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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **EASTERN DIVISION**

12 **RAUL NOVOA, JAIME CAMPOS**
13 **FUENTES, ABDIAZIZ KARIM, and**
14 **RAMON MANCIA**, individually and
on behalf of all others similarly situated,

15 *Plaintiffs,*

16 v.

17 **THE GEO GROUP, INC.,**

18 *Defendant.*
19
20
21

Civil Action No. 5:17-cv-02514-JGB-SHKx

PLAINTIFFS' REPLY IN
SUPPORT OF MOTION TO
EXCLUDE TESTIMONY OF DR.
JEFFREY KROPF

22 GEO attempts to salvage the testimony of Dr. Jeffrey Kropf by narrowing his
23 proposed testimony to a single issue: “the psychological effects of seventy-two (72)
24 hours or less of segregation in a detention facility and how those effects vary across
25 individuals.” Dkt. 349 at 8; *see also id.* at 21 (conceding that Kropf will not testify
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1 regarding any other issues set forth in his Report or Rebuttal Report).¹ Even despite
 2 this *mea culpa*, GEO has failed to carry its burden of showing by a preponderance of the
 3 evidence that Kropf's proposed testimony is admissible. GEO cannot meet this burden,
 4 because Kropf is not qualified to testify, and his opinions are neither reliable nor
 5 relevant. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The
 6 Court should grant Plaintiffs' motion and exclude Kropf's testimony in its entirety. *See*
 7 *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (under
 8 *Daubert*, "the judge is supposed to screen the jury from unreliable nonsense opinions.").

9 **A. Kropf does not possess the specialized knowledge, training, insight, or**
 10 **experience required to testify in this case.**

11 The record does not support GEO's characterization of Kropf as a "preeminent
 12 authority on clinical psychology in detention centers" with "extensive qualifications in
 13 the field of psychology of detained individuals." Dkt. 349 at 9; 12. As set forth in
 14 Plaintiffs' Motion, Dkt. 333-1 at 7-8, Kropf has never authored, published, or edited any
 15 research, scholarly papers, book chapters, books, or manuals on any topic. His only
 16 published writing is a co-written lesson for physicians entitled "The Mentally Disordered
 17 Offender's Path Within the California Correctional System: California's Mentally
 18 Disordered Offender Act." *Id.* n.1. And the only research Kropf has conducted was for
 19 his 1991 dissertation, which was "an exploration of Henry Murray's theory of
 20 personology in relation to suicidality." Dkt. 333-5 (Kropf Dep.) at 71:16-18. Kropf has
 21 never held an academic position, taught an academic course, or served on the editorial
 22 board of a scholarly journal or press. He holds no memberships in any professional
 23 organizations. And it appears that the only professional honor he has ever received was
 24 related to his undergraduate degree in 1984. *See* Dkt. 349 at 9.

25
 26 ¹ Based on GEO's concession that Kropf would opine only "as to the psychological
 27 effects of seventy-two (72) hours or less of segregation in a detention facility and how
 28 those effects vary across individuals," Dkt. 349 at 8, Plaintiffs will address only the
 narrowed scope of GEO's proffer here.

1 GEO admits that Kropf's professional experience is limited to treating individuals
2 confined to two state correctional institutions: the California Department of Corrections
3 and Rehabilitation's ("CDCR") Mentally Disordered Offender Unit and the Stark Youth
4 Correctional Facility ("Stark"). Dkt. 349 at 10. But GEO does not explain how or why
5 Kropf has expertise to opine on any issues in this case, which involves civil immigration
6 detention facilities (not jails or prisons) operated by a private contractor (not the state)
7 with a contractual obligation to comply with ICE's Performance Based National
8 Detention Standards (not the California Mentally Disordered Offender statute).

9 GEO fails to identify any relevant legal authority to support its position that
10 Kropf's possession of a Ph.D and a professional license overcome the dearth of relevant
11 expertise pertaining to the issues here. Indeed, every case relied upon by GEO reaches
12 the opposite conclusion, that is, that an expert must have actual knowledge of the issues
13 on which he or she seeks to opine. *See United States v. Young*, 916 F.3d 368, 380, n.6 (4th
14 Cir.), *cert. denied*, 140 S. Ct. 113 (2019) (expert qualified to testify based on his training
15 and extensive experience regarding the specific issues and factual situation presented in
16 the case); *In re Stand 'N Seal, Prod. Liab. Litig.*, 636 F. Supp. 2d 1333, 1337 (N.D. Ga.
17 2009) (same); *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir.), *opinion amended on*
18 *denial of reh'g*, 246 F.3d 1150 (9th Cir. 2001) (same). *See also Tardif v. City of New York*, 344
19 F. Supp. 3d 579 (S.D.N.Y. 2018) (psychologist could testify that he examined the
20 plaintiff and diagnosed her with psychological injuries).

