

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' OPPOSITION TO
PLAINTIFFS' MOTION TO
EXCLUDE IN PART THE
TESTIMONY OF ROGER K.
PITMAN, M.D.

August 21, 2017
Oral Argument Requested

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO EXCLUDE IN
PART THE TESTIMONY OF ROGER K.
PITMAN, M.D.
NO. 2:15-CV-286-JLQ

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

1 Plaintiffs' Motion to Exclude in Part the Testimony of Roger K. Pitman,
 2 M.D. (the "Motion") seeks to exclude Dr. Pitman's conclusions regarding the
 3 causes of Plaintiffs Salim and Ben Soud's post-traumatic stress disorder ("PTSD")
 4 diagnoses. But Dr. Pitman's opinions are plainly reliable as required by Fed. R.
 5 Evid. 702. Moreover, Plaintiffs mischaracterize Dr. Pitman's testimony and rely
 6 on case authority that is inapposite. Accordingly, the Motion must be denied.
 7

8 **A. Dr. Pitman's Conclusions are Reliable.**

9 Plaintiffs' request that the Court assess the reliability of Dr. Pitman's
 10 rankings, *see* Mot. at 4-5, fails to consider that this inquiry is a "flexible" one.
 11 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). The Court has
 12 discretionary authority to "avoid unnecessary 'reliability' proceedings in ordinary
 13 cases where the reliability of an expert's methods is properly taken for granted."
 14 *Id.* at 152; *see also United States v. Calderon-Segura*, 512 F.3d 1104 (9th Cir.
 15 2008).

16 Here, Ben Soud and Salim's rankings of their traumatic experiences were
 17 provided in the course of Dr. Pitman's examination of them. Obtaining
 18 information from a subject is a standard, reliable and important component of a
 19 mental health evaluation. *See Pickel v. United Pacific R.R. Co.*, 04-cv-1319, 2006
 20 WL 4941836, at *1 (C.D. Cal. July 18, 2006) ("An expert witness is free to rely on
 21 statements of a patient in reaching conclusions about the nature, extent, cause, and
 22 diagnosis of a patient's condition"); *see also Cooper v. Carl A. Nelson & Co.*,
 23 211 F.3d 1008, 1021 (7th Cir. 2000) ("in clinical medicine, the methodology of
 24 physical examination and self-reported medical history . . . is generally
 25

1 appropriate”) (cited with approval in *Ferguson v. Riverside School Dist. No. 416*,
2 No. CS-00-0097, 2002 WL 34355958, at *9 (E.D. Wash. Feb. 6, 2002)). Dr.
3 Pitman’s evaluations of Ben Soud and Salim, based, in part, on the information
4 they provided him, are reliable even if he does not regularly ask his subjects to
5 provide information by ranking their traumatic experiences using post-it notes as
6 part of his examination. See *City of Pomona v. SQM North America Corp.*,
7 750 F.3d 1036, 1047 (9th Cir. 2014) (“a slight modification of an otherwise
8 reliable method does not render expert testimony inadmissible.”).
9

10 Asking Salim and Ben Soud to rank their experiences is further consistent
11 with the methodology of “creat[ing] a hierarchy of things that make a person
12 anxious or a hierarchy of traumatic events that have led to symptoms.” Glasner
13 Decl., Ex. 1 (“Pitman Dep.”) at 47:14-17; see also Raymond L. Richmond, *A*
14 *Guide to Psychology and its Practice*, available at
15 <http://guidetopsychology.com/sysden.htm> (last checked on July 23, 2017) (“[t]o
16 aid in sorting the items, write each one on a separate index card”). This
17 methodology is recognized by Plaintiffs’ expert, Dr. Matthew Friedman. See
18 Candice M. Monson, Matthew J. Friedman, et al., *A Psychological History of*
19 *PTSD*, in *HANDBOOK OF PTSD: SCIENCE AND PRACTICE*, 65 (Matthew J. Friedman,
20 et al. eds., 2014) (“Based on the patient’s hierarchy of anxiety-provoking
21 stimuli....”). The rankings further comport with the structured clinical interviews
22
23
24
25

1 that Dr. Pitman conducted¹— which Plaintiffs do not challenge—to determine
 2 which of Ben Soud and Salim’s experiences met Criterion A of the diagnostic
 3 criteria for PTSD under the Diagnostic and Statistical Manual of Mental Disorders
 4 (“DSM-5”). Pitman Dep at 49:21-50:24; 144:6-11. For example, where a subject
 5 has experienced multiple potentially traumatic events, CAPS-5 instructs a mental
 6 health examiner to identify the “worst parts” of these events in order to determine
 7 which, if any, are the “basis for [PTSD] symptom[s].” See Instructions for
 8 Administration of CAPS-5, ¶ 1. This methodology is not invalidated by asking
 9 Plaintiffs to assist in constructing that hierarchy by re-ordering post-it notes
 10 identified with their experiences – even if Dr. Pitman had never prepared the
 11 hierarchy in exactly that way before.
 12

13 Dr. Pitman’s opinions regarding the relative causes of Salim and Ben Soud’s
 14 PTSD diagnoses are also not based solely upon his “bald assurance[s]”, as
 15 Plaintiffs assert. Mot. at 7. Instead, his opinions are based upon his expert
 16 knowledge of the DSM-5, his comprehensive examination of Ben Soud and Salim
 17 and evaluation of their symptoms, among other things. Pitman Ben Soud Rep. at
 18 9-11; Glasner Decl., Ex.3, (“Pitman Salim Rep.”) at 9-12. This methodology is of
 19 the kind traditionally used by medical professionals, *see, e.g., Cooper*, 211 F.3d at
 20

21
 22 ¹ Dr. Pitman employed the Clinician-Administered PTSD Scale for DSM-5
 23 (“CAPS-5”) as to Ben Soud, and the Structured Clinical Interview for DSM-5
 24 (“SCID”) as to Salim. Glasner Decl., Ex. 2, (“Pitman Ben Soud Rep.”) at 10;
 25 Pitman Dep at 37:22-38:4.

1 1021; *Pickel*, 2006 WL 4941836, at *1, and is “precisely what *Daubert* [*v. Merrell*
 2 *Dow Pharm., Inc.*, 509 U.S. 579 (1993)] requires.” *Kennedy v. Collagen Corp.*,
 3 161 F.3d 1226, 1229 (9th Cir. 1998) (experts’ testimony admissible “as long as it is
 4 based on methods reasonably relied on by experts in their field”).²

5 Finally, to the extent that Dr. Pitman’s ranking of Salim and Ben Soud’s
 6 experiences was “makeshift”, different from his standard approach, or does not
 7 capture the relative weight of different potential causes of PTSD, these issues go to
 8 weight, not admissibility, and present a question for the jury, not the Court. *See*
 9 *City of Pomona*, 750 F.3d at 1047; *Pickel*, 2006 WL 4941836, at *1.

11 **B. The Motion Does Not Support Plaintiffs’ Request for Relief.**

12 Plaintiffs seek to exclude *all* of Dr. Pitman’s “conclusions” as to “the
 13 causation of Plaintiffs’ [PTSD],” [ECF No. 208-1], but the Motion only addresses
 14 Dr. Pitman’s opinions regarding the relative degree to which events caused Salim
 15 and Ben Soud’s PTSD diagnoses. Dr. Pitman’s opinions as to whether a certain
 16 event satisfied Criterion A of DSM-5 or constituted a cause (no matter how severe)
 17 of Salim or Ben Soud’s respective PTSD diagnoses are not within Plaintiffs’
 18 challenge, and must be admissible. Likewise, as Plaintiffs only seek to exclude Dr.
 19 Pitman’s “*conclusions*,” testimony in the first instance that he requested Salim and
 20

21
 22
 23 ² Plaintiffs do not challenge Dr. Pitman’s qualifications. Thus, their assertion that
 24 Dr. Pitman has only ever examined one other torture survivor, Mot. at 4, is
 25 irrelevant.

1 Ben Soud to rank their experiences and the order in which they did so is also
2 admissible.

3 **C. Plaintiffs Mischaracterize Dr. Pitman’s Testimony and Rely on**
4 **Inapposite Legal Authorities.**

5 Plaintiffs offer selective excerpts of Dr. Pitman’s deposition testimony and
6 ignore the errata sheet submitted following his deposition to assert—incorrectly—
7 that Dr. Pitman “invented” the ranking “technique” “solely for the purposes of this
8 litigation.” (Mot. at 5-6). But, Dr. Pitman has “used the idea before.” Pitman
9 Dep. at 45:22-23; Errata Sheet at 1 (“Change ‘invented’ to ‘implemented’”). Also,
10 the method of using a list to rank patients’ traumatic events came from Dr.
11 Pitman’s clinical experiences. Pitman Dep. at 47:1-2, 8-9. The “technique” was
12 therefore developed “independent of the litigation.” *Cf. Clausen v. MV NEW*
13 *CARISSA*, 339 F.3d 1049, 1056 (9th Cir. 2003) (“one very significant fact to be
14 considered is whether the experts are proposing to testify about matters growing
15 naturally and directly out of research they have conducted independent of the
16 litigation”).

