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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christopher Walsh,

Plaintiff,

vs.

LG Chem America, et al.,

Defendants.

No. CV-18-01545-PHX-SPL

ORDER

Before the Court is Defendant’s Motion to Exclude the Testimony and Opinions of Chester Sandberg Pursuant to Federal Rule of Evidence 702. (Doc. 104). The Motion has been fully briefed and is ready for review.¹ (Docs. 104, 113, 124). Defendant seeks to exclude Sandberg’s opinions on causation, design defect, and warnings defect. (Doc. 104 at 7, 13). The Motion will be granted, as set forth below.

I. BACKGROUND

This is a products liability case involving two batteries from a vaping device. (Doc. 30 at 2). Plaintiff purchased the vaping device and batteries from Defendant retail smoke shop Oueis Gas, Inc. on October 28, 2015. (*Id.*). On November 18, 2016, Plaintiff alleges those same batteries reacted with a set of keys in his right pocket and exploded, causing serious burns. (*Id.*). Plaintiff filed a complaint against Defendant on May 22, 2018, with

¹ Because it would not assist in resolution of the instant issues, the Court finds the pending motion is suitable for decision without oral argument. *See* LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 four counts: (1) negligent design; (2) negligent failure to warn; (3) strict liability/design
2 defect; and (4) strict liability/information defect. (*Id.* at 3–4).

3 Following the incident, Plaintiff negligently failed to preserve the batteries and keys
4 as evidence. (Doc. 131 at 5). As a result, Defendant moved for an adverse instruction based
5 on Plaintiff’s spoliation of evidence, which this Court granted. (*Id.* at 6).

6 In preparing its case, Plaintiff consulted Chester Sandberg as an expert witness on
7 liability and causation. (Doc. 113 at 3). Sandberg has “a BS degree from Massachusetts
8 Institute of Technology in Mechanical Engineering, and an MS in Electrical Engineering
9 from Stanford University.” (Doc. 113-9 at 2). Relevant to this case, Sandberg has
10 experience with lithium-ion battery use and failure analysis, worked for a lithium-ion
11 battery manufacturer, and has been associated with lithium-ion electrical storage projects.
12 (*Id.*). On February 27, 2020, Sandberg issued his Report and drew several conclusions as
13 to causation, design defects, and warning defects. (Docs. 104-2 & 113-11). On March 26,
14 2021, Sandberg was deposed by both parties. (Docs. 104-1 & 113-10).

15 **II. LEGAL STANDARD**

16 Federal Rule of Evidence (“FRE”) 702 permits parties to file motions to exclude to
17 ensure relevance and reliability of expert testimony. *See Kumho Tire Co. v. Carmichael*,
18 526 U.S. 137, 152–53 (1999). FRE 702 provides that:

19 A witness who is qualified as an expert by knowledge, skill,
20 experience, training, or education may testify in the form of an
opinion or otherwise if:

- 21 (a) the expert’s scientific, technical, or other specialized
22 knowledge will help the trier of fact to understand the evidence
or to determine a fact in issue;
23 (b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods;
24 and
(d) the expert has reliably applied the principles and methods to
25 the facts of the case.

26 Fed. R. Evid. 702. The Rule imposes on the trial courts a gatekeeping obligation to “ensure
27 that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”
28 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). “Whether the expert is

1 appropriately qualified, whether her testimony is relevant, and whether her testimony is
2 reliable are all distinct inquiries under Rule 702.” *Contreras v. Brown*, No. CV-17-08217-
3 PHX-JAT, 2019 WL 2080143, at *1 (D. Ariz. May 10, 2019).

4 The proponent of the expert evidence—here, Plaintiff—has the burden of proving
5 the expert’s testimony is admissible under Rule 702 and the *Daubert* standard. *Grant v.*
6 *Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 989 (D. Ariz. 2000). “When an expert meets the
7 threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the
8 jury decides how much weight to give that testimony.” *Id.* When the expert does not meet
9 the threshold, the Court may prevent her from providing testimony. *See Alaska Rent-A-*
10 *Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (“Basically, the judge
11 is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions
12 merely because they are impeachable.”).

13 **III. DISCUSSION**

14 In the Motion, Defendant seeks to exclude Sandberg’s opinions on causation, design
15 defect, and warnings. Defendant argues these opinions are not reliable because they are not
16 based on sufficient facts and evidence or a reliable methodology. (Doc. 104 at 1).

17 **A. Sandberg’s Causation Opinions**

18 Sandberg concludes that the cause of the explosion was a thermal runaway event
19 caused by an external short circuit of the battery. (Doc. 104-1 at 36). Specifically, the
20 “[u]nprotected terminals of the 18650 battery were shorted” when Plaintiff placed the
21 battery in his pocket, and it contacted his keys. (Doc. 104-2 at 2). Defendant argues that
22 Sandberg’s causation opinion should be excluded under FRE 702 because it lacks sufficient
23 facts or data to support it and because Sandberg failed to employ a reliable methodology
24 in reaching the conclusion. (Doc. 104 at 7). Plaintiff argues that Sandberg’s causation
25 opinion is sufficiently supported by the evidence that was available to him, and that
26 Sandberg reliably applied the protocol set out in the National Fire Protection Association
27 (“NFPA”) publication *NFPA 921: Guide for Fire and Explosion Investigations* (“NFPA
28 921”) to reach his conclusion. (Doc. 113 at 3–5, 10).

1 The parties here agree that NFPA 921 is a recognized and reliable method of
2 determining the origin and cause of the explosion. (Docs. 104 at 6 & 113 at 4). Federal
3 courts, including this Court, have also recognized NFPA 921 as a reliable method under
4 *Daubert*. See, e.g., *Fireman’s Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054, 1057–
5 58 (8th Cir. 2005); *Philadelphia Indem. Ins. Co. v. BMW of N. Am. LLC*, No. CV-13-
6 01228-PHX-JZB, 2015 WL 5693525, at *6 (D. Ariz. Sept. 29, 2015). When investigating
7 a fire or explosion, the first step under NFPA 921 is to “determine and establish the origin.”
8 NFPA 921 § 4.1. Next, NFPA 921 explains that the scientific method is applied using the
9 following steps: (1) define the problem; (2) collect data; (3) analyze the data; (4) develop
10 a hypothesis based on the data; (5) test the hypothesis. NFPA 921 § 4.3.

11 In the Response, Plaintiff walks through the NFPA 921 analysis that he asserts
12 Sandberg conducted. (Doc. 113 at 4–5). According to Plaintiff, Sandberg first established
13 the area of origin and defined the problem. (*Id.* at 4). Next, Sandberg collected the available
14 evidence: surveillance video of the incident; examinations of the keychain, an exemplar
15 pair of pants, and all purchase receipts and warnings from Defendant; an interview with
16 Plaintiff; the deposition transcripts of Plaintiff, Lindsay Niziolek (Plaintiff’s ex-girlfriend),
17 and Gail Niziolek (Lindsay’s mother); an examination of LG HG2 18650 battery patents;
18 and an “extensive” literature search on the batteries’ safety history and why they explode.
19 (*Id.* at 3). From this evidence, Plaintiff asserts that Sandberg ruled out all but one potential
20 cause and developed his hypothesis: that the battery experienced an external short and
21 exploded, “because the metal keys or keychain in [Plaintiff]’s pocket touched the battery’s
22 positive and negative tabs.” (*Id.* at 4). Finally, Sandberg tested this hypothesis by
23 conducting a demonstration in which he touched a key to both ends of an exemplar battery
24 and caused an explosion similar to the one in the surveillance video. (*Id.* at 5).

25 This Court takes issue with Plaintiff’s NFPA 921 argument because nowhere in
26 Sandberg’s Report is NFPA 921 even mentioned. Even at Sandberg’s deposition—at least
27 in the excerpts provided to the Court—the only mention of the NFPA is when Sandberg
28 states that he is a life member of the “NEC,” which he explains is a part of the NFPA. (Doc.

1 113-10 at 3); *see Werth v. Hill-Rom, Inc.*, 856 F. Supp. 2d 1051, 1059 (D. Minn. 2012)
2 (“The most fundamental problem with Plaintiffs’ argument is that nowhere in the nearly
3 300-page Report . . . is NFPA 921 ever mentioned. . . . Plaintiffs simply assert in their brief
4 that their experts followed this well-recognized methodology without proffering any
5 evidence to support it.”). In comparison, the experts in *Philadelphia Indemnity Insurance*
6 *Company*—a case to which Plaintiff analogizes²—explicitly mention NFPA 921 in their
7 conclusions and reports. *Philadelphia Indem. Ins. Co.*, 2015 WL 5693525, at *3, *4 (“Mr.
8 Nelson concluded [that]: ‘Based on the evaluation of the available data . . . and utilizing
9 the recognized investigation methods, including the Scientific Method as defined in *NFPA*
10 *921*, the area of fire origin was determined to be’”; “Mr. Hogge states in his Report
11 that he followed the Scientific Method in NFPA 921”). Sandberg’s failure to mention
12 NFPA 921 or to explain its role in his analysis undermines Plaintiff’s assertion that
13 Sandberg conducted an “extensive analysis” under NFPA 921. (Doc. 113 at 10).

14 However, whether Sandberg actually relied on NFPA 921 in reaching his causation
15 conclusion is not dispositive on the issue of admissibility under FRE 702. “[A]n expert’s
16 reliance on a methodology other than NFPA 921 does not render his opinions per se
17 unreliable.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. C06-1750JLR, 2014
18 WL 1494023, at *4 (W.D. Wash. Apr. 16, 2014); *Russell v. Whirlpool Corp.*, 702 F.3d
19 450, 455 (8th Cir. 2012) (“We have held NFPA 921 qualifies as a reliable method endorsed
20 by a professional organization, . . . but we have not held NFPA 921 is the *only* reliable way
21 to investigate a fire.”). The question then is whether Sandberg’s conclusion—that an
22 external short circuit caused the explosion—is sufficiently grounded in the “methods and
23 procedures of science” rather than in “subjective belief or unsupported speculation.”
24 *Daubert*, 509 U.S. at 589–90.

25
26 ² The other two cases to which Plaintiff cites—*Dietz v. Waller*, 141 Ariz. 107 (1984)
27 and *Rocky Mountain Fire & Casualty Co. v. Biddulph Oldsmobile*, 131 Ariz. 289 (1982)—
28 are inapposite to the present case. They stand for the proposition that Plaintiff be allowed
to rely on circumstantial evidence alone in a strict liability case; neither case dealt with the
reliability or admissibility of expert opinion under FRE 702.

1 This Court first notes that Sandberg’s Report fails to explain his causation opinion
2 in any meaningful way. Instead, it merely states Sandberg’s causation conclusion as a
3 factual statement in the opening paragraph: “Unprotected terminals of the 18650 battery
4 were shorted when [Plaintiff] placed the cell in his pocket with his keys.” (Doc. 104-2 at
5 2). The Report does not support this conclusion in any way and fails to explain how it was
6 reached. The Report makes no mention of other possible causes, even though there are
7 several other recognized causes of thermal runaway aside from just external shorts.
8 Specifically, the parties and their experts agree that potential causes include internal shorts,
9 external shorts, damage to the battery, overcharging, manufacture defects, and overheating.
10 (Docs. 104-1 at 7–9 & 113-10 at 7–8). Sandberg’s Report, however, appears to operate
11 under the assumption that an external short caused the explosion, and instead focuses on
12 Sandberg’s defect analysis.

13 A review of Sandberg’s deposition testimony—at least those excerpts provided to
14 this Court by the parties—also fails to shed light on the basis for Sandberg’s causation
15 opinion. Sandberg’s deposition statements on causation are largely just restatements of his
16 conclusion. (*See, e.g.*, Doc. 104-1 at 8 (“[T]he only one that was really probable in this
17 case was that it was shorted out in his pocket, and I tested that and showed that, yep, that
18 was the one that probably happened.”); Doc. 104-1 at 36 (“I’m saying that the
19 predominance of evidence in my mind shows that the keys shorted out the battery, and it’s
20 more than 51 percent likely that that happened. So you can do a whole bunch of
21 hypotheticals of other things that could happen, but, in this case, it didn’t happen. The keys
22 clearly shorted it out.”); Doc. 113-10 at 16 (“Well, going through the five [possible causes]
23 that [Defendant’s expert] said, the only one it could be is a short out of the terminals,
24 negative and positive. That’s the only one it could be.”)). Sandberg did reveal, at least in
25 part, how he ruled out an “internal short” as a potential cause, stating that an internal short
26 was unlikely because it would have more likely occurred while the battery was on the
27 charger, and not while in Plaintiff’s pocket. (Doc. 104-1 at 8, 35–36). Beyond that,
28

1 however, Sandberg never explicitly addressed how he ruled out the other possibilities.³ In
2 fact, Sandberg stated just the opposite: that he did not even test the alternate causes because
3 he “didn’t need to . . . because . . . in [his] mind it’s clear that the battery in [Plaintiff’s]
4 pocket was shorted out by his keys, . . . and that’s what happened.” (*Id.* at 9).

5 Given that Sandberg’s Report and deposition fail to explain the basis of Sandberg’s
6 causation conclusion, this Court is left only with the parties’ arguments to determine the
7 conclusion’s reliability. The crux of Defendant’s argument is that because the incident
8 battery is missing, Sandberg never physically examined it and therefore he cannot opine
9 that the thermal runaway was caused by an external short circuit, as opposed to some other
10 cause. (Doc. 104 at 8). Plaintiff responds by listing out the evidence that Sandberg *did* have
11 available to him. (Doc. 113 at 3). Plaintiff then asserts that, based on this evidence,
12 Sandberg was able to rule out the other causes. (*Id.* at 4–5 (“[Sandberg] found no evidence
13 to render an alternative cause more likely than less likely.”)).

14 “An expert opinion requires some explanation as to how the expert came to his
15 conclusion and what methodologies or evidence substantiate that conclusion.” *Riegel v.*
16 *Medtronic, Inc.*, 451 F.3d 104, 127 (2d Cir. 2006). Here, Plaintiff asserts that Sandberg
17 was able to rule out battery damage and overcharging based on interviews with Plaintiff,
18 his examination of the charger, and his review of Lindsay Niziolek’s deposition. (Doc. 113
19 at 4–5). Plaintiff fails, however, to cite to any portion of the record that supports this

20
21 ³ One potential cause of thermal runaway—existing damage to the battery—seems
22 to have been particularly overlooked by Sandberg. While Sandberg acknowledged that
23 “when the [battery] wrapper becomes damaged, it’s a whole lot easier for the connection
24 to be made between the positive cap and the negative can,” he subsequently stated, “I don’t
25 know” when he was asked whether the battery in Plaintiff’s pocket was damaged prior to
26 the incident. (Doc. 104-1 at 6). Sandberg also appears to have disregarded how Plaintiff
27 used the battery prior to the incident—information that would have likely been useful in
28 determining whether the battery had preexisting damage. (*Id.* at 3).

25 Plaintiff asserts that Sandberg relied on his interviews with Plaintiff, examination
26 of the charger, and a review of Lindsay Niziolek’s deposition to exclude battery damage
27 as a cause. Defendant, however, notes that Sandberg denied having interviewed Plaintiff
28 altogether. (Doc. 124 at 4 n.2). Further, this Court finds no explanation—from Sandberg
or Plaintiff—of how Sandberg’s examination of the charger indicated to Sandberg that the
battery was undamaged. Finally, the Niziolek deposition excerpts provided to this Court
(Doc. 104-1 at 64 & Doc. 113-7 at 2) show no discussion of battery damage.

