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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 KYLE JOHNSON,
13 Plaintiff,
14 v.
15
16 CITY OF SAN JOSE, et al.
17 Defendants.
18
19

Case Number: 5:21-cv-01849-BLF

**DEFENDANTS’ NOTICE OF MOTION
AND MOTION TO EXCLUDE
TESTIMONY OF PLAINTIFF’S
EXPERT ROGER CLARK**

Date: December 14, 2023
Time: 9:00 a.m.
Courtroom: 3, 5th Floor
Judge: Hon. Beth Labson Freeman

Trial: February 26, 2024

20
21 Please take notice that on December 14, 2023, or as soon as this matter can be heard,
22 Defendants City of San Jose and James Adgar will and hereby do move pursuant to Federal Rule of
23 Evidence 702 to preclude the opinion testimony of witness Roger Clark whom Plaintiff Kyle Johnson
24 has designated as a putative expert in this action.

25 This motion is based on the attached memorandum of points and authorities, all materials
26 submitted in conjunction herewith, and any other materials or information that should come to the
27 Court’s attention as part of this proceeding.
28

Introduction

1
2 This case concerns the response by the San Jose Police Department (“SJPDP”), and in particular,
3 the alleged actions of SJPDP Officer James Adgar, during the protests which took place on May 30,
4 2020 in front of San Jose City Hall. Among his claims, Plaintiff Kyle Johnson alleges that Ofc. Adgar
5 violated his First Amendment rights, used excessive force, and did so pursuant to a municipal policy,
6 practice, or lack of training by firing a 40mm projectile that evening, which hit him in the leg. Plaintiff
7 has retained Roger Clark as his police practice expert in this case.

8 Mr. Clark is a former police officer who retired from the Los Angeles County Sheriff’s Office
9 in 1993. *See* Declaration of Yue-Han Chow (“Chow Decl.”), Ex. 1 (Clark Report) at 21. Mr. Clark has
10 not been a police officer for nearly three decades. *See* Chow Dec., Ex. 2 (Clark Dep.) at 19:24-20:1).
11 Since his retirement in 1993, Mr. Clark has had no law-enforcement experience but rather has spent his
12 days testifying against thousands of police officers, almost exclusively for plaintiffs in civil rights
13 actions. *Id.* at 59:7-59:12. Mr. Clark has not trained a police officer on any standard since 1993. *Id.* at
14 20:2-20:5. He has never developed a training curriculum or advised police departments on how they
15 should train officers, not even in crowd control or projectile impact weapons. *Id.* at 54:19-55:2, 184:7-
16 185:6. He has not written any articles about policing or published any scholarly works on the subject.
17 *Id.* at 17:15-17:20. Mr. Clark’s purported expertise as it relates to this case consists of his familiarity
18 with POST standards, which any person can access from the internet and apply to any given situation,
19 as well as his experience in responding to riots in 1970 and in 1992. *Id.* at 21:14-23:15; Report at 4.

20 Many of Mr. Clark’s opinions are unreliable because he has no special expertise beyond that of
21 a juror, he improperly opines as to legal conclusions, and he has no factual basis upon which to render
22 his opinion. Numerous courts in numerous instances have held Mr. Clark’s purported “expert”
23 testimony inadmissible under analogous circumstances. *See, e.g., A.G. I v. City of Fresno*, No. 16-cv-
24 1914-JLT-SAB, 2023 U.S. Dist. LEXIS 95659, at *11-16 (June 1, 2023); *Day v. County of Contra*
25 *Costa*, No. C 07-4335, 2008 U.S. Dist. 93487, at *28-29 (N.D. Cal. Nov. 10, 2008) (excluding Clark
26 opinion that an officer’s “life was not threatened, [and] that his fear was imaginary or subjective”);
27 *Dean v. City of Fresno*, 546 F. Supp. 2d 798, 817 n.23 (E.D. Cal. 2008) (excluding Clark’s expert
28 testimony that officer’s actions fell “below POST standards” because “whether a reasonable officer in

1 the Defendant[’s] shoes could reasonably believe that his conduct was constitutional is a question of
 2 law for the Court”); *Ortega v. City of Oakland*, No. C07-02659, 2008 U.S. Dist. LEXIS 85183, at *12
 3 n.5 (N.D. Cal. Oct. 8, 2008) (excluding Clark opinion that “the use of force by [Defendant] was grossly
 4 excessive and unnecessary” as “inappropriate expert testimony”); *see also Williams v. City of Houston*,
 5 No. CV H-16-3342, 2019 U.S. Dist. LEXIS 97553, at *5 (S.D. Tex. June 11, 2019) (excluding all
 6 Clark testimony and observing that Clark’s opinions “about what the videotapes show” is “within a
 7 factfinder’s lay knowledge and does not require specialized knowledge”); *Baldauf v. Davidson*, No.
 8 1:04CV1571, 2006 U.S. Dist. LEXIS 91352, at *12-13 (S.D. Ind. Dec. 18, 2006); *Carr v. Montgomery*
 9 *County*, No. CIV.A. H-13-2795, 2015 U.S. Dist. LEXIS 136560, at *21-29 (S.D. Tex. Oct. 7, 2015).

10 Argument

11 Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony in
 12 the federal courts:

13 If scientific, technical, or other specialized knowledge will assist the trier of fact to
 14 understand the evidence or to determine a fact in issue, a witness qualified as an expert
 15 by knowledge, skill, experience, training, or education, may testify thereto in the form of
 16 an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2)
 17 the testimony is the product of reliable principles and methods, and (3) the witness has
 applied the principles and methods reliably to the facts of the case.

18 Fed. R. Evid. 702; *see also Reiffen v. Microsoft Corp.*, 270 F. Supp. 2d 1132, 1145 (N.D. Cal. 2003).

19 Although Rule 702 affords a court wide latitude to admit expert testimony, such testimony is
 20 inadmissible unless it meets two related requirements: (1) it must be based on the special knowledge of
 21 the expert; and (2) it must be reliable and helpful to the finder of fact. *See Daubert v. Merrell Dow*
 22 *Pharmaceuticals, Inc.*, 508 U.S. 579, 589-91 (1993); *Andrew v. Metro North Commuter R. Co.*, 882
 23 F.2d 705, 708 (2d Cir. 1989) (“For an expert’s testimony to be admissible . . . it must be directed to
 24 matters within the witness’ scientific, technical, or specialized knowledge and not to lay matters which
 25 a jury is capable of understanding and deciding without the expert’s help.”); *United States v. Jackson*,
 26 425 F.2d 574, 576 (D.C. Cir. 1970) (same). Testimony about what videos show, for example, is not
 27 helpful to the factfinder because it tells the jury what result to reach when a jury is “capable of
 28 analyzing the images” for itself. *Lee v. Andersen*, 616 F.3d 803, 808-09 (8th Cir. 2010).

1 The burden is on the party offering the proposed expert opinion to prove by a preponderance of
2 the evidence that the testimony satisfies the requirements for admissibility. *See Daubert*, 509 U.S. at
3 592 n.10. An expert cannot base opinions on assumptions of fact that lack evidentiary support. “When
4 expert opinions are not supported by sufficient facts, or when the indisputable record contradicts or
5 otherwise renders the opinions unreasonable, they cannot be relied upon.” *De La Torre v. Cashcall,*
6 *Inc.*, 56 F. Supp. 3d 1073, 1095-96 (N.D. Cal. 2014) (citation omitted) (collecting cases).

7 **I. Video interpretation is up to the jury**

8 Mr. Clark opines on the central factual dispute in this case, asserting that Officer Adgar shot
9 Mr. Johnson. Chow Decl. Ex. 1 at 10, 17. But this is based on his review of the video recordings. What
10 a video recording shows or does not show is something a jury can determine without the help of an
11 expert. At least one court has excluded a similar opinion by Mr. Clark, finding that this improperly
12 invaded the province of the jury. *Williams v. City of Houston*, No. CV H-16-3342, 2019 WL 97553, at
13 *15-16 (S.D. Tex. June 11, 2019) (excluding all Clark testimony and observing that Clark’s opinions
14 “about what the videotapes show” is “within a factfinder’s lay knowledge and does not require
15 specialized knowledge”). More importantly, Plaintiff retained a video expert to analyze the videos.
16 This video expert issued a 17-page report to conclude based on his “analysis of the videos along with
17 [his] 3D computer modeling of the incident” as to which officer shot Mr. Johnson. Chow Decl. ¶ 9.
18 Mr. Clark has no stated expertise in video analysis and should not be permitted to opine on what the
19 videos show.

20 **II. Mr. Clark does not know if Adgar intentionally struck Johnson**

21 Mr. Clark further opines that Officer Adgar “intentionally struck Mr. Johnson,” and that “SJPD
22 generally and Officer Adgar in particular failed in their duty to protect and facilitate [the First
23 Amendment] rights [of]...[by firing] impact weapons at peaceful demonstrators – including Mr.
24 Johnson.” Chow Decl. Ex. 1 at 10, 17.

