

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 **IN RE:**

6 **AIR CRASH AT SAN FRANCISCO,
7 CALIFORNIA, ON JULY 6, 2013**

MDL No.: 2497

**PRETRIAL ORDER NO. 5 RE: DEFENDANT'S
MOTION IN LIMINE TO EXCLUDE
SUPPLEMENTAL REPORT AND OPINION
EXPRESSED THEREIN OF GREGORY J.
O'SHANICK, M.D.**

THIS ORDER RELATES TO:

Kyung Rhan Rha v. Asiana Airlines et al.
Case No. 14-CV-01486

13 Having considered the filings to date and the arguments and other submissions at the
14 Pretrial Conference, held on Tuesday, September 12, 2017, and plaintiff's submission of
15 additional information on September 15, 2017, (Dkt. No. 1027, Plaintiff's Submission Re: Dr.
16 Wesley Kong ("Plaintiff's Supplemental Submission")), and for good cause shown, the Court
17 **GRANTS** defendant's motion *in limine* No. 3 to exclude the Supplemental Report and opinion
18 expressed therein of Gregory J. O'Shanick, M.D. Plaintiff is ordered to admonish Dr. O'Shanick
19 of the Court's ruling. Failure to comply with a ruling by the Court may result in sanctions,
20 including without limitation the striking of the witness' entire testimony.

21 Pursuant to Rule 403, the Court "may exclude relevant evidence if its probative value is
22 substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing
23 the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative
24 evidence." Plaintiff produced the expert report of Dr. O'Shanick on April 4, 2017. (Dkt. No. 997
25 at 2.) In his expert report, Dr. O'Shanick opined that plaintiff sustained a traumatic brain injury
26 and listed twenty-five diagnoses for plaintiff, none of which relate to urinary incontinence. Dr.
27 O'Shanick issued a Supplemental Report on June 20, 2017, eleven days after the cut-off for
28 damages expert discovery and seventeen days before the deadline for *Daubert* motions to be filed.

1 Plaintiff failed to disclose the Supplemental Report in a timely manner pursuant to the Court’s
2 pretrial schedule. (*See* Dkt. No. 710 at 2 (setting May 31, 2017 deadline for exchange of damages
3 expert reports and June 9, 2017 cut-off for damages expert discovery.) In his supplemental report,
4 Dr. O’Shanick offered a new opinion regarding plaintiff’s alleged neurogenic bladder condition.
5 (*See* Dkt. No. 863, Exh. A, O’Shanick Supplemental Report.)

6 On September 14, 2017, the Court ordered plaintiff to provide additional information
7 regarding (i) when Dr. Rha’s alleged neurogenic bladder condition first appeared, and (ii) why
8 such condition could not have been diagnosed earlier. (Dkt. No. 1024, Pretrial Order No. 4 at 4,
9 8.) Plaintiff has failed to provide a sufficient answer to either question. The Court understands
10 from plaintiff’s filings (and the lack thereof) that despite the fact that plaintiff saw numerous
11 physicians in the four years following the air crash which occurred at San Francisco International
12 Airport on July 3, 2013, lack of bladder control was never noted as a symptom irrespective of the
13 new diagnosis at issue here.

14 Plaintiff concedes that “[p]laintiff has no explanation as to why Dr. Rha’s medical treaters
15 [sic] did not, or were not able to, diagnose or even test for Dr. Rha’s neurogenic bladder condition,
16 other than the fact that thoracic outlet syndrome (“TOS”) is a difficult condition to detect and
17 diagnose, and that it is a progressive condition, i.e., the symptoms get worse over time.”
18 (Plaintiff’s Supplemental Submission at 2.)

19 By definition, for a condition to “get worse,” it must first exist. Plaintiff does not indicate
20 when Dr. Rha lost control of her bladder, or why counsel waited so long to send her to a doctor
21 that could diagnose the source of this symptom.¹ Accordingly, the Court finds that the opinion
22 does not reference a prior condition, but instead attempts to assert a new condition. The Court
23 further finds that the Supplemental Report and opinion expressed therein of plaintiff’s expert
24 Gregory J. O’Shanick, M.D. are properly excluded under Rule 403 on grounds of unfair prejudice
25 and undue delay. In addition, as noted, the Supplemental Report was not timely under the Court’s

26 _____
27 ¹ Plaintiff provides an academic article which indicates that neurogenic bladder symptoms
28 may be delayed by weeks or even months. Here, however, the diagnosis was made more than *four*
years after the air crash.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

pretrial schedule. Accordingly, the Court **GRANTS** defendant's motion *in limine* No. 3.

IT IS SO ORDERED.

Dated: September 20, 2017



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE