

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TAPESTRY, INC.,

and

CAPRI HOLDINGS LIMITED.

Defendants.

REDACTED VERSION

Case No. 1:24-cv-03109-JLR

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE
TESTIMONY OF JEFF GENNETTE**

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Plaintiff Federal Trade Commission (“FTC”) moves to exclude the testimony, opinions, and report of Defendants’ purported industry expert, Jeff Gennette, the former CEO of Macy’s Inc. (“Macy’s”). The Court should exclude Mr. Gennette’s testimony and opinions because Mr. Gennette’s opinions fall far outside the range of his experience at Macy’s, covering [REDACTED]

[REDACTED] with whom Mr. Gennette has no experience. Moreover, both Plaintiff and Defendants took deposition testimony of [REDACTED]

[REDACTED] Thus, providing an expert witness to opine on [REDACTED] is not just improper—it is unnecessary. It is also troubling given the history between Mr. Gennette and Defendants. For instance, [REDACTED] [REDACTED] PX2835 (Capri) / CAPRI-001480773, attached as Exhibit A to Declaration of Victoria Sims (“Sims Decl.”).

Mr. Gennette goes far outside of his area of expertise to offer opinions [REDACTED]

[REDACTED] Mr. Gennette employs no methodology, aside from [REDACTED]

[REDACTED] He conducts no analyses of [REDACTED]

[REDACTED] and offers no expertise in these areas. In short, Mr. Gennette’s testimony does not pass the test set forth in Federal Rule of Evidence 702, which was created precisely to exclude this kind of confusing and unreliable testimony. For these reasons, the Court should exclude Mr. Gennette’s testimony and opinions.

BACKGROUND

Jeff Gennette is the former CEO of Macy's, which includes wholesalers Macy's, Bloomingdale's, and the beauty store Bluemercury. On August 7, 2024, Mr. Gennette submitted an expert report in this case. *See generally* Exhibit B to Sims Decl.¹ Mr. Gennette relies on his [REDACTED] as the basis for his expertise.

Gennette (Defs.) Dep. at 7:14-17, Exhibit D to Sims Decl. In his report, Mr. Gennette offers numerous opinions on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

LEGAL STANDARD

Under Federal Rule of Evidence 702, the party offering expert testimony has the burden of establishing that (1) “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,” (2) “the testimony is based on sufficient facts or data,” (3) “the testimony is the product of reliable principles and methods,” and (4) “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” Fed. R. Evid. 702.

The district court has the “gatekeeping” responsibility of barring the introduction of conjecture and speculation by witnesses who may not be qualified to render expert opinions on

¹ Defendants provided Mr. Gennette’s August 7, 2024 Report and the Exhibits and Appendices to his report in two separate files. Exhibit B to Sims Decl. is Mr. Gennette’s August 7, 2024 Report. Exhibit C to Sims Decl. are the Exhibits and Appendices to Mr. Gennette’s report.

the matter at issue, and whose proffered testimony is not supported by validation and reliable scientific methodology. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (clarifying that this “gatekeeper” function “applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge”). Although the *Daubert* analysis may differ in the context of a bench hearing, the Court “still must perform a Rule 702 and *Daubert* analysis before it relies on expert testimony.” *Town & Country Linen Corp. v. Ingenious Designs LLC*, No. 18-CV-5075 (LJL), 2022 WL 2757643, at *3 & *17 (S.D.N.Y. July 14, 2022) (excluding expert testimony that was unhelpful or not based on sound reasoning).

The proponent of expert testimony must show how the witness’s experience and expertise reliably led to their conclusions or provided a basis for their opinions. *Mason v. AmTrust Fin. Servs., Inc.*, No. 19 CIV. 8364 (DLC), 2020 WL 7425254, at *3 (S.D.N.Y. Dec. 18, 2020) (citing *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Properties, LLC*, 467 F.3d 107, 132 (2d Cir. 2006)). Further, expert testimony admitted under Rule 702 “must be relevant, meaning it must help the trier of fact to understand the evidence or to determine a fact in issue.” *Choi v. Tower Rsch. Cap. LLC*, 2 F.4th 10, 20 (2d Cir. 2021) (internal quotation marks omitted). An expert may not offer testimony that simply “constructs a factual narrative based on record evidence” or “summariz[es] facts and documents in the record that the [trier of fact] is capable of understanding on its own.” *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 32 F. Supp. 3d 453, 460, 462 (S.D.N.Y. 2014) (internal quotation marks omitted).

