Ronaldo A. Coulter (ISB No. 3850)
Emile Loza de Siles (ISB No. 6531)
IDAHO EMPLOYMENT LAW SOLUTIONS
776 E. Riverside Dr., Suite 206
P.O. Box 1833
Eagle, Idaho 83616
Telephone: (208) 672 6112
Facsimile: (208) 672-6114
ron@idahoels.com
emile@idahoels.com

Attorneys for Plaintiff

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JUN YU, **Plaintiff,** **v.** **IDAHO STATE UNIVERSITY,** and **JOHN/JANE DOES I through X, whose true identities are presently unknown,** **Defendants.**	**Case No. 4: 15-cv-00430-REB** **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE REQUESTING THE COURT TO EXCLUDE DRU C. GLADNEY, PH.D. AS AN EXPERT WITNESS OR STRIKE HIS TESTIMONY**

INTRODUCTION

Plaintiff JUN YU ("Mr. Yu"), by and through his counsel, Ronaldo A. Coulter and Emile Loza de Siles, Attorneys at Law of Idaho Employment Law Solutions, has filed this Memorandum, an Affidavit of Counsel ("Affidavit"), and accompanying exhibits[1] in support of

[1] As exemplified by Court in *Sommer v. Elmore County*, Case No. 1:11-CV-00291-REB, 2013 WL 5274223, at *6 (D. Idaho 2013), Mr. Yu augments his presentation here with demonstratives and other exhibits to the accompanying Affidavit, *supra*. In particular, Exhibit MIL-DE-26 presents a table summarizing the per-opinion analyses presented in this Memorandum.

the above-captioned Motion. Through his Motion and supporting materials, Mr. Yu has requested that the Court take one of three principle actions, including as alternatives, as to Dru C. Gladney, Ph.D. ("Dr. Gladney"), Defendant's proffered expert witness, and the correspondingly proffered expert report and testimony. First, Mr. Yu has requested that, pursuant to Federal Rule of Civil Procedure 37, the Court exclude Dr. Gladney as a witness and exclude his entire testimony for multiple, unjustifiable, and harmful failures of Defendant's disclosure of Dr. Gladney and the report to comply with the mandates of Federal Rule of Civil Procedure 26. Second, Mr. Yu has requested that Dr. Gladney be excluded as an unqualified expert under Federal Rule of Evidence 702 and that his testimony be stricken, in whole or part, for multiple reasons under Federal Rules of Evidence 702, 703, and 704 and otherwise as stated herein, including as demonstrated in Exhibit MIL-DE-26.

Should the Court defer ruling on Mr. Yu's Motion, Mr. Yu will request, through counsel, to examine Dr. Gladney as to his qualifications for Defendant's scope of his designated testimony and to do so under *voir dire* outside the presence of the jury. If the Court determines that Dr. Gladney is qualified for all or part of the expert testimony for which Defendant designated him, Mr. Yu respectfully asserts his right under Federal Rule of Evidence 615 for Dr. Gladney to remain sequestered until called to testify.

I. SUMMARY OF FACTS

Dr. Gladney is an anthropology professor of note at a private university in California. His scholarly work concentrates on field work in China, Asia Minor, and elsewhere abroad regarding minority populations, including ethnic and religious minorities in those locations.

According to his curriculum vitae ("CV"), Dr. Gladney has published extensively and provided consultative services on these subjects. *See* Exhibit MIL-DE-2.[2]

Defendant disclosed Dr. Gladney as its proffered expert witness and designated the issues as to which it wishes him to provide expert testimony, in relevant part, as follows:

> Dr. Gladney is designated to provide expert testimony on the issue of [1] **minority affairs, ethnicity and the Chinese culture within our educational system**. He will opine as to [2] the **ability of Chinese students including the Plaintiff to acclimate to U.S. educational institutions** and [3] **their[, *i.e.*, Chinese students'] ability to acclimate to the nuances of our society**.[3]

Ex. MIL-DE-1 at 2 (emphases supplied). Defendant subsequently disclosed a proffered expert report purportedly prepared by Dr. Gladney. *See* Ex. MIL-DE-3. The opinions expressed in that report document occupy fewer than two (2) pages. *See* Ex. MIL-DE-3A.

Federal Rule of Civil Procedure 26 ("Rule 26") delineates the requirements for any expert disclosure, including the required written proffered expert report. *See* FED. R. CIV. P. 26(a)(2)(B). Defendant's disclosure of the report document proffered as to Dr. Gladney failed to comply with those Rule 26 requirements, as summarized next.

First, the document was unsigned and, therefore, unattested. *See* Ex. MIL-DE-3 at 4. The identity of the person who prepared the document proffered as Dr. Gladney's expert report is unknown.[4] The report document referenced Dr. Gladney's current CV as having been provided

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[2] Exhibit numbers styled "MIL-DE-XX" refer to exhibits attached and attested to by the Affidavit filed in support of the subject motion.

[3] Defendant also states, "Dr. Gladney will also be utilized to rebut the Plaintiffs experts' opinions regarding adverse racism." The evidentiary and procedural framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), governs the upcoming trial, and any permissible expert rebuttal by Defendant would occur under that framework's second phase. *See* Plaintiff's Motion *in Limine* as to the *McDonnell Douglas v. Green* Framework (to be filed by Sept. 28, 2018).

[4] Because the document exhibits such significant departures from the quality, comprehensiveness, and rationality of Dr. Gladney's other professional work, it is reasonable to

by Defendant. That CV was not current, the last publication listed there as having been published in 2011. The report referenced, but did not attach an Exhibit B in which was to have been provided Dr. Gladney's experience in providing testimony by deposition or at trial in litigation within the last four (4) years. *See* Ex. MIL-DE-3 at 1-2. In addition, there were numerous additional substantive issues of non-compliance under Rule 26(a)(2)(B)(i)-(ii). *See* discussion, *infra*; Ex. MIL-DE-26. Finally, Defendant never provided Mr. Yu with any corrective supplemental materials. The time to do so has long passed.[5]

In addition to these failures, the report document paid short shrift to the mandatory requirements under Rule 26(a)(2)(B)(i)-(ii) demanding the substantive sufficiency of the facts and data and, therefore, the reliability of the opinions expressed therein. The report document lists the five (5) document or sets of documents that he reviewed in preparing his testimony. In the text, but not listed, the report also discussed the report of Plaintiff's expert witness, M. Leslie Wade Zorwick, Ph.D. Plaintiff turned over extensive discovery to Defendant, including expert reports of Gerald Koocher, Ph.D., and Shannon Chavez-Korell, Ph.D. Beyond Dr. Zorwick's report, the report reveals that Dr. Gladney (presumably) reviewed none of Plaintiff's discovery or otherwise disclosed documents.

The report document includes one quotation from a white paper produced by an educational recruitment and support services organization focusing on the Chinese-speaking market for education in the United States ("Wholeren Paper"). For reasons detailed below, the

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doubt whether the document was, in truth, prepared by Dr. Gladney, a scholar and academician of some standing within his specific fields of anthropological study. *Compare* Ex. MIL-DE-3 *with*, *e.g.*, Ex. MIL-DE-19 & Ex. MIL-DE-20.

[5] Defendant has not provided Mr. Yu with any supplement to Dr. Gladney's proffered expert report. *See* FED. R. CIV. P. 26(a)(2)(E). The time for Defendant's compliance with Rule 26 as to that expert witness disclosure expired on August 11, 2017. *See* Amended Case Management Order, ¶ 1(c), Dkt. No. 53 (May 24, 2017); FED. R. CIV. P. 26(a)(2)(D).

proffered expert witness and testimony unreasonably relied upon the Wholeren Paper. The report document neither lists nor refers to any applicable literature. Indeed, the report document does not indicate that Dr. Gladney undertook any research or review of applicable literature whatsoever. For this and other reasons detailed below, the proffered expert testimony is inadmissible.

II. SUBJECTS AT ISSUE FOR TRIAL

The case at bar is a Title VI discrimination case alleging intentional racial and national origin discrimination by Defendant against Mr. Yu.[6] Therefore, the relevant subjects[7] at issue for trial (collectively, "Subjects at Issue") are, as follows:

1. Whether Mr. Yu met Defendant's legitimate educational expectations for a doctoral student in clinical psychology;
2. Whether Mr. Yu was qualified to continue his doctoral education, including through his final internship, with Defendant's department of clinical psychology;
3. Whether Mr. Yu was a victim of adverse educational action(s) [hereinafter, "actions"] by Defendant;
4. Whether Defendant took adverse actions against Mr. Yu that were, in part or whole, motivated by Defendant's racism toward Mr. Yu;
5. Whether Defendant treated Mr. Yu differently than it did similarly-situated students in its clinical psychology doctorate program;
6. Whether Defendant's proffered reasons for its adverse actions against and different treatment of Mr. Yu were pretextual for its racism toward Mr. Yu;
7. Whether Defendant's proffered reasons for its adverse actions against and different treatment of Mr. Yu were discriminatorily-applied to him as motivated by its racism toward him;

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[6] "Racism" is used to mean racism, including aversive racism, racial bias, and racial, linguistic, and/or national origin prejudice, implicit or otherwise.

[7] Whether Defendant satisfies the jurisdictional requirement for a Title VI action as to federal financial assistance and whether Mr. Yu is a member of a protected class are also subjects at issue, but ones as to which Dr. Gladney's testimony is relevant.

8. Whether Defendant's proffered reasons for its adverse actions against and different treatment of Mr. Yu were *post hoc* fabrications;

9. Whether Defendant's proffered reasons did not actually motivate its adverse actions against and differing treatment of Mr. Yu;

10. Whether Defendant's adverse actions against Mr. Yu were arbitrary and capricious and deviated from accepted norms for such a clinical psychology program, psychology department, officials, and institution;

11. Whether Mr. Yu was the victim of intentional discrimination by Defendant Idaho State University, including as evidence demonstrates occurred by:

    a. Violation of the ethical and accreditation standards applicable to Defendant, including, but not limited to, its department of psychology, its faculty, including professional clinical psychologists who oversaw internships and other practical training in direct patient care and other healthcare settings as part of the department's doctoral education program, its Graduate School; and the university as a whole [hereinafter, collectively "Defendant"];

    b. Cultural incompetence displayed by Defendant; and

    c. Racism, which resulted in Defendant's application of shifting standards in stereotype-relevant judgments it made as to Mr. Yu; and otherwise; and

12. Whether racism motivated Defendant's intentional discrimination against Mr. Yu.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[8]

III. STANDARD OF REVIEW & SUMMARY OF ARGUMENTS

Mr. Yu seeks evidentiary rulings regarding a proffered expert and expert report, as are otherwise sought by Mr. Yu through his Motion, are reviewed on appeal under an abuse of discretion or manifest error standard. *See General Electric Co. v. Joiner*, 522 U.S. 136, 141-43, 118 S. Ct. 512, 517, 139 L. Ed. 2d (1997); *U.S. v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (citation omitted). The Court serves as gatekeeper to ensure that proffered expert testimony is relevant and reliable before its presentation to the jury. *See Daubert*, 509 U.S. at

[8] *See also* Plaintiff's Trial Brief & Plaintiff's Motion *in Limine* as to the *McDonnell Douglas v. Green* Framework (both to be filed by Sept. 28, 2018).

589, 113 S. Ct. at 2795. The inquiry in the reliability of a proffered expert's testimony goes only to principles and methodology employed to develop that testimony and not to the conclusions generated thereby.[9] *See id.* at 595, 113 S. Ct. at 2797.

Mr. Yu's Motion calls forth two interrelated sets of analyses. The first set of analyses is made pursuant to Federal Rules of Civil Procedure 26 and 37. The second set of analyses involves determinations as to Defendant's proffered expert witness and report under Federal Rules of Evidence 702 through 704 and, as to related matters, 104, 402, and 801. *See Daubert*, 509 U.S. at 595, 113 S. Ct. at 2797. In addition to the points and authorities discussed herein, Exhibit MIL-DE-26, which is attached to the accompanying Affidavit, summarizes per-opinion analyses in tabular and brief written form to supplement this Memorandum.

IV. THRESHOLD ISSUE OF DEFENDANT'S NON-COMPLIANCE WITH RULE 26

The expert report proffered for Dr. Gladney multiply fails to comply with the requirements of Federal Rule of Civil Procedure 26. Although the Defendant could have remedied its glaring technical failures to comply with Rule 26, for example, by providing a current CV for Dr. Gladney, Defendant cannot now, on the pending eve of trial, remedy its substantive failures to do so without significant harm to Mr. Yu.

Absent the Court's order or the parties' stipulation otherwise, Federal Rule of Civil Procedure 26(a)(2)(B) sets forth the mandatory requirements for Defendant's disclosure of Dr. Gladney and his proffered expert report, as follows:

> [T]his disclosure must be accompanied by a written report—**prepared and signed by the witness**—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. **The report must contain**:

[9] *But see* discussion, *infra*, as to general inadmissibility of proffered expert opinions on law under Federal Rules of Evidence 702(a) and 704(a).

> (i) **a complete statement of all opinions the witness will express and the basis and reasons for them**;
> (ii) **the facts or data considered by the witness** in forming them;
> (iii) **any exhibits that will be used to summarize or support them**;
> (iv) **the witness's qualifications, including a list of all publications authored in the previous 10 years**; [and]
> (v) **a list of all other cases** in which, during the previous 4 years, the witness testified as an expert at trial or by deposition[.]

FED. R. CIV. P. 26(a)(2)(B)(emphases supplied).

If a proffered report does not comply with the Rule 26 requirements, then Federal Rule of Civil Procedure 37(c)(1) ("Rule 37") operates to exclude the witness and strike the report, as well as permit the Court to award costs and other sanctions, stating, in part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

FED. R. CIV. P. 37(c)(1). "The sanction is **automatic and mandatory** unless the sanctioned party can show that its violation . . . was either justified or harmless." *Clear-View Technologies, Inc. v. Rasnick*, 2015 WL 3509384, at *2 (N.D. Cal., Jun. 3, 2015) (emphasis in original); *see Hoss v. United Parcel Service, Inc.*, 2010 WL 672743, at *3-*4 (D. Idaho 2010)("Federal Rule of Civil Procedure 37(c)(1) 'gives teeth' to the disclosure requirements by 'forbidding the use at trial of any information required to be disclosed by rule 26(a) that is not properly disclosed.'") (citation omitted).

Defendant's substantive failures to comply with Rule 26 call into stark question: (1) the authorship and independent authenticity of the report, *see* FED. R. CIV. P. 26(a)(2)(B), subpart 1; and (2) the substantive sufficiency of the facts and data and, therefore, the opinions expressed therein, *see id.* at 26(a)(2)(B)(i)-(ii). Furthermore, these failures compound the admissibility

challenges that Dr. Gladney's proffered testimony faces under Federal Rules of Evidence 702 and 703, as discussed *infra*.

To avoid the sanctions of its witness' exclusion and the striking of his proffered expert report under Rules 26 and 37, the Defendant must show a **substantial justification** for its disclosure's failure to comply with Rule 26 and its continued neglect to correct those failures during the time permitted by the Court. *See* FED. R. CIV. P. 37 (emphasis supplied). Defendant can offer no excuse, substantial or otherwise, for Defendant's failure to comply with the Rule 26 requirements for its expert witness disclosure or for its failure to make the corrections via supplement during the time ordered by the Court.

Alternatively, the Defendant must show that Mr. Yu was not harmed by Defendant's substantive expert disclosure failures. Defendant is likewise incapable of so showing. If the improperly disclosed expert is allowed to testify, the harm to Mr. Yu will be significant and irremediable now on the near eve of trial. Defendant's substantive disclosure failures, if permitted to stand, also will create significant disruption to the Court, Mr. Yu and his witnesses, family, and counsel. Significant travel has been planned and paid at great cost to Mr. Yu, including travel from China, Ohio, Massachusetts, New York, California, Arkansas, Georgia, Washington, D.C., and other locations to be present for trial in Pocatello. Among other harms to Mr. Yu is the impact upon his trial team in preparing to cross-examine Dr. Gladney, if permitted to testify, without having the required disclosure of and the ability to prepare using his recent past testimonial experience. For these reasons, Dr. Gladney should be excluded as an expert witness and his testimony and report stricken entirely for Defendant's multiple failures to comply with the Rule 26 disclosure requirements.

V. QUALIFICATION OF PROFFERED EXPERT AND ADMISSIBILITY OF HIS PROFFERED TESTIMONY UNDER RULES 702 THROUGH 704

As discussed in this and the following sections, Federal Rules of Evidence 702, 703, and 704 and the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, including the subsequent decision on remand, *Daubert*, 43 F.3d 1311 (9th Cir., Jan. 4, 1995), *rehearing en banc denied*, (May 3, 1995), *cert. denied*, 116 U.S. 189 (1995), also govern the issues raised by Mr. Yu's Motion regarding expert testimony. Rule 702 reads, as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

A. Dr. Gladney Is Not Qualified and Was Not Disclosed as an Expert to Testify About Any Subject Now at Issue.

The Subjects at Issue for trial, delineated *supra*, are focused and limited. Defendant designated Dr. Gladney to provide expert testimony on a set of issues that are now irrelevant to the Subjects at Issue. *See* Ex. MIL-DE-1 at 2. Furthermore, Dr. Gladney has no specialized "knowledge, skill, experience, training, or education" applicable to any of the Subjects at Issue. FED. R. EVID. 702, subpart 1; *see* Ex. MIL-DE-2 (CV).[10] For these reasons, Dr. Gladney should

[10] Defendant's disclosure provided a CV for Dr. Gladney that appears to be approximately five (5) years out of date, which, as noted above, fails to comply with Rule 26. Mr. Yu has relied upon that disclosure, but has made other attempts to glean more information about Dr. Gladney.

be excluded as an expert witness under Rule 702. *See United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999), *as additionally amended en banc* (Mar. 17, 1999), *cert. denied*, 528 U.S. 873 (1999).

B. Under Rule 702(a), Opinions 1-13, 15, and 20 Are Excluded Because They Do Not Fit the Subjects at Issue for Trial and, Therefore, Are Irrelevant and Inadmissible.

Assuming all other requirements are met, proffered expert opinions must fit with the issues that are before the fact finder.[11] *See Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. at 591-93, 113 S. Ct. at 2795-96 (1993). If no such *Daubert* fit exists as to the opinions proffered for Dr. Gladney, including as to the underlying conditions, assumptions, and methodologies upon which they are based, then his opinion testimony should be excluded. *See*, *e.g. id.*; *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 344-45 (7th Cir. 1995) (unverified statements unsupported by scientific method).

