

The Cause of the Destruction Of The World Trade Center Buildings on September 11, 2001 and the Admissibility of Expert Testimony Under the Standards Developed in *Daubert v. Merrell Dow Pharmaceutical, Inc.*
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ABSTRACT:

Under the standards established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993) and its progeny, expert testimony offered to support the official theory and hypotheses concerning the cause of the destruction of World Trade Center Buildings 1, 2 and 7 (the WTC) on September 11, 2001 would probably be excluded from admission into evidence by an impartial judge in a civil or criminal proceeding. In contrast, expert testimony presenting an alternative theory and hypotheses explaining the cause(s) of the destruction of the WTC grounded in and adhering to accepted and reliable scientific principles using the scientific method would satisfy the *Daubert* test and would be admitted into evidence.

If a “*Daubert* hearing” were held to determine the admissibility of expert opinion evidence regarding the cause or causes of the destruction of the WTC, expert opinion testimony presenting the official theory would likely not satisfy the *Daubert* test of reliability and would be rejected by an impartial judge after a *Daubert* hearing as unsupported by science and the laws of physics and, thus, unreliable and inadmissible into evidence under the Federal Rules of Evidence. In that event, the official theory of the cause of the destruction of the WTC would not be presented to and considered by the trier of fact. Conversely, expert opinion testimony and related evidence presenting an alternative hypothesis explaining the cause(s) of the destruction of the WTC that are grounded in reliable scientific principles using the scientific method, or “good science”, would pass the *Daubert* test and would be admissible into evidence. Consequently, in a civil or criminal proceeding the ruling or verdict on the question of the cause or causes of the destruction of the WTC would be based only upon expert testimony and related evidence presenting an alternative theory or theories.

I. Introduction.

It is well known that on September 11, 2001 New York City, New York, suffered an attack that resulted in the tragic death of nearly 3,000 people and the destruction of property, most notably the destruction and collapse of World Trade Center Buildings 1 and 2 (WTC 1 and WTC 2). It is less well known that at approximately 5:21 p.m. on that same day World Trade Center Building 7 (WTC 7) also collapsed. Since that day there has been a continuing debate between two schools of thought concerning the cause or causes of the destruction of WTC 1, 2 and 7.¹

¹ In this paper I refer generally to these two opposing schools of thought as the official theory and the alternative theory.

In November 2002 Congress appointed a bipartisan commission to investigate 9/11.² The investigation took approximately eighteen months and resulted in the release and publication on July 22, 2004 of the *Final Report of the National Commission on Terrorist Attacks Upon the United States*, otherwise known as the *9/11 Commission Report*. However, the *9/11 Commission Report* said very little about the cause of the destruction of WTC 1 and 2 and nothing about the cause of the destruction of WTC 7.³ In the years since 9/11, many people who are qualified by education, training, and experience to give an opinion on the subject of the cause(s) of the destruction of WTC 1, 2 and 7 have come forward and have presented alternative scientific hypotheses and theories concerning the cause(s) of the destruction of these buildings.⁴ The National Institute of Standards and Technology (NIST) also became involved and over time presented a series of reports presenting the official theory or explanation of the cause(s) of the destruction of WTC 1, 2 and 7.⁵ The official theory and the alternative theory or theories of the cause(s) of the destructions of these buildings are not in agreement.⁶

Very briefly,⁷ the official theory of the destruction of WTC 1 and 2 is that aircraft impact damage combined with intense heat from the fires created by the ignition of the jet fuel on Flights 11 and 175 undermined the integrity of structural support systems in the upper floors of WTC 1 and 2. According to NIST, as a result of this process, “global collapse was inevitable.”⁸ NIST has, however, been unable to provide a full explanation of the collapse of WTC 1 and 2.⁹

The official theory of the destruction of WTC 7 is that it collapsed due to fire.¹⁰ The fires were caused by debris from the collapse of WTC 1 which ignited fires on at

² See, *National Commission on Terrorist Attacks Upon the United States* (Public Law 107-306, November 27, 2002)

³ See, generally, *9/11 Commission Report*, Ch. 9, Heroism and Horror.

⁴ Among such individuals is a group of over 2,000 architects and engineers who have banded together in an organization called *Architects & Engineers for 9/11 Truth*. <http://www.ae911truth.org/>. See also, *The Journal of 9/11 Studies* at <http://www.journalof911studies.com/>

⁵ NIST is a United States governmental agency and is a part of the United States Department of Commerce. It is the science, engineering, technology and measurement laboratory for the United States. See, 15 U.S.C. § § 271 *et seq.* The Federal Emergency Management Agency (FEMA) also conducted an investigation and issued reports.

⁶ It is worth noting that both the official theory and the alternative theory at their core point to an underlying conspiracy to carry out the attacks on 9/11. *Black's Law Dictionary*, Seventh Edition, (1999) defines conspiracy as: “An agreement by two or more persons to commit an unlawful act; a combination for an unlawful purpose.” This is the generally accepted definition of “conspiracy” in all jurisdictions in the United States.

⁷ It is beyond the scope of this paper to completely catalog and discuss in great detail all of the facts that have been proffered to buttress expert opinions offered either in support of the official theory or in support of the alternative theories explaining the destruction of WTC 1, 2 and 7. I have attempted in this paper to introduce the reader to the subject and to provide sources on both sides of the debate so that the reader may consult the sources and conduct further investigation. A brief summary of the opposing views of the facts and science involved must suffice at this time.

⁸ However, the NIST study “...does not actually include the structural behavior of the towers after conditions for collapse initiation were reached.” In addition, the NIST study did not support the “pancake theory” of collapse which is premised on progressive failure of the floor systems in the towers.

⁹ See, footnote 42 below.

¹⁰ The *9/11 Commission Report* makes no mention of the collapse of WTC 7 on 9/11/01. Since the publication of the *9/11 Commission Report* the National Institute of Standards and Technology (NIST) has published papers that present an explanation of the collapse of WTC 7, as well as WTC 1 and 2. See, <http://www.nist.gov/el/disasterstudies/wtc/>

least 10 floors in WTC 7 which then burned out of control until the building collapsed naturally due to gravity alone.¹¹ According to the official theory of the destruction of WTC 1, 2 and 7 there is no corroborating evidence for any alternative hypotheses suggesting that the WTC towers were destroyed by controlled demolition using explosives planted prior to September 11, 2001.¹² However, contrary to National Fire Protection Association guidelines and the scientific method, NIST did not look for evidence of explosives.¹³

In contrast to the official theory, the alternative theory of the cause of the destruction WTC 1, 2 and 7 is that they were destroyed as a result of explosives that had been placed in the buildings prior September 11, 2001. On that date the explosives were detonated causing WTC 1 and 2 to be pulverized from the top down by some form or forms of explosives and incendiary devices, bringing them down smoothly at near free-fall acceleration. WTC 7, on the other hand, was destroyed in a more conventional, controlled manner typical of the means and methods used to destroy similar buildings and bring them down in a controlled manner into virtually their own footprint. According to the experts who subscribe to some form of the alternative theory or hypotheses, neither damage caused by the impact of the planes, nor the resulting fires were sufficient to cause the complete and total destruction of WTC 1 and 2, nor were fires alone sufficient to cause WTC 7 to collapse in the manner it did.¹⁴

While there is some disagreement among those who advocate, or agree with, the alternative theory or theories as to the exact means and methods used to destroy WTC 1, 2, and 7, many qualified experts who have studied the available data have concluded that the official theory does not hold up to scientific scrutiny and analysis using the scientific method. Likewise, there are many experts who support the official theory of a gravitational collapse, but who differ significantly as to the mechanism of the collapse (e. g., progressive pancake versus pile driver). Thus, one can reasonably deduce that there is no general acceptance of the official theory or the alternative explosives theory in the scientific community. Attempting to determine which theory or hypothesis is reliable and which is not, or whether they may both have elements of reliability and should be considered by the judge or a jury in an evidentiary proceeding, is fertile ground for a *Daubert* hearing.¹⁵ Indeed, a *Daubert* hearing is often where the discipline of the scientific method meets the discipline of the law. In the courtroom a *Daubert*

¹¹ Because WTC 7 was not impacted by an aircraft, in the final analysis NIST concluded that fire is the cause of the initiation of the collapse sequence for WTC 7. Similarly, although NIST concluded that aircraft impact damage played a role, in the final analysis NIST identified fire as the primary cause of the initiation of the collapse sequence for WTC 1 and 2.

¹² See, http://www.nist.gov/el/disasterstudies/wtc/faqs_wtc7.cfm;
http://www.nist.gov/el/disasterstudies/wtc/wtc_draftreports.cfm); and http://wtc.nist.gov/reports_october05.htm

¹³ See, footnote 48 below.

¹⁴ See, e.g., *How the Towers were Demolished*, <http://gordonssite.tripod.com/id2.html>. See, also, <http://www.ae911truth.org/> and <http://www.journalof911studies.com/>; and “Areas of Specific Concern in the NIST WTC Reports” at <http://www.ae911truth.org/en/news-section/41-articles/926-25-points-of-specific-concern-in-the-nist-wtc-reports.html>. (identifying 25 points demonstrating that NIST’s reports on the cause of the destruction of WTC 1, 2 and 7 are not reliable.)

¹⁵ What occurred at the Pentagon on September 11, 2001 is likewise fertile ground for a *Daubert* hearing.

hearing is where the judge is required to not only determine whether proffered expert testimony and related evidence is legally relevant, but also whether it is scientifically reliable and, therefore, entitled to be admitted into evidence and considered by the trier of fact—whether a judge or a jury.

II. ***Daubert*--The Federal Rules of Evidence and the Admissibility of Expert Opinion Testimony in an Adversarial Evidentiary Proceeding.**

"If it is a Miracle, any sort of evidence will answer; but if it is a Fact, proof is necessary." (Mark Twain)

In *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed 2d 469 (1993) the United States Supreme Court rejected the long-standing test governing the admissibility into evidence of expert testimony that had been established in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923) and followed for decades by virtually all courts. Under *Frye*, when "novel" scientific expert testimony and related evidence was at issue, a judge could defer to the proffered experts, or perhaps to his or her own judgment, on the question of whether or not the novel scientific evidence had gained "general acceptance" in the relevant field of science.¹⁶ If the court concluded that it had gained general acceptance the expert evidence was admissible, unless it was inadmissible and excluded for some other reason. If the scientific evidence had not gained general acceptance in the relevant field it was not to be admitted into evidence. It follows that if the *Frye* test is applied the argument over admissibility will focus on whether or not the novel scientific evidence was generally accepted in the particular field of science that is at issue.

While *Daubert* did not scrap the *Frye* test *in toto*, but rather retained the "general acceptance" factor, it established additional factors to be considered by courts on the question of the admissibility of scientific expert testimony under the Federal Rule of Evidence.¹⁷ *Daubert* was followed about six years later by *Kumho Tire Co. Ltd v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed 2d 238 (1999). In *Kumho* the United States Supreme Court made it clear that under the Federal Rules of Evidence the courts' evidentiary gate-keeping responsibility imposed by *Daubert* applies not just to scientific expert testimony, but also to expert testimony based upon "technical or other specialized knowledge." In other words, where the Federal Rules of Evidence apply, all expert opinion testimony is subject to the courts' gate-keeping responsibility under the test established in *Daubert*.

¹⁶ "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 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.*" *Frye* 293 F. at 1014 (emphasis added)

¹⁷ In *Daubert* the United States Supreme Court interpreted and applied the Federal Rules of Evidence to the question of the admissibility of scientific expert evidence. *Daubert* did not rest on an interpretation of the United States Constitution. As such, *Daubert* is not necessarily binding on the states. Many, but not all, states have adopted the *Daubert* test. Some states continue to employ the *Frye* test or a test similar to *Frye*. For a survey as of March 31, 2006, of the states that have adopted *Daubert* see *The Status of Daubert in State Courts*, by Martin S. Kaufman of the Atlantic Legal Foundation. The state in which I practice, New Mexico, adopted *Daubert* in *State v. Alberico*, 116 N.M. 156, 861 P. 2d 192 (1993).

Under the Federal Rules of Evidence governing expert testimony,¹⁸ *Daubert* and *Kumho* instruct that a court is to serve as a “gatekeeper” and must conduct what is essentially a four-part analysis of the proposed expert opinion or theory before the expert testimony is to be admitted into evidence in support of the opinion or theory.¹⁹ The purpose of the courts’ gatekeeper function is to allow judges to determine that the expert opinion testimony is both relevant and reliable before the jury (or the judge) is permitted to receive it into evidence.²⁰ *Daubert* and *Khumo*, passim.²¹

Following *Daubert* and *Khumo* Rule 702 of the Federal Rules of Evidence was amended to take into account the *Daubert* factors. In addition, the admissibility of all expert testimony is governed by the principles of Rule 104 (a).²² Under Rule 104(a), the proponent of the expert testimony has the burden of proving by a preponderance of the evidence that the admissibility requirements have been met.²³ Rule 702 reads as follows:

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 upon 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.

As a threshold matter, under Rule 702 the proposed expert witness must be qualified in the scientific or technical field under inquiry. Rule 702 (a), and to some extent Rule 702 (b), mandate that the proposed expert testimony must be “helpful to the trier of fact”. The “helpful” factor is an expression of the relevancy component emphasized in *Daubert* and codified in FRE Rule 401. The reliability factor enunciated in *Daubert* is set forth in FRE 702 (b), (c) and (d). In short, under the Federal Rules of

¹⁸ See, generally, FRE 104 (Preliminary Questions), FRE 401 (Test for Relevant Evidence), 702 (Testimony by Expert Witnesses), 703 (Bases of an Expert’s Opinion Testimony), 704 (Opinion on an Ultimate Issue) and 705 (Disclosing the Facts or Data Underlying an Expert’s Opinion).

¹⁹ See, *Daubert*, 509 U.S. at 592-93 and *Kumho*, 526 U.S. at 141.

²⁰ The significance of facts and opinions being admitted into evidence is that the judge or jury may then consider the evidence when reaching a decision or a verdict. In a bench trial to a judge only, i.e., where there is no jury, much more is heard or seen by the judge but it may not ultimately be admitted into evidence and, if not, the judge is not to consider it when reaching a decision even though he or she heard or saw the “evidence.” In a jury trial the judge’s ruling excluding evidence should result in the jury never hearing or seeing the excluded evidence in the first place and, thus, excluded evidence should not be a factor in a jury’s deliberations and verdict.

²¹ The federal and State cases that cite and discuss *Daubert* or *Khumo* are legion and it is beyond the scope of the paper, if not the realm of possibility, to delve into and discuss every case. The reader is referred generally to U.S.C., Federal Rules of Evidence, Rule 702, Advisory Committee Notes, Research Guide, and Interpretive Notes and Decisions.

²² “(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. []”

²³ See, e.g., *Bourjaily v. United States*, 483 U.S. 171 (1987).

Evidence, before a putative expert can give opinion testimony: 1) the expert must be qualified, 2) the testimony must be helpful to the trier of fact (that is, it must be based upon facts and data material and relevant to the case), and 3) the testimony must be relevant and reliable. For purposes of this paper it is assumed that in any *Daubert* hearing the proffered experts will be qualified by knowledge, skill, experience, training, or education to give an opinion on the question of the cause(s) of the destruction of WTC 1, 2 and 7.²⁴ Accordingly, only the relevancy and reliability factors are discussed below.

1. Relevancy.

In a civil or criminal action in which the purpose, or a purpose, would be to determine the cause or causes of the destruction of WTC 1, 2 and 7 on September 11, 2001, competent and material evidence offered to establish the cause of the destruction of these buildings would be relevant.²⁵ Under Rule 401 of the Federal Rules of Evidence:

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

This rule itself, and as construed and applied by the case law, is to be used as a guide by judges to handle the wide variety of relevancy issues that will arise in any given case, which issues are bounded only by the ingenuity and savvy of lawyers as they advocate for their clients. Expert opinion relevancy, like all relevancy issues, is case specific. As a general proposition, scientific evidence ruled to be relevant in one case will not “fit” in another case and will be ruled irrelevant.²⁶

For purposes of the subject under inquiry in this paper, relevant evidence would be evidence that tends to make more probable that the alleged facts in support of the official theory of the destruction of WTC 1, 2 and 7 are true or correct, or that tend to make less probable that such facts are true or correct. Conversely, relevant evidence would also include evidence that tends to make less probable that the facts alleged in support of the official theory of the destruction of WTC 1, 2 and 7 have been proved, or

²⁴ The question of a proffered expert witness’s qualification requires an entirely different analysis and invokes other considerations beyond the scope of this paper.

²⁵ The rules of evidence are designed and intended to get to the truth of the facts asserted and to that end only relevant and trustworthy evidence is to be admitted in any civil or criminal trial or other evidentiary hearing in a court of law. The threshold test for admissibility, simply put, is relevancy. That is, relevant evidence is evidence that tends to make the existence of a fact that is of consequence more probable or less probable than it would be without the evidence. The goal behind admitting relevant evidence is to get to the truth of the matter asserted, either by proving a claimed fact or by disproving it. This concept applies equally to fact or lay person testimony, as well as to expert testimony.

²⁶ See, e. g., *Daubert*, 509 U. S. 591-592 (“Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” [citation omitted] This consideration has been aptly described [] as ‘fit.’ ‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”)

that tends to make more probable that such facts have not been proved and are false.²⁷ In that connection, expert testimony and related evidence that presents facts, and that provides reliable opinions, to prove the cause(s) of the destruction of WTC 1, 2 and 7 are relevant. Ultimately, the facts to be proved by the expert opinion testimony and related evidence are facts that establish causation, i. e., the proximate cause or causes of the destruction of these buildings.²⁸ Because causation is relevant, expert testimony and related evidence is admissible on the question of causation--provided it is reliable. This would include not only reliable expert testimony and related evidence in support of the official theory, but also such expert opinion and evidence that presents facts and opinions in support of the alternative explosives hypotheses.²⁹

2. Reliability.

Once it is determined that the expert testimony, whether based on scientific, technical or specialized knowledge, is relevant on the issue of causation the question then becomes whether it is reliable and should be admitted into evidence. If the court rules that the expert testimony is reliable it may be admitted into evidence at which time it is entitled to whatever evidentiary weight the jury (or judge) puts on it. If, on the other hand, it is ruled unreliable, any such evidence is not to be admitted and as a result will never be considered by the jury and should not be considered by the judge in a bench trial.³⁰ In short, under the courts' evidentiary gatekeeper function, judges are required to exclude unreliable expert evidence, including opinion testimony. Indeed, unreliable expert testimony is not to come into evidence at all, with the hope or expectation that the trier of fact, whether a judge or a jury, will put no weight on it or outright reject it. The risk that unreliable expert testimony will be accepted as true, for whatever reason, and affect the jury's verdict is too great to allow it to come into evidence in the first place. Thus, under *Daubert* and *Kumho* the judge as the evidentiary gatekeeper is required to keep unreliable expert testimony out of evidence in the first instance and admit only relevant and reliable expert testimony.

3. The *Daubert* factors.³¹

Under *Daubert* and FRE 702, when carrying out their evidentiary gate-keeping duties under the Federal Rules of Evidence, judges must at a minimum inquire into:

²⁷ Evidence *per se* is not proof. Evidence does not become proof until the fact(s) that the evidence seeks to establish is accepted and believed by the judge or the jury and forms a part of the court's ruling or the jury's verdict.

²⁸ *Black's Law Dictionary*, Seventh Edition (1999), defines "cause" as: "1. Something that produces an effect or result." and defines proximate cause as: "1. A cause that is legally sufficient to result in liability. 2. A cause that directly produces an event and without which the event would not have occurred."

²⁹ The author is well aware that a probable outcome of a *Daubert* hearing on the cause(s) of the destruction of WTC 1, 2 and 7 would be that a judge would allow expert testimony and related evidence in support of both the official theory and the alternative theory. Nevertheless, the thesis of this paper remains unchanged: under *Daubert* expert testimony in support of the official theory should, at a minimum, be excluded as unreliable, if not irrelevant.

³⁰ See, e.g., *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999) ("Under *Daubert*, any step that renders the expert's analysis unreliable...renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies the methodology.") (citing *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 746 (3rd Cir. 1994))

³¹ See, *Daubert*, 509 U.S. at 592-595.

1. Whether the opinion or theory is susceptible to testing and has been subjected to such testing;³²
2. Whether the opinion/theory has been subjected to peer-review and publication;³³
3. Whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the techniques' operation;³⁴ and,
4. Whether the opinion/theory has been scrutinized and generally accepted by the scientific community.³⁵

Significantly, *Daubert* established a non-exclusive checklist or guide for courts to use when determining the relevancy and reliability of expert testimony. Both before and after *Daubert* courts have found other factors important when assessing whether the proffered expert testimony is sufficiently relevant and reliable to be admitted into evidence and considered by the trier of fact. Examples of additional factors considered by courts include:

- (1) Whether the 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.”³⁶
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.³⁷
- (3) Whether the expert has adequately accounted for obvious alternative explanations.³⁸
- (4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.”³⁹

³² “Scientific methodology today is based upon 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.” *Daubert*, 509 U.S. at 593

³³ “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.” *Daubert*, 509 U.S. at 593.

³⁴ Some courts and commentators have split this factor into two factors thus arriving at five *Daubert* factors, not four, to wit: “Whether there is a [(a)] known or potential rate of error associated with the methodology used and [(b)] whether there are standards controlling the techniques' operation.”

³⁵ “Finally, ‘general acceptance’ can have a bearing on the inquiry. [] 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’ [citation omitted] may properly be viewed with skepticism.” *Daubert*, 509 U.S. at 594.

³⁶ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (Under this factor it is reasonable to inquire into whether, independent of WTC 1, 2 and 7, NIST has reached the conclusion in any other cases or circumstances that steel skyscrapers have collapsed due to impact damage of some kind and/or fire.)

³⁷ See, e.g., *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”)

³⁸ See, e.g., *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 plaintiff’s condition). Cf. *Ambrosini v. Labarraque*, 101 F.3d 129 (D. C. Cir. 1996) (noting that 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)

(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.⁴⁰

While the four *Daubert* factors are applicable to all cases generally (where the Federal Rules of Evidence apply or where the state courts have adopted the *Daubert* or similar test), these additional factors are examples of the types of tests that have been developed by the courts in the trenches of litigation and in the context of the facts and circumstances of real cases playing out in courtrooms every day where, as they say, “the rubber meets the road”. When determining whether the proffered expert testimony is relevant and reliable, additional factors such as these are often as informative and useful to courts, if not more so, than the *Daubert* factors *per se* standing alone.⁴¹

III. Application of the *Daubert* Factors to the Official Theory and to the Alternative Theories of the Cause of the Destruction of WTC 1, 2 and 7.

In this paper the reader has been provided with a reasonably sufficient introduction to the question of the cause(s) of the destruction of WTC 1, 2 and 7, as well as citations to several sources and documents addressing both sides of the debate on this subject. It is beyond the scope of this paper to go into greater detail. Indeed, it is incumbent upon the readers who are so inclined to dig deeper into the available information and conduct their own research with respect to investigating the facts, proved or alleged, and the science and technology involved in connection with the question of the cause(s) of the destruction of WTC 1, 2 and 7 on September 11, 2001. I will endeavor, however so briefly here, to apply the *Daubert* factors to the expert opinions on this important issue.

1. Whether the opinion or theory is susceptible to testing and has been subjected to such testing?

a. The Official Theory. Answer: Yes and no.

The official theory of the destruction of WTC 1, 2 and 7 is susceptible to testing, but, for obvious reasons, the theory has not been tested on full scale replica in the field with an actual steel-structure high rise, whether similar to WTC or otherwise. The tests conducted by NIST used global impact computer simulations and analysis on WTC 1 and 2, and fire dynamics, thermal and limited tests on certain elements using building materials under controlled conditions as to all three buildings. However, the material

³⁹ See, *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 135, 152 (1999) (stating that *Daubert* requires the trial court to satisfy 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”)

⁴⁰ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 135, 151 (1999) (noting that *Daubert*’s general acceptance factor does not help show that an expert’s testimony is reliable where the discipline itself lacks reliability); *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 plaintiffs respiratory problem, where the opinion was not sufficiently grounded in scientific methodology)

⁴¹ See, e.g., *Kuhmo* 119 S. Ct. 1167, 1176 (“[W]e conclude that the trial judge must be given considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”)

and fire tests conducted by NIST did not support its initial findings. Moreover, NIST could not explain the total collapse of the buildings and never conducted tests on scale models as is typically done on other structural failures to verify if indeed “global collapse was inevitable” once initiated. Based only on the computer models conducted by NIST, NIST formulated its hypotheses for the official theory discussed above.⁴² “Unofficial”, i.e., private, tests of the official theory conducted by qualified architects, engineers, physicists, and demolition and explosive experts have proved to the satisfaction of those performing the tests, as well as many of their peers and lay persons, that the official theory is not scientifically valid.⁴³ Notably, actual fires in all other steel-structured high-rises that have occurred in the field under real-life situations and conditions have never caused any of them to globally collapse—including the Empire State Building, which was impacted by a B-25 Bomber on July 28, 1945 and which suffered extensive fire damage. (See, Endnote)

b. The Alternative Theory. Answer: Yes.

The alternative explosives hypothesis has been tested. Conventional explosives, as well as high-tech explosives, have destroyed, and will destroy, steel-structured high rise buildings in the manner observed on September 11, 2001 in connection with WTC 1, 2 and 7.⁴⁴ Moreover, such explosives will produce the same types of evidence observed with the destruction of the Twin Towers, including a uniform downward acceleration, pyroclastic-like flows, and temperatures high enough to melt steel—all of which are impossible with a fire-induced gravity collapse.

2. Whether the opinion/theory has been subjected to peer-review and publication?

a. The Official Theory. Answer: No.

While NIST had a team of individuals provide support for NIST’s investigation and the preparation and publication of NIST’s draft and final reports on the destruction of WTC 1, 2 and 7, there is little if any information available suggesting that the hypotheses advanced by NIST in support of the official theory have been subjected to

⁴² NIST acknowledges that “we are unable to provide a full explanation of the total collapse” of WTC 1, 2 and 7. See, September 27, 2007 letter from Catherine S. Fletcher, Chief, Management and Organization Division, U.S. Department of Commerce, National Institute of Standards and Technology, written in response to an April 12, 2007 petition and request for correction from Bob McIlvain, Bill Doyle, Dr. Steven Jones, Kevin Ryan, Richard Gage, AIA Architect, and Frank Legge of Scholars for 9/11 Truth and Justice. This letter is available at <http://www.journalof911studies.com/volume/2007/NISTresponseToRequestForCorrectionGourleyEtal2.pdf>. This is the letter to which NIST was responding: http://stj911.org/actions/NIST_DQA_Petition.pdf

⁴³ See, *Why The NIST World Trade Center Reports Are False*, by Kevin Ryan, published in *The 9/11 Toronto Report: International Hearings on the Events of September 11, 2001* available at: <http://torontohearings.org/2012/12/02/the-toronto-hearings-report-is-now-available/>

⁴⁴ For an analysis of this question, see *Why Indeed Did The WTC Building Collapse?* By Steven E. Jones, PhD, http://wtc7.net/articles/stevenjones_b7_051122.html. Dr. Jones makes a case that the only hypothesis that accounts for all the available data regarding the cause of the collapse of WTC buildings 1, 2 and 7 is the “explosive demolition hypothesis.” See, also, *Architects & Engineers for 9/11 Truth*. <http://www.ae911truth.org/> and *The Journal of 9/11 Studies* at <http://www.journalof911studies.com/>

formal peer review.⁴⁵ In the private sector many architects, engineers, physicists, demolition and explosive experts, and other qualified people have poured over the NIST reports, as well as other documents and available evidence and have analyzed the official theory given the available information they were able to obtain.⁴⁶ Such reviews of NIST's reports has resulted in the publication of numerous scientifically valid and in some cases peer-reviewed studies, many of which call into question the validity and reliability of the NIST reports on several significant and critical points that bear on the question of causation.⁴⁷

b. The Alternative Theory. Answer: Yes

While NIST states that its investigation found no evidence to support the alternative explosives hypotheses (contrary to NFPA guidelines it did not look for evidence of explosives),⁴⁸ many architects, engineers, physicists, demolition and explosive experts have investigated and analyzed the explosives hypotheses and have concluded that that the only hypothesis that accounts for all the available evidence and observations regarding the cause of the collapse of WTC buildings 1, 2 and 7 using the scientific method is the "explosive demolition hypothesis."⁴⁹

3. Whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the techniques' operation?

a. The Official Theory. Answer: Yes

The rate of error is 100%. That is, the previous rate of success in collapsing two 110-story steel skyscrapers such as WTC 1 and 2, by a fire ignited by jet fuel (even taking into account aircraft impact damage) and one 47 story steel skyscraper such as WTC 7 (which had no aircraft impact damage) is 0%. The official explanation of the destruction of these three buildings on September 11, 2001 assumes unprecedented

⁴⁵ See, e.g., *WTC 7: A Refutation of NIST's Analysis*, by David Chandler, published in *The 9/11 Toronto Report: International Hearings on the Events of September 11, 2001* available at: <http://torontohearings.org/2012/12/02/the-toronto-hearings-report-is-now-available/>

⁴⁶ Despite several Freedom of Information Act requests for all such data, much of the data and information that NIST had available to it has not been provided to independent researchers.

⁴⁷ See, e.g., *WTC Destruction: An Analysis of Peer-Reviewed Technical Literature 2001-2012* by Timothy Eastman and Jonathan Cole, April 2013, <http://www.journalof911studies.com/resources/2013EastmanColeVol37Apr.pdf>

⁴⁸ NIST acknowledges that it did not test the buildings' debris or the site of their destruction for explosive residue. See, September 27, 2007 letter from Catherine S. Fletcher, Chief, Management and Organization Division, U.S. Department of Commerce, National Institute of Standards and Technology, written in response to an April 12, 2007 petition and request for correction from Bob McIlvain, Bill Doyle, Dr. Steven Jones, Kevin Ryan, Richard Gage, AIA Architect, and Frank Legge of Scholars for 9/11 Truth and Justice. ("Finally, as NIST has noted in the frequently asked questions page on the NIST WTC website, <http://wtc.nist.gov>, NIST did not test for the presence of explosive residue and such tests would not necessarily have been conclusive. Therefore, your request for corrections [] are denied.") See, this letter at

<http://www.journalof911studies.com/volume/2007/NISTresponseToRequestForCorrectionGourleyEtal2.pdf>

⁴⁹ See, footnote 44 above. See, also, *The 9/11 Toronto Report: International Hearings on the Events of September 11, 2001* available at <http://torontohearings.org/2012/12/02/the-toronto-hearings-report-is-now-available/>

processes and events in all three cases. Crucial tests were ignored by NIST and, in some cases, results were achieved through unscientific and illegitimate manipulation of data.⁵⁰ Many qualified experts conclude that the official theory is impossible because it defies the fundamental laws of physics.

b. The Alternative Theory. Yes.

The rate of error of the tests that have been conducted is 0%. That is, with the exception of demolitions that were only partially ignited or that had “gone wrong,” the rate of success of collapsing steel skyscrapers and other buildings with explosives is 100%. Moreover, samples of the WTC dust were examined by accredited researchers with relevant expertise using standard, established scientific methods and their results have been published in a peer-reviewed journal: the researchers found nanothermite in the dust.⁵¹ The widespread presence of nanothermite, which can function either as an incendiary or an explosive, in the WTC dust is a very strong indicator of deliberate demolition of the buildings and evidence that explosives had been planted in the WTC prior to September 11, 2001. Further, the use of Newtonian physics to determine the rate of the acceleration of WTC 7’s collapse has definitively ruled out NIST’s hypothesis of a fire-induced collapse.⁵² In sum, the alternative explosives-demolition-hypotheses accounts for all the available data and observations regarding the cause of the collapse of WTC buildings 1, 2 and 7.

4. Whether the opinion/theory has been scrutinized and generally accepted by the scientific community?

a. The Official Theory. Answer: Yes and No.

The official theory as pronounced by NIST (and FEMA) has been scrutinized by numerous architects, engineers, physicists, demolition, and explosive experts. While some members of the scientific community have chosen to accept the official theory, there is no general acceptance of the theory in the scientific community. Indeed, the official theory has been rejected by many qualified experts who have reviewed and scrutinized the NIST reports and the data that NIST has made available.

b. The Alternative Theory. Answer: Yes and No.

While there are some who accept the alternative hypotheses and some who do not, it appears that the more time members of the scientific community devote to

⁵⁰ See, *Why The NIST World Trade Center Reports Are False*, by Kevin Ryan, published in *The 9/11 Toronto Report: International Hearings on the Events of September 11, 2001* available at:

<http://torontohearings.org/2012/12/02/the-toronto-hearings-report-is-now-available/>

⁵¹ See, *The Journal of 9/11 Studies* at <http://www.journalof911studies.com/>

⁵² <http://www.journalof911studies.com/volume/2010/ChandlerDownwardAccelerationOfWTC1.pdf> and <http://torontohearings.org/2012/12/02/the-toronto-hearings-report-is-now-available/>

scrutinizing the evidence, including that provided by NIST and FEMA, the more likely they are to accept the alternative explosives demolition theory.⁵³

IV. Conclusion.

Daubert hearings are very well established in American jurisprudence. When scientific and other technical evidence is at issue the right to a *Daubert* hearing is as straightforward as legal matters can get. In any civil or criminal proceeding in this country where expert testimony is required to assist the trier of fact to reach a decision or a verdict, it is a litigant's right (and duty) to seek to admit expert testimony in support of the litigant's case. That right is nearly, if not entirely, absolute and is subject only to the *Daubert*, or similar, test of relevance and reliability. In virtually every civil lawsuit or criminal proceeding presented in the United States, whether pending in a federal court or in a state court, it is routine, standard practice for our courts to ask the parties very early in a case whether they will need a *Daubert* hearing. Courts routinely set *Daubert* hearings and it can be reversible error for a court to fail to conduct such a hearing.⁵⁴ Many such hearings occur every day in this country in the State courts, as well as the United States District Courts. These hearings give all parties the opportunity to establish that their expert opinion testimony is relevant and reliable and to challenge the relevancy and reliability of all proposed expert opinion testimony and related evidence.

To the knowledge of this author, no court has conducted a *Daubert* hearing and considered the relevancy and reliability of any expert evidence on either side of the question of causation in connection with the destruction of WTC 1, 2 and 7.⁵⁵ Cases that may have required such a *Daubert* hearing have been dismissed on one ground or another, or in a few instances settled, long before a *Daubert* hearing would have been held in due course. Given the magnitude of 9/11 and all that has followed in its wake, it is not unreasonable to inquire whether we, the people of the United States of America, indeed the people of the World, are entitled to a *Daubert* hearing on the question of the cause(s) of the destruction of WTC 1, 2 and 7 on September 11, 2001.

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Endnote:

As an interesting and relevant historical side note, unknown to most people alive today, long before 9/11 a New York City skyscraper was hit by a large aircraft. On July 28, 1945 the Empire State Building was struck by a B-25 bomber. The plane lost its bearings in dense fog and struck the 79th floor of the building and burst into flames. According to an article entitled *The Plane That Crashed Into The Empire State Building*:

⁵³ See, e.g., *Architects & Engineers for 9/11 Truth*. <http://www.ae911truth.org/>

⁵⁴ The importance of a *Daubert* hearing cannot be understated. Appellate courts have vacated jury verdicts in cases where the court failed to conduct a *Daubert* hearing. See, e.g., *Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (vacating a jury verdict of \$9.4 million because the court failed to hold a *Daubert* hearing)

⁵⁵ To date this author's research has not uncovered a case in which a court has held a *Daubert* hearing on the question of the cause or causes of the destruction of WTC 1, 2 and 7.

At 9:49 a.m. the ten-ton B-25 bomber smashed into the north side of the Empire State Building. The majority of the plane hit the 79th floor, creating a hole in the building eighteen feet wide and twenty feet high. The plane's high-octane fuel exploded, hurtling flames down the side of the building and inside through hallways and stairwells all the way down to the 75th floor. []

One of the engines and part of the landing gear hurtled across the 79th floor, through wall partitions and two fire walls, and out the south wall's windows to fall onto a twelve-story building across 33rd Street. The other engine flew into an elevator shaft and landed on an elevator car. []

Some debris from the crash fell to the streets below, sending pedestrians scurrying for cover, but most fell onto the building setbacks at the fifth floor. After the flames were extinguished and the remains of the victims removed, the rest of the wreckage was removed through the building.

The plane crash killed 14 people (11 office workers and the three crewmen) plus injured 26 others. Though the integrity of the Empire State Building was not affected, the cost of the damage done by the crash was \$1 million.

<http://history1900s.about.com/library/misc/blempirecrash.htm>;
http://en.m.wikipedia.org/wiki/B-25_Empire_State_Building_crash

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