In determining whether a witness is qualified to be an expert, “the court must examine the totality of the witness’s background to determine whether he or she exhibits any one or more of the qualifications listed in Rule 702—knowledge, skill, experience, training, or education—with

respect to a relevant field.” *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 304 (S.D.N.Y. 2015). “Second, the court ‘compare[s] the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony.’” *Id.* Without “an adequate showing that [a proffered expert] possesses the requisite expertise to be a reliable witness on the subject,” the testimony is inadmissible under Rule 702. *Bayoh v. Afropunk LLC*, 2020 WL 6269300, *4-5 (S.D.N.Y. Oct. 26, 2020).

ARGUMENT

The Court should exclude Mr. Gennette’s testimony, opinions, and report because he bases his opinions solely on [REDACTED]

[REDACTED] Mr. Gennette has [REDACTED] See Gennette Rep., Appendix A.

He offers opinions on [REDACTED] Gennette Rep. at ¶ 88. He has [REDACTED]

[REDACTED] Gennette Dep. at 17:4-6, 17:10-12. He does not claim a [REDACTED]

[REDACTED] *Id.* at 18:4-23, 20:13-21:13.

An expert opinion, even one drawing on experience rather than scientific technique, must be based on the application of reliable principles and methods to specific data. Fed. R. Evid. 702 (b)-(d); *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 667 (N.D. Ill. 2006). The expert must also show how their experience led to their conclusions. *LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 CIV. 7242 (SAS), 2002 WL 1585551, at *4 (S.D.N.Y. July 16, 2002).

Mr. Gennette’s analyses fall short of this standard because he failed to employ an adequate methodology in coming to his opinions. His opinions are not based on “sufficient facts

or data.” he reviewed [REDACTED]

[REDACTED]

[REDACTED] Gennette Dep. at 26:18-20, 30:4-9. He conducted [REDACTED]

[REDACTED] Mr. Gennette’s opinions are not based on any “reliable principles and methods” or reliable applications of such “principles or methods to the facts of the case.” Fed. R. Evid. 702(c)-(d). His opinions set forth below, should be excluded.

I. Mr. Gennette’s Opinions Regarding [REDACTED] Are Not Based on His Expertise or Reliable Principles or Methodologies.

Mr. Gennette, [REDACTED]

[REDACTED] offers opinions about [REDACTED]

[REDACTED]

[REDACTED] Gennette Rep. at ¶ 12(a). Mr. Gennette, also, inexplicably posits that [REDACTED]

[REDACTED], *id.*—despite having [REDACTED]

[REDACTED] Thus, here, there is a mismatch between “the area in which the witness has superior knowledge, education, experience, or skill” and “the subject matter of the proffered testimony.” *Kellwood*, 105 F. Supp. 3d at 304.

[REDACTED]

[REDACTED]

[REDACTED]

Gennette Rep. at ¶¶ 20-24. [REDACTED]

[REDACTED] *id.* at ¶ 23, [REDACTED] *id.* at

¶ 21, [REDACTED]

[REDACTED] *id.* at ¶ 24, [REDACTED] He concludes that [REDACTED]

[REDACTED]

[REDACTED] *id.* at ¶ 23, again, [REDACTED]

[REDACTED]

[REDACTED] Gennette Dep. at 22:20-22, 24:7-9, 71:12-21, 74:3-12.

Mr. Gennette also [REDACTED]

[REDACTED]

[REDACTED] Gennette Rep. at ¶ 26. He

relies here, not even on his limited experience, but rather, the lack of such experience [REDACTED]

[REDACTED] Not to mention that Mr. Gennette [REDACTED]

[REDACTED] Gennette Dep. at 30:4-9.

Mr. Gennette proceeds, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Gennette Rep. at ¶¶ 27-37. The [REDACTED] conducted by Mr.

