IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	
	*	
v.	*	4:18-CV-00191-ELR
	*	
CHARLES C. ADAMS, M.D., et al.,	*	
	*	
Defendants.	*	
	*	

O R D E R

There are several matters presently pending before the Court. The Court sets forth its reasoning and conclusions below.

I. Background[1]

This case concerns the reimbursement claims submitted by Defendants Charles C. Adams, M.D., and Charles C. Adams, M.D., P.C. (d/b/a Full Circle Medical Center, d/b/a Personal Integrative Medicine PLLC) to Medicare for chelation therapy treatments performed on their patients. See generally Am. Compl. [Doc. 176]. On August 27, 2018, the United States filed this action on behalf of the United States Department of Health and Human Services and the Centers for

[1] For additional factual and procedural background, the Court refers to its Order dated May 16, 2022. [Doc. 148].

Medicare and Medicaid Services ("CMS"). See generally Compl. [Doc. 1]. In the operative Complaint, the United States brings claims for violations of the False Claims Act (the "FCA"), 31 U.S.C. § 3729(a)(1)(A); payment by mistake of fact; and unjust enrichment related to Defendants' reimbursement claims for chelation therapy performed on their patients. See Am Compl. ¶¶ 190–200. The United States claims that Defendants' reimbursement claims for chelation therapy are false and violate Medicare's "reasonable and necessary" requirement because Defendants performed chelation therapy on patients who did not show symptoms of lead poisoning or exhibit extremely elevated blood lead levels. See Plaintiff's Response to Defendants' Statement of Undisputed Material Facts ("Pl.'s Resp. to Defs.' SOMF") ¶¶ 72–74 [Doc. 136] (describing the facts of this case from the United States' perspective); see also 42 U.S.C. § 1395y(a)(1)(A) (laying out Medicare's "reasonable and necessary" requirement). In response, Defendants contend that their use of chelation therapy was both reasonable and necessary to remove excess heavy metals from patients' blood, and, therefore, their claims for reimbursement for these treatments do not violate Medicare's coverage rules or the FCA. See Defendants' Statement of Undisputed Material Facts ("Defs.' SOMF") ¶¶ 10, 12 [Doc. 116].

In the spring of 2021, the Parties identified expert witnesses and provided expert disclosures. [See Docs. 99, 103, 104, 107]. The Parties have since filed their

respective motions to exclude various experts. [See Docs. 155, 156, 157, 158, 159]. Having been fully briefed, these motions are ripe for the Court's review.

II. Legal Standard

Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides:

> 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. Although the rule on its face provides the Court with only limited guidance as to when expert testimony is admissible, the Supreme Court's opinion in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), is instructive. As the Court observed in that opinion, "[u]nlike an ordinary witness, . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." Daubert, 509 U.S. at 592. However, a jury may find it difficult to evaluate an expert's opinion. See id. Trial courts are

therefore tasked with acting as "gatekeepers" to ensure that a proposed expert's testimony is not only relevant, but reliable. Id. To that end, district courts are "charged with screening out experts whose methods are untrustworthy or whose expertise is irrelevant to the issue at hand." Corwin v. Walt Disney Co., 475 F.3d 1239, 1250 (11th Cir. 2007).

In performing this gatekeeping function, a trial court must engage in a "rigorous three-part inquiry" to determine whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998)). Although the three (3) prongs of this analysis inevitably overlap, trial courts must be cautious not to conflate them, and the proponent of expert testimony bears the burden to show that each requirement is met. Id.; Cook ex rel. Est. of Tessier v. Sheriff of Monroe Cnty., 402 F.3d 1092, 1113–14 (11th Cir. 2005).

While many factors bear on the Court's inquiry, there is no definitive checklist. See Maiz v. Virani, 253 F.3d 641, 665 (11th Cir. 2001); see also United States v. Scott, 403 F. App'x 392, 397 (11th Cir. 2010) (finding that Daubert provides only general guidelines and that the trial judge has "considerable leeway in

deciding in a particular case how to go about determining whether particular expert testimony is reliable" (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999))). There are multiple ways, for instance, that an individual may be qualified to give expert testimony. Indeed, the text of Rule 702 makes clear that expert status may be based on "knowledge, skill, experience, training, *or* education." FED. R. EVID. 702 (emphasis added) advisory committee's notes to 2000 amendment ("Nothing in this amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony.").

Likewise, Daubert sets forth a list of "general observations" regarding the reliability of a proposed expert's testimony. Factors to be considered include: (1) whether the expert's theory can be and has been empirically tested; (2) whether the expert's theory has been subjected to peer review and publication; (3) the known or potential error rate of the expert's theory and whether that rate is acceptable; and (4) whether the expert's theory is generally accepted in the scientific community. See Daubert, 509 U.S. at 593–94. Importantly, not every factor "will apply in every case, and in some cases other factors will be equally important in evaluating the reliability of proffered expert opinion." Frazier, 387 F.3d at 1262; accord FED. R. EVID. 702 advisory committee's notes to 2000 amendment. Thus, the trial court has considerable leeway to determine whether proffered expert testimony is reliable. Frazier, 387 F.3d at 1262.

Finally, the district court must assess whether the expert testimony will assist the trier of fact. Put another way, the court must ask whether the expert testimony "concerns matters that are beyond the understanding of the average lay person." Id. If the proffered expert testimony "offers nothing more than what lawyers for the parties can argue in closing arguments," it should not be admitted. Id. at 1262–63.

III. Analysis

A. United States' Motions to Exclude [Docs. 155, 156, 157]

The United States argues that this Court should exclude the testimony of Defendants' experts Hoyt Torras, Dr. Christa Wright, and Dr. Eric Born. [Docs. 155, 156, 157]. Defendants oppose all three (3) of the United States' motions. [Docs. 162, 163, 164]. The Court assesses each of the United States' motions in turn.

1. Hoyt Torras [Doc. 155]

The United States first seeks to exclude the expert testimony of Hoyt Torras by arguing that (1) Mr. Torras' proposed testimony regarding medical coding will not be helpful or relevant and (2) any testimony he plans to offer regarding physician confusion with Medicare's coding requirements is improper. [See Doc. 155 at 3–6]. In response, Defendants contend that Mr. Torras will assist the jury in understanding "how medical coding works, the relevant coding books used by physicians for this task, and the details of specific codes at issue in this suit[.]" [Doc. 164 at 5].

Defendants also maintain that Mr. Torras' opinions regarding physicians' struggles to understand Medicare coding requirements are supported by "40 years' worth of experience in working, studying, publishing, and observing in this area." [Id. at 7].

Upon review, the Court finds that Mr. Torras is sufficiently qualified to offer expert testimony regarding medical coding. The United States does not dispute Mr. Torras' four (4) decades of experience in "medical practice management, coding, regulatory matters, and reimbursement" or his extensive, relevant publications. [See Docs. 115-4 at 25; 164 at 2]. Mr. Torras' proposed testimony also appears reliable and helpful. In his report, Mr. Torras consults the medical coding books "Current Procedural Terminology" published by the American Medical Association and "International Classification of Diseases" published by the World Health Organization, both of which are relevant to the coding issues raised in this case and support the reliability of Mr. Torras' expert opinion. [See Doc. 115-4 at 14–24]. Despite the United States' argument that Mr. Torras' testimony is "simple but unnecessary" because other witnesses can testify to the same information and because the Parties have stipulated to certain facts regarding medical coding, the Court finds that Mr. Torras' testimony may still assist the jury in understanding the medical coding process, which is not commonly known to laypersons. [See Doc. 155 at 3–4]. Indeed, to be admissible, an expert's testimony need only be helpful

and need not be necessary.[2] See FED. R. EVID. 702(a). To this extent, the Court denies the United States' motion to exclude Hoyt Torras. [Doc. 155].

However, to the extent that Defendants intend for Mr. Torras to testify that "[t]here are few, if any, physicians who have the time to attend to patient needs, maintain a medical practice, and deal with the intricacies and vagaries of Medicare and other payer rules," the Court finds that such testimony is improper. [Doc. 115-4 at 13]; see Deposition of Hoyt W. Torras ("Torras Dep.") at 44:8–45:12 [Doc. 142-4]. As Mr. Torras concedes, his opinion that physicians do not understand Medicare coding requirements is neither "based on sufficient facts or data" nor the "product of reliable principles and methods." FED. R. EVID. 702; see Torras Dep. at 45:9–12 ("I mean, I can't put a footnote and cite somebody else's opinion on this. It's my opinion from being in this business for 40 years."); 46:18 ("No, there's no survey."). Such a speculative, anecdotal observation that admittedly lacks support from empirical testing or widespread acceptance in the scientific community "offers nothing more than what lawyers for the parties can argue in closing arguments[.]" Frazier, 387 F.3d at 1262–63; see Daubert, 509 U.S. at 593–94. Therefore, the Court finds it appropriate to limit Mr. Torras' expert testimony to the medical coding

[2] To the extent the United States argues that Mr. Torras' testimony will only serve to highlight that the medical coding books he reviewed do not "include insurance-coverage information," which the United States contends is "obvious," and that those books are not "designed to cover the topic of insurance coverage," the Court finds that this concern may be resolved upon cross-examination. [See Doc. 155 at 4].

process. Accordingly, the Court grants in part and denies in part the United States' motion to exclude Mr. Torras as an expert witness. [Doc. 155].

2. Dr. Christa Wright [Doc. 156]

Next, the United States challenges the relevancy of the testimony of Defendants' expert Dr. Wright regarding the effects of low-level lead exposure from environmental sources. [See Doc. 156 at 4, 8]. In response, Defendants contend that Dr. Wright's testimony is relevant because Defendant Adams relies on "public health expert opinions regarding the toxic effects of lead in the environment and what complications those present in [his] patient populations[.]" [See Doc. 163 at 7].

Upon review, the Court finds that the United States fails to demonstrate why the Court should exclude Dr. Wright's expert testimony. Dr. Wright is an Assistant Professor in the Division of Environmental Health at Georgia State University, and the United States does not challenge her qualifications as an expert. Likewise, the United States does not dispute that Dr. Wright's testimony is reliable. Instead, the United States speculates that Dr. Wright might testify that Medicare should cover chelation therapy because "low levels of lead exposure are bad[,] worse than is currently recognized" or that Defendant Adams acted reasonably in using that treatment "because he was aware of the research suggesting that even low levels are

bad for health[.]" [See Doc. 156 at 4]. The United States argues that such testimony would be impermissible or irrelevant. [See id.]

However, the Court finds that Dr. Wright's testimony may be relevant and helpful to the trier of fact. Defendants intend for Dr. Wright to "testify regarding the sources and toxic effects of lead in the environment," as well as to her opinion that "there is no safe level of lead and any amount of lead exposure can result in" adverse health outcomes (in support of which Dr. Wright cites literature by the Center for Disease Control and the World Health Organization). [See Docs. 142-2 at 27; 163 at 2]. Given that this case concerns the reasonableness and necessity of Defendants' use of chelation therapy to treat low levels of lead toxicity in patients, Dr. Wright's testimony may provide relevant context regarding low level lead exposure from environmental sources and the resultant effects on the human body. Although the United States correctly points out that "Dr. Wright is not a medical doctor" and that she cannot and does not "offer any opinion on whether lead exposure requires medical intervention, what types of intervention are appropriate, or when those interventions should be performed," the fact that an expert cannot testify about *every* issue at trial is no basis for exclusion, and Defendants do not propose that Dr. Wright testify about any topic outside of her area of expertise. [See Docs. 156 at 2; 163 at 2, 4–6]. At minimum, the Court finds Dr. Wright may provide helpful and relevant background information not generally known to laypersons.

See Fair Fight Action v. Raffensperger, Civil Action No. 1:18-CV-5391-SCJ, 2020 WL 13561791, at *6 (N.D. Ga. Dec. 4, 2020) (concluding an expert was (1) relevant because her opinions had "a valid connection to the disputed facts" and she could provide information "about the facts available to [the defendants] and the arena in which they made their decisions" and (2) "helpful to the trier of fact" because she could "prove at least a portion of the proponent's case" by providing "context as to the backdrop and legitimacy of [the topic at issue]"). Therefore, the Court denies the United States' motion to exclude the expert testimony of Dr. Wright. [Doc. 156].

