IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

WILLIAM THORPE, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	)	Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' REPLY IN SUPPORT OF MOTION, AND MEMORANDUM IN SUPPORT OF MOTION, TO EXCLUDE THE REPORT AND TESTIMONY OF PLAINTIFFS' PROPOSED EXPERT DAN PACHOLKE

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The Court should exclude the testimony and opinions of Dan Pacholke. In their opposition to Defendants' Motion to Exclude, Plaintiffs' arguments carry two themes. First, Plaintiffs argue that the Court should admit some of Pacholke's opinions solely on the basis of his "experience." But without a reliable foundation for testimony, "experience" is indistinguishable from *ipse dixit*. Second, Plaintiffs argue that the Court should admit other opinions of Pacholke *despite* his lack of experience in the relevant field. But again, Federal Rule of Evidence 702 and *Daubert* are not a menu from which parties can select particular items—qualifications, reliability *or* fit—a la carte to establish admissibility. Instead, the proponent of expert testimony must show the proffered testimony satisfies each requirement. With Pacholke, Plaintiffs cannot meet their burden.

Plaintiffs proffer Pacholke to offer opinion testimony about the conditions of confinement within Red Onion State Prison ("Red Onion"). As a starting point, Pacholke opines that restrictive housing is appropriate only for inmates who pose an "imminent threat" *and* a direct threat to the safety of others or orderly operation of the facility. Pacholke included that "imminent" component in his formulation of the test for assignment to restrictive housing because that is the basis for his opinion that the Virginia Department of Corrections ("VDOC") keeps inmates in the Step-Down Program for longer than necessary. The "imminent" prong provides Pacholke the temporal basis for his opinion that VDOC should move inmates out of the program more quickly. Pacholke was very clear at his deposition that he considers "imminent threat" to be a separate concept and, thus, separate requirement, from "direct threat." But Plaintiffs have identified no basis in corrections literature, or in the policies of any corrections department, for Pacholke's opinion that only inmates posing an "imminent" threat should remain in restrictive housing. That is a litigation-driven opinion on Pacholke's part, and it underscores his willingness to take extreme, unsupportable positions in purported service to his clients' claims.

For similar reasons, the Court should not permit Pacholke to testify about what Plaintiffs have called "solitary confinement." Pacholke uses a self-created definition of "solitary confinement" that is materially different from any generally accepted source, including any source Plaintiffs have cited in this case. Plaintiffs do not dispute that they cannot identify any authority supporting Pacholke's opinion that "solitary confinement" can mean isolation of *any* length, with no minimum duration. Again, Pacholke has put himself out on a limb, unable to point to anything supporting his opinion.

Plaintiffs wave away the absence of any objective basis for these opinions. They claim Pacholke's long work history in the corrections field—all the way up through Secretary of Corrections for Washington State—ought to suffice. That is wrong as a matter of law. Set aside the fact that Pacholke's brief tenure as Secretary of Corrections ended with an abrupt resignation under what could most generously be called a cloud.[1] And set aside the fact that Pacholke's opinions run contrary to his actual experience—i.e., the way things were done at the Washington Department of Corrections while he worked there. The bottom line is that "experience" does not obviate the need for a reliable foundation for opinions, and Plaintiffs point to no such foundation.

In the same vein, Plaintiffs do nothing to rehabilitate Pacholke's failure to properly apply correctional science in his criticism of VDOC's use of evidence-based principles and the risks-need-responsivity model in the Step-Down Program. Plaintiffs fundamentally misunderstand that Pacholke's opinions are inadmissible not because the conclusions he offers about general and

[1] *See* "Prison Official in Washington State Resigns Over Early-Release Error," Ashley Southall, New York Times, Feb. 6, 2016. Attached as Ex. 1. The error resulted in the improper release of thousands of inmates. Some of those inmates committed further crimes after their improper release, including at least two homicides. Prison officials were aware of the error for some time before correcting it. Pacholke denied prior knowledge of the malfeasance but resigned nonetheless.

specific responsivity are *wrong*—though they are—but because those conclusions are unsupported and unfounded, based on misinterpretations of the factual record and backed by nothing more than his own *ipse dixit* pronouncements.

Finally, the flipside of Plaintiffs' "experience is enough" argument is their "no experience necessary" argument. Pacholke is not an expert in mental health, he is not an expert in reading comprehension, and he is not an expert in the degree to which VDOC employees understand "evidence-based practices." Yet those are all subjects on which Pacholke seeks to opine. Just as bad, he devotes 20 pages of his report to reciting paragraphs from named Plaintiffs' declarations. There is nothing expert in that exercise. And Plaintiffs utterly fail to explain why any of that is admissible under Rule 702.

ARGUMENT

I. Plaintiffs Fail to Rehabilitate Pacholke's Opinion that Inmates Remain in the Step-Down Program Too Long.

Pacholke aims to testify that the Step-Down Program lasts too long—that inmates "are subjected to unnecessary deprivation beyond the length of time necessary." *E.g.*, ECF No. 370-1, Expert Report of Dan Pacholke ("Pacholke Rep.") at 6. Each inmate's length of time in the program is a critical issue to both Pacholke and Plaintiffs. So it comes as no surprise that Pacholke articulated a test for the length of time an inmate is in restrictive housing that expressly incorporates a temporal component. He opines that inmates should be subjected to restrictive housing only for as long as they pose a "*clear and imminent* threat to the safety of people or the orderly operation of the facility," and "when inmates do not pose *these threats*, they should be removed from administrative segregation." *See* Pacholke Rep. ¶ 12 (emphasis added). Thus, Pacholke makes very clear in his Report that, if an inmate no longer poses both a clear threat *and* an imminent threat, the inmate should be released from the Step-Down Program.

Pacholke made the point equally clear at his deposition, claiming that his "clear and imminent threat" requirement is a "standard definition" used in the correctional industry and academic literature. ECF No. 370-2, Pacholke Dep. 102:6–8. He agreed over and over that "imminent" is a separate, and important, component of his test for assigning to retaining in restrictive housing:

> Q. Your opinion is that they should only remain in restrictive housing when there's an imminent threat, is what you said here, right?
>
> A. Clear and imminent threat, yes.

Id. at 102:9–12. And Pacholke testified that, unlike "clear" or "direct" threats, "'imminent' connote[s] some idea that the risk is immediate." *Id*. at 101:15–17.

It is that immediacy that undergirds Pacholke's opinion that inmates must be released from restrictive housing as soon as the imminent threat passes. However, as explained in Defendants' opening brief, the concept of an "imminent threat" is completely absent from the literature. ECF No. 370, Defendants' Motion, and Memorandum in Support of Motion, to Exclude the Report and Testimony of Plaintiffs' Proposed Expert Dan Pacholke ("Mot. to Exclude Pacholke") at 5–6. Nothing Pacholke identified at his deposition actually supports his opinion that restrictive housing is permissible only during an "imminent threat."

Nor have Plaintiffs identified a single source supporting Pacholke's opinion. They argue it should not matter "whether the specific language Mr. Pacholke used in his report (*e.g.*, 'imminent threat') appears verbatim in the literature." ECF No. 394, Plaintiffs' Response to Defendants' Motion to Exclude the Opinions of Dan Pacholke ("Opp. Br.") at 8. According to Plaintiffs, "Mr. Pacholke made clear [at his deposition]—while the specific phrase 'imminent threat' may or may not be found in any given publication in the literature—whatever language *is* used in that

publication will carry the same concept and intent as the phrase 'imminent threat.'" *Id*. (emphasis in original).

It is simply not true that "whatever language is used" is unimportant because all of the terminology purportedly is interchangeable. Pacholke opines in his report that, if an inmate does not pose an "imminent threat," VDOC must release him immediately from restrictive housing. If Pacholke did not mean that, he should not have said that—and he should not have held so vehemently to that position at his deposition. He did so because "imminent" implies a temporal component in the way that "clear" and "direct"—terms *actually* used in the literature—do not. Pacholke and Plaintiffs here are employing a motte-and-bailey approach:[2] Pacholke used maximalist language, staking out a position regarding an "imminent threat" that is unsupported by literature. When called on it, Plaintiffs claim that Pacholke used "clear and imminent" to mean the same thing as "clear"—to them, the Court should simply ignore what Pacholke actually said.

