, Velsicol does not specifically argue that the district court erred in awarding the five representative plaintiffs damages for pain and suffering. See e.g., *Dixie Feed & Seed Co. v. Byrd*, 52 Tenn.App. 619, 376 S.W.2d 745 (1963), *cert. denied*, Tenn.S.Ct., *cert. denied*, 379 U.S. 15, 85 S.Ct. 147, 13 L.Ed.2d 84 (1964). Finding that the court had a proper basis for its award, therefore, we do not address this category of damages.
- 21 In awarding damages to the plaintiffs for their increased risk to cancer and other diseases, the court stated in pertinent part:
- [I]t must be emphasized that the increased susceptibility to kidney and liver disease and cancer is a presently existing condition in each plaintiff who suffered exposure to the various toxins. Plaintiffs produced scientific experts who testified, that, to a reasonable degree of scientific certainty, each plaintiff now has a presently existing condition known as "enhanced or increased susceptibility" to disease. Finally, they testified that the condition resulted from consuming the Velsicol chemicals in the water.
- ....
- In sum, it is generally recognized that a plaintiff is entitled to damages for an enhanced risk of injury occasioned by a defendant's wrongdoing. There is simply no element of speculation in awarding those damages between the condition and defendant's wrongdoing.
- 647 F.Supp. at 321–22.
- 22 Specifically, with respect to the future risk of cancer, while the Tennessee courts have not ruled on the issue of awarding damages for increased risk of disease, they have warned against allowing the introduction of evidence of such risk on the grounds of prejudicing the trier of fact. See *Daniels v. Combustion Eng'g*, 583 S.W.2d 768 (Tenn.App.1978).
- 23 In awarding damages to the plaintiffs, the court stated in pertinent part:

Velsicol's conduct caused chemical contaminants to come in contact with or invade each particular plaintiff's body, and impacted upon his or her body. Because those contaminants were of such a nature as to cause the reported symptoms and cellular damage, and adverse biological change, (however slight), the Court considers that this ingestion, inhalation or contact caused emotional distress in each plaintiff.

Moreover, plaintiffs are entitled to recover for fear, distress, or emotional injury because that fear or distress reasonably and naturally flowed or resulted from the disclosure of the nature and possible effects of those chemical contaminants. The Court has considered the nature, extent or duration of such fear of distress, since any award must compensate plaintiffs for any distress experienced since the disclosure of the contaminants in the water up to the present time, and even into the future, because the Court finds the medical and scientific evidence provided justifies the conclusion that such fear and apprehension has continued after disclosure and/or will continue into the future.

647 F.Supp. at 320–21 (citations omitted).

- 24 Cancerphobia is merely a specific type of mental anguish. See *Hagerty v. L & L Marine Serv.*, 788 F.2d 315 (5th Cir.), *reh'g denied*, 797 F.2d 256 (5th Cir.1986) (en banc); *Jackson v. Johns–Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986); *Gideon v. Johns–Manville Sales Corp.*, 761 F.2d 1129 (5th Cir.1985); *Clark v. Taylor*, 710 F.2d 4 (1st Cir.1983); *Anderson v. W.R. Grace & Co.*, 628 F.Supp. 1219 (D.Mass.1986); *Wetherill v. University of Chicago*, 565 F.Supp. 1553 (N.D.Ill.1983); *Dempsey v. Hartley*, 94 F.Supp. 918 (E.D.Pa.1951).
- 25 The plaintiffs argue that only treatment, as separate from diagnosis, of immune system dysregulation remains controversial throughout the scientific community. Therefore, plaintiffs argue “no findings as to the testimony of Dr. Levin or Dr. Crook were required” because they were testifying “solely about diagnosis of disease.” However, this court cannot locate any relevant authority that suggests that clinical ecology is solely concerned with the treatment of immune system dysregulation exclusive of its diagnosis.
- 26 See, e.g., 16 Tenn.Juris.Interest § 5 (“Interest is allowed for wrongs to property, but it is not allowed in such actions as ... for personal injury by negligence ...”); Hare and Meelheim, *Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness*, 5 Am.J.Trial Advoc. 81, 92 (Summer 1981) (Tennessee not listed among states with statutes “allowing some type of prejudgment interest in tort claims.”); Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising Within the Sixth Circuit*, 46 U.Cin.L.Rev. 151 (1977) (personal injury claims in Tennessee do not bear prejudgment interest); Note, *Prejudgment Interest: Implementing Its Compensatory Purpose*, 15 Loy.U.Chi.L.J. 541, 547 n. 36 (1984) (Tennessee not listed among 15 states allowing prejudgment interest awards in tort cases).
- 27 Velsicol also argues the district court improperly rejected its argument that punitive damages should not be awarded against an innocent successor corporation. On May 30, 1985, Farley Industries, through its subsidiary Farley Northwest Acquisition Corporation, acquired control over Northwest Industries which wholly owned Velsicol Chemical Corporation. This court has cautioned that the award of punitive damages is inappropriate where the successor corporation was a new and different entity and where the successor corporation and its owners are wholly innocent of the allegedly unlawful activities. *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352 (6th Cir.1978). However, in *Drayton*, the trial court noted both improving industry practices, and a change in corporate ownership, as weighing against such an award. Velsicol provides no evidence of such beneficial changes in either its practices or management to merit the alleviation of such an award. See *Moran v. Johns–Manville Sales Corp.*, 691 F.2d 811 (6th Cir.1982).

2010 WL 2382405

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.SUMMIT PROPERTIES  
INTERNATIONAL, LLC, Plaintiff,  
v.  
LADIES PROFESSIONAL GOLF  
ASSOCIATION, Defendant.

No. 07 Civ. 10407(LBS).

|  
June 14, 2010.

West KeySummary

**1 Federal Civil Procedure**🔑 Copyright, trademark, and unfair  
competition cases

Projections contained in experts' summary judgment affidavits, as to the amount of future profits the exclusive licensing agent for a women's professional golf association would lose as a result of termination of its exclusive licensing contract, were insufficient to establish entitlement to future lost profits under New York law. The projections relied on a panoply of speculative assumptions and few known factors.

9 Cases that cite this headnote

**MEMORANDUM & ORDER**

SAND, District Judge.

\*1 Plaintiff Summit Properties International, LLC ("Summit") was the exclusive licensing agent for Defendant Ladies Professional Golf Association ("LPGA") from 1999 until 2006. In 2006, LPGA terminated the relationship with Summit. Summit filed this diversity action for breach of contract. Both parties have moved for partial summary judgment. In addition,

LPGA has filed four motions *in limine*. LPGA's partial summary judgment motion is granted in part, denied in part. As a result, LPGA's motions *in limine* are moot. Summit's partial summary judgment motion is granted in its entirety.

**I. Background**

In 1999, Summit and LPGA entered into a Representation Agreement, which appointed Summit as the exclusive licensing representative of LPGA outside of the United States. In 2002, the parties executed the Amended and Restated Representation Agreement, which expanded Summit's role to include the United States. (Holmes Aff. Ex. A ("Agreement").) The Agreement operated until March 31, 2007, unless extended or terminated in accordance with the provisions of the Agreement. According to the Agreement, Summit had the right to extend the Agreement "as it is in effect as of June 30, 2006 through December 31, 2009 by notice given on or before September 30, 2006." (Agreement ¶ 18(a).) Summit was required to pay LPGA annual payments ("Guarantees") regardless of the amount of the royalties Summit collected. (Def.'s 56.1 ¶ 2.) These payments ensured that LPGA would receive a minimum amount of revenue.

From 2002 to 2005, Summit paid LPGA \$170,000 more in Guarantees than it received in royalties from the licensees it procured. (Def.'s 56.1 ¶ 9; Pl.'s Response to 56.1 ¶ 9.) The only year Summit's receipts exceeded the Guarantees it paid was 2003. (Def.'s 56.1 ¶¶ 6, 7.) In December 2005, Summit made a series of projected revenues in connection with a business plan it shared with LPGA. (Def.'s 56.1 ¶ 10.) The December 15, 2005 "conservative" projections (the "Projections") are relied upon by Summit and its expert in the instant litigation. (Def.'s 56.1 ¶ 12.) The Projections predicted continued losses through 2007; however, beginning in 2008, the Projections anticipated that royalties would begin to exceed the Guarantees. (Pl.'s 56.1 ¶¶ 13, 14.) Five of the Summit representatives that had made the Projections were deposed: Geoffrey Holmes and Kenneth Wang, Summit's founders and principals; Sharlene Sones, who worked on the predictions for the United States; Matthew Holmes, who worked on the predictions for Canada and Europe; and Daniel Mao, who worked on the predictions for Asia. (Def.'s Mem. Summ. J. 4.) The Projections did not use a specific growth rate but rather "assumed conservative growth." (M. Holmes Dep. at 114:8–18.)

In June 2006, LPGA sent Summit a notice that it was terminating Summit as LPGA's exclusive licensing representative for alleged breaches. (Def.'s 56.1 ¶ 26.) Summit rejected the notice, and in September 2006 Summit sent LPGA a notice extending the Agreement. (Pl.'s 56.1 ¶ 28.) Summit did not pay LPGA any Guarantee payments after June 2, 2006, the date of LPGA's termination notice. (Def.'s Response to 56.1 ¶ 30.) Summit filed the instant suit in November 2007.

## II. Standard of Review

\*2 A court may only grant a motion for summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court looks to the substantive law to identify which facts are material; only disputes over facts that might affect the outcome of the suit under the governing law will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Kinsella v. Rumsfeld*, 320 F.3d 309, 311 (2d Cir.2003). “[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson*, 477 U.S. at 247–48 (emphasis in original). An issue is genuine if “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Id.* at 249. If the evidence is “merely colorable” or “not significantly probative,” summary judgment may be granted. *Id.* at 249–50.

To show the existence of a genuine issue, the nonmoving party must have more than a scintilla of evidence to support its position. *Id.* at 252. “The non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.” *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir.1998). In evaluating cross-motions for summary judgment, “each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration.” *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir.2001). The court must draw all inferences in favor of the non-moving party. *Id.*

## III. Discussion

### a. LPGA's Motion for Partial Summary Judgment

Defendant moves for partial summary judgment dismissing six of Plaintiff's claims: (1) breach of contract insofar as it seeks damages for lost profits; (2) breach of contract insofar as it seeks damages relating to Golfsmith, a potential licensee; (3) breach of contract insofar as it seeks damages after December 31, 2006; (4) a permanent injunction; (5) declaratory judgment; and (6) unjust enrichment for the period before June 2, 2006.<sup>1</sup>

### i. Lost Profits

In order to recover loss of future profits as damages for breach of contract under New York law,<sup>2</sup> the plaintiff must establish the existence and the amount of lost profits with reasonable certainty, and that the lost profits were within the contemplation of the parties at the time the contract was made. *Schonfeld v. Hilliard*, 218 F.3d 164, 173 (2d Cir.2000) (citing *Kenford Co., Inc. v. Erie County*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 493 N.E.2d 234 (1986) (“*Kenford I*”)). To meet this burden, the plaintiff must establish (1) the existence of the lost profits with reasonable certainty, and (2) that the alleged loss is capable of proof with reasonable certainty. *Kenford I*, 67 N.Y.2d at 261, 502 N.Y.S.2d 131, 493 N.E.2d 234. “[T]he damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.” *Id.*; see also *3497 Austin Boulevard Assoc. LLC v. M.K.D. Capital Corp.*, No. 04 Civ. 8596(NRB), 2007 WL 1575265, at \*2 (S.D.N.Y. May 30, 2007) (“Projections of future profits which are made on the basis of a ‘multitude of assumptions’ that require ‘speculation and conjecture’ with few known factors do not provide the requisite certainty for recovery.”). Additionally, “evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate.” *Schonfeld*, 218 F.3d at 172.

\*3 Summit need not establish the exact amount of lost profits; it “need only provide the jury with a sound basis for approximating with reasonable certainty the profits lost as a result” of LPGA's actions. *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 853 (2d Cir.1987). Accordingly, LPGA can prevail on its motion for summary judgment on the issue of lost profits only if Summit has failed to raise

a genuine issue of material fact as to the *existence* of lost profits.<sup>3</sup> *V.S. Int'l, S.A. v. Boyden World Corp.*, No. 90 Civ. 4091(PKL), 1993 WL 59399, at \*7 (S.D.N.Y. Mar.4, 1993). For the following reasons, we find that Summit has failed to raise a genuine issue as to the existence of lost profits.

Courts have repeatedly found that where the existence of lost profits rests on a multitude of assumptions, the plaintiff has failed to establish the existence of lost profits to a reasonable certainty. *See Schonfeld*, 218 F.3d at 173 (affirming the district court's decision that the expert's projections, which were based on a “seemingly endless list of assumptions,” were insufficient to establish lost profits to a reasonable certainty); *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 333 (2d Cir.1993) (“[Plaintiff's] lost profits presentation depended entirely on speculation of a particularly dubious kind. [Plaintiff's accounting expert] assumed an abrupt expansion of the market for trademark search services, assumed that [Plaintiff] would reverse the long decline in its market share, assumed that [Plaintiff's] historically aggressive competitors would take no measures to counter [Plaintiff's] ascendancy, and predicted which choices customers would make among a variety of new and old search technologies—all of these assumptions reduced to speciously exact dollar amounts and spun out to the year 1998.”); *Bessemer Trust Co., N.A. v. Branin*, 544 F.Supp.2d 385, 389–90 (S.D.N.Y.2008) (rejecting the plaintiff's lost profits theory because it relied on a “multitude of assumptions,” including assumptions regarding the rates of return of managed assets, additions of new assets to the portfolio, variable costs, discount rates, and the length of relationship).

Similarly, in the instant case the Projections rely on a “host of speculative assumptions and few known factors.” *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 405–06, 604 N.Y.S.2d 912, 624 N.E.2d 1007 (1993). Aside from the 2006 numbers, the Projections relied on licenses that did not exist yet. (Singer Dec. Ex. C (“G. Holmes Dep.”) at 161:21–162:6.) Not one of the five Summit representatives, who helped create the Projections, could explain the assumptions and specific growth rates used in creating the Projections for the years 2007 to 2010. (M. Holmes Dep. at 114:8–18; Mao Dep. at 141:2–17.) The Projections did not use a specific growth rate but rather “assumed conservative growth.” (M. Holmes Dep. at 114:8–18.) The licenses anticipated in the Projections include contracts in

regions, such as Asia, and merchandise, such as DVDs, where Summit had never previously obtained licenses. (G. Holmes Dep. at 117:18–24; 121:21–24; 126:19–127:16.) The Projections also assumed that if there was a guarantee amount under the license, it would be paid in full to Summit, (M. Holmes Dep. at 120:4–12), despite the fact that licensees repeatedly failed to pay the guarantees to Summit in the past. (G. Holmes Dep. at 112:18–113:8; M. Holmes Dep. at 67:13–68:3 .)

\*4 Summit has not offered any evidence that suggests that the Projections or, more generally, the existence of lost profits is anything more than merely speculative. From 2002 to 2006, Summit was the exclusive licensing agent for LPGA. During that time Summit repeatedly failed to collect more in royalties than it had to pay in Guarantees. Through 2005, Summit had paid \$170,000 more in Guarantees than it had collected in royalties. Even under Summit's own highly speculative Projections, Summit would not have made a profit until 2008. These facts demonstrate that the Projections, which rely on a “multitude of assumptions,” do not raise a genuine issue of fact as to the existence of lost profits. *Bessemer*, 544 F.Supp.2d at 389.

Summit contends that given the unique nature of the Agreement and the atypical risk allocation encompassed in it, the Court should use an approach adapted to these specific circumstances in assessing lost profits. (Pl.'s Supp. Mem. 7.) Specifically, Summit urges a tailored approach, where the Court looks to Summit's profits independent of the Guarantee obligations under the contract. (Pl.'s Supp. Mem. 7.) Looking at the Agreement as a whole, it is clear the parties put in place certain features that were meant to mitigate the risk Summit assumed under the contract. The Agreement anticipated the early growth years; and, therefore, the Guarantees that Summit paid LPGA in the first three years after the U.S. expansion—\$480,000, \$480,000, and \$500,000—were substantially lower than in the subsequent years—\$630,000, \$715,000, \$800,000, and \$895,000. (Agreement ¶ 3(b)(i).) Summit was also given a unilateral right to terminate the contract in March 2005 if the business was not developing or for any other reason. (Agreement ¶ 18.) Finally, as discussed in more detail below, paragraph 15 of the Agreement (the “Tail provision”) provides that Summit is entitled to recover royalties for three years after the termination or expiration of the Agreement. (Agreement ¶ 15.)

Summit's contention that LPGA anticipated that Summit would take losses in the early years and then "thwarted" the receipt of profits is an unsupported inference, especially considering the royalties Summit was entitled to under the Tail provision. The graduated increase in the Guarantees suggests that lower Guarantees existed in the early years, so that Summit would be able to obtain profits; as the business was expected to grow, the Guarantees also grew. The slow growth and risky nature of the Agreement was anticipated by the sophisticated parties, and provisions were incorporated to address these issues. LPGA's motion for summary judgment for breach of contract as to lost profits only is granted.<sup>4</sup>

### ii. Golfsmith

LPGA next seeks summary judgment on Summit's breach of contract claim insofar as Summit seeks damages relating to Golfsmith, a potential licensee. Summit does not argue that Golfsmith ever submitted a deal proposal or that the parties had agreed to any specific terms; rather, Summit contends that but for LPGA's interference the deal would have gone forward.

\*5 Summit argues that the negotiations with Golfsmith were stalled as a result of LPGA's intentional interference. Summit puts forth no evidence to support the allegation that but for LPGA's interference the deal with Golfsmith was likely to come into fruition. (Pl.'s Opp. Summ. J. 22.) Summit's reliance on the "test run in which LPGA's product sold out of Golfsmith's stores" to demonstrate that a deal with Golfsmith was imminent is unavailing. (Pl.'s Opp. Summ. J. 22.) The test run was in 2004–2005 and related to a licensing arrangement that Summit had with a different licensee, RMP Benchmark. (G. Holmes Dec. ¶¶ 65–66.) This test run, which occurred prior to any negotiations with Golfsmith and involved a third-party, is not evidence that a deal with Golfsmith was imminent. Summit has failed to offer any evidence that there is a genuine issue of fact that the Golfsmith deal was imminent. Additionally, for the reasons discussed in the previous section, lost profits related to the deal are too speculative. Summit is precluded from seeking any damages related to the possible Golfsmith deal.<sup>5</sup>

### iii. Post–December 31, 2006 Damages

LPGA argues that, even if it breached the agreement in June 2006, Summit is precluded from recovering

any damages after December 31, 2006 because Summit affirmed the contract and then breached that contract by failing to pay the December 31, 2006 guarantees. While we agree with LPGA that any agreement with Summit was terminated no later than December 31, 2006, this finding does not preclude Summit from recovering post-termination royalties.<sup>6</sup>

Upon LPGA's breach of the Agreement, Summit had two options: "(1) it could have stopped performance and sued for total breach; or (2) it could have affirmed the contract by continuing to perform while suing in partial breach." *ARP Films, Inc. v. Marvel Entm't Group, Inc.*, 952 F.2d 643, 649 (2d Cir.1991); see also *Bigda v. Fischbach Corp.*, 898 F.Supp. 1004, 1011–12 (S.D.N.Y.1995). If Summit affirmed the contract, it would have been obligated to perform all of its obligations under the Agreement. See *ARP Films*, 952 F.2d at 649 (having affirmed the contract through performance of certain contractual duties and benefits, plaintiffs breached the contract when they failed to pay defendants the distribution proceeds owed under the contract). We need not resolve whether Summit actually affirmed the contract. If Summit did not affirm the contract, the agreement terminated June 2006. The Agreement would only exist post-December 31, 2006, if Summit did, in fact, affirm the Agreement, or extend it by the September notice. If Summit affirmed the contract, it breached by failing to pay the Guarantee in December.<sup>7</sup>

To the extent LPGA is seeking a determination that the Agreement with the parties ended no later than December 31, 2006,<sup>8</sup> its motion is granted.<sup>9</sup> However, as discussed *infra* Part III.b.ii., Summit is entitled to royalties under the Tail provision upon expiration or termination of the Agreement, even if the contract was terminated due to Summit's material breach. Thus, even if Summit breached the agreement in December, it would still be entitled to post-termination royalties. LPGA's motion to preclude the recovery of any post-December 31, 2006 damages is denied.

### iv. Permanent Injunction

\*6 Summit seeks a permanent injunction, which would prevent LPGA from using its own trademark. Summit concedes that it does not own the trademarks but contends that LPGA should be restrained from soliciting, negotiating or obtaining new licenses, other than through Summit. To obtain an injunction, a party must succeed on

the merits of its claim, as well as establish irreparable harm and inadequacy of legal remedies. *Ticor Title Insurance Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir.1999). LPGA contends that, even if Summit were to succeed on the merits, it would not be entitled to injunctive relief because Summit does not own the mark in question, and the only damage it has suffered is loss of royalties and equitable remedies are not warranted to protect what would be a purely monetary interest. (Def.'s Reply Summ. J. 15.)

In briefing this issue, Summit failed to make any specific showing as to irreparable harm or absence of an adequate remedy at law. The Complaint alleges that LPGA's merchandising and licensing of its own mark has caused Summit irreparable harm for which there is no adequate remedy at law. (Compl. ¶¶ 70, 72.) Specifically, Summit alleges irreparable harm in that LPGA has “destroyed [Summit's] relationships with whom it had the exclusive right to deal.” (Compl. ¶ 71.) Summit puts forth no factual evidence to support this allegation. Presumably, Summit's relationships were “destroyed” because LPGA prevented Summit from representing LPGA in negotiations after its June termination. This fact simply does not support the allegation and does not constitute a showing adequate to support injunctive relief. Summit has failed to sufficiently identify an irreparable harm, or even argue why the remedies at law are inadequate. Summit's claim for injunctive relief is dismissed.

#### v. Declaratory Judgment

The Court of Appeals for the Second Circuit has held that a declaratory judgment action should be entertained “(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” *Continental Casualty Co. v. Coastal Savings Bank*, 977 F.2d 734, 737 (2d Cir.1992). Where the declaratory judgment is duplicative of the breach of contract claim, neither of these purposes is served. *Id.*; see also *Intellectual Capital Partner v. Institutional Credit Partners LLC*, No. 08 Civ. 10580(DC), 2009 WL 1974392, at \*6 (S.D.N.Y. Jul.8, 2009) (declaratory judgment would “serve no useful purpose as the legal issues will be resolved by litigation of the breach of contract claim”); *Camofi Master LDC v. College Partnership, Inc.*, 452 F.Supp.2d 462, 480 (S.D.N.Y.2006) (dismissing the declaratory judgment claim where the “question of the parties' obligations to one

another will all be resolved in the context of [the breach of contract] claims”).

Despite Summit's allegations, no “cloud” exists over the parties' business activities. Summit has not acted as LPGA's representative since 2006; furthermore, Summit has chosen to litigate its rights through its breach of contract claim. *Intellectual Capital Partner*, 2009 WL 1974392, at \*6 (“Any ‘cloud of uncertainty’ regarding the scope and enforceability of the provisions will be dispelled in litigation of the breach of contract claim, which also provides for damages.”); *Camofi*, 452 F.Supp.2d at 480 (finding no cloud of uncertainty where “[t]he parties have already chosen to pursue their coercive remedies and [the party seeking a declaratory judgment] has not been left awaiting the initiation of legal proceedings while damages accrue”). The issue of LPGA's alleged breach, and the parties' obligations to each other, will be resolved in the context of the breach of contract claims. Summit's claim for a declaratory judgment is dismissed.

