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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ernest Joseph Atencio, et al.,
Plaintiffs,
v.
Joseph M. Arpaio, et al.,
Defendants.

No. CV-12-02376-PHX-PGR
ORDER

The Court has before it Plaintiffs’ Motion to Exclude Testimony of Kathryn Wild on the Reasonableness of Defendant McLean’s Care Under Arizona Law (Doc. 277), Plaintiffs’ Motion to Exclude Testimony of William Gause on the Reasonableness of Defendant P.A. Cranmer’s Care (Doc. 287), City Defendants’ Motion to Strike/Exclude Plaintiffs’ Untimely Disclosed Rebuttal Expert Dr. Trepeta (Doc. 288), City Defendants’ *Daubert* Motion to Exclude the Testimony of Ron Bruno and Eldon Vail (Doc. 291), City Defendants’ *Daubert* Motion to Exclude the Causation Opinions of Plaintiffs’ Expert Dr. Wilcox and a Portion of His Untimely Rebuttal Report (Doc. 294), Defendants’ Joint Motion to Exclude Testimony of Plaintiffs’ Use of Force Expert Ron Bruno (Doc. 297), Motion to Exclude the Testimony of Plaintiffs’ Expert Ken Katsaris and Alternative Motion for *Daubert* Hearing (Doc. 306), Motion to Exclude Plaintiffs’

1 Expert Todd Wilcox (Doc. 308), Plaintiffs' Motion to Exclude Testimony of Joan Cairns
2 (Doc. 322), City Defendants' Motion to Strike Portions of Plaintiffs' Response (Doc.
3 329, 341), Plaintiffs' Motion to Exclude Testimony of Tim Gravette (Doc. 352), Motion
4 to Exclude the Testimony of Plaintiffs' Expert Eldon Vail and Alternative Motion for
5 *Daubert* Hearing (Doc. 354), Defendants Maricopa County and Monica Scarpati's
6 Motion to Disqualify/Exclude Plaintiffs' Standard of Care Expert Robert J. Wimmer
7 (Doc. 391).¹
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10 The Court has considered the parties' extensive briefing on these pending motions
11 as well as the experts' reports, depositions, and other evidence presented by the parties,
12 and finds the record adequate to support the Court's inquiry into and conclusion
13 regarding the admissibility of the experts' opinions without the necessity of holding
14 separate *Daubert* hearings. *See Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971,
15 979 (9th Cir. 2009) (district court not required to hold separate *Daubert* hearing before
16 ruling on admissibility of expert testimony). The Court will therefore deny the pending
17 motions to the extent they seek a *Daubert* hearing. However, the parties will have an
18 opportunity, during *voir dire* at trial, to explore the relevance and reliability of proposed
19 expert testimony not previously excluded by the Court and, if *voir dire* turns up any
20 issues, to conduct further questioning outside the presence of the jury. *See United States*
21 *v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000).
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26 ¹ The Court finds that oral argument would not assist in resolving the various motions
27 and accordingly finds the pending motions suitable for decision without oral argument.
28 *See* LRCiv 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir.
1998).

1 **A. Standard of Care Expert Motions under State Law**

2 Under A.R.S. § 12-2604, an individual may provide expert testimony on the
3 appropriate standard of practice or care only if the witness is “licensed as a health
4 professional in this state or another state,” and, during the year immediately preceding the
5 event giving rise to the lawsuit, the witness devoted a majority of their professional time
6 to “[t]he active clinical practice of the same health profession as the defendant” or “[t]he
7 instruction of students in an accredited health professional school or accredited residency
8 or clinical research program in the same health profession as the defendant.” A.R.S. 12-
9 2604(A)(2). These requirements are intended to ensure that health care professionals
10 “testifying as experts have a sufficient expertise to truly assist the fact-finder on issues of
11 standard of care and proximate causation.” *Cornerstone Hosp. of Southeast Arizona,*
12 *LLC v. Marner ex rel. County of Pima*, 290 P.3d 460, 465 (Ariz. Ct. App. 2012)
13 (quotation marks and citation omitted).

14 1. Plaintiffs’ Motion to Exclude Testimony of Kathryn Wild on the
15 Reasonableness of Defendant McLean’s Care Under Arizona Law (Doc.
16 277)

17 Defendants Maricopa County and William McLean, R.N., have disclosed Kathryn
18 Wild, R.N., as an expert on the reasonableness of Defendant McLean’s care. Plaintiffs
19 seek to exclude Wild’s testimony, arguing that she is not qualified to testify under A.R.S.
20 § 12-2604. Specifically, Plaintiffs contend that Wild did not spend the majority of her
21 professional time during the year prior to December 16, 2011, engaging in “active
22 clinical practice” or instructing students. *See* A.R.S. § 12-2604(A)(2)(a). Defendants do
23 not dispute that Wild did not engage in the instruction of students. However, they
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1 contend that Wild spent the majority of her professional time engaged in “active clinical
2 practice.”

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4 Arizona courts have not interpreted the meaning of “active clinical practice.”
5 However, several other jurisdictions have addressed the issue under statutes that are, in
6 relevant part, the same as Arizona’s.

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8 In *Hinkley v. Koehler*, 606 S.E.2d 803 (Va. 2005), the expert had been actively
9 engaged in teaching and consulting with residents, medical students, and interns at a
10 university;² performed consultative work with partners in his six-person medical practice;
11 had recently joined the editorial review board of a journal; and conducted “peer review
12 work” for a medical society. *Id.* at 805. Noting that one of the primary purposes of the
13 statutory “active clinical practice” requirement was to “prevent testimony by individuals
14 who do not provide healthcare services in the same context in which it is alleged that a
15 defendant deviated from the standard of care,” the court held that the expert did not
16 qualify to testify as an expert. *Id.* at 808. Specifically, the expert had not, within the one-
17 year period prior to the incident (which involved a pregnancy), directly cared for,
18 provided treatment or management to, or made delivery decisions for any pregnancy, and
19 “did not evaluate, manage, or treat problems in pregnancies in the context of direct
20 patient care as did the defendant doctors,” and thus did not engage in “active clinical
21 practice” as required by the statute. *Id.* at 807-08.

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23 In *Moore v. Hooper*, 726 S.E.2d 812 (N.C. 2012), the court found that “clinical” in
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28 ² Virginia’s statute requires an expert to have been engaged in “active clinical practice”;
it does not include a provision allowing an expert to qualify based on time spent
instructing students. *See* V.C.A. § 8.01-581.20A

1 the term “active clinical practice” meant “actual experience in the observation and
2 treatment of patients” and not merely “activities simply relating to the health profession,
3 such as administration or continuing education.” *Id.* Noting that the doctor, although
4 “retired,” had continued to practice as a “fill-in” for a substantial number of hours in the
5 profession, the court held that the doctor likely would be deemed to have been in “active”
6 practice because all of the hours he spent in the profession were “spent engaged in
7 clinical practice,” and therefore it appeared the expert would be qualified to testify. *Id.* at
8 820.

11 In *Gay v. Select Specialty Hosp.*, 813 N.W.2d 354 (Mich. Ct. App. 2012), the
12 expert served as director of education at a hospital and oversaw education for all support
13 staff, including the nursing staff. *Id.* at 359. The expert testified that she spent twenty
14 five percent of her professional time orienting nurses to their units by instructing,
15 explaining, and coordinating nurses about the proper care of patients, which the court
16 deemed to be indirect treatment of patients. *Id.* at 361. Because the expert spent an
17 additional fifty percent of her professional time teaching at the hospital for an accredited
18 residency program, the court found the expert fulfilled the requirement of spending a
19 majority of her professional time either in active clinical practice or instructing students.
20 *Id.* at 362.

