

1 BETTS, PATTERSON & MINES P.S.
2 Christopher W. Tompkins (WSBA #11686)
3 CTompkins@bpmlaw.com
4 701 Pike Street, Suite 1400
Seattle, WA 98101-3927

5 BLANK ROME LLP
6 Henry F. Schuelke III (admitted *pro hac vice*)
7 HSchuelke@blankrome.com
8 1825 Eye St., N.W.
Washington, DC 20006

9 James T. Smith (admitted *pro hac vice*)
10 Smith-jt@blankrome.com
11 Brian S. Paszamant (admitted *pro hac vice*)
12 Paszamant@blankrome.com
13 Jeffrey N. Rosenthal (admitted *pro hac vice*)
14 Rosenthal-j@blankrome.com
15 One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

16 **UNITED STATES DISTRICT COURT**
17 **FOR THE EASTERN DISTRICT OF WASHINGTON**
18 **AT SPOKANE**

19 SULEIMAN ABDULLAH SALIM,
20 MOHAMED AHMED BEN SOUD,
21 OBAID ULLAH (as personal
representative of GUL RAHMAN),

22 Plaintiffs,

23 vs.

24 JAMES ELMER MITCHELL and
25 JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

DEFENDANTS' MOTION TO
EXCLUDE EXPERT OPINIONS

August 21, 2017
Oral Argument Requested

DEFENDANTS' MOTION TO EXCLUDE
EXPERT OPINIONS
NO. 2:15-CV-286-JLQ

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I. INTRODUCTION

Plaintiffs have disclosed multiple experts. Certain of the experts' opinions are not admissible under Fed. R. Evid. 702, and Defendants move to exclude all of the proffered testimony of Drs. Sondra Crosby, Brock Chisholm, and Matthew Friedman, as well as portions of the proffered testimony of Dr. Charles Morgan.

Plaintiffs must demonstrate that the expert testimony they seek to elicit will assist the trier of fact in resolving their claims by showing that: (1) the experts are *qualified* to render their opinions; (2) their opinions are based upon *reliable* reasoning or methodology and (3) their opinions are *relevant* to the case at bar. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010); *Hangerter v. Provident Life*, 373 F.3d 998, 1015 (9th Cir. 2004). In addition, expert opinions regarding causation of Plaintiffs' injuries do not assist the trier of fact—and are therefore inadmissible—when they state that events at issue “*possibly*,” rather than “*probably*,” caused Plaintiffs' injuries, *Daubert v. Merrell Dow Pharms, Inc.*, 43 F.3d 1311, 1321-22 (9th Cir. 1995) (“*Daubert II*”), and when they do not eliminate all other possible causes of Plaintiffs' injuries to a “reasonable degree of medical certainty.” *See Henrickson v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1161 (E.D. Wash. 2009).

Dr. Crosby's proffered opinions not only lack reliability, but her diagnosis of complex PTSD—which she is unqualified to make—is not generally accepted by the mental health community. Certain of *Dr. Morgan's* proffered opinions are irrelevant to the claims and defenses at issue. *Dr. Friedman* acknowledges that

1 Defendants fall outside the class of mental health professionals to whom his
 2 opinions apply. Finally, Drs. Crosby, Chisholm and Friedman each fail to
 3 advance their opinions to a reasonable degree of medical certainty so as to assist
 4 the trier of fact. All such opinions are inadmissible and must be excluded.
 5

6 II. ARGUMENT

7 A. **Expert Testimony is Not Admissible When the Expert is Not Qualified, 8 or When the Opinions are Unreliable, Irrelevant or Are Not Stated to 9 the Requisite Degree of Certainty.**

10 The principles announced in *Daubert v. Merrell Dow Pharm., Inc.*,
 11 509 U.S. 579 (1993) (“*Daubert*”), and its progeny, including *Daubert II*, are
 12 incorporated into Federal Rule of Evidence 702. The *proponent* of an expert’s
 13 testimony must establish its admissibility by a preponderance of the evidence.
 14 *Daubert*, 509 U.S. at 592 n. 10. Ultimately, the court must be satisfied that the
 15 “expert is proposing to testify to (1) scientific knowledge that (2) will assist the
 16 trier of fact to understand or determine a fact in issue.” *Id.* at 592-93. Thus, a
 17 testifying expert must be “qualified as an expert by knowledge, skill, experience,
 18 training, or education.” *Hangarter*, 373 F.3d at 1015. Moreover, the court must
 19 evaluate whether the “the expert testimony both rests on a *reliable* foundation and
 20 is *relevant* to the task at hand.” *Primiano*, 598 F.3d at 564 (emphasis added).
 21 Expert testimony is relevant if it has “a valid connection to the pertinent inquiry,”
 22 *id.* at 565, and “logically advance[s] a material aspect of the proposing party’s
 23 case.” *Daubert II* at 1315. It is reliable if the underlying knowledge has “a
 24 reliable basis in the knowledge and experience of the relevant discipline,”
 25