#### b. Summit's Motion for Partial Summary Judgment

\*7 Summit moves for partial summary judgment on three of LPGA's counterclaims: breach of fiduciary duty, conversion, and money had and received.

##### i. Breach of Fiduciary Duty

In New York, in order to establish a breach of fiduciary duty, there must be a fiduciary duty owed. *SCS Commc'ns, Inc. v. Herrick Co., Inc.*, 360 F.3d 329, 342 (2d Cir.2004). The Agreement contains explicit language that the parties are not fiduciaries. (Agreement ¶ 14) (“Nothing herein contained shall be construed to place the parties in the relationship of partners, joint ventures, principal and agent, or fiduciaries...”). “It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.” *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 658 N.E.2d 715 (1995). As a result, when the terms of the contract are clear and unambiguous, the contract should be enforced according to those terms. *Id.*

Courts have repeatedly applied this basic principle of contract law in the context of fiduciary disclaimers. See *Cooper v. Parsky*, 140 F.3d 433, 439 (2d Cir.1998) (dismissing the breach of fiduciary duty claim because the waiver was sufficiently explicit and the plaintiffs “may

not sue upon a duty that was expressly excluded from the Agreement”); *Seippel v. Jenkens & Gilchrist, P.C.*, 341 F.Supp.2d 363, 381–82 (S.D.N.Y.2004) (“Because contractual disclaimers of fiduciary duty are effective in New York, no fiduciary duty can arise from the relationship between the Seippels and Deutsche Bank.”); *Asian Vegetable Research and Dev. Ctr. v. Inst. of Int’l Educ.*, 944 F.Supp. 1169, 1178 (S.D.N.Y.1996) (finding no fiduciary relationship existed where the parties had entered into a contract that “clearly and unambiguously disclaims a fiduciary relationship”). Given that the Agreement contains a clear and unambiguous disclaimer of a fiduciary relationship, we find there was no fiduciary duty between the parties.

LPGA claims that it allowed Summit to continue to act on its behalf in a limited capacity after the June termination, and this post-termination relationship created a fiduciary duty that is not governed by the parties' Agreement. (Def.'s Opp. Summ. J. 1–2.) This argument is directly contradicted by LPGA's representations to the Court at oral argument that no relationship existed between the parties after LPGA's termination notice.<sup>10</sup> Even disregarding these representations, the evidence before us does not suggest that a new fiduciary relationship was created by the post-termination relationship. Drawing all inferences in favor of LPGA, the evidence suggests a situation analogous to *ARP Films, supra* Part. III. a. iii, where the non-breaching party allowed the breaching party to act in a limited capacity after the termination and, in doing so, affirmed the contract.<sup>11</sup> *ARP Films*, 952 F.2d at 647. As the evidence does not suggest the creation of a fiduciary duty; LPGA's counterclaim for breach of fiduciary duty is dismissed.

## ii. Conversion and Money Had and Received

\*8 LPGA's third and fourth claims are for conversion and money had and received, respectively. These claims relate specifically to the post-termination royalty payments, approximately \$224,000, which Summit is currently holding. Summit maintains that LPGA has no right to these payments under the Agreement and the claims should be dismissed. The Tail provision provides that upon termination or expiration of the Agreement, Summit will “continue to receive and retain all amounts which it is entitled to receive or retain ... for a period of three years following expiration or termination of this Agreement ... and, in addition, 30% of such amounts for

one (1) additional year thereafter, except as otherwise provided in this Section.” (Agreement ¶ 15.) LPGA argues that the Tail provision does not apply to terminations for material breaches, and, therefore, Summit has no right to post-termination royalties.

“Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.” *Beal Savings Bank v. Sommer*, 8 N.Y.3d 318, 325, 834 N.Y.S.2d 44, 865 N.E.2d 1210 (2007). “The court should ‘construe the agreements so as to give full meaning and effect to the material provisions.’” *Id.* (quoting *Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co.*, 3 N.Y.3d 577, 582, 789 N.Y.S.2d 461, 822 N.E.2d 768 (2004)). “A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties.” *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66, 869 N.Y.S.2d 511 (N.Y.App.Div.2008) (citing *Teichman v. Community Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 663 N.E.2d 628 (1996); *Morlee Sales Corp. v. Manufacturers Trust Co.*, 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 172 N.E.2d 280 (1961)). If the meaning of a contract is clear on its face, “a court is not free to alter the contract to reflect its personal notions of fairness and equity.” *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002).

The Tail provision applies following “expiration or termination” of the Agreement. (Agreement ¶ 15.) LPGA could only terminate for cause. (Agreement ¶¶ 16, 18.) The Agreement describes the “Events of Default” that would permit the parties to terminate the contract prior to expiration. (Agreement ¶ 16.) These events include default “in the payment of any sum due under the Agreement” and default “in the performance or observance of any of the material non-monetary terms, agreements, covenants or conditions of this Agreement.” (Agreement ¶¶ 16(a)(i)-(ii).) Upon the occurrence of an event of default, the non-defaulting party had the right to terminate the contract and was entitled to all remedies available at law or equity. (Agreement ¶ 16(b).) The Tail provision states that “[u]pon termination or expiration, all rights of SPI will terminate” except its rights to post-termination royalties. (Agreement ¶ 15.)

\*9 The clear language of the contract contemplates that termination will include termination for breaches of the Agreement. This interpretation of the Agreement is consistent with the overall intent of the parties to put in place certain protections for Summit, who was entering a risky venture as LPGA's representative. *See supra* Part III.a.i. Based on the unambiguous language of the Agreement, we find that "termination" in paragraph 15 includes termination for breaches of the Agreement. LPGA's counterclaims for conversion and money had and received are dismissed.<sup>12</sup>

LPGA's motion for partial summary judgment is denied in part, granted in part. LPGA's four motions *in limine* are now moot. Summit's motion for partial summary judgment is granted in its entirety. The parties are directed to submit to the Court in writing within thirty (30) days of this order a schedule for further proceedings in this case.

**SO ORDERED.**

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 2382405

#### IV. Conclusion

#### Footnotes

- 1 Summit states in its Opposition that it seeks unjust enrichment as to the "benefits accruing to LPGA *following* the termination of the Agreement." (Pl.'s Opp. Summ. J. at 27) (emphasis in original). The parties do not dispute this issue; LPGA's motion for summary judgment as to any unjust enrichment claims prior to June 2, 2006 is granted.
- 2 The parties do not dispute that New York law governs this diversity action.
- 3 The parties do not dispute that lost profits were within the contemplation of the parties when the contract was made.
- 4 As a result of this grant of partial summary judgment, LPGA's motions *in limine* Numbers 2 through 4 are moot.
- 5 As a result, LPGA's motion *in limine* Number 1 is now moot.
- 6 Summit's briefing focuses on the availability of post-termination royalties. However, given that Summit does argue in other instances that the Agreement continued past the LPGA's June termination notice, we find it necessary to determine whether the Agreement was terminated no later than December 31, 2006.
- 7 Summit concedes as much in its Supplemental Memorandum. (Pl.'s Supp. Mem. 3) ("As soon as [Summit] missed a guarantee payment, it could, under the contract, no longer be LPGA's licensing agent.").
- 8 The issue of whether the Agreement was breached prior to that date is not currently before us.
- 9 Summit does not allege that LPGA affirmed the contract after December 31, 2006.
- 10 "THE COURT: And then after the termination you worked together in some relationship which the nature of which is disputed.  
MR. RUBIN: Well, we didn't really work together. They were in the middle of negotiating with one party in England and they kept going and we kept trying to say to them would you please stop and give us the information on how to contact these people....  
THE COURT: You didn't tell them to cease and desist any activity.  
MR. RUBIN: We absolutely did. We will be able to show e-mails from Eve Wright, then head of licensing and general counsel very much telling them to stop that we don't want them doing this. We want to do it on our own." (T. at 19:22–20:18.)
- 11 In fact, LPGA makes this very argument in the context of its own summary judgment motion, in which it alleges that after affirming the contract Summit was obligated to perform all of its contractual obligations. (Def.'s Mem. Summ. J. 22–23.)
- 12 Having found the Tail provision applicable even in instances of termination for breach, Summit's failure to pay the December 2006 Guarantees is not relevant.

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by Inficon, Inc. v. Verionix, Inc., S.D.N.Y., April 19, 2016

390 F.Supp.2d 355  
United States District Court,  
S.D. New York.

THE UPPER DECK COMPANY, LLC, Plaintiff,

v.

BREAKEY INTERNATIONAL, BV, Defendant.

Breakey International, BV, Counterclaim Plaintiff,

v.

The Upper Deck Company,  
LLC, Counterclaim Defendant.

No. 03 Civ. 8978(MGC).

|  
Sept. 29, 2005.

### Synopsis

**Background:** Toy licensee brought action against toy manufacturer, seeking to rescind licensing agreement. Manufacturer filed counterclaims for lost royalties, unspent advertising dollars, and punitive damages for breach of contract. Licensee moved for partial summary judgment with respect to the counterclaims.

**Holdings:** The District Court, Cedarbaum, J., held that:

[1] manufacturer was not entitled to award for lost profits, and

[2] genuine issue of material fact existed as to amount of manufacturer's actual loss, precluding summary judgment for manufacturer on its claim seeking to recover unspent advertising dollars.

Motion granted in part and denied in part.

West Headnotes (7)

#### [1] Damages

 Breach of Contract

#### Damages

#### Loss of Profits

Under New York law, a claimant may recover lost profits for breach of contract if it can demonstrate that such damages were caused by the breach, that the alleged loss is capable of proof with reasonable certainty, and that the damages were within the contemplation of the parties at the time the contract was made.

5 Cases that cite this headnote

#### [2] Damages

#### Loss of Profits

Under New York law, to recover lost profits for breach of contract, both the existence and the amount of lost profits damages must be established with reasonable certainty, and although such damages need not be proven with mathematical precision, they must be capable of measurement based upon known reliable factors without undue speculation.

3 Cases that cite this headnote

#### [3] Damages

#### Loss of Profits

Under New York law, manufacturer of new entertainment product failed to establish amount of lost profits damages it suffered with reasonable certainty, and, thus, was not entitled to award of lost profits for licensee's alleged breach of licensing agreement, in light of insufficient historical record upon which to project future earnings.

4 Cases that cite this headnote

#### [4] Evidence

#### Reports

#### Federal Civil Procedure

#### Admissibility

Report of toy manufacturer's managing director of what a third party "informed" him was inadmissible hearsay and could not be considered on licensee's motion for summary judgment on manufacturer's claims for lost royalties, unspent advertising dollars, and punitive damages for breach of contract.

1 Cases that cite this headnote

[5] **Damages**

🔑 Loss of Profits

Under New York law, manufacturer of new entertainment product failed to establish amount of lost royalties it would have been entitled to under a hypothetical contract with terms identical to those in its licensing agreement with licensee, and, thus, was not entitled to award of lost royalties, beyond term of licensing agreement, based on licensee's alleged breach.

Cases that cite this headnote

[6] **Federal Civil Procedure**

🔑 Contract Cases in General

Genuine issue of material fact existed as to amount of toy manufacturer's actual loss, precluding summary judgment for manufacturer on its claim seeking to recover unspent portion of six million dollars licensee was required by licensing agreement to spend on marketing and advertising over the two year term of agreement.

2 Cases that cite this headnote

[7] **Damages**

🔑 Mode of Estimating Damages in General

Damages in a breach of contract action are generally measured by the non-breaching party's actual loss.

2 Cases that cite this headnote

**Attorneys and Law Firms**

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*OPINION*

CEDARBAUM, District Judge.

The Upper Deck Company, LLC (“Upper Deck”) has moved for partial summary judgment dismissing the counterclaims of Breakey International, BV (“Breakey”) for lost royalties, unspent advertising dollars, and punitive damages for breach of contract. At oral argument on February 2, 2005, summary judgment was granted to Upper Deck dismissing Breakey's counterclaim for punitive damages. For the reasons that follow, the balance of Upper Deck's motion is granted in part and denied in part.

**BACKGROUND**

This opinion assumes familiarity with the earlier summary judgment opinion in this case, *Upper Deck Co. v. Breakey Int'l, BV*, No. 03 Civ. 8978(MGC), 2004 WL 2980190 (S.D.N.Y. Dec.22, 2004).

Breakey is a small Dutch company that developed a toy made of small plastic keys and a related online game called “Breakey.” In a contract dated “[a]s of November 15, 2002,” (the “Agreement”), Breakey granted Upper Deck an exclusive two-year license “to use, copy, promote, distribute, market and sell” the Breakey product worldwide, excluding Brazil, Venezuela, and the Benelux countries (Belgium, the Netherlands, and Luxembourg). In exchange for these rights, Upper Deck agreed, among other things, (i) to launch the product in reasonable commercial quantities in the United States, the European Union, and Japan (the “Material Territories”) by May 2003 and in all other territories by November 2003, (ii) to spend a minimum of \$1 million on marketing and advertising during each of the two years of the Agreement in each of the three Material Territories (for a total of \$6 million), and (iii) to pay Breakey royalties equal to ten percent of “Net Sales.” The Agreement further required Upper Deck to pay Breakey a \$2.5 million “nonreturnable Minimum Guarantee” at the commencement of each contract year as an advance on royalties to be earned during that year.

Upper Deck sued to rescind the Agreement on November 13, 2003, two days before its obligation to pay the second \$2.5 million minimum guarantee came due. Breakey counterclaimed for breach of contract. On October 13, 2004, Breakey moved for partial summary judgment dismissing the claims in Upper Deck's Third Amended Complaint and granting certain of its own counterclaims. At oral argument on Breakey's motion, I held that Upper Deck had breached the Agreement by failing to make the second \$2.5 million minimum guarantee payment. Summary judgment was granted to Breakey on that portion of its counterclaim, and judgment will be entered pursuant to Fed.R.Civ.P. 54(b). I also held that there is a genuine issue of disputed fact as to whether Upper Deck's alleged failure to spend the marketing and advertising minimums provided for under the Agreement was a breach of contract, and that even if such a failure did constitute a breach, there is no evidence that it caused Breakey to suffer loss on a dollar-for-dollar basis.

Upper Deck now moves for partial summary judgment dismissing certain damages Breakey seeks in connection with its breach of contract counterclaim. Specifically, Upper Deck moves to dismiss Breakey's claims for lost royalties in the second year of the Agreement, lost royalties \*358 under a hypothetical future two-year license agreement, and the unspent portion of the \$6 million Upper Deck was required under the Agreement to spend on marketing and advertising.

## DISCUSSION

### A. Summary Judgment Standard

A motion for summary judgment shall be granted if the court determines “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In deciding whether a genuine issue exists, the court must “examine the evidence in the light most favorable to the party opposing the motion, and resolve ambiguities and draw reasonable inferences against the moving party.” *In re Chateaugay Corp.*, 10 F.3d 944, 957 (2d Cir.1993).

The test for granting summary judgment is similar to the standard for a directed verdict. *Anderson v. Liberty Lobby*,

*Inc.*, 477 U.S. 242, 250-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the evidence is such that a reasonable finder of fact could return a verdict for the nonmoving party, then there is a genuine factual dispute and summary judgment should not be granted. *Id.*; *Richardson v. Coughlin*, 763 F.Supp. 1228, 1234 (S.D.N.Y.1991). However, if after discovery the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to one of the claims, and on which that party will bear the burden of proof at trial, summary judgment should be granted on that claim. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548; *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309 (2d Cir.1994). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548.

### B. Breakey's Claim for Lost Royalties

[1] [2] Under New York law, a claimant may recover lost profits for breach of contract if it can demonstrate that such damages were caused by the breach, that the alleged loss is capable of proof with reasonable certainty, and that the damages were within the contemplation of the parties at the time the contract was made. *Kenford Co., Inc. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 493 N.E.2d 234 (1986); *Galloping, Inc. v. QVC, Inc.*, 27 F.Supp.2d 466, 468 (S.D.N.Y.1998). Both the existence and the amount of lost profits damages must be established with reasonable certainty, and although such damages “need not be proven with ‘mathematical precision,’ they must be ‘capable of measurement based upon known reliable factors without undue speculation.’” *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir.2000) (quoting *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 403, 604 N.Y.S.2d 912, 624 N.E.2d 1007 (1993)).

In this case, the Agreement between Upper Deck and Breakey specifically provided for the payment of profits in the form of royalties to Breakey. The Agreement also assured Breakey \$2.5 million in royalties each year, regardless of Upper Deck's sales performance. Therefore, in order to establish the existence of damages and defeat summary judgment, Breakey must come forward with evidence sufficient to demonstrate with reasonable certainty that Upper Deck would have generated sales in excess of \$25 million annually during the term of the Agreement.

**\*359** 1. *Lost Royalties In the Second Year of the Agreement*

[3] Breakey seeks to recover royalties it claims it would have earned in the second year of the Agreement had Upper Deck fully performed its obligations. In support of this claim, Breakey submits the report of Marion B. Stewart, an economist who has for the past seventeen years been employed by a company that provides economists as witnesses in lawsuits. Stewart opines in his report that “[a]s a result of failing to launch the product on the agreed-upon schedule and not expending the contractual minimum advertising and marketing costs, Upper Deck caused Breakey to lose royalty revenues” in the amount of \$9.4 million in the second year of the Agreement. This would entitle Breakey to \$6.9 million beyond the \$2.5 million minimum guarantee.

Stewart relies for this opinion on an October 2003 invoice reflecting a sale of 15,000 boxes of the Breakey product to Studio 100, then Breakey's exclusive licensee in the Benelux countries. Stewart states that “[a]ccording to Breakey,” Studio 100 resold the boxes in Belgium during the period from December 2003 through May 2004. Breakey concedes that Studio 100 terminated its agreement with Breakey in early June 2004, and that there were no further sales in Belgium. Nevertheless, Stewart doubles the 15,000 boxes to reach a hypothetical sales figure of 30,000 boxes a year. “[S]caling the 30,000 figure up” to an assumed target population of children ages six to twelve years old in the Material Territories, Stewart multiplies that number by an average wholesale price of \$32 per box—a price he assumes based on “a number of sources that indicate actual or projected wholesale revenues in the range of \$29 to \$54 per box.” The “sources” Stewart identifies are a 2002 “forecast” of sales by Diset, a Spanish distributor with whom Breakey never contracted, a “discussion with Rob Sluijs” about Breakey's revenues in the Netherlands, and three Upper Deck documents, submitted by Breakey after oral argument, labeled “Q1 Projections,” “Draft” “Preliminary Profit & Loss Account for 3 months from Launch Date-German launch,” and “Draft” “Projected Income Statement-Breakey.” After accounting for “the timing of the revenues,” Stewart ultimately concludes that “lost royalties to Breakey total at least \$8.0 million [in the Material Territories] during the second year of the contract.”

Stewart applies the same analysis to thirteen additional countries he identified with “per-capita income levels and rates of Internet use at least as high as those at the lower end of the list in the Material Territories,” and opines that sales into these other territories would have resulted in an additional \$1.4 million in lost royalties to Breakey in the second year of the Agreement.

At oral argument and again by order dated March 1, 2005, I directed Breakey to identify from among the documents it submitted in opposition to Upper Deck's motion for partial summary judgment the admissible evidence showing the basis for its assertion that sales by Studio 100 in Belgium took place over a six-month period. It could not. Instead, it proffered new evidence in the form of a declaration by Rob Sluijs, Breakey's managing director. Sluijs states that he “believe[s]” Studio 100 sold all 15,000 boxes of the Breakey product in Belgium between December 2003 and early June 2004 because (i) Breakey's manufacturer in China delivered the boxes to Studio 100 in December 2003, (ii) Studio 100 stopped selling the product in early June 2004 when it cancelled the license agreement, and (iii) Studio 100 did not exercise its right under **\*360** the license agreement to return a percentage of unsold products to Breakey.

[4] According to Sluijs, his belief that Studio 100 sold all 15,000 boxes in six months is “further corroborated” by Studio 100's report to Breakey at an April 2003 meeting that it had already sold seventy percent of the inventory after three months of retail sales in Belgium. Sluijs also states that Studio 100 “informed us that [it] believe[s] all of the [15,000] boxes were sold, but [it] cannot be certain because the keys were sold in a joint venture with Het Laatste Nieuws.” Sluijs's report of what a third party, Studio 100, “informed” him is inadmissible hearsay and cannot be considered on a motion for summary judgment. *Rubens v. Mason*, 387 F.3d 183, 189 (2d Cir.2004); *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir.2004). Breakey has offered no testimony from Studio 100 to establish its actual sales experience in Belgium.

In his original and supplemental reports, Stewart points to other data that he contends support estimates of sales in excess of \$25 million per year. These are: (i) a comment by Upper Deck's CEO Richard McWilliam to Sluijs over dinner on November 21, 2002 that the product would generate \$120 to \$180 million in worldwide sales each year, (ii) a June 2003 internal Upper Deck document titled

“Brand Strategy” for the United States, which notes a “[w]orldwide [l]aunch” of September 15, 2003 and lists among “[b]rand [o]bjectives” “[g]enerat[ing] \$50MM in revenue by December 31, 2004,” (iii) BreaKey’s own sales in the Netherlands during twelve weeks between April 2002 and July 2002, (iv) Diset’s 2002 “forecast,” (v) sales by Upper Deck in the United States during the four months from December 2003 through March 2004, and (vi) sales by Upper Deck in Germany from October through December 2003.

Stewart’s damages calculations are based on too many unsupportable assumptions to establish the existence of lost royalties with the reasonable certainty required. While Upper Deck may be, as BreaKey argues, “an experienced player in the collectible toy market,” this is a new entertainment product that has never before been sold in thirty-five of the thirty-seven countries for which Stewart projects sales. See *Schonfeld*, 218 F.3d at 172 (noting that “evidence of lost profits from a new business venture receives greater scrutiny because there is no track record upon which to base an estimate” of lost profits). The data on which Stewart relies provide an insufficient historical record upon which to project future earnings. See *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 333 (2d Cir.1993) (holding plaintiff could not extrapolate seven years of lost profits from four months of sales of new product); *Int’l Telecom, Inc. v. Generadora Electrica del Oriente*, No. 00 Civ. 8695(WHP), 2004 WL 784941, at \*4 (S.D.N.Y. Apr.13, 2004) (denying lost profits where plaintiff “[sought] to project eight years of lost profits based on only two months revenues in a new business venture”). BreaKey’s reliance on *Galloping, Inc. v. QVC, Inc.*, 27 F.Supp.2d 466 (S.D.N.Y.1998), is misplaced. In that case, plaintiff presented evidence of sales over a two-and-a-half-year period in the relevant market. *Id.* at 468; see also *Care Travel Co. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 994 (2d Cir.1991) (evidence of actual sales over nearly three-year period in the relevant market).<sup>1</sup>

\*361 Nor is there any basis in the record for Stewart’s assumption that short periods of sale in Belgium, the Netherlands, the United States and Germany can be extended over longer periods and repeated in countries as varied as Estonia, Portugal and Japan. See *David v. Glemby Co.*, 717 F.Supp. 162, 169 (S.D.N.Y.1989) (holding that plaintiff’s successful franchise business in Europe could not be the basis for establishing that

he would have been equally successful in the United States). “Indeed, New York courts have been especially loath to award lost profits for entertainment ventures,” because “[t]he heterogeneity of entertainment products, and the volatility of consumer preferences ... increases the difficulty of predicting future hits and misses for even the most savvy of marketers and investors.” *Schonfeld v. Hilliard*, 62 F.Supp.2d 1062, 1076 (S.D.N.Y.1999) (collecting cases), *aff’d in part and reversed on other grounds*, 218 F.3d 164 (2d Cir.2000).

