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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN), Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN Defendants.	No. 2:15-cv-286-JLQ PLAINTIFFS' MOTION TO EXCLUDE IN PART THE TESTIMONY OF ROGER K. PITMAN, M.D. August 18, 2017 Without Oral Argument

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INTRODUCTION

Defendants have produced two expert reports by Dr. Roger Pitman, each of which offers an opinion on the cause of Plaintiffs' injuries based upon an untested technique that Dr. Pitman testified he "invented [] on the spot" during his examination of Plaintiffs. Dr. Pitman admitted that he lacks any relevant training or education in applying his invented methodology, and that he has no relevant clinical experience and little familiarity with the scientific literature on the examination of torture survivors. Dr. Pitman further admitted that his invented methodology has never been scientifically validated, and that his technique is, as far as he is aware, without any support in scientific literature. Because Dr. Pitman's conclusions as to causation are thus based on a theory and technique that are untested, unknown to the scientific community, ungrounded in his own research and experience, and invented solely for the purpose of this litigation, they are unreliable and must be excluded.

BACKGROUND

In his expert reports, Dr. Pitman concluded that Mr. Salim and Mr. Ben Soud suffered from Posttraumatic Stress Disorder ("PTSD"), but that "only a relatively small portion of [the] PTSD is attributable to the administration of Defendants' recommended" interrogation methods. Declaration of Kate Janukowicz ("Janukowicz Decl."), Exh. A (Forensic Psychiatric Evaluation of Suleiman Abdullah Salim) at 21, Exh. B (Forensic Psychiatric Evaluation of Mohamed Ahmed Ben Soud) at 19. Dr. Pitman based this conclusion on a "technique" that he "invented [] on the spot" during his examination of Mr. Ben

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Soud, and then slightly adapted during his examination of Mr. Salim. Janukowicz Decl., Exh. C (Deposition of Roger K. Pitman, M.D) at 44:16–45:8, 73:5. That novel technique for determining the etiology of PTSD was to simply ask Mr. Ben Soud and Mr. Salim to describe and rank, in order of severity, from most severe to least, various traumatic events they had experienced. Janukowicz Decl., Exh. C at 71:9–76:21; 143:2-18. Because "it got a little confusing," Dr. Pitman asked the translator to write down on Post-it notes the various events described by Mr. Salim, so that Mr. Salim could arrange the Post-it notes, from left to right, ranking them in decreasing order of what subjectively "caused most of his psychological difficulty." *Id.* at 71:16–72:8. Mr. Salim initially identified twelve events and later a thirteenth. Janukowicz Decl., Exh. A at 6. Although Mr. Salim had initially left out a traumatic event, Dr. Pitman did not make any further effort to determine whether other traumatic events had been left out. Janukowicz Decl., Exh. C. at 86:20–87:10. Dr. Pitman agreed that he "made no effort" to evaluate "[t]he severity of any particular" event beyond its rank ordering. *Id.* at 79:16–79:24; *see also id.* at 76:13–21. In other words, Dr. Pitman took no steps to evaluate whether the differences in severity were major or minor.

Dr. Pitman explained that he devised the relative "ranking" technique because it was "just a matter of common sense to ask a person of all the events that they experienced, which did they feel was the worst for them and to get their answer." *Id.* at 46:4–8. This method provided the basis for Dr. Pitman's opinion: "The higher on the list, the more likely it is the source of PTSD." *Id.*at

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161:22–23.According to Dr. Pitman, "It makes commonsense that the items that he said mostly severely affected him were most responsible for any psychopathology he would have developed." *Id.* at 210:23–211:2. Accordingly, Dr. Pitman compared the most highly-ranked traumatic events to his personal understanding of Defendants' methods, and concluded that "the bulk of [Plaintiffs'] PTSD appears to have derived from events that were either a) not part of Defendants' EITs . . . or b) gross exaggerations of Defendants' EITs performed in the absence of Defendants' supervision." Janukowicz Decl., Exh. B at 19; *see also* Janukowicz Decl., Exh. A at 20–21. Dr. Pitman identified no scientific literature supporting his theory that simply asking an individual to rank events could identify the origins of "the bulk of" an individual's PTSD.