1 *Primiano*, 598 F.3d at 565, as assessed by the expert’s reasoning or methodology,
2 using an appropriate criteria such as testability, publication in peer-reviewed
3 literature, known or potential error rate, and general acceptance. *Estate of*
4 *Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014).

5
6 Expert testimony does not assist the trier of fact, and therefore is
7 inadmissible, when the expert’s opinions are not offered with a requisite degree of
8 certainty. For example, in *Daubert II*, the Court excluded expert testimony that
9 merely suggested a *possibility* as opposed to a *probability* that certain drugs
10 caused birth defects. *Id.* at 1321-22; *see also Hausman v. Holland America Line-*
11 *USA*, No. 13-cv-00937, 2015 WL 9839747, *1 (W.D. Wash. Aug. 21, 2015)
12 (Causation testimony must show that “the injury-producing situation ‘probably’
13 or ‘more likely than not’ caused the subsequent condition”). Moreover,
14 where “general causation opinions are not supported by reliable epidemiological
15 studies, they must set forth a reliable differential diagnosis through which, to a
16 reasonable degree of medical certainty, all other possible causes of the victims’
17 condition can be eliminated.” *Henrickson*, 605 F.Supp.2d at 1161.

18
19 **B. Dr. Crosby’s Opinions are Inadmissible.**

20 **1. The opinions are not reliable**

21 Dr. Crosby—a physician specializing in *internal medicine* (not
22 psychiatry)—advances opinions [REDACTED]

23 [REDACTED]

24 [REDACTED]

1 [REDACTED] But, the reasoning and methodology
2 underlying her opinions are infirm. Dr. Crosby is biased, as shown by her failure
3 to adhere to the generally accepted practice, and her own practice, of not serving
4 as both a retained expert and treating practitioner for the same patient. *Id.*, Ex. 2
5 (“Crosby Dep.”) at 197:24–198:6; Daniel W. Shuman, *Introduction to the Legal*
6 *System*, in THE AMERICAN PSYCHIATRIC PUBLISHING TEXTBOOK OF FORENSIC
7 PSYCHIATRY, 46-48 (Robert I. Simon and Liza H. Gold, eds., 2004); Larry H.
8 Strasburger, et al., *On Wearing Two Hats: Role Conflict in Serving as Both*
9 *Psychotherapist and Expert Witness*, 154 AM. J. PSYCHIATRY 4, 448-54 (1997).
10 Further, she acknowledges having had a “preconceived understanding of Mr.
11 Salim’s status” based on her “ongoing communications with him for six years”
12 prior to her engagement as an expert witness for this litigation. *Id.* at 104:13-18.
13 And, in addition to her role as a treating physician for Salim, Dr. Crosby admits
14 that she has sought to give Salim “moral support” and has offered to “stand strong
15 with [him]”. Dr. Crosby acknowledges that she could not recall having ever
16 served as an expert “on behalf of any other individual with whom [she] had a
17 relationship similar to that between [herself] and Mr. Salim.” *Id.* at 105:10-13;
18 105:22-106:4.

21 Dr. Crosby’s evaluation methodology also lacks reliability because she
22 conducted Salim’s clinical interview without a Swahili language interpreter
23 present, *even though* Salim had only “moderate” English skills such that Dr.
24 Crosby could not state definitively whether her evaluation was “impaired by the
25

1 absence of a translator.” *Id.* at 80:1, 9, 12-16. Of note, Salim insisted on having
2 an interpreter present for Defendants’ deposition. Glasner Decl., Ex. 9 (“Salim
3 Dep.”) at 26:13-19. “Multiple potential sources of miscommunication and
4 distortion result[] from gaps in communication, particularly when no interpreters
5 or ad hoc interpreters are used.” Amy M. Bauer and Margarita Alegria, *Impact of*
6 *Patient Language Proficiency and Interpreter Service Use on the Quality of*
7 *Psychiatric Care: A Systematic Review*, 61 PSYCHIATRIC SERVS. 765, 772 (2010).
8