25 Mr. Clark admitted in deposition that he did not know if Adgar meant to hit Mr. Johnson.
26 Chow Decl. Ex. 2 at 108:25-109:5. Nowhere in Officer Adgar’s deposition did he testify that he was
27 aiming for Mr. Johnson (Chow Decl. ¶ 7), and Mr. Clark admitted that Adgar’s police report does not
28 describe aiming at someone who matched Mr. Johnson’s description. *Id.* at 109:6-109:17. This is a

1 fact dispute which should be decided by the jury. Furthermore, whether SJPD or Officer Adgar
 2 violated the First Amendment rights of Plaintiff, because officers allegedly used force on lawful
 3 protestors, is a legal conclusion best left to the jury, not something for which Mr. Clark can provide an
 4 expert opinion. *Dean*, 546 F. Supp. 2d at 817 n.23 (excluding Clark testimony because it was “an
 5 improper legal conclusion”) (citing *Aguilar v. Intn’l Longshormen’s Union Local # 10*, 966 F.2d 443
 6 (9th Cir. 1992)); *Day*, 2008 WL 4858472 at *23 (same).

7 **III. Juries Make Credibility Determinations, Not Experts**

8 Mr. Clark makes assertions in his reports which he couches as conclusions a jury could draw,
 9 but if this were so, then there would be no need for him to make these statements. Mr. Clark should not
 10 be allowed to testify as to these assertions, as they involve credibility determinations. *See* Chow Decl.
 11 Ex. 2 at 9:18-10:2.

12 For example, he states that Adgar filed a false police report when Adgar wrote that he saw Mr.
 13 Johnson commit a crime. Chow Decl. Ex. 1 at 10. But Adgar never identified the person he aimed at in
 14 his deposition as Johnson, and as Mr. Clark already admitted, Adgar’s report never describes aiming at
 15 someone matching Johnson’s description. Chow Decl. Ex. 2 at 129:7-131:2; Ex. 3 (Adgar Dep.) at
 16 94:18-96:5. In any case, these are all basic factual questions as to which no expert testimony is
 17 necessary or proper.

18 **IV. Mr. Clark Cannot Opine on Adgar’s State of Mind**

19 Mr. Clark opines that “Officer Adgar demonstrated an unprofessional hostility towards the
 20 demonstrators and the protests that resulted in Mr. Johnson’s injury. I consider that a jury would
 21 determine his wounding of Mr. Johnson as connected to a general animus and apparent discriminatory
 22 view towards the demonstrators...” Chow Decl. Ex. 1 at 8. Mr. Clark clarified this confusing language
 23 by testifying that he is not purporting to determine whether Officer Adgar had any animus. Chow
 24 Decl. Ex. 2 at 14:2-16:23. He also admits he is not a psychologist or human behavioralist, has no
 25 education, expertise, or specialized knowledge in these areas, other than in his work as a police officer
 26 and detective, and has never been qualified to opine on whether a police officer has subjective animus,
 27 bias, or hostility. *Id.* at 10:21-11:22, 13:23-14:1. His opinions as to Officer Adgar’s state of mind or
 28 intentions are gratuitous and baseless. As such, he should not be allowed to render this opinion at trial

1 at all. *See A.G.I v. City of Fresno*, No. 16-cv-1914-JLT-SAB, 2023 U.S. Dist. LEXIS 95659, at *11-
 2 16 (June 1, 2023) (excluding Clark’s opinion on decedent’s state of mind because he is not an expert in
 3 human behavior, psychology, or expression and has no expertise that is not within the capacity of lay
 4 jurors).

5 **V. Mr. Clark Has No Basis for Opining on Training**

6 Mr. Clark opines that “[t]he lack of an adequate policy and training regarding the use of these
 7 powerful weapons, as well as a failure to prepare formal rules of engagement regarding the use of
 8 weapons at the protest, likely contributed to the officers’ improper use of impact munitions.” Chow
 9 Decl. Ex. 1 at 18. He then contradicts himself with this separate opinion: “The officers deployed that
 10 day were poorly trained, commanded and supervised, and thus did not understand SJPD’s policies on
 11 crowd management, intervention and control.” *Id.* at 20. The alleged bases for this opinion fell apart at
 12 Mr. Clark’s deposition.

13 At deposition, Mr. Clark clarified he agreed with SJPD’s policies. He agrees with SJPD’s
 14 projectile impact weapon policy which requires an officer only to use the weapon when objectively
 15 reasonable to prevent serious injury, and he agrees that no dispersal order is necessary before using the
 16 weapon against someone who is assaulting an officer. Chow Decl. Ex. 2 at 95:4-96:18, 170:15-171:11.
 17 He further does not criticize SJPD for having officers equipped with the 40mm launcher at the protests.
 18 *Id.* at 156:10-156:19. Mr. Clark also agrees that SJPD trains its officers by the standards required by
 19 POST. *Id.* at 76:11-76:24.

