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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JANE DOE; STEPHEN ALBRIGHT; AMERICAN KIDNEY FUND, INC.; and DIALYSIS PATIENT CITIZENS, INC.,

Plaintiffs,

v.

ROB BONTA, in his Official Capacity as Attorney General of California; RICARDO LARA in his Official Capacity as California Insurance Commissioner; SHELLY ROUILLARD in her official Capacity as Director of the California Department of Managed Health Care; and TOMAS ARAGON, in his Official Capacity as Director of the California Department of Public Health,

Defendants.

8:19-cv-2105-DOC-ADS

DEFENDANTS' NOTICE OF MOTION AND *DAUBERT* MOTION TO EXCLUDE THE TESTIMONY OF EXPERT WITNESS LAURENCE J. FREEDMAN, ESQ.

Date:	May 2, 2022
Time:	8:30 a.m.
Courtroom:	9D
Judge:	The Honorable David O. Carter
Trial Date:	July 12, 2022
Action Filed:	November 1, 2019

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on May 2, 2022, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable David O. Carter, U.S. District Judge, in Courtroom 9D of the Ronald Reagan Federal Building and United States Courthouse, U.S. District Court for the Central District of California, located at 411 West Fourth Street, Santa Ana, California 92701, Defendants Rob Bonta, Ricardo Lara, Shelly Rouillard, and Tomás Aragón, sued in their official capacities, will move this Court for an order excluding the testimony of Laurence J. Freedman, Esq., proffered by Plaintiffs Jane Doe, Stephen Albright, American Kidney Fund, Inc., and Dialysis Patient Citizens, Inc., pursuant to Federal Rules of Evidence 403, 702, 703, and 704.

This motion is based on the Notice of Motion, the accompanying memorandum, the Declaration of S. Clinton Woods with its accompanying exhibits, the arguments of counsel, the record in this action, and any matters of which the Court may or must take judicial notice.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on February 18, 2022.

INTRODUCTION

Defendant moves to strike any testimony from Plaintiffs' proposed expert, Laurence J. Freedman, Esq. Mr. Freedman's testimony should be excluded because (1) the entirety of Mr. Freedman's opinions go to the ultimate legal issue—whether Advisory Opinion 97-1 preempts AB 290—which is an improper subject for expert opinion, and (2) Mr. Freedman's opinions are not based on sufficient facts or data and are unreliable, and thus do not meet the relevant standards under Federal Rule of Evidence 702.

BACKGROUND

The complaint in this case raises claims related to federal preemption. Plaintiffs allege that they cannot comply with both the requirements of AB 290 and a 1997 Advisory Opinion known as Advisory Opinion 97-1, which was issued by the Office of the Inspector General (OIG) of the Department of Health and Human Services.[1]

Plaintiffs have disclosed Laurence J. Freedman, an attorney in private practice for the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo (Mintz), to offer the opinion that AKF "cannot comply with AB 290 without being outside of its certifications supporting" Advisory Opinion 97-1. Declaration of S. Clinton Woods (Woods Decl.), Ex. 1 [Expert Report of Laurence J. Freedman (Freedman Report)] at ¶ 22. He also purports to testify that without those certifications, AKF's HIPP program "would be subject to ruinous liability, whether in cases initiated by federal agencies, or 'whistleblowers' under the qui tam provisions of the [False Claims Act]." *Id.* at ¶ 23. Finally, Mr. Freedman opines that the mechanism within AB 290 which allows time for AKF to seek another Advisory Opinion is insufficient and "provides no pathway for AKF to continue its HIPP program in California." *Id.* at ¶ 25.

[1] Plaintiffs raise a federal preemption claim based on the Medicare Secondary Payer Act, as well, but Mr. Freedman's report does not speak to this claim.

These matters are legal opinions which go to the ultimate legal issue—whether AB 290 is preempted by federal law. Mr. Freedman opines that "AKF has operated its patient assistance program in accordance with [Advisory Opinion 97-1] since OIG issued the opinion in 1997." *Id.* at ¶ 20. But in formulating his opinions, Mr. Freedman did not do any factual investigation, interview anyone, or talk to anyone at all. Woods Decl., Ex. 2 [Deposition of Laurence J. Freedman (Freedman Dep.)] at 49:21-50:21; 67:6-17. Nor did he review any scientific literature or conduct research regarding the health outcomes of patients with ESRD. *Id.* at 49:21-50:21; 112:11-113:6. Instead, as Mr. Freedman's expert report and deposition transcript make clear, his "opinion" is pure legal argument, based solely on his review of the statutes, certain pleadings in this matter, and discussions with another senior associate at Mintz. Freedman Report, Appendix D; Freedman Dep. 62:5-22.