1 assertion⁴—that is, that shows Sandberg actually *did* rule out battery damage and
2 overcharging based on this specific evidence. And even if it were true, this Court would
3 still be without an understanding of *how* Sandberg used the evidence to exclude the
4 alternate causes. In other words, Plaintiff—and Sandberg, in his Report and deposition
5 testimony—has not shown what aspects of Sandberg’s interview with Plaintiff, his
6 examination of the charger, and Niziolek’s deposition allowed Sandberg to rule out battery
7 damage and overcharging. Instead, all Plaintiff offers are conclusory assertions that
8 Sandberg looked at certain evidence and ruled out certain causes. On this alone, the Court
9 cannot find that Sandberg’s opinion—here, excluding battery damage and overcharging as
10 causes—is sufficiently reliable under *Daubert* because the Court has no insight into
11 Sandberg’s methodology. *See Daubert*, 509 U.S. at 595 (“The focus [of a Rule 702 inquiry]
12 must be solely on principles and methodology, not on the conclusions they generate.”).

13 Similar issues arise with the other potential causes. Plaintiff states that Sandberg’s
14 “extensive review of the literature” allowed him to rule out a manufacturing defect. (Doc.
15 113 at 5). Then Plaintiff states that the conditions of the battery’s environment at the time
16 of the explosion—the batteries being “loose” in Plaintiff’s pocket on a cool November
17 evening—allowed Sandberg to rule out overheating as a cause. (*Id.*). Again, what is
18 missing is Sandberg’s underlying methodology and reasoning. It is one thing to state that
19 Sandberg reviewed literature and ruled out manufacturing defects; it is entirely different to
20 explain—or, perhaps even better, to cite to a place where Sandberg himself explains—what
21 specific literature was reviewed, what the literature revealed about batteries and
22 manufacture defects, and why that allowed Sandberg to rule out a manufacturing defect as
23 a potential cause. Because the principles and methodology of Sandberg’s exclusions of
24 alternate causes have not been shown, this Court cannot find those exclusions to be reliable.

25
26 ⁴ Plaintiff cites only to an unrevealing exchange between counsel and Sandberg
27 during Sandberg’s deposition. (Doc. 113 at 5). Plaintiff’s counsel went through each of the
28 alternate causes and asked Sandberg whether he had seen any evidence that led him to
believe that the alternate cause was “more likely than less likely” to have caused the
explosion. (Doc. 113-10 at 8–9). To each alternate cause, Sandberg responded that he had
not and provided no further explanation. (*Id.*).

1 All told, this Court finds that—to the extent Sandberg concludes that an external
2 short circuit was the probable or definite cause of the explosion—Sandberg’s conclusion
3 is not sufficiently reliable. Sandberg did not meaningfully explain the reasoning and
4 methodology underlying the conclusion in his Report or at his deposition. While Plaintiff
5 argues that Sandberg complied with NFPA 921, Plaintiff did not point to any place in the
6 record that proves such compliance. And although Plaintiff argues that Sandberg was able
7 to exclude other potential causes based on the evidence available to him, Plaintiff did not
8 point to any place in the record where Sandberg actually did so, nor did Plaintiff
9 meaningfully explain the methodology of such exclusions. As a result, the only support for
10 Sandberg’s causation conclusion is his demonstration which showed, at best, that an
11 external short circuit was possible. Without any showing that the other potential causes
12 were considered and reliably ruled out, however, this demonstration does not prove that an
13 external short circuit was the probable cause, let alone the definite cause. This Court holds
14 that Sandberg’s causation conclusion—that an external short circuit was the probable cause
15 of the explosion—is excluded under FRE 702 and the *Daubert* standard.

16 **B. Sandberg’s Design Defect Opinion**

17 Sandberg concludes that LG 18650 H2 lithium-ion batteries are defective in design.
18 (Doc. 104-2 at 3–5). According to Sandberg, the batteries are “intrinsically hazardous
19 unless managed with adequate mechanical and electrical design and implementation.” (*Id.*
20 at 3). Sandberg concludes that the unprotected nature of the battery’s terminals created a
21 risk that the battery could short circuit if a metal object, such as a set of keys, bridged the
22 tabs of the battery. (*Id.* at 3–5). Sandberg suggests three alternative designs that would have
23 been safer: removable insulating brackets, a silicon jacket, or a seal with a warning. (*Id.* at
24 5). Sandberg states that all three of these designs would have protected the battery’s
25 terminals and prevented them from contacting the keys in Plaintiff’s pocket and short
26 circuiting the battery. (*Id.*).

