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12 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT

14 SOUTHERN DISTRICT OF CALIFORNIA

15 ARTHUR PADILLA, an individual,

16 Plaintiff,

17 vs.

18 UNITED STATES OF AMERICA;
and DOES 1 through 50, inclusive,

19 Defendant.

Case No.: 17cv1182-W-AHG

DEFENDANT UNITED STATES OF AMERICA'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORTS OF DR. STEWART LONKY

Motion in Limine No. 2 of 6

Trial: May 12, 2020

Time: 9:00 a.m.

Dept.: 3C

Hon. Thomas J. Whelan

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1 The United States moves to exclude the testimony and reports of Plaintiff Arthur
 2 Padilla’s “non-retained” rebuttal expert, Dr. Stewart Lonky.¹ As a “non-retained” expert,
 3 Dr. Lonky is only allowed to testify about facts and opinions that are within his personal
 4 knowledge. Many of Dr. Lonky’s opinions, however, are based on second-hand accounts
 5 from other people, and not on his personal observations. Moreover, in addition to his lack
 6 of personal knowledge, many of Dr. Lonky’s opinions fail to satisfy the admissibility
 7 requirements under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²
 8 The United States also moves to preclude Dr. Lonky from testifying in Mr. Padilla’s case-
 9 in-chief (because he is a rebuttal expert), and to exclude Dr. Lonky’s reports (because they
 10 are hearsay).

I

FACTUAL & PROCEDURAL HISTORY

A. Dr. Lonky

14 Mr. Padilla claims he developed a cough after he was allegedly exposed to
 15 *Aspergillus flavus* while working at a Navy-owned building (known as “Building 3122”)
 16 in early 2015.³ In addition to filing this lawsuit, Mr. Padilla also filed a workers’
 17 compensation claim.⁴ And in connection with that claim, Mr. Padilla was examined by
 18 Dr. Stewart Lonky – a workers’ compensation medical evaluator – on June 8, 2018 and
 19 September 20, 2019.⁵

22 ¹ Mr. Padilla’s “Rebuttal and Amended Expert Designation and Disclosure,” dated October
 23 1, 2018, Exhibit 6 to the accompanying Notice of Lodgment, at p. USA_079. (Unless
 24 otherwise indicated, all exhibits referenced herein are attached to the accompanying Notice
 of Lodgment.)

25 ² 509 U.S. 579 (1993).

26 ³ Mr. Padilla’s First Amended Complaint, ECF No. 5 at ¶¶ 22-31.

27 ⁴ Mr. Padilla’s January 14, 2016 Workers’ Compensation Complaint, Exhibit 8 at
 USA_107-108.

28 ⁵ Dr. Lonky’s June 8, 2018 Report, Exhibit 9 at USA_110-183; Dr. Lonky’s September 19,
 2019 Report, Ex. 10 at USA_185-228.

1 **B. Mr. Padilla’s Designation of Dr. Lonky**

2 In this District Court action, Magistrate Judge Stormes ordered Mr. Padilla and the
3 United States to exchange their Rule 26(a)(2) initial expert disclosures and reports on
4 September 17, 2018, and their rebuttal expert disclosures and reports on October 1, 2018.⁶

5 Mr. Padilla produced his initial disclosures and reports on September 17, 2018, but
6 he did not designate Dr. Lonky as an expert in those disclosures.⁷ Instead, Mr. Padilla
7 waited and designated Dr. Lonky as a “non-retained” rebuttal expert in his October 1, 2018
8 disclosures.⁸ (Mr. Padilla did not produce any report by Dr. Lonky before either of the
9 Court’s report production deadlines.)

