IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEN BAKER and CLARISSA GLENN, Plaintiffs, v. CITY OF CHICAGO, Former CHICAGO POLICE SERGEANT RONALD WATTS, OFFICER KALLATT MOHAMMED, SERGEANT ALVIN JONES, OFFICER ROBERT GONZALEZ, OFFICER CABRALES, OFFICER DOUGLAS NICHOLS, JR., OFFICER MANUEL S. LEANO, OFFICER BRIAN BOLTON, OFFICER KENNETH YOUNG, JR., OFFICER ELSWORTH J. SMITH, JR., PHILIP J. CLINE, KAREN ROWAN, DEBRA KIRBY, and as-yet-unidentified officers of the Chicago Police Department., Defendants.	)	Case No. 16 C 8940 Judge Franklin U. Valderrama Magistrate Judge Sheila M. Finnegan (This case is part of *In re: Watts Coordinated Pretrial Proceedings*, Master Docket Case No. 19 C 1717)

DEFENDANTS' JOINT REPLY IN SUPPORT OF JOINT MOTION TO BAR JEFFREY DANIK

Defendants have jointly moved to bar Plaintiffs' purported expert, Jeffrey Danik, from testifying or offering opinions at the trial in this matter. (Dkt. 307) As set forth in the Motion, Danik lacks the requisite qualifications to offer the specific testimony and opinions set forth in his report. While Danik may be a former FBI agent, he has no experience working on a joint investigation between the FBI and a separate law enforcement agency investigating that agency's members for alleged criminal conduct. Moreover, his opinions lack any standards or methodology by which this Court can evaluate their reliability. He offers little more than his own say-so and personal *ipse dixit*. Rather than apply sound methodology to a set of facts, Danik offers argumentative assertions that likely mirror Plaintiffs' counsel's anticipated closing argument. In addition to these fatal deficiencies,

several other reasons exist for this Court to bar Danik's opinions. For the reasons set forth herein and in the Motion to Bar, Danik's testimony is inadmissible, in total, and should be barred.

I. Danik is not Qualified to Offer the Opinions Set Forth in His Report.

According to Danik's report[1] (at 4-5), he primarily bases his opinions on his experiences with the FBI from 2002 through 2015. An expert who bases his opinions on his experience "must nevertheless explain how the application of his prior experience to the facts of the case compels his conclusion." *Jordan v. City Chicago*, 2012 WL 254243, at *6 (N.D. Ill. Jan. 27, 2012) (excluding opinion entirely based on "30+ years of experience as a firearms expert"); *see also* Fed. R. Evid. 702 Advisory Committee's Note ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"). This analysis is particularly critical here as Danik failed to identify even one specific investigation in which he was involved that is comparable to the joint FBI/IAD criminal investigation at issue, let alone provide a "reliable basis" in his experiences that would suffice to support his criticisms.

Plaintiffs' Response (Dkt. 337, at 7) reframes Defendants' challenge to Danik as contending he "lacks experience with police agencies (as contrasted with the FBI)". Defendants do not question Danik's experience with the FBI. While Danik might be qualified to critique an FBI investigation, he lacks sufficient experience to offer criticisms of the specific type of joint investigation at issue in this case. This case does not simply involve an FBI investigation. Rather, this case involves a joint investigation conducted between the FBI and the Chicago Police Department's Internal Affairs Division ("IAD") concerning allegations of corruption against CPD officers Watts and Mohammed

[1] Danik's report is attached as Exhibit 1 to Defendants' joint motion to bar.

that was controlled by the U.S. Attorney's Office ("USAO"). There is a critical difference between the joint FBI/IAD investigation and the types of investigations with which Danik had experience. The joint investigation at issue here involved the FBI and a law enforcement agency (CPD) jointly investigating allegations of criminal conduct by the agency's own members. Danik points to no similar experience with such an investigation.

Plaintiffs' Response (at 7) nevertheless suggests Danik "regularly dealt with the exact issue Defendants say he lacks the qualifications to discuss." For support, Plaintiffs point to Danik's deposition testimony concerning two investigations in which he was involved. A review of that cited testimony establishes Danik did not "deal with the exact issue" raised by Defendants.

The Response (at 7) first cites to [redacted] However, that case did not involve a joint investigation between the FBI and a law enforcement agency that investigated alleged criminal conduct by the agency's members. [redacted] It was not an FBI investigation conducted jointly with a local law enforcement agency to investigate members of that law enforcement agency.

The second investigation posited by Plaintiffs to establish Danik's experience fares no better. [redacted]

[2] Danik's deposition transcript was attached as Exhibit 4 to Defendants' joint motion to bar.

[redacted] In contrast to the investigation at issue in this case, [redacted]

Neither FBI investigation identified in Plaintiffs' Response involved the complexities, challenges, and confidentiality concerns presented by jointly conducting with a law enforcement agency a criminal investigation of that agency's members. Like [redacted] underscores the critical absence of Danik's relevant experience to support his specific opinions regarding the joint FBI/IAD investigation of Watts and Mohammed.

Danik further offers opinions concerning police department and Internal Affairs matters for which he is not qualified. Danik was never a police officer and does not have any applicable internal affairs experience. Defendants' Motion (at 13-14) provides examples of opinions for which he lacks sufficient qualifications in this regard. Plaintiffs' Response (at 7) cites to *Jimenez v. City of Chicago*, 732 F.3d 710, 719 (7th Cir. 2013), for the proposition that an FBI agent may obtain sufficient experience in law enforcement practices to testify about a police department's compliance with generally accepted law enforcement standards. Although that specific issue was not presented to or addressed by the court in *Jimenez*, Defendants need not quarrel with that proposition here. The point is that Danik, a non-police officer who never worked in a police department's Internal Affairs section, lacks the requisite experience to offer criticisms directed to IAD's actions as part of the joint FBI/IAD criminal investigation of Watts and Mohammed.

Danik fails to meet the FRE Rule 702 factors set forth above. He does not sufficiently explain how his actual experience leads to the conclusion reached, why that experience is a sufficient basis for his opinions, and most significantly, how his experience is reliably applied to the specific facts of this case. This Court should not simply "take the expert's word for it" and should bar Danik's testimony and opinions regarding the joint FBI/IAD investigation in this case.

II. Danik's Testimony and Opinions Lack any Methodology and are Unreliable.

The lack of any asserted bases for Danik's opinions renders them inadmissible under Rules 702 and 703 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Other than referencing his own personal experience (which, as set forth above, does not include a single comparable investigation or any real experience in Internal Affairs), Danik fails to provide any explanation or application of actual professional standards to reach his argumentative "opinions" in this case. More to the point, there is no basis by which this Court can evaluate the reliability of Danik's opinions.

Plaintiffs' Response (at 9) argues "Danik relied on his experience as well as published standards to form his opinions." Closer examination of this contention proves Defendants' point regarding the lack of sufficient bases to support Danik's opinions. As to Danik's experience, the previous section highlights the critical absence of Danik's experience to support his opinions regarding the joint FBI/IAD investigation of Watts and Mohammed at issue in this case. And while Plaintiffs suggest Danik relied on published standards, his report and deposition testimony refute that assertion.

As set forth in the Motion (at 2), Danik's report references a single publication that discusses whether a parallel administrative proceeding can be conducted during a pending criminal investigation. (DOJ, Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice, attached to Defendants' Motion as Exhibit 3). Danik's report refers to certain pages of the document concerning parallel criminal and administrative investigations but fails to meaningfully discuss or apply the referenced sections. He simply cites to page ranges. (Report, at 6). He does not explain how anything in the DOJ publication supports his criticisms and he does not quote anything substantive from the document. Without explanation, Danik simply offers the document as somehow supporting his opinion that the CPD should have moved administratively to discipline Watts and/or members of his team before the conclusion of the Joint FBI/IAD Criminal Investigation. In terms relevant to Rule 702, Danik's report does not set forth or identify specific standards or generally

accepted standards concerning parallel investigations on which he is relying. Indeed, that would not be possible. The DOJ publication does not provide a national standard applicable to parallel investigations. To the contrary, the DOJ publication expressly acknowledges that policies and customs of agencies throughout the country concerning the way agencies investigate administrative rule violations "vary greatly." (*Id.*, at 23).

Plaintiffs' Response identifies two additional "published standards" on which Danik purportedly relies: the FBI's Domestic Investigations and Operations Guidelines, 2011 version ("DIOG"), and the FBI's Manual of Investigative Operations and Guidelines Part II, Section 18 ("MIOG"). Apart from listing the DIOG and MIOG in an Appendix, these FBI documents are not discussed or even mentioned in the report itself. And for good reason. At deposition, when asked if there was anything in the DIOG that he relied upon in formulating his opinions, Danik answered "Not really." (Danik dep., at 149:21-23.) As for the MIOG, Danik testified he referred to it for "historical guidance" concerning the FBI's use of MOUs (Memorandum of Understanding). (*Id.* at 153: 4-15.)

Neither Danik's report nor his deposition testimony establishes that these two FBI publications or the DOJ publication provide support for his opinions regarding the CPD and the joint FBI/IAD investigation of Watts and Mohammed. This Court is left to guess as to how (or even if) these publications provide a basis by which to evaluate the reliability of Danik's opinions.

One additional point is noteworthy regarding the absence of standards supporting Danik's opinions. At one point in his deposition, Danik discussed his work as an expert in civil litigation, explaining that he reviews a case file to "look for violations of policy by the officers or the agents." (Danik dep, at 105:24 – 106:6.) However, with respect to his work in this case, Danik admitted he did not review the internal policies of the CPD on "how they're supposed to investigate these matters." *Id.* at 218:24 – 219:2. Without reviewing the applicable policies of the CPD, he nevertheless purports

to offer criticisms of the CPD's investigation in this case. Danik's opinions regarding this case are inadmissible pursuant to amended Rule 702 because they are devoid of any basis by which this Court can evaluate their reliability.

III. Danik's Opinions that Parrot Plaintiffs' Anticipated Closing Arguments Should be Barred.

For the reasons set forth above, Danik's opinions and related testimony should be barred in their entirety. Additional reasons exist for this Court to bar his opinions. As set forth in the Motion, Danik repeatedly parrots Plaintiffs' anticipated closing argument under the guise of "opinion" testimony. His opinions are not stated in the objective, measured language expected of an expert, but instead resort to argumentative, occasionally inflammatory language more indicative of a closing argument.[3] Defendants' challenge to these opinions is not "tone-policing" as derisively characterized by Plaintiffs. (Response, at 3). Rather, the type and tone of the language reveal Danik's report and opinions are nothing more than Plaintiffs' allegations cloaked as expert opinion. As such, they should be deemed inadmissible. *Goldberg v. 401 North Wabash Venture LLC*, 755 F.3d 456, 461 (7th Cir. 2014) ("An expert witness is not permitted to parrot what some lay person has told him."); *Higgins v. Koch Development Corp.*, 2013 WL 6238650 (S.D. Ind. Dec. 3, 2013) ("[T]he court must be wary that experts are not simply parroting the opinions of counsel.")

Defendants' Motion (at 7-9) includes bullet points reflecting a number of objectionable opinions offered by Danik lest Defendants be accused of failing to identify specific opinions they seek to bar. Plaintiffs criticize what they deem to be "laundry list objections" that does not include further discussion of each. (Response, at 12). However, Plaintiffs argument overlooks that Defendants set

[3] Just a few examples of such language from Danik's report include: "shocked and saddened;" "worst possible;" "often-bungling group of officials;" "stunning information;" "spectacularly failed operation;" "incredible operational failure;" "most astounding allegation;" "disturbingly;" "shockingly;" "alarming;" "inexplicable combination of amateurism;" "ominously;" "unbelievably;" "misfires and bungling."

forth the bases of their objections before listing the bullet points as examples of opinions inadmissible under Rule 702. The list includes examples that necessarily rely on Danik's conclusions about disputed underlying facts or opine on the mental state of the Defendants, the credibility of witnesses, and/or ultimate legal matters. Danik's opinions set forth in the bullet points are almost exclusively comprised of summarizing and repeating arguments and/or evidence he has construed to be favorable to Plaintiffs. A repetitive discussion of each opinion with multiple objections is unnecessary to establish that Danik's report is rife with deficiencies.

Moreover, as explained above, Danik fails to define the standards by which he judges Defendants' actions, offering no "concrete information against which to measure abstract legal concepts." *U.S. v. Blount*, 502 F.3d 674, 680 (7th Cir. 2007). Without a sound framework, his opinions are tantamount to bald legal conclusions, which are unhelpful and inadmissible. *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003).

Defendants' Motion also raised the concern that many of these objectionable opinions create the very real possibility of confusion of the issues for the jury. By argumentatively labeling Defendants' alleged actions as "stunning," a "spectacular[] failure," "long bungled," and that he was "shocked and saddened by the investigation" Danik impermissibly "induce[s] the jurors to substitute their own independent conclusions for that of the experts." *See Thompson v. City of Chicago*, 472 F.3d 444, 458 (7th Cir. 2006). These opinions "would confuse the jury and unfairly prejudice [Defendants] by implying scienter or at least allowing the jury to infer it." *Am. Family Mut. Ins. Co. v. Electrolux Home Prods., Inc.*, 2014 WL 2893179, at *8 (W.D. Wis. 2014) (refusing to admit proffered expert opinion that Defendant behaved "unethically"). Plaintiffs' Response does not address this concern.

IV. Danik's Speculative Opinions Should be Barred.

As set forth in Defendants' Motion (at 11-13), Danik speculates throughout his report, which is improper. The Motion provides representative examples, which need not be repeated here. Suffice

to say, these objectionable "opinions" include tentative language like "almost," "mostly because," "might have immediate impact," "apparently never," "appeared to," "potential significant benefit," "high probability she could have," "seems to have," and/or "appears to take no action." Opinions utilizing such language should be barred because they involve improper speculation.

Plaintiffs' Response (at 14) suggests the examples offered by Defendants are not speculation, they are Danik's opinions. Opinions or not, they are speculation. In attempting to salvage Danik's speculative opinions, the Response (at 15) tries to clean up the opinions by removing the equivocal language that renders them speculative. That ploy, however, should not be allowed to avoid the actual language in the speculative opinions offered by Danik. They should be barred.

Defendants' Motion (at 12-13) also challenged as inadmissible speculation Danik's opinion that the CPD should have taken administrative action against Watts and Mohammed before the conclusion of the joint FBI/IAD criminal investigation. The Motion cites examples from Danik's deposition testimony demonstrating his lack of knowledge of important facts regarding the FBI/IAD investigation. (*Id.* at 13). Plaintiffs' Response (at 16) explains Danik did not base his opinion on certain facts about the investigation, but based his opinion on the entirety of the facts he reviewed, his "extensive experience with these types of investigations," and his knowledge of generally accepted standards. But as set forth above, Danik critically does *not* have "extensive experience in these types of investigations" (Section I, *supra*) and he provided no generally accepted standards on which he relied (Section II, *supra*) to support his opinions. Danik's speculative opinion that the CPD should have taken administrative action against Watts and Mohammed before the conclusion of the joint FBI/IAD criminal investigation should be barred.

V. Opinions Against Non-Parties Should be Barred.

Danik's report includes opinions pertaining to parties against whom there are no pending claims. As set forth in the Motion (at 14-15), these include opinions critical of [redacted]

[redacted] which Danik asserts are based on "stunning information." Neither the [redacted] referenced in Danik's report are parties to this case. As such, Danik's opinions related to these non-parties will not "help the trier of fact to understand the evidence or to determine a fact *in issue*." Fed. R. Evid. 702 (emphasis added).

Plaintiffs' Response (at 16) argues Danik is not offering opinions against non-parties, he is simply "describing facts." Plaintiffs' position is belied by the actual language of Danik's report. For example, Danik refers to "stunning information" concerning [redacted] (Report, at 24, 28). When asked about that language at his deposition, Danik confirmed this opinion "was mainly of [redacted]." (Danik dep. at 281). Such assertions [redacted] clearly involve much more than a description of "facts." Such opinions concerning non-parties should be barred.

VI. Opinions Based on Facts Not Found in the Record and Contradicted by the Record Should be Barred.

Under Rule 702, experts may not offer opinions that are not supported or are contradicted by unrebutted evidence in the record. *Martinez v. Sakurai Graphic Sys.*, 2007 WL 2570362, at *5 (N.D. Ill. Aug. 30, 2007). Defendants' Motion (at 15 – 18) identifies four opinions or assertions offered by Danik that lack support or are contradicted by unrebutted evidence in the record: [redacted]

Plaintiffs' Response fails to meaningfully rebut Defendants' Motion as to these points.

Taking the first example, Danik's report states, [redacted] Although Plaintiffs' Response (at 18) accuses Defendants of misrepresenting this opinion, Plaintiffs concede the record does not support Danik's actual statement and attributes the error to a "typo." (*Id.*) [redacted]

Next is Danik's rewriting of [redacted] Plaintiffs' Response does not refute that Danik is rewriting the express language [redacted] chalking it up to Danik's "experience" in suggesting a different interpretation. (Response, at 17). This opinion should be barred. It cannot be reliably tested, contradicts the actual record, and would only serve to confuse, rather than assist, a jury.

As to the claim the CPD failed to bring to the FBI's attention allegations [redacted] the Motion [redacted] provides citations to the record that flatly contradict Danik's assertion. Plaintiffs' Response does not address this issue. Plaintiffs' failure to respond to this

[4] Holliday's 9/21/04 memo is attached as Exhibit 6 to Defendants' Motion to Bar.

argument in their Response results in forfeiture. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010).

Finally, Danik should not be allowed to testify or infer [redacted] Danik should not be permitted to inject pure conjecture into this case with this unsupported allegation, especially in light of his admission at deposition.

Plaintiffs' Response does not contest Danik's disavowal of an opinion [redacted] Instead, the Response focuses on Defendants' additional argument that any attempt to [redacted] before the jury would be unduly prejudicial and should be barred under Rule 403. Defendants concede the Rule 403 analysis is more appropriately addressed through motions in *limine* in advance of trial. However, any testimony or inference from Danik [redacted] is unsupported by the record, has been disavowed by Danik, and is properly the subject of a motion to bar under *Daubert*.

VII. Opinions Regarding the Memorandum of Understanding (MOU) Should be Barred.

Danik's testimony is inadmissible, in total, and should be barred. This conclusion necessarily includes Danik's opinions with respect to the MOU. But even if considered separately, Danik's opinions regarding his interpretation of the MOU at issue should be barred.

As noted above (Section I, *supra*), this case involves a joint investigation conducted between the FBI and CPD's IAD concerning allegations of corruption against CPD officers Watts and Mohammed that was controlled by the USAO. While Danik may have been a former FBI agent, he had no experience working on a joint investigation between the FBI and a separate law enforcement

agency investigating that agency's members for alleged criminal conduct. The same analysis applies to Danik's experience with MOUs. While Danik may have had experience with MOUs in his work for the FBI, he would not have had specific experience in [redacted] Danik's lack of experience with [redacted] is particularly significant. As the Response (at 20-21) concedes, Danik is not relying on [redacted] he is "interpreting it in the context of his extensive experience." As established above, Danik lacks that experience with the type of joint investigation at issue here, and thus lacks the necessary experience to "interpret" the MOU in question. His opinions concerning the MOU in question should be barred.

WHEREFORE, Defendants request that this Court enter an order *in limine* barring Jeffrey Danik as a witness, and for whatever other relief this Court deems fit.

Respectfully submitted,

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