Dr. Pitman testified that, as far as he was aware, the technique he invented had never been scientifically validated, Janukowicz Decl., Exh. C at 47:24–48:3, and that he was not aware of any literature supporting it, *id.* at 45:2–8 ("Q: Are you aware of any—any literature that supports this kind of ranking? A: No. Actually, I invented it the previous day with Mr. Ben Soud, and then I used it for Mr. Salim"). Although Dr. Pitman claimed that the technique was based on his own clinical experience, he admitted that "nothing specific in my training or experience" supported it beyond training that "when someone's had more than one traumatic event to ask about, you know, what they were and get a list or, you know, a list of them, I suppose." *Id.* at 46:9–17.

Dr. Pitman further admitted that he had no experience in using the technique he invented for this litigation because he "rarely run[s] into someone

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who experiences so many different kinds of traumatic events" as Plaintiffs. *Id*. at 45:18-24. In fact, Dr. Pitman admitted, he had only ever examined one other torture survivor, and this single clinical experience was 30 or 40 years ago and did not influence his opinion. *Id.* at 15:1–16:6. Dr. Pitman also testified that he had little familiarity with the psychological literature on the examination and treatment of torture survivors, with the exception of a few articles he reviewed during the course of this litigation. *Id.*at 16:14–17:1-11.

ARGUMENT

The Supreme Court has established "a gatekeeping role for the judge" to ensure that expert testimony is reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *see also* Fed. R. Evid. 702 (expert witness testimony must be "the product of reliable principles and methods"). "Before a witness may come 'before the jury cloaked with the mantle of an expert[]' under Rule 702, ... [t]he party presenting the expert must demonstrate that the expert's findings are based on sound principles and that they are capable of independent validation." *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1153–54 (E.D. Wash. 2009) (quoting *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001)).

"In determining reliability, a court may consider a number of factors including: (1) whether the theory can be and has been tested; (2) whether it has been subjected to peer review; (3) the known or potential rate of error; and (4) whether the theory or methodology employed is generally accepted in the relevant scientific community." *Id.* at 1153. In the absence of "normal scientific

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scrutiny through peer review and publication," an expert "may also show the validity of their theory by explaining precisely how the experts went about reaching their conclusions and pointing to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." *Domingo ex rel. Domingo v. T.K., M.D.*, 289 F.3d 600, 605–06 (9th Cir. 2002) (quotation and alteration marks omitted). Dr. Pitman's conclusions as to the relative causation of Mr. Salim's and Mr. Ben Soud's PTSD must be excluded as unreliable because they are based solely on an unverified technique Dr. Pitman invented "on the spot" for the purposes of this litigation. This technique has no basis in scientific literature, nor has it achieved any recognition in Dr. Pitman's field.

Dr. Pitman's "technique" for determining the relative causation of PTSD is unreliable because he invented it solely for the purposes of this litigation. *See* Janukowicz Decl., Exh. C at 44:20–45:1 ("A: I invented it on the spot. Q: Is that right? A: Yes. Q: And why was that? A: Because I thought it was very relevant to this case."). The Ninth Circuit has explained that "[o]ne very significant fact to be considered is 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." *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1056 (9th Cir. 2003), *as amended on denial of reh'g* (Sept. 25, 2003) (quoting

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Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir.1995)). Accordingly, courts regularly reject expert opinions that are based on new techniques invented solely for the purposes of the litigation. As a recent decision by a court in this Circuit explained in rejecting such a technique, "[w]hile the term 'junk science' may be unduly pejorative, the fact is that [the proffered expert] invented this methodology for this case." *In re SFPP Right-of-Way Claims*, No. CV 15-07492JVS (DFMX), 2017 WL 2378363, at *7 (C.D. Cal. May 23, 2017). Another recent decision similarly rejected a technique "invented" for the purpose of litigation because such a method "which has never been used . . . before and likely never will be used again, simply does not present the degree of reliability required under Rule 702." *Feduniak v. Old Republic Nat'l Title Co.*, No. 13-CV-02060-BLF, 2015 WL 1969369, at *5 (N.D. Cal. May 1, 2015). Dr. Pitman's technique, based not on his independent research but "invented [] on the spot" during his examination of Plaintiffs for the purpose of this litigation, is similarly unreliable. *See also Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2006) ("That this methodology was created for the purposes of litigation further supports our conclusion that [the] testimony was not reliable under *Daubert*.").

The Ninth Circuit has held that where—as here—"testimony is not based on independent research[,] then what is required is proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication." *Clausen*, 339 F.3d at 1056 (quotation marks omitted). This too is wholly lacking. Dr. Pitman did not

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support his technique by reference to any peer reviewed publications. In fact, Dr. Pitman admitted that he knows of no support in the scientific literature for his theory. Janukowicz Decl., Exh. C at 45:2–5 ("Q: Are you aware of any—any literature that supports this kind of ranking? A: No.").

Nor did Dr. Pitman identify any other objective source that could establish the validity of his methodology, such as "a learned treatise" or "the policy statement of a professional association." *Domingo*, 289 F.3d at 605–06. As he testified, as far as he is aware no one in his field has ever validated the technique on which he based his causation conclusion. *See* Janukowicz Decl., Exh. C at 47:24–48:3 ("Q: Are you aware of whether this procedure, in terms of ranking, has been validated by anybody? A: No."). Dr. Pitman's conclusions must therefore be excluded for lack of any showing that they are based on "objective, independent validation of the expert's methodology" that would "show that the expert's findings are based on sound science." *Henricksen*, 605 F. Supp. 2d at 1154; *see also Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996) (excluding opinion based on "litigation-driven" research in the absence of "an objective source demonstrating that his method and premises were generally accepted by or espoused by a recognized minority of" scientists in expert's field).

Instead of independent validation, Dr. Pitman explained that, in his view, the "technique that [he] used" was reasonable "[b]ecause it stands on its face." Janukowicz Decl., Exh. C at 210:4–20. But an "expert's bald assurance of validity is not enough," as this Court has explained, because without evidence

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that "(at least) a recognized minority of scientists in his field, accept his methodology . . . causation opinions are based on subjective belief and unsupported speculation." *Henricksen*, 605 F. Supp. 2d at 1154, 1178 (citations and quotation marks omitted). As the Ninth Circuit has held, opinions based on purported knowledge that is "untested and unknown to the scientific community" are inadmissible because "opinion based on such unsubstantiated and undocumented information is the antithesis of the scientifically reliable expert opinion admissible under *Daubert* and Rule 702." *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1423 (9th Cir. 1998); *see also Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1321 (11th Cir. 1999) ("Because the untested theories of Allison's experts are not generally accepted in the scientific community, they obviously have a high potential rate of error.").

In short, as this Court has observed, "[s]omething doesn't become scientific knowledge just because it's uttered by a scientist." *Henricksen*, 605 F. Supp. 2d at 1154. Although Dr. Pitman testified that "[i]t makes commonsense that the items that he said mostly severely affected him were most responsible for any psychopathology he would have developed," Janukowicz Decl., Exh. C at 210:23–211:2, this conclusion is not scientifically reliable in the absence of any evidence or research supporting it. In fact, courts specifically reject expert opinions where they are "based on, as [the witness] states, common sense, rather than highly specialized technical knowledge." *Icicle Seafoods, Inc. v. Khalif*, No. C04-2279RSM, 2006 WL 5159255, at *1 (W.D. Wash. Oct. 4, 2006); *see also PacTool Int'l, Ltd. v. Kett Tool Co.*, No. C06-5367 BHS, 2012 WL

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3637391, at *4 (W.D. Wash. Aug. 22, 2012) (excluding opinion where witness "declare[d] that this principle is 'self[-]evident,'" as "[t]he term 'self-evident' conveys the idea that the principle is widely accepted and could be supported by some accepted literature on the subject" and no such literature provided).

Finally, because Dr. Pitman testified that he knew of no scientific literature supporting his theory and technique, his testimony cannot be retroactively saved from exclusion even if Defendants manage, in response to this motion, to uncover some evidence that might support it. As the Ninth Circuit has found, expert testimony is properly excluded when experts "form[] their opinions before reading the relevant literature," as *post hoc* justification of expert conclusions are incompatible with the scientific method:

> Coming to a firm conclusion first and then doing research to support it is the antithesis of this method. Certainly 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.

Claar v. Burlington N. R. Co., 29 F.3d 499, 502–03 (9th Cir. 1994) (citations omitted).

CONCLUSION

For the above reasons, the Court should exclude as unreliable Dr. Pitman's testimony on the causation of Plaintiffs' PTSD.

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DATED: July 14, 2017 By: *s/ Dror Ladin*

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, I caused to be electronically filed and served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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