Without any foundation to point to, Plaintiffs fall back on Pacholke's long employment history. Citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), they argue that "Rule 702 permits expert testimony where that expert's testimony is based on experience." Op. Br. at 9. But nothing in *Kumho Tire* suggests that experience is a substitute for a reliable foundation. The Court should still consider whether expert "testimony's factual basis, data, principles, methods, or their application are called . . . into question." *Id*. at 149. Such is the case here: Pacholke's testimony "should [be] excluded as it [i]s 'unsupported by any evidence such as test data or relevant literature

[2] A motte-and-bailey position refers to a medieval system of defense "in which a stone tower on a mound (the Motte) is surrounded by an area of land (the Bailey) which in turn is encompassed by some sort of a barrier such as a ditch." "The Vacuity of Postmodernist Methodology," Nicholas Shackel, Metaphilosophy Vol. 36 Apr. 2005, p. 297. Attached as Ex. 2. The "Bailey[] represents a philosophical doctrine or position with similar properties: desirable to its proponent but only lightly defensible. The Motte is the defensible but undesired position to which one retreats when hard pressed." *Id*.

in the field.'" *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017) (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 249 (4th Cir. 1999)).

Plaintiffs' reliance on Pacholke's "experience" is not just unhelpful but inexplicable. His experience, to the extent it is relevant, weighs *against* admission of his testimony. His experience was earned at the Washington Department of Corrections ("WDOC"). Pacholke's criticisms of VDOC's criteria to measure inmate progress through the Step-Down Program are directly contradicted by WDOC's written policies during the time Pacholke led that department. Plaintiffs' Opposition does not refute this. Instead, Plaintiffs' attempt to dodge this contradiction by first misstating Pacholke's positions and then by making vague references to evolving literature. Neither tactic is persuasive.

Plaintiffs begin by attempting to essentially rewrite Pacholke's testimony, suggesting that Pacholke's criticisms of VDOC's criteria do not *actually* contradict WDOC's policy because he stated during his deposition that "I think there should be some ability to have expectations around hygiene and cell standards. Don't disagree." Pacholke Dep. at 160:10–12. Plaintiffs argue that this statement proves that the Motion to Exclude mischaracterized Pacholke's testimony and robbed it of needed context and nuance. This is false. Plaintiffs' cherry-picked citation to the deposition conveniently leaves out Pacholke's very next sentence: "Whether or not that results in a longer stay in restrictive housing, I would probably say no." *Id.* at 160:13–14. When viewed in its entirety, this statement is squarely on point with Pacholke's repeated assertions in both his Report and at deposition that VDOC's criteria are inappropriate measurements for an inmate's continued confinement in restrictive housing. *See* Mot. to Exclude Pacholke at 8–9. Plaintiffs' attempt to suggest otherwise mischaracterizes the record.

Next, Plaintiffs' suggest that the blatant contradiction between Pacholke's current opinions in this litigation and the policies he endorsed at WDOC are justified because, according to Pacholke, "significant advancements in the relevant literature have occurred" in the seven years since Pacholke left the department. Opp. Br. at 12 (citing Pacholke Dep. at 110:7–21). But neither Pacholke during his deposition nor Plaintiffs' Opposition even attempts to identify any of the "relevant literature" that supposedly caused Pacholke to reevaluate his opinions. Plaintiffs cannot satisfy their obligation to present reliable expert testimony through such vague and unsupported appeals to authority. *See Nease*, 848 F.3d 219, at 234 (finding testimony "should have been excluded as it was 'unsupported by any evidence such as test data or relevant literature in the field.'") (internal citations omitted).

II. Plaintiffs Fail to Identify a Single Authority Supporting Pacholke's Expansive Definition of "Solitary Confinement."

From the filing of their Complaint, Plaintiffs have been adamant that it is about "solitary confinement." *See* Compl. ¶ 1, ECF No. 1; *see also*, *e.g.*, Memo. in Supp. of Mot. for Class Cert. at 1, ECF No. 174; "ACLU-VA Sues to End Solitary Confinement in Two Virginia Prisons," Press Release dated May 6, 2019.[3] Presumably, Plaintiffs' expert on prison conditions and operations should be able to provide a coherent definition of solitary confinement, and whether the Step-Down Program uses solitary confinement. But that presumption would be wrong. At his deposition, Pacholke offered a definition of solitary confinement that *at best* is idiosyncratic.[4]

[3] *See* https://www.acluva.org/en/press-releases/aclu-va-sues-end-solitary-confinement-two-virginia-prisons (last visited Oct. 22, 2023).

[4] At deposition, Pacholke defined "solitary confinement" as: "living in isolation by yourself with limited ability to interact in a natural way with other people, as an example, that no barrier between you and the person you're speaking with; have some ability to have, you know, group recreation; the ability to communicate in a natural voice." Pacholke Dep. at 49:12–18. When asked for some objective criteria, Pacholke did not set any minimum amount of time a prisoner must be

Defendants explained in their opening brief why the Court should not permit Pacholke to testify about "solitary confinement" at trial, when to the extent he has a working definition, that definition is "[w]ithout testing, supporting literature in the pertinent field, peer reviewed publications or some basis to assess the level of reliability." *Small v. WellDyne, Inc.*, 927 F.3d 169, 177 (4th Cir. 2019).

Plaintiffs defend Pacholke's definition of solitary confinement by asserting that he was "testifying extemporaneously at his deposition." Opp. Br. at 10. On that basis, they excuse Pacholke's failure to "include a temporal minimum when he attempted to describe solitary confinement." *Id*. There are three problems with that excuse. First, the "temporal minimum" is not a minor consideration when defining solitary confinement. Instead, a minimum amount of time in isolation is a critical component of any useful or accepted definition of solitary confinement. Both the United Nations and the ACLU itself (Plaintiffs' counsel) define solitary confinement as isolation of inmates for at least 22 hours a day. *See* Mot. to Exclude Pacholke at 7–8. Notably, Plaintiffs do not identify any definition of solitary confinement, from any source, that does not include a minimum amount of time in isolation. Opp. at 9–11.

Second, Pacholke was given every opportunity at his deposition to provide a minimum duration, and declined. Pacholke was asked specifically whether he could think of "any kind of objective criteria that [he] could give us that we can apply to a particular set of circumstances to know whether those circumstances constitute solitary confinement." Pacholke Dep. at 50:3–7. Rather than offer a minimum duration—which would *actually* be an objective criterion—he offered the concept of "social isolation, and . . . the ability to communicate, the ability to develop a relationship or rapport with other people in a natural way." *Id.* at 50:8–12. He confirmed his

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isolated before opining the prisoner is in "solitary confinement." See Mot. to Exclude Pacholke at 7–8.

belief that "an inability to develop a relationship and rapport in a natural way is an objective criterion." *Id*. at 50:13–18.

The Court should not assume that Pacholke's failure to include a temporal component in his definition of solitary confinement was an "extemporaneous" oversight. If Pacholke used the same definition of solitary confinement as the UN and the ACLU, he would have had to concede that inmates in the Step-Down Program today are *not* subject to solitary confinement, in direct contradiction to all of Plaintiffs' allegations in pleadings, representations to the Court, and press releases about this case.

Plaintiffs argue that this is an issue for cross-examination because under *Daubert* "a court evaluates the methodology or reasoning that the proffered scientific or technical expert uses to reach his conclusion; the court does not evaluate the conclusion itself." Opp. Br. at 10 (quoting *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003)). But Pacholke's definition of solitary confinement is not "the conclusion itself," because this case is not an abstract debate about definitions. Under *TFWS* (and *Daubert*), the Court must evaluate Pacholke's personal definition of solitary confinement to decide whether he can reliably testify about the *Step-Down Program*, including Plaintiffs' inflammatory characterization of the program as solitary confinement.

Pacholke has no basis for his definition of solitary confinement. Thus, this is exactly the circumstance in which "expert opinion testimony can easily, but improperly, devolve into nothing more than proclaiming an opinion is true 'because I say so.'" *Small*, 927 F.3d at 177. "As the Supreme Court has repeatedly held, nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (citations omitted).

III. Plaintiffs Fail to Establish Pacholke's Qualifications to Offer Certain Opinions, or that Other Opinions Are the Proper Subject of Expert Testimony.

Pacholke seeks to offer opinions on subjects well outside his purported expertise, and Plaintiffs fail to establish he can testify on those subjects notwithstanding his lack of qualifications.

First, Pacholke cannot offer opinions regarding mental health issues. Plaintiffs argue that Pacholke "is not offering clinical opinions on the individual Plaintiffs' mental health, but is offering opinions on how VDOC's policies and practices addressed the mental health of inmates." Opp. Br. at 14. The fact that Pacholke purports to opine on how the Step-Down Program addresses *all* inmates' mental health rather than *each* inmate's mental health—or even just each named Plaintiff's mental health—is a distinction without any difference.

In any event, Plaintiffs are wrong that Pacholke merely opines on how the Step-Down Program addresses mental health, rather than how it affects mental health. Pacholke expressly opines on the cause and extent of mental health issues. For instance, Pacholke asserts that VDOC must know that inmates with serious mental health issues remain in restrictive housing based on his personal review of External Review Team ("ERT") proceeding videos. Pacholke Rep. ¶ 178. He opines that inmates with mental health codes MH-1 and MH-2 often had significant mental health issues, based on suicide rates and other statistics. *Id.* ¶ 177. And he opines that VDOC has failed to identify at least some inmates with mental health problems. *Id.* ¶ 176. Which inmates, and how does Pacholke know what their "true" mental health conditions are? Moreover, Plaintiffs cannot fairly characterize those opinions as limited to corrections policies, as opposed to mental health issues. Plaintiffs did not address, let alone justify, any of these opinions in their opposition brief. Nor did Plaintiffs address the case law cited by Defendants. *See* Mot. to Exclude Pacholke at 12–13.

Pacholke cannot render his mental health opinions admissible by casting them so broadly that they relate to all inmates rather than any specific inmate. He is unqualified in either case, and in any event a mental health opinion not specific to any individual is not helpful to any jury.

Second, Pacholke cannot offer opinions about whether inmates comprehend the Step-Down Program, or VDOC employees know what Evidence-Based Principles are. Pacholke has no qualifications to know whether a policy document is understandable to others, and no insight into what specific VDOC employees know. Their testimony will speak for itself, and the Court should not permit Pacholke to read tea leaves to a factfinder.

Plaintiffs do not claim that Pacholke has expertise in the specific relevant fields. Instead, they argue that his work for WDOC is sufficient to cover all the ground before him: "Mr. Pacholke is eminently qualified to offer opinions about the field of corrections based on his decades of experience in the field." Opp. Br. at 12. The entire case is about the "field of corrections," yet surely even Plaintiffs would concede that *something* must be off limits to Pacholke.

Pacholke is no more an expert about what VDOC employees understand than any juror would be. Plaintiffs argue that his testimony about "how professionals in the field would interpret and understand VDOC's policies will aid a fact-finder, because interpretations of corrections' [sic] policies is not within the everyday knowledge of a layperson." *Id*. at 13–14. But Pacholke's proposed testimony is not just on "interpretations of corrections policies"—it is a critique of how VDOC employees interpret the policies. He testified that he understands the policies; he just believes that *other* corrections professionals don't. Pacholke Dep. at 199:6–200:13. Similarly, if the named Plaintiffs want to testify that they do not understand VDOC policy documents, they can testify to that. There is no need for Pacholke to relate that to a factfinder secondhand, with the gloss of expertise added on. *See, e.g.*, *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993) ("the

evaluation of the commonplace by an expert witness" must not supplant the factfinder's "independent exercise of common sense").

IV. Plaintiffs Fail to Refute that Pacholke's Failure to Properly Apply Correctional Science Renders His Testimony Inadmissible.

Pacholke's Report offers extensive criticism of VDOC's use of evidence-based principles and the risks-need-responsivity model in the Step-Down Program, specifically the department's implementation of the general and specific responsivity components. In their Opposition, Plaintiffs argue that Defendants seek to exclude Pacholke's opinions on responsivity merely because "they disagree with certain conclusions he offers about VDOC's Step-Down Program." Opp. Br. at 15. But Plaintiffs once again misunderstand the problem with Pacholke's opinions. Pacholke's opinions are excludable not because the conclusions he offers about general and specific responsivity are simply wrong, but because those conclusions are unsupported and unfounded, based on mischaracterizations of the factual record and backed by nothing more than his own *ipse dixit* pronouncements.

Plaintiffs mischaracterize Pacholke's opinions about general responsivity. In his Report, the heart of Pacholke's criticism of VDOC's implementation of general responsivity is that inmates housed *in Level S* do not receive interactive or group programming. Pacholke Rep. ¶ 74. That statement is false—a fact that Pacholke himself admitted during his deposition. *See* Mot. to Exclude Pacholke at 15–16. That Pacholke acknowledged that there were some aspects of interactive programming at *lower levels* of the Step-Down Program, as Plaintiffs stress in their Opposition, does nothing to mitigate the fact that Pacholke's opinion about the application of general responsivity in Level S is based on an admittedly flawed reading of the factual record. *See Sparks v. Gilley Trucking Co., Inc.*, 992 F.2d 50, 54 (4th Cir. 1993) ("[A] court may refuse to allow

a generally qualified expert to testify if his factual assumptions are not supported by the evidence.").

Plaintiffs' attempt to rehabilitate Pacholke's opinions regarding specific responsivity is equally unavailing. Plaintiffs simply point to Pacholke's references to his "experience and review of discovery materials in this case" to conclude that he "employed a valid methodology in evaluating the Step-Down Program's responsivity." Opp. Br. at 17. But this is a fallacy of circular reasoning—Pacholke's methodology is not valid simply because Pacholke, the purported expert, claims it to be so. Plaintiffs' argument does nothing to explain the very real flaws in Pacholke's methodology—namely, his inability to explain how VDOC's behavior management and programming subgroups fail to address criminogenic needs or their connection to a "risks-needs tool." *See* Mot. to Exclude Pacholke at 16–17. It remains unrefuted that these pronouncements are a clear violation of the Daubert standard's reliability requirement. *See Walker v. DDR Corp.*, No. 3:17-cv-01586-JMC, 2019 WL 3409724 (D.S.C. Jan. 4, 2019) (concluding that an expert's "bald assurance of validity is not sufficient as it relates to the measurements and the reliability of his opinions.").

V. Plaintiffs Fail to Explain Why Pacholke's Recitation of Testimony and Plaintiffs' Allegations Constitutes Admissible Expert Testimony.

Pacholke devotes dozens of pages in his Report to direct, verbatim quotation from Plaintiffs' declarations, along with summaries of ERT proceedings. *See*, *e.g.*, Pacholke Rep. at pp. 82–115 (quotation of declarations); pp. 53–58 (ERT summaries). Pacholke employs no expertise in cutting and pasting Plaintiff declarations, or summarizing proceedings.

In response, Plaintiffs assert that "Defendants' primary complaint appears to be that Mr. Pacholke identified too much support for his opinions from within the discovery record." Opp. Br. at 18. That, of course, misses the point. Pacholke did not "identif[y] too much support for his

opinions"—rather, in these sections, he did not offer any opinions *at all*. Nor do Plaintiffs identify in this argument any opinion that relies on his regurgitation of Plaintiffs' declarations. Pacholke cannot serve as a summary witness for Plaintiffs, pulling together in a tidy package the disparate, contradictory statements from the numerous named Plaintiffs. Defendants' "primary complaint" is that this proposed testimony does not fall within the ambit of Rule 702.

Plaintiffs denigrate this argument as Defendants' "weakest." *Id*. Yet Plaintiffs do not identify a single case in support of their own position. That is unsurprising: courts do not admit summary testimony in the guise of expert opinions. *See*, *e.g.*, *Bygum v. City of Montgomery*, No. 2:19-cv-00456, 2021 WL 4487610 at *4 (S.D.W.V. Sept. 30, 2021) ("[The expert] is simply restating a fact in the record, which is an unreliable application of expert testimony. The court also notes that expert testimony is not helpful when the ultimate opinion is simply a restatement or presentation of a fact to the jury."); *Ohio State Troopers Ass'n, Inc. v. Point Blank Enter., Inc.*, No. 19-cv-61881, 2020 WL 1666763 at *15 (S.D. Fla. Apr. 3, 2020) ("Experts that do nothing more than act as narrators of facts 'fail to convey opinions based on their knowledge and expertise.'") (internal citations omitted); *Erhart v. Bofl Holding, Inc.*, 445 F. Supp. 3d 831, (S.D. Cal. 2020) (excluding expert where testimony sought to "merely bolster" the plaintiff's testimony as to matters for which the expert had no personal knowledge as both improper and unnecessary under Rule 702).

Pacholke "may not simply rehash otherwise admissible evidence," because an expert cannot regurgitate otherwise admissible evidence "to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Karavitis v. Makita U.S.A. Inc.*, 243 F. Supp. 3d 235, 241 (D. Conn. 2017). Pacholke's exhausting recitation of Plaintiffs' declarations offers nothing else, and the Court should exclude it.

CONCLUSION

Because Plaintiffs have failed to establish the admissibility of Pacholke's opinions, the Court should exclude his report and testimony.

October 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2023 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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