9 Finally, Dr. Crosby’s opinions are not reliable [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 _____
23 1 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[REDACTED]

2. Complex PTSD is not a generally accepted diagnosis nor is Dr. Crosby qualified to render such a diagnosis

By Dr. Crosby’s *own admission*, complex PTSD is not a generally accepted diagnosis in the psychiatric community, has not been recognized as a valid diagnosis under DSM-5, and is not consistently defined in the scientific literature. Crosby Dep. 87:15-22; 147:18-150:6; 151:20-155:16; 160-61; *see also* Glasner Decl., Ex. 5 (“Friedman Dep.”) at 37:24-41:12. Moreover, Dr. Crosby does not meet even the “broad conception” of sufficient qualifications to testify as an expert to this atypical psychiatric diagnosis under Fed. R. 702, *Hangarter*, 373 F.3d at 1015, in that she acknowledges that she is “not ... familiar with the general PTSD literature” and lacks any formal training in the field of psychiatry. Crosby Dep. 32:16-34:13; 49:20-23; 174 20-21.

C. Certain of Dr. Morgan’s Opinions Are Inadmissible Because They Are Irrelevant and Will Not Assist the Trier of Fact.

Dr. Morgan is a psychiatrist with training in PTSD. Among others, he advances the following opinions: (1) in 2002, a person with doctoral level training in the relevant behavioral science would not believe that findings based on research conducted at the Survival, Evasion, Rescue and Escape (“SERE”) school

1 proved that those techniques were a valid means of acquiring information in a real
2 world setting but instead, prolonged exposure to SERE stressors would result in
3 psychological harm; and (2) there is no relationship between the theory of
4 “learned helplessness” and the SERE model. Glasner Decl., Ex. 6 (“Morgan
5 Rep.”).
6

7 This case is simply *not* about the scientific validity of the interrogation
8 techniques employed by the CIA or whether the SERE training model invokes a
9 theory of “learned helplessness.” As such, these opinions do not assist the trier of
10 fact to determine liability, under the Alien Tort Statute, for the treatment received
11 by Plaintiffs at the hands of the CIA and they are therefore inadmissible.

12 **D. Dr. Friedman’s Opinions Are Inadmissible Because He Concedes They**
13 **Do Not Fit the Issues in this Case.**

14 In his report, Dr. Friedman advanced forensic psychiatric opinions
15 concerning (1) the history of post-traumatic stress disorder (“PTSD”), (2) whether
16 in 2002 it was generally recognized that exposure to stress may cause PTSD and
17 (3) what the mental health community knew in 2002 regarding the effects of
18 inducing and sustaining a state of learned helplessness. *See* Glasner Decl., Ex. 4
19 (“Friedman Rep.”) at 1, 12-13. He opines that certain aspects of the treatment,
20 diagnosis and causes of PTSD were “well known” or “well understood” in 2002.
21 Friedman Rep. at 4, 8-9, 12-13. When asked to whom these facts were “well
22 known” or “understood,” Dr. Friedman clarified that he was referring exclusively
23 to those who “either diagnose or treat PTSD”, Friedman Dep. at 256:2-10, and
24 acknowledged that he had “no knowledge” whether either Defendant ever
25

1 diagnosed or treated PTSD. *Id.* at 259:14:18; 260:7-14. Since Dr. Friedman
2 concedes that his opinions apply only to those who diagnose and treat PTSD, and
3 since neither Defendant diagnosed nor treated PTSD in 2002 (*see* Mitchell Decl.
4 at ¶ 3, Jessen Decl. at ¶¶ 3-4), his opinions do not fit the issues presented and
5 cannot assist the trier fact. As such, they are inadmissible.
6

7 **E. Certain of Plaintiffs’ Expert Opinions Are Not Stated to a Degree of**
8 **Certainty and Therefore Do Not Assist the Trier of Fact.**

9 **1. Dr. Crosby**

10 Dr. Crosby acknowledges her understanding of the significance of defining
11 the degree of probability of her opinions to assist the factfinder, [REDACTED]

12 [REDACTED]
13 [REDACTED]. Crosby Dep. at 28:14-30:4. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 As such, these opinions fail to assist the factfinder and are therefore inadmissible.

21 **2. Dr. Chisholm**

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[REDACTED]

At his deposition, Dr. Chisholm acknowledged that he understood the need for an expert to express opinions to a reasonable degree of scientific certainty. Glasner Decl., Ex. 8 (“Chisholm Dep.”) 82:4-12. *But*, he did not address the fact that he had not done so, nor did he clarify the degree of probability he would assign his opinions. Dr. Chisholm’s testimony is therefore inadmissible.