24 In *Wright v. United States*, 2008 WL 820557 (D. Ariz. 2008), the court excluded
25 the expert for failure to comply with the statutory requirement that the expert have
26 devoted a majority of professional time to active clinical practice. *Id.* at *7. In so ruling,
27 the court rejected the expert’s statement in her affidavit that she devoted the majority of
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1 her professional time to active clinical practice because the statement was unsupported
2 and contradicted the expert's earlier deposition testimony. *Id.* at *2.
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4 In the present case, Wild stated the following during her deposition: She began
5 working at the Orange County Jail on October 25, 2010, and spent the next two-and-one-
6 half years working with the health care agency reorganizing the program at the Orange
7 County Jail. (Doc. 298-1 at 8-10.) She testified that she was hired to essentially do a
8 system overhaul at the Orange County Jail, and that she spent the majority of time,
9 particularly in her first year there, "in the trenches with the staff, you know, trying to
10 understand . . . the flow, the delivery system, and from staff perspective what those issues
11 were and what we needed to do to resolve that." (Doc. 298-1 at 10.) She testified that
12 she "spent a lot of time with sheriff's staff trying to understand their perspective, their
13 issues and complaints, and then working to pull together a leadership team to make some
14 significant changes." (Doc. 298-1 at 10-11.) In response to the question of whether it
15 was "fair to say that the majority of your time wasn't spent in a clinical setting practicing
16 nursing," Wild responded, "Absolutely. My job there was to reorganize a delivery
17 system that made sense and provided care that met the standards," and that she "wasn't
18 seeing patients all day long in a clinical sense." (Doc. 298-1 at 11.) When asked again if
19 it was "fair to say you weren't spending the majority of your time seeing patients the first
20 year in Orange County," Nurse Wild again responded, "You're right, correct." (Doc.
21 298-1 at 12.) Finally, when asked what percentage of her time in the year prior to
22 December 16, 2011, was devoted to an active clinical practice, Nurse Wild responded
23 that during that time, she was "working in Orange County as their director of correctional
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1 health, so I wasn't in active clinical practice." (Doc. 298-1 at 13.) Thus, Nurse Wild
2 made clear during her deposition that she engaged in primarily administrative activities in
3 connection with her position as director of clinical health, and focused on reorganizing
4 and overhauling the health care delivery system, and that she did not engage in "active
5 clinical practice" during the year prior to December 16, 2011.
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8 In Wild's affidavit, submitted in opposition to the motion to exclude her
9 testimony, she stated that she "spent more than two and a half years, including 2011,
10 observing, monitoring, overseeing and improving the healthcare delivered by nurses,
11 including mentoring and training nurses" in the Orange County Jail; that she spent 2010-
12 2011 "working in the trenches directly with staff nurses . . . including nurses assessing
13 inmates and detainees coming into the jail, in an effort to better understand the flow and
14 delivery of nursing care in the jail, and to mentor and train the nurses and improve upon
15 the delivery of nursing care"; that she "worked in the trenches with the staff nurses at the
16 Orange County Jail in 2010/2011, three to four days per week of a five day week, and
17 provided direct care to inmate and detainee patients while also observing, monitoring,
18 overseeing, mentoring and training staff nurses who were also providing direct care to
19 inmate and detainee patients, and discussed with staff nurses patient assessments and
20 nursing treatment plans for the inmate and detainee patients"; and, finally, that she
21 misunderstood the questions asked during her deposition and that her "answer should
22 have been that in 2010/2011, I spent a majority of my time . . . in an 'active clinical
23 practice' observing, monitoring, overseeing, mentoring, training, and improving the
24 delivery of healthcare provided by correctional nurses." (Doc. 285-1 at 3-4.)
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1 Wild's statement in her affidavit that she spent a majority of her time in an "active
2 clinical practice" during 2010/2011 is not supported with explanations as to how her
3 interactions with nursing staff at the jail constituted "active clinical practice" rather than
4 merely or primarily administrative activities in connection with her position as director of
5 clinical health, as indicated in her deposition. Moreover, to the extent Wild spent time
6 directly training and mentoring staff nurses regarding patient care, and providing direct
7 care to inmates and detainees, she does not provide any information as to how much of
8 her professional time was spent in these activities, let alone demonstrate that she spent a
9 majority of her professional time in these activities.
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13 Finally, Wild's affidavit directly contradicts her deposition testimony in which she
14 specifically denied that she spent a majority of her time in active clinical practice, and
15 made clear that she acted primarily as an administrator working on reorganizing and
16 overhauling the health care delivery system. *See Van Asdale v. International Game*
17 *Technology*, 577 F.3d 989, 998 (9th Cir. 2009). The Court also is unpersuaded by Wild's
18 explanation in her affidavit that she answered the question regarding active clinical
19 practice incorrectly in her deposition because she did not understand those questions to
20 seek information about her experience working in the Orange County Jail. *See id.*; *see*
21 *also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (setting forth
22 general rule that parties may explain or attempt to resolve contradictions with an
23 explanation that is sufficiently reasonable).
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27 In sum, the Court finds that Wild has not demonstrated that she spent the majority
28 of her professional time in active clinical practice during the year prior to December 16,

1 2011. Accordingly, the Court will grant the motion to exclude Wild from testifying as to
2 the standard of care under Arizona law. The Court will, however, provide Defendant
3 McLean with the opportunity to disclose a substitute expert regarding the standard of care
4 under Arizona law.
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6 2. Plaintiffs' Motion to Exclude Testimony of William Gause on the
7 Reasonableness of Defendant P.A. Cranmer's Care (Doc. 287)

8 Defendant Cranmer, a physician assistant, has disclosed William Gause, a nurse
9 practitioner, as an expert on the reasonableness of Cranmer's care. Plaintiffs seek to
10 exclude Gause from testifying, contending that a nurse practitioner ("NP") is not engaged
11 in "the same health profession" as a physician assistant ("PA"). See A.R.S. § 12-
12 2604(A)(2) (requiring a standard of care expert be engaged in "the active clinical practice
13 of the same health profession as the defendant").
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16 Although there are differences in both the education and the licensing
17 requirements for a NP and a PA, both are defined under Arizona law as a "primary care
18 practitioner." A.R.S. § 36-2901(15). Moreover, both have similar skills and
19 responsibilities, both are considered to be "physician extenders," and both will often have
20 substantially equal duties in their employment. See *Alverson v. United States*, 88 Fed. Cl.
21 331, 332 (Fed. Cl. 2009); *Beck-Wilson v. Principi*, 441 F.3d 353, 361 (6th Cir. 2006)
22 (noting substantial evidence that NPs and PAs perform similar jobs); see also *Fridena v.*
23 *Evans*, 622 P.2d 463, 467 (Ariz. 1980) (expert testimony admissible where the difference
24 in the type of training of expert and type of training of defendant did not make any
25 difference in procedure used); A.R.S. §§ 32-1601 *et seq.*; A.R.S. § 32-2531. The Court
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1 concludes that, under the circumstances of this case, Gause, a NP, is engaged in the
2 “same health profession” as defendant Cranmer, a PA.

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4 Plaintiffs also seek to exclude the testimony of Gause under Federal Rule of
5 Evidence 702, arguing that Gause does not have the “knowledge, skill, experience,
6 training, or education” to qualify him to opine on the standard of care for a PA. For the
7 reasons already discussed in relation to state law, the Court makes a preliminary finding,
8 subject to the presentation at trial of the witness’s qualifications and experience, and
9 Plaintiffs’ opportunity to conduct *voir dire* of the witness, that Gause has sufficient
10 knowledge, skill, experience, training, and/or education to render an opinion on the
11 standard of care for a PA. The Court will therefore deny the motion to exclude Gause as
12 an expert. In so ruling, the Court is not making a definitive determination as to the
13 admissibility of this expert’s testimony, nor is the Court absolving Defendants of their
14 obligation at trial of establishing foundation for the admissibility of the expert/expert’s
15 testimony.
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19 3. Plaintiffs’ Motion to Exclude Testimony of Joan Cairns (Doc. 322)

20 Defendant Scarpati has disclosed Joan Cairns as an expert on the reasonableness
21 of Scarpati’s care. Plaintiffs seek to exclude Cairns, contending she was not engaged in
22 “active clinical practice” for a majority of her professional time during the year prior to
23 December 16, 2011. *See* A.R.S. § 12-2604(A)(2).³
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27 ³ To the extent County Defendants contend that Cairns can testify as an expert on the
28 standard of care based on her qualification under Federal Rule of Evidence 702 even if
she does not qualify under A.R.S. § 12-2604(A), their contention is foreclosed by
Seisinger v. Siebel, 203 P.3d 483, 488 (Ariz. 2009) (“The expert therefore must both

1 At her deposition, Cairns testified that during the relevant time period, she was the
2 director of Jail Psychiatric Services in San Francisco. (Doc. 364-1 at 7.) In that position,
3 she “basically ran the program,” which involved “program development, policy and
4 procedures” and supervising staff. (*Id.*) She also worked one day per week in the
5 booking and intake facility providing actual direct services. (*Id.* at 7-8.) When asked
6 specifically about the one year period prior to December 16, 2011, Cairns confirmed that
7 during that time, she performed eight hours a week of direct clinical work, and thirty-two
8 hours a week of administrative work. (Doc. 322-2 at 3-4; Doc. 364-1 at 8.) Thus,
9 Cairns’ deposition testimony makes clear that she did not spend the majority of her
10 professional time during the year prior to December 16, 2011, engaging in active clinical
11 practice.
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13 Defendants’ reliance on *Gay*, 813 N.W.2d 354, and *Hinkley*, 606 S.E.2d 802, is
14 misplaced. As discussed above, in *Gay*, the expert was deemed to meet the requirements
15 because she spent fifty percent of her professional time engaged in providing instruction
16 in a qualified educational program, and twenty-five percent of her professional time
17 indirectly treating patients. *See Gay*, 813 N.W.2d at 361. Here, in contrast, Cairns spent
18 only eight hours of a forty hour work week in direct clinical practice, and the remaining
19 thirty-two hours of her professional time each week as an administrator, engaging in
20 “program development, policy and procedures,” and “supervising staff.”
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26 In *Hinkley*, the expert did not meet the statutory requirements for admissibility
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possess the qualifications required by Rule 702 and satisfy the additional requirements of
§ 12–2604(A).”).