## 2. Lost Royalties Beyond the Term of the Agreement

BreaKey also seeks to recover royalties it claims it would have earned under a future license agreement in the two years following expiration of the term of the Agreement on November 14, 2004. BreaKey claims these damages arise from its “inability to contract upon favorable terms with another licens[ee] ... because of Upper Deck’s wrongful conduct.”

In calculating BreaKey’s lost royalties for the two years beyond the term of the Agreement, Stewart “assum[es] that Upper Deck’s actions have precluded BreaKey from entering another two-year contract on similar terms to the original Upper Deck/BreaKey contract (with Upper Deck or another licensee).” Based on that assumption and on the same analysis used to calculate lost royalties under the Agreement with Upper Deck, Stewart concludes that “additional lost royalties to BreaKey would total \$19.6 million.”

[5] “[A]n expert’s opinion is not a substitute for a plaintiff’s obligation to provide evidence of facts that support the applicability of the expert’s opinion to the case.” *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 69 F.Supp.2d 571, 579 (S.D.N.Y.1999), *aff’d*, 257 F.3d 256 (2d Cir.2001). There is no factual basis in the record to support Stewart’s assumption that Upper Deck’s conduct prevented BreaKey from entering into another contract on terms similar to the Agreement with Upper Deck. Rather than point to admissible evidence in the record that would defeat summary judgment, BreaKey, in its brief in opposition to Upper Deck’s motion and again at oral argument, simply offered as a matter of logic that “no company will license a product if that product’s patentability is being challenged, if that product has been dumped on the market and then withdrawn, if a major former licensee of the product is defaming the product and

the product's owners, and if they might thereby be dragged into litigation.”

\*362 After oral argument, Breakey attempted to proffer new evidence in the form of a declaration from a potential licensee with whom it had discussions in June 2004 following termination of the Agreement. Because Breakey refused prior to this motion to provide Upper Deck with the names of potential licensees with whom it was negotiating, the declaration will not be considered here. Breakey cannot shield itself from discovery and then use the same information it sought to withhold as a sword to defeat summary judgment.

Because Breakey's claim for lost royalties under a hypothetical contract for November 2004 to November 2006 with terms identical to those in the Agreement with Upper Deck is speculative, the claim must be dismissed.

*C. Breakey's Claim for \$6 Million  
in Unspent Advertising Dollars*

Finally, Breakey seeks to recover the unspent portion of the \$6 million Upper Deck was required to spend on marketing and advertising over the two-year term of the Agreement. Breakey argues that “a jury could find that Breakey will have to spend the \$6 million itself to market the product, and thus award that amount to Breakey.”

Footnotes

- 1 Breakey also relies on internal Upper Deck manufacturing schedules and “projections” to support its lost royalties claim. However, the cases it cites for the proposition that a defendant's own projections may support an award of lost profits are unavailing because the projections in those cases were accompanied by and based on a more robust record of sales within the relevant market. See *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1037, 1038 (2d Cir.1992) (considering documents provided by franchisor to franchisee showing both projected and actual sales of Sir Speedy franchisees); *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 852 (2d Cir.1987) (holding jury could have calculated plaintiff's profits based on undisputed evidence of full year of sales, and on projection which defendant itself found sufficiently credible to cause it to terminate its agreement with plaintiff and establish its own military sales representative).

[6] [7] As previously noted, Breakey's own motion for summary judgment on this claim was denied. The damages in a breach of contract action are generally measured by the non-breaching party's actual loss. See Restatement (Second) of Contracts § 347. Here, the actual loss to Breakey was the value to the Breakey brand that the advertising would have generated. That number is a disputed fact. Accordingly, it is inappropriate to preclude Breakey on summary judgment from proving the amount of that actual loss.

CONCLUSION

For the foregoing reasons, Upper Deck's motion for partial summary judgment dismissing Breakey's claims for lost royalties during and after the term of the Agreement is granted. Upper Deck's motion to dismiss Breakey's claim for damages resulting from an alleged failure to spend the required advertising funds is denied.

SO ORDERED.

All Citations

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2006 WL 5230033

Only the Westlaw citation is currently available.

United States District Court,  
E.D. New York.

Joseph YACCARINO and  
Tracy Yaccarino, Plaintiffs,

v.

MOTOR COACH INDUSTRIES,  
INC., et al., Defendants.

No. 03-CV-4527 (CPS).

|  
Sept. 29, 2006.

Named Expert: Peter Schutz.

#### Attorneys and Law Firms

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#### MEMORANDUM AND ORDER

[ROANNE L. MANN](#), United States Magistrate  
Judge.

\*1 Currently pending before this Court, on a referral from the Honorable Charles P. Sifton, are two sets of motions: one by defendant Isringhausen, Inc. (“defendant” or “Isringhausen”) to preclude expert testimony by a mechanical engineer retained by plaintiffs Joseph Yaccarino (“Yaccarino” or “plaintiff”) and his wife Tracy (collectively, “plaintiffs”); and a cross-motion by plaintiffs for an order sanctioning defendant for allegedly violating its discovery obligations. For the reasons that follow, defendant’s motion for a preclusion order is granted and plaintiffs’ cross-motion for sanctions is denied.

#### INTRODUCTION

This litigation arises from an incident that occurred on March 21, 2003, while Yaccarino, a bus operator for the New York City Transit Authority (“NYCTA”), was driving a municipal bus, without passengers, to a depot on Staten Island. *See* Transcript of Deposition of Joseph Yaccarino dated December 21, 2004 (“Yaccarino Tr.”),<sup>1</sup> at 94. According to Yaccarino, as he turned the bus onto the Richmond Avenue exit from the Staten Island Expressway, the driver’s seat he occupied detached from its mounting and began toppling to the right. *See id.* at 94-95, 102. While the seat leaned, loose, beneath him, Yaccarino, held in place by his seatbelt, managed to stop the bus, at which point the seat fell to the floor. *See id.* at 102. Yaccarino contends that after his fall, he observed that the tracks at the base of the seat, which were used for adjusting the seat forward and backward, were bent and deformed, especially on the left side. *See id.* at 105-07. He claims to have sustained a debilitating back injury as a result of the mishap. *See id.* at 111, 141-42.

Immediately after the incident, Yaccarino radioed the bus depot; Kevin Kolonkowski, an NYCTA investigator, reported to the scene, where he took photographs of the bus operator’s seat. *See* Transcript of Deposition of Kenneth Kolonkowski dated December 10, 2004 (“Kolonkowski Tr.” [Brown Ex. J] ),<sup>2</sup> at 7-10, 20, 26, 33. According to Kolonkowski, he noticed that four bolts used to fasten the driver’s seat to its frame were missing, and he prepared an incident report in which he attributed the fall to the absence of the bolts. *See* On-the-Job Injury Form (Brown Ex. P); Kolonkowski Tr. at 25-26, 36, 38, 54, 63-64, 83-84.

On August 11, 2003, plaintiffs commenced this action in state court against Motor Coach Industries, Inc. (“MCI”), the manufacturer of bus # 1898, the bus involved in the incident. Following removal of the action to this Court, plaintiffs added Isringhausen as a defendant, on the theory

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

that Isringhausen manufactured the allegedly defectively designed driver's seat.<sup>3</sup> The amended complaint asserts claims for negligence, strict liability, and, on behalf of Tracy Yaccarino, lack of consortium. *See generally* Amended Complaint (Brown Ex. A). A protracted period of discovery ensued, during which plaintiffs dropped their claims against MCI.

\*2 In connection with the litigation, plaintiffs hired Peter Schutz, a mechanical engineer, to render an expert opinion as to why the driver's seat fell from its mounting. In two reports, Schutz concluded that the seat came loose due to the lateral forces acting on it as Yaccarino leaned into a sharp right curve while driving along the exit ramp. *See* Report No. 05-0641-P dated August 15, 2005 ("Schutz Report" [Brown Ex. F; Brenner Ex. D] ), at 3-4; Supplemental Report No. 05-0641-P dated December 15, 2005 ("Schutz Supplemental Report" [Brown Ex. G; Brenner Ex. E] ), at 3. According to Schutz, the precise cause of the seat's failure likely involved one of the slide tracks comprising the rail system that allowed the driver's seat to adjust forward and backward to accommodate drivers of varying sizes. *See* Schutz Report at 3. Schutz opined that Yaccarino's weight distribution on the seat, as the bus rounded the curve of the exit ramp, could have resulted in stress on the left slide track sufficient to pull the track mechanism apart, disconnecting the seat from the floor and causing it to fall. *See* Schutz Supplemental Report at 3. Schutz concluded that the steel used to manufacture the slide track had been unable to withstand the lateral load applied to it during the incident, and that this deficiency constituted a design defect responsible for the seat's failure. *See* Schutz Report at 4; Schutz Supplemental Report at 4.

Defendant has moved to preclude Schutz's testimony, on the grounds that he does not qualify as an expert and that his opinions and methodology are unreliable. *See generally* Brief in Support of Motion of Defendant Isringhausen, Inc. to Preclude Expert Testimony Under [Federal](#)

[Rules of Evidence 702](#) ("Def. *Daubert* Br.").<sup>4</sup> Plaintiffs' cross-motion for sanctions, and their opposition to defendant's motion to preclude Schutz's testimony, both advance the same central argument: that defendant violated its discovery obligations, thereby causing plaintiffs prejudice. To remedy this alleged violation, plaintiffs ask the Court to sanction defendant and to deny defendant's preclusion motion, which, plaintiffs claim, unfairly "seeks to reap the rewards of their blatant disregard of the discovery rules of this Court." Brief in Support of Cross-Motion of Plaintiffs' Joseph Yaccarino and Tracy Yaccarino to Impose Sanctions on Defendant Isringhausen, Inc. ("Pl. Sanctions Br."), at 18;<sup>5</sup> *see* Brief in Opposition to Defendant's Motion to Preclude Plaintiffs' Expert Testimony Pursuant to Federal Rules of Evidence ("FRE") 104(a), 403 and 702 ("Pl. *Daubert* Br."),<sup>6</sup> at 15 (arguing that defendant "should not be allowed to profit from their flagrant willful disregard of these rules."). Not surprisingly, defendant denies that it violated its discovery obligations; in addition, defendant asks the Court to sanction plaintiffs' counsel, under [Rule 11 of the Federal Rules of Civil Procedure](#), for arguments the defense characterizes as frivolous. *See generally* Brief in Support of Defendant's Opposition to Plaintiff's Cross Motion for Sanctions/Defendant's Request for Imposition of [Rule 11](#) Sanctions ("Def. Sanctions Brief").<sup>7</sup>

### I. THE DISCOVERY ISSUES

\*3 In view of the fact that plaintiffs have advanced the discovery issues as both a shield and a sword, the Court will first review the factual backdrop of the pending discovery dispute, will dispose of the cross-motions for sanctions, and will then address the merits of defendant's motion to preclude. As demonstrated below, and by a fair reading of the record, plaintiffs have identified no discovery violations by defendant, let alone ones that would warrant the imposition of monetary sanctions and/

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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or the remedial denial of defendant's preclusion motion.

**A. Factual Background**

At some point prior to the filing of this lawsuit, the NYCTA replaced the seat involved in the incident (hereinafter “the subject seat”), and its whereabouts remain unknown. *See* Def. *Daubert* Br. at 2. The disappearance of the seat has created evidentiary problems for plaintiffs, who are proceeding on the theory that the subject seat was manufactured by Isringhausen<sup>8</sup> and that the particular model was 6801/517. *See* Pl. Sanctions Br. at 10. Delays in the production of documents by non-party witness NYCTA frustrated plaintiffs' efforts to identify the subject seat. *See id.* To eliminate any resulting prejudice to plaintiffs, this Court granted them numerous extensions of both the fact discovery cut-off-which was originally set for July 30, 2004<sup>9</sup>-and plaintiffs' deadline for serving expert disclosure.<sup>10</sup>

The evidence concerning the identification of the subject seat is in many respects conflicting. In the earliest stages of this litigation, defendant MCI (the manufacturer of NYCTA bus # 1898) served its automatic disclosure, including a “Final Vehicle Record” pertaining to MCI's sale of the bus identified as “Fleet No. 1898” to the NYCTA; the document, which appears to have been prepared in September 1998, lists what are designated as “addendums” to a prior sales order, including the notation “DRIVERS SEAT-ISRINGHAUSEN 6800/338.” *See* MCI Final Vehicle Record (Brown Ex. D), at 4. Much later in the litigation, the NYCTA produced a copy of its contract for the purchase of 120 buses; the technical specifications, revised as of 4/18/97, listed three approved driver's seats: the Isringhausen 6801/517, the Recaro B100, and the USSC 9100. *See* NYCTA Contract B31153 (Brenner Ex. I). From these documents, the parties draw different conclusions concerning the operator's seat with which Bus # 1898 was equipped at the time of its delivery to the NYCTA. Plaintiffs, relying in part on the contract specifications, contend that the seat was an Isringhausen 6801/517.

*See* Pl. Sanctions Br. at 10. Defendants, citing the Final Vehicle Record, argue that the original seat was an Isringhausen 6800/338. *See* Def. Sanctions Br. at 4, 6.

Further fueling the parties' debate are additional documents produced by the NYCTA in 2005, and testimony elicited from various of its employees, concerning repairs to and/or modifications of the operator's seat. Defendant relies on an NYCTA work order from November 3, 1999, which reflects that the operator's seat on bus # 1898 was broken and could not be repaired, and that a replacement seat was thereafter sought and installed. *See* NYCTA Maintenance Work Order 0092635-1 (Brown Ex. I); Transcript of Deposition of Charles Gugliotta dated January 14, 2005 (“Gugliotta Tr.” [Brown Ex. N]), at 58-59, 85-88. The records do not disclose, and the NYCTA witnesses could not recall, the brand of the replacement seat. *See id.* at 59, 88.<sup>11</sup> Citing only the Schutz Supplemental Report and portions of the record not submitted to the Court, plaintiffs assert that the original driver's seat was never replaced. *See* Pl. Sanctions Br. at 10, 16; Pl. Sanctions Reply at 8-9.

\*4 Plaintiffs' theory that the subject seat was an Isringhausen model 6801/517 is a relatively recent development, having first surfaced after the close of fact discovery in 2005. *See* Pl. Sanctions Br. at 16. The seeds for this theory had been sown at a deposition of Roger Geving, an Isringhausen employee, on January 6, 2005. During the deposition, plaintiffs' counsel showed Geving two pages of photocopies of photographs and asked him to identify the seat depicted therein. *See* Transcript of Deposition of Roger Geving dated January 6, 2005 (“Geving Tr.” [Brenner Ex. G]), at 51-52. Geving responded that “[t]hat looks like an Isringhausen model 6801/517 seat.” *Id.* However, no attempt was made at the Geving deposition to connect the photocopies to the subject seat. Indeed, when shown the same photocopies, neither Yaccarino, nor Kolonkowski (the NYCTA investigator who photographed the subject seat after the incident), nor Vincent Gambardello (the

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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NYCTA employee who removed the subject seat after the incident), could confirm that the seat featured therein was the seat involved in the fall. *See* Yaccarino Tr. at 144-47; Kolonkowski Tr. at 31-33; Gambardello Tr. at 27-28.

In May 2005, after the NYCTA produced a series of original color photographs of (among other things) a bus operator's seat, the parties deposed Denis Kearney, the NYCTA employee who had retrieved the photographs from storage. The photographs appear to be the originals of some of the photocopies previously shown to the witnesses. *See* Brenner Exs. L, O. Kearney, who had no personal knowledge as to what was depicted in those color photographs, explained that after looking randomly in various boxes, he had found the photos in an envelope with the name of a dispatcher and with a folder reflecting Yaccarino's name. *See* Transcript of Deposition of Denis Kearney dated May 20, 2005 (“Kearney Tr.” [Brown Ex. L]), at 9-12.

Fact discovery closed on June 30, 2005. *See* 5/9/05 Calendar Order. Despite the Court's frustration with the lengthy history of discovery delays, plaintiffs were granted several additional extensions of time to file their expert disclosure. *See* 6/27/05 Calendar Order; 7/1/05 Endorsed Order; 8/8/05 Order. Even after service of Schutz's Report, dated August 15, 2005, the Court reopened expert disclosure at plaintiffs' request, to allow them to serve a supplemental expert report. *See* 11/22/05 Calendar Order. The Court did so based in part on plaintiffs' counsel's claim that he and his expert had only recently come to the conclusion that the subject seat was a model 6801/517. *See* 11/4/05 Letter to the Court from Stephen G. Brenner, at 2; *see also* Pl. Sanctions Br. at 16. Crediting defendant's representation that that model had been discontinued and that defendant thus could no longer furnish an exemplar, the Court denied plaintiffs' newest request, made for the first time on November 8, 2005, for an order directing defendant to produce an exemplar of that model. *See* 11/22/05 Calendar Order; Transcript of 11/22/05 Proceeding (“11/22/05 Tr.”) at 8-9; 11/8/05 Letter to the

Court from Stephen G. Brenner (“11/8/05 Brenner Letter”), at 2.

\*5 Having obtained an exemplar from another source, plaintiffs served their supplemental expert disclosure in December 2005, and defendant moved two months later to preclude Schutz's testimony. In April 2006, plaintiffs opposed defendant's motion and simultaneously cross-moved for an order sanctioning defendant for alleged violations of its discovery obligations. Those filings represented the first time that plaintiffs challenged the sufficiency of defendant's responses to plaintiffs' discovery demands.

### B. Analysis

Though replete with rhetoric, plaintiffs' submissions are largely devoid of specific supporting factual allegations. Distilled to their essence, plaintiffs' papers appear to advance two arguments: that defendant failed to supplement its answers to interrogatories and automatic disclosures, in which it had denied knowledge of the make and model of the subject seat, *see* Pl. Sanctions Br. at 15, 17; and that defendant “chose to ignore plaintiffs' ongoing demands” for “missing discovery information.” *Id.* at 18. Both of these arguments are unavailing.

As an initial matter, plaintiffs' motion fails to include the requisite certification that plaintiffs' counsel conferred in good faith with opposing counsel before seeking judicial intervention on this discovery matter. *See* Fed.R.Civ.P. 37(a)(2)(A). In addition to ignoring this requirement, plaintiffs made no application for relief at any time during the discovery period.<sup>12</sup> On this ground alone, the Court would be entitled to deny plaintiffs' motion for sanctions.

Moreover, plaintiffs' challenge to defendant's failure to supplement is predicated on a misinterpretation of the record. Plaintiffs seek to create a conflict where none exists—i.e., between defendant's interrogatory responses in November 2004 (wherein defendant denied knowledge of

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

the incident or subject seat)<sup>13</sup> and defendant's automatic disclosure served in December 2004 (wherein defendant stated that it might rely on documents pertaining to Isringhausen model 6800/338).<sup>14</sup> Significantly, and understandably, defendant reiterated in its automatic disclosure that it had no information concerning the alleged incident apart from the allegations in plaintiffs' complaint and the prior disclosures of co-defendant MCI. *See* Def. Automatic Disclosure at 2.<sup>15</sup> Defendant's reference to seat model 6800/338 in its automatic disclosure was expressly predicated on MCI's disclosures and was made "[w]ithout admitting any involvement in plaintiff's incident ...." Def. Automatic Disclosure at 2. Defendant's recognition that the bus may originally have been outfitted with a model 6800/338 seat did not constitute an admission that that model, or any Isringhausen seat, was involved in the incident. Rather, it was plaintiffs who apparently mistakenly assumed that the subject seat was a model 6800/338. *See* Pl. Sanctions Br. at 15.

Equally unavailing is plaintiffs' claim that defendant's witness, Roger Geving, "positively identified the subject seat as Isringhausen model 6801/517." Pl. Sanctions Br. at 15. In fact, although Geving examined photocopies that appeared to him to depict model 6801/517, the photocopies had not been authenticated or in any way tied to the seat that failed. Indeed, neither Yaccarino nor the NYCTA employees who photographed or removed the subject seat following the incident could confirm that the photocopies shown to Geving depicted the seat at issue here. To be sure, the subsequent deposition of the NYCTA employee who located the corresponding original color photographs provided circumstantial evidence that tended to connect the photos to the subject seat; nevertheless, defense counsel's examination of that witness raised questions about the integrity of the NYCTA's recordkeeping process and suggested that the photos might relate to an entirely different incident. *See* Kearney Tr. at 21-25.

\*6 Consequently, defendant has never conceded that an Isringhausen model 6801/517 was involved in Yaccarino's fall. On the contrary, throughout this litigation defendant has maintained that the subject seat has not been conclusively identified as *any* Isringhausen product.

[Rule 26 of the Federal Rules of Civil Procedure](#) provides, in pertinent part, that parties have a duty to update their automatic disclosures and/or discovery responses if they later learn that such disclosures are materially incomplete or incorrect. *See* [Fed.R.Civ.P. 26\(e\)\(1\), \(2\)](#). Pursuant to [Rule 37](#), the Court may sanction a party that fails to supplement its disclosures or otherwise fulfill its discovery obligations under [Rule 26](#). *See* [Fed.R.Civ.P. 37\(c\)\(1\)](#). Here, however, plaintiffs have not established that defendant acquired information that rendered its interrogatory responses or automatic disclosures "incomplete or incorrect," thereby requiring amendment or supplementation under [Rule 26\(e\)](#).

In addition, [Rule 26](#) does not require supplementation of an interrogatory response if the corrective information has "otherwise been made known to the other part[y] during the discovery process or in writing." [Fed.R.Civ.P. 26\(e\)\(2\)](#). Upon reviewing MCI's Final Vehicle Record, defendant noted in its automatic disclosures that it might rely on documents pertaining to model 6800/338. *See* Def. Automatic Disclosure at 2. To the extent that that reference could be deemed to vary from defendant's interrogatory responses one month earlier, the latter disclosure constituted sufficient corrective information under [Rule 26](#).<sup>16</sup>

Plaintiffs seem to imply that even in the absence of a specific request for documents pertaining to model 6801/517, defendants were obligated to supplement their automatic disclosure to produce such records. However, pursuant to [Rule 26\(a\)\(1\)\(B\)](#), the only documents that a party must disclose "without awaiting a discovery request" are those "that the disclosing party may use to support its claims or defenses, unless solely for impeachment."

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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[Fed.R.Civ.P. 26\(a\)\(1\)\(B\)](#). Plaintiffs do not and cannot contend that defendant plans to use documents concerning model 6801/517 to support its defenses; on the contrary, defendant denies that the bus was ever equipped with such a seat. That documents concerning model 6801/517 might be useful to *plaintiffs* in proving *their* claims does not trigger the obligation of automatic disclosure under [Rule 26](#). See [Fed.R.Civ.P. 26](#) advisory committee note (2000 amendment) (explaining that, as a result of the 2000 amendment to [Rule 26\(a\)\(1\)](#), “[a] party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.”).<sup>17</sup> Had plaintiffs wished to obtain such records, they could and should have made timely demands for them. Plaintiffs' failure to do so is thus a problem of their own making.

