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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Bob Agahi, et al.,

10 Plaintiffs,

11 v.

12 Kevin Richard Kelly, et al.,

13 Defendants.
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No. CV-21-01369-PHX-DLR

ORDER

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16 Before the Court is Defendants' Motion to Exclude Steven Garfinkel's Expert
17 Report and Testimony. (Doc. 109.) The motion is fully briefed (Docs. 129, 135) and, for
18 the reasons set forth herein, is granted in part and denied in part.

19 Plaintiffs allege that Defendants made false and defamatory statements on five
20 websites, namely claiming Plaintiffs have ties to and/or affiliations with organized crime.
21 Plaintiffs bring claims of defamation *per se* and false light invasion of privacy. Defendants
22 have moved, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow*
23 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to exclude the opinions of Plaintiffs' expert,
24 Steven Garfinkel, on two issues: (1) "the duty and care the FBI uses when engaging with
25 the media to avoid besmirching an individual's character on the basis of highly attenuated
26 and meaningless information;" and (2) "why Bob Agahi is not associated with organized
27 crime and would not be someone that any reasonable person in law enforcement would
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1 consider having ‘links’ to organized crime based upon the information provided in the
2 websites published by Kevin R. Kelly.” (Doc. 109 at 3-4.)

3 *Daubert* requires the Court to act as a “gatekeeper,” excluding expert opinions if
4 they do not meet the standards of reliability required under Rule 702. The Court
5 accomplishes this by making a preliminary determination that the proffered evidence is
6 both relevant and reliable. *Daubert*, 509 U. S. at 589-95. “[A] trial court *may* consider
7 one or more of the more specific factors that *Daubert* mentioned when doing so will help
8 determine that testimony’s reliability. But, as the Court stated in *Daubert*, the test of
9 reliability is flexible, and *Daubert*’s list of specific factors neither necessarily nor
10 exclusively applies to all experts or in every case. Rather, the law grants a district court
11 the same broad latitude when it decides *how* to determine reliability as it enjoys in respect
12 to its ultimate reliability determination.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,
13 141-42 (1999) (quotation omitted).

14 Experts may establish the validity of their opinions by explaining how they reached
15 them and pointing to some objective source to show that they have followed the scientific
16 method, as it is practiced by a recognized minority in their field. *Daubert*, 509 U.S. at 593-
17 94. “[T]he evidentiary rationale that underlay the Court’s basic *Daubert* gatekeeping
18 determination [is not] limited to scientific knowledge. *Daubert* pointed out that Federal
19 Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other
20 witnesses on the assumption that the expert’s opinion will have a reliable basis in the
21 knowledge and experience of his discipline. The Rules grant that latitude to all experts,
22 not just to scientific ones.” *Kumho*, 526 U.S. at 148 (1999) (quotations and citation
23 omitted). Where the expert’s opinions are non-scientific but are based on the knowledge
24 and experience of the expert, the *Daubert* factors of peer review, publication, potential
25 error rates, etc. are not applicable. *Hangarter v. Provident Life & Accident Ins. Co.*, 373
26 F.3d 998, 1017 (9th Cir. 2004).

27 The first expert opinion which Defendants seek to exclude is the opinion pertaining
28 to the policies and procedures adopted by the FBI to avoid “besmirching” an individual’s

1 character when engaging with the media. Plaintiffs argue, among other things, that the
2 relevance is established by Defendants' published websites, which reference federal
3 investigators, the FBI, court filings, and "Fed Scrutiny." (Doc. 116 at 75.) Defendants
4 point out that the FBI is mentioned only once on each of the websites, which state: "two
5 other sources on Wall Street say that Supinsky may have been questioned by investigators
6 who are building a case against Phillip Abramo, described by the FBI in court papers as
7 capo in the DeCavalcante crime family." (Doc. 135 at 5.)

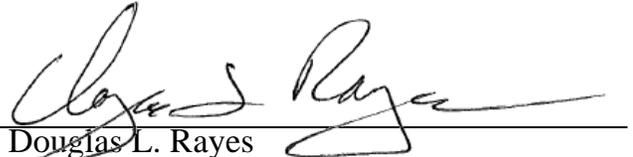
8 Garfinkel's testimony about the FBI's rules and practices to avoid disclosure of
9 information of investigations is relevant to the likelihood of the FBI releasing information
10 of a criminal investigation, of Supinsky having been questioned by the FBI, and whether
11 the FBI was building a case against Philip Abramo. It is relevant to a determination of
12 whether the FBI was the source of the information contained in the article, which is tied to
13 the issues of the substantial truth of the information contained in the websites and whether
14 Defendants acted reasonably in attempting to discover the truth or falsity of the alleged
15 defamatory statements. Garfinkel has experience in the FBI and relies on an FBI manual.
16 Either would provide a reliable basis for his testimony about the FBI's procedures to
17 protect the disclosure of investigations.

18 The second objection is to Garfinkel's opinion that the articles linked to the
19 webpages do not contain evidence of Agahi's association with organized crime. His
20 opinions about what information or lack of information in the articles is evidence of
21 association with organized crime is relevant and may assist the jury. Garfinkel's definition
22 of associate does not warrant exclusion of his opinion, which can be explored in cross
23 examination. However, Garfinkel's opinions that Ahahi is not an organized crime
24 associate and what the average lay person might think are not supported by a reasonable
25 basis and are not helpful to the jury. Those determinations do not require the assistance of
26 an expert. Garfinkel may not testify that Agahi is or is not linked to organized crime or
27 about the understanding or inferences that a lay person might take away from reading the
28 website.

1 **IT IS ORDERED** that Defendants’ Motion to Exclude Steven Garfinkel’s Expert
2 Report and Testimony (Doc. 109) is **GRANTED IN PART** and **DENIED IN PART** as
3 explained herein.

4 Dated this 19th day of September, 2022.

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Douglas L. Rayes
United States District Judge