Similarly, Mr. Freedman lacks any expertise or training in evaluating why patients might choose a provider. Freedman Dep. 28:16-30:13. His expert report cites no peer-reviewed research whatsoever, and he testified at his deposition that his only education in health care choices or coverage has been through the review of legal literature. *Id*. at 30:15-32:1; 80:9-15.

Nevertheless, Mr. Freedman asserted at his deposition that his "strongly held view" was that complying with AB 290 would subject AKF to "legal risk." *Id*. at 81:24-84:6; 89:16-90:10. But Mr. Freedman admits that he has no direct experience working with Advisory Opinion 97-1. *Id*. at 35:11-24; 46:13-25. Indeed, Mr. Freedman's deposition testimony demonstrates that he does not understand how Advisory Opinion 97-1 works, as he testified that he believes it prevents dialysis providers from knowing which patients are receiving HIPP assistance, when in reality there is no such prohibition. *Id*. at 93:19-94:14. Regardless, Mr. Freedman admitted that the ultimate determination of whether AKF has complied with Advisory Opinion 97-1 to date—a key plank upon which

Mr. Freedman bases his conclusions—is a question for a court of law. *Id*. at 72:24-73:12.

LEGAL STANDARD

Federal Rule of Evidence 702 permits expert testimony only from a witness who is "qualified as an expert by knowledge, skill, experience, training, or education." General qualifications as an expert are not sufficient, however. Rather, an expert witness must be qualified in the specific subject for which his testimony is offered. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-91 (1993). Rule 702 also "places limits on the areas of expertise and the methodologies of analysis which may be covered and used by an expert witness." *DSU Med. Corp. v. JMS Co., Ltd.*, 296 F. Supp. 2d 1140, 1146 (N.D. Cal. 2003).

Expert witness testimony is admissible if it will assist the trier of fact to determine a fact at issue; is based on sufficient facts or data, is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. These requirements are meant to ensure that proffered expert testimony is only admitted if it rests on a sufficiently trustworthy foundation. *Daubert*, 509 U.S. at 590 n.9. Rule 702 requires that the Court serve as a gatekeeper to ensure that all expert testimony "is not only relevant, but reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (citing *Daubert*, 509 U.S. at 589).

While Federal Rule of Evidence 704 states that expert testimony is not necessarily "objectionable just because it embraces an ultimate issue," courts have determined that although an expert may at times be able to testify as to an ultimate issue of fact, this exception does not extend to testimony on an ultimate issue of law. *See United States v. Diaz*, 876 F.3d 1194, 1196-97 (9th Cir. 2017) ("Consistent with Rule 704(a), this court has repeatedly affirmed that an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law.") (internal quotations and citations omitted).

ARGUMENT

I. MR. FREEDMAN'S REPORT SHOULD BE EXCLUDED BECAUSE IT SEEKS TO OPINE ON AN ULTIMATE ISSUE OF LAW

The entirety of Mr. Freedman's report should be stricken as the question whether AKF may comply with AB 290 and still remain in compliance with Advisory Opinion 97-1 is a question of law, not fact, and is properly reserved for the Court. The entirety of Mr. Freedman's opinion is the conclusion that there is no way for AKF to comply with both Advisory Opinion 97-1 and AB 290 without exposing itself to "ruinous liability" for violations of other federal statutes. Freedman Report ¶ 23; Freedman Dep. 81:24-84:6. But the question whether an entity can comply with two different statutes is a purely legal determination. Mr. Freedman's report therefore seeks to substitute his own legal judgment for that of the Court, and should be excluded on that basis. *Diaz*, 876 F.3d at 1196-97.

Mr. Freedman admits that in formulating his report he did not do any research or investigation other than reviewing pleadings, statutes, and other legal information. Freedman Dep. at 49:21-50:21. The only person he spoke to in formulating his opinions was an associate at Mintz who helped him draft his report. *Id*. at 62:5-22. Indeed, Mr. Freedman was retained in his capacity as a Mintz attorney, and submitted his bills through his law firm. *Id*. at 75:23-76:14; Woods Decl., Ex. 3. In short, Mr. Freedman's report is no different from an attorney providing a legal opinion for a client.[2]

Moreover, the conclusions that Mr. Freedman draws in his report are explicitly legal. Mr. Freedman opines that "AB 290 Directly Conflicts With the Essential Requirements of [Advisory Opinion 97-1]." Freedman Report at 14. Mr. Freedman asserts that this conflict is based on the legal requirements of certain