10 **C. Dr. Lonky’s June 8, 2018 Report**

11 On October 9, 2018, Mr. Padilla produced a workers’ compensation report from
12 Dr. Lonky, dated June 8, 2018.⁹ In the 77-page report, Dr. Lonky provides a summary of
13 Mr. Padilla’s medical history, occupational history, and present symptoms. Dr. Lonky also
14 provides a description of the conditions inside Building 3122 (Mr. Padilla’s workplace)
15 during a remodeling project that took place in 2015. But because Dr. Lonky did not visit
16 Building 3122 during the remodeling project (or at any other time), the report does not
17 contain Dr. Lonky’s personal account of the conditions. Instead, the report’s account is
18 based entirely upon Mr. Padilla’s description of the conditions. The report states:

19 Mr. Padilla relates that from February to March 2015, he worked during
20 remodeling of the facility in which he worked. He relates that there was
21 construction, with tearing out drywall, flooring, insulation, wood paneling,
22 walls, and doors. There was dry rot and fungus. He relates that not all of the
23 dry rot and fungus were removed; some of it was just covered. Tile was taken
up. Some sections of the tile were removed, with new tile glued down.
Shelving was removed and replaced, with which he assisted.

24 ⁶ Order Re: Plaintiff’s Request to Amend the Discovery Schedule, ECF 17 at p. 2:18-19.

25 ⁷ Mr. Padilla’s Initial Expert Disclosures, Exhibit 11 at p. USA_230-233.

26 ⁸ Mr. Padilla’s Rebuttal Disclosures, Exhibit 6 at p. USA_079. Although required by Fed.
27 R. Civ. P. 26(a)(2)(B), Mr. Padilla’s disclosure does not provide a description of
28 Dr. Lonky’s anticipated testimony. Dr. Lonky’s website, however, describes him as “The
world’s only authority on lethal obesity” See <http://stewartlonky.com/>.

⁹ Ex. 9 at p. USA_110-183.

1 During this process, Mr. Padilla noted visible mold in the walls when they
 2 were opened. There was a lot of dust from the construction. There were
 termites.¹⁰

3 Later in the report, Dr. Lonky notes that in December of 2015 – eight months after
 4 the remodeling project at Building 3122 had ended – Mr. Padilla saw his pulmonologist,
 5 Dr. Julian Lichter, with complaints of a cough.¹¹ Dr. Lonky claims that, during that visit,
 6 Dr. Lichter performed blood tests on Mr. Padilla. And according to Dr. Lonky, that “blood
 7 work showed *aspergillus flavus*.”¹²

8 Near the end of the report, Dr. Lonky provides his opinions regarding the alleged
 9 cause of Mr. Padilla’s cough. And in that section, Dr. Lonky: (1) adopts Mr. Padilla’s
 10 account of the conditions at Building 3122 as fact; and (2) adopts the results of Dr. Lichter’s
 11 alleged blood test as fact. Next, Dr. Lonky uses those two “facts” to conclude that
 12 Mr. Padilla’s cough was caused by an exposure to *Aspergillus flavus* at Building 3122
 13 during the remodeling project. Dr. Lonky writes:

14 CAUSATION

15 It is my opinion, given the historic facts in this case, that it is with reasonable
 16 medical probability that the indoor environment that was described at
 17 Mr. Padilla’s place of employment, particularly in 2015, when remodeling
 18 and construction were done to remove areas that were contaminated with
 mold, was the cause of his exposure to *Aspergillus flavus* and his development
 19 of hypersensitivity pneumonia and possible allergic bronchopulmonary
 aspergillosis. Obviously, any studies that were done on the material would be
 helpful, if such data are available. Therefore, it is with a reasonable amount
 20 of medical probability that this reaction to *Aspergillus flavus* in Mr. Padilla is
 industrial in its origin.¹³

21 **D. Dr. Lonky’s September 20, 2019 Report**

22 On November 14, 2019 – more than 13 months after the deadline to produce expert
 23

24
 25 ¹⁰ *Id.* at p. USA_115.

26 ¹¹ *Id.* at p. USA_116.

27 ¹² *Id.* Italics in original.

28 ¹³ *Id.* at p. USA_180-181. Additionally, there is no evidence to support Dr. Lonky’s
 assumption that the remodel of Building 3122 was “done to remove areas that were
 contaminated with mold.” *Id.* at p. USA_181.

1 reports had passed – the parties filed their Pretrial Disclosures.¹⁴ Mr. Padilla’s disclosures
2 identified – for the very first time – a second workers’ compensation report by Dr. Lonky,
3 dated September 20, 2019.¹⁵ This second report is largely duplicative of the first, except
4 that it includes Dr. Lonky’s review and adoption of additional records that he obtained after
5 issuing his first report.¹⁶ Dr. Lonky also uses the second report to update his causation
6 opinions. But, like his first report, he maintains that the primary cause of Mr. Padilla’s
7 cough is an exposure to *Aspergillus flavus* at Building 3122 during the 2015 remodeling
8 project. Dr. Lonky writes:

9 As already stated, [Mr. Padilla’s] interstitial lung disease and pneumonitis . .
10 . derives primarily from his exposure to *Aspergillus flavus* during the course
11 of his employment as described previously.¹⁷

12 **E. No Mold Testing**

13 Neither of Dr. Lonky’s reports contain any reference to any study or test (or any
14 other scientific evidence) that might suggest the existence of any mold (including
15 *Aspergillus flavus*) at Building 3122. Also, neither of Dr. Lonky’s reports consider whether
16 Mr. Padilla might have been exposed to *Aspergillus flavus* at someplace other than
17 Building 3122.

18 **II**

19 **ARGUMENT**

20 Because Dr. Lonky has never visited Building 3122, the United States moves to
21 exclude Dr. Lonky’s second-hand opinions regarding the purported conditions at Building
22 3122 and their alleged cause of Mr. Padilla’s cough. It also moves to exclude these
23 opinions because they fail to satisfy Fed. R. Evid. 702 and *Daubert*. Additionally, because

24
25 ¹⁴ ECF Nos. 67 and 68.

26 ¹⁵ ECF No. 67 at p. 6:3; Ex 10 at p. USA_185-228. Dr. Lonky’s second report is untimely
27 under the Court’s Scheduling Order and Fed. R. Civ. P. 26. Thus, it is inadmissible under
28 Fed. R. Civ. P. 37(c).

¹⁶ *Id.*

¹⁷ *Id.* at p. USA_225.

1 he is a rebuttal expert, the United States moves to preclude Dr. Lonky from testifying in
2 Mr. Padilla’s case-in-chief. And finally, the United States moves to exclude Dr. Lonky’s
3 workers’ compensation reports because both are inadmissible hearsay.

4 **A. As a “Non-Retained” Expert, Dr. Lonky May Not Offer Facts or**
5 **Opinions Beyond His Personal Knowledge**

6 The Federal Rules contemplate two different types of expert witnesses: (1) those
7 retained or specifically employed to give expert testimony in a case; and (2) those who are
8 not retained or specially employed.¹⁸ Retained experts are authorized by Fed. R. Civ. P.
9 26(a)(2)(B), while non-retained experts are authorized by Rule 26(a)(2)(C). Retained
10 experts must prepare and produce a report in accordance with Rule 26(a)(2)(B)(i) and (ii).
11 Non-retained experts, on the other hand, are not required to produce reports. Instead, the
12 party who designates a non-retained expert need only disclose the subject matter on which
13 the expert is expected to present evidence, and a summary of the facts and opinions to
14 which the expert will testify.¹⁹ Finally – and most important to this motion – retained
15 experts are allowed to base their opinions on facts beyond their personal knowledge (e.g.,
16 facts acquired via research and investigation), whereas non-retained experts may only base
17 their opinions on facts within their personal knowledge (e.g., their personal observations).
18 Courts have repeatedly confirmed and enforced this “personal knowledge” distinction.
19 (*See Tarter v. United States* (limiting a non-retained expert’s testimony “to what he
20 witnessed or experienced,” and precluding him from giving opinions based on “an ‘after-
21 the-fact’ examination of the facts.”²⁰); *Indianapolis Airport Auth. v. Travelers Prop. Cas.*
22 *Co. of America* (stating that a non-retained expert “must testify from the personal
23 knowledge [he] gained from the job.”²¹); *Goodman v. Staples The Office Superstore, LLC*