3. Dr. Eric Born [Doc. 157]

Finally, the United States moves to exclude the testimony of Defendants' expert Dr. Eric Born. [Doc. 157]. The United States' primary assertion is that Dr. Born's "opinion is not the product of a reliable scientific methodology." [Id. at 1]. Specifically, the United States contends that Dr. Born's conclusions are "rooted in [his] subjective trust of Dr. Adams' clinical decision-making" and that his report is "filled with *ipse dixit* statements of his own beliefs, which are unsupported" by sufficient facts or data, reliable procedures, or a scientifically valid methodology. [Id. at 7–10]. In response, Defendants argue that Dr. Born's testimony is reliable because his opinion is based on "reviewing patient charts, reviewing literature, and researching references" rather than his "subjective ideas about Dr. Adams[.]" [Doc. 162 at 7–8]. Upon review, the Court finds that Defendants fail to carry their burden

to establish that Dr. Born's opinion is the product of reliable principles and methods, and therefore, the Court excludes his testimony. See Frazier, 387 F.3d at 1260 ("The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion[.]").

In his expert report and deposition, Dr. Born discusses the process (to the extent that there is one) a physician should use for deciding whether to perform chelation therapy. [See generally Doc. 117-8]; Deposition of Dr. Eric Born ("Born Dep.") [Doc. 142-1]. Dr. Born testifies that a number of symptoms such as "fatigue, decreased memory, neuropathy, atherosclerotic vascular disease, and hypertension" supposedly indicate a patient suffers from heavy metal toxicity, including lead poisoning. [Doc. 117-8 at 3]. Where a patient exhibits these symptoms, Dr. Born opines that a lab test (preferably a provoked urine test) must be performed to determine "the patient's total body burden of potential heavy metal toxicities in their system." [Id.]; see Born Dep. at 54:7–55:3. According to Dr. Born, however, once a doctor receives these test results, there are few medical standards or guiding methodology to then determine if chelation therapy is the appropriate treatment. See Born Dep. at 105:5–106:3. In fact, Dr. Born testifies that a physician should allow a patient to elect to receive chelation therapy regardless of the level of lead (or other heavy metals) detected in the patient's blood. See Born Dep. at 51:1–4, 52:21–53:1, 58:15–59:18; [see also Doc. 117-8 at 2]. Although Dr. Born acknowledges that other

metal toxicity treatments exist, many of which (including chelation therapy) are only recommended by medical organizations when certain levels of metal toxicity are detected, he insists that "letting patients choose whether they want to be treated or not makes more sense, rather than relying on an arbitrary number that a committee came up with that continues to change." [See Doc. 117-8 at 2]; see also Born Dep. at 51:7–52:9, 53:21–54:6, 55:4–56:6, 58:15–59:18, 64:11–65:20, 100:10–16, 103:19–105:21. Otherwise, Dr. Born only provides that a patient's medical history and a physical exam can be helpful in determining if chelation therapy is appropriate, and that all doctors "have their own style of practice" in making that determination. Born Dep. at 59:3–5, 67:4–5, 72:6–73:25.

Upon review, the Court does not find any reliable procedure or practice by which Dr. Born arrives at his opinions regarding the reasonableness or necessity of chelation therapy. Notably, Dr. Born claims that, in his opinion, *no* standard of care exists to guide when a doctor should perform chelation therapy. Id. at 105:5–10. Though Dr. Born does not clearly state his conclusions, his expert report and deposition testimony state that his practice is to recommend and allow patients to choose chelation therapy in response to *any* amount of metal toxicity following a urine test. See id. at 49:21–50:6; [Doc. 117-8 at 2]. However, beyond general, vague statements regarding metal toxicity at abstract levels, Dr. Born provides no specific

or direct facts or data in support of such a practice.[3] See, e.g., Born Dep. at 106:5–107:9 (Dr. Born admitting that he cannot recall a scholarly article that recommends using chelation therapy on patients with blood lead levels of less than ten (10) micrograms per deciliter); [see also generally Doc. 117-8 at 2]. Considering the dearth of support for Dr. Born's proffered opinions, along with his acknowledgement that several medical organizations' guidance contradict his own practices, the Court cannot conclude that Dr. Born's methods are reliable or scientifically valid. See Born Dep. at 51:7–52:9, 58:15–59:18, 103:19–105:21.

Indeed, Dr. Born's expert report generally fails to provide any reliable methodology as the basis for his opinions. Dr. Born's expert report is thirteen (13) pages long, out of which a scant four (4) pages comprise his substantive research and findings. [See generally Doc. 117-8]. The first two (2) paragraphs are entirely *ipse dixit* statements for which Dr. Born provides no citations. [Id. at 1–2]. The remainder of Dr. Born's report contains ten (10) citations total, almost all of which merely support general propositions that doctors should test for metal toxicity more

[3] Dr. Born only provides one quote ("there is no safe level of lead") from a journal article titled "Exposure to Lead in Children—How Low is Low Enough?" to rationalize allowing patients to "choose whether they want to be treated" regardless of their blood lead levels. [Doc. 117-8 at 2]. Otherwise, the citations in his brief expert report only support the proposition that some unknown level of "heavy metal toxins" is harmful and that urine-based testing is the best way to measure metal levels. [Id.] Crucially, Dr. Born never clarifies when, why, or how he believes chelation therapy is an appropriate treatment. Indeed, Dr. Born makes no attempt to connect his sweeping generalizations regarding metal toxicity to the merits of chelation therapy or the reasonableness of a doctor's decision to use it. [Id.]

often, that these tests should be urine-based, and that some unspecified amount of metal in humans can lead to adverse health consequences.[4] [See id. at 2]. Dr. Born's report focuses on these broad topics without any reference to chelation therapy outside of a brief discussion of Defendants' patient files. [See id.] Thus, Dr. Born fails to establish how the medical literature he cites in his report support his opinions as to when, why, or how chelation therapy is an appropriate treatment or that Defendants' actions in this case were reasonable or necessary.[5] Instead, Dr. Born's report only supports the undisputed proposition that metal toxicity—at *some* level—is dangerous. In sum, Dr. Born fails to provide any relevant testing, data, studies, or scholarly articles that specifically support his positions that (1) metal toxicity at any level must be treated and (2) chelation therapy is the appropriate treatment. [See id.]