In an effort to shift the blame to defendant, plaintiffs contend that “defense counsel defied the Rules of this Court and chose to ignore plaintiffs' ongoing demands” for discovery in and after July 2005. Pl. Sanctions Br. at 18. Plaintiffs refer to their letter to the Court dated November 8, 2005, in which plaintiffs claim to have “again demanded that defendant, ISRINGHAUSEN produce an exemplar of seat 6801/517 along with its specifications.” *Id.* at 18; see 11/8/05 Brenner Letter at 2. However, despite the suggestion in plaintiffs' brief that they had made an even earlier demand for an exemplar and specifications, the record reflects that counsel's letter of November 8, 2005 was the first time that such a request was made. Indeed, a few days earlier, plaintiffs had advised the Court that an exemplar seat was available for purchase *through a supplier*. See 11/3/05 Letter to the Court from Stephen G. Brenner, at 1. Furthermore, defendant did not ignore plaintiffs' November 8th request for an exemplar; rather, defendant explained (and the Court accepted) that defendant had no exemplar of this product, which had been discontinued years earlier. See 11/22/05 Calendar Order; 11/22/05 Tr. at 8-9.<sup>18</sup> As for plaintiffs' passing reference to specifications, that appeared to be an afterthought inserted into plaintiff's application for an order

“allow[ing] plaintiff's expert to supplement his report with an explanation of the exemplar seat.” 11/8/05 Brenner Letter at 2; see 11/22/05 Tr. at 11. The Court granted that request on November 22, 2005, and, until the instant motions were filed, the Court heard nothing further from plaintiffs about defendant's failure to provide specifications.

\*7 In any event, in order to warrant the imposition of sanctions, plaintiffs would have to establish that defendant withheld discovery that it had a duty to disclose. Plaintiffs cannot make that showing here. As defendant correctly observed, fact discovery ended on June 30, 2005, and, absent a court order to the contrary, defendant was not required to respond to any demand served after the court-imposed deadline. See 11/9/05 Letter to the Court from Robert D. Brown, Jr. (Brenner Ex. M), at 5.<sup>19</sup> Consequently, contrary to the crux of plaintiffs' cross-motion, defendant has violated neither the letter nor the spirit of the discovery rules, and plaintiffs' demand for sanctions is thus without basis.

Similarly unavailing is plaintiffs' attempt to interpose the same arguments as a shield against defendant's motion to preclude Schutz's testimony. After both sets of motions had been fully briefed, Judge Sifton reopened discovery on a limited basis, to afford plaintiffs the opportunity to formally demand and obtain the discovery that they needed—whether or not previously demanded—in order to respond to defendant's pending motions. See 5/31/06 Tr. at 21-22; see also *id.* at 17, 23. Plaintiffs served their most recent demands on defendant, which produced the additional materials required by this Court's order. See 8/17/06 Calendar Order. Defendant's supplemental disclosures did not include documents concerning the composition of the slide assembly; as defense counsel had explained to Judge Sifton, defendant did not fabricate the slide assembly and thus did not have such materials in its custody, possession or control. See 5/31/06 Tr. at 9, 11, 17; see also 8/21/06 Letter to the Court from Philip W. Crawford, at 5.<sup>20</sup>

In connection with the reopened discovery, this Court expressly directed plaintiffs to “particulariz[e]” how the newly produced information “would be incorporated into a second supplemental report by plaintiffs’ expert.” 8/17/06 Calendar Order. Plaintiffs’ counsel declined to do so. Rather than consult with plaintiffs’ expert and comply with the Court’s directive, plaintiffs’ counsel asserted that “I am not an engineer and therefore I cannot speculate as to how the [new] information will assist my expert.” 8/18/06 Letter to the Court from Stephen G. Brenner, at 3; *see* 8/28/06 Memorandum and Order. As plaintiffs thus made no showing that the newly produced information in any way altered their expert’s conclusions or analysis, plaintiffs were not granted leave to file a second supplemental expert’s report. *See* 8/28/06 Memorandum and Order at 2. For the same reason, the Court is entitled to assume that plaintiffs have not been prejudiced by the timing of defendant’s production.

### C. Defendant’s Request for Rule 11 Sanctions

In response to plaintiffs’ cross-motion, defendant in turn requests that the Court impose Rule 11 sanctions against plaintiffs for filing a motion that defendant characterizes as frivolous and based on factual misrepresentation. *See* Def. Sanctions Br. at 9. However, pursuant to the so-called “safe-harbor” provision of Rule 11, a motion seeking the imposition of Rule 11 sanctions “shall not be filed with or presented to the court, unless, within 21 days after service of the motion [on the opposing party] ... the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.” Fed.R.Civ.P. 11(c)(1) (A). Before filing its Rule 11 motion with the Court, defendant failed to give plaintiffs the required 21-day period to cure their alleged misconduct.<sup>21</sup> Accordingly, defendant’s motion is denied. *See, e.g., Perpetual Sec., Inc., v. Tang*, 290 F.3d 132, 142 (2d Cir.2002) (holding that trial court’s award of sanctions, in contravention of “the explicit procedural requirements of Rule 11,” was an abuse of discretion).

## II. DEFENDANT’S MOTION TO PRECLUDE

### A. General Legal Principles

\*8 In its motion for preclusion, defendant argues that Schutz’s testimony should be excluded under Rule 702 of the Federal Rules of Evidence, on the grounds that his opinion is unreliable as well as irrelevant to the disposition of this case. *See* Def. *Daubert* Br. at 31-32. Rule 702 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.

Fed.R.Evid. 702.

Once a pretrial challenge has been lodged under Rule 702, the trial court must determine whether the proffered expert testimony is reliable and relevant to the dispute. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The purpose of this screening process is to ensure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The Second Circuit has described the general methodology to be employed by trial courts in conducting Rule 702 analyses. *See Amorgianos*

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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*v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265-66 (2d Cir.2002). First, the trial court should determine “whether proffered expert testimony is relevant, i.e., whether it has 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.” *Id.* at 265 (internal quotations omitted). Next, the court should determine “whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered.” *Id.* (internal quotation, citation omitted). The trial court possesses “broad discretion in determining what method is appropriate for evaluating reliability under the circumstances of each case.” *Id.*

### B. The Relevance of Schutz's Testimony

In connection with the first step in this inquiry, defendant argues that Schutz's opinions must be excluded because they are irrelevant, in that they cannot assist the jury on the question of causation in this case. *See* Def. *Daubert* Br. at 32-33. Plaintiffs do not address this argument but instead complain of discovery abuses that did not occur. *See generally* Pl. *Daubert* Br.; *supra* pp. 5-16. The Court nevertheless has conducted the requisite inquiry under *Daubert* and its progeny.

The purpose of the relevance inquiry under [Rule 702](#) is to ensure that the proffered expert evidence assists “the trier to understand the evidence or to determine a fact in issue.” *Daubert*, 509 U.S. at 591 (internal quotation omitted). One aspect of the inquiry “is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* (internal quotation, citation omitted). For expert testimony to be relevant in a design defect case, not only must it offer a feasible alternative design, but the expert “must also establish that his hypothetical design would have resulted in greater safety in the ... accident at issue.” *Zaremba v. Gen. Motors Corp.*, 360 F.3d 355, 359 (2d Cir.2004).

\*9 Schutz has not expressly proposed an alternative design in this case, although implicit in his conclusion is the suggestion that a slide track manufactured from sufficiently stronger steel would not have failed under the same conditions that resulted Yaccarino's fall. Even assuming, *arguendo*, that this implicit suggestion would suffice to satisfy [Rule 702](#)'s relevance requirement, the Court must nevertheless determine whether that assumption, and Schutz's causation theory in general, rest on a reliable foundation.<sup>22</sup>

## C. The Reliability of Schutz's Testimony

### 1. Schutz's Qualifications

As a threshold matter in analyzing the reliability of the bases for Schutz's opinion, the Court must assess Schutz's qualification to offer expert testimony in this matter. *See Zaremba*, 360 F.3d at 360 (detailed analysis of an expert's testimony is “superfluous” if the expert is not qualified to offer a reliable opinion).

Schutz has bachelor's and master's degrees in mechanical engineering. *See* Schutz Tr. at 9. He has operated his own engineering firm since receiving his master's degree in 1985. *See id.* at 10. Although Schutz does not have a degree in metallurgy, his employment as a mechanical engineer has afforded him experience working with metal: his resume includes as areas of speciality “mechanical systems and components, machined parts, plastic and metal parts ....” *See* Curriculum Vitae of Peter K. Schutz (final page of Brown Ex. G). Additionally, Schutz has experience designing mechanical assemblies, including slide assemblies,<sup>23</sup> and has evaluated seating systems in connection with other litigation. *See* Schutz Tr. at 12, 14-15.

Defendant offers two arguments against Schutz's qualification as an expert in this case. First, defendant contends that Schutz's lack of background or training in metallurgy should disqualify him from testifying about the properties of the steel used in the slide track assembly. Second, the defense argues that, because Schutz has no

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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experience designing or evaluating motor vehicle seating systems, he is not qualified to evaluate the slide track component of the seat at issue in this case. *See* Def. *Daubert* Br. at 8. Plaintiffs respond that the nature of Schutz's testimony does not require a degree in metallurgy, and that his general experience with other types of slide assemblies and seating systems is sufficient to qualify him to opine as an expert in this case. *See* Pl. *Daubert* Br. at 14-15.

The Second Circuit has liberally interpreted expert qualification requirements. *See Zwillinger v. Garfield Slope Hous. Corp.*, No. CV 94-4009(SMG), 1998 WL 623589, at \*9 (E.D.N.Y. Aug.17, 1998) (citation omitted). The admission of expert testimony and the qualification of experts fall within the broad discretion of the trial court, *see Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81 (2d Cir.1997), which need not preclude an expert from testifying merely because he or she does not possess experience tailored to the precise product or process that is the subject matter of the dispute. *See, e.g., id.* at 82 (reversing trial court's preclusion order despite the fact that the expert had no experience designing the specific kind of system at issue); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir.1995) (holding that district court properly admitted expert testimony of a physician whose specialty area was not identical to the subject matter of the dispute); *Kass v. West Bend Co.*, No. 02-CV-3719(NGG), 2004 WL 2475606, at \*5 (E.D.N.Y. Nov.4, 2004) (holding, in a case involving an allegedly defective coffee maker, that an expert was qualified, where, despite having no experience with consumer products, he had sufficient experience in accident prevention); *Zwillinger*, 1998 WL 623589, at \*8-9 (in a toxic tort case, admitting as qualified a physician who, though not a certified toxicologist, nonetheless possessed "the minimum educational qualifications necessary to render an expert opinion.").

\*10 In *McCullock*, the trial court admitted the testimony of a physician-an ear, nose, and throat specialist-in order to establish that chemical fumes had injured the plaintiff's throat. *See* 61 F.3d at

1041-42. On appeal, the Second Circuit rejected the defense argument that only a specialist in environmental medicine would be qualified to opine on causation, holding that the expert's almost three decades of experience in a relevant specialty was sufficient. *See id.* at 1043. Similarly, in *Stagl*, the district court had precluded the testimony of an engineer in a case involving the alleged defective design of an airport baggage claim system, because the expert had no experience designing such a system. *See* 117 F.3d at 82. The Second Circuit reversed, holding that the district court erred in disqualifying the expert on that basis, and concluding that his expertise in the more general field of "the interaction between machines and people" qualified him to testify. *See id.*

In light of such precedent, Schutz's lack of training as a metallurgist should not prevent him from testifying in this case. Schutz's opinion as to the inadequacy of the slide track steel assembly is not based, for example, on his own analysis of the chemical structure of its metal, an approach that might have required a trained metallurgist. Although an evaluation of the strength of the steel is a component of Schutz's conclusion, his analysis for the most part focuses on the loads and stresses acting on the metal, and, to the extent he required information concerning the properties of the metal involved, he was able to find it in standard engineering reference materials. *See* Schutz Tr. at 62-68. Nor should Schutz be disqualified based on his lack of experience evaluating seating systems designed specifically for motor vehicles. This case turns on the alleged failure of a specific component of a seating system-the adjustable slide track assembly-and, according to Schutz's deposition testimony, he has "designed mechanical slide assemblies like this ...." *Id.* at 12. Consequently, defendant's challenges to Schutz's qualifications go to the weight of his testimony, not its admissibility.

## 2. Reliability of Schutz's Analysis

Next, the Court must assess Schutz's proposed testimony against the "indicia of reliability"

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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identified in [Rule 702](#), i.e., whether that testimony (1) is grounded on sufficient facts or data; (2) is the “product of reliable principles and methods”; and (3) applies those principles and methods reliably to the facts of this case. *See Amorgianos*, 303 F.3d at 265; *Fed.R.Evid.* 702.

Defendant characterizes Schutz's opinions as “guesses” based on speculation, conjecture, and subjectivity, rather than on the scientific method. *See Def. Daubert Br.* at 32. For this reason, defendant urges, Schutz's testimony cannot aid the jury and must be excluded. *See id.*<sup>24</sup> This Court agrees.<sup>25</sup>

**a. Summary of Schutz's Analytic Approach**

\*11 To place the reliability issues in context, the Court will begin its discussion with a summary of the steps taken by Schutz to arrive at his conclusion, as gleaned from his deposition testimony. Because Schutz neither examined the actual seat involved in the accident, nor had any documentation regarding the seat's manufacturing specifications,<sup>26</sup> age, use history, or condition at the time of the accident, his conclusion that the track assembly failed due to a defective design rests on at least three sets of assumptions. The first set of assumptions concerns the load limit of the steel used in fabricating the slide assembly. The second set of assumptions concerns the magnitude of the lateral forces acting on the steel at the time of the incident. The final set of assumptions concerns certain stress-enhancing factors that Schutz chose to apply in reaching his conclusion.

As to the load limit of the steel, Schutz first assumed that the piece had been manufactured using standard carbon steel, “[b]ecause that's typically what people would use for something like this.” Schutz Tr. at 33. Working from this assumption, Schutz then estimated that the rail had an ultimate tensile strength of between 60,000 and 70,000 pounds per square inch (“psi”)-that is, absent external factors including prior wear and tear or surface imperfections in the metal, the rail

could withstand stresses of up to 60,000 or 70,000 psi before it would fail. *See id.* at 36.

Having thus estimated the ultimate strength of the rail, Schutz proceeded to estimate the forces created by the distribution of Yaccarino's weight across the seat as he leaned into the curve of the exit ramp. *See id.* at 54-56. From that estimate, Schutz then calculated that, as the bus moved along the ramp, the left slide rail was subjected to a force of about 11,000 psi. *See id.* at 54. This figure, of course, was well below the load limit that Schutz had assigned to the steel, and by itself would not have been sufficient stress to cause the rail's failure. *See id.* at 71.

Lastly, as demonstrated at his deposition, Schutz made a number of further assumptions about the age, history, and physical characteristics of the steel used in the rail. *See id.* at 62-113. These were the assumptions that, in the end, led him to conclude that the steel was inadequate. *See id.* at 71. He postulated the number of loads the slide assembly had carried over its life, the magnitude of those loads, the surface finish of the steel part, and the position of Yaccarino's seat at the time of the accident. *See id.* at 62-113. Schutz theorized that these factors combined to increase the 11,000 psi of stress acting on the steel by a multiple of ten or more, thereby putting the stress well above the range Schutz estimated the metal could withstand. *See id.* at 85.

**b. Information Relied On By**

**Experts: Applicable Legal Standards**

The law is clear that “[e]xpert testimony as to causation may be excluded, particularly where it is speculative and conjectural.” *In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 824 (2d Cir.1994).<sup>27</sup> Although “[t]rained experts commonly extrapolate from existing data ... nothing 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.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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L.Ed.2d 508 (1997). Thus, the trial court “may conclude that there is simply too great an analytical leap between the data and the opinion proffered.” *Id.* Moreover, as Judge Sifton observed in *Smith v. Herman Miller, Inc.*, No. CV-03-5358 (CPS), 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.” Consequently, the “proponent of expert testimony bears the burden of showing a grounding in the methods and procedures of a science which must be based on actual knowledge and not subjective belief or unaccepted speculation.” *Id.* at \*4 (internal quotation marks and citation omitted).

\*12 As detailed below, plaintiffs have not met their burden. In this connection, the Supreme Court's handling of expert testimony in *Kumho Tire*, 526 U.S. at 143-44, is instructive. There, the plaintiff employed an expert to determine whether a tire had failed due to defective design or, rather, due to age, misuse, or poor maintenance. *See id.* Though the tire exhibited signs of misuse and disrepair, the expert, based on a visual inspection, opined that a design defect was responsible for the tire's failure. *See id.* The Supreme Court noted that the expert's inspection method could not reveal whether the tire in question had been in use for less than 10,000 or more than 50,000 miles. *See id.* at 155. Because of this, the trial court “could reasonably have wondered about the reliability of a method ... insufficiently precise to tell with any certainty” the amount of mileage on a tire, a factor directly relevant to the expert's inquiry. *Id.* (internal quotation omitted). The Supreme Court concluded that the trial court had acted within its discretion in excluding the testimony of the expert, who lacked sufficient information to “draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.” *Id.* at 154, 158.

**c. Information Relied Upon By Schutz**

Here, the sufficiency of the information relied upon by Schutz presents a problem akin to that in *Kumho Tire*. As to his estimate regarding the ultimate strength of the steel track, Schutz cites no support

for his assumption that the part was probably made of standard carbon steel, offering only his unadorned observation that “that's typically what people would use for something like this.” Schutz Tr. at 33. Although Schutz had access to an exemplar seat that he believed contained a slide assembly identical to the one involved in the accident (*see* Schutz Supplemental Report at 1), he performed no testing on the exemplar in order to determine with precision what grade of steel was present in the slide rail. *See* Schutz Tr. at 35. Nor did Schutz offer evidence of any industry standard for seat manufacturers in the fabrication of slide track assemblies, relying instead on his vague assumption as to “typically what people would use ....” *Id.* at 33.

Similarly unsubstantiated are Schutz's assumptions regarding the amount of stress acting on the slide rail at the time of Yaccarino's fall. In lieu of conducting any actual tests, or citing any studies or other reference material, Schutz offered the following description of how he arrived at his estimate: “I visualized my body in a seat such as that going around a curve like that and ... how much leaning I would do in a curve like that, and how much force I'm estimating I would be applying to the seat there.” *Id.* at 55.

In this way, Schutz theorized that as the bus turned, the seat was subject to a lateral force equal to about half of Yaccarino's body weight (plaintiff weighed 275 pounds at the time of the incident)-a critical step in his determination that the total stress on the slide assembly was 11,000 psi. *See id.* at 56-57. Nevertheless, rather than base his analysis on an assumed force of 137.5 pounds, Schutz used 150 pounds in his estimate. *See id.* at 54. This discrepancy led to the following exchange at Schutz's deposition:

\*13 Q: Why did you not use 137.5?

A: Well, I could have done that. That would be very close to what I did use .... [Y]ou know, it could be 180 pounds, it could be 130 pounds. I'm-this is my best estimate, so it's a very rough number.

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

Q: Okay. But that number affects the ultimate conclusion. Correct? A:

A: Yes.

Q: And is it proportional, if you reduce the weight by 25 percent, your final figure is reduced by 25 percent?

A: I believe so.

Q: Why did you pick 150?

A: It was my best estimate.

Q: Well, it's not half of the plaintiff's weight, so I'm just curious why you picked 150?

A: I could have picked 132.3. That would have been silly ....

Obviously, if I'm going by my own estimates when I'm driving a car, I can't estimate it more accurately ... so I round off numbers when I'm doing rough calculations, so everyone can see that.

If I were to say 149.2, then that would indicate that it's very accurate when it's obviously not.

*Id.* at 57-58 (plaintiffs' counsel's objection omitted).

Additionally, the seat's age, state of general repair, and use history were elements crucial to Schutz's conclusion that the seat was defective. By Schutz's own admission, without the "stress-enhancing factors" he mentally assigned to these elements, he could not have concluded that the slide assembly failed due to Yaccarino's weight alone. *See id.* at 71. However, despite the critical nature of these factors, Schutz's estimates again appear to be the result of guesswork.<sup>28</sup> He had no idea of the age of the seat or the length of time it had been in use. *See id.* at 74, 76. Not having ever examined the slide assembly involved in the incident, Schutz had no personal knowledge of its condition, and instead relied on Yaccarino's description of it. *See* Schutz Report at 2-3. Nor did Schutz have any information

concerning the number of load cycles<sup>29</sup> to which the seat had been subjected, and he conceded that the possible range was between one thousand and one million.<sup>30</sup> *See* Schutz Tr. at 83-88.

Similarly, Schutz performed no testing in the field to measure the magnitude of the stress or load cycles such a seat would have been subjected to, and he consulted no reference materials relating to automotive design; instead, he arbitrarily assigned a factor of three to account for impact loading, thereby tripling his load estimate and bolstering his conclusion regarding the existence of a design defect. *See id.* at 97-102. Schutz applied additional stress multipliers to allow for the possibility that, at the time of the accident, there were micro-cracks in the steel and/or the seat was adjusted to a position that increased the stresses on the slide assembly. *See id.* at 108-12. He applied these additional multipliers in the form of a so-called "safety factor" that he testified is customarily applied by engineers designing parts.<sup>31</sup> *See id.* at 106-08.

\*14 In this way, through a series of estimates and assumptions having no connection to the actual conditions existing at the time of Yaccarino's fall, Schutz created a scenario on which he based his conclusion regarding the existence of a design defect. As in *Kumho Tire*, that conclusion is predicated on an insufficient factual foundation and is inappropriate for consideration by a jury.

#### d. Schutz's Methodology

Schutz's testimony should be precluded for another reason. Having applied the analysis outlined by the Supreme Court in *Daubert*, this Court concludes that Schutz's methods are not sufficiently reliable to be admitted under Rule 702. In *Daubert*, the Supreme Court identified four non-exclusive factors that a trial court should ordinarily consider in analyzing the soundness of the methodology underpinning proffered expert evidence: (1) whether the witness' theory or technique can be and has been tested; (2) whether the method has been subjected to peer review

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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or publication; (3) whether there is a known or potential error rate; and (4) whether the method has been generally accepted by the relevant scientific community. See 509 U.S. at 593-94. Although these factors are not exclusive and may not be appropriate in every case, a district court should consider them “where they are reasonable measures of the reliability of expert testimony.” *Zaremba*, 360 F.3d at 358 (citation omitted).

In yet another argument not addressed by plaintiffs, defendant contends that Schutz's testimony should be precluded because his methodology fails to satisfy any of the *Daubert* factors. See Def. *Daubert* Br. at 31. Defendant first argues that Schutz neither offered an alternative safer design for a bus seat mechanism nor tested his theory that the seat failed as a result of a flawed design. See *id.* at 12.