24 ¹⁸ *See Tarter v. Throne Law Office, P.C.*, Case No. CV-17-123-BLG-SPW, 2019 WL
25 609337, *2 (D. Mont. Feb. 13, 2019), citing Fed. R. Civ. P. 26(a)(2)(B) and (a)(2)(C). *See*
26 *also Cantu v. United States*, Case No. CV-14-00219 MMM (JCGx), 2015 WL 12743881,
* 3 (C.D. Cal. April 6, 2015).

27 ¹⁹ Rule 26(a)(2)(C). *See also Tarter, supra*, 2019 WL 609337 at *2.

28 ²⁰ *Tarter, supra*, 2019 WL 609337 at * 6.

²¹ 849 F.3d 355, 371 (7th Cir. 2017).

1 (doctors who offered opinions “beyond the scope of their treatment” ceased to be non-
2 retained experts²²); *Cantu v. United States* (“courts considering whether expert witnesses .
3 . . are “non-retained” or “retained” have found the nature of the expert’s testimony
4 particularly important: when an expert is to offer testimony limited to his or her percipient
5 knowledge, . . . the expert is treated as a non-retained expert; [but] where . . . the witness’s
6 testimony relies on information beyond his or her percipient knowledge, the witness is
7 treated as a retained expert.”²³) and *United States v. Sierra Pacific Industries* (The
8 distinguishing characteristic between retained and non-retained experts “is whether the
9 opinion is based on information the expert witness acquired through percipient
10 observations or whether, as in the case of retained experts, the opinion is based on
11 information provided by others or in a manner other than by being a percipient witness to
12 the events at issue.”²⁴)

13 Here, there is no question that Dr. Lonky is a non-retained expert. First, that is
14 exactly how Mr. Padilla designated him – as a “NON-RETAINED EXPERT” expert.²⁵
15 And although Dr. Lonky created two workers’ compensation reports, both were produced
16 after the Court’s deadlines for retained expert reports (September 17, 2018 and October 1,
17 2018²⁶) had expired, and neither complies with Rule 26(a)(2)(B)(i) through (vi)’s
18 requirements for a retained expert’s reports.²⁷ Thus, Dr. Lonky can only be, at most, a
19 “non-retained” expert because he does not meet any of the “retained” expert requirements.

20 As a “non-retained” expert, Dr. Lonky may only testify about facts and opinions that
21

22 ²² 664 F.3d 817, 826 (9th Cir. 2011).

23 ²³ *Supra*, 2015 WL 12743881 at *4.

24 ²⁴ Case No. CIV S-09-2445 KJM EFB, 2011 WL 2119078, *4 (E.D. Cal. May 26, 2011).

25 ²⁵ Mr. Padilla’s Rebuttal Expert Disclosures, Ex. 6 at USA_079.

26 ²⁶ *See* Court’s June 18, 2018 Order, ECF No. 17 at p. 2:18-19.

27 ²⁷ Among other things, Dr. Lonky’s reports do not include his qualifications or a list of all
28 publications he has authored in the previous 10 years (as required by Rule 26(a)(2)(B)(iv));
a list of all other cases in which he has testified as an expert during the previous four years
(as required by Rule 26(a)(2)(B)(v)); or a statement of the compensation he is to be paid
for his study and testimony in the case (as required by Rule 26(a)(2)(B)(vi)).

1 are within his personal knowledge. But both of Dr. Lonky’s workers’ compensation reports
2 are filled with facts and opinions that go well beyond his personal knowledge. As detailed
3 above, Dr. Lonky has never visited Building 3122 at any time, and he certainly never
4 inspected or tested it for mold during the 2015 remodeling project. And because he has
5 never been there, he has no basis for stating any “fact” or offering any “opinion” regarding
6 any alleged condition within Building 3122. More particularly, Dr. Lonky has no basis for
7 opining that any mold – including *Aspergillus flavus* – was ever present in Building 3122.
8 Indeed, Dr. Lonky himself acknowledges this fact. When writing about the conditions
9 within Building 3122, Dr. Lonky is careful to preface his remarks with the phrases
10 “Mr. Padilla relates . . . ,” and “Mr. Padilla noted”²⁸ Dr. Lonky is simply adopting
11 Mr. Padilla’s allegations as fact. The law prohibits non-retained experts, like Dr. Lonky,
12 from doing this.

13 This situation is akin to a traffic accident case, wherein the plaintiff tells an
14 emergency room physician that the defendant ran a red light immediately before the
15 collision. At trial, the physician would be allowed to testify about what he observed while
16 treating the plaintiff (*e.g.*, “I saw that the plaintiff’s arm was broken”), but he would not be
17 permitted to testify about the accident’s cause (*e.g.*, “the defendant caused the accident by
18 running a red light”). The latter testimony would be inadmissible because the physician –
19 who did not witness the accident – would lack the personal knowledge needed to give it.
20 Dr. Lonky’s proposed testimony is no different. Despite never visiting Building 3122 (in
21 2015 or at any other time), he seeks to use Mr. Padilla’s claim that he saw mold at Building
22 3122 as a basis for opining: (1) that there was mold at Building 3122; (2) that the mold was
23 *Aspergillus flavus*; (3) that Mr. Padilla was exposed to the *Aspergillus flavus* at Building
24 3122; and (4) that the *Aspergillus flavus* at Building 3122 caused Mr. Padilla’s cough. Just
25 as a treating physician cannot base opinions on a patient’s allegations, Dr. Lonky cannot
26 base his opinions on Mr. Padilla’s allegations.

27 Further, as a “non-retained” expert, Dr. Lonky also cannot rely on second-hand

28 ²⁸ Dr. Lonky’s reports, Ex. 9 at p. USA_115; Ex. 10 at p. USA_190.

1 accounts, observations, and tests by other medical providers (*e.g.*, the purported blood test
2 that Dr. Lichter allegedly performed on Mr. Padilla). Because Dr. Lonky's testimony
3 cannot exceed his personal knowledge, his testimony must be limited to what he personally
4 observed – and opinions he personally reached – during his examinations of Mr. Padilla.
5 Everything beyond that is outside of Dr. Lonky's personal knowledge and, thus,
6 inadmissible. (If Mr. Padilla wants to present testimony about Dr. Lichter's alleged blood
7 tests, he can just call Dr. Lichter to testify. Both Mr. Padilla and the United States have
8 listed Dr. Lichter as a trial witness.²⁹)

9 **B. Dr. Lonky's Opinions Do Not Satisfy Fed. R. Evid. 702 or *Daubert***

10 Even if Dr. Lonky's opinions were based on his personal knowledge (they are not),
11 they would still be inadmissible because they fail to satisfy Fed. R. Evid. 702 and
12 *Daubert*.³⁰ First, Dr. Lonky is not qualified to opine on the existence of mold at Building
13 3122. He is a pulmonologist, not an industrial hygienist, toxicologist, or microbiologist.
14 And nothing in either of Dr. Lonky's workers' compensation reports suggests that he has
15 any education, training, experience, or certification in mold detection, collection, or
16 identification. Without these qualifications, Dr. Lonky's opinions regarding the type,
17 location, and timing of Mr. Padilla's alleged mold exposure are pure conjecture. Simply
18 put, these opinions are far beyond Dr. Lonky's area of expertise.

19 Second, Dr. Lonky's opinion that Mr. Padilla's cough was caused by an exposure to
20 *Aspergillus flavus* at Building 3122 in early 2015 is not based on sufficient facts or data.
21 Nor is it the product of any reliable principles or methods. As noted above, Dr. Lonky has
22 never even visited Building 3122, let alone tested it for mold. And neither have any of
23 Mr. Padilla's other experts. In fact, Mr. Padilla never even asked the United States for an
24 opportunity to inspect or test Building 3122 (*e.g.* via Fed. R. Civ. P. 34). In other words,
25 neither Mr. Padilla, nor any of his experts – including Dr. Lonky – have any facts or data

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27 ²⁹ Pretrial Order, ECF 71 at p. 5:20 and 15:17.

28 ³⁰ For a more detailed discussion of the legal standards established by Rule 702 and
Daubert, see the United States' Motion in Limine No. 1 at p. 4:3 – 5:6.

1 to suggest that *Aspergills flavus* has ever existed at Building 3122. Nor is there any test or
2 study to suggest that *Aspergillus flavus* has ever existed at Building 3122. And because of
3 this, Dr. Lonky has no basis for offering any opinion regarding the existence of any mold
4 species at Building 3122, or its purported role in causing Mr. Padilla’s alleged cough.

5 Finally, because Dr. Lonky’s opinions regarding the existence of *Aspergillus flavus*
6 at Building 3122 in early 2015 are not based on any facts, data, or scientific methods, his
7 purported “opinions” will not help the finder of fact. On the contrary, his opinions are
8 irrelevant and their admission will only waste time and cause confusion. Thus, in addition
9 to the reasons set forth above, those opinions should also be excluded under Fed. R. Evid.
10 402 and 403.

11 **C. Dr. Lonky May Only Testify During Rebuttal**

12 In addition to designating Dr. Lonky as a “non-retained” expert, Mr. Padilla also
13 designated him as a “rebuttal expert.”³¹ It is well established that “[r]ebuttal experts cannot
14 testify in their parties’ case-in-chief.”³² Courts have held that “[t]he principal objective of
15 rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other
16 side’s case.”³³ “As such, rebuttal evidence may be used to challenge the evidence or theory
17 of an opponent – and not to establish a case-in-chief.”³⁴ Accordingly, to the extent

18 _____
19 ³¹ Padilla’s Rebuttal Designation, Ex. 6 at p. USA_078-79.

20 ³² *Hirata v. S. Nevada Health Dist.*, 2016 WL 8603655, at *1 (D. Nev. Aug. 24, 2016)
21 citing *Amos v. Makita, U.S.A., Inc.*, Case No. 2:09-cv-1304-GMN-RJJ, 2011 WL 43092
22 at* 2 (D. Nev. Jan. 6, 2011).

23 ³³ *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006).

24 ³⁴ *Id.* See also *Ellis v. Corizon, Inc.*, No. 1:15-CV-00304-BLW, 2018 WL 6268199, at *5
25 (D. Idaho Nov. 30, 2018) (precluding the plaintiff’s rebuttal expert from testifying in the
26 case-in-chief and noting that if defendants decided not to present their experts at trial, the
27 plaintiff would be foreclosed from putting his rebuttal expert on the stand); *Danganan v.*
28 *Am. Family Mut. Ins.*, No. 2:17-CV-02786-RFB-PAL, 2018 WL 3660198, at *4 (D. Nev.
Aug. 2, 2018) (same); *Kirksey v. Schindler Elevator Corp.*, No. CV 15-0115-WS-N, 2016
WL 5213928, at *17 (S.D. Ala. Sept. 21, 2016) (same); *Palm Capital, LLC v. Travelers*
Prop. Cas. Co. of Am., No. CV-15-6385-DMG (PJWx), 2017 WL 5665010, at *2 (C.D.
Cal. Apr. 3, 2017) (holding that the plaintiff would “be limited to using its rebuttal experts
for just that – rebuttal – and may not call upon them to testify in its case-in-chief”); *Grove*

1 Dr. Lonky testifies at all, he may only take the stand during rebuttal, and not during
2 Mr. Padilla's case-in-chief.

3 **D. Dr. Lonky's Reports Are Inadmissible Hearsay**

4 In the Pretrial Order, Mr. Padilla identifies both of Dr. Lonky's workers'
5 compensation reports as exhibits that he "expects" to offer at trial.³⁵ But courts have held
6 that expert reports are generally inadmissible hearsay.³⁶ In *Hunt v. City of Portland*, for
7 example, the Ninth Circuit found that the district court erred when it admitted an expert
8 report into evidence.³⁷ Because there is no hearsay exception that would apply to
9 Dr. Lonky's reports, they should both be excluded pursuant to Fed. R. Evid. 802.

10 **IV**

11 **CONCLUSION**

12 In light of the foregoing facts and legal authorities, the United States respectfully
13 requests an order that:

14
15 _____
16 *City Veterinary Serv., LLC v. Charter Practices, Int'l LLC*, No. 3:13-CV-2276-AC, 2016
17 WL 1573830, at *16 (D. Or. Apr. 19, 2016) (explaining that rebuttal testimony is not "an
18 opportunity for the correction of any oversights in the plaintiff's case in chief") (citation
19 omitted); *Sharma v. City of Vancouver*, No. C06-5688BHS, 2008 WL 11343467, at *2
20 (W.D. Wash. June 17, 2008) ("Until and unless Defendants' experts testify, Plaintiff's
21 experts will be unable, as a practical matter, to truly rebut such testimony. Therefore,
22 Plaintiff's rebuttal experts will be allowed to testify at trial only after Defendants' experts
23 have testified."); *Santiago v. Select Portfolio Servicing, Inc.*, No. CV07-262-S-EJL, 2008
24 WL 4411392, at *5 (D. Idaho Sept. 25, 2008) ("Plaintiff will not be allowed to . . . use the
25 rebuttal expert in her case-in-chief, instead, such an expert witness, if any, shall only be
26 called as a rebuttal witness."); *Int'l Bus. Machines Corp. v. Fasco Indus., Inc.*, No. C-93-
27 20326 RPA, 1995 WL 115421, at *3 (N.D. Cal. Mar. 15, 1995) ("[A] party can control the
28 scope of the testimony of its adversary's rebuttal experts by limiting its own experts'
testimony to a given subject matter.")

³⁵ ECF 71 at p. 18:27 – 19:13, Trial Exhibit Nos. 35 and 36.

³⁶ Fed. R. Evid. 802; *Hunt v. City of Portland*, 599 Fed. Appx. 620, 621 (9th Cir. 2013);
Durham v. Cnty. of Maui, 804 F.Supp.2d 1068, 1070 (D. Haw. 2011); *Marceau v. Int'l
Broth. Of Elec. Workers*, 618 F.Supp.2d 1127, 1142-43 (D. Ariz. 2009); *Alexie v. United
States*, 2009 WL 160354, *1 (D. Alaska Jan. 21, 2009).

³⁷ *Hunt, supra*, 599 Fed. Appx. At 621.

1 1. Prohibits Dr. Lonky from testifying about any fact or opinion that is beyond
2 his personal knowledge. In particular, Dr. Lonky should be precluded from testifying
3 about: (a) the alleged conditions within Building 3122; (b) the alleged existence of mold
4 (including *Aspergillus flavus*) at Building 3122; (c) observations made, and tests
5 performed, by other medical providers; and (d) his opinions regarding the alleged cause of
6 Mr. Padilla’s cough;

7 2. Prohibits Dr. Lonky from offering opinions that fail to satisfy Rule 702 and
8 *Daubert*, including: (a) the alleged existence of mold (including *Aspergillus flavus*) at
9 Building 3122; and (b) his opinions regarding the alleged cause of Mr. Padilla’s cough;

10 3. Prohibits Dr. Lonky from testifying in Mr. Padilla’s case-in-chief; and

11 4. Excludes Dr. Lonky’s workers’ compensation reports.

12
13 DATED: April 14, 2020

ROBERT S. BREWER
United States Attorney

14
15 *s/ Brett Norris*
16 Brett Norris
17 Assistant U.S. Attorney
18 Deputy Chief, Civil Division
19 Douglas Keehn
20 Assistant U.S. Attorney
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