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18 UNITED STATES DISTRICT COURT
19 FOR THE EASTERN DISTRICT OF WASHINGTON

20 SULEIMAN ABDULLAH SALIM,
21 MOHAMED AHMED BEN SOUD, OBAID
22 ULLAH (AS PERSONAL
23 REPRESENTATIVE OF GUL RAHMAN),

24 Plaintiffs,

25 v.

26 JAMES ELMER MITCHELL and JOHN
"BRUCE" JESSEN

Defendants.

No. 2:15-cv-286-JLQ

**PLAINTIFFS'
OPPOSITION TO
DEFENDANTS' MOTION
TO EXCLUDE EXPERT
OPINIONS**

1 Defendants have moved to exclude the testimony of Plaintiffs' experts
2 Drs. Sondra Crosby, Brock Chisholm, and Matthew Friedman *in toto*, and of Dr.
3 Charles Morgan in part. ECF No. 210. Each of these experts is highly qualified
4 and formed an opinion that is reliable and which will greatly assist the trier of
5 fact to decide this matter. As a result, the testimony of each is admissible in full
6 under Federal Rule of Evidence 702. *Daubert v. Merrell Dow Pharm., Inc.*, 509
7 U.S. 579, 592-93 (1993) (expert must be qualified and render reliable, relevant
8 opinion); *Primiano v. Cook*, 598 F.3d 558, 563-64 (9th Cir. 2010) (same).
9 Defendants' motion distorts both the facts and the law and should be denied.
10

11 **1. Dr. Sondra Crosby**

12 Dr. Crosby's clinical practice focuses on individuals who have
13 experienced trauma resulting from war, torture, and/or sexual violence. ECF
14 No. 211-1 at ¶¶ 5-6. In this capacity, she has evaluated approximately 1,000
15 victims of torture in 17 years of practice, published and lectured extensively, and
16 been qualified to testify as an expert in federal courts and military tribunals. *Id.*
17 at ¶¶ 6, 8, 9; Janukowicz Decl., Ex. A at 149:5-10; *Id.*, Ex. B.
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19 In 2010, before this suit was initiated, Dr. Crosby evaluated Mr. Salim at
20 the request of nonprofit organizations seeking to secure treatment for him. ECF
21 No. 211-1 at ¶ 11. With the aid of a Swahili interpreter, she compiled a "trauma
22 history" and conducted a physical and psychological evaluation in accordance
23 with the United Nations' "Istanbul Protocol" for assessing torture survivors. *Id.*
24 at ¶¶ 11-12, 17; Janukowicz Decl., Ex. A at 35:11-20; Declaration of Sondra
25 Crosby ("Crosby Decl."), Ex. 1 at 1, 8. She determined that Mr. Salim suffered
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1 from major depression and post-traumatic stress disorder (PTSD), in addition to
2 physical pain. *Id.* at 11. Because Mr. Salim did not have prospects for treatment
3 in his home country of Tanzania, Dr. Crosby made periodic contact to check on
4 his well-being. Janukowicz Decl., Ex. C (Crosby Rebuttal) at ¶ 13.

6 Retained by Plaintiffs in 2015, Dr. Crosby evaluated Mr. Salim over four
7 days in October 2016, performing a clinical interview and limited physical
8 examination. ECF No. 211-1 at ¶ 14. In her report, she concluded that Mr. Salim
9 suffers from physical pain, major depression, and PTSD that meets the criteria
10 for “complex PTSD,” noting that of the approximately 1,000 torture survivors
11 she has assessed, Mr. Salim was among the most profoundly damaged. *Id.* at ¶¶
12 2, 37, 94, 120. She further opined that Mr. Salim’s injuries are traceable in
13 substantial part to methods devised by Defendants. *Id.* at ¶¶ 111-120. Dr.
14 Crosby’s testimony is admissible in its entirety. *See Pyramid Technologies, Inc.*
15 *v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814-15 (9th Cir. 2014) (where expert
16 had “decades of relevant experience” and “principles and methods were
17 reliable,” testimony “from which causation and damage reasonably may be
18 inferred” held “not one of the ‘unreliable nonsense opinions’ that should be
19 screened from use.”) (internal citation omitted).

22 Defendants nonetheless attack Dr. Crosby’s testimony on several grounds.
23 *First*, Defendants allege that Dr. Crosby is “biased,” citing her prior
24 communications and clinical evaluation of Mr. Salim. ECF 210 at 4. But this
25 argument defies common sense: that Dr. Crosby’s expert opinion is consistent
26 with her previous evaluation only strengthens its reliability, as opinions derived

1 outside of litigation are usually viewed as *more* reliable. *See Daubert v. Merrell*
2 *Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (“*Daubert II*”) (holding
3 “very significant” that expert testimony “grow[s] naturally and directly . . .
4 independent of the litigation”). Moreover, treating physicians routinely provide
5 expert reports and testify as experts. *See Goodman v. Staples*, 644 F.3d 817, 826
6 (9th Cir. 2011) (describing rules for treating physicians retained as experts). But
7 more fundamentally, “it is axiomatic that a witness’s ‘possible bias’ goes ‘to the
8 weight of her testimony, not its admissibility.’” *United States v. Bonilla-Guizar*,
9 729 F.3d 1179, 1185 (9th Cir. 2013) (citation omitted); *accord* 29 Fed. Prac. &
10 Proc. Evid. § 6264.2 (2d ed. 2017) (“courts may not consider credibility
11 questions such as bias” in determining “qualification to testify as an expert”).
12

13
14 *Second*, Defendants fault Dr. Crosby for conducting her 2016 evaluation
15 without a Swahili interpreter. ECF 210 at 4. But Dr. Crosby made an informed,
16 professional judgment that her re-assessment of Mr. Salim could be performed
17 in English. Janukowicz Decl., Ex. A at 81:14 - 82:22. Critically, Defendants do
18 not allege any misinterpreted facts. Instead, their own experts rely on Dr.
19 Crosby’s recitation, *see* Janukowicz Decl., Ex. D at 3 (Dr. Crosby’s chronology
20 “appears to provide a sufficiently useful background to my evaluation”), record
21 the same physical complaints, *compare id.*, Ex. E at ¶¶ 57-64, *and id.*, Ex. F at
22 1-3, *with* ECF No. 211-1 at ¶ 89, and reach grossly similar psychiatric
23 conclusions, *see* Janukowicz Decl., Ex. D at 18, 22 (diagnosing major
24 depression and PTSD). Dr. Crosby’s prospective testimony is thus clearly
25 “based on sufficient facts or data” to be admissible, Fed. R. Evid. 702(b); *see*
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also Wilbur v. City of Mount Vernon, 2013 WL 1774624, at *2 (W.D. Wa. April 25, 2013) (“challenge [to] the accuracy of certain facts underlying [expert’s] opinions” speaks to “weight . . . rather than [] admissibility”).

Third, Defendants’ allege that Dr. Crosby relies improperly on the report of Dinah Kituyi, a Kenyan psychologist who also evaluated Mr. Salim. ECF 210 at 5. But this allegation is simply untrue: the Kituyi Report relied upon Dr. Crosby’s 2010 report, not the other way around. *See Crosby Decl.*; *see Kituyi Report* (noting referral of Dr. Crosby, demonstrating that Crosby 2010 assessment was first in time); *compare* ECF 211-1 at ¶¶ 21-23 *with* Crosby Decl., Ex. 1 at 1 (showing Dr. Crosby utilized her own earlier language). As Dr. Crosby testified, she *reviewed* the Kituyi Report in 2016—exactly as Defendants’ proffered expert did. Janukowicz Decl., Ex. A at 92:5-7, 93:6-20; *Id.*, Ex. D at 3 (listing Kituyi Report among items reviewed). Moreover, every expert, including Defendants’, agrees that Mr. Salim suffers from depression and PTSD.