1 because, although he had been actively engaged in performing consultative work with
2 partners in his six-person medical practice, he had not evaluated, managed, or treated
3 “problems in pregnancies in the context of direct patient care as did the defendant
4 doctors,” and thus did not engage in “active clinical practice.” *Hinkley*, 606 S.E.2d at
5 807-08. Similarly, here, Cairns’ thirty-two hours of administrative activities per week
6 did not involve the evaluation, management, or treatment of patients in the context of
7 direct patient care, and thus do not qualify as hours spent in “active clinical practice.”
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10 The Court finds that Cairns did not spend the majority of her professional time
11 during the year prior to December 16, 2011, engaged in active clinical practice. The
12 Court will therefore exclude Cairns from testifying as to the standard of care under
13 Arizona law. The Court will, however, provide Plaintiffs with the opportunity to disclose
14 a substitute expert regarding the standard of care under Arizona law.
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17 4. Motion to Disqualify/Exclude Plaintiffs’ Standard of Care Expert Robert J.
18 Wimmer (Doc. 391)

19 Plaintiffs have disclosed Robert Wimmer as an expert on the reasonableness of the
20 care provided by Defendant Scarpati. Defendants Maricopa County and Scarpati move to
21 exclude Wimmer, contending he does not satisfy the requirements of A.R.S. § 12-
22 2604(A)(2) because he is not in the “same health profession” as Scarpati and does not
23 meet the “licensing” requirement.
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25 a. “Same Health Profession”

26 Defendants argue that Wimmer, who is a licensed clinical social worker, is not in
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1 the “same health profession” as Scarpati, who is a licensed professional counselor.⁴ The
2 Court disagrees.

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4 Both licensed professional counselors (“LPC”) and licensed clinical social
5 workers (“LCSW”) fall under the broader category of licensed mental health
6 professionals, and are employed as such at the jail. *See Graves v. Arpaio*, -- F. Supp. 3d -
7 -, 2014 WL 4898717, *28 (D. Ariz. 2014) (“Mental health professionals [at the jail] are
8 licensed professional counselors or licensed social workers.”); *cf. Fitzgerald v.*
9 *Commonwealth of Va.*, 643 S.E.2d 162, 165 (Va. 2007) (comparing a LCSW and a LPC,
10 noting that both “are governed by a similar statutory scheme,” both are authorized to
11 diagnose mental disorders, and both may render expert testimony). Moreover, both LPCs
12 and LCSWs are licensed as “health professionals” by Arizona and Utah; are required in
13 both states to have a masters or higher degree in the applicable field of practice; and are
14 required in both states to have completed significant post masters-level experience. *See*
15 A.R.S. §§ 32-3274(B)(1), (2); A.R.S. § 32-3293(1)(a), (b); A.R.S. § 32-3301(B), (C);
16 U.C.A. § 58-60-205(1)(d), (e), (g), (h). The Court finds that a LCSW licensed in Utah is
17 in the “same health profession” as a LPC licensed in Arizona.

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22 b. Licensing Timing

23 Defendants do not dispute that Wimmer is licensed in Utah as a clinical social
24 worker but contend that Wimmer is not qualified to testify under § 12-2604 because he
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26 _____
27 ⁴ The Court declines to address arguments raised for the first time in the reply brief that a
28 master social worker should not be permitted to opine as to the standard of care
applicable to a licensed professional counselor because a licensed professional counselor
“has more expertise, education, and experience.”

1 was not licensed at the time of the incident but instead obtained his license several
2 months afterwards.