17
18 Moreover, Plaintiffs wrongly rely on case authority that excluded testimony
19 based on an expert’s “common sense, rather than any technical expertise.” Mot. at
20 8 (citing to *Icicle Seafoods, Inc. v. Khalif*, No. 04-cv-2279, 2006 WL 5159255
21 (W.D. Wash. Oct. 4, 2006)). On the contrary, Dr. Pitman’s opinions regarding the
22 causation of PTSD with respect to Salim and Ben Soud are based on his expertise
23 in diagnosing PTSD and evaluating its causes. Plaintiffs also rely on case
24 authority concerning real property valuations, *see* Mot. at 6 (citing to *In re SFPP*
25

1 *Right of Way Claims*, No. 15-cv-07492, 2017 WL 2378363 (C.D. Cal. May 23,
2 2017) and *Feduniak v. Old Republic Nat'l Title Co.*, No. 13-CV-02060, 2015 WL
3 1969369 (N.D. Cal. May 1, 2015)), but offer no explanation as to how expert
4 opinions regarding this subject matter are relevant to this case.

5
6 **CONCLUSION**

7 For the foregoing reasons, Plaintiffs' Motion should be DENIED.

8 DATED this 28th day of July, 2017.

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

10
11 By: s/ Christopher W. Tompkins
12 Christopher W. Tompkins, WSBA #11686
13 ctompkins@bpmlaw.com
14 Betts, Patterson & Mines, P.S.
15 701 Pike St, Suite 1400
16 Seattle, WA 98101

17 **BLANK ROME LLP**

18 Henry F. Schuelke III (admitted *pro hac vice*)
19 HSchuelke@blankrome.com
20 1825 Eye St., N.W.
21 Washington, DC 20006

22 James T. Smith (admitted *pro hac vice*)
23 Smith-jt@blankrome.com
24 Brian S. Paszamant (admitted *pro hac vice*)
25 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 28th 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 <u>echiang@aclu-wa.org</u> ACLU of Washington Foundation 901 Fifth Ave, Suite 630 Seattle, WA 98164</p>	<p>Paul Hoffman <u>hoffpaul@aol.com</u> Schonbrun Seplow Harris & Hoffman, LLP 723 Ocean Front Walk, Suite 100 Venice, CA 90291</p>
<p>Andrew I. Warden <u>Andrew.Warden@usdoj.gov</u> Senior Trial Counsel Timothy A. Johnson <u>Timothy.Johnson4@usdoj.gov</u> 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> <u>swatt@aclu.org</u> Dror Ladin, admitted <i>pro hac vice</i> <u>dladin@aclu.org</u> Hina Shamsi, admitted <i>pro hac vice</i> <u>hshamsi@aclu.org</u> ACLU Foundation 125 Broad Street, 18th Floor New York, NY 10007</p>
<p>Avram D. Frey, admitted <i>pro hac vice</i> <u>afrey@gibbonslaw.com</u> Daniel J. McGrady, admitted <i>pro hac vice</i> <u>dmcgrady@gibbonslaw.com</u> Kate E. Janukowicz, admitted <i>pro hac vice</i> <u>kjanukowicz@gibbonslaw.com</u> Lawrence S. Lustberg, admitted <i>pro hac vice</i> <u>llustberg@gibbonslaw.com</u> Gibbons PC One Gateway Center Newark, NJ 07102</p>	<p>Anthony DiCaprio, admitted <i>pro hac vice</i> <u>ad@humanrightslawyers.com</u> Law Office of Anthony DiCaprio 64 Purchase Street Rye, NY 10580</p> <hr/> <p>Jeffry K. Finer <u>jeffry@finerwinn.com</u> Center for Justice 35 W Main, Suite 300 Spokane, WA 99201</p>

By s/ Karen Langridge
Karen Langridge
klangridge@bpmlaw.com
Betts, Patterson & Mines, P.S.

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO EXCLUDE IN
PART THE TESTIMONY OF ROGER K.
PITMAN, M.D.
NO. 2:15-CV-286-JLQ

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988