27 Defendant argues that Sandberg’s design defect opinion is unreliable because it is
28 based entirely on the assumption that the explosion in this case was caused by an external

1 short circuit. (Doc. 104 at 7). This Court agrees. As discussed above, Sandberg failed to
2 show that an external short circuit was the probable cause of the explosion. While he
3 demonstrated that his causation theory was possible, he did not reliably exclude any of the
4 other potential causes. Critically, some of the other potential causes—*e.g.*, battery damage,
5 overcharging, manufacturing defect, and overheating—may have nothing to do with the
6 unprotected nature of the terminals. If Sandberg has not reliably shown that the explosion
7 was caused by an external short circuit that resulted from the unprotected terminals
8 contacting the metal keys, then he cannot reliably testify that the batteries were defectively
9 designed solely because the terminals were unprotected. *See Kumho Tire Co.*, 526 U.S. at
10 153–54 (upholding trial court’s exclusion of expert’s opinion that tire failed due to defect
11 in part because expert had not reliably ruled out abuse as potential cause of tire’s failure).

12 Even if Sandberg had shown that the explosion was probably caused by an external
13 short circuit, his design defect opinion lacks sufficient facts and data and is not clearly the
14 result of a reliable methodology. In supporting his conclusion that the 18650 battery is
15 defectively designed Sandberg first establishes that the battery is “intrinsically hazardous.”
16 (Doc. 104-2 at 3). He does this by referencing a 2010 NASA presentation, the United
17 Nations standard for shipping requirements, a Google search for 18650 battery fires that
18 returned “400,000 hits,” and a 2017 FEMA report. (*Id.* at 3–5). The NASA presentation
19 purports to show that safety considerations related to 18650 batteries “were prominent” as
20 early as 2010 and that it was “widely known” that they had the ability to self-destruct and
21 produce external damage. (*Id.*). The UN shipping requirements apparently “show the
22 critical nature of the protection of [battery] cells in transit.” (*Id.* at 5, 7). The Google search
23 and the 2017 FEMA report apparently show that, by the time Plaintiff purchased the
24 batteries in October 2015, there had been many reports of e-cigarette battery explosions.
25 (Docs. 104-2 at 5, 8 & 113-10 at 5). After establishing the danger of the 18650 battery,
26 Sandberg makes the assertion that the battery is defectively designed because there were
27 feasible alternative designs that would have prevented the accident. (Doc. 104-2 at 5).

28 The problem with Sandberg’s design defect opinion is that “there is simply too great

1 an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*,
2 522 U.S. 136, 146 (1997). Sandberg presented data indicating that 18650 batteries pose
3 certain dangers. (Doc. 104-2 at 3–8). Sandberg then presented three alternative designs that
4 would have covered the otherwise unprotected terminals. (*Id.* at 5). He suggests that,
5 because the alternative designs were not adopted, the 18650 batteries are defectively
6 designed. (*Id.*). Sandberg never meaningfully explains how the dangers to which he alludes
7 relate to his conclusion that the battery was defectively designed. Merely showing that the
8 batteries are a dangerous product does not automatically imply that they are defectively
9 designed. Moreover, the Report’s cited sources do not clearly indicate that the dangers
10 posed by the batteries relate to the unprotected terminals. For example, the UN shipping
11 requirements may show that the batteries are dangerous, but not necessarily because their
12 terminals are unprotected. Similarly, a Google search for “lithium ion battery 18650 fire”
13 that returns 400,000 hits only proves that the batteries may have been involved in a number
14 of fire-related incidents; it does nothing to prove that such incidents were directly the result
15 of unprotected terminals. The 2017 FEMA report lists over 100 “E-cigarette fires and
16 explosion incidents” in the years leading up to Plaintiff’s October 2015 battery purchase.
17 The FEMA report does not, however, specify the causes of the incidents nor does it tie the
18 incidents specifically to the unprotected terminals.