Under the substantive law of New York, which applies to this diversity action, a plaintiff alleging a design defect must prove the existence of a feasible safer alternative design. See *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108, 463 N.Y.S.2d 398, 450 N.E.2d 204 (1983). In connection with a *Daubert* analysis in a design defect case, testing, while “not an absolute prerequisite for an expert's theory of causation or alternative design ... is usually critical to show that the expert adhered to the same standards of intellectual rigor that are demanded in their professional work.” *Kass*, 2004 WL 2475606, at \*6 (internal quotations, citation omitted). Testing “also ensures that the focus of the jury's deliberation is on whether the manufacturer could have designed a safer product, not on whether an expert's proposed but untested hypothesis might bear fruit.” *Id.* (citation omitted). Accordingly, courts in this Circuit-at both the appellate and trial levels-have rejected expert testimony in design defect cases where, as here, the experts failed to test alternative designs or causation theories. See, e.g., *Zaremba*, 360 F.3d at 359; *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir.2000); *Smith*, 2005 WL 2076570 at \*4; *Kass*, 2005 WL 2475606 at \*6-10.

\*15 The Second Circuit's decision in *Brooks* involved evidentiary concerns similar to those in the present case. The infant plaintiff in *Brooks* had had his hand amputated by the propeller of a motor on an outboard motor boat. See *Brooks*, 234 F.3d at 90. In his action against the motor's manufacturer, the plaintiff engaged an expert, who concluded that the accident had resulted from the motor's defective design. See *id.* The district judge precluded that testimony as unreliable and speculative, noting that the expert had performed no testing on either the boat or motor involved in the accident, nor had he tested his proposed alternative design to determine whether it would have prevented the accident. See *id.* at 91. The court consequently granted summary judgment for the defense, and the Second Circuit affirmed, concluding that the district court had acted within its discretion in excluding the testimony, inasmuch as “[t]he failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony.” *Id.* at 92.

While not expressly offering an alternative design, Schutz's reports can charitably be read to imply that a slide track manufactured from stronger steel might not have failed to hold the seat in place. That inference, however, remains untested. Despite having access to an exemplar seat, Schutz performed no tests to determine the composition of the metal in the slide track and/or to verify that a higher grade of steel would have prevented the seat from falling. See Schutz Tr. at 35. Schutz took no steps to verify his admittedly “rough calculations” regarding the distribution of Yaccarino's weight in the seat at the time of the accident. See *id.* at 58-59. And the values assigned by Schutz at his deposition to account for prior wear on the slide assembly and the positioning of the seat just prior to the fall find no factual support in the record.

Schutz's proffered testimony also fails to satisfy the remaining factors specifically identified by the Supreme Court in *Daubert*. Plaintiffs do not and cannot contend that Schutz submitted his methods for peer review or publication, or that any measurable rate of error can be assigned to them. See Def. *Daubert* Br. at 30-31. Finally, plaintiffs

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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make no claim that Schutz's methods "have been accepted in the industry or are otherwise accepted." [Smith, 2005 WL 2076570](#), at \*4.

In short, with the exception of Schutz's educational and professional qualifications, every step of the Court's reliability analysis weighs against the admission of Schutz's testimony. The methodology he employed in this case tends to show only that a seating system component made of a certain type of steel, if sufficiently worn, may fail if subjected to a certain level of stress, which may or may not have been present at the time of the incident at issue here. Because such a general proposition has no connection, beyond Schutz's unsupported conjecture, to the known facts of this case, Schutz's testimony should be excluded, just as Judge Sifton excluded the testimony of an engineer in a similar case. See [Smith, 2005 WL 2076570](#), at \*5 ("[Plaintiffs' expert's] report, in sum, consists of his conclusion that the chair was unreasonably designed because it would be unable to withstand the pressure created by someone rocking forward and back in it. He based this reasoning on the spacing of the bolts and the materials used. But his failure to explain the reasoning or calculations

behind that conclusion leaves the Court 'with the mere *ipse dixit*, or say so, of the witness.") (citation omitted); see also [Amorgianos, 303 F.3d at 266](#) ("[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusion reached, *Daubert* and [Rule 702](#) mandate the exclusion of that unreliable opinion testimony.").

### CONCLUSION

\*16 For the foregoing reasons, defendant's motion to preclude the testimony of plaintiffs' expert witness is granted; and the parties' cross-motions for sanctions are denied.

The parties are directed to comply with Judge Sifton's scheduling order concerning defendant's pending motion for summary judgment.

**SO ORDERED.**

### All Citations

Not Reported in F.Supp.2d, 2006 WL 5230033

### Footnotes

- 1 A copy of portions of that transcript is attached as Exhibit E to the Certification in Support [ ] of Defendant's Motions to Preclude Expert Testimony Pursuant to [FRE 104\(a\)](#), [403](#), and [702](#) and for Summary Judgment Pursuant to [Fed.R.Civ.P.56](#) ("Brown Certification"), which was filed as ECF document # 80. Hereinafter, exhibits appended to the Brown Certification will be cited as "Brown Ex.," followed by the corresponding letter designations.
- 2 Copies of additional portions of the Kolonkowski Transcript are attached as Exhibit N to the Certification in Support of Plaintiffs' Opposition to Defendant[']s Motion to Preclude Expert Testimony and In Opposition to Defendant's [Rule 56](#) Motion ("Brenner Certification"), which was filed as ECF document # 82. Hereinafter, exhibits appended to the Brenner Certification will be cited as "Brenner Ex. \_\_\_\_."
- 3 Defendant maintains that it is not a manufacturer but instead is the importer of seat assemblies fabricated by a German corporation, non-party Isringhausen GmbH. See Defendant Isringhausen, Inc.'s Response to Plaintiff's First Set of Interrogatories and Request for Production of Documents ("Def. Resp." [Brown Ex. C; Brenner Ex. B]), at Answer 15.
- 4 Defendant's *Daubert* brief was filed as ECF document # 77. Defendant's reply brief on the preclusion motion was filed as ECF document # 90.
- 5 Plaintiffs' sanctions brief was filed as ECF document # 87. Their reply brief on the cross-motion ("Pl. Sanctions Reply") was filed as ECF document # 96.
- 6 Plaintiffs' brief opposing defendant's motion to preclude was filed as ECF document # 82.
- 7 Defendant's sanctions brief was filed as ECF document # 92.

- 8 *But see supra* note 3.
- 9 See 12/9/03 Calendar Order.
- 10 See 7/30/04 Endorsed Order (granting plaintiffs' request to extend discovery deadlines by 90 days); 12/1/04 Endorsed Order (granting plaintiffs' application to extend expert disclosure); 2/22/05 Order (extending fact discovery to 4/22/05); 5/9/05 Calendar Order (extending fact discovery to 6/30/05, and plaintiffs' expert disclosure to 5/31/05); 6/16/05 Endorsed Order (extending expert disclosure deadlines by three weeks in response to defense counsel's representation that plaintiffs still had not served their expert disclosure); 6/27/05 Calendar Order (reopening expert disclosure and extending plaintiffs' due date until 7/25/05); 8/8/05 Order (granting plaintiffs another extension until 8/15/05, to serve expert disclosure); 11/22/05 Calendar Order (granting plaintiffs' request to reopen expert disclosure and to serve supplemental expert report by 12/16/05); *see also* 10/24/04 Endorsed Order (extending fact discovery at defendant's request, where plaintiff consented and neither side had completed discovery); 2/11/05 Calendar Order at 1 (adjourning discovery deadlines *sine die* while plaintiffs pursued documents from NYCTA).
- 11 Documentation from the NYCTA also suggests that NYCTA mechanics tightened the slide assembly and reassembled the operator's seat in November 2001 (see NYCTA Maintenance Work Order 0250115-1 (Brown Ex. I), at 3), and that following the incident at issue in this case, the subject seat was replaced with a driver's seat manufactured by Recaro. See NYCTA Maintenance Work Order No. 0371510-1 (Brown Ex. I); Transcript of Deposition of Vincent Gambardella dated February 11, 2005 ("Gambardella Tr." [Brown Ex. M] ), at 23-25.
- 12 Plaintiffs complain that "[t]he undersigned did not have time to make any motion to compel defense counsel to supply the sought after discoverable materials since plaintiffs' counsel was placed on a strict discovery schedule by Magistrate Mann." Pl. Sanctions Reply at 11-12. In fact, the "strict discovery schedule" spanned more than 18 months and included innumerable extensions. See *supra* note 10.
- 13 See, e.g., Def. Resp. (Brown Ex. C; Brenner Ex. B), at Answers 13-14, 17.
- 14 See 12/20/04 Letter to Stephen G. Brenner from Robert D. Brown, Jr. ("Def. Automatic Disclosure" [Brenner Ex. C] ), at 2.
- 15 As noted above, MCI produced a Final Vehicle Record that reflected that bus # 1898 had been delivered to the NYCTA equipped with an Isringhausen 6800/338 bus driver's seat.
- 16 It bears noting that, despite their shift in theory as to the model of the subject seat, plaintiffs reportedly have never supplemented or amended their disclosures. See Def. Sanctions Br. at 2.
- 17 FEDERAL JUDICIAL PROCEDURE AND RULES, at 156 (Thomson West rev. ed.2006).
- 18 Defendant further explained that because the NYCTA purchased its seats from a supplier, Neopart, and not from defendant, the NYCTA might have purchased a previously discontinued model that happened to remain in Neopart's inventory. See 11/9/05 Letter to the Court from Robert D. Brown, Jr. (Brenner Ex. M), at 4.
- 19 According to defense counsel's November 9th letter, on July 28, 2005, plaintiffs served a demand for photographs of all models of Isringhausen seats from 1995 through 2003. See 11/9/05 Crawford Letter at 5. The Court has located the referenced Notice to Produce, dated July 28, 2005, which was among the documents attached to plaintiffs' counsel's November 8th letter. As accurately described by defense counsel, the Notice to Produce contained an untimely demand for photographs of all models of Isringhausen seats from 1995 through 2003; it did not demand specifications or anything else.
- 20 Plaintiffs' counsel apparently did not seek to obtain that information through third-party subpoenas, despite Judge Sifton's suggestion that he do so. See 5/31/06 Tr. at 11.
- 21 Although defendant suggests that its request for Rule 11 sanctions is not a "formal motion for such relief" (Def. Sanctions Br. at 11), to dispense with the safe-harbor requirement on that basis would elevate form over substance.
- 22 Plaintiffs suggest in their opposing papers that Schutz also opined that lengthening the tracking slide assembly would have resulted in a safer design. See Pl. *Daubert* Br. at 9, 15. In support of this proposition, plaintiffs cite Schutz's two reports and portions of his deposition testimony. See Transcript of Deposition of Peter Schutz dated January 20, 2006 ("Schutz Tr." [Brenner Ex. A] ), at 121, 122, 181-82. However, Schutz proposed no such alternative design in either of his reports or in the cited portions of his deposition testimony.

Yaccarino v. Motor Coach Industries, Inc., Not Reported in F.Supp.2d (2006)

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- 23 Though none of these slide assemblies involved seats in motor vehicles, Schutz characterizes them as analogous to the one at issue in this case. See Schutz Tr. at 12.
- 24 Though defendant advances this argument in challenging the testimony's relevance (see Def. *Daubert* Br. at 32), the argument in fact goes to the reliability of the foundation for Schutz's causation theory.
- 25 Plaintiffs do not address this challenge to Schutz's reliability, but instead advance a failure-to-warn theory, see Pl. *Daubert* Br. at 15-16, which was not discussed in either of Schutz's reports and thus has no bearing on defendant's *Daubert* motion. The soundness of plaintiffs' claim that one "does not need an expert opinion in order to prove a 'failure to warn' theory of liability under New York State law" (8/15/06 Letter to the Court from Stephen G. Brenner, at 2), is an issue beyond the scope of this opinion.
- 26 As previously noted, after Judge Sifton reopened discovery, and defendant produced additional documents, plaintiffs failed to comply with this Court's directive to specify how Schutz's reports would be impacted by the newly acquired information. See *supra* p. 16; 8/28/06 Memorandum and Order; cf. *Amorgianos*, 303 F.3d at 269 n. 3 (noting that plaintiffs opted not to supplement their expert report to remedy its defects). The new discovery materials did not include documents concerning the composition of the slide assembly, which reportedly was not manufactured by defendant. See *supra* note 3; *supra* p. 15.
- 27 This District has recognized the Supreme Court's implied partial reversal of *Lockerbie* on other grounds. See *Anderson v. SAM Airlines*, No. 94 Civ.1935(ERK), 1997 WL 1179955, at \*2 (E.D.N.Y. Apr.25, 1997) (citing *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996)).
- 28 Schutz's reports do not attempt to quantify these factors, but instead consider them "only qualitatively ...." Schutz Tr. at 70, 103. Schutz's calculations thus appear to have been created in response to deposition questions. However, as Judge Sifton has observed, "vague references to a 'rule of thumb' and the performance of mental calculations" made aloud during a deposition do not satisfy the prerequisites of [Rule 702](#). *Smith*, 2005 WL 2076570, at \*5.
- 29 The term "load cycle" refers to the number of times a part bears a certain load, a relevant factor in analyzing the amount of wear the part will withstand. See, e.g., Schutz Tr. at 72.
- 30 Schutz did conclude, based in part on his experience as a bus passenger, that the number of load cycles was "probably somewhere closer to a million than a thousand." Schutz Tr. at 83, 87-88.
- 31 Schutz's application of this "safety factor" reveals a flaw in his entire approach to the calculation of stress-enhancing factors. In determining the values to assign for each factor, Schutz apparently used reference materials intended as a guide for engineers at the *design* stage of a project, in order to ensure that the materials incorporated into a design are sufficiently strong to withstand various stresses. See Schutz Tr. at 62-68, 106-07. Such a prospective approach, which attempts to account for potential stresses that ultimately may or may not arise, would seem to have limited value in attempting to analyze retrospectively why a specific part failed.

United States Code Annotated  
Federal Rules of Evidence (Refs & Annos)  
Article VII. Opinions and Expert Testimony

Federal Rules of Evidence Rule 702, 28 U.S.C.A.

Rule 702. Testimony by Expert Witnesses

Currentness

<Notes of Decisions for Rule 702 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for Rule 702.>

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

**CREDIT(S)**

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

**ADVISORY COMMITTEE NOTES**

**1972 Proposed Rules**

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. “There is no more certain test for determining when experts may be used than the common sense inquiry 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.” Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.

## 2000 Amendments

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon “the particular circumstances of the particular case at issue.” 119 S.Ct. at 1175.

No attempt has been made to “codify” these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by “widely accepted scientific knowledge”). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

- (1) Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).
- (3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
- (4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1175 (1999) (*Daubert*’s general acceptance factor does not “help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”), *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff’s respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. 1167, 1176 (“[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”). Yet no single factor is necessarily dispositive of the reliability of a particular expert’s testimony. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (“not only must each stage of the expert’s testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.”); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines “have the courtroom as a principal theatre of operations” and as to these disciplines “the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.”).

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a “seachange over federal evidence law,” and “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.” *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion “both to avoid unnecessary ‘reliability’ proceedings in ordinary

cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.”).

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents “do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.... The evidentiary requirement of reliability is lower than the merits standard of correctness.” *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by “a recognized minority of scientists in their field.”); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) (“*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.”).

The Court in *Daubert* declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), “any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*”

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony “fit” the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) (“We conclude that *Daubert's* general holding--setting forth the trial judge's general ‘gatekeeping’ obligation--applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. TelSmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”). Some types of expert testimony will be more objectively verifiable, and subject

to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after *Daubert*, 157 F.R.D. 571, 579 (1994) (“[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”).

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms “principles” and “methods” may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g.*, *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions “are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches”). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”).

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply “taking the expert's word for it.” *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (“We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.”). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (“[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”).

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying “facts or data.” The term “data” is intended to encompass the reliable opinions of other experts. *See* the original Advisory Committee Note to Rule 703. The language “facts or data” is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the “reasonable reliance” requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information--whether admissible information or not--is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. See Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) (“Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review.”). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an “expert.” This was done to provide continuity and to minimize change. The use of the term “expert” in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an “expert.” Indeed, there is much to be said for a practice that prohibits the use of the term “expert” by both the parties and the court at trial. Such a practice “ensures that trial courts do not inadvertently put their stamp of authority” on a witness's opinion, and protects against the jury's being “overwhelmed by the so-called ‘experts.’” Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term “expert” in injury trials).

### **GAP Report--Proposed Amendment to Rule 702**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word “reliable” was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.
2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.
3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

### 2011 Amendments

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Notes of Decisions (1247)

Fed. Rules Evid. Rule 702, 28 U.S.C.A., FRE Rule 702  
Including Amendments Received Through 8-1-16

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Rule 4515. Form of expert opinion, NY CPLR Rule 4515

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McKinney's Consolidated Laws of New York Annotated  
Civil Practice Law and Rules (Refs & Annos)  
Chapter Eight. Of the Consolidated Laws  
Article 45. Evidence (Refs & Annos)

McKinney's CPLR Rule 4515

Rule 4515. Form of expert opinion

**Currentness**

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

**Credits**

(L.1962, c. 308. Amended L.1963, c. 808, § 1.)

McKinney's CPLR Rule 4515, NY CPLR Rule 4515

Current through L.2016, chapters 1 to 395.

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# Damages for Lost Future Profits in Franchise Disputes—Overcoming the New Business Rule and Establishing Reasonable Certainty

*Carmen D. Caruso and Bruce S. Schaeffer*

Claims to recover lost profits can be among the most substantial damages claims asserted in commercial litigation. In franchising, lost profits claims are often asserted by either franchisors or franchisees when a franchise is terminated before the expiration of its term. And increasingly, lost profits claims are gaining traction in cases where the desired franchises never opened for business.

In both situations, the general rule is that damages must be proven to a reasonable degree of certainty—but the reasonable certainty standard is often misunderstood.<sup>1</sup> And, in cases where lost profits are claimed for an intended franchise that never opens, the defense is almost certain to argue that the claim is barred by the common law “new business rule.”

This article reviews the applicable standards for recovering lost profits for both established and new or never-opened franchises in cases where the substantive right to seek the recovery of lost future profits is otherwise established as a matter of contract, tort, or statutory law. The authors conclude that the prevailing “reasonable certainty” standard should be consistently applied whenever lost profits are claimed, no matter how new the business, with different outcomes being attributable to differences in proof. In addition, the authors urge the conclusion that “reasonable certainty” is established by a preponderance of the evidence and nothing more.



Mr. Caruso



Mr. Schaeffer

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1. For an excellent analysis going beyond the scope of this Article, see Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 TENN. J. BUS. L. 11 (2010).

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## I. The Reasonable Certainty Standard

“Broadly speaking, all American jurisdictions require that the party seeking recovery of lost profits must establish those lost profits ‘with reasonable certainty.’”<sup>2</sup> The reasonable certainty standard as it evolved at common law was intentionally flexible by design. In colorful language, a leading evidence commentator once described it as “*a free play in the joints of the machine—which enables the judges to give due effect to certain ‘imponderables’ not reducible to exact rule.*”<sup>3</sup>

In practice, the reasonable certainty standard usually means that to recover lost profits, the plaintiff must present proof “sufficient to bring the issue outside the realm of conjecture, speculation or opinion unfounded on definite facts,”<sup>4</sup> and the financial information contained in the record must be such that a just or reasonable estimate can be drawn.<sup>5</sup> The plaintiff has the burden of proof and to sustain it, it must show with reasonable certainty the amount of damages and the cause from which they resulted.

However, the task of proving damages to a reasonable degree of certainty is not necessarily as daunting as it sounds. As the Seventh Circuit has explained, “the epithet ‘certainty’ is overstrong, and that the standard is a qualified one, of ‘reasonable certainty’ merely, or, in other words, of ‘probability.’”<sup>6</sup> Rather, “reasonable certainty means by preponderance of the evidence as in other civil contexts.”<sup>7</sup> For lawyers representing plaintiffs, this is an important point that should be emphasized at all stages of the case, such as in the briefing of summary judgment motions, since more than one savvy defense lawyer has been heard to suggest that “reasonable certainty” requires some unspecified level of proof that would approach “beyond a reasonable doubt.”

Furthermore, and also an important point for plaintiffs seeking to get their lost profits claim over a summary judgment or directed verdict hurdle, there is authority holding that:

The [reasonable certainty] rule applies only to the fact of damages, not to the amount of damages. Proof of the fact of damages in a lost profits case means proof that there would have been some profits. If plaintiff’s proof leaves uncertain

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2. H.B. Williamson Co. v. Ill-Eagle Enters., 2015 U.S. Dist. LEXIS 22603, at \*14–15 (S.D. Ill. Feb. 25, 2015).

3. Charles T. McCormick, *The Recovery of Damages for Loss of Expected Profits*, 7 N.C. L. REV. 235 (1929) (emphasis added).

4. Fireside Marshmallow Co. v. Frank Quinlan Constr. Co., 213 F.2d 16, 18 (8th Cir. 1954); see also 22 AM. JUR. 2d Damages § 171.

5. Rich v. Eastman Kodak Co., 583 F.2d 435, 437 (8th Cir. 1978) (per curiam); Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 855 (8th Cir. 1952); see also Sun Blinds, Inc. v. S.A. Recasens, Bus. Franchise Guide (CCH) ¶ 12,913 (1st Cir. 2004) (recovery under the Puerto Rico Dealers’ Contracts Act required proof of specific damages for a contractual impairment and did not permit “indirect” proof of damages).

6. TAS Distrib. Co. v. Cummins Engine Co., 491 F.3d 625, 634 (7th Cir. 2007).

7. Mac Sales v. E.I. du Pont de Nemours & Co., 1996 U.S. Dist. LEXIS 3199, at \*14 (E.D. La. Mar. 8, 1996).

whether plaintiff would have made any profits at all, there can be no recovery. But once this level of causation has been established for the fact of damages, less certainty (*perhaps none at all*) is required in proof of the amount of damages.<sup>8</sup>

In a very recent case, *Wilbern v. Culver Franchising System, Inc.*,<sup>9</sup> a federal district judge held on June 7, 2016, that the preponderance of evidence standard applies to the entire issue of whether lost profits may be recovered, including the first level inquiry of whether any lost profits injury was sustained and the second level determination of the amount of the damages. The court's oral ruling has been transcribed and is included as an appendix to this article.<sup>10</sup> However, it must be mentioned that at the conclusion of trial, the jury found the defendant not guilty and, therefore, no lost profits were awarded.

## II. Lost Future Profits Arising from Established Franchises

Where a franchisor wrongfully terminates or otherwise injures an established franchise, the recovery of lost profits by the franchisee is obviously far more likely where the franchise has been profitable as opposed to unprofitable, all other evidentiary factors being equal. Consistent with the Restatement (Second) of Contracts, where the franchise has been profitable, the loss of future profits is likely to be reasonably certain.<sup>11</sup> If the franchise did not have a track record of profits, the franchisee/plaintiff's task is all the more daunting because the plaintiff will have to show that "but for" some actionable misconduct by the franchisor (or another defendant, if applicable) that it was "reasonably certain" that the franchise would have been profitable before it was terminated.

Curiously, many franchisors appear to believe that the same logic and the same "reasonable certainty" requirement does not apply when the shoe is on the other foot. In cases where a franchisor seeks to recover lost profits in the nature of lost future royalties from a franchisee that abandoned the franchise before the expiration of the term, the franchisor often argues that the franchisee's lack of profitability (if that is the case) is irrelevant because the franchisor's revenue comes from gross sales or the top line.

Faced with such arguments, franchisees may fight back by invoking the now familiar *Daubert* standards for the admissibility of expert opinion testimony, which generally include the requirement that an expert consider the "known and potential error rates" that would undermine the "certainty" of

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8. *Mid-Am. Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1365 (7th Cir. 1996) (emphasis added).

9. Case No. 13-C-3269 (N.D. Ill. June 7, 2016), *available at* [https://scholar.google.com/scholar\\_case?case=5274351533043176760&q=Wilbern+v.+Culver+Franchising+System,+Inc.&hl=en&as\\_sdt=400006&as\\_vis=1](https://scholar.google.com/scholar_case?case=5274351533043176760&q=Wilbern+v.+Culver+Franchising+System,+Inc.&hl=en&as_sdt=400006&as_vis=1).

10. Co-author Carmen Caruso represented the plaintiffs in this case, and substantial portions of this article were adapted from briefs filed by the plaintiffs in this case.

11. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352, cmt. b.

the expert's opinions.<sup>12</sup> Where a franchise is not profitable, the likelihood that it can survive to generate royalties for a full term is obviously going to be much lower than if it were profitable for the franchisee; therefore, any expert opinion as to the franchisor's lost future revenue stream should arguably be required to take the "going out of business" risk into account. This argument is perhaps better made by the franchisee in the first instance as a *Daubert* challenge, as opposed to moving for summary judgment against the franchisor's lost profits claim in its entirety as a matter of substantive law (i.e., arguing that as a matter of law the franchisor cannot meet the reasonable certainty standard).

Of course, many franchisors might wish to argue that their franchise agreements require the payment of lost future royalties (or liquidated damages), even in cases where the franchisee has gone out of business; the success of such an argument will likely depend, in the first instance, on the applicable contract language. In essence, a franchisor making such an argument is contending that the franchisee *guaranteed* the franchisor's profit, something that few franchisees would consciously do.

### III. Lost Future Profits Arising from New or Unopened Franchises

In deciding whether lost profits have been proven with reasonable certainty, courts often distinguish between established businesses and "new businesses" because new businesses must generally meet a higher evidentiary burden.<sup>13</sup> For many years, the common law "new business rule" stood as a formidable barrier to the recovery of lost profits by any business that did not have a track record of profits. At its peak, the new business rule approached per se status in many jurisdictions, meaning that a business without a track record of profits was categorically barred from recovering lost future profits, which were deemed too speculative as a matter of law "for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty."<sup>14</sup>

12. In *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Supreme Court directed trial courts to consider at least four factors when making the threshold determination of whether to admit expert testimony: (1) whether the theory or technique can be tested, (2) whether the expert's work has been subjected to peer review, (3) whether the rate of error is acceptable, and (4) whether the method utilized enjoys widespread acceptance. The second case in the *Daubert* trilogy is *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), which stands for two propositions: (1) the "gatekeeper" function allows the court itself to investigate the expert's reasoning process as well as the expert's general methodology, and (2) the standard of review of such a trial court's decision is only to be for "abuse of discretion." See, e.g., *Dollar Rent A Car Sys., Inc. v. P.R.P. Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 13,676 (10th Cir. Aug. 2, 2007). In the third case of the trilogy, *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Court rejected the argument that *Daubert* applied only to "scientific" testimony, holding that the *Daubert* test applies to all expert witnesses.

13. *Travellers Int'l v. Trans World Airlines*, 41 F.3d 1570, 1579 (2d Cir. 1994).

14. *Kenford v. Cty. of Erie*, 493 N.E.2d 234 (N.Y. 1986).

However, cracks began to appear in the new business rule over the years. Some courts, for example, held that instead of being an absolute bar, the rule is simply an evidentiary rule that requires a higher level of proof to achieve reasonable certainty as to the amount of damages.<sup>15</sup> Courts taking this view hold that although a new business is not categorically precluded from claiming lost profits, the evidence presented must remove the claimed profits from the “realm of speculation” and must be certain enough to support such an award. The inherent problem is that a new business lacks any established income stream or historical performance against which to compare its claims.

#### IV. The New Business Rule—National Trends

Although it was once held in high esteem, the majority of states now expressly reject the idea that the new business rule is a per se automatic exclusion of any claim for “lost profits” by a “new business.” The rejection has sometimes been by statute<sup>16</sup> and sometimes by case law,<sup>17</sup> but in any event, the vast majority of jurisdictions have rejected it as a per se rule of exclusion and instead allow lost profits when they can be proved with reasonable certainty.<sup>18</sup> The majority approach conforms to Restatement (Second) of Contracts (1981) § 352 comment b, which provides in part that:

15. *TVT Records v. Island DEF JAM*, 279 F. Supp. 2d 366, 388 (S.D.N.Y. 2003).

16. *See e.g.* VA. CODE ANN. § 8.01-221.1 (“Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation.”).

17. *See, e.g., Olivetti Corp. v. Ames Bus. Sys., Inc.*, 356 S.E.2d 578 (N.C. 1987) (holding that “the ‘new business rule,’ which precludes an award of damages for lost future profits where the allegedly damaged party has no recent record of profitability, is not the law in North Carolina. There should be no per se rule against the award of damages for lost future profits where they are shown with the requisite degree of certainty.”); *accord Iron Steamer, Ltd. v. Trinity Rest.*, 431 S.E.2d 767 (N.C. Ct. App. 1993) (recognizing the rejection of the new business rule); *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179 (Mo. Ct. App. 2007) (rejecting the new business rule as an absolute).

18. *See, e.g., Int’l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 86 (2d Cir. 1996) (under New York law, new business rule does not per se preclude lost profits); *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 681 (3d Cir. 1991) (under Pennsylvania law, new business can prove lost profits with reasonable certainty); *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 327 (Ala. 1987) (anticipated profits of new business recoverable if proved with reasonable certainty); *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980) (new business rule no longer law); *McNamara v. Wilmington Mall Realty Corp.*, 466 S.E.2d 324, 330 (N.C. Ct. App. 1996) (refused to adopt new business rule); *Welch v. U.S. Bancorp Realty & Mortgage Trust*, 596 P.2d 947, 964 (Or. 1979) (reasonable certainty standard applies to new business lost profits); *Smith Dev. Corp. v. Bilow Enters., Inc.*, 308 A.2d 477, 482–83 (1973) (“reasonable certainty” rule, not per se, new business rule applies); *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 371 S.E.2d 532, 534 (S.C. 1988) (new business rule not automatic bar); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 132 (Tex. App. 1997) (Texas case law in line with vast majority of jurisdictions in rejecting new business rule as per se exclusion); *Keck, Mahin & Cate v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000).

[i]f the breach prevents the injured party from carrying on a well-established business, the resulting loss of profits can often be proved with sufficient certainty. Evidence of past performance will form the basis for a reasonable prediction as to the future. . . . However, if the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.

A series of decisions by the Seventh Circuit exemplifies the national trend in this area, recognizing that difficulty in establishing lost profits when a business is strangled in its cradle does not mean the new business rule bars recovery of lost profits regardless of the evidence. In 1996, the Seventh Circuit surveyed national case law and observed that:

[W]hat was once a generally accepted rule precluding lost profits damages for a new business has become the minority view and “the development of the law has been to find damages for lost profits of an unestablished business recoverable when they can be adequately proved with reasonable certainty.” . . . [T]here is no basis for concluding that MidAmerica is precluded from recovering lost future profits as a matter of law merely because it is a new or unestablished business.<sup>19</sup>

Thereafter, in *MindGames, Inc. v. Western Publishing Co.*, the Seventh Circuit held that the new business rule has been “widely regarded as [a] failed” attempt to control damages and confirmed that the new business rule has lost its aura of being a per se bar to these claims.<sup>20</sup> And in *Smart Marketing Group, Inc. v. Publications International Ltd.*, the Seventh Circuit held that new businesses “are entitled to try” to recover lost profits although, like any plaintiff, they must present “hard evidence” in support.<sup>21</sup> In *Smart Marketing*, the court cited to an Illinois Supreme Court decision, *Tri-G, Inc. v. Burke, Bosselman & Weaver*, where the *Tri-G* court held that “a recovery may be had for prospective profits when there are *any* criteria by which the probable profits may be estimated with reasonable certainty” and that “[t]here is no inviolate rule that a new business can never prove lost profits. Rather, in some cases, courts have found that the rule that a new business’s profits are too speculative did not fit the circumstances before them.”<sup>22</sup>

Finally, in *Parvati Corp. v. City of Oak Forest*, the Seventh Circuit analyzed what it referred to as the now “discredited” new business rule, finding that while “the rule is based on the correct observation that it is more difficult to establish loss objectively when a business is strangled in its cradle . . . it doesn’t make sense to build on this insight a flat prohibition,” but rather courts should apply “the general standards governing proof of damages,

19. *Mid-Am. Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1365 (7th Cir. 1996).

20. 218 F.3d 652, 657 (7th Cir. 2000).

21. 624 F.3d 824, 829 (7th Cir. 2010).

22. 856 N.E.2d 389, 407 (Ill. 2006) (emphasis in original); see also *Apa v. Nat’l Bank of Commerce*, 872 N.E.2d 490, 493 (Ill. App. Ct. 2007) (also holding that “[l]ost profits may be recovered when there are *any* criteria by which the probable profits may be estimated with reasonable certainty”).

which requires a plaintiff to make a reasonable estimate of its damages as distinct from relying on hope and a guess.”<sup>23</sup>

### V. Successful Franchising Overcomes New Business Rule Concerns

Courts across the country have recognized that successful franchising may supply sufficient evidence to achieve reasonable certainty with respect to lost profits claims in cases that might previously have been subject to the common law new business rule. As stated by the U.S. District Court for the Northern District of Illinois, “[c]ourts are willing to entertain lost profit calculations based upon historical data from franchise operations, even when those calculations also included the business owner’s assumptions, and sometimes, when the business had not yet begun operation.”<sup>24</sup>

This is true because a franchise agreement is a “conveyance of the franchisor’s good will to the franchisee for the length of the franchise.”<sup>25</sup> As a leading treatise on damages law has observed, a business that opens its doors enjoying substantial goodwill, i.e., a franchise in a proven brand, is not a new business:

The supposed rule that lost profit damages of an unestablished business were not recoverable would seem to be least justifiable when the business to be established is a location for a national franchise. Each store is cast from the same mold. The locations are rigidly controlled by the national franchisor. Projections are readily available based on extensive experience in other stores from which sales and profits can be derived with a high degree of certainty. These projections are the basis for the franchisor’s selection of the new location and the franchisee’s investment in it. If the figures are good enough for the parties to invest their money, it would seem that they should be good enough for the court.<sup>26</sup>

This position is based on the theory that one franchise unit is a “yardstick” for anticipating results at a new unit to be opened in the same system. It is also articulated in *Pauline’s Chicken Villa, Inc. v. KFC Corp.*, where the Kentucky Supreme Court similarly allowed a KFC franchisee to recover lost profits for units that were never built.<sup>27</sup> These courts were persuaded by consumer acceptance of the brand<sup>28</sup> and related factors, such as “national [or regional] advertising, uniform quality control, earnings and expense figures on nearby and comparable locations, and an available history concerning success and failure ratios.”<sup>29</sup>

23. 709 F.3d 678, 685 (7th Cir. 2012).

24. *FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.*, 2007 U.S. Dist. LEXIS 19517, at \*31 (N.D. Ill. Mar. 20, 2007).

25. *Quizno’s Corp. v. Kampendahl*, 2002 U.S. Dist. LEXIS 9124, at \*15 (N.D. Ill. May 20, 2002).

26. DUNN ON DAMAGES § 4.7 (2005) (“Recovery of Lost Profits of an Unestablished Business”) (citing *Smith Dev. Corp. v. Bilow Enters.*, 308 A.2d 477, 483 (R.I. 1973) (allowing a McDonald’s franchisee who was blocked from opening his unit to recover lost profits).

27. 701 S.W.2d 399, 401–02 (Ky. 1985).

28. *Smith*, 308 A.2d at 483.

29. *Pauline’s Chicken Villa*, 701 S.W.2d at 401–02.

In *Super Valu Stores, Inc. v. Peterson*, the Alabama Supreme Court reversed a summary judgment for a defendant based on the new business rule, finding that a nationwide franchise system provided sufficient data to support the recovery of lost profits and expressly holding that it would be inequitable to deny the franchisee lost profits where the franchisee produced “the best evidence available” and it was sufficient to afford a reasonable basis for estimating the claimed losses.<sup>30</sup>

These franchising cases are not outliers. The authors are unable to find any reported opinions in which a plaintiff seeking to recover lost profits for unbuilt units in a successful franchise system was categorically denied on the basis of the common law new business rule. An opinion from the U.S. District Court for the Northern District of Illinois in *Otis v. Doctor's Associates, Inc.* appears to be the proverbial exception that proves the rule.<sup>31</sup> The court in *Otis* rejected a lost profits claim based on franchised restaurant outlets that were never built, but critically, those unbuilt units would have been part of what the court described as a “failed fast food franchise known as Cajun Joe’s Chicken.”<sup>32</sup> The *Otis* decision denying the lost profits claim harmonizes with the other cases in which lost profits for unbuilt franchise units were awarded. The critical dispositive factor appears to be, and we submit ought to be, whether the performance of the brand, as a whole, provides sufficient data to overcome new business concerns. The brand as a whole, not the particular units that were never built, is the alleged new business being evaluated.

## VI. Toward a Federal Common Law on Lost Future Profit Claims in “New Franchise” Cases

A recent U.S. District Court for the Northern District of Illinois opinion has upheld “franchising exception” to the new business rule in the context

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30. 506 So. 2d 317, 330 (Ala. 1987) (cited with approval by the Seventh Circuit in *Mid-Am. Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1365 (7th Cir. 1996)).

31. 1998 U.S. Dist. LEXIS 15414 (N.D. Ill. Sept. 10, 1998).

32. *Id.* at \*1 (emphasis added). The district court held: “However, Illinois law also enforces the ‘New Business Rule’ which precludes a plaintiff from recovering lost profits in some circumstances. Under Illinois law, a new business generally has no right to recover lost profits.” *Id.* (citing *Stuart Park Assocs. Ltd. P’ship v. Ameritech Pension Trust*, 51 F.3d 1319, 1328 (7th Cir. 1995)). Rather, “this element of damages is recoverable only if the business was previously established.” *Otis*, 1998 U.S. Dist. LEXIS 15414 (citing *Hill v. Brown*, 520 N.E.2d 1038, 1043 (Ill. App. Ct. 1988)). Moreover, proffered evidence demonstrating lost profits must provide “a reasonable basis for the computation of damages” and cannot be “conjecture or sheer speculation.” *Real Estate Value Co. v. USAIR, Inc.*, 979 F. Supp. 731, 741 (N.D. Ill. 1997) (quoting *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 66 (Ill. 1987)). In assessing the *Otis* opinion, the authors believe that the district court in that case simply did not have occasion to consider the status of the new business rule in Illinois because the plaintiff seeking to recover lost profits for unbuilt units in a “failed franchise system” simply did not get to “first base,” thus mooting the need for any deeper analysis. *Otis*, 1998 U.S. Dist. LEXIS 15414, at \*1. *Otis* was decided several years before the Illinois Supreme Court decision in *Tri-G, Inc. v. Burke, Bosseman & Weaver*, 856 N.E.2d 389, 407 (Ill. 2006), discussed above, which appears to align Illinois with the modern trend for allowing the possible recovery of lost future profits in any case where there is sufficient proof.

of a federal civil rights claim. In *Wilbern v. Culver Franchising System, Inc.*, which is mentioned above, an African American franchisee contended that he was denied the opportunity to open as many as three Culver's restaurants in predominantly African American neighborhoods in Chicago in alleged violation of a federal civil rights law, 42 U.S.C. § 1981; he sought to recover lost profits for the unbuilt restaurants.<sup>33</sup> The defendant moved for summary judgment under Federal Rule of Civil Procedure 56, arguing that the lost profits claims were too speculative to meet the reasonable certainty standard and also pointing out that Illinois law has historically frowned upon the recovery of lost profits by new businesses except in certain very narrowly defined exceptional situations.<sup>34</sup> The defendant also filed a related *Daubert* challenge to the opinions of plaintiffs' expert setting forth the plaintiffs' lost profits claims.

As a threshold response to the defense motions, the plaintiffs pointed out that damages in federal civil rights cases are determined as a matter of federal common law;<sup>35</sup> and that federal courts have historically recognized the need for uniformity in the interpretation of the federal civil rights laws.<sup>36</sup> The district court agreed, and thus the analysis of the lost profits claims in *Wilbern* is a matter of federal common law.

Citing to *FMS, Inc. v. Volvo Construction Equipment North America, Inc.*,<sup>37</sup> *America's Favorite Chicken Co. v. Samaras*,<sup>38</sup> *No Ka Oi Corp. v. National 60 Minute Tune, Inc.*,<sup>39</sup> *Pauline's Chicken Villa, Inc. v. KFC Corp.*,<sup>40</sup> and *Smith Development Corp. v. Bilow Enterprises, Inc.*,<sup>41</sup> the district court held at the summary judgment stage that, in the franchise context, historical data as to the performance of similar franchised units is a permissible "yardstick" for measuring losses sustained by the potential franchisee that was prevented from going into the franchise business by the wrongful conduct of the defendant.<sup>42</sup> The court found two factors to be persuasive: the overall success of the franchise brand and its national character.<sup>43</sup> In particular, because the "the nationwide character of the franchise business at issue provide[s] an ample basis

33. *Wilbern v. Culver Franchising Sys., Inc.*, 2015 U.S. Dist. LEXIS 130888 (N.D. Ill. Sept. 29, 2015).

34. Illinois courts provided for exceptions to the new business rule: (1) where the business would sell a product indistinct from an existing product with a known market, (2) where the new business was prevented from acquiring the operations of an existing business, or (3) where the new business lost profits to the defendant and the defendant's profits were quantifiable. *Millex Prods., Inc. v. Alra Lab.*, 603 N.E.2d 1226, 1237 (Ill. App. Ct. 1992); *Malatesta v. Leichter*, 542 N.E.2d 768, 781-82 (Ill. App. Ct. 1989); *Jamsports & Entm't, LLC v. Paradama Prods., Inc.*, 336 F. Supp. 2d 824, 849 (N.D. Ill. 2004).

35. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969).

36. *See Basista v. Weir*, 340 F.2d 74, 86 (3d Cir. 1965).

37. 2007 U.S. Dist. LEXIS 19517 (N.D. Ill. Mar. 20, 2007).

38. 929 S.W.3d 617 (Tex. App. 1996).

39. 863 P.2d 79, 83 (Wash. Ct. App. 1993).

40. 701 S.W.2d 399 (Ky. 1985).

41. 308 A.2d 477 (R.I. 1973).

42. *Wilbern v. Culver Franchising Sys., Inc.*, 2015 U.S. Dist. LEXIS 130888, at \*105 (N.D. Ill. Sept. 29, 2015) (citing *Volvo*, 2007 U.S. Dist. LEXIS 19517 (N.D. Ill. Mar. 20, 2007)).

43. *Id.* at \*105-06.

for computation of probable losses”<sup>44</sup> and because “a national franchisor, with uniformity of national advertising, uniform quality control, earnings, and expense figures on nearby and comparable locations, and an available history concerning success and failure ratios” can provide adequate yardsticks for calculating lost profits.<sup>45</sup> Despite the plaintiffs’ loss at trial, the case provides viable precedent for future franchisees seeking to recover lost profits on units *in successful brands* that were never built.

To be sure, most franchising disputes are adjudicated under state law as claims for breach of contract, common law fraud, or under state franchise acts or Little FTC acts. Nonetheless, the opinion in *Wilbern* is likely to be cited as persuasive authority in future cases, whether state or federal law is controlling.

## VII. Challenges in Proof

Defendants faced with lost future profit claims that now may be more likely to survive a new business rule challenge are not left without arguments in their arsenals. As a first line of defense, a defendant may challenge the contention that the unbuilt franchise (or any other unopened business) would have ever opened its doors to the public absent the defendant’s alleged wrongful conduct. However, defendants relying on this approach should be aware of two reported decisions in which the courts appeared to be very lenient in accepting the plaintiffs’ claims that they would have been able to open the desired new franchises but for the defendants’ misconduct.

For example, in *America’s Favorite Chicken Co. v. Samaras*, a Texas appellate court upheld the recovery of lost profits for two “build to suit” Popeye’s Chicken units that the franchisor had agreed, but failed, to deliver to the franchisee.<sup>46</sup> Significantly, at the time of the breach of contract in that

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44. *Id.* (citing *No Ka Oi Corp. v. Nat’l 60 Minute Tune, Inc.*, 863 P.2d 79, 83 (Wash. Ct. App. 1993)).

45. *Id.* at \*105–06 (citing *Pauline’s Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985)). An expert estimating lost profits generally has four available approaches:

(1) *Before and after method*: Under the before and after method, the plaintiff’s profits are analyzed before the wrongful act, during the loss period, and after the loss period ends, and estimates are made of the amount by which profits were reduced by the wrongful act.

(2) *Sales projection method*: Under the sales projection method, the plaintiff estimates sales and profits during the loss period based on what the results would have been but for the defendant’s wrongful act. Projected profits are then compared with actual profits to estimate lost profits.

(3) *Yardstick method*: The yardstick method uses a benchmark (comparable companies) to estimate lost sales, profits, or value for the subject company. The results of the benchmark companies are compared to the subject company and the difference forms the basis for the loss estimate.

(4) *Market share method*: The market share method calculates lost profits based on the market share the company would have attained but for the wrongful act of the other party. This approach is most appropriate for larger companies owning a reasonable market share for their products.

46. 929 S.W.2d 617, 623–24 (Tex. App. 1996) (cited with approval in *Volvo*, 2007 U.S. Dist. LEXIS 19517, at \*31).

case, sites for the proposed units had not been identified; there remained substantial open contract terms such as “the amount, duration and repayment terms under the lease agreement;” and it was “not determined whether AFC would finance the build-to-suit restaurants internally or externally.”<sup>47</sup> Despite these uncertainties, the court rejected the defendant’s “speculation” objections, holding that:

[T]he contract was about as definite and certain as the parties could have made it under the circumstances, and it was sufficiently definite and certain to furnish a basis for arriving with reasonable certainty at the minimum damages which [Samaras] would suffer by reason of [AFC’s] breach even though, to repeat, the locations of the two un-built units had not been determined.<sup>48</sup>

The facts are even more striking in a Washington state court decision, *No Ka Oi Corp. v. National 60 Minute Tune*.<sup>49</sup> There, the plaintiff signed an “area representative agreement” with the franchisor of 60 Minute Tune (an “automobile tune-up and service franchises in the Western United States”) giving the plaintiff “the exclusive rights to sell or own up to ten 60 Minute Tune franchises in Hawaii for twenty-five years.”<sup>50</sup> In preparation, the plaintiff “made two trips to Hawaii to investigate and develop the Hawaii market for 60 Minute Tune franchises.”<sup>51</sup> That was the extent of the progress toward opening these franchises.<sup>52</sup> At the time of the alleged breach of contract, not a single 60 Minute Tune retail shop was open in Hawaii; not a single franchise had been sold; the 60 Minute Tune franchise offering was not yet registered for sale in the State of Hawaii; not a single specific site had been identified for any proposed units; no land had been obtained by lease or purchase; no signed real estate contracts were cited in the opinion; and no firm financing arrangements were in place for any proposed shop.<sup>53</sup> Despite the inherent speculation as to future success, the court affirmed a jury verdict awarding lost profits to the area representative, holding that:

Proof of the nationwide character of the franchise business at issue provided an ample basis for computation of probable losses. *It has come to be recognized that in the arena of franchise or chain stores, “courts are displaying increasing reluctance to apply the new business rule” because of the inherent characteristics of franchise outlets, which “eliminate nearly all uncertainty.”* . . . When the franchisor is a national or regional franchisor with uniform advertising and quality control, and when there is available data on earnings and expenses and on failure and success ratios from similar locations, the franchisee can usually show lost profits with “reasonable certainty.”<sup>54</sup>

47. *America’s Favorite Chicken Co.*, 929 S.W.2d at 623.

48. *Id.* at 624.

49. 863 P.2d 79 (Wash. Ct. App. 1993).

50. *Id.* at 80.

51. *Id.*

52. *See id.*

53. *See generally id.*

54. *Id.* at 83 (emphasis added) (citations omitted); *see also* Joel R. Buckberg, *When Private Equity Knocks, Will You be Ready to Answer*, 13 L.J.N’s FRANCHISING BUS. & L. ALERT 11 (Aug. 2007).

## VIII. Two Other Issues: Best Evidence and Intent and Preparedness

### A. Best Evidence

The result in *No Ka Oi Corp.* is best understood by reference to the common law “wrongdoer rule,” which sometimes overlaps with the “best evidence” rule. In a 1931 decision, *Story Parchment Co. v. Patterson Parchment Paper Co.*, the U.S. Supreme Court held: “Where the tort itself is of such a nature as to preclude the ascertainment of damages with reasonable certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts.”<sup>55</sup>

Following this logic, the Seventh Circuit in *Mid-America Tablewares* held that:

“Where the defendant’s wrong has caused the difficulty of proof of damages, he cannot complain of the resulting uncertainty” and “If the best evidence of the damage of which the situation admits is furnished, this is sufficient.” . . . These principles are commonly invoked by courts allowing recovery of future lost profits by new or unestablished businesses. See, e.g., *Chung v. Kaonobi Center Co.*, 62 Haw. 594, 606, 618 P.2d 283, 291 (1980) (allowing recovery of lost profits by a restaurant that never opened and stating “it would be grossly unfair to deny a plaintiff meaningful recovery for lack of a sufficient ‘track record’ where the plaintiff has been prevented from establishing such a record by defendant’s actions”); *Welch v. United States Bancorp Realty & Mortgage Trust Co.*, 286 Or. 673, 704–05, 596 P.2d 947, 963–64 (1979) (allowing recovery of lost profits by unestablished business and observing that expert testimony as to plaintiff’s expected returns was all that could be expected under the circumstances and that to require more “would be tantamount to holding that the defendant could breach this particular contract with impunity”); *Fera v. Village Plaza Inc.*, 396 Mich. 639, 648, 242 N.W.2d 372, 376 (1976) (affirming award of lost profits by store that never opened and noting that precision in the assessment of damages is not required “particularly . . . where it is defendant’s own act . . . that has caused the imprecision”); see also *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 383 (7th Cir. 1986) (“Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer.”), *certiorari denied*, 480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574.<sup>56</sup>

The theory discussed above, of not requiring “best evidence” that is unavailable because of the defendant’s actions has also gained acceptance in state courts, including, for example, the Illinois Supreme Court, which held in *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, that “[d]efendants should not be permitted to escape liability entirely because the amount of the damage they have caused is uncertain. To do so would be to immunize defendants from the consequences of their wrongful conduct.”<sup>57</sup>

55. 282 U.S. 555, 563 (1931).

56. *Mid-Am. Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1365–66 (7th Cir. 1996) (citations in original).

57. 770 N.E.2d 177, 199 (Ill. 2002).

### B. Intent and Preparedness

Similar law has been developed in a line of market exclusion cases, in which federal courts have allowed antitrust plaintiffs to recover lost profit damages by making a sufficient showing that they were “prepared to enter the market,” even though they never actually entered the market or earned a dime in the intended business. In *JamSports & Entertainment, LLC v. Paradama Products*, the U.S. District Court for the Northern District of Illinois held that:

The fact that JamSports was never able actually to promote a supercross tour does not preclude it from recovering damages. “There would be a big gap in the damage remedies of the antitrust laws if [section 4 of the Clayton Act] were read to prevent the recovery of damages by all would-be entrants.” . . . The key problem involves “quantifying lost hopes. While damages for loss of future earnings and profits are familiar items in tort and contract cases, the problem of measurement is greater when the loss occurs in a market that the plaintiff is not yet in.” To “balance the interest in deterrence against the concern with measurement,” courts, including the Seventh Circuit, have required a plaintiff that has not yet entered the market “to show that it intended to enter and was prepared to do so within a reasonable time as a prerequisite to collecting lost profits for being excluded. . . . As the intent and preparedness requirement is generally interpreted, only a plaintiff who takes demonstrable steps to enter an industry can recover projected lost profits as antitrust damages.” The plaintiff’s preparedness to enter the market is determined by assessing its ability to finance the business; consummation of the requisite contracts; affirmative action to enter the business; and background and experience in the prospective business.<sup>58</sup>

Of significance, the district court in *JamSports* continued:

The Court finds no support in the law for a hard-and-fast rule that full financing, signed on the bottom line, must be proven as a prerequisite to recovery of damages for exclusion from a market. . . . As the [Seventh Circuit has] said . . . “the whole purpose of the ‘intention and preparedness’ test is to allow recovery of damages in cases where the plaintiff has not entered the business in which he is seeking lost profits.”<sup>59</sup>

Following the same logic, the district court in *JamSports* also allowed the plaintiff to present its ancillary state law lost profits claims based on tortious interference with prospective economic advantage to the jury, rejecting the common law new business rule objection and recognizing that to deny recovery where the plaintiff presented the best available evidence “*would effectively write such tort claims out of existence.*”<sup>60</sup>

Of course, while a plaintiff may try to establish best evidence, intent and preparedness as discussed above, the defendant remains free to introduce evidence that the plaintiff’s efforts were feeble or that there were insurmountable obstacles that simply could not have been overcome in any circum-

58. 2004 U.S. Dist. LEXIS 23605, at \*11–13 (N.D. Ill. Nov. 22, 2004) (citing *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982)).

59. *Id.*

60. *Id.* at \*15–17 (emphasis added) (citations omitted).

stances. For example, the prospective new business might have required third party approval, such as the granting of a license by a governmental entity. In *Gecker v. Flynn (In re Emerald Casino, Inc.)*, the U.S. District Court for the Northern District of Illinois barred an expert from testifying to damages that in substantial part depended on the plaintiff obtaining approval from the Illinois Gaming Board (IGB) for a gaming casino, but where:

[t]he IGB expressed clear hostility towards a casino in Rosemont throughout Emerald's efforts to sell the license . . . The Trustee cannot show that Emerald lost the opportunity to operate a casino in Rosemont because the Trustee has not shown that but for Defendants' conduct, the IGB would have approved a Rosemont location.<sup>61</sup>

One can argue that if the evidence in the *Emerald Casino* case had been the opposite, i.e., if the plaintiff had been able to show *clear support* for its project by the relevant gaming board, instead of "clear hostility," the lost profits claim would have been allowed to proceed. In other words, there is no hard and fast reason why the outcome of the reasonable certainty analysis cannot anticipate the outcome of a political process such as the granting of a license. The authors submit that decisions in these types of cases must turn on their facts.

## IX. Conclusion

The prevailing "reasonable certainty" standard as developed at common law is the correct standard for assessing claims for lost profit damages in every case, regardless of whether the business was established or un-opened at the time of the claimed injury. In other words, the goal posts should not be moved. The once-heralded new business rule is largely discredited and is no longer a per se bar in most jurisdictions. Franchising, in particular, lends itself to the potential recovery of lost profits in cases that would previously have been barred by strict application of the new business rule. In effect, this represents a shift from demanding "before and after" proof of lost profits to accepting "yardstick" proof from the same system. Franchisees or area developers that are thwarted in their efforts to open new units in successful franchise systems are much more likely to succeed in recovering lost profits than in the past. It is important for practitioners to keep in mind that the new business to be analyzed in the franchise context is often the franchisor. Franchisors can no longer rely on the new business rule as a complete shield from these claims in most jurisdictions.

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61. 2014 U.S. Dist. LEXIS 139804, at \*14–15 (N.D. Ill. Sept. 30, 2014) (citations omitted).

## APPENDIX I

### New Business Rule Cases

#### 2TH CIRCUIT

1. *TVT Records v. Island Def Jam Music Grp.*, 279 F. Supp. 2d 366 (S.D.N.Y. 2003), *rev'd*, 412 F.3d 82 (2d Cir. 2005).

#### 4TH CIRCUIT

1. *Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, 423 F. App'x 274 (4th Cir. Apr. 14, 2011).
2. *Vulcan Chem. Tech., Inc. v. Barker*, 167 F. Supp. 2d 867 (W.D. Va. 2001), *vacated*, 297 F.3d 332 (4th Cir. 2002).
3. *Perry v. Scruggs*, 2001 U.S. App. LEXIS 18553 (4th Cir. 2001).

#### 7TH CIRCUIT

1. *Parvati Corp. v. City of Oak Forest*, 709 F.3d 678 (7th Cir. 2013).
2. *Smart Mktg. Grp. v. Publ'ns Int'l Ltd.*, 624 F.3d 824 (7th Cir. 2010).
3. *Von der Rubr v. Immtech Int'l, Inc.*, 570 F.3d 858 (7th Cir. 2009).
4. *TAS Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625 (7th Cir. 2007).
5. *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652 (7th Cir. 2000).

#### 8TH CIRCUIT

1. *Housing 21, L.L.C. v. Atl. Home Builders Co.*, 289 F.3d 1050 (8th Cir. 2002).

#### 9TH CIRCUIT

1. *Humetrix, Inc., v. Gemplus S.C.A.*, 268 F.3d 910 (9th Cir. 2001).

#### 10TH CIRCUIT

1. *Blair-Naughton L.L.C. v. Diner Concepts, Inc.*, 369 F. App'x 895 (10th Cir. 2010).
2. *Specialty Beverages, L.L.C. v. Pabst Brew'g Co.*, 537 F.3d 1165 (10th Cir. 2008).
3. *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188 (10th Cir. 2004).

## 11TH CIRCUIT

1. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009).
2. *Lowe's Home Cent., Inc. v. Gen. Elec. Co.*, 381 F.3d 1091 (11th Cir. 2004).

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## ALABAMA

1. *KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265 (M.D. Ala. 2011).

## ARKANSAS

1. *Arloe Designs, LLC v. Ark. Capital Corp.*, 431 S.W.3d 277 (Ark. 2014).
2. *Erdman Co. v. Phoenix Land & Acquisition, LLC*, No. 2:10-CV-2045, 2013 WL 3776805 (W.D. Ark. July 18, 2013).

## CALIFORNIA

1. *Flying J, Inc. v. Dep't of Transp.*, No. F060545, 2012 WL 147925 (Cal. Ct. App. Jan. 18, 2012).
2. *Sargon Enters., Inc. v. Univ. of S. Cal.*, No. B156587, 2005 WL 435413 (Cal. Ct. App. Feb. 25, 2005).
3. *Transphase Sys., Inc. v. S. Cal. Edison Co.*, No. G025948, 2002 WL 31576869 (Cal. Ct. App. Nov. 19, 2002).

## DELAWARE

1. *XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. CV-09-157-RGA, 2013 WL 6118447 (D. Del. Nov. 20, 2013).

## FLORIDA

1. *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, No. 05-21113-CIV, 2007 WL 3232274 (S.D. Fla. Oct. 31, 2007).
2. *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319 (S.D. Fla. 2006) (order granting post-trial motion).

## GEORGIA

1. *Reynolds v. Fla. Highway Prods., Inc.*, No. CV507-78, 2008 WL 5430332 (S.D. Ga. Dec. 31, 2008) (order granting in part and denying in part motion for partial summary judgment).
2. *Gen. Elec. Co. v. Lowe's Home Ctrs., Inc.*, 608 S.E.2d 636 (Ga. 2005).

ILLINOIS

1. *Wilbern v. Culver Franchising Sys., Inc.*, Case No. 13-C-3269 (N.D. Ill. June 7, 2016).
2. *H.B. Williamson Co. v. Ill-Eagle Enters., Ltd.*, No. 14-cv-0575-MJR-PMF, 2015 WL 802250 (S.D. Ill. Feb. 25, 2015).
3. *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 31 N.E.3d 451 (Ill. Ct. App. 2015).
4. *In re Emerald Casino, Inc.*, 459 B.R. 298 (Bankr. N.D. Ill. 2014).
5. *Levin v. Grecian*, 974 F. Supp. 2d 1114 (N.D. Ill. 2013).
6. *Smart Mktg. Grp., Inc. v. Publ'ns Int'l, Ltd.*, No. 04-cv-00146, 2013 WL 2384248 (N.D. Ill. May 29, 2013).
7. *Sys. Dev. Integration, LLC v. Computer Sciences Corp.*, 886 F. Supp. 2d 873 (N.D. Ill. 2012).
8. *Blythe Holdings, Inc. v. Flawless Fin. Corp.*, No. 06 cv 5262, 2012 WL 3028329 (N.D. Ill. July 23, 2012).
9. *TAS Distrib. Co. v. Cummins, Inc.*, No. 07-CV-1141, 2011 WL 5180285 (C.D. Ill. Oct. 28, 2011).
10. *Kinesoft Dev. Corp. v. Softbank Holdings Inc.*, 139 F. Supp. 2d 869 (N.D. Ill. 2011).
11. *Cement-Lock v. Gas Tech. Inst.*, 618 F. Supp. 2d 856 (N.D. Ill. 2009).
12. *Euroholdings Capital & Inv. Corp. v. Harris Tr. & Sav. Bank*, 602 F. Supp. 2d 928 (N.D. Ill. 2009).
13. *TAS Distrib. Co. v. Cummins, Inc.*, No. 07-cv-1141, 2009 WL 928100 (C.D. Ill. Mar. 31, 2009).
14. *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, No. 08 C 6031, 2009 WL 995477 (N.D. Ill. Apr. 14, 2009).
15. *TAS Distrib. Co., Inc. v. Cummins Inc.*, No. 07-1141, 2009 WL 3757375 (C.D. Ill. Oct. 27, 2009) (order granting in part and denying in part motion for summary judgment).
16. *Kiswani v. Phoenix Sec. Agency, Inc.*, 247 F.R.D. 554 (N.D. Ill. 2008).
17. *Polyad Co. v. Indopco Inc.*, No. 06 C 5732, 2008 WL 4287623 (N.D. Ill. Sept. 12, 2008).
18. *Dominion Nutrition, Inc. v. Cesca*, 467 F. Supp. 2d 870 (N.D. Ill. 2006).
19. *Q Sales & Leasing, LLC v. Quilt Prot., Inc.*, No. 01 C 1993, 2004 WL 2420640 (N.D. Ill. Oct. 26, 2004).
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23. *Alper v. Alzheimer & Gray*, No. 97 C 1200, 2002 WL 31133287 (N.D. Ill. Sept. 26, 2002).

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1. *Square D Co. v. Breakers Unlimited, Inc.*, No. 1:07-cv-806-WTL-JMS, 2009 WL 1468700 (S.D. Ind. May 21, 2009) (order denying motion to exclude testimony).
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#### IOWA

1. *Catipovic v. Turley*, 68 F. Supp. 3d 983 (N.D. Iowa 2014).
2. *DePenning v. Res. Elec., Inc.*, No. 10-1377, 2011 WL 3115172 (Iowa Ct. App. July 27, 2011).
3. *Green v. Heithoff*, No. 10-1608, 2011 WL 5515167 (Iowa Ct. App. Nov. 9, 2011).
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8. *Kolkman v. Roth*, No. 01-0945, 2002 WL 1429524 (Iowa Ct. App. July 3, 2002).
9. *Hog Slat, Inc. v. Ebert*, 104 F. Supp. 2d 1112 (N.D. Iowa 2000).

#### KANSAS

1. *Blair-Naughton, L.L.C. v. Diner Concepts, Inc.*, 568 F. Supp. 2d 1261 (D. Kan. 2008).

#### MAINE

1. *Packgen v. Berry Plastics Corp.*, 113 F. Supp. 3d 371 (D. Me. 2015).
2. *Gamache v. Kingfield Sav. Bank*, No. CV-99-135, 2000 WL 33671782 (Me. Super. Ct. Dec. 21, 2000) (order granting in part and denying in part motion for partial summary judgment).

## MICHIGAN

1. *Dunn v. CCH Inc.*, 834 F. Supp. 2d 657 (E.D. Mich. 2011).

## NEW JERSEY

1. *Essex Cty. Vocational Sch. Bd. of Educ. v. New United Corp.*, 2014 WL 1356603 (N.J. Super. Ct. App. Div. Jan. 1, 2014).
2. *Gorjuice Wrap, Inc. v. Okin, Hollander & De Luca, LLP*, 2011 WL 92957 (N.J. Super. Ct. App. Div. Jan. 12, 2011).
3. *Mamacita, Inc. v. Colborne Corp.*, 2010 WL 2793781 (N.J. Super. Ct. App. Div. July 15, 2010).
4. *Bounanno Revocable Tr. v. Franklin Universal Bldg. Corp.*, 2006 WL 2947689 (N.J. Super. Ct. Ch. Div. Oct. 13, 2006).
5. *Sea Crest Enters., L.L.C. v. City of Elizabeth*, 2006 WL 2590327 (N.J. Super. Ct. App. Div. Oct. 17, 2005).
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## NEW MEXICO

1. *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Co-op., Inc.*, 301 P.3d 387 (N.M. 2013).

## NEW YORK

1. *Pharmacy, Inc. v. Am. Pharm. Partners, Inc.*, 511 F. Supp. 2d 324 (E.D.N.Y. 2007).

## NORTH CAROLINA

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2. *Basic Med. Care Plus, Inc. v. N.C. Mut. Life Ins. Co.*, No. 1:03CV00269, 2005 WL 2205016 (M.D.N.C. Sept. 6, 2005).

## OHIO

1. *In re Smarttalk Tel'Servs., Inc. Sec. Litig.*, 487 F. Supp. 2d 940 (S.D. Ohio 2007).
2. *Telxon Corp. v. Smart Media of Del., Inc.*, No. 22098 & 22099, 2005 WL 2292800 (Ohio Ct. App. Sept. 21, 2005).

## RHODE ISLAND

1. *UST Corp. v. Gen. Rd. Truck'g Corp.*, 783 A.2d 931 (R.I. 2001).

## VERMONT

1. *Madowitz v. Woods at Killington Owners' Ass'n*, 196 Vt. 47 (2014).

## VIRGINIA

1. *PBM Prods., Inc. v. Mead Johnson & Co.*, 174 F. Supp. 2d (E.D. Va. 2001).
2. *Interactive Return Serv., Inc. v. Va. Polytechnic Inst.*, No. LE-3014-4, 2000 WL 489617 (Va. Cir. Ct. Apr. 20, 2000).

## WASHINGTON

1. *Colombia Park Golf Course, Inc. v. City of Kennewick*, 248 P.3d 1067 (Wash. Ct. App. 2011).
2. *Strategic Intent, LLC v. Strangford Lough Brew'g Co. Ltd.*, No. CV-09-309-RHW, 2011 WL 1810474 (E.D. Wash. May 11, 2011).
3. *Torres Mazatlan Remainder, L.L.C. v. FLRX, Inc.*, No. 64747-4-I, 164 Wash. App. 1038 (Wash. Ct. App. Nov. 14, 2011).
4. *Ultimate Timing, L.L.C. v. Simms*, 715 F. Supp. 2d 1195 (W.D. Wash. 2010).
5. *Point Ruston, L.L.C. v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, No. C09-5232BHS, 2010 WL 3720277 (W.D. Wash. Sept. 17, 2010) (order granting in part and denying in part motions in limine).
6. *A.G. Design & Assocs., LLC v. Trainman Lantern Co.*, No. C07-5158RBL, 2009 WL 1393240 (W.D. Wash. May 18, 2009).
7. *613 Fairview Ave., L.L.C. v. Pong's Corp., Inc.*, No. 49728-6-I, 115 Wash. App. 1012 (Wash. Ct. App. Jan. 21, 2003).
8. *Nw. Mining & Extraction, Inc. v. Safe Guard Prods.*, No. 19715-8-III, 122 Wash. App. 1045 (Wash. Ct. App. July 23, 2002).
9. *Kaech v. Lewis Cty. Pub. Util. Dist. No. 1*, 23 P.3d 529 (Wash. Ct. App. 2001).
10. *Morgan v. Microsoft Corp.*, No. 41586-7-I, 2001 WL 783758 (Wash. Ct. App. July 9, 2001).
11. *KK & LL Corp. v. Alamo Grp. (WA), Inc.*, No. 23533-1-II, 2000 WL 380455 (Wash. Ct. App. Apr. 14, 2000).

APPENDIX II

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MICHAEL ANTHONY G. WILBERN )  
and WILBERN ENTERPRISES, )  
LLC, ) Docket No. 13 C 3269  
)  
Plaintiffs, )  
)  
vs. ) Chicago, Illinois  
) June 7, 2016  
CULVER FRANCHISING SYSTEM, ) 4:31 p.m.  
INC., a Wisconsin corporation, )  
)  
Defendant. )

EXCERPT TRANSCRIPT OF PROCEEDINGS—Trial  
BEFORE THE HONORABLE THOMAS M. DURKIN, and Jury

APPEARANCES:

For the Plaintiffs: CARMEN D. CARUSO LAW FIRM, by  
MR. CARMEN D. CARUSO  
MR. SHANE D. VALENZI  
MS. XIAOYIN CAO  
77 W. Washington Street, Suite 1900  
Chicago, IL 60602

For the Defendant: SMITH AMUNDSEN, LLC, by  
MR. LARRY A. SCHECHTMAN  
MR. ALAN L. FARKAS  
MR. DARREN P. GRADY  
150 N. Michigan Avenue, Suite 3300  
Chicago, IL 60601

Also Present: MR. MICHAEL ANTHONY G. WILBERN  
MR. STEVEN E. ANDERSON

Contract Court Reporter: AMY M. SPEE, CSR, RPR, CRR  
219 S. Dearborn Street, Room 2144A  
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(In open court outside the presence of the jury.)

(Proceedings had not herein transcribed.)

THE COURT: All right. Well, defendant—here’s my ruling: Defendant proposes that plaintiff must prove by a reasonably certain standard that either Stony Island and/or—that Stony Island and/or Marshfield Plaza would open, and that if that burden is met, the burden of proving the amount of lost profits is by a preponderance standard.

I see nothing in the case law supporting such differing burdens of proof. Also, I see nothing that defines reasonably certain as a higher—or a different burden of proof than preponderance. And the word “certainty,” even reasonable certainty, can misleadingly lead the jury to require more of the plaintiff than is required under the law.

Damages can’t be speculative, and the jury is instructed at Pages 28 and 29 of that that [sic] compensatory damages must be based on evidence and not guesswork. They are instructed on Page 30 that there must be a reasonable basis for estimating the amount of lost profits. And if there is no reasonable basis for estimating the amount of loss, they cannot award damages in the form of lost profits. They are told it cannot be based on hope or a guess.

