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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION  
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12 KYLE JOHNSON,  
13 Plaintiff,  
14 v.  
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16 CITY OF SAN JOSE, et al.  
17 Defendants.  
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Case Number: 5:21-cv-01849-BLF

**DEFENDANTS' REPLY IN SUPPORT  
OF 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

1 **Introduction**

2 The opinions of Plaintiff’s police practices expert, Roger Clark, should be excluded as he lacks  
3 the expertise, opines as to legal conclusions, and has no factual basis to support his opinion. As such,  
4 he improperly usurps the role of the jury.

5 **Argument**

6 **I. Clark Improperly Opines on What the Video Shows**

7 Mr. Clark’s statements on what the bodyworn camera videos show are not just support for his  
8 opinions, they *are* his opinion. ECF 110-1, Ex. 1 at 10 (“...per the video recordings, it is uncontested  
9 that Mr. Johnson was struck by Officer Adgar’s 40mm projectile”), 17 (“Officer Adgar shot Mr.  
10 Johnson. My review of video recordings of [the incident] reflects that Officer Adgar lifted, aimed, and  
11 fired at Mr. Johnson at the precise moment that Mr. Johnson was struck.”). While Mr. Clark may  
12 *assume* that Adgar’s shot struck Plaintiff, he cannot make this factual conclusion, as that is for the jury  
13 to decide. *Williams v. City of Houston*, No. CV H-16-3342, 2019 WL 97553, at \*15-16 (S.D. Tex.  
14 June 11, 2019) (excluding all Clark testimony and observing that Clark’s opinions “about what the  
15 videotapes show” is “within a factfinder’s lay knowledge and does not require specialized  
16 knowledge”).

17 **II. Mr. Clark Does Not Know The State of Mind of Any Officer, Including for Adgar**

18 Mr. Clark opines that (1) Officer Adgar “intentionally struck Mr. Johnson,” (2) “SJPD generally  
19 and Officer Adgar in particular failed in their duty to protect and facilitate [the First Amendment] rights  
20 [of]...[by firing] impact weapons at peaceful demonstrators – including Mr. Johnson,” and (3) “Officer  
21 Adgar demonstrated an unprofessional hostility towards the demonstrators and the protests that resulted  
22 in Mr. Johnson’s injury. I consider that a jury would determine his wounding of Mr. Johnson as  
23 connected to a general animus and apparent discriminatory view towards the demonstrators...” ECF  
24 110-1, Ex. 1 at 8, 10, 17. Regardless of what Mr. Clark relied upon to render these opinions, this is  
25 improper and speculative testimony on whom SJPD officers targeted and why. Mr. Clark even admitted  
26 that he had no way to know whether Officer Adgar struck Mr. Johnson by accident. Chow Supp. Decl.  
27 Ex. 5 (Clark Dep.) at 108:24-109:5. Courts have excluded Mr. Clark’s opinion on this very issue more  
28 than once. *See Godinez v. Huerta*, 16-cv-0236-BAS-NLS, U.S. Dist. LEXIS 73623, \*17-18 (S.D. Cal.

1 May 1, 2018) (“Mr. Clark is precluded from offering testimony regarding [defendant officer’s]  
2 subjective knowledge or state of mind.”); *Valiavicharska v. Celaya*, No. CV-10-4847-JSC, 2012 U.S.  
3 Dist. LEXIS 8191, \*13 (N.D. Cal. Jan. 24, 2012) (“Roger Clark may not speculate about what anyone  
4 thought or the reasons behind their actions, particularly in the cases of [the defendant officer] and  
5 Plaintiff, both of whom will be on the witness stand and able to testify as to their motivations.”).

### 6 **III. Mr. Clark Cannot Identify Any Deficiency in The Policies or Training**

7 Mr. Clark’s basis for opining that there were deficiencies in SJPD’s policies, practices, and  
8 training can be distilled to one point: he did not agree with the use of the 40mm launcher on the  
9 evening of May 30, 2020. Chow Supp. Decl. Ex. 5 (Clark Dep.) at 158:8-159:13. From that one point,  
10 he concluded that there therefore existed deficiencies in SJPD’s policies or training. But when pressed,  
11 he was unable to identify any such deficiencies. And as explained in the next section, his extrapolation  
12 from this one event to conclude there was an unconstitutional practice is speculative.

13 There is no confusion as to Mr. Clark’s agreement with SJPD’s written projectile impact  
14 weapons policy. Despite his protestations to the contrary, he ultimately agreed that SJPD’s written  
15 policies were fine; he just disagreed with the actual use of 40mm launchers in this specific event. Chow  
16 Supp. Decl. Ex. 5 (Clark Dep.) at 155:9-157:19. He reviewed the SJPD Duty Manual and found the  
17 use-of-force policies met POST standards. Chow Supp. Decl. Ex. 5 (Clark Dep.) at 75:24-76:9. He  
18 agreed that officers may only use the weapon when objectively reasonable to prevent serious injury.  
19 ECF 110-1, Ex. 2 at 95:4-96:18. And he further agreed in both his report and at deposition that the  
20 SJPD Duty Manual prohibited the use of the 40mm projectile impact weapon for crowd control  
21 purposes. ECF 110-1, Ex. 1 at 5; Chow Supp. Decl. Ex. 5 (Clark Dep.) at 96:19-97:12.

22 Mr. Clark was also unable to identify the basis for his opinion that SJPD does not adequately  
23 train its officers. When asked to describe the training he would expect on use of the 40mm launcher in  
24 a crowd control setting, he explained what he would expect *but then was unable to identify a single*  
25 *agency that trains this way*. ECF 110-1 at 126:2-129:6. At most, he only knew that other agencies had  
26 different policies on the 40mm launcher in the crowd control setting (*e.g.*, use would have to be under  
27 the authorization of a commander), but he already acknowledged that SJPD’s use-of-force policies  
28 were “in harmony with the POST standards.” Chow Supp. Decl. Ex. 5 (Clark Dep.) at 75:24-76:9. He

1 also testified that SJPD “trains all of its police officers to at least the standards required by POST.”  
2 ECF 110-1 Ex. 2 at 76:11-76:24.

3 With respect to the expected training, he said he would (1) emphasize the implications of a  
4 40mm discharge into a group without a declaration of unlawful assembly, and (2) there would have to  
5 be a target specific against a credible threat. ECF 110-1 at 126:2-126:23. But he agreed that no  
6 dispersal order is necessary before using the weapon against someone who is assaulting an officer. ECF  
7 110-1, Ex. 2 at 170:15-171:11 (“Q. In a demonstration, don’t you agree with me that if someone tries to  
8 assault a police officer, you don’t need an unlawful assembly order to use force against that person,  
9 right? A. I think based on your question, that’s possible, like if I was – when my personnel at the Rose  
10 parade got attacked suddenly, of course they can respond to that.”). The extensive 40mm launcher  
11 training materials and information Plaintiff’s counsel failed to provide Mr. Clark also discuss the  
12 appropriate circumstances for their use, the potential to cause serious injury or death, the difference  
13 between passive and active resisters in crowd control situations, and the lawful corresponding response  
14 to these different levels of compliance and resistance, including the use of force. ECF 107-6 (Sciba  
15 Decl.) ¶¶ 8, 10, 11; ECF 107-5 (Tassio Decl.) ¶ 13. He therefore had no basis to conclude SJPD’s  
16 training was deficient.

#### 17 **VI. Mr. Clark Speculates about SJPD’s Alleged Crowd Control Practices**

18 Mr. Clark has no non-speculative basis to opine that SJPD had unconstitutional practices which  
19 led to the (alleged) use of a projectile against Mr. Johnson on May 30, 2020. His opinion is not the  
20 “product of reliable principles and methods,” as required by Fed. R. Evid. 702. *See also De La Torre v.*  
21 *Cashcall, Inc.*, 56 F. Supp. 3d 1073, 1095-96 (N.D. Cal. 2014) (“When expert opinions are not  
22 supported by sufficient facts, or when the indisputable record contradicts or otherwise renders the  
23 opinions unreasonable, they cannot be relied upon.”) (citation omitted) (collecting cases).

24 Plaintiff does not contest that Mr. Clark lacks experience in using 40mm launchers, particularly  
25 in the crowd control context. The case they cite in support of the reliability of his testimony discusses  
26 Mr. Clark’s opinion on whether a specific officer’s use of force complied with police training standards  
27 and policies, but not on the tactics or practice of an entire police department. *See Godinez v. Huerta*,  
28 16-cv-0236-BAS-NLS, U.S. Dist. LEXIS 73623, \*9-11 (S.D. Cal. May 1, 2018). The opinions that

1 Defendants challenge have to do with “failures in the command and control structure of SJPD to  
2 promulgate and enforce appropriate crowd control tactics.” ECF 130 at 8:1-8:4. This is not simply an  
3 issue of Mr. Clark’s unfamiliarity with the “technical specifications and proper maintenance of the  
4 40mm projectile launcher.” ECF 130 at 8:11-8:12. He has no background or experience to render an  
5 opinion on crowd control tactics or practices, particularly when it comes to less lethal projectile impact  
6 weapons. When he was at the LA County Sheriff’s Office, they did not have 40mm launchers. Chow  
7 Supp. Decl. Ex. 5 (Clark Dep.) at 29:20-29:24. He has never trained any officers on tactics nor advised  
8 any department on how it should train officers on tactics, much less crowd control tactics. ECF 110-1,  
9 Ex. 2 at 183:22-185:6. He has never developed tactics for crowd control, nor has he written any  
10 articles on tactics. ECF 110-1, Ex. 2 at 17:15-18:1, 54:19-54:21. The last time he responded to a  
11 crowd control situation was 30 years ago in 1992. *Id.* at 30:1-30:7. Notably, in his two experiences  
12 with crowd control, either on the skirmish line with a baton or assigned to keep people away from a  
13 specific building, he and his unit were not even equipped with projectile impact weapons. *Id.* at 47:8-  
14 51:5; Chow Supp. Decl. Ex. 5 (Clark Dep.) at 35:11-38:13. His units only had projectile weapons for  
15 the delivery of tear gas, not for direct impact on protestors. *Id.* He has no experience with the use of  
16 projectile impact weapons in the crowd control setting.

17 More importantly, Mr. Clark relies on speculation for his opinion that SJPD used indiscriminate  
18 force against the protestors on May 30. ECF 130 at 9:5-9:6. It is absolutely the point that he does not  
19 know “who those [other] officers were targeting and why.” ECF 130 at 9:4-9:10. Without  
20 understanding the intent of the other officers’ use of the 40mm launcher on May 29 and May 30, he  
21 cannot state that “officers shot into a crowd.” *Id.* Mr. Clark himself explained that by “indiscriminate  
22 force” he did not mean an accidental strike where the officer targets a credible threat and misses; he  
23 meant officers firing with no purpose other than to create injury into the crowd. Chow Supp. Decl. Ex.  
24 5 (Clark Dep.) at 139:15-143:22. He came to this conclusion based on what he saw in the videos. *Id.* at  
25 142:22-143:8. But he did not have access to any videos showing what the officers were targeting nor  
26 the reports of the officer who fired 40mm projectiles. ECF 110-1 ¶¶ 9-10, Ex. 1 at 2-4, & Ex. 2 at  
27 91:12-93:16, 142:12-143:22, 181:1-181:12. And as discussed earlier, he cannot opine as to any  
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1 officer's state of mind. His opinion about SJPD having an unconstitutional practice of indiscriminate  
2 force, without knowing why any officer shot a 40mm projectile, is speculative and must be excluded.

3 Finally, Mr. Clark's opinion about SJPD's alleged failure to use the law enforcement tactics of  
4 undercover officers for surveillance and amplification equipment on May 30 is excludable because it is  
5 contradicted by the facts in the record and not reliable. The accuracy of his opinions is not "a fact  
6 dispute more appropriate for a jury to decide." ECF 130 at 9:21-9:22. There is no dispute at all;  
7 Plaintiff can point to no facts to suggest otherwise. SJPD's After Action Report, which was cited in the  
8 operative complaint and Opposition to Defendants' Motion for Summary Judgment (ECF 73 ¶¶ 22 &  
9 65; ECF 116 at 9), and made publicly available (but evidently not provided to Mr. Clark), described  
10 how "[e]mbedded officers were helpful in providing surveillance from within the crowd so offenders  
11 could be arrested later when separated from the larger crowd." Chow Supp. Decl. Ex. 6 at SJ400119.  
12 And Mr. Clark admitted at deposition that the videos he reviewed showed SJPD had amplification  
13 equipment available on May 30. ECF 110-1, Ex. 2 at 194:22-195:22. To allow Mr. Clark to testify as  
14 to these opinions would be misleading and not helpful to the jury.

### 15 Conclusion

16 The Court should exclude the testimony and opinions of Roger Clark. He has no unique  
17 qualifications outside the knowledge of a lay person when it comes to video evidence, has no expertise  
18 or experience to opine on the use of projectile impact weapons in a crowd control setting, cannot testify  
19 as to legal conclusions, cannot speculate as to officers' states of mind, and should not confuse the jury  
20 by offering opinions not supported by the evidence. His opinions are inadmissible under Rule 702  
21 because they are improper and not helpful to the trier of fact.

22  
23 Respectfully submitted,

24 NORA FRIMANN, City Attorney

25 Dated: October 11, 2023

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

27 Attorneys for Defendants  
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