3. Dr. Friedman

Dr. Friedman fails to state any of his opinions to a degree of certainty, medical or otherwise. Instead, he suggests that “exposure to trauma *may* produce enduring psychological consequences,” something he claims “has long been recognized.” Friedman Rep. at 2 (emphasis added). Finally, Dr. Friedman concedes that “the question of whether torture and captivity produces learned helplessness is a *theoretical issue that has not been completely settled*” – i.e., that torture and captivity “*may*” produce learned helplessness but the science cannot say (or has not determined) that they do. *Id.* at 13.

1 At his deposition, Dr. Friedman failed to clarify his opinions. For example,
2 when asked whether certain enhanced interrogation techniques (“EITs”) posed a
3 “high risk” of causing PTSD, Dr. Friedman said that they created a “*potentially*
4 traumatic event” that “*potentially* might be responsible for the development of
5 PTSD,” but noted that “‘potentially’ does not equate with certainty.” Friedman
6 Dep. at 103:18-104:2; 104:18-20 (emphasis added). He also explained his
7 understanding that the “reasonable degree of medical certainty standard [is] ... a
8 standard beyond more likely than not,” *id.* at 167:23-168:2, conceded that his
9 opinions were not expressed to a reasonable degree of medical certainty, *id.* at
10 129:15-20, and did not explain as to how a trier of fact should distinguish
11 between these two degrees of probability. As such, Dr. Friedman’s opinions fail
12 to assist the trier of fact and are therefore inadmissible.
13

14 III. CONCLUSION

15 For the foregoing reason, Defendants’ Motion to Exclude Plaintiffs’ Expert
16 Opinions should be granted.
17

18 DATED this 14th day of July, 2017.

19 **BETTS, PATTERSON & MINES, P.S.**

20 By: / Christopher W. Tompkins
21 Christopher W. Tompkins, WSBA #11686
22 ctompkins@bpmlaw.com
23 Betts, Patterson & Mines, P.S.
24 701 Pike St, Suite 1400
25 Seattle, WA 98101

BLANK ROME LLP

Henry F. Schuelke III (admitted *pro hac vice*)
HSchuelke@blankrome.com
1825 Eye St., N.W.
Washington, DC 20006

James T. Smith (admitted *pro hac vice*)
Smith-jt@blankrome.com
Brian S. Paszamant (admitted *pro hac vice*)
Paszamant@blankrome.com
Jeffrey N. Rosenthal (admitted *pro hac vice*)
Rosenthal-j@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

CERTIFICATE OF SERVICE

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

<p>Emily Chiang echiang@aclu-wa.org ACLU of Washington Foundation 901 Fifth Ave, Suite 630 Seattle, WA 98164</p>	<p>Paul Hoffman hoffpaul@aol.com Schonbrun Seplow Harris & Hoffman, LLP 723 Ocean Front Walk, Suite 100 Venice, CA 90291</p>
<p>Andrew I. Warden Andrew.Warden@usdoj.gov Senior Trial Counsel Timothy A. Johnson Timothy.Johnson4@usdoj.gov Trial Attorney United States Department of Justice Civil Division, Federal Programs Branch 20 Massachusetts Ave NW Washington, DC 20530</p>	<p>Steven M. Watt, admitted <i>pro hac vice</i> swatt@aclu.org Dror Ladin, admitted <i>pro hac vice</i> dladin@aclu.org Hina Shamsi, admitted <i>pro hac vice</i> hshamsi@aclu.org ACLU Foundation 125 Broad Street, 18th Floor New York, NY 10007</p>
<p>Avram D. Frey, admitted <i>pro hac vice</i> afrey@gibbonslaw.com Daniel J. McGrady, admitted <i>pro hac vice</i> dmcgrady@gibbonslaw.com Kate E. Janukowicz, admitted <i>pro hac vice</i> kjanukowicz@gibbonslaw.com Lawrence S. Lustberg, admitted <i>pro hac vice</i> llustberg@gibbonslaw.com Gibbons PC One Gateway Center Newark, NJ 07102</p>	<p>Anthony DiCaprio, admitted <i>pro hac vice</i> ad@humanrightslawyers.com Law Office of Anthony DiCaprio 64 Purchase Street Rye, NY 10580</p>

By s/ Shane Kangas
Shane Kangas
skangas@bpmlaw.com
Betts, Patterson & Mines, P.S.