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4 Section § 12-2604 does not explicitly require licensure at the time of the *incident*,
5 but instead merely requires that the expert is licensed in order to actually testify. *See*
6 A.R.S. § 12-2604 (providing that “a person shall not give expert testimony on the
7 appropriate standards of practice or care unless the person is licensed as a health
8 professional in this state or another state . . .”). Thus, under the plain language of the
9 statute, Wimmer meets the “license” requirement because he is now licensed as a health
10 professional in Utah.
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13 This does not, however, render the timing of Wimmer’s licensing irrelevant. To
14 the contrary, the Court finds that the license timing is relevant to the determination of
15 whether Wimmer spent a majority of his professional time during the year immediately
16 prior to December 16, 2011, in the “active clinical practice of the same health profession
17 as the defendant.” A.R.S. § 12-2604(A)(2)(a). This is because, although the Court has
18 determined that a *licensed* clinical social worker is in the “same health profession” as a
19 licensed professional counselor, the Court finds that an *unlicensed* social worker is not.
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22 As discussed above, Wimmer is licensed in Utah. Under Utah’s licensing statute,
23 to become licensed, a clinical social worker must not only have obtained a minimum of a
24 master’s degree in social work, but also must have, among other things, completed at
25 least 4,000 hours of clinical social work training; completed a qualifying case work,
26 group work, or family treatment course sequence with a clinical practicum; and passed an
27 examination. U.C.A. § 58-60-205(1)(e), (g), (h). Arizona’s licensing statute imposes
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1 similar requirements for both clinical social worker licensing and professional counselor
2 licensing. *See* A.R.S. § 32-3293(1)(a), (b) (clinical social worker licensing); A.R.S. § 32-
3 3301(A), (B) (professional counselor licensing).
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5 Thus, licensing as a clinical social worker or as a professional counselor is not
6 merely a formality, but instead demonstrates that the individual has completed certain
7 education, has received substantial additional training and experience, and has
8 successfully passed a professional examination. The Court finds that, until a clinical
9 social worker has successfully completed these steps and become licensed, he or she is
10 not engaging in the “same health profession” as a licensed professional counselor.
11 Accordingly, although Wimmer spent the majority of his professional time engaged in
12 active clinical practice as a mental health professional during the year prior to December
13 16, 2011, he was not, during that time, licensed as a clinical social worker and thus was
14 not engaged in the “same health profession” as Scarpati, a licensed professional
15 counselor. The Court will thus grant the motion to exclude Wimmer as an expert on the
16 standard of care applicable to Scarpati. The Court will, however, provide Plaintiffs with
17 the opportunity to disclose a substitute expert regarding the standard of care under
18 Arizona law.
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23 **B. City Defendants’ Motion to Strike/Exclude Plaintiffs’ Untimely Disclosed**
24 **Rebuttal Expert Dr. Trepeta (Doc. 288).**

25 Dr. Trepeta was disclosed by Plaintiffs as a rebuttal expert. Defendants seek to
26 strike and exclude the testimony of Trepeta (Doc. 288, 289, 290, 292) on the ground that
27 he was untimely disclosed by Plaintiffs. Defendants do not deny that if Trepeta is a
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1 proper rebuttal witness, Plaintiffs' disclosure was timely. Instead, Defendants' argument
2 is that disclosure of Trepeta was untimely because he "cannot properly be considered a
3 rebuttal expert." (Doc. 288 at 6.)
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5 Defendants contend that Trepeta cannot properly be considered a rebuttal expert
6 because Plaintiffs have the burden of proving causation, and "their causation expert
7 cannot be a rebuttal expert." (Doc. 288 at 6-7.) However, Plaintiffs clarify that they will
8 not be calling Trepeta in their case-in-chief, and will only call him on rebuttal in response
9 to the anticipated testimony of Defendants' pathologists, Stone and/or Di Maio. Plaintiffs
10 further explain that they have disclosed a different expert, Wilcox, to establish causation
11 in their case-in-chief, and disclosed Trepeta only in response to, and to rebut, the
12 opinions of defense experts Stone and Di Maio.
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15 The Court does not find that Plaintiffs should have anticipated these opinions, and
16 further finds that Plaintiffs' disclosure of Trepeta as a rebuttal witness was proper.
17 Further, contrary to Defendants' contention, Trepeta was not required to specifically state
18 in his report the names of the experts to which he was responding. *See* Fed. R. Civ. P.
19 26(a)(2)(B)(i), (D)(ii).
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22 Defendants contend that Trepeta's report is insufficient because it is not clear what
23 documents Trepeta actually reviewed in forming his opinions. (Doc. 288 at 8-9.) Under
24 Rule 26(a)(2)(B)(ii), an expert report is to include "the facts or data considered by the
25 witness in forming" their opinion. Trepeta's report states that he reviewed all of the
26 materials provided to him by Plaintiffs' counsel, including "police reports, video discs,
27 medical records, autopsy materials, disclosures and expert reports." Trepeta also
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1 provided Defendants with a detailed list of the information he reviewed in response to
2 Defendants' subpoena. (Doc. 314-5 at 18-19.) This information sufficiently apprised
3 Defendants of the information Trepeta reviewed and considered in forming his opinions.
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5 Defendants also argue that Trepeta's report is insufficient because it does not
6 provide any information about his qualifications as an expert as required by Rule
7 26(a)(2)(B)(iv). Plaintiffs do not dispute that Trepeta's report did not include information
8 regarding his qualifications or his CV. However, Plaintiffs indicate that they believed
9 Trepeta had disclosed his CV in response to Defendants' subpoena and that Plaintiffs
10 were not aware that Trepeta had not done so, presumably first learning of this deficiency
11 during the briefing on this motion. Notably, Defendants do not challenge in their motion
12 the qualifications of Dr. Trepeta as an expert.
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15 The Court finds that Plaintiffs' failure to disclose Trepeta's qualifications with the
16 report was in violation of Rule 26(a)(2)(B)(iv). The Court does not, however, find this
17 violation a sufficient basis on which to exclude Trepeta's expert testimony. The Court
18 further notes that, although it is Plaintiffs' obligation to ensure compliance with the
19 disclosure requirements, communication between counsel would likely have resolved this
20 problem without the necessity of Court intervention.
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23 The Court will grant in part and deny in part the motion to strike/exclude Trepeta's
24 testimony. Trepeta's testimony will be limited to rebuttal, and will be allowed only if
25 Defendants present testimony from the defense pathologists. To the extent Plaintiffs
26 have not yet disclosed to Defendants Trepeta's CV or otherwise provided Defendants
27 information regarding Trepeta's qualifications, the Court will require Plaintiffs to do so.
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1 The motion to exclude will otherwise be denied.⁵ In so ruling, the Court is not making a
2 definitive determination as to the admissibility of this expert's testimony, nor is the Court
3 absolving Plaintiffs of their obligation at trial of establishing foundation for the
4 admissibility of the expert/expert's testimony.
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6 **C. City Defendants' Motion to Strike Portions of Plaintiffs' Response (Doc. 329,**
7 **341).**