19 Plaintiff argues that Sandberg reliably supported his conclusion by conducting an
20 “extensive cost/benefit analysis.” (Doc. 113 at 9). This analysis consisted of Sandberg
21 testifying that there were three alternative designs, that all were technologically and
22 economically feasible in 2015, that all would have prevented this accident, and that the
23 costs of an accident outweigh any benefits of the design utilized. (*Id.*). While Sandberg
24 gave such testimony, he failed to support any of these assertions or explain his
25 methodology in reaching them. Sandberg does not appear to have tested or researched his
26 alternative designs. He did not compare their efficacy to other designs already on the
27 market, such as the free silicon cases that many consumers are given upon purchasing a
28 battery. (Doc. 104-1 at 42–43). Sandberg does not point to any studies or reports that

1 support his conclusion that the batteries are defectively designed. Sandberg fails to even
2 prove that his alternative designs would have prevented Plaintiff's injuries, in part because
3 he fails to prove that the explosion here was indeed a result of the unprotected terminals.
4 And when asked to explain why he concluded that the costs of an accident outweighed the
5 benefits of the current design, he did not respond with a systematic balancing of costs and
6 benefits. Instead, he merely stated "[b]ecause the downside of the thing when it fails is
7 significant personal injury." (Doc. 113-10 at 7).

8 These are just some of the ways in which Sandberg could have provided insight into
9 the basis and methodology of his design defect opinion. Instead, Sandberg concludes that
10 the battery is defectively designed merely because the battery is dangerous and because he
11 has three alternative designs which he asserts would have prevented Plaintiff's injury.
12 Sandberg's design defect opinion—that the battery was defectively designed—is excluded
13 as unreliable under FRE 702 and the *Daubert* standard.

14 **C. Sandberg's Warnings Opinion**

15 The record indicates that on the date Plaintiff allegedly purchased the batteries,
16 October 28, 2015, no warning was present on Plaintiff's receipt. (Doc. 104-2 at 12). By
17 December 2, 2015, the date of Plaintiff's next purchase, Defendant had changed the receipt
18 to include the following warning:

19 Battery Warning – Store and transport your e-cigarette
20 batteries in non-conductive cases such as the cases we give
21 away for free. Do not store any Li-ion LiMN or any e-cigarette
22 batteries in your pockets, purses, backpacks, or luggage
23 without a proper undamaged case. Do not disassemble or
24 tamper with batteries in any way. Discontinue using if there is
25 damage to the battery, casing, or surrounding wrap, including
26 but not limited to bulges, rips, tears and scarring. Misuse of the
27 described batteries outside of safe handling guidelines may
28 result in fire or explosion causing personal harm or property
damage. Use at your own risk.

(*Id.* at 14). On December 11, 2015, Defendant put a safety card in the store next to where
customers check out. (*Id.* at 2). Plaintiff made at least 13 more purchases from Defendant—
each time receiving a receipt containing the warning—between December 2015 and

1 November 18, 2016, the date of the incident. (*Id.* at 18–43).

2 Sandberg’s Report concludes that the warnings provided by Defendant “were
3 inadequate.” (*Id.* at 2). The Report purports to show that the batteries posed a known threat
4 prior to Plaintiff’s purchase and states that Defendant’s “lack of warnings do not comport
5 with the warnings a prudent manufacturer would provide, given the known danger.” (*Id.* at
6 5). Defendant argues that this opinion should be excluded because Sandberg is not qualified
7 to offer warnings opinions and because Sandberg did not employ any reliable methodology
8 in reaching his conclusion.

9 Even assuming Sandberg is qualified to offer expert opinion on warnings, this Court
10 cannot find Sandberg’s warnings defect opinion to be reliable because it is unclear what
11 methodology Sandberg employed in reaching his conclusion. In *Triant v. American*
12 *Medical Systems, Inc.*—a case to which Plaintiff cites—a doctor sought to testify that the
13 warnings associated with certain medical devices were adequate. *Triant v. Am. Med. Sys.,*
14 *Inc.*, No. CV-12-00450-PHX-DGC, 2020 WL 4049844, at *5 (D. Ariz. July 20, 2020). The
15 Court excluded the opinion, in part, because the doctor

16 does not address the content of the [warnings] or the risks they
17 address, and he does not explain why he thinks the [warnings]
18 provide adequate warnings of relevant risks. Nor does he say
19 anything about the kinds of warnings expected by physicians
or the standards he applied in concluding that the warnings in
this case were adequate.