[2] Mr. Freedman testified at his deposition that he previously provided legal counsel for DaVita on matters of compliance, underscoring his role as a legal analyst here. Freedman Dep. at 54:15-55:8.

sections of AB 290, most notably Sections 3(c)(2) and 3(e)(1). *Id*. at ¶¶ 74-79. While Defendants vigorously disagree with Mr. Freedman's conclusions,[3] the conflicts he purports to identify are legal ones. Mr. Freedman admitted as much at his deposition. *See, e.g.*, Freedman Dep. 82:21-84:6 ("Q- And what did you mean by "AKF cannot comply without being outside its certifications supporting [Advisory Opinion] 97-1"? A- … But if AKF complied with the provisions of AB 290 then it would be probably inconsistent with its certifications and its—the conduct described when it requested Advisory Opinion 97-1. They're inconsistent with each other. Q- And that would put AKF in legal jeopardy, correct? A- It would create a lot of risk for AKF, yes…. Q- Would you consider those to be legal risks? A- Their risk of being in violation of the kickback statute, the False Claims Act, the beneficiary inducement statute. So yes….") Mr. Freedman also admitted that it was the province of the Court, not any other body, to determine whether AKF has in fact operated within the certifications of Advisory Opinion 97-1. *Id*. at 72:24-73:12. Mr. Freedman's assertions thus do not "help the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702(a), but instead merely repeat the statements made by Plaintiffs' witnesses.

Plaintiffs may argue that Mr. Freedman's experience with the OIG and Advisory Opinions in general gives him the expertise to opine about how Advisory Opinion 97-1 works or how patients will be affected by AB 290. *See, e.g.*, Freedman Report ¶¶ 75-78. Yet Mr. Freedman cites no specific facts or experience that he relies upon to inform his opinion. In addition, to the extent Mr. Freedman's opinion is based on his background, it lacks foundation, *In re Toyota Motor Corp.*, 978 F. Supp. 2d 1053, 1067-68 (C.D. Cal. 2013), as he testified that he had no involvement with Advisory Opinion 97-1 or the Affordable Care Act while he was at the U.S. Department of Justice, Freedman Dep. 35:11-24; 46:13-25.

[3] See Woods Decl., Ex. 4 (Rebuttal Report of Randolph Pate).

Mr. Freedman's report consists of legal conclusions drafted by an attorney, not expert testimony designed to aid the trier of fact. Because Mr. Freedman's conclusions about the existence of a purported conflict between AB 290 and Advisory Opinion 97-1 are purely legal in nature, his opinion should be excluded. *Diaz*, 876 F.3d at 1196-97.

II. MR. FREEDMAN'S REPORT SHOULD BE EXCLUDED BECAUSE IT IS NOT A PRODUCT OF RELIABLE METHODS

Mr. Freedman also testified about how ESRD patients, federal agencies, or other third parties *might* behave in response to the enactment of AB 290. Because his opinion is not a product of reliable methods, it should be excluded. Fed. R. Evid. 702.

First, even if these topics were a proper subject of expert opinion—and they are not—Mr. Freedman's expertise does not encompass predicting how third parties will react to the enactment of a state statute that regulates insurance reimbursement rates for non-federal health care programs. The expert report prepared by Mr. Freedman largely consists of legal conclusions combined with unsupported factual allegations, many which are entirely unrelated to his field of expertise, which is law. *See, e.g.*, Freedman Report ¶ 23 (opining that AB 290 would expose AKF to "ruinous liability" to federal agencies and qui tam whistleblowers); *id.* at ¶ 78 (opining that patients will be incentivized to choose providers based on their co-insurance payments). Nothing in his background or training provides Mr. Freedman with a special ability to draw inferences about the subjective state of mind of ESRD patients or probable behavior of third parties such as federal agencies. Indeed, Mr. Freedman admitted that while his Report makes assertions about how patients may react to AB 290, he did no research on patient behavior regarding choice of providers, and reviewed no scientific literature whatsoever. *Id.* at 49:21-50:21; 112:11-113:6.

Second, because Mr. Freedman possesses no special expertise, he is in no better position than the Court to determine from the evidence what the effect of AB 290 would be on ESRD patients or other third parties. *See Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995) (holding that trial court properly excluded from bench trial the proposed testimony of experts on what could be heard in a tape-recorded conversation because "hearing is within the ability and experience" of the factfinder); *United States v. Finley*, 301 F.3d 1000, 1009-10 (9th Cir. 2002) (noting that medical expert who merely recites the allegations of the alleged victim "in the guise of a medical opinion... does not assist the trier of fact as required by Rule 702") (quotations and citations omitted); *Wendler & Ezra, P.C. v. Am. Intern. Group, Inc.*, 521 F.3d 790, 791 (7th Cir. 2008) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."). Mr. Freedman's opinion is thus neither reliable expert testimony nor helpful to the Court, as required by Federal Rule of Evidence 702.