20 Instead, he states that Adgar had not been trained on the 40mm projectile impact weapon in the
 21 5 years preceding the protest, which is not supported by the record. Chow Decl. Ex. 2 at 84:20-85:19.
 22 In fact, Adgar graduated from the Academy in December 2017 which included a special 4-hour training
 23 on projectile impact weapons, qualified at the range to carry the 40mm launcher after that, received a
 24 video on projectile impact weapons in 2018, and attended a continuing education course on Defensive
 25 Tactics in 2019, which included a section on projectile impact weapons as well. ECF 107-6 (Sciba
 26 Decl. ¶¶ 6, 8-12); ECF 107-3 (Adgar Decl. ¶¶ 2-3). In each of these instances, the training included the
 27 SJPD Duty Manual policy governing the use of projectile impact weapons.

28 He also criticizes SJPD for not providing training to its officers on using the 40mm less lethal

1 projectile launcher in a crowd control setting. Chow Decl. Ex. 2 at 84:9-84:19. He has no background
2 or special expertise in this area. He has never developed any projectile impact weapon training or
3 trained on the 40mm launcher. *Id.* at 54:22-55:25. Indeed, Mr. Clark has never even used a projectile
4 impact weapon himself. *Id.* at 53:24-54:6. He also discussed that any projectile impact weapon training
5 within a crowd control setting was that it should be target-specific and not an indiscriminate peppering
6 of the crowd, but that was exactly how SJPD officers *were* trained as per the SJPD policy, and Mr.
7 Clark has no basis for asserting otherwise. *Id.* at 46:14-47:7, 95:4-96:18. And even after describing
8 what he expected that training would be, Mr. Clark was unable to name a single agency that actually
9 provided such training. *Id.* at 126:2-129:6.

10 Mr. Clark further described what crowd control training he expected SJPD to provide to its
11 officers. Chow Decl. Ex. 2 at 161-18-162:17. As with projectile weapons, though, what he described,
12 was precisely the training SJPD provides on crowd control. ECF 107-3 (Adgar Decl. ¶ 3); ECF 107-5
13 (Tassio Decl. ¶¶ 4-8, 10-13).

14 Notably, Mr. Clark was not provided with any of the voluminous training materials the City
15 produced in this case. Chow Decl. ¶ 4 & Ex. 1 at 2-4. Had he been provided with that information, he
16 would not make such statements which are clearly contradicted by the evidence. For all of the above
17 reasons, Mr. Clark should be precluded from rendering these opinions on the lack of training. *See*
18 *Ortega v. City of Oakland*, No. C07-02659, 2008 U.S. Dist. LEXIS 85183, at *32-33 (N.D. Cal. Oct. 8,
19 2008) (excluding Clark opinion that Oakland had “no adequate continuing training” as speculation
20 where he reviewed no training records and cited no training failures or inadequate rules).

21 **VI. It Is Speculation That SJPD Had a Practice of Using Arbitrary Force**

22 Mr. Clark opines that SJPD, not just Adgar, took “arbitrary and unnecessary actions” in
23 responding to the protest on May 30 and that the use of impact weapons against protestors was
24 improper and in violation of “well-known law enforcement tactics.” Chow Decl. Ex. 1 at 18, 19. He
25 states that “SJPD deliberately inflicted significant indiscriminate force on the many persons in the
26 crowd, including Mr. Johnson, who were lawfully present,” and that SJPD did so with “a callous
27 disregard for the lives and safety of the protestors.” *Id.* He appears to base this opinion on Johnson
28 being struck with a projectile, the use of 200-something projectiles by SJPD the day before, an

1 unlawful assembly not being declared, and the 5-6 officers who shot projectiles on May 30. Chow
2 Decl. Ex. 2 at 177:25-181:12. While Mr. Clark does not specifically use the word “practice,” by
3 opining that SJPD took actions, he is essentially opining on municipal liability.

4 First, Mr. Clark lacks expertise in less lethal projectile use and crowd control tactics. He never
5 used or trained on the 40mm launcher when he worked at the LA County Sherriff’s Office. Chow
6 Decl. Ex. 2 at 25:8-25:22, 53:24-54:6. As a supervisor, he never once reviewed a use of force
7 involving a less than lethal project impact weapon either. *Id.* at 56:1-56:4. He has never been qualified
8 as an expert on the 40mm launcher. *Id.* at 28:8-28:12. He has never developed tactics for crowd
9 control, nor has he written any articles on tactics. *Id.* at 17:15-18:1, 54:19-54:21. The last time he
10 responded to a crowd control situation was in 1992, and even then, that was under very difficult
11 circumstances. *Id.* at 30:1-30:7, 47:8-51:5.