The Seventh Circuit Pattern Instruction 11.4.3 for lost profits in a patent context uses the words “reasonable probability.” That was issued in 2010.

Reasonable probability takes out the word “certainty,” which implies a burden greater than the law requires. The *TAS v. Cummins* case interpreted Illinois law, but we must look to federal law under Section 1981.

Even *MindGames*—even the *MindGames* case discussion of new business—of the new business rule regarding lost profits and its use of the words “reasonable certainty” is in discussing the language from certain state court cases across the country. *MindGames* itself actually dealt with Arkansas law.

In the end, the Court in *MindGames* analyzed the appropriateness of the damages under the lens of excessive speculativeness or under speculation.

In a more recent Seventh Circuit case than *MindGames* and *TAS* was *Parvati v. City of Oak Forest*, 709 F.3d 678 (2013), which we mentioned in our summary judgment ruling, which was a Section 1981 case. The Court said the general standard governing proof of damages, even in a lost profits case involving a new business—the Court referred to the new business—

referred to that as a business strangled in the cradle. And the Court said, Plaintiff must make a reasonable estimate of its damages as distinct from relying on hope and a guess. Nothing about reasonable certainty is said in that case.

I'll note in a different context, the Seventh Circuit criticized even the language of reasonable probability in the context of whether the jurisdictional minimum of \$75,000 in a diversity case has been met.

In fact, the phrase "reasonable probability that jurisdiction exists" was, as the Court said, banished from our lexicon.

Obviously it's a different context, but the rationale of why it was banished was because of the confusion caused by comparing reasonably probable with a preponderance standard. As the Court in that case said, "All legal phrases have some potential for misuse, which must be tolerated when there is no good alternative," but there was a very good alternative to reasonable probability: the preponderance standard.

Recognizing that's a different case, I still find in this case that reasonable certainty is not called for; it's preponderance standard. And even using the words "reasonably probable," which were suggested by the plaintiff, is inappropriate. So we're going to give that instruction as I gave it to you yesterday, which takes out the words "reasonable certainty" and "reasonable probability." You'll—it will be prepared as I edited it yesterday.

And the proper standard for damages whether it is—whether Marshfield and Stony Island would open, and if they opened, if one or both opened, what the type or burden of proof is as to the amount of damages is a preponderance standard for both, both issues. That will be the ruling.

Is there any objection to that by plaintiff?

MR. CARUSO: No objection.

THE COURT: Any objection by defendant?

MR. FARKAS: Yes, your Honor. We maintain the objection and prefer the wording of the instruction as submitted by defendant that includes the reasonable certainty language.

THE COURT: Very good. Your objection is noted and preserved for the record.

MR. FARKAS: Thank you.

THE COURT: Okay. Any questions about that instruction then?

MR. VALENZI: No, Judge, I think we understand.

THE COURT: Okay. Anything else we need to discuss on instructions or any other issue?

MR. CARUSO: Not by plaintiff.

MR. VALENZI: Should—I will say, Judge, should we send one more final version?

THE COURT: Yes, make that edit, send a final version which incorporates Mr. Schechtman's changes, send them all in red line, but in a way where we can remove the red line. And then we'll—I may reorder these instructions somewhat and we'll make copies of them tonight. And we'll make copies for the jury. I think that's going to be easier, because if I have to flip through them and change the order, it does you no good to staple them and unstaple them.

If we have problems copying, you'll get an e-mail with the correct order and we'll ask probably the plaintiffs to make those copies; but if not, we'll handle it from our end.

All right. So nothing else from plaintiff.

Mr. Farkas, Mr. Schechtman, anything else?

MR. SCHECHTMAN: No.

MR. FARKAS: No, your Honor.

(Proceedings had not herein transcribed.)

(Excerpt concluded at 4:37 p.m.)

## C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the excerpt of proceedings in the above-entitled matter.

*/s/ Amy M. Spee*

AMY M. SPEE, CSR, RPR, CRR  
Contract Court Reporter

*June 15th, 2016*



## John H. Gionis

Partner

John H. Gionis is a Partner in the Litigation Group at Certilman Balin. His practice encompasses personal and catastrophic injuries, medical malpractice, real estate, commercial litigation, trusts and estates, and criminal law including white collar crime cases involving fraud. A seasoned litigator, Mr. Gionis has successfully tried to verdict cases in both the state and federal courts in the New York metropolitan area. Prior to joining the firm, he was a Partner at the East Norwich firm of Murphy, Lynch & Gionis, where he tried high profile real estate and tort cases.

A former Nassau County District Attorney from 1983 until 1986, Mr. Gionis is a trial attorney to the core. Known for his cross examination techniques, his aggressive and thorough style in the courtroom enable him to achieve positive results for his clients. A quick study, Mr. Gionis has an uncanny ability to understand the issues from a variety of legal practice areas and is often called upon by his partners to assist their clients, both plaintiffs and defendants, in courtroom trials. Most of his cases are document intensive, especially in matters involving complicated fraud and negligence and disciplinary proceedings.

In 1977, he earned his Bachelor of Arts in English from the State University of New York at Albany; and in 1982, he earned his Juris Doctor from California Western School of Law at San Diego where he graduated in the top 2% of his class and received the Jurisprudence Award in Trial Advocacy.

Throughout his career, Mr. Gionis has lectured on numerous issues including real estate and trusts and estates and has served as the CLE Director of the American Inn of Courts.

He was recently appointed to serve on the Grievance Committee for the 10th Judicial District. In addition, Mr. Gionis has achieved the highest professional rating by [Martindale Hubbell](#). In April 2013, Mr. Gionis was awarded a "Legal Eagle" for Civil and Criminal Law from LI Pulse Magazine. He was named to the 2016, 2015 and 2014

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Admitted to practice in the State of New York and in both the Eastern and Southern Federal Courts in New York, Mr. Gionis is a member of the [Nassau, Suffolk, New York and American Bar Associations](#). He is fluent in Greek and is involved in the American Hellenic Educational Progressive Association ([AHEPA](#)).

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### Practice Areas

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U.S. District Court, Eastern District  
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Lauren B. Grassotti is Of Counsel to the Litigation & Dispute Resolution and Employment Law practice groups at Meyer, Suozzi, English & Klein, P.C. Ms. Grassotti regularly counsels clients of all levels on labor and employment matters including family and medical leave, disability questions, employee handbooks, employee discharge and discipline, wage and hour issues, employment contracts, and severance agreements. Ms. Grassotti's litigation practice includes contract disputes, commercial paper, business torts, shareholder and partnership disputes, intellectual property litigation, and various employment-related issues and statutes, along with regulatory investigations and enforcement proceedings. She represents clients in a wide range of industries, including financial services, legal, accounting, hospitality, real estate development and management, manufacturing, and recycling and waste management. Ms. Grassotti is experienced in all aspects of litigation, including pre-litigation investigation and claim assessment, development of litigation strategy, pleadings, depositions, discovery (including electronic discovery), expert discovery, motions, preparing cases for trial, trial and appeals, and regularly practices before state and federal trial and appellate courts. Ms. Grassotti also has substantial experience conducting internal investigations and responding to regulatory subpoenas and inquires.

From 2015-2016, Ms. Grassotti was named to the *New York Super Lawyers - Rising Star* list. No more than 2.5 percent of the lawyers in the state are recognized by Super Lawyers for this recognition.

Notable experience includes:

- Represented licensor and inventor of novel camouflage technology in connection with disputes against licensees involving claims arising under parties' license agreements, trade dress infringement and patent-related declaratory judgment counterclaims.
- Represented related limited liability companies and majority members in related disputes against minority member involving fiduciary duty, contract, and intellectual property claims.
- Represented a startup social media company and its principals in litigations involving theft of trade secrets, computer fraud and abuse, breach of fiduciary duty, breach of shareholder agreement, and derivative claims.
- Represented a publicly traded biotechnology company in related litigations concerning distribution agreements for patented technology.
- Represented a large Russian steel manufacturer in an international arbitration against a Brazilian steel manufacturer/purchaser concerning supply contracts.

## Lauren B. Grassoti

- Represented a publicly traded biotechnology company in proxy contest initiated by insurgent minority stockholders.
- Represented real estate developer in an investigation conducted by the Moreland Commission to Investigate Public Corruption concerning New York state property tax exemption program.
- Represented real estate developer in an investigation conducted by the State of New York Office of the Inspector General concerning the selection of a vendor to operate a video lottery terminal facility at Aqueduct Racetrack.
- Represented broker-dealer in an investigation conducted by the New York State Attorney General concerning mortgage-backed securities.

Before joining the firm, Ms. Grassoti was an associate in the litigation department at Greenberg Traurig, LLP in New York City.

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### Eric H. Gruber

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Mr. Gruber is a CLMC partner and heads the firm's Litigation Department. Over the last 29 years, Mr. Gruber has developed a diversified commercial and corporate practice representing public and private companies and individuals over a range of practice areas from litigation and dispute resolution to transactional and corporate matters.

An experienced litigator and accomplished trial attorney, Mr. Gruber has crafted the legal strategy for a broad range of civil cases and arbitrations. Mr. Gruber has represented plaintiffs and defendants in various matters across a spectrum of substantive areas, including commercial disputes, business torts, partnership disputes, real estate, construction, creditors' rights including bankruptcy, securities, telecommunications and general business law in the federal and state trial and appellate courts and before various arbitration panels, including the American Arbitration Association and the National Association of Securities Dealers. Mr. Gruber has also represented clients before the Securities and Exchange Commission.

On the transactional side, Mr. Gruber has experience in asset-based lending and other areas of commercial finance, including bankruptcy matters, workouts and turn-around situations. He has actively represented clients in the documentation of commercial finance and equipment leasing transactions. Mr. Gruber has represented various business entities in connection with the acquisition and sale of businesses and assets. Mr. Gruber has also represented landlords, managing agents and businesses in connection with the structuring and negotiation of commercial real estate leases, as well as litigation that has arisen out of, or in connection with, such transactions.

Mr. Gruber has lectured for various professional groups and organizations including the Nassau Academy of Law on points of legal procedure and litigation.

Mr. Gruber is admitted to the United States Court of Appeals for the Second Circuit, the United States District Court for the Southern and Eastern Districts of New York, and all of the Courts of the State of New York.

Mr. Gruber is a Member of the New York State Bar Association and the Nassau County Bar Association. He is also a member of the Theodore Roosevelt American Inns of Court and a Past President of B'nai B'rith's Banking and Finance Unit.

**Glenn R. Jersey III** is a third year law student at the Maurice A. Deane School of Law at Hofstra University. He received his Undergraduate Degree in History from Adelphi University in 2012. He spent the summer of his first year of law school at the The Safe Center LI (formally the Nassau County Coalition Against Domestic Violence) where his interest in Family and Matrimonial Law was solidified. He is currently employed by DiMascio and Associates, LLP, where he will continue to work post graduation. He is also the President of the Columbian Student Lawyers' Association, a member of the Dean's Student Advisory Council, Family Law Society and various other organizations. He is also involved in the Nassau County Columbian Lawyers' Association, the Nassau County Bar Association Matrimonial & New Lawyers (Young Lawyers) Sub-Committees, and New York Family Law American Inn of Court.

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Thomas A. O'Rourke is a founding partner of the firm Bodner & O'Rourke. Mr. O'Rourke's practice involves all areas of patent, trademark and copyright law. For over thirty years he has been registered to practice before the United States Patent & Trademark Office. Mr. O'Rourke has counseled clients regarding the procurement and enforcement of patents, trademarks, copyrights and trade secrets in a variety of technologies including mechanical, and computer technology. In addition, his practice involves domestic and international technology transfer, acquisition and licensing. He is a member of the bar of the States of New York and California. He has also been admitted to numerous Federal District Courts and Courts of Appeal across the country including, the Court of Appeals for the Federal Circuit.

Mr. O'Rourke has been a member of the Board of Directors of the New York Intellectual Property Law Association. Mr. O'Rourke is Chairman of the Suffolk County Bar Association's Committee on Intellectual Property Law and has been a member of the Advisory Board of the Licensing Journal. He has lectured on Intellectual Property Law at numerous Continuing Legal Education programs, including programs presented by the American Bar Association, the Connecticut Intellectual Property Law Association and the Suffolk County Bar Association. He was also the Editor of the New York Intellectual Property Law Association Bulletin and the author of numerous articles on patents, trademarks and copyrights for the New York Intellectual Property Law

Association. Mr. O'Rourke has also authored monthly articles on intellectual property law licensing, which have appeared in the Licensing Journal.

Mr. O'Rourke has a B.S. degree from Fordham University and obtained his J.D. degree from St. John's University School of Law, where he was a member of the Law Review.



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Hofstra University Law School  
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U.S. District Court, Eastern District of Michigan

U.S. District Court, Eastern District of Wisconsin

Kevin Schlosser is a Member and the Chair of the Litigation and Dispute Resolution Department at Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. Mr. Schlosser has been involved in all aspects of state and federal litigation since starting his legal career in 1984. An experienced civil litigator, Mr. Schlosser has engineered the legal strategy for a broad range of cases and arbitrations, including complex commercial disputes, business torts, fraud, breach of fiduciary duty, breach of contract, professional liability and malpractice claims, construction law, real estate and commercial landlord-tenant disputes, corporate and partnership disputes, ERISA, health law, Federal Fair Debt Collection Practices Act class actions, employment and restrictive covenants, intellectual property, products liability, insurance claims and defense, including disability insurance claims and the prosecution and defense of other tort-related claims. His clients consist of some of the largest companies in the world, as well as local businesses and individuals, including senior law partners, accountants, doctors and others in the professions. A proven appellate lawyer, he is also an accomplished trial attorney, whose victories include million-dollar recoveries and a record-breaking jury verdict.

In addition to his litigation experience, Mr. Schlosser also acts as general outside corporate counsel, advising corporate clients on the full spectrum of legal affairs. Mr. Schlosser receives referrals for most of his clients from other practicing attorneys (often former adversaries) and existing clients. Because of his experience in the Commercial Division of the Supreme Court in Nassau County, Mr. Schlosser is also frequently tapped to serve as local Long Island counsel to many other law firms in New York City and out of state.

Notable experience includes:

- Won a \$12.6 million judgment in a jury trial in the Commercial Division, Nassau County, in a breach of contract case involving a stock purchase agreement
- Won at trial in Commercial Division, New York County, defeating \$1.2 million commission claim by Trump Securities
- Appeared as special litigation counsel to the National Football League and obtained the immediate vacatur of an injunction through an order of the Appellate Division in Long Island, thereby permitting the NFL to pursue its policy of mandatory drug testing of professional football player

## Kevin Schlosser

- Successfully defended a \$65 million shareholder derivative action alleging breach of fiduciary duties and corporate waste against the former president of a public bank, resulting in the entire action against the president being dismissed with no monetary payment from the president and his counsel fees being reimbursed in their entirety by the bank
- Successfully defended a \$25 million action alleging several counts of fraud, breach of contract and business torts against the largest casino operator in the world
- Obtained summary judgment dismissing case and prevailed on appeal to the First Department and Court of Appeals in an action alleging damages of over \$20 million, asserting intentional interference with contract and interference with business relations against largest casino operator in the world
- Prevailed on appeal to the Second Department to sustain claim of punitive damages in a commercial fraud and breach of fiduciary duty action
- Prevailed after trial in dispute between senior law partners concerning the proper method for allocating fees in cases handled by the law firm
- Obtained injunctive relief on behalf of product manufacturer/seller in federal district court barring competitors from selling competing, offending product, and prevailed after trial in challenge to the injunction
- Obtained final judgment against large manufacturer's competitor and former employee under restrictive covenants and non-disclosure agreements based upon claims of misappropriation of trade secrets and breach of contract
- Obtained highest jury award on record for damages in an action for nuisance and interference with real property rights on behalf of property owners in the Supreme Court, Suffolk County
- Obtained jury verdict on behalf of international distributor-commercial tenant on the ground of constructive eviction even though tenant continued to remain in the leased premises for lengthy period of time, in which jury awarded tenant significant monetary damages against the landlord and relieved the tenant of any further obligation for rent on remaining lease term after the tenant moved to new space
- Obtained summary judgment against insurer on behalf of insured manufacturer declaring that insurer must defend underlying false advertising and Lanham Act claims pending in federal district court
- Obtained favorable resolution of several actions arising from partnership dispute and sale of real property in New York City, including \$14 million fraud claims, breach of fiduciary duty claims and breach of contract
- Recovered, by way of judgment and settlements, millions of dollars on behalf of disabled professionals and other employees under private and ERISA disability insurance policies
- Spearheaded as general outside counsel to an international manufacturer (the largest of its kind in the world) the favorable settlement of a \$25 million products liability action after several rounds of mediation, successfully resolving complex insurance issues and coordinating three outside defense firms in the defense of the client
- As general outside corporate counsel to an international manufacturer, provides on-going oversight of all legal affairs of the company, including employment, regulatory, acquisitions and joint ventures, licensing and intellectual property transactions, distribution agreements, independent contractor agreements, operating agreements and related matters

## Kevin Schlosser

Mr. Schlosser serves in various teaching capacities: He is a member of the faculty of the National Institute for Trial Advocacy; has chaired the Continuing Legal Education Program on New York Civil Motion Practice at Hofstra Law School; and is a member of the Continuing Legal Education faculty panel of the New York State Bar Association and the Nassau County Bar Association Academy of Law, where he instructs experienced practicing attorneys. He has given CLE seminars and presentations with some of the most prominent judges in the state and federal courts, including Supreme Court Commercial Division Justices Timothy S. Driscoll, Vito M. DeStefano, Stephen Bucaria, Emily Pines, Elizabeth Hazlitt Emerson, Saliann Scarpulla and Thomas Whelan, Appellate Division Justices Leonard Austin, Karla Moskowitz, Barbara Kapnick and federal judiciary such as U.S. District Court Judges Shira Scheindlin, Richard J. Sullivan and Nicholas G. Garaufis and Magistrate Judges A. Kathleen Tomlinson, Arlene R. Lindsay and William Wall.

Mr. Schlosser has written extensively on many aspects of the law, publishing numerous articles over twenty years in leading legal publications. He has authored the "Litigation Review" column for the *New York Law Journal* and served on the Board of Editors of the *Nassau Lawyer*, which is the official publication of the Nassau County Bar Association.

Active in charitable organizations, Mr. Schlosser received the 2003 Leadership Award presented by the Long Island Chapter of the National Multiple Sclerosis Society. He also serves as a faculty member of the Construction Management Institute, sponsored by the New York State Chapter of the National Association of Minority Contractors, helping minority-owned contractors enhance their developing businesses.

During law school, Mr. Schlosser was a Member and then Articles Editor of the *Hofstra Law Review*. In his capacity as Articles Editor, Mr. Schlosser interacted with and edited articles of some of the most prominent and well-respected legal scholars, including law professors, evidence experts and Congressional leaders. He also clerked for the Honorable George C. Pratt, United States Circuit Court Judge, where he drafted several court decisions, including a complex antitrust ruling. He also obtained valuable trial experience while clerking in the Criminal Division of the United States Attorney's Office for the Eastern District of New York, where he assisted in the prosecution of several major felony cases. Mr. Schlosser graduated law school with the highest honors. Additionally, he was a founding officer of a national criminal justice honor society at John Jay College of Criminal Justice of the City University of New York.

At the outset of his career, Mr. Schlosser acquired intensive litigation experience, having been trained at two prominent firms based in New York City: Patterson, Belknap, Webb & Tyler, and Chadbourne & Parke. In 1990, he became an associate of one of Long Island's largest law firms, where he rose to the level of a managing partner and head of its litigation department, the largest group in the firm. After joining Meyer, Suozzi and becoming a Member in 2002, Mr. Schlosser was appointed Co-Chair of the firm's litigation department in November 2002. In 2006, Mr. Schlosser became Chair of the litigation department. He is also a member of the firm's Management Committee.

Mr. Schlosser is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence. Mr. Schlosser was recognized by *Long Island Pulse Magazine* in 2010 and 2011 as the region's "Top Legal Eagle for Litigation." Mr. Schlosser has been named to the *New York Super Lawyers* list as one of the top attorneys in New York from 2012-2016. In 2016, Mr. Schlosser was inducted as the President of the Theodore Roosevelt American Inn of Court.

Adam Solomon graduated from Utica College with a B.S. in Criminal Justice in 2009. He then spent the next six years working within our local government at the Nassau County Clerk's Office, before matriculating at Hofstra Law. Adam is currently a rising 3L at Hofstra Law and plans to sit for the Bar in July. In the spring of his first year, he competed in the 1L Intramural Moot Court Competition and was selected to join the Moot Court Board where he serves as an Associate Editor; assisting in the development of the Fall and Spring problems for the intramural competitions.

Adam is currently the Managing Editor of Staff of the *Hofstra Labor & Employment Law Journal*, Vol. 34. He has been an active member of the Disaster Recovery Law Clinic, Real Estate Law Association, Trusts and Estates Society, a mentor in the First Generation Law Society, and was named a Dean's Scholar as well as named to the Dean's List each semester. He is currently a law clerk at the Law Offices of Cohen & Schwartz LLP, handling estate planning, probate administration, and estate and civil litigation matters. He is also student member of the Nassau County Bar Association, New York State Bar Association, and Theodore Roosevelt American Inn of Court. Outside of school, he is a member of the APA, enjoys playing pool, bowling, and golf, spending time at the beach, and relaxing with friends and family.

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## Judicial Directory

### *JUDGES OF THE TRIAL COURTS*

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#### **Hon. Leonard Steinman**



Nassau County Supreme Court  
100 Supreme Court Drive  
Mineola, NY 11501  
(516) 493-3252

[Judge's Part Rules](#)

#### **Judicial Offices**

Justice, Supreme Court, Nassau County, Elected, 2013 to 2026

#### **Other Professional Experience**

Blank Rome LLP, Partner, 1991 to 2012

Summit Rovins & Feldesman, Associate, 1988 to 1991

Rubin Baum Levin Constant & Friedman, Associate, 1985 to 1988

Montclare & Guay, Associate, 1984 to 1985

#### **Admission to the Bar**

NYS, Appellate Division, Third Department, 1985

United States District Court, Eastern and Southern Districts, 1985

United States Tax Court, 2005

United States Court of Appeals, Second Circuit, 1989

Supreme Court of the United States, 1998

#### **Education**

J.D., Albany Law School of Union University, 1984

B.A., Boston University, 1981

#### **Publications**

Note, Liberal Contribution Rules in New York: In The Plaintiffs' Best Interest, 49 Alb. L. Rev. 244, 1984

Foreign Sales Mean Increased Risk for Directors, Executive Counsel, Vol. 5, No. 3, May/June 2008

#### **Professional & Civic Activities**

Board Member, Nassau County Interim Finance Authority, 2010 to 2012

10/20/2016

Judicial Directory: Judge Bio

Member, College Council, State University of New York, College at Old Westbury, 2008 to 2012

Chairman, Nassau County Industrial Development Agency, 2010

Web page updated: October 20, 2016

**Kasandra Zaeri** was born and raised in Orlando where she received her B.A. in Political Science from the University of Central Florida. As a 2L, she has received placement on the Dean's List and is an associate staff member of the American College of Trust and Estate Counsel Law Journal, Vol. 42. During the summer and continuing throughout the year, she's been interning at Colleran, O'Hara & Mills, concentrating on the labor and employment rights of unions. In her spare time, she travels the world independently and enjoys learning new languages and cultures.