Fourth, Defendants allege that “complex PTSD is not a generally accepted diagnosis nor is Dr. Crosby qualified to render such a diagnosis.” ECF 210 at 6. But “general acceptance” is not the *Daubert* standard. *See Ruiz-Troche v. Pepsi Cola.*, 161 F.3d 77, 85 (1st Cir. 1998) (“*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.”). All that *Daubert* requires is agreement with “a recognized minority of scientists in [the] field.” *Daubert II*, 43 F.3d at 1319; *accord Henricksen v. ConocoPhillips Co.*, 605 F.Supp.2d 1142, 1178 (E.D. Wa.

1 2009), because “the psychological and psychiatric community is far from
2 unanimous in its constantly-evolving conception of what constitutes ‘disorder.’”
3 *United States v. Rahm*, 993 F.2d 1405, 1411 (9th Cir. 1993). Here, complex
4 PTSD has garnered support from a recognized—and reputable—minority: the
5 diagnosis will be listed in the World Health Organization’s International
6 Statistical Classification of Diseases and Related Health Problems (ICD-11), and
7 has been supported in numerous peer-reviewed journals. ECF 211-1, Exs. B-D.
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10 Further, Dr. Crosby is qualified to make this diagnosis. Federal Rule of
11 Evidence 702 permits qualification “by knowledge, skill, experience, training, or
12 education[.]” Fed. R. Evid. 702; *see* Wright, *et al.*, 29 Fed. Prac. & Proc. Evid. §
13 6264.1 (2d ed.) (“[A] background in just one of these five [bases for
14 qualification] may be sufficient.”). Dr. Crosby has extensive experience with the
15 physical and psychological sequelae of torture as a result of 17 years and
16 approximately 1,000 evaluations in the field. ECF No. 211-1at ¶ 2; Janukowicz
17 Decl., Ex. A at 149:5-10. The Ninth Circuit has explicitly recognized this type
18 of expert qualification. *United States v. Finley*, 301 F.3d 1000, 1011 (9th Cir.
19 2002) (physician’s “experience with evaluating ‘thousands’ of people should not
20 be undervalued”); *Primiano*, 598 F.3d at 566 (“We held in *United States v.*
21 *Smith* that even a physician’s assistant was qualified based on experience to
22 offer his opinion.”). Dr. Crosby’s expertise has been recognized in the federal
23 courts and military tribunals; it should not be kept from the jury.
24

25 *Fifth*, and finally, Defendants allege that Dr. Crosby’s opinion will not
26 “assist the factfinder” because it assigns no degree of probability to the cause of

1 Mr. Salim’s physical injuries and fails to rule out alternative causes as to all
2 injuries. *Id.* This is simply false. Dr. Crosby opines, “It is my expert medical
3 opinion to a high degree of medical certainty that Mr. Salim’s medical and
4 psychological injuries can be traced, in part, directly to the torture methods
5 devised by Defendants.” ECF No. 211-1 at ¶ 111. She explains her conclusion in
6 detail, making plain why Defendants’ methods are contributory to Mr. Salim’s
7 injuries. *Id.* at ¶¶ 111-120. Defendants’ contention that Dr. Crosby “merely
8 opines that [] injuries are ‘consistent with’ a certain cause,” ECF No. 210 at 8,
9 thus misstates the facts.
10

11 **2. Dr. Brock Chisholm**

12 Dr. Chisholm is a clinical psychologist who has assessed over 1,000
13 survivors of traumas such as torture, persecution, war, and rendition, including
14 for the British government and in forensic settings. ECF No. 211-7 at ¶¶ 5, 7, 9.
15 He performed a psychological assessment of Plaintiff Ben Soud in this case,
16 opining that Mr. Ben Soud suffers from moderate PTSD, and that he met criteria
17 for a psychotic disorder such as schizophrenia during a period between April
18 2003 and April 2004. *Id.* at ¶¶ 152-174. In addition, Dr. Chisholm meticulously
19 considered Mr. Ben Soud’s entire life history, *id.* ¶¶ 183-221, before concluding
20 that, “on the balance of probability, Mr. Ben Soud’s PTSD was primarily caused
21 by the rendition and torture he received during COBALT,” *id.* at ¶ 228.
22