Dr. Born's opinions based on his review of Defendants' patient files are similarly unhelpful and unsupported because he states his opinions with little to no explanation. In evaluating the patient files, Dr. Born concludes that the patients "had elevated levels of heavy metals," yet he critically omits what "elevated" means, why the levels of metal in these patients required treatment, if the levels in these patients were comparable to the (unspecified) levels of metal toxicity that cause the health

[4] Appendix B to Dr. Born's expert report lists another five (5) scholarly sources "provided" to him to prepare his report. [Doc. 117-8 at 8]. However, Dr. Born admits he did not "look[] much at those articles." Born Dep. at 49:10–20.

[5] If these sources do support his specific conclusions rather than just the general propositions he cites, Dr. Born makes little effort to make such a crucial fact clear.

issues he previously discusses in his report, or why chelation therapy was an appropriate treatment in response. [See id. at 2–3]. Neither does Dr. Born apply any standard or methodology in arriving at his conclusion that chelation therapy was appropriate in the cases he reviewed. At best, Dr. Born appears to conclude that Defendants' use of chelation therapy was reasonable because metal toxicity tests conducted on patients who received the therapy revealed some unspecified amounts of metal in those patients and because Defendants use patient questionnaires and "comprehensive consent forms," none of which he discusses in any detail. [See id. at 3]. However, Dr. Born does not explain why these ambiguous factors justify the use of chelation therapy in this case (or even in general). Dr. Born omits these crucial details and skips to the unsupported opinion that a patient might need additional chelation treatments following the first to improve their metal levels based on "the number of different metals, which chelator was used and how often, and the individual's ability to detoxify," again failing to explain in any detail how he arrives at the conclusion that Defendants' use of chelation therapy was reasonable or necessary in the first place. [Id.]

In sum, Dr. Born's conclusion that Defendants' use of chelation therapy on patients with "elevated" metal levels was reasonable relies solely on abstract generalizations about the dangers of metal toxicity (at some unspecified level) and his belief that Defendant Adams "has the patient's best interest in his clinical

decisions." See Born Dep. at 68:21–69:8; [see also generally id.] However, the dispute here is not whether metal toxicity at *some* level can be harmful, but, rather, at *what* level metal toxicity justifies chelation therapy. To the extent that Dr. Born opines that any level of metal toxicity justifies the use of chelation therapy, he fails to provide reliable principles or sufficient facts and data to clearly support his opinion. And the Court cannot simply take Dr. Born's "word for it." Frazier, 387 F.3d at 1261.

Moreover, even if some reliable principle or methodology could be gleaned from his report, the Court finds that Dr. Born cannot accurately apply it to this case. For instance, Dr. Born claims that testing urine, blood, or hair is "necessary" to confirm metal toxicity (although how these results are interpreted or when they support the use of chelation therapy remains unclear). Born Dep. 54:11–55:3. However, when asked if it would be appropriate for Defendants to use chelation therapy without performing these tests or before obtaining the test results, Dr. Born testified that using chelation therapy would still be appropriate "because [he] trusts Dr. Adams has the patient's best interest in his clinical decisions." Id. at 68:21–69:8; 69:24–25 ("I believe if Dr. Adams thought it was appropriate, it was."). Dr. Born's self-contradicting statements that urine, blood, or hair testing is "necessary" to determine the appropriateness of chelation therapy—but not if Defendant Adams is the physician making that determination—further bolster this Court's finding that

his opinions are not the "product of reliable principles and methods" and that he is not capable of "reliably appl[ying] th[ose] principles and methods to the facts of [this] case." FED. R. EVID. 702(c)–(d).

In sum, the Court finds Dr. Born's conclusions in this case are not dependable because he fails to demonstrate how his opinions are based on sufficient facts or data, the product of reliable principles and methods, or that he could accurately apply either to the case at hand. Therefore, the Court grants the United States' motion to exclude Dr. Born's expert testimony. [Doc. 157].

B. Defendants' Motions to Exclude [Docs. 158, 159]

Defendants argue that this Court should exclude the expert testimonies of Drs. Leland Garrett and Travis D. Olives. [Docs. 158, 159]. The United States opposes both motions. [Docs. 160, 161]. The Court assesses each of Defendants' motions in turn.

1. Dr. Leland Garrett [Doc. 158]

Defendants first seek to exclude the expert testimony of Dr. Leland Garrett for two (2) reasons: (1) Dr. Garrett was "improperly designated as an expert witness who is not required to provide a report under Rule 26(a)(2)(C), when he should have provided a written report under subsection (B)"; and (2) Dr. Garrett's testimony is irrelevant because he works for Palmetto, the current Medicare Administrative Contractor ("MAC"), whereas the conduct at issue in this case occurred under the

previous MAC, Cahaba. [Doc. 158 at 6, 13]. The Court addresses each argument in turn.

a. Dr. Garrett's designation as a Rule 26(a)(2)(C) expert

Federal Rule of Civil Procedure 26(a)(2) generally governs the required disclosures of expert witnesses. See FED. R. CIV. P. 26(a)(2). Subparagraphs (B) and (C) differentiate between experts who must provide a written report as a part of their required disclosures and those who do not. Id. 26(a)(2)(B)–(C). If the expert 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," a written report must be provided. Id. 26(a)(2)(B). Any expert who falls outside of Rule 26(a)(2)(B) is classified pursuant to Rule 26(a)(2)(C), and the Party offering his or her testimony need only disclose a summary of the subject matter, facts, and opinions about which the proffered expert intends to testify and need not provide a full written report from that expert.[6] Id. 26(a)(2)(C). Importantly, "[a] witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rules 702, 703, or 705" as a hybrid witness pursuant to Rule 26(a)(2)(C). Id. advisory committee's notes to 2010 amendment; see SB Holdings I, LLC v. Indian Harbor

[6] The Rule 26(a)(2)(C) category of experts was added in 2010 "to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions." See FED. R. CIV. P. 26(a)(2)(C) advisory committee's notes to 2010 amendment.