12 Second, as discussed above, Mr. Clark cannot point to any written policy or deficiency in
13 training to support this opinion. He agrees that a 40mm projectile may be used without a declaration of
14 an unlawful assembly if it is targeting a credible threat. Chow Decl. Ex. 2 at 126:10-126:23. He has no
15 information, however, as to why the other officers fired their projectile weapons, or whether they
16 reasonably perceived a credible threat. He admitted that he never read the reports of any other officers
17 from May 29 or May 30, other than Adgar’s report. Chow Decl. Ex. 1 at 2-4, Ex. 2 at 142:12-143:22.
18 He did not know the circumstances of any use of the projectile impact weapon on May 29 or 30 (other
19 than Officer Adgar’s), including whether officers used those weapons against assaultive individuals or
20 were otherwise within SJPD policy. Chow Decl. Ex. 2 at 91:12-93:16, 181:1-181:12. He also only had
21 access to body worn camera videos from two of the five officers who fired a projectile impact weapon
22 the evening of May 30, 2020. Chow Decl. ¶¶ 9-10 & Ex. 1 at 2-3. The one City Hall security camera
23 video Mr. Clark had does not show what any of the officers who shot less than lethal projectile impact
24 weapons struck or were aiming at when they shot. *Id.* ¶ 10. This is contrary to the methodology
25 required to determine whether a use of force is excessive. As part of the *Graham v. Connor* standard
26 for determining whether a use of force is excessive, courts must analyze it from “the perspective of a
27 reasonable officer on the scene.” 490 U.S. 386, 396 (1989). It is therefore pure speculation that the
28 actions of the other officers who used projectile impact weapons that evening were “arbitrary and

1 unnecessary.”

2 Third, whether the actions of officers on May 30 were a result of deliberate indiscriminate force
3 or demonstrates a callous disregard for protestors’ safety, these are factual and legal conclusions that
4 only a jury and this Court should reach. *See, e.g., Dang v. Cross*, 422 F.3d 800, 805, 806 (9th Cir.
5 2005) (discussing “callous disregard” within the context of punitive damages).

6 VII. SJPD used the exact law enforcement tactics Mr. Clark said it lacked

7 While Mr. Clark states he was a recognized expert in his department on tactics, since his
8 retirement 30 years ago, he has never trained any officers on tactics nor advised any department on how
9 it should train officers on tactics, much less crowd control tactics. Chow Decl. Ex. 2 at 183:22-185:6.

10 Mr. Clark opinion that SJPD “failed to use well-known law enforcement methods” in
11 controlling the individual throwing objects is contradicted by the evidence in the record. Chow Decl.
12 Ex. 1 at 20. In particular, Mr. Clark states that SJPD did not try to identify and arrest these individuals,
13 did not have undercover officers to help them with this effort, and did not have amplification
14 equipment at the ready for dispersal order announcements. *Id.* But Mr. Clark was not provided with
15 any other police reports from May 30 other than Adgar’s. *Id.* at 2-4. If he had read the other reports, he
16 would have learned that SJPD did have undercover officers embedded in the crowd throughout the day
17 and that SJPD used arrest teams on May 30. Chow Decl. Ex. 4 (Dwyer Dep.) at 111:18-115:16.
18 Indeed, one of the arrests on May 30 was the subject of another lawsuit. *See NAACP, et al. v. City of*
19 *San Jose, et al.*, No. 21-cv-01705-PJH, ECF No. 108 at ¶ 110 (plaintiff describing his arrest on May 30
20 by SJPD with 30-40 other people at Plaza de Cesar Chavez). Mr. Clark also admitted that SJPD did
21 have amplification equipment available based on his review of the videos. Chow Decl. Ex. 2 at
22 194:22-195:22.

23 Conclusion

24 Defendants respectfully request that the Court exclude the testimony and opinions of Roger
25 Clark. He is not qualified to render expert opinion outside the knowledge of a lay person in this case,
26 cannot testify as to legal conclusions, and should not be permitted to offer opinions not supported by
27 the evidence. His opinions are inadmissible under Rule 702 because they are improper and not helpful
28 to the trier of fact.

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Dated: August 7, 2023

Respectfully submitted,
NORA FRIMANN, City Attorney

By: /s/ Yue-Han Chow
YUE-HAN CHOW
Sr. Deputy City Attorney

Attorneys for Defendants