23 Defendants do not challenge Dr. Chisholm’s qualifications or the
24 reliability of his opinion, but instead allege that “he characterizes his opinions in
25 multiple—equally inadequate—ways,” and fails to “eliminate other potential
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1 causes . . . to a reasonable degree of medical certainty.” ECF No. 210 at 9. These
2 charges are belied by Dr. Chisholm’s careful Report, the substance of which
3 Defendants ignore in favor of semantic requirements roundly rejected by the
4 courts. Having failed to identify a problem with Dr. Chisholm’s methodology,
5 Defendants cannot exclude his testimony based on a lack of “magic words.” *See*
6 *People of the Territory of Guam v. Reyes*, 879 F.2d 646, 649 (9th Cir. 1989)
7 (expert testimony that “did not use the words ‘reasonable degree of medical
8 certainty’” properly admitted where it reflected “the substantive equivalent
9 thereof”); *Schulz v. Celotex Corp.*, 942 F.2d 204, 208 (3d Cir. 1991) (“Care
10 must be taken [] to see that the incantation [‘reasonable degree of medical
11 certainty’] does not become a semantic trap and the failure to voice it is not used
12 as a basis for exclusion without analysis of the testimony itself.”).

15 3. Dr. Matthew Friedman

16 Dr. Matthew Friedman is one of the world’s leading experts on PTSD.
17 For nearly a quarter century, he served as the Executive Director of the U.S.
18 Department of Veterans Affairs’ National Center for PTSD. *See* ECF No. 211-4
19 at 1. Even Defendants recognize his testimony as authoritative, as they cite it
20 multiple times in support of their own arguments. *See* ECF No. 210 at 5 n.1, 6.
21 In this case, Dr. Friedman opined that any mental health professional in 2002
22 should have known that Defendants’ methods were “extremely likely” to
23 produce PTSD. *See* ECF No. 211-4 at 13. While Defendants concede that Dr.
24 Friedman is qualified and employs a reliable methodology, they contend that
25 they (the Defendants) somehow “fall outside the class of mental health
26

1 professionals to whom [Dr. Friedman’s] opinions apply.” ECF No. 210 at 1-2.
2
3 But in opining on what was “well known” in 2002, Dr. Friedman made clear that
4 he was referring to “mental health professionals,” a term he defined to include
5 doctoral-level psychologists such as Defendants. *See, e.g.*, ECF No. 211-44 at 1,
6 4, 12-13; Janukowicz Decl., Ex. G 130:7-135:24. Nevertheless, Defendants
7 insist that Dr. Friedman’s opinions apply “exclusively” to those who “diagnosed
8 or treated” PTSD in 2002. Defendants’ distinction is puzzling; they admit that
9 they themselves treated individuals for PTSD prior to 2002 and the diagnosis
10 has not changed. *See, e.g.*, Janukowicz Decl., Ex. H 67:8-21; *id.*, Ex. I 25:23-
11 26:2; ECF No. 211-4 at 4 (“the basic construct” of PTSD has “withstood the test
12 of time” over decades). But, in any event, Dr. Friedman’s opinions are not so
13 restricted; when asked whether his opinion applied “exclusively” to those who
14 “diagnose and/or treat” PTSD, Dr. Friedman testified that he was referring to
15 any “mental health professional.” *See Id.*, Ex. G at 266:5-22; 269:21-24.
16