20 *Id.* Here, Sandberg similarly failed to address the specific content of the warnings and
21 explain *why* the warnings were, in this case, inadequate. During his deposition, Sandberg
22 was asked at least two times to explain what he meant when he concluded the warnings
23 were inadequate. The first time, Sandberg responded, “Well, if they had been adequate . .
24 . [Plaintiff] wouldn’t have put [the battery] in his pocket when it had a possibility of
25 shorting out.” (Doc. 104-1 at 16). The second time, Sandberg stated that Defendant’s
26 addition of warnings after Plaintiff’s October 2015 battery purchase was Defendant
27 “essentially admitt[ing] . . . that the warnings weren’t adequate.” (*Id.* at 18). Neither of
28 these explanations address what specific aspects of the warnings were deficient. Instead,

1 Sandberg seems to suggest that they were inadequate only because Plaintiff was injured
2 and because Defendant decided to amend its warnings after Plaintiff's October 2015
3 purchase.

4 Moreover, Sandberg does not point to examples of what would have constituted
5 adequate warnings, nor does he show any data, studies, or standards that he relied on in
6 making his conclusion. As Defendant argues, Sandberg does not point to any research or
7 testing on the efficacy of battery warnings. (Doc. 104 at 14). While it is true, as Plaintiff
8 points out, that Defendant fails to cite to authority requiring such research or testing, (Doc.
9 113 at 12), it is abundantly clear that the *Daubert* standard requires something more than
10 the mere "ipse dixit of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
11 "The trial court's gatekeeping function requires more than simply taking the expert's word
12 for it." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995).
13 "Something doesn't become scientific knowledge just because it's uttered by a scientist;
14 nor can an expert's self-serving assertion that his conclusions were derived by the scientific
15 method be deemed conclusive." *Henricksen v. ConocoPhillips Co.*, 605 F.Supp.2d 1142,
16 1154 (E.D. Wash. 2009). "[T]he expert's bald assertion of validity is not enough. Rather,
17 the party presenting the expert must show that the expert's findings are based on sound
18 science, and this will require some objective, independent validation of the expert's
19 methodology." *Daubert*, 43 F.3d at 1316.

20 Here, the best Sandberg does to support his warnings defect opinion is show that the
21 batteries were a known danger prior to Plaintiff's October 2015 purchase. For example,
22 Sandberg cites to a 2010 NASA presentation which shows that "safety considerations were
23 prominent at that time" and that it was "widely known" that 18650 battery cells had the
24 ability to "self-destruct and produce external damage." (Doc. 104-2 at 3-5). Sandberg also
25 refers to a 2017 FEMA report which showed an increase in the number of incidents
26 involving vaping and battery issues. (Doc. 104-1 at 16-17). But merely showing that the
27 batteries posed a danger, without more, speaks nothing to the adequacy of the warnings
28 provided by Defendant. All told, Sandberg's warnings defect opinion lacks "sufficient facts

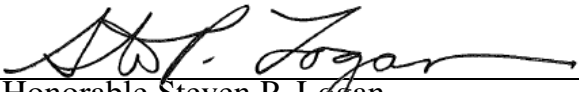
1 and data” to back it up and fails to show the methodology Sandberg used in reaching his
2 conclusion. Instead, Sandberg seeks to opine that the warnings were inadequate without
3 explaining why. This Court holds that Sandberg’s conclusion—that the warnings were
4 defective—is excluded because it is unreliable under FRE 702 and the *Daubert* standard.

5 **IV. CONCLUSION**

6 Therefore,

7 **IT IS ORDERED** that Defendant’s Motion to Exclude (Doc. 104) is **granted** and
8 Sandberg’s opinions on causation, design defect, and warnings defect are excluded.

9 Dated this 19th day of October, 2021.

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11 _____
12 Honorable Steven P. Logan
13 United States District Judge
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