

The Honorable Robert J. Bryan

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

UGOCHUKWU GOODLUCK NWAUZOR,
FERNANDO AGUIRRE-URBINA,
individually and on behalf of all those
similarly situated,

Plaintiffs/Counter-Defendants,

v.

THE GEO GROUP, INC.,

Defendant/Counter-Claimant.

Case No.: 3:17-cv-05769-RJB

**DEFENDANT THE GEO GROUP, INC.’S
MOTION TO EXCLUDE EXPERT
TESTIMONY OF JEFFREY MUNSON**

NOTE ON MOTION CALENDAR:
Date: January 17, 2020

Pursuant to Local Rule 16(b)(4) and Federal Rule of Evidence 702, The GEO Group, Inc. (“GEO”) respectfully submits its motion to exclude the expert testimony of Jeffrey Munson.

INTRODUCTION

In support of their claim for damages, Plaintiffs submit an expert report of Mr. Jeffrey Munson, a Psychologist whose professional focus is research about autism, “serious mental illness”, “hallucinations”, and “pregnancy in primates.” Declaration of Colin Barnacle, Ex. A Munson Dep. 9:1-6; 10:16-24 (hereinafter “Munson Dep.”). Plaintiffs provide no justification for why an individual who is trained in Psychology, not mathematical calculations, is qualified to provide expert testimony in the area of damages. And, upon further inquiry at his deposition, Mr. Munson did not provide a suitable basis for his expertise. Put simply, Mr. Munson’s background does not establish the requisite expertise to permit him to testify about damages calculations, employment law, or ICE detainee work programs. Moreover, even if his background were

1 sufficient, Mr. Munson did not rely upon any commonly accepted methods in reaching his
 2 ultimate opinions. *Id.* 20:7-10. Nor did he reach his opinions through reliable factual evidence,
 3 but instead, relied upon blind assumptions that were not supported by the documents he
 4 considered. *Id.* 43:22-25; 44:1-10. Accordingly, he cannot meet the standards for expert
 5 testimony required by Federal Rule of Evidence 702 and his testimony should be excluded.

6 LAW

7 Expert testimony is governed by Federal Rule of Evidence 702, which states:

8 If scientific, technical, or other specialized knowledge will assist the trier of
 9 fact to understand the evidence or to determine a fact in issue, a witness
 10 qualified as an expert by knowledge, skill, experience, training, or education,
 11 may testify thereto in the form of an opinion or otherwise, if (1) the testimony
 is based upon sufficient facts or data, (2) the testimony is the product of
 reliable principles and methods, and (3) the witness has applied the principles
 and methods reliably to the facts of the case.

12 Interpreting Rule 702, in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10 (1993),
 13 the Supreme Court held that in cases where the testimony of a party's expert is challenged, the
 14 district court must act as a "gatekeeper" and rule on the admissibility of the expert testimony and
 15 the qualification of expert witnesses. In *Kumho Tire*, the Supreme Court extended the *Daubert*
 16 and held that Rule 702 applies to all expert testimony, not just "scientific expert testimony."
 17 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). Admissibility is established by
 18 satisfying the two-prong test introduced in *Daubert*: expert testimony must be both (1) reliable
 19 and (2) relevant to the case. *Id.*; *Daubert*, 509 U.S. at 592 n.10; *Estate of Barabin v. Asten*
 20 *Johnson, Inc.*, 740 F.3d 457, 463–64 (9th Cir. 2014); *Simmons v. Safeway, Inc.*, No. 18-5522
 21 RJB, 2019 WL 2921013, at *1 (W.D. Wash. July 8, 2019) (Bryan, J.). The party seeking
 22 admission of expert testimony bears the burden of establishing its admissibility. *Daubert*, 509
 23 U.S. at 592 n. 10.

24 ARGUMENT

25 **A. Mr. Munson's Testimony is Not Reliable.**

26 In assessing whether an expert's testimony is admissible, Rule 702 serves as a guide.
 27 Under Rule 702, an expert's testimony is not reliable unless, "(1) the testimony is based upon

1 sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and
 2 (3) the witness has applied the principles and methods reliably to the facts of the case.” FRE
 3 702. If the expert’s testimony does not satisfy all three criteria, it should be excluded. Here, Mr.
 4 Munson’s testimony must be excluded because it is (1) based upon insufficient facts and data;
 5 and (2) it is not the product of reliable principles and methods.

6 **1. Mr. Munson’s Psychology Background Does Not Provide a Reliable**
 7 **Background For His Opinions.**

8 To begin, Mr. Munson seeks to provide testimony that wanders far afield from that which
 9 is reasonably within the province of his qualifications. Mr. Munson is a Psychologist by trade,
 10 who focuses on Behavioral Sciences. Declaration of Colin Barnacle, Ex. B, Munson Report at
 11 13. Mr. Munson has a Ph. D from the University of Washington in Child Clinical Psychology,
 12 the focus of which entailed “treatment and assessment of family’s and children’s mental health
 13 issues.” Munson Dep. 8:11-12. Since obtaining his degree, he has worked at the University of
 14 Washington “[d]oing research. Studying autism primarily.” *Id.* at 8:23-25; 9:1-6. He currently
 15 focuses his research on “serious mental illness and hallucinations” and “pregnancy in primates.”
 16 *Id.* 10:16-24.

17 As part of his profession, he also manages data, related to psychological conditions, by
 18 organizing it in a database. *Id.* 9:19-20. Mr. Munson has not “been involved in the direct data
 19 collection for many years.” *Id.* 13:23-25. He does not have any specific certificates, degrees, or
 20 other qualifications in data analysis. *Id.* 14:5-13. In fact, he has not taken a course related to data
 21 analysis since 1997. *Id.* 16:21. Beyond that, he is “largely self-taught” and has relied upon
 22 “querying google many times to try to figure out different things” to form the basis of his so-
 23 called expertise. *Id.* 17:8-9. Despite not continuing his formal education, Mr. Munson concedes
 24 that “statistical methodology is always changing.” *Id.* 17:17.

25 Nothing about this background provides any basis for his purported expertise in
 26 economic damages related to alleged lost wages. To be sure, a lack of training in a specific field
 27 provides a sufficient basis for a Court to disqualify an expert. *See Samuels v. Holland Am. Line-*

1 *USA Inc.*, 656 F.3d 948, 953 (9th Cir.2011) (finding that a proffered travel industry expert was
 2 not in the position to testify about the customs of the cruise line business specifically because he
 3 never worked in the cruise industry); *Laux v. Mentor Worldwide, LLC*, 295 F. Supp. 3d 1094,
 4 1098 (C.D. Cal. 2017), aff'd, 786 F. App'x 84 (9th Cir. 2019); *Neal-Lomax v. Las Vegas Metro.*
 5 *Police Dep't*, 574 F. Supp. 2d 1193, 1200 (D. Nev. 2008), aff'd, 371 F. App'x 752 (9th Cir.
 6 2010) ("Rhodes, as an electrical engineer, likely could not offer such an opinion that would
 7 satisfy Nevada's rule requiring expert medical testimony as to causation."); *Radio Sys. Corp. v.*
 8 *Lalor*, No. C10-828RSL, 2014 WL 4626298, at *2 (W.D. Wash. Sept. 12, 2014) (excluding a
 9 witness who was well educated but lacked experience in the relevant field); *Kingsbury v. U.S.*
 10 *Greenfiber, LLC*, No. CV 08-00151 DSF AGRX, 2013 WL 7018657, at *2 (C.D. Cal. Nov. 5,
 11 2013) ("Even if Beardmore is generally aware of disclosure requirements with respect to the sale
 12 of real estate, he has no basis to opine on disclosures relating to this particular insulation
 13 product"). Thus, Mr. Munson's testimony should be excluded on this basis alone.

14 **2. Mr. Munson's Opinion is Not the Product of Reliable Principles and**
 15 **Methods.**

16 Insofar as the Court is inclined to decide that Mr. Munson's background provides a
 17 sufficient basis for his testimony in this case, he did not apply reliable principles and methods.
 18 *JMJ Enterprises, Inc. v. Via Veneto Italian Ice, Inc.*, No. CIV. A. 97-CV-0652, 1998 WL
 19 175888, at *10 (E.D. Pa. Apr. 15, 1998), aff'd, 178 F.3d 1279 (3d Cir. 1999) ("[A]n expert must
 20 be able to point to methods that he applied."). Mr. Munson himself conceded that he cannot
 21 satisfy the second requirement of Rule 702:

22 Q · Do you have a standard methodology for approaching claims
 23 for back wages or missed meal breaks?

24 A · No · I implement assumptions provided by the attorneys I'm
 working with relevant to the case at hand.

25 Munson Dep. 20:7-10. And, even giving Mr. Munson the benefit of all doubts (which
 26 this Court need not do), the closest Mr. Munson comes to providing a basis for his expertise, is
 27 his prior coursework and experience in "multivariant statistical techniques." *Id.* 14:13. The two

1 techniques that Mr. Munson typically uses in his work are “linear mixed models” and
2 “structural equation models.” *Id.* 14:20; 15:15. Mr. Munson did not apply *either* of those
3 techniques in this case. *Id.* 15:11-14. In fact, Mr. Munson made “no statistical inferences in [his]
4 work in this case.” *Id.* 15:15-16; 62:15-16 (“Q. So this analysis is not a statistical analysis? A.
5 That’s correct.”).