8 In conjunction with its reply in support of its motion to strike/exclude the
9 testimony of Trepeta, City Defendants filed a motion seeking to strike portions of
10 Plaintiffs' response. The Court will deny the motion as without merit.
11

12 **D. City Defendants' Daubert Motion to Exclude the Testimony of Ron Bruno**
13 **and Eldon Vail (Doc. 291); Defendants' Joint Motion to Exclude Testimony of**
14 **Plaintiffs' Use of Force Expert Ron Bruno (Doc. 297); and Motion to Exclude**
15 **the Testimony of Plaintiffs' Expert Eldon Vail and Alternative Motion for**
Daubert Hearing (Doc. 354).

16 Defendants seek to exclude the testimony of Ron Bruno and Eldon Vail (Doc. 291,
17 293, 296, 297, 311, 354, 378).
18

19 1. Ron Bruno: City Defendants' Daubert Motion to Exclude the Testimony
20 of Ron Bruno and Eldon Vail (Doc. 291)

21 a. "Training" Claim

22 Defendants contend that Bruno should be excluded from testifying because there
23 is no training claim against the City. A review of Bruno's expert report and deposition
24 testimony provided by the parties does not indicate any intent by Plaintiffs to have Bruno
25

26
27 ⁵ The Court declines to address additional grounds for exclusion of Trepeta's testimony
28 raised by Defendants for the first time in their reply brief. See *Lane v. Dept. of Interior*,
523 F.3d 1128, 1140 (9th Cir. 2008) (a district court can, in its discretion, decline to
consider arguments raised for the first time in a reply brief).

1 render an opinion on the adequacy of the City’s training, and Plaintiffs confirm that they
2 are not intending to have Bruno testify on the adequacy of the City’s training. Further,
3 the Court disagrees that the “natural inference” of Bruno’s testimony regarding how a
4 reasonably trained officer would have responded is that the officer’s training was
5 somehow deficient. The Court also disagrees that Plaintiffs are attempting, through
6 Bruno’s testimony, to “thwart” the Court’s denial of Plaintiffs’ motion to add a training
7 claim against the City.
8
9

10 b. Daubert Claim

11 Defendants contend that Bruno’s opinions fail to meet the standards set forth in
12 *Daubert* or Federal Rules of Evidence 702 and 703. The Court disagrees.
13