More than half (15) of the opinions proffered in the report document should be excluded because they do not fit the Subjects at Issue for the upcoming trial. Moreover, although three (3) other opinions possibly possess such a fit, Opinions 14, 26, and 27 should nevertheless be stricken, per below, because their respective subject matter is entrusted to the jury's common sense and knowledge, rendering expert testimony unhelpful under Rule 702(a).

C. Under Rule 702(a), Opinions 7-14 and 26 Should Be Excluded Because Their Respective Subject Matter Is Within the Common Sense and Knowledge of the Jury, Rendering Expert Testimony Thereupon Unhelpful.

Federal Rule of Evidence 702(a) preconditions the admissibility of a qualified expert's testimony by requiring that his or her specialized knowledge be helpful to the jury's understanding of the evidence or determination of a fact at issue. *See* FED R. EVID. 702(a). If the

[11] Individual opinions proffered for Dr. Gladney are delineated and numbered in Exhibit MIL-DE-26 and cited by opinion number in this Memorandum. Here, a citation of "Op. 1" signifies Opinion #1 as set forth and the precise source of which is further cited therein. *See also* Ex. MIL-DE-3 & MIL-DE-3A.

jury is capable of carrying out these tasks within the scope of its own common knowledge, then the expert's testimony is excluded because it adds no value. *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046-47 (9th Cir. 2013) ("Specialized or technical knowledge is not required to understand Strong's straightforward assertions. A jury is perfectly capable of understanding" the relevant facts.); *Peters v. Five Star Marine Serv.*, 898 F.2d 448, 449 (5th Cir. 1990) (affirming trial court's exclusion of expert, quoting, "These "are matters that you can competently deal with based upon your common sense and your knowledge of the world[,] . . . things that you can handle without anybody giving opinions to you.").

More than one-third, *i.e.*, ten (10), of the opinions proffered for Dr. Gladney are such straightforward matters entrusted to the jury's common sense and knowledge. *See* Op's 7-14 & 26. For example, Opinion 8 asserts, "[L]inguistic barriers for second-language learning students []can act as a natural barrier to academic success." Op. 8. Even if this opinion were relevant to a Subject at Issue, which it is not, the assertion is clearly a matter of common sense and thus inadmissible as expert testimony. Accordingly, Opinions 7 through 14 and 26 are inadmissible under Federal Rule of Evidence 702(a), and Dr. Gladney's corresponding testimony should be excluded. *See U.S. v. Castaneda*, 94 F.3d 592, 596 (9th Cir. 1996) ("[T]subject of the testimony was not one that needed illumination from an expert.").

VI. DR. GLADNEY'S PROFFERED TESTIMONY IS INADMISSIBLE UNDER RULE 702(B)-(D) BECAUSE IT FAILS TO MEET THE STANDARDS OF INTELLECTUAL RIGOR THAT ARE DEMANDED OF HIM IN HIS PROFESSIONAL WORK.

Here, the inquiry under Federal Rule of Evidence 702(b)-(d) may be combined. These subsections of Rule 702 require that proffered expert testimony be based on "sufficient facts or data" and that it be the "product of reliable principles and methods" that were, in turn, "reliably applied" by the expert to "the facts of the case." FED. R. EVID. 702(b)-(d).

To pass muster, the proffered expert 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., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176 (1999). If scientists, as proffered experts, do not adhere to the standards of intellectual rigor demanded in their professional fields of endeavor, then "their evidence is inadmissible no matter how imposing their credentials."[12] *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (citations omitted).

The opinions proffered for Dr. Gladney in the report consume fewer than two (2) pages of text. That report quotes and cites to one (1) source and one source only: the Wholeren Paper. *See* Ex. MIL-DE- 3 at 2. The proffered report states and indicates that Dr. Gladney relied upon a very small set of documents in preparing his opinions, those being the initial Complaint in this

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[12] *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 2 FED. R. OF EVIDENCE MANUAL 1239 (7th ed. 1998).

> [A] scientific expert's testimony will be admissible if she employs the same methodology in reaching her conclusion as she would employ working as a scientist[12] in the real world. If the methodology is good enough for the real world, it is good enough for trial. On the other hand, if the methodology is altered for the purposes of litigation, there is every reason to exclude it[.]

Id. The *Daubert* framework applies to all expert testimony. *See* FED. R. EVID. 702 (Advis. Comm. Notes to 2000 amendments) (citations omitted).

matter and about 819 pages of Defendant's discovery documents; one (1) of Mr. Yu's four (4) expert witness' reports, *see* Ex. MIL-DE-7; and the Wholeren Paper, *see* Ex. MIL-DE-4A.[13] *See* Ex. MIL-DE-3 at 5. Rule 26(a)(2)(B) requires that Dr. Gladney identify all facts, data, and materials upon which he relied in developing his opinions. Because his listing contains no other materials and because of the glaringly poor intellectual quality of the report itself, it is plain that Dr. Gladney did not search or review any scientific, scholarly, or other reputable literature in preparing his opinion.