6 Indeed, if Mr. Munson were to analyze data here, like in his typical work related to
7 children with autism, he would obtain a sample and then generalize that sample to the broader
8 population of all children with autism. *Id.* 16:1-11. Yet, here, he did not do so. He made no
9 inference from a sample to a population. *Id.* That is to say, he did not request sample data for a
10 certain subset of detainees and the number of hours they participated in the VWP—and then
11 apply that to a larger population. Furthermore, in other cases where he has served as an expert,
12 Mr. Munson admitted, he had “detailed information... so the level of detain—the information for
13 that is very different than what I’ve done thus far for—in this GEO case.” *Id.* 25:8-11.
14 Accordingly, because Mr. Munson’s opinion consists of nothing more than the *ipse dixit* of
15 Plaintiffs’ counsel, it should be excluded.

16 **3. Mr. Munson’s Opinions are Based Upon Insufficient Facts and Data.**

17 In assessing whether an expert is qualified, this Court’s role is to ensure that the expert
18 “employs in the courtroom the same level of intellectual rigor that characterizes the practice of
19 an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119
20 S.Ct. 1167, 143 L.Ed.2d 238 (1999). In general, the expert’s opinion must be based on
21 principles, techniques, or theories that are generally accepted in his or her profession and must
22 reflect something more than subjective belief and/or unsupported speculation. *Daubert*, 509 U.S.
23 at 590; *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, (1997) (“Trained experts commonly
24 extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence
25 requires a district court to admit opinion evidence that is connected to existing data only by the
26 *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap
27 between the data and the opinion proffered.”). The failure to independently verify information

1 that is readily available to an expert is grounds for exclusion. *JMJ Enterprises, Inc.*, 1998 WL
2 175888, at *10. “[E]xpert testimony that ignores existing data and is based on speculation is
3 inadmissible.” *Id.* at *6.

4 In his deposition, Mr. Munson conceded that an “implicit part of [his] process, too, is to
5 examine the data.” Munson Dep. 11:18-22. Thus, before interpreting data, he would “want to . . .
6 ensure its, you know, validity and accuracy.” *Id.* 11:21-22. One thing, for example, that Mr.
7 Munson would typically do, is look “for patterns of missing information.” *Id.* 12:7. Mr. Munson
8 did not perform any of these preliminary steps here, but rather relied entirely upon Exhibit 20 to
9 Ryan Kimble’s 30(b)(6) deposition without considering the document’s purpose or limitations.
10 *See* Declaration of Colin Barnacle, Ex. C, Kimble Dep.

11 Instead, Mr. Munson did not use any of the documents he reviewed to “determine
12 whether or not the information in Exhibit 20 was appropriate or not” *Id.* 40:1-9. Nor did he use
13 the documents he received, including Mr. Kimble’s deposition, to understand what Exhibit 20
14 represented. Nor did he do the *basic* task of verifying that the math in Exhibit 20 was accurate,
15 despite his purported ability to perform “simple arithmetic” at an expert level. *Id.* 41:21-25;
16 64:12-13. Mr. Munson testified that his understanding of the document was that it represented
17 the average length of a workers shift. *Id.* 43:2-4. But, Ryan Kimble’s deposition made clear that
18 the document represented the maximum number of volunteers that *could* participate at a time—
19 not the average number that actually *did* participate. Declaration of Colin Barnacle, Ex. C
20 Kimble Dep. 153:18-25. Despite stating in his report that he reviewed Mr. Kimble’s deposition
21 in creating his report—he admitted at his deposition that he actually had not. Munson Dep.
22 43:16-18; 45:1-4. Nor did he verify whether the methods used to produce it were reliable, have
23 an understanding of the assumptions utilized to create the document, or even find out who
24 created the document. *Id.* 43:22-25; 44:1-10. And, despite using it across all years—2014 to
25 2018, Mr. Munson did not know what time period the document reflected. *Id.* 47:1-17. Nor did
26 he know what an entire column of Exhibit 20 represented, testifying he did not know if the
27 column listing different VWP positions represented different jobs. *Id.* 49:1-6. Despite not

1 understanding an entire column of the only document upon which he relied, he made no effort to
2 figure out what the notations therein meant. *Id.* 49:7-9.

3 Indeed, he stated that his supposition that each individual worked an average of 1.72
4 hours per day was merely an “assumption.” *Id.* 21:14-19. Because he merely relies upon
5 assumptions, the “opinions I—I offer kinda come with that—that built-in flexibility because I
6 have no opinion about the veracity of the assumption itself.” *Id.* 26:16-18. He therefore made no
7 attempt to assess whether Exhibit 20 was reliable. *Id.* 75:24-25; 76:1-6.

8 Additionally, Mr. Munson made assumptions for months in which he did not have data
9 for, meaning that he assumed both the number of VWP participants in a given month *and* the
10 average number of hours each individual worked—relying upon only variables and no actual
11 data. *Id.* 60:23-25; 61:1-3. These assumptions were used for the period of time between March 1,
12 2018 and January, 2019. *Id.* 61:5-11. Mr. Munson provided no testimony or explanation in his
13 report about why the averages would be reliable or why his methodology of calculating averages
14 would be generally accepted by others in his field. Accordingly, his opinions are not admissible.
15 *Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994) (“An expert’s
16 opinion should be excluded when it is based on assumptions which are speculative and are not
17 supported by the record.”).

18 Mr. Munson’s failure to assess the validity or accuracy of the data undercuts the
19 reliability of his opinion. *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1024
20 (C.D. Cal. 2018) (excluding expert testimony based upon unreliable assumptions). Mr. Munson
21 admitted that if there had been only two barbers working in the VWP, that would have changed
22 the number he used to calculate the lost wages in this case. Munson Dep. 50:17-20. And, had he
23 considered Mr. Kimble’s testimony about how many barbers there could be at a given time, the
24 overall average of 1.72 would have dropped. *Id.* 51:19-25; 52:1-8. Indeed, Mr. Munson
25 explained that “if there were more people working in longer shift areas, the average would go
26 up. If there’s fewer people in the longer shifts or more people in the shorter shifts, the average
27 would go down.” *Id.* 69:4-7. Mr. Munson did not consider any “information about what location

1 [or position] an individual did work in.” *Id.* 23:1-3. There was no reason for Mr. Munson to rely
 2 upon inaccurate information. Indeed, he testified that a document, that was in Plaintiffs’
 3 possession well before his report was drafted, “appears to contain the specifics with regard to
 4 which person in which shift. And in that regard, there would be no estimate required . . .” 69:13-
 5 15. But, he was not provided that document to review in his report. *Id.* at 6. Therefore, his
 6 opinions are inadmissible because they are based upon an unreliable foundation. *Kingsbury v.*
 7 *U.S. Greenfiber, LLC*, No. CV 08-00151 DSF AGRX, 2013 WL 7018657, at *2 (C.D. Cal. Nov.
 8 5, 2013) (“Nevin offers no support for this assumption; he does not even address this issue. His
 9 opinions as to Pulte’s profits are therefore not based on a ‘reliable foundation’ and must be
 10 excluded.”); *Tyger Const. Co. Inc.*, 29 F.3d at 145 (“This is particularly true, in a situation such
 11 as this, when an expert has apparently taken factual data from the specific project in dispute, and
 12 formulated estimates of damages. Without accurate factual support, the damages calculations
 13 were speculative and the district court abused its discretion in allowing McCoy’s testimony”).

14 **4. Mr. Munson’s Opinion is Not Based Upon Specialized Knowledge.**

15 At his deposition, Mr. Munson testified that his methods were “at the end of the day, just
 16 arithmetic ... and multiplication.” Munson Dep. 36:15-18. Indeed, he explained that the
 17 “mathematical operation is—is straightforward and simple. Anyone implementing these
 18 assumptions would use those mathematical operations.” *Id.* 37:5-8; 63:2-10 (“here I’m simply
 19 adding . . .”). And, he did not require specialized knowledge to perform this arithmetic. *Id.*
 20 37:15. Mr. Munson has no specialized background in mathematics. He is not an accountant,
 21 economist, or member of any other profession requiring financial expertise. Thus, his
 22 mathematical calculations are not based upon any specialized knowledge. Accordingly, they are
 23 not expert opinions under Rule 702. *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir.
 24 2001) (holding that expert testimony is not helpful to a jury, and thus not relevant, when it
 25 addresses an issue that is within “the common knowledge of the average layman.”).

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1 **B. Mr. Munson’s Testimony Would Confuse the Jury.**

2 “In terms of relevancy, the ‘central concern’ of Rule 702 is whether expert testimony is
3 helpful to the jury.” *Dickinson v. City of Kent*, No. C06-1215RSL, 2007 WL 4420931, at *1
4 (W.D. Wash. Dec. 14, 2007). “‘Expert evidence can be both powerful and quite misleading
5 because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible
6 prejudice against probative force under Rule 403 ... exercises more control over experts than
7 over lay witnesses.’” *Daubert*, 509 U.S. at 595 (citations omitted).

8 At his deposition Mr. Munson made clear—he simply applies the assumptions that the
9 attorneys, for whom he works, ask him to apply—with no independent analysis. Thus, his
10 testimony would serve no other purpose than to amplify Plaintiff’s theory of the case to the
11 status of “expert testimony” without any justification for doing so. He did not consider the
12 whole of the evidence, or even a reliable sample. Because they lack a reliable basis, his opinions
13 would certainly confuse the jury. Accordingly, this Court should exercise its gatekeeping
14 functions to exclude Mr. Munson’s opinion to avoid misleading the jury. *Tyger Const. Co. Inc.*,
15 29 F.3d at 144 (“When the assumptions made by an expert are not based on fact, the expert’s
16 testimony is likely to mislead a jury, and should be excluded by the district court.”).

17 **CONCLUSION**

18 For the foregoing reasons, this Court should grant GEO’s motion to exclude Mr.
19 Munson’s testimony.

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Respectfully submitted, this 2nd day of January, 2020.

By: s/ Colin L. Barnacle

AKERMAN LLP

Colin L. Barnacle (Admitted *pro hac vice*)
Christopher J. Eby (Admitted *pro hac vice*)
Ashley E. Calhoun (Admitted *pro hac vice*)
Adrienne Scheffey (Admitted *pro hac vice*)
Allison N. Angel (Admitted *pro hac vice*)
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: (303) 260-7712
Facsimile: (303) 260-7714
Email: colin.barnacle@akerman.com
Email: christopher.eby@akerman.com
Email: ashley.calhoun@akerman.com
Email: adrienne.scheffey@akerman.com
Email: allison.angel@akerman.com

By: s/ Joan K. Mell

III BRANCHES LAW, PLLC

Joan K. Mell, WSBA #21319
1019 Regents Boulevard, Suite 204
Fircrest, Washington 98466
Telephone: (253) 566-2510
Facsimile: (281) 664-4643
Email: joan@3brancheslaw.com

Attorneys for Defendant The GEO Group, Inc.

PROOF OF SERVICE

I hereby certify on the 2nd day of January, 2020, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **DEFENDANT THE GEO GROUP, INC.’S MOTION TO EXCLUDE EXPERT TESTIMONY OF JEFFREY MUNSON** via the Court’s CM/ECF system on the following:

SCHROETER GOLDMARK & BENDER

Adam J. Berger, WSBA #20714
Lindsay L. Halm, WSBA #37141
Jamal N. Whitehead, WSBA #39818
Rebecca J. Roe, WSBA #7560
810 Third Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 622-8000
Facsimile: (206) 682-2305
Email: hberger@sgb-law.com
Email: halm@sgb-law.com
Email: whitehead@sgb-law.com
Email: roe@sgb-law.com

THE LAW OFFICE OF R. ANDREW FREE

Andrew Free (Admitted *Pro Hac Vice*)
P.O. Box 90568
Nashville, Tennessee 37209
Telephone: (844) 321-3221
Facsimile: (615) 829-8959
Email: andrew@immigrantcivilrights.com

OPEN SKY LAW PLLC

Devin T. Theriot-Orr, WSBA #33995
20415 72nd Avenue S, Suite 100
Kent, Washington 98032
Telephone: (206) 962-5052
Facsimile: (206) 681-9663
Email: devin@openskylaw.com

MENTER IMMIGRATION LAW, PLLC

Meena Menter, WSBA #31870
8201 164th Avenue NE, Suite 200
Redmond, Washington 98052
Telephone: (206) 419-7332
Email: meena@meenamenter.com

Attorneys for Plaintiffs

s/ Nick Mangels

Nick Mangels