Ins. Co., No. 20-14729, 2021 WL 3825166, at *3 n.6 (11th Cir. Aug. 27, 2021) (noting that a "hybrid witness refers to certain types of individuals, such as treating physicians, who are exempt from the disclosure requirements for retained experts"). Examples of experts who fall outside of Rule 26(a)(2)(B) are "treating physicians" and "other healthcare providers." See FED. R. CIV. P. 26(a)(2)(B) advisory committee's notes to 1993 amendment; id. 26(a)(2)(C) advisory committee's notes to 2010 amendment.

Defendants argue that Dr. Garrett falls within Rule 26(a)(2)(B), but the United States failed to disclose his required written report, and, thus, this Could should exclude his expert testimony. [See Doc. 158 at 6]. In support, Defendants assert that Rule 26(a)(2)(C) encompasses only those experts who are a "percipient witness" and whose testimony is "based on firsthand experience and personalized knowledge[.]" [Id. at 6–9]. Meanwhile, the United States argues that Dr. Garrett does not regularly sit for depositions or testify as an expert and was not "employed or specially retained" within the meaning of Rule 26(a)(2)(B) because he is not "a professional expert witness[] by trade[.]" [Doc. 160 at 7–8]. According to the United States, because Dr. Garrett is not an "expert by trade," he was properly classified as a Rule 26(a)(2)(C) expert and did not have to provide a written report. [Id. at 10].

"In order to give the phrase 'retained or specially employed' any real meaning, a court must acknowledge the difference between a percipient witness who happens to be an expert and an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony."[7] Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 6 (1st Cir. 2011). In Prieto v. Malgor, 361 F.3d 1313 (11th Cir. 2004), the Eleventh Circuit recognized this distinction in overruling a district court's admission of a use of force expert's testimony where the expert did not provide a Rule 26(a)(2)(B) written report. In that case, the court rejected the county's argument that the expert was a hybrid witness and an employee exempt from the Rule 26(a)(2)(B) requirements. See Prieto, 361 F.3d at 1318. Rather than create a "blanket exception for all employee expert testimony," the court concluded that "[b]ecause [the expert] had no direct, personal knowledge of any of [the facts of the case]" and "had no connection to the specific events underlying th[e] case apart from his preparation for th[e] trial," "his role was simply not analogous to that of a treating physician, the example offered by the Advisory Committee of an employee exempt from the written report requirement." Id. at 1319. Because the proposed expert "functioned exactly as an expert witness normally does, providing

[7] It does not appear from Dr. Garrett's deposition that his current duties include regularly providing expert testimony. See Deposition of Dr. Leland Garrett ("Garrett Dep.") at 6:8–21 [Doc. 158-3]; [see also Doc. 160 at 7–8]. Therefore, the Court declines to further discuss that portion of Rule 26(a)(2)(B).

a technical evaluation of evidence he had reviewed in preparation for trial," the court held that he was required to submit a Rule 26(a)(2)(B) written report. Id.

In SB Holdings I, LLC, the Eleventh Circuit similarly acknowledged the distinction between "retained or specially employed" experts who must disclose a written report pursuant to Rule 26(a)(2)(B) and all other experts who may testify as hybrid witnesses without a written report (and who after 2010 fall within the more limited disclosure requirements of Rule 26(a)(2)(C)). 2021 WL 3825166, at *3. The court noted that a "hybrid witness refers to certain types of individuals, such as treating physicians, who are exempt from the disclosure requirements for retained experts because their testimony primarily concerns personal observations made during the course of rendering their professional services." Id. at *3 n.6 (citing Downey, 633 F.3d at 7). Other judges within this district have made a similar distinction. See L.A. v. Riverside Mil. Acad. Found., Inc., Civil Action No. 2:18-CV-00215-RWS, 2021 WL 8998914, at *4 (N.D. Ga. Sept. 30, 2021) (holding that, because an expert had "enough first hand knowledge and expertise to qualify as a hybrid witness[,]" he did not need to file a Rule 26(a)(2)(B) report to testify); see also Bruce v. Classic Carrier, Inc., Civil Action No. 1:11-CV-01472-JEC-JCF, 2012 WL 12835705, at *5 (N.D. Ga. Oct. 31, 2012) (holding that where an expert "intend[s] to offer testimony based on hypotheticals, or intend[s] to rely on facts or data outside the treatment of the [p]laintiff," a Rule 26(a)(2)(B) report is necessary,

but "[i]f, on the other hand, any treating physicians intend only to testify based on their own experience treating [p]laintiff, then for any such witness a disclosure in compliance with Rule 26(a)(2)(C) would be sufficient." (internal citations omitted)).

In Downey, a case cited favorably by the Eleventh Circuit in SB Holdings I, LLC, the First Circuit considered whether a bug extermination expert should be required to submit a written report prior to testifying about the cause of a bedbug infestation he observed. 633 F.3d at 4–5. The First Circuit observed that an expert is "retained or specially employed" where he or she is "recruited" "without prior knowledge of the facts giving rise to the litigation." Id. at 6. On the other hand, an expert like a treating physician whose testimony "arises . . . from his ground-level involvement in the events giving rise to the litigation" need not disclose a written report because his expert opinion "is premised on personal knowledge." Id. According to the First Circuit, where an expert's testimony arises from "his enlistment as an expert" or "the expert comes to the case as a stranger and draws their opinion from facts supplied by others" rather than as a "part of the ongoing sequence of events," the expert properly falls within Rule 26(a)(2)(B) and must comply with its more onerous disclosure requirements.[8] Id. In sum, there is a

[8] The Second Circuit recognizes a similar analysis. See Caruso v. Bon Secours Charity Health Sys., Inc., 703 F. App'x 31, 33 (2d Cir. 2017) ("The report requirement in Rule 26(a)(2)(B) does not turn solely on an expert's compensation or lack thereof. Rather, the more relevant distinction is between an expert who happened to have personal involvement with the events giving rise to litigation and an expert whose only involvement consists of aiding the already-initiated litigation.").