Gennette do not require any particular expertise and are [REDACTED]

[REDACTED] *Grdinich v. Bradlees*, 187 F.R.D. 77, 82 (S.D.N.Y. 1999) (“Expert

testimony is not admissible when it addresses ‘lay matters which [the trier of fact] is capable of

understanding and deciding without the expert’s help.”); *LinkCo*, 2002 WL 1585551, at *2

(expert opinion is inadmissible when it does no more than counsel would do.).

Finally, Mr. Gennette states that [REDACTED]

[REDACTED] Gennette Rep. at ¶ 38. This opinion is

offered despite the fact that Mr. Gennette [REDACTED] and

it is not “the area in which the witness has superior knowledge, education, experience, or skill.” *Kellwood*, 105 F. Supp. 3d at 304. Mr. Gennette’s sole support [REDACTED]

[REDACTED] Gennette Rep. at ¶¶ 38-39.

Courts in this district have rejected similar attempts to use experts to present “a summary of facts that the Defendants wish to argue are relevant to the decisions the fact finder must make at trial. This is not proper expert testimony.” *FTC v. Vyera Pharms., LLC*, 20cv00706 (DLC), 2021 WL 5403749, at *2 (S.D.N.Y. Nov. 18, 2021); *see also, e.g., In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004). The same result is proper here.

II. Mr. Gennette’s Opinion [REDACTED] Should Be Excluded.

Mr. Gennette opines that [REDACTED]

[REDACTED] rather than a reliable methodology and thus should be stricken. Despite using the word [REDACTED] Mr. Gennette admits [REDACTED]

[REDACTED] Gennette Dep. at 259:14-16, 268:8-10; Gennette Rep. at ¶ 88; *see* Gennette Rep. § V.

Mr. Gennette also claims [REDACTED]

[REDACTED] Gennette Rep. at ¶ 44;

Gennette Dep. at 263:24-264:4. An expert must show how their experience led to their conclusions. *LinkCo*, 2002 WL 1585551, at *4. Mr. Gennette fails to do this.

Mr. Gennette’s report offers [REDACTED]

[REDACTED] Gennette Rep. at ¶ 44. This claim lacks any citation, and Mr. Gennette conceded [REDACTED]

[REDACTED] Gennette Dep. at 266:1-4. His report also claims [REDACTED]
[REDACTED]

[REDACTED] Gennette Rep. at ¶ 51; Gennette Dep. at 266:21-
267:16. He also admitted [REDACTED]
[REDACTED] *Id.* at 267:22-25.

Finally, Mr. Gennette’s report relies on [REDACTED]
[REDACTED]

[REDACTED] Gennette Rep. Figs. 13-15. But these [REDACTED] were not obtained through
reliable or principled methods that will help the Court understand the evidence or determine any
fact at issue. First, Mr. Gennette does not know [REDACTED] Gennette Dep. at
32:6-21. Second, Mr. Gennette testified [REDACTED]
[REDACTED]

[REDACTED] *Id.* at 132:16-
25. [REDACTED]
[REDACTED]

[REDACTED] *Id.* at 213:7-17.

Given the lack of reliable methodology or principles underlying this opinion, and the
dearth of facts or data supporting the accompanying anecdotal claims, Mr. Gennette’s opinion
about [REDACTED] should be excluded. *See* Fed. R. Evid. 702(b)-(c).

**III. Mr. Gennette’s Economic Opinions Regarding [REDACTED]
Should Be Excluded.**

Despite the fact that [REDACTED]
Mr. Gennette offers sweeping claims about [REDACTED]

[REDACTED] For example, Mr.

Gennette's report [REDACTED]

[REDACTED] Gennette Rep. at ¶ 72. Mr.

Gennette lacks the qualifications required to offer such opinions. *See* Fed. R. Evid. 702(a).

Mr. Gennette also fails to employ any reliable principles or methods to come up with his opinion [REDACTED] First, Mr. Gennette did not

[REDACTED]

[REDACTED]

[REDACTED] Gennette Dep. at 22:20-23:3, 271:16-25; *see* Gennette Rep. § VI. Second,

Mr. Gennette relies [REDACTED] Gennette

Rep. at ¶¶ 65 n.132, 69 n.136, 82 n.152, 83 n.155. Mr. Gennette's interpretation of these

documents adds little to help the factfinder; he [REDACTED]

[REDACTED] *Longtop*, 32 F. Supp. 3d at 460, 462 (an expert may not offer testimony that simply "constructs a factual narrative based on record evidence" or "summariz[es]

facts and documents in the record that the [trier of fact] is capable of understanding on its own")

(internal quotation marks omitted); *LinkCo*, 2002 WL 1585551, at *2 ("testimony by fact

witnesses familiar with those documents would "be far more appropriate . . .") (citation

omitted). Defendants' use of an expert to simply offer their own views of the evidence is "not

proper expert testimony." *Vyera Pharms.*, 2021 WL 5403749, at *2; *see also, e.g., Rezulin Prod.*

Liab. Litig., 309 F. Supp. 2d at 551.

Third, to fill in the gaps of his limited review of documents and depositions, Mr.

Gennette uses [REDACTED]

[REDACTED] Gennette Dep. at 22:9-19. For example, in describing his opinion

[REDACTED] Mr. Gennette

repeatedly raised [REDACTED]

[REDACTED] *Id.* at 71:12-21, 188:12-189:1, 274:3-275:3, 281:23-282:4. However, [REDACTED]

[REDACTED] *Id.* at 188:12-189:1 [REDACTED]

[REDACTED]; *see also id.* at 281:23-282:4 [REDACTED]

[REDACTED] An expert must “show their work” to demonstrate how their opinions are grounded in the reliable application of principles to facts. *E.g., Castagna v. Newmar Corp.*, No. 3:15-CV-249 JD, 2020 WL 525936, at *3 (N.D. Ind. Feb. 3, 2020); *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prod. Liab. Litig.*, No. 2:18-CV-01320, 2021 WL 4931996, at *6 (S.D. Ohio Oct. 22, 2021). Mr. Gennette fails to do so.

[REDACTED]
[REDACTED]
[REDACTED]
Gennette Dep. at 274:3-275:3. Yet, [REDACTED]

[REDACTED] Gennette Rep., Appendix B. In fact, Mr. Gennette [REDACTED]

[REDACTED] Gennette Dep. at 29:18-25. Mr. Gennette’s [REDACTED]

[REDACTED] falls far

short of the standard for reliability necessary under Rule 702. *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (“the proffered testimony [must have] a sufficiently reliable foundation to permit it to be considered”) (internal quotation marks omitted). Mr. Gennette fails to properly demonstrate how his conclusions stem from his experience. *LinkCo*, 2002 WL 1585551, at *4; *World Trade Ctr. Properties*, 467 F.3d at 132.

Mr. Gennette [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Grdinich*,

187 F.R.D. at 82 (“Expert testimony is not admissible when it addresses ‘lay matters which [the trier of fact] is capable of understanding and deciding without the expert’s help.’”) (citation omitted).

IV. Mr. Gennette’s Opinions Regarding [REDACTED] Should Be Excluded.

Mr. Gennette levels [REDACTED]

[REDACTED] Gennette Rep. at ¶¶ 88-110. [REDACTED]

[REDACTED] he has neither qualifications for making such criticisms, nor any coherent methodology for conducting his analyses, nor any bases for his opinions. First, Mr. Gennette

[REDACTED] *id.* at ¶¶ 88-92, although [REDACTED]

[REDACTED] Gennette Dep. at 7:14-21, 16:22-25. *See Kellwood*, 105 F. Supp. 3d at 304 (“the court ‘compare[s] the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony.’”) (citation omitted).

Mr. Gennette claims [REDACTED]

[REDACTED] Gennette Rep. at ¶¶ 88-92. This is despite the fact that, as Mr. Gennette admitted [REDACTED]

[REDACTED] Gennette Dep. at 30:4-9. Meaning, that

Mr. Gennette employed no methodology to test [REDACTED], as is required under Federal Rule of Evidence 702(c), and his [REDACTED]

[REDACTED] rather than sufficient facts or data, as required by Fed. R. Evid. 702(b). Mr. Gennette also explained [REDACTED] [REDACTED] Gennette Dep. at 26:16-20, 119:2-4. Thus, not only does Mr. Gennette lack the expertise to opine [REDACTED] [REDACTED] he also lacks a reliable foundation to do so. *Amorgianos*, 303 F.3d at 265. Mr. Gennette additionally provides testimony [REDACTED] at Gennette Rep. ¶ 93, which, as described *infra*, is not appropriate expert testimony.

