

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-CR-00519-CEJ
)	
WILLIAM DAVIDSON)	
)	
Defendant.)	

**DEFENDANT’S MOTION FOR HEARING
PURSUANT TO DAUBERT/KUMHO TIRE**

I. Introduction

Comes now Defendant William Davidson by his attorney, John D. Stobbs II, and requests a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), to determine whether proposed Government expert testimony is both relevant and reliable.¹ The defendant seeks to admit at trial the testimony of William Buller. It is Defendant’s position that the proposed testimony appears to have no relevance to any issue at trial, and the disclosure to date does not allow for an adequate assessment of the reliability of the proffered testimony. As such, Defendant respectfully requests a hearing.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules

¹To date the Government has not formally filed its response to Defendant’s Motion for Disclosure of Expert Testimony. Due to the fact that trial is approximately one month away, this Motion is being filed to advise this Honorable Court of Defendant’s intention to contest the proposed expert testimony the Government will attempt to adduce at trial. Defendant has retained an expert who might be called to give testimony which will in all likelihood rebut the testimony of Mr. Buller. However, until the Government responds to the Motion for Disclosure of Expert Testimony Defendant will not be able to be specific regarding this Motion and will amend it if need be.

of Evidence and Supreme Court case law interpreting the rule.² To introduce expert testimony, the proponent must first demonstrate that the proffered expert is “qualified as an expert by knowledge, skill, experience, training, or education to render his or her opinions.” Fed. R. Evid. 702. Next, the proponent must satisfy the court that the proffered testimony is both relevant and reliable. *Id.*; *Daubert*, 509 U.S. at 589. The Supreme Court has interpreted Rule 702 as requiring that the district court act as a “gatekeeper,” ensuring that “any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.*, see also *Kumho Tire Co.*, 526 U.S. at 141; and *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). Under Federal Rule of Evidence 104(a), the proponent of the testimony bears the burden of establishing to the trial judge that “the pertinent admissibility requirements are met by a preponderance of the evidence.” Fed. R. Evid. 702 Advisory Committee’s Note (2000 amends.) (Citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). The decision whether to admit or exclude expert testimony is within the broad discretion of the district court. *General Electric Co. v. Joiner*, 522 U.S. at 136-37; *United States v. Hall*, 165 F.3d 1095, 1001(7th Cir. 1999).

II. Reliability

In evaluating whether expert testimony is reliable, the court considers the following nonexhaustive list of factors: 1) whether the theory is scientific knowledge that will assist the trier of fact and can be tested; 2) whether the theory has been subjected to peer review or publication; 3) the known or potential rate of error and the existence of standards controlling the technique’s operation; and 4) the extent to which the methodology or technique employed by the expert is generally accepted in the scientific community. *Goodwin v. MTD Products, Inc.*, 232 F.3d 600, 608 n. 4(7th Cir. 2000) citing *Daubert*, 509 U.S. at 593-94. While *Daubert* refers to scientific testimony, *Kumho Tire* held that “[t]he

²Fed. 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, 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.

Daubert standard applies to all expert testimony, whether it relates to areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise.” *Smith v. Ford Motor Co.*, 215 F.3d 715, 719 (7th Cir. 2000); *see Kumho Tire*, 526 U.S. at 146. “[N]othing 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,” *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416 420 (7th Cir. 2005) quoting *General Electric Co.*, 522 U.S. at 146.

Given Mr. Buller’s background, he would likely be qualified as an expert in the field of accounting. The next question is whether his proffered testimony is reliable. Discovery in this case is massive. It is not entirely clear from what the Government has provided vis a vis Mr. Buller what information he has reviewed, and what his findings and conclusions were. Similarly it is not clear how Mr. Buller will arrive at his findings regarding Defendant’s financial situation at the times mentioned in the Superseding Indictment.

An issue Defendant intends to raise at a Hearing is the form and methodology employed by Mr. Buller and what steps Mr. Buller went through to extract his conclusions from the available documents that he reviewed. In reviewing the discovery and reports prepared it is not clear whether Mr. Buller will be able to inquire into other manifestly relevant factors such as whether Defendant had other assets, whether he had deductible losses, or a variety of other factors not easily gleaned from merely examining the documents provided thus far in discovery. A hearing will determine whether Mr. Buller’s opinions satisfy the *Daubert/Kumho Tire* reliability analysis or whether there is “too great an analytical gap between the data and the opinion proffered.” *G.E. v. Joiner*, 522 U.S. at 146.

III. Relevance

Even if the court finds that a proffered expert is qualified and his testimony is reliable, the testimony may not be admitted unless it is also relevant. “When analyzing the relevance of proposed testimony, the district court must consider whether the testimony will assist the trier of fact with its analysis of any of the issues involved in the case.” *Ford Motor Co.*, 215

F.3d at 718. Nothing what Mr. Buller could testify to bears on any of the issues in this case. Defendant William Davidson is charged with violating 18 U.S.C. 1344, 1346, 1956(a)(1)(A)(ii) and 2 and 26 U.S.C. 7201. Any testimony from Mr. Buller is not relevant to any issue in the case. Because there is not relevance to any issue, the court need not even apply Rule 403 balancing.

Even assuming arguendo that the proffered testimony had slight relevance and met the requirements of Rule 702, it would still not be admissible. “Of course, expert testimony that is otherwise admissible under Rule 702 may nonetheless be excluded under Rule 403 if its probative value is outweighed by the danger of unfair prejudice.” *Buscaglia v. United States*, 25 F.3d 530, 533 (7th Cir. 1994) citing *United States v. Brown*, 7 F.3d 648, 654 (7th Cir. 1993). Almost all of the concerns of Rule 403 apply because Mr. Buller’s testimony would not only create unfair prejudice, but would also confuse the issues, mislead the jury, and waste time. “Unless the expertise adds something, the expert at best is offering a gratuitous opinion, and at worst is exerting undue influence on the jury that would be subject to control under Rule 403.” *United States v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996).

IV. Conclusion

For the foregoing reasons, the government respectfully requests a *Daubert* hearing to determine prior to trial whether Mr. Buller’s testimony will be both reliable and relevant.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007 a copy of the attached *DEFENDANT'S MOTION FOR HEARING PURSUANT TO DAUBERT/KUMHO TIRE* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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