"difference between an opinion formulated by an on-the-scene expert during treatment (e.g. by a treating physician) and one formulated by an expert hired in anticipation of testimony[.]" Id. at 7. The First Circuit went on to permit the bug extermination expert to testify as to both his personal observations and causation without disclosing a Rule 26(a)(2)(B) written report because "he formed his opinion about causation . . . based on his personal knowledge and information gleaned in the course of his initial inspection and related efforts to remediate the problem." Id. at 8.

And though many of the cases analyzing whether an expert falls within Rule 26(a)(2)(B) concern treating physicians—the advisory committee's prime example of an expert who typically does not need to disclose a written report and instead falls within Rule 26(a)(2)(C)—the "analogy is persuasive" in considering whether other experts must file a written report. Downey, 633 F.3d at 6; compare Kondragunta v. Ace Doran Hauling & Rigging Co., Civil Action No. 1:11-cv-01094-JEC, 2013 WL 1189493, at *12 (N.D. Ga. Mar. 21, 2013) ("If a physician's opinion regarding causation or any other matter was formed and based on observations made during the course of treatment then no Subsection B report is required . . . albeit the Subsection C report . . . will be required."), with In Re Denture Cream Prods. Liab. Litig., No. 09-2051-MD, 2012 WL 5199597, at *4 (S.D. Fla. Oct. 22, 2012)

("[T]reating physicians who give expert testimony beyond the scope of the treatment are experts from whom full Rule 26(a)(2)(B) reports are required.").

The case on which Defendants rely pronounces similar conclusions. [See Doc. 158 at 8–9]. In Architects Collective v. Pucciano & Eng., Inc., the court held that the proposed expert witness was properly classified under Rule 26(a)(2)(C), stating (in relevant part):

> [the expert] was not "retained or specially employed to provide expert testimony in the case," nor does his position as the principal of Architects Collective "regularly involve giving expert testimony." Rather, [the expert] is more akin to a "percipient witness" under Rule 26(a)(2)(C) or a lay opinion witness under Federal Rule of Evidence 701 because he has firsthand knowledge of the facts of the case and his testimony regarding the similarity of the plans is based on his specialized and particularized knowledge garnered from his years of experience as an architect designing his own architectural plans.

247 F. Supp. 3d 1322, 1333 (N.D. Ga. 2017) (citing Downey, 633 F.3d at 6). The court further elaborated on this conclusion, stating:

> [the expert] is a proper Rule 26(a)(2)(C) witness because his opinion arises "from his ground-level involvement in the events giving rise to the litigation," and not because of his "enlistment" as an expert. See Downey, 633 F.3d at 6. His testimony is based on his direct personal knowledge and familiarity with his own copyrighted plans and [d]efendant's plans. And his involvement in the events giving rise to the litigation—his design of the plans at issue and the discovery of the alleged infringement by [d]efendant—renders [the expert] a percipient witness. As a result, he is not required to submit a Rule 26 expert report and his disclosures comply with Rule 26(a)(2)(C)(ii)'s requirement that he provide a summary of the facts and the opinions on which he intended to testify.

Id. at 1334. In sum, the caselaw interpreting Rules 26(a)(2)(B) and (C) and accompanying advisory committee notes support the conclusion that an expert witness who is recruited to testify "without prior knowledge of the facts giving rise to the litigation" and without "connection to the specific events underlying th[e] case apart from [their] preparation for th[e] trial" is not a Rule 26(a)(2)(C) hybrid witness and instead falls within the meaning of "retained or specially employed" pursuant to Rule 26(a)(2)(B) and must disclose a written report. See Prieto, 633 F.3d at 1319; Downey, 633 F.3d at 6; see also SB Holdings I, LLC, 2021 WL 3825166, at *3 n.6.

Here, Dr. Garrett falls within the ambit of Rule 26(a)(2)(B) and therefore was required to disclose a written expert report pursuant to that Rule rather than the more limited disclosures he produced pursuant to Rule 26(a)(2)(C). [See Doc. 158-1]. Dr. Garrett's proposed expert testimony includes analyzing Defendants' chelation therapy reimbursement claims using his knowledge of Medicare's rules and regulations. [See Doc. 160 at 4]. However, his involvement in this case stems from his enlistment as an expert rather than any direct personal knowledge, involvement, or familiarity with the specific facts. See, e.g., Deposition of Dr. Leland Garrett ("Garrett Dep.") at 25:3–5, 99:4–7 [Doc. 158-3]. Unlike a treating physician whose testimony arises from "ground-level involvement in the events giving rise to the litigation," Dr. Garrett's knowledge of this case arises only from "facts supplied by others." Downey, 633 F.3d at 6; see Garrett Dep. at 16:18–18:1 (discussing the

number of times he spoke with the United States' attorneys regarding this case and his deposition). Similar to the use of force expert in Prieto, Dr. Garrett has "no connection to the specific events underlying this case apart from his preparation for this trial." 361 F.3d at 1318. Indeed, the United States does not contest that Dr. Garrett lacks personal knowledge of Defendants' actions or that his involvement in this case is solely due to his recruitment as a CMS expert. Instead, the United States contends that only "[t]hose witnesses who are professional expert witnesses by trade must provide more information" pursuant to Rule 26(a)(2)(B). [See Doc. 260 at 7]. As discussed above, that contention is unsupported and belied by caselaw examining the distinctions between Rule 26(a)(2)(B) and (a)(2)(C) witnesses.[9] [See Doc. 260 at 7]. Therefore, Dr. Garrett was required to comply with the disclosure requirements of Rule 26(a)(2)(B). Because Dr. Garrett failed to comply with these disclosure requirements, the Court next turns to whether exclusion is the proper remedy.

[9] The Court is not persuaded by the United States' argument that the court in Architects Collective only discussed a percipient witness and a Rule 701 lay opinion witness as additional grounds that supported qualifying the expert under Rule 26(a)(2)(C). [See Doc. 160 at 9–10]. Indeed, the fact that Rule 26(a)(2)(C) experts are permitted to testify regarding both expert and factual matters as hybrid witnesses supports a comparison to percipient witnesses and Rule 701 fact witnesses who may testify only to non-scientific or non-technical matters "rationally based on the witness's perception[.]" FED. R. EVID. 701(a); see FED. R. CIV. P. 26(a)(2)(C) advisory committee's notes to 2010 amendment.

b. Exclusion analysis

Pursuant to Federal Rule of Civil Procedure 37(c)(1), a court may exclude expert testimony where "a party fails to provide information or identify a witness as required by Rule 26(a)." However, exclusion is not warranted where the failure to comply with Rule 26(a) was "substantially justified or harmless." FED. R. CIV. P. 37(c)(1). This district considers five (5) factors to determine if a failure to comply with Rule 26(a) is harmless:

> (1) the surprise to the party against whom the evidence would be offered;
>
> (2) the ability of that party to cure the surprise;
>
> (3) the extent to which allowing the evidence would disrupt the trial;
>
> (4) the importance of the evidence; and
>
> (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Kondragunta, 2013 WL 1189494, at *7.

Applying the above factors here, the Court finds that the United States' failure to properly designate Dr. Garrett was harmless. Defendants primarily claim "surprise" based on the "stack of materials" that Dr. Garrett brought to his deposition that Defendants' counsel was unable to review beforehand. [See Doc. 158 at 11]. As an initial matter, Defendants cannot claim that Dr. Garrett's proposed testimony regarding Medicare billing and how Defendants' claims would have been analyzed

is surprising. Defendants knew in advance of Dr. Garrett's deposition that he would testify on these subjects because the United States identified him as an expert witness on these subjects six (6) months before that time and Defendants agreed that Dr. Garrett's deposition would satisfy the United States' obligation to disclose a Rule 30(b)(6) representative of CMS on these subjects. [See Docs. 158-2; 160 at 4–5]; Garrett Dep. at 15:19–16:12.

The materials Dr. Garrett brought to his deposition provide no basis for a finding of surprise, either. Defendants' counsel asked Dr. Garrett about these materials, and Dr. Garrett responded that his testimony was not based on the materials at all; rather, the materials were there "to refresh [Dr. Garrett's] memory about lead[,]" if needed, so that Dr. Garrett could effectively testify about "the Medicare functions concerning claim management and how those are handled," subjects within his expertise irrespective of the materials. See Garrett Dep. at 10:1–11. Additionally, Dr. Garrett disclosed the materials he brought with him when asked, id. at 8:13–9:20, and Defendants did not request to depose Dr. Garrett again prior to the close of discovery after having the opportunity to review these materials.

Second, Defendants "had the ability to complain, and thereby cure [any claimed] surprise, prior to the expiration of expert discovery, by advising [the United States] that [its] disclosures did not comply with [Rule 26(a)(2)(B)] and by requesting more specific disclosures." Kondragunta, 2013 WL 1189493 at *8.

Though Defendants claim to have raised Dr. Garrett's incorrect expert classification during his deposition, they failed to take action in response to the purported misclassification afterwards. They do not appear to have raised the issue further with the United States, nor did they seek the Court's intervention to correct the purported misclassification of Dr. Garrett. See Kondragunta, 2013 WL 1189493 at *8 (declining to exclude an expert where the "[d]efendant did not [raise the expert's classification earlier], but instead laid in wait, hoping that plaintiff's non-compliance would doom his ability to offer any expert testimony.").

Finally, Dr. Garrett's testimony is critically important to the United States' case. Defendants admitted as much in their prior motion for summary judgment in which they claimed that "Dr. Garrett is the only witness" who can testify as to whether the claims Defendants submitted are reimbursable, and that the United States could not establish materiality, a requisite element of proving a false claim, without Dr. Garrett's testimony. [See Doc. 117 at 24].

Because a majority of the five (5) factors weigh in favor of a finding that the United States' failure to disclose Dr. Garrett as a Rule 26(a)(2)(B) expert was harmless, the Court declines to discuss the remaining two (2) factors and will not exclude his testimony even though Dr. Garrett did not produce the required disclosures pursuant to Rule 26(a)(2)(B). See FED. R. CIV. P. 37(c)(1). Instead, to cure this failure, the Court directs Dr. Garrett to, with twenty-one (21) days from the

date of this order, provide to Defendants a written expert report that complies with the requirements set out in Rule 26(a)(2)(B)(i)–(vi). Defendants will be permitted twenty-one (21) days from the date they receive the expert report to re-depose Dr. Garrett should they find that such a deposition is necessary.

c. Relevance of Dr. Garrett's testimony

Finally, Defendants argue that Dr. Garrett's testimony should be excluded as irrelevant because he was never an employee of Cahaba, the MAC that oversaw the Georgia Medicare region from 2008 to 2015 when Defendants' conduct occurred. [See Doc. 158 at 13]. However, Dr. Garrett was designated by the United States as an expert and Rule 30(b)(6) witness in this case in response to Defendants' request that the United States produce a CMS representative. [See Doc. 158-2]. Dr. Garrett is the Chief Medical Officer and contract Medical Director for Palmetto, the current MAC overseeing the Georgia Medicare region. [See Doc. 160 at 1]. According to the United States:

> The MACs are responsible for knowing and enforcing Medicare's coverage rules, which are the same across the nation. The vast majority of claims are processed without human review, but individual claims can be hand reviewed as part of an audit or appeal. When this occurs, the MACs employ Medical Directors who make the final call as to whether a particular claim should be paid.

[Id. at 3]. Based on his experience in this position with Palmetto, Dr. Garrett intends to testify regarding "how Medicare understood and enforced its rules during the relevant timeframe." [See Docs. 158-1 at 1; 160 at 14]. Contrary to Defendants'

contention, although the MAC overseeing Georgia Medicare claims changed from Cahaba to Palmetto after Defendants' conduct occurred, the relevant rules and requirements regarding Medicare coding and billing that all MACs enforce did not change. [See Doc. 160 at 3–4]. Thus, given his position and expertise regarding Medicare's rules, the Court finds that Dr. Garrett's testimony as to how these rules are understood and applied to Defendants' reimbursement claims is appropriate and relevant, regardless of the fact that he did not work for the MAC that would have reviewed Defendants' claims for reimbursement had those claims been flagged for an audit at the time they were made. Indeed, the United States correctly notes that "Dr. Garrett is not testifying as a representative of Palmetto; he is testifying as an expert witness who gained his experience while working at Palmetto." [Id. at 13]. Similarly, during his Rule 30(b)(6) deposition, Dr. Garrett testified as a representative of CMS, not as a representative of Palmetto. [See Docs. 158-2; 160 at 5 n.2].

Accordingly, the Court finds that Dr. Garrett's proposed expert testimony is relevant because he is competent to testify as an expert regarding Medicare's analysis and enforcement of its coding and billing rules. [See Doc. 160 at 4–5]. The Court denies Defendants' motion to exclude Dr. Garrett but directs him to file a written expert report pursuant to Rule 26(a)(2)(B) within twenty-one (21) days from

the date of this order, at which time Defendants will have twenty-one (21) days from the date they receive his report to re-depose him. [Doc. 158].

2. Dr. Travis D. Olives [Doc. 159]

Second, Defendants argue that this Court should not permit Dr. Travis D. Olives to testify as an expert witness in this case regarding lead poisoning, chelation therapy, or the relevant standard of care for either because he "is unqualified" and "his opinion is unreliable, as he ignored certain literature on [the topics involved in this case] in reaching the conclusions in his report." [Doc. 159 at 3, 6]. Defendants contend that Dr. Olives is unqualified to opine on chelation therapy or Defendants' actions because he "was not even a practicing physician at the time the conduct in this case is alleged to have occurred" and "he has no experience administering chelation therapy[.]" [Id. at 9]. In response, the United States argues that Dr. Olives—"a board-certified medical toxicologist"—is qualified to testify in regard to lead poisoning and the need to administer chelation therapy based on his education and experience. [Doc. 161 at 5–6].

Upon review, the Court finds that Dr. Olives is qualified to give expert testimony regarding metal poisoning and its diagnosis, chelation therapy, and the

relevant medical standards for both.[10] Dr. Olives holds a Medical Doctorate; completed his fellowship in medical toxicology; is board certified in emergency medicine, internal medicine, and medical toxicology; and works as an Assistant Professor of Emergency Medicine at the University of Minnesota Medical School as well as an Associate Medical Director of a Regional Poison Control System. [See Doc. 159-4 at 1]; Deposition of Travis D. Olives, M.D. ("Olives Dep.") at 21:22–22:13 [Doc. 159-3]. Despite Defendants' protestations to the contrary, the fact that Dr. Olives treats lead poisoning "incredibly infrequently" and has never personally administered chelation therapy is neither surprising nor disqualifying: poisoning with any type of metal is "very rare" and demanding that the Court only allow experts with significant lead poisoning treatment experience is unreasonable. See Olives Dep. at 45:20–46:23; 102:3–4 ("I am called upon to evaluate for the need for chelation regularly."); 104:7–105:4 (discussing personal involvement in deciding to administer "vanishingly rare" chelation therapies). Thus, the Court finds it sufficient that Dr. Olives possesses qualifications and experience in metal poisoning and

[10] Defendants further argue that Dr. Olives' expert opinion on the medical community's standard for diagnosing lead poisoning and administering chelation therapy is irrelevant and not a basis for establishing liability under the FCA. [See Doc. 159 at 8]. Although liability under the FCA is not entirely predicated on failing to adhere to the relevant standard of care, an expert's testimony regarding acceptable practices is surely relevant to the determination of whether a medical procedure was "reasonable and necessary for the diagnosis or treatment of illness or injury." See 42 U.S.C. § 1395y(a)(1)(A); see also United States v. R&F Props. of Lake Cnty., Inc., 433 F.3d 1349, 1356 (11th Cir. 2005) ("Medicare claims may be false if they claim reimbursement for services or costs that either are not reimbursable or were not rendered as claimed.").

toxicology, which are the areas of medicine in which chelation therapy is most often used. See G v. Fay Sch., Inc., 282 F. Supp. 3d 381, 392 (D. Mass. 2017) (holding expert's qualifications and experience as a "pediatric neurologist and neuroscientist" were sufficient for her to evaluate the diagnosis of a child with electromagnetic hypersensitivity syndrome, a "rare phenomenon," even though she was not specially qualified as a diagnostician in that area).

Defendants similarly provide little justification for their argument that Dr. Olives' expert opinion is "unreliable," citing only the fact that he confines his literature review to those documents contained in the National Library of Medicine, the world's largest medical library. [See Docs. 159 at 9–10; 161 at 10]. In stark contrast to Dr. Born's expert report, Dr. Olives' forty-seven (47)-page expert report provides a plethora of citations to scholarly research, studies, and data in support of his conclusions. [See generally Doc. 159-1].

Thus, the Court finds that Dr. Olives is qualified to serve as an expert by education and experience, bases his opinion on sufficient facts and data, utilizes a reliable procedure and methodology, and will assist the trier of fact in understanding metal poisoning diagnoses and the medical standard for using chelation therapy. Therefore, the Court denies Defendants' motion to exclude him. [Doc. 159].

IV. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** the United States' "Motion to Exclude the Testimony of Hoyt Torras." [Doc. 155]. Specifically, the Court **GRANTS** the motion to exclude Mr. Torras' testimony regarding physicians' general confusion with Medicare coding requirements but **DENIES** the motion to the extent that Mr. Torras may testify regarding the medical coding process.

The Court **DENIES** the United States' "Motion to Exclude the Testimony of Dr. Christa Wright" [Doc. 156] and **DENIES** Defendants' "Motion to Exclude Testimony of Dr. Travis D. Olives." [Doc. 159]. The Court **GRANTS** the United States' "Motion to Exclude the Testimony of Dr. Eric Born." [Doc. 157].

Finally, the Court **DENIES** Defendants' "Motion to Exclude Testimony of Dr. Leland Garrett" [Doc. 158] but **DIRECTS** the United States to produce to Defendants a written expert report on behalf of Dr. Garrett pursuant to Rule 26(a)(2)(B) within twenty-one (21) days from the date of this order. The Court permits Defendants twenty-one (21) days from the date of receipt of Dr. Garrett's report to re-depose him.

SO ORDERED, this 28th day of November, 2022.

Eleanor L. Ross
United States District Judge
Northern District of Georgia