21 GEO cites *In re Apollo Grp. Inc. Sec. Litig.*, 527 F. Supp. 2d 957 (D. Ariz. 2007) for
22 the proposition that "peer review and publication is relevant, though not dispositive" of
23 an expert's credentials. Dkt. 349 at 15-16. But in that case, the court was actually
24 explaining that publication in a peer-reviewed journal of a theory or technique—not a
25 purported expert's scholarship—is relevant to "assessing the scientific validity of a
26 particular technique or methodology on which an opinion is premised." *Id.* at 960.

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1 And, contrary to GEO's assertion, *Coppi v. City of Dana Point*, 2014 WL 12589639
2 (C.D. Cal. Feb. 24, 2014) (Bernal, J.) supports Plaintiffs' position that an expert must be
3 qualified to testify regarding the specific issues and factual situation presented in the
4 case. As a threshold issue, *Coppi* was a bench trial, so "concerns about admitting expert
5 legal opinion may be lessened." *Id.* at *7. *Coppi* involved a challenge under the Americans
6 with Disabilities Act to wheelchair accessibility of facilities around Strand Beach. *Id.* at
7 *1. An architect sought to testify as an expert regarding ADA compliance and
8 accessibility issues, including the appropriate specifications of wheelchair ramps. *Id.* at
9 *8. Finding the architect qualified to render an expert opinion on those issues, the Court
10 noted that he "is the former president of the Certified Access Specialist Institute. He is
11 currently a Certified Access Specialist, and has provided ADA access compliance
12 services for over 15 years. These services include ADA and access compliance seminars,
13 among others." *Id.* at *7. The expert was certified not because he was a licensed
14 architect, but because he was an architect who specialized in ADA accessibility issues.

15 Here, in contrast to *Coppi*, Kropf has no expertise (let alone "extensive
16 qualifications," Dkt. 349 at 12) pertaining to the specific issues and factual situation at
17 issue. Kropf has no experience—academic or clinical—in civil immigration detention or
18 the PBNDS. Worse, he admits he has no understanding of how segregation at Adelanto
19 actually operates. *See* Dkt. 333-5 (Kropf Dep.) at 211:6-16 (assuming Adelanto has
20 congregate and segregated housing units because CDCR institutions have congregate
21 and segregated housing units); *id.* at. 212:13-21 ("I've not visited the Adelanto facility so
22 I can't offer a definitive description of segregated housing at that facility. I can offer an
23 impression based on my experience working at facilities that I imagine to be like
24 Adelanto."); *id.* at. 215 (stating that detainees in disciplinary segregation cannot
25 participate in the Voluntary Work Program because "I've never worked at a facility or
26 heard of a facility where a confined person placed in disciplinary housing would be
27 released from disciplinary housing to participate in activities in the general population.").
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1 Kropf's general experience in psychology and apparent specialization in the
2 application of California's Mentally Disordered Offender statute do not qualify him to
3 testify as an expert on matters related to conditions of confinement with which he admits
4 he is not familiar. *See Burrows v. BMW of N. Am., LLC*, 2018 WL 6314187, at *2 (C.D.
5 Cal. Sept. 24, 2018) ("Calef's broad automotive background and firsthand experience,
6 although impressive, does not qualify him to testify as an expert on all matters related to
7 the design and function of vehicles with which he is not personally familiar."). Indeed,
8 "clinical judgment does not provide an adequate basis for an opinion on an issue foreign
9 to [an expert's] clinical practice. This is the type of subjective belief and unsupported
10 speculation that *Daubert* guards against." *Nelson v. Matrixx Initiatives*, 2012 WL 3627399,
11 at *12 (N.D. Cal. Aug. 21, 2012), *aff'd sub nom. Nelson v. Matrixx Initiatives, Inc.*, 592 F.
12 App'x 591 (9th Cir. 2015). Because Kropf lacks expertise relevant to this case, his
13 testimony should be excluded.

14 **B. Kropf's opinions are not reliable.**

15 GEO concedes that expert testimony is "inadmissible when the facts upon which
16 the expert bases his testimony contradict the evidence." Dkt. 349 at 20 (citing *Tucker v.*
17 *Cty. of Riverside, California*, 2018 WL 6017036, at *12 (C.D. Cal. May 23, 2018) (Bernal, J.).
18 And GEO admits that Kropf based his opinions on assumptions provided to him by
19 GEO's counsel, including the assumption that GEO complies with all applicable
20 contractual, regulatory, statutory, contract, client, and jurisdictional requirements in its
21 operation of Adelanto. *See* Dkt. 349 at 21. But there is no evidence supporting this
22 assumption; instead, there is significant evidence already in the public record
23 contradicting it. *See, e.g.* Dkt. 192-1 at 10-25 (citing record evidence demonstrating that
24 GEO does not comply with all applicable contractual, regulatory, statutory, contract,
25 client, and jurisdictional requirements in its operation of Adelanto). But Kropf did not
26 review any evidence or engage in any analysis of the fact of this case. *See, e.g.*, Dkt. 333-

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1 1 (Kropf Dep.) at 261:7-20; 36:7-10; 116:7-22. He relied on no facts at all, but rather on
2 the mere say-so of GEO’s counsel.

3 A purported expert may not opine, as GEO proffers Kropf to do, that his
4 conclusions are accurate simply because he has seen no “compelling evidence” to
5 suggest otherwise—especially when he admits (as does Kropf) that he engaged in no
6 investigation or analysis of any facts or data that affirmatively support his conclusions.
7 *See* Dkt. 333-1 (Kropf Dep.) at 30:10-18; 43:18-48:2; *Bragdon v. Abbott*, 524 U.S. 624, 653
8 (1998) (rejecting expert opinion “based on the absence of contrary evidence, not on
9 positive data,” because “[s]cientific evidence and expert testimony must have a traceable,
10 analytical basis in objective fact before it may be considered on summary judgment”);
11 *Nemes v. Dick’s Sporting Goods, Inc.*, 2019 WL 3982212, at *15 (S.D.N.Y. Aug. 23, 2019)
12 (citing *Bragdon* and excluding expert testimony regarding injury causation reached
13 “simply by reading secondary documents and ruling out other hypothetical causes
14 without looking at the device in question or conducting any sort of particularized analysis
15 that build on his unique expertise”).

16 Despite conducting no analysis of any fact or data—and, indeed, ignoring all
17 evidence to the contrary of GEO’s preferred narrative—Kropf reaches the
18 “unequivocal” conclusion that solitary confinement for 72 hours or less does not cause
19 “serious psychological harm.” Dkt. 349 at 11-12. The basis for his conclusion is that he
20 **does not “recall”** any inmates or wards at CDCR or Stark “report[ing] or evidenc[ing]
21 distress” related to solitary confinement. *See* Dkt. 349 at 10 (citing Dkt. 333-3 at 24, 22).
22 Kropf’s opinions, based on his “recollections” of what inmates in two state correctional
23 facilities have expressed to him, are not merely impeachable. They are inadmissible.

24 Kropf’s literature review does not save his testimony. First, his proposed
25 testimony regarding the solitary confinement literature does not “grow naturally and
26 directly” out of his experience or research he conducted independent of this litigation.
27 *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). Kropf conducted
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1 his literature review (by Google search) only after he was retained by GEO. Dkt. 333-5
2 (Kropf Dep.) at 265:25-266:23. His testimony should be excluded on this basis alone.
3 *Elbert v. Howmedica, Inc., a Div. Pfizer Hosp. Products Group, Inc.*, 59 F.3d 174, 1995 WL
4 383409, *1 (9th Cir. 1995) (excluding expert testimony where “prior to his enlistment as
5 an expert witness” he had no familiarity with the subject of his testimony). But even
6 beyond that, Kropf relies only on literature espousing outlier positions that are not
7 justified by existing scientific knowledge. *See* Dkt. 333-1 at 14-17.

8 GEO cites no relevant legal authority to support its position that Kropf’s
9 proposed testimony is reliable. Instead, every case relied upon by GEO demonstrates
10 the opposite; that is, that expert testimony is admissible only where it is based on facts
11 and data. *See Tucker v. Cty. of Riverside, California*, 2018 WL 6017036, at *11 (C.D. Cal. May
12 23, 2018) (Bernal, J.) (permitting medical examiner to testify as to decedent’s body
13 position and wounds because he performed the autopsy and thus his “conclusion is not
14 based on pure speculation without any factual support in the record”); *Brighton Collectibles,*
15 *Inc. v. Coldwater Creek Inc.*, 2010 WL 3718859, at *9 (S.D. Cal. Sept. 20, 2010) (permitting
16 economist to testify as to lost profit damages based on his extensive analysis of sales,
17 marketing, and financial data); *United States v. Tsosie*, 791 F. Supp. 2d 1099, 1115–16
18 (D.N.M. 2011) (permitting doctor to testify as to defendant’s blood alcohol level because
19 her retrograde extrapolation was “scientifically valid and relevant to the facts of the case”
20 and “[t]he Supreme Court of New Mexico has approved experts using similar
21 assumptions”); *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 960-70 (9th
22 Cir. 2013) (affirming district court’s order permitting economist to testify as to lost
23 profits based on his analysis of underlying comparative sales, marketing, bankruptcy, and
24 market share data); *Linares v. Crown Equip. Corp.*, 2017 WL 10403454, at *9 (C.D. Cal.
25 Sept. 13, 2017) (Bernal, J.) (permitting a safety engineer to testify as to a forklift’s
26 allegedly defective design based on his analysis of available data and experience
27 conducting safety inspections of forklifts).

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1 As GEO’s own legal research demonstrates, an expert’s proposed testimony must
2 be based on facts and data, not speculation. Kropf’s proposed testimony falls well short
3 of that requirement. These failings do not go to Kropf’s credibility, but rather to the very
4 admissibility of his testimony. His testimony should be excluded.

5 **C. Kropf’s opinions are not relevant.**

6 GEO argues that Kropf’s proposed testimony is relevant because the legal
7 definition of “serious harm” includes psychological harm, and Kropf is “keenly aware
8 of the effects of segregation and whether placement in segregation may give rise to
9 psychological harm.” Dkt. 349 at 26-27. GEO’s argument fails.

10 As GEO admits, “serious harm” is a term of art in the forced labor statutes. *Id.*
11 at 26-27; *see also* Dkt. 333-1 at 18. However, Kropf defines “serious psychological harm”
12 based on his understanding the term as used in the Mentally Disordered Offender statute
13 and Welfare and Institutions Code 1800. Dkt. 333-5 (Kropf Dep.) at 237:18-239:24;
14 237:10-14 (defining “serious psychological harm” as “a condition that substantially
15 impacts thoughts or perceptions of reality or emotional process or judgment or behavior
16 that is unlikely to remit without treating.”). Civil immigration detention is not
17 penological, Class Members are not so-called “Mentally Disordered Offenders,” and
18 California criminal statutes like the Mentally Disordered Offender Statute are not
19 relevant to any issue presented in this case. Kropf’s proposed testimony—that Adelanto
20 is the same as CDCR and that Class Members are the same as Mentally Disordered
21 Offenders—will prejudice Plaintiffs by leading the jury to conflate criminal detention
22 with civil immigration detention. *See Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063–64
23 (9th Cir. 2002) (A trial court’s “gatekeeping” obligation to admit only expert testimony
24 that is both reliable and relevant is especially important “considering the aura of
25 authority experts often exude, which can lead juries to give more weight to their
26 testimony.”). And, again, while Kropf may be “keenly aware” of his own perception
27 about segregation at CDCR facilities and Stark based on his recollections, Dkt. 349 at
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1 10, there is no question that Kropf has no knowledge whatsoever about segregation at
2 Adelanto or any other civil immigration detention facility. *See* Section A, *supra*.

3 GEO again fails to cite any relevant legal authority to advance its position. In fact,
4 GEO's proffered caselaw does not even apply the correct legal standard. *See Huddleston*
5 *v. United States*, 485 U.S. 681, 681 (1988) (concerning the relevancy standard for the
6 admissibility of character evidence under Fed. R. Evid. 404(b), not expert testimony
7 under Fed. R. Evid. 702); *United States v. Hobson*, 519 F.2d 765 (9th Cir. 1975) (concerning
8 the relevancy standard for the admissibility of physical evidence under Fed. R. Evid. 401,
9 not expert testimony under Fed. R. Evid. 702); *Jacques v. Clean-Up Grp., Inc.*, 96 F.3d 506
10 (1st Cir. 1996) (concerning the relevancy standard for the admissibility of physical
11 evidence under Fed. R. Evid. 401, not expert testimony under Fed. R. Evid. 702).

12 Similarly, *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (*en banc*) did not concern
13 a *Daubert* challenge to expert testimony. There, the Ninth Circuit held that a prison policy
14 requiring male guards to conduct random, nonemergency, suspicionless clothed body
15 searches of female prisoners was cruel and unusual punishment in violation of the
16 Eighth Amendment. *Id.* at 1531. In dicta, the court mentioned—in one paragraph of a
17 63-page opinion—that “[t]he inmates presented testimony from ten expert witnesses”
18 including correctional officers and officials, social workers, psychologists, and an
19 anthropologist. *Id.* at 1525-26. Is expert testimony generally a helpful tool in litigation?
20 Sure. Does *Jordan* support GEO's supposition that Kropf's testimony is reliable simply
21 because it is offered under the aura of expertise? No.

22 CONCLUSION

23 For the reasons set forth herein and in Plaintiffs' Memorandum in Support of
24 Motion to Exclude Testimony of Dr. Jeffrey Kropf, Dkt. 333-1, Plaintiffs respectfully
25 request that the Court grant the pending motion and exclude Kropf's testimony for any
26 purpose in this case.

1 Dated: October 19, 2020

Respectfully Submitted,

2
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CERTIFICATE OF SERVICE

I, Lydia A. Wright, electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Central District of California, using the electronic case filing system. I hereby certify that I have provided copies to all counsel of record electronically or by another manner authorized by Fed. R. Civ. P. 5(b)(2).

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