Further, Dr. Gladney, however, reviewed none of the materials produced by Mr. Yu in this matter, a fact that, in itself, is a shocking departure for any expert, but particularly so for one who is a university professor. In sharp contrast with Dr. Gladney's one-sided and very limited case document review, Drs. Zorwick, Cooley, and Fouad each examined at least 845 pages of **Defendant's** materials, in addition to relevant literature and extensive Plaintiff's materials, prior to forming their opinions and preparing their reports. *Compare* Ex. MIL-DE-3 at 5 (Gladney) *with* Ex. MIL-DE-7 at 2 (Zorwick); Ex. MIL-DE-5 at 2 (Cooley); *and* Ex. MIL-DE-6 at 2 (Fouad).

An almost assuredly universal practice among professional scholars and academicians when inquiring and opining on any subject is to conduct a search and review of applicable scholarly and professional peer-reviewed and other reputable literature. Another is to evaluate the content and underlying rationale and methodologies for the literature thus reviewed to discern whether it possesses the analytical standing and reliable substance upon which to

[13] The report also states that Dr. Gladney reviewed an online article about this case, but does not indicate any use thereof. *See* Ex. MIL-DE-3 at 5 (Ex. A, ¶ 4 (referring to appended Gladney Bates-number pages, which contain Redden Article, as defined in Affidavit, ¶ 2.F)); Ex. MIL-DE-4B (Redden Article).

subsequently build one's own scholarship. *See*, *e.g.*, Ex. MIL-DE-5 at 2; Ex. MIL-DE-6 at 1-2 & 15; Ex. MIL-DE-7 at 2.

One point of comparison is the slipshod approach to "courtroom" work ascribed to Dr. Gladney with his own much higher standards of quality in his profession as an anthropology scholar and academician.[14] A second point of comparison is to examine the intellectual rigor, or lack thereof, exhibited by the proffered expert report with those of other professional scholars and academicians. The reports of three (3) of Mr. Yu's expert and rebuttal expert witnesses exemplify and contrast with the proffered report.[15] Despite his impressive credentials in anthropology, Dr. Gladney abjectly fails to meet even the one fundamental standard of intellectual rigor assuredly demanded in all learned professions, including his, to search and review the relevant literature.

In addition, Mr. Yu's rebuttal experts have identified other failings of the bases and methods underlying Dr. Gladney's opinions.[16] Dr. Cooley observes:

> In his expert witness report, Dr. Gladney indicates that he is "familiar with the theory of 'aversive racism,'" but that he does not agree with Dr. Zorwick's conclusion "that the theory can be used

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[14] *Compare* Ex. MIL-DE-3 (proffered expert report with 1 cited reference & fewer than 2 substantive pages)(<0.5 source citation per substantive page)) *with* Ex. MIL-DE-19 (Dru C. Gladney, *Representing Nationality in China: Refiguring Majority/Minority Identities*,[14] 53 J. ASIAN STUDIES 92-123 (Feb. 1994), https://doi.org/10.2307/2059528 (~22.3 substantive pages with 91 cited sources & 32 notes)(4.1 cited sources & 1.4 notes per substantive page)) *and* Ex. MIL-DE-20 (Dru C. Gladney, *The Ethnogenesis of the Uigher*,[14] 9 CENTRAL ASIAN REVIEW 1-28 (1990) (~17.5 substantive pages with 85 cited sources & 30 notes)(4.9 cited sources & 1.7 notes per substantive page)).

[15] *Compare* Ex. MIL-DE-3 *with* Ex. MIL-DE-5 at 25-27 (bibliography, rebuttal expert report of Dr. Erin Cooley); Ex. MIL-DE-6 at 2, 4, 6 & 13 (rebuttal expert report of Dr. Nadya Fouad) (citations to supporting literature & professional materials); Ex. MIL-DE-7 at 28-32 (bibliography, expert report of Dr. Leslie Zorwick); *id.* at 1-9 & 21-24 (citations to supporting literature & professional materials).

[16] *See*, *e.g.*, Ex. MIL-DE-5 (Dr. Cooley) at 7, § III, ¶ 3; 8, § III, ¶ 7; 10, § III, ¶¶ 11-13; 13-14, § III, ¶¶ 19-22; 15, § III, ¶ 24; 18, § IV, ¶¶ 1-2; 20, § IV, ¶ 3; 23, § IV, ¶¶ 6-7; & § V, para. 1.

> to describe any discrimination by Idaho State University or its faculty with respect to Jun Yu." However, in reaching this opinion, **Dr. Gladney does not address any of the 22 examples of behaviors consistent with aversive racism described in Dr. Zorwick's report.** In fact, Dr. Gladney does not mention any specific examples of behavior to support his claims that ISU "bent over backwards to assist Mr. Yu in his academic endeavors" or that Mr. Yu "knowingly refused" to take advantage of opportunities given to him. Thus, the claims made by Dr. Gladney in his expert witness report are unfounded.

Ex. MIL-DE-5 at 23, § V, para. 1 (emphasis supplied). Dr. Nadya Fouad also has exposed the intellectual misconceptions that underlie Dr. Gladney's analysis and proffered opinions. *See*, *e.g.*, Ex. MIL-DE-6 at 11, ¶ 1 through 12, ¶ 2.

These failings are fatal. Because neither they nor their preparation adhere to "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," Dr. Gladney's testimony and the report are inadmissible. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176 (1999).

VII. UNREASONABLE RELIANCE UPON AN IRRELEVANT, HIGHLY FLAWED AND SUSPECT SOURCE RENDERING INADMISSIBLE DR. GLADNEY'S EXPERT TESTIMONY AND PROFFERED REPORT

Federal Rule of Evidence 703 states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703.

The following additional facts are relevant and helpful to the Rule 703 analysis. On information and belief, Mr. Yu matriculated in 2008 into Defendant's doctoral program in

clinical psychology shortly before his thirtieth (30th) birthday. When he did so, he and his wife, Ms. Jocelyn Eikenburg, had been married for more than four (4) years. The couple lived together in the Pocatello, Idaho area at all times during Mr. Yu's attendance at Idaho State University and in the Cleveland, Ohio area at all times during his volunteer work and internship at the Cleveland Clinic Children's Autism Center ("CCCA"). Mr. Yu and Ms. Eikenburg returned to China following his dismissal from Idaho State University and have lived in and around Beijing since that time.

In contrast with young unmarried and remotely-parented Chinese students in the United States covered by the Wholeren Paper, Mr. Yu has had the significant benefit of his wife's constant presence and support, including as to cultural perspectives and English language skills and linguistic nuances relevant to Mr. Yu's background and experience in the United States, including while at Idaho State University and CCCA.[17] In further contrast to the Wholeren cohort, Mr. Yu had consistently very good grades and other indicators of his excellent academic performance at Idaho State University and had earned good reviews from Dr. Cheryl Chase during his CCCA internship.[18]

As averred by Mr. Yu's rebuttal experts Drs. Erin Cooley and Nadya Fouda, the Wholeren Paper is severally and severely flawed and, more, irrelevant to Mr. Yu's personal and academic circumstances as a successful, mature, and married student, including during his tenure at Idaho State University. Dr. Fouad succinctly condemns the Report's use of the irrelevant Wholeren Paper, stating:

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[17] For several years leading up to the time of her marriage to Mr. Yu, Ms. Eikenburg had lived and worked in China. Ms. Eikenburg, an American citizen and native English speaker, is fluent in Mandarin Chinese. She is highly culturally knowledgeable and competent within the majority culture in the United States and within other cultures, including in China.

[18] *See*, *e.g.*, Ex. MIL-DE-27; Ex. MIL-DE-28.

> Dr. Gladney's attached [Wholeren] White Paper identifies several reasons that younger Chinese students (those seeking a baccalaureate degree) fail or are dismissed. **The reasons cited in the paper do not apply to Mr. Yu: he is not young, he did not have a low GPA, he was not seeking a bachelor's degree, and he was not in a STEM major. The reasons for dismissal in the paper do not apply to Mr. Yu's case.**

Ex. MIL-DE-6 at 12, ¶ 3.[19]

Dr. Cooley directly criticized the Wholeren Pan's glaring analytical flaws and bias, writing, "**The white paper draws conclusions that move beyond what the data actually indicate**. In fact, the **conclusions at times demonstrate racial prejudice**." Ex. MIL-DE-5 at 22, ¶ 6(b) (emphasis supplied). She went on to document numerous instances in which Wholeren Paper made "[u]nfounded and perhaps prejudicial comments[.]" *Id.*; *see also*, *e.g.*, *id.* at 21-22 (irrelevance of Wholeren Paper to facts of Mr. Yu's case).

Indeed, among the worldwide English-writing diaspora of scholars, Dr. Gladney is virtually alone in his reliance upon the highly questionable Wholeren Paper. Searches of literally millions of records, including on-site at the Library of Congress in Washington, D.C., yielded no professional use of the Wholeren Paper beyond two (2) graduate students in dissertation as partial work toward doctorate of education degrees.[20] Indeed, the entity identified as the author of the Wholeren Paper itself did not exist and has never existed.[21]

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[19] Additionally, a review of the apparent geographic origins of the data underlying the Wholeren Paper show that it has no relevance to even any Wholeren student client, much less to Mr. Yu. *See* Affidavit at ¶¶ 44-49 & accompanying Exhibits.

[20] *See* Affidavit at ¶¶ 10-28 & accompanying Exhibits (scope & results of multiple searches); *id.* at ¶¶ 23-27 & accompanying Exhibits (Zhou & Green papers). The searches likewise would have encompassed any use of subsequent versions of the Wholeren Paper, but revealed none.

[21] *See id.* at ¶¶ 3-9 & accompanying Exhibits.

A discerning examination of the Wholeren Paper itself and the Wholeren.com Web site also reveals that the Wholeren Paper constitutes advocacy research aimed at Wholeren's Chinese-speaking target market to generate demand for its expulsion center and other emergency educational intervention services. *See* Affidavit at ¶¶ 33-43 & accompanying Exhibits. Where such a flawed and biased study is a basis for an expert's proffered opinion, that testimony is inadmissible. *See United States v. Artero*, 121 F.3d 1256, 1262 (9th Cir. 1997).

A. Under Rules 702(a) and 704, Opinions 15, 20, and 22 through 25 Should Be Excluded as Impermissible Opinions of Law.

Rule 704 permits a qualified expert to opine on an ultimate issue of fact, stating "An opinion is not objectionable just because it embraces an ultimate issue." FED. R. EVID. 704(a). Expert testimony may reach to an ultimate issue of fact under Rule 704(a), but generally not of law under Rule 702(a). *See Hoss v. United Parcel Service, Inc.*, 2010 WL 672743, at *1 (D. Idaho 2010). Where expert opinions state opinions of law, even correctly so, they are deemed inadmissible as unhelpful under Rule 702(a) and as invasive upon the province of the judge and jury under Rule 704(a). *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046-47 (9th Cir. 2013) (quoting *United States v. Weitzenhoff,* 35 F.3d 1275, 1287 (9th Cir. 1993) ("The court's admission of expert testimony on contested issues of law in lieu of instructing the jury was manifestly erroneous")); *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1058-59 (9th Cir. 2008); *Weitzenhoff*, 35 F.3d at 1287-88 (citations omitted). Therefore, the subject opinions, as expressed in Exhibit-MIL-DE-3 and 3A and analyzed in Exibit-MIL-DE-26, cannot be allowed.

VIII. SEQUESTRATION & *VOIR DIRE*

If the Court denies or defers its decision on Mr. Yu's Motion, Federal Rule of Evidence 615 ("Rule 615") governs Mr. Yu's request to sequester Dr. Gladney, stating, in relevant part,

"At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." FED. R. EVID. 615. Mr. Yu makes this request as a matter of right. *See United States v. Ell*, 718 F.2d 291, 292 (9th Cir. 1983); FED. R. EVID. 615, Advisory Comm. Notes (1972 proposed rules). None of the Rule 615 exclusions to Mr. Yu's right to have Dr. Gladney sequestered applies.[22] *Accord* FED. R. EVID. 615(c).

Should the Court defer ruling on Mr. Yu's Motion, Mr. Yu will request, through counsel, to examine Dr. Gladney as to his qualifications for Defendant's scope of his designated testimony and to do so under *voir dire* outside the presence of the jury.[23] *See* FED. R. EVID. 705; SALTZBURG, ET AL., *supra* note 11, at 1439 ("Rule 705 specifically authorizes the Trial Judge to require testimony as to the bas[es of the proffered opinion] in advance. It is easier to avoid an objectionable opinion than to strike one from the memory of the jurors who have heard it.")

IX. CONCLUSION

For the reasons and on the points of authorities set forth above, this Court acts well within its discretion to grant Mr. Yu's Motion and exclude Dr. Gladney as an expert witness and to strike his proffered expert testimony.

DATED: September 28, 2018

PLAINTIFF
By Plaintiff's Attorney

Idaho Employment Law Solutions, PLLC

__/s/_____
R. A. (RON) COULTER

[22] Mr. Yu acknowledges that, depending upon the Court's decision on his Motion, Defendant may have the opportunity for a showing under Rule 615(c).
[23] *See* FED. R. EVID. at 104(c)(3).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2018, I caused to be served a copy of the foregoing document on CM/ECF Registered Participants as reflected on the Notice of Electronic Filings, as follows:

MICHAEL E. KELLY, ISB # 4351
SHANNON M. GRAHAM, ISB #10092
380 E. PARKCENTER BLVD., SUITE 200
POST OFFICE BOX 856
BOISE, ID 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344

IDAHO EMPLOYMENT LAW SOLUTIONS

/s/
R. A. (RON) COULTER