14 Contrary to Defendants’ arguments, in determining the reliability of non-scientific
15 expert testimony, such as Bruno’s, “the *Daubert* factors (peer review, publication,
16 potential error rate, etc.) simply are not applicable to this kind of testimony, whose
17 reliability depends heavily on the knowledge and experience of the expert, rather than the
18 methodology or theory behind it.” *Hangarter v. Provident Life and Acc. Ins. Co.*, 373
19 F.3d 998, 1017 (9th Cir. 2004) (citation and quotation marks omitted).
20
21

22 Moreover, a review of Bruno’s training and experience convinces the Court that
23 he is qualified as an expert on the reasonableness of the use of force. (*See* 317-1 at 3-4.)
24 Bruno has more than nineteen years of experience in law enforcement, and is currently
25 certified as a Utah Law Enforcement Officer. His duties over his nineteen year career
26 have included reserve police officer, patrol officer, field training officer, community
27 support officer, bicycle unit officer, special weapons and tactics operator, property crimes
28

1 investigator, gang suppression detail officer, Crisis Intervention Team⁶ (“CIT”) Officer,
2 CIT Utah Coordinator, and his current assignment of CIT Investigator and CIT Utah
3 Program Director. (*Id.*)
4

5 In addition, Bruno was assigned to the Utah Olympic Public Safety Command,
6 which provided him with experience in planning all public safety aspects for the 2002
7 Winter Olympics; working as part of a committee to train the public safety personnel
8 working in the various venues throughout Utah; and acting as project manager of the
9 2002 Winter Olympics Public Safety Handbook. (Doc. 317-1 at 3.) Bruno also has
10 provided training to other officers as an instructor in arrest control tactics, self-defense
11 tactics, ASP Baton tactics, Verbal Judo tactics, verbal de-escalation tactics, mobile field
12 force tactics, active shooter response tactics, special weapons and tactics operations,
13 crisis intervention tactics, and CIT Certification.
14
15

16
17 As to his CIT background and experience, Bruno was trained as a CIT Officer at
18 the Memphis Police Department’s CIT Academy in 2000, after which he returned to his
19 agency to put his training into practice as a patrol officer responding to mental health
20 calls and as a CIT Coordinator, working with local assets and partners to develop a
21 statewide CIT Utah Program. Bruno acted as the CIT coordinator until 2002, when he
22 was appointed as CIT Utah Program Director. (Doc. 317-1 at 3.) As CIT Program
23 Director, Bruno’s responsibilities include instructional involvement and oversight of
24
25

26
27 ⁶ The Crisis Intervention Team “is a program that assists with building community
28 partnerships to train law enforcement officers in tactics when interacting with persons
with mental illness,” and, through the partnerships it builds, “provides opportunities to
develop more appropriate criminal justice/mental health systems of care for members of
the community with mental illness.” (Doc. 317-1 at 3.)

1 testing in all CIT Academies for patrol conducted in the eight regions of Utah, and a
2 statewide CIT Academy for corrections. He is “responsible for oversight of curriculum
3 development, program fidelity adherence, program expansion, and assisting with the
4 development of more appropriate criminal justice/mental health services.” (*Id.*) As CIT
5 Utah Program Director, also Bruno has been and continues to be a resource for
6 communities throughout the United States interested in developing better integration of
7 criminal justice/mental health services.
8

9
10 When he was appointed to the position of CIT Program Director, Bruno also was
11 assigned as an investigator for his department’s CIT Investigative Unit. His
12 responsibilities thus include administration of the CIT Utah Program as well as
13 investigation of department cases involving mental health issues. (Doc. 317-1 at 4.)
14 Bruno’s assignment as an investigator allowed him to continue as a “first responder to
15 mental health calls for service,” and work with “members of the community who have a
16 mental illness and an involvement with the criminal justice system.” (*Id.*)
17

18
19 Bruno is also a founding board director of CIT International, which promotes
20 appropriate law enforcement response to situations involving persons with mental illness,
21 conducts conferences to assist communities with development of CIT programs, and
22 advocates for more effective interaction between the criminal justice and the mental
23 health systems. His last term as a director with CIT International expired at the end of
24 2013, but he continues to be involved in the organization through committee work.
25

26
27 Bruno also assisted in the development of recommended methods in a manual
28 released in 2011 by the National Alliance on Mental Illness. This manual is intended to

1 assist communities in understanding law “enforcement’s involvement with early
2 identification of mental health needs and appropriate collaborative efforts.” (*Id.*)
3

4 Further, Bruno sits on numerous local and national councils and committees that
5 address criminal justice/mental health issues; has been invited to meet with individual
6 members of Congress to discuss criminal justice/mental health programs and funding
7 needs; and has presented numerous local and national