17 Defendants next contend that Dr. Friedman did not “state any of his
18 opinions to a degree of certainty.” ECF No. 210 at 9. Again, no such “magic
19 words” are necessary, *supra* p. 7, but in any event, Defendants ignore Dr.
20 Friedman’s testimony that “[i]t’s a complete medical certainty that the
21 likelihood [of developing PTSD] increases the greater the exposure to the
22 traumatic event” Janukowicz Dep., Ex. G at 246:15-20; *see also id.* at
23 227:16-22. Defendants’ remaining objection, that Dr. Friedman stated that the
24 causal relationship between torture and learned helplessness “has not been
25 completely settled,” ECF No. 210 at 9, is beside the point: as Dr. Friedman
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1 testified, “the more important question is whether the uncontrollable stress
2 produced by torture and captivity . . . was likely to precipitate PTSD.” ECF No.
3 214 at 13. He concluded that such “traumatic episodes were extremely likely to
4 produce PTSD” and that “with repeated episodes of torture that likelihood
5 increases towards certainty.” *Id.* Finally, Defendants’ motion ignored that Dr.
6 Friedman’s opinions on subjects other than causation – for example, on the
7 history of PTSD – “logically advance[] a material aspect” of Plaintiffs’ case, and
8 are therefore admissible. *Daubert*, 43 F.3d at 1315.
9

10 **4. Dr. Charles Morgan**

11 Recognizing that Dr. Charles Morgan – a highly regarded forensic
12 psychiatrist who has for decades studied stress and associated psychological
13 injury resulting from the Survival, Evasion, Resistance and Escape (SERE)
14 training that some members of the U.S military undergo, and which is the
15 admitted model for the Defendants’ techniques – is uniquely well-qualified and
16 applies sound methodology, Defendants seek to cherry-pick certain of his
17 opinions that they argue will not aid the jury. ECF No. 210 at 6-7. Without
18 citing any authority, Defendants argue that Dr. Morgan’s opinions are, in part,
19 irrelevant because “[t]his case is simply *not* about the scientific validity of the
20 interrogation techniques employed by the CIA or whether the SERE training
21 model invokes a theory of ‘learned helplessness.’” *Id.* at 7 (emphasis in
22 original). But this contention runs directly contrary to Defendant’s claims that
23 their methods were scientifically valid, would yield accurate information, and
24 would do so by rendering a detainee helpless to resist. Janukowicz Decl., Ex. H
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1 at 274:10-276:16; ECF No. 175 at ¶ 38. This is precisely what Dr. Morgan's
2 proposed testimony would address. ECF No. 211-6 at 2, 6, 8-14, 17-20.
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4 Moreover, Defendants specifically argue that they were selected to
5 develop the CIA program because of their experience with SERE and that they
6 believed in and advocated for those methods because they were based on those
7 used at SERE. Janukowicz Decl., Ex. I at 113:4-115:11; *id.*, Ex. J at 61; 54-55.
8 Dr. Morgan's report and testimony establish that Defendants would and should
9 have recognized the differences between the application of SERE techniques for
10 a limited period of time to volunteer military personnel who could withdraw
11 from the program whenever they wished and the application of their techniques
12 to prisoners like Plaintiffs, who were detained indefinitely against their will,
13 with no ability to end the abuse they had to endure daily. Dr. Morgan will testify
14 that people familiar with SERE and anyone with doctoral level training in the
15 relevant behavior sciences – such as Defendants – would have known, in 2002,
16 that: (1) SERE techniques were, in and of themselves, capable of causing
17 significant psychological injury, ECF No. 205-11 at 130:7-132:3; ECF No. 211-
18 6 at 22, and (2) that the use of these techniques in a real-world detainee setting
19 would make all but certain the probability of these damaging effects, *see, e.g.*,
20 ECF No. 205-11 at 132:4-136:17; 217:21-218:4; ECF No. 211-6 at 4-5, 14. Dr.
21 Morgan should be permitted to testify as to the full breadth of his report. *See*
22 *United States v. Finley*, 301 F.3d 100, 1008 (9th Cir. 2002) (“Expert testimony
23 assists the trier of fact when it provides information beyond the common
24 knowledge of the trier of fact”).
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CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied.

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DATED: July 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 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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