Third, Mr. Freedman's opinions are inadmissible because he did not prepare them with the intellectual rigor that the law requires. Rule 702 requires that expert testimony be "based on sufficient facts or data" and that it be "the product of reliable principles and methods," which the expert has applied to the facts of the case. Indeed, "an expert, whether basing testimony upon professional studies or personal experience, [must] employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. at 152. Courts are not required "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Courts can "conclude that there is simply too great an analytical gap between the data and the opinion offered." *Id.*

Here, Mr. Freedman's opinion is not a product of reliable methods. Mr. Freedman did nothing more than review pleadings and other legal documents. Freedman Dep. 30:15-32:1; 80:9-15. Mr. Freedman did not interview anyone or

read any scientific literature of any kind. *Id.* at 49:21-50:21. His opinion is largely based on the self-serving declarations of LaVarne Burton, the CEO of AKF, and other declarations submitted by Plaintiffs. *Id.* at 62:5-22.

Thus, Mr. Freedman lacks a sufficient factual basis from which to form an opinion about the alleged factual compliance of AKF with the certifications of Advisory Opinion 97-1. When expert opinions are premised on hearsay information, the Court must ensure that the testimony both rests on a reliable foundation and is relevant to the task at hand. *U.S. v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2007). The hearsay evidence that Mr. Freedman relied on is inherently unreliable, as it came from an AKF officer—an interested party to this litigation—without any corroboration from other sources. Courts have long recognized that expert opinion based on self-serving statements provided by an interested witness is not sufficiently reliable under Rule 703. *Faries v. Atlas Truck Body Mfg. Co.*, 797 F.2d 619, 624 (8th Cir. 1986) (proposed expert opinion regarding excessive speed premised on eyewitness account); *see also Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721, 722 (6th Cir. 1981) (state trooper's opinion derived primarily from story of biased eyewitness inadmissible as expert opinion); *In re Agent Orange Prods. Liability Litig.*, 611 F. Supp. 1223, 1243-47 (E.D.N.Y. 1985) (medical expert opinion on causation premised mainly on symptom checklists prepared by one party inadmissible because no expert would reasonably rely on such information).

And to the extent Mr. Freedman proffers testimony about risks to AKF that would result from AB 290's implementation, such testimony is not based on any research on this topic. *See, e.g., Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An opinion has a significance proportioned to the sources that sustain it.") (citation omitted). His opinion relies exclusively on his experience with the United States Department of Justice and as an attorney, but he cites to nothing specific about that experience that would entitle

his statements to the deference accorded an expert. The federal rules do not permit expert testimony based on such nonspecific assertions of expertise. *In re Toyota Motor Corp.*, 978 F. Supp. 2d at 1067-68 (excluding opinion of expert who relied on his "experience as an attorney" rather than "specific training or education"); *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) ("A witness who invoked 'my expertise' rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term."). Because Mr. Freedman's testimony does not meet evidentiary requirements under federal law, it should be stricken for the purposes of summary judgment.

CONCLUSION

The Court should strike the Report of Laurence J. Freedman in its entirety.

Dated: March 3, 2022

Respectfully submitted,

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/s/ S. Clinton Woods

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CERTIFICATE OF SERVICE

Case Name: ***Jane Doe, et al v. Xavier Becerra, et al.*** No. **8:19-cv-2105-DOC-(ADSx)**

I hereby certify that on March 4, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANTS' NOTICE OF MOTION AND *DAUBERT* MOTION TO EXCLUDE THE TESTIMONY OF EXPERT WITNESS LAURENCE J. FREEDMAN, ESQ.**
- **DECLARATION OF S. CLINTON WOODS IN SUPPORT OF *DAUBERT* MOTION TO EXCLUDE THE TESTIMONY OF EXPERT WITNESS LAURENCE J. FREEDMAN, ESQ. WITH EXHIBITS 1-4**
- **[PROPOSED] ORDER GRANTING *DAUBERT* MOTION TO EXCLUDE THE TESTIMONY OF EXPERT WITNESS LAURENCE J. FREEDMAN, ESQ.**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 4, 2022, at San Francisco, California.

K. Figueroa-Lee
Declarant

Signature

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