Furthermore, Mr. Gennette engages [REDACTED] [REDACTED] [REDACTED] which Mr. Gennette has no qualifications to make. Gennette Rep. at ¶¶ 94-110; *Kellwood*, 105 F. Supp. 3d at 304. Mr. Gennette [REDACTED] [REDACTED] See Gennette Dep. at 7:14-21, 16:22-25. Nonetheless, he criticizes [REDACTED] [REDACTED] Gennette Rep. at ¶¶ 94-103. The basis for these criticisms is not the Hypothetical Monopolist Test or any tool recognized by the Merger Guidelines. It is, instead, a combination of speculation and review of [REDACTED] See *id.* at ¶¶ 94-103.

Mr. Gennette starts by asserting, [REDACTED] [REDACTED] Gennette Rep. at ¶ 95. He goes on to state, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] *Id.* at ¶ 96. He then proceeds [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at ¶¶ 97-98.

This testimony [REDACTED] nor is it a comprehensive, methodological study of [REDACTED]

[REDACTED] It is a study [REDACTED]

[REDACTED] that Mr. Gennette appears to have selected because they support his argument. Gennette Rep. at ¶¶ 97-98 [REDACTED]

[REDACTED]. In short, Mr. Gennette’s analysis relies neither on his experience nor on a reliable methodology to ascertain [REDACTED]

See Fed. R. Evid. 702(a), (c).

Finally, Mr. Gennette criticizes [REDACTED]

[REDACTED] Gennette Rep. at ¶¶ 104-110. Mr. Gennette again argues, [REDACTED]

[REDACTED]

[REDACTED]

Id. at ¶¶ 105, 107-109. Mr. Gennette draws on neither any reliable application of his personal experience nor a methodology designed to evaluate [REDACTED]

[REDACTED] *See Fed. R. Evid. 702(a), (c), (d).* Even if Mr. Gennette is uniquely qualified to opine [REDACTED]

[REDACTED]

[REDACTED] *Kellwood*, 105 F. Supp. 3d at 304.

V. Mr. Gennette’s Opinions Are Unduly Prejudicial Because They Are Based on His Inadmissible, Undisclosed Personal Knowledge of [REDACTED].

Although Defendants frame Mr. Gennette’s proffered expert testimony as simply

clarifying what is and is not commonplace within the industry, his deposition confirmed that Mr. Gennette's true role is to supply inadmissible lay witness testimony to undermine the actual discovery record from [REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Gennette Rep. at ¶¶ 51, 57 n.113, 75, 85, 93.

[REDACTED]

Having failed to elicit the testimony from [REDACTED] that they wanted, Defendants proffer ([REDACTED]) Mr. Gennette, to enter into evidence their wish list of facts and cast doubt on the testimony [REDACTED] Gennette Dep. at 8:25-9:2. During his deposition, Mr. Gennette improperly opined [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 216:21-217:8; *United States v. Maxwell*, No. 20-CR-330 (AJN), 2021 WL 5283951, at *4 (S.D.N.Y. 2021) (“[E]xpert testimony cannot ‘constitute evaluations of witness credibility’—that is, expert testimony is inadmissible if it ‘comment[s] directly, under the guise of expert opinion, on the credibility of trial testimony from’ specific fact witnesses.”) (quoting *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005)).

CONCLUSION

For all of the reasons set forth above, the FTC requests that the Court exclude the testimony of Mr. Jeff Gennette. Mr. Gennette is a fact witness in the guise of an expert who is improperly being offered to [REDACTED], offer opinions outside the scope of his experience [REDACTED], and dispute [REDACTED]. [REDACTED] Not only is Mr. Gennette qualified neither by his experience nor by his training to offer these opinions, but he also fails to apply any principled methodology to his task, aside from reviewing the documents and deposition transcripts [REDACTED]. [REDACTED] He conducts [REDACTED]. [REDACTED] Mr. Gennette fails to meet any of the criteria of Federal Rule of Evidence 702 and his testimony should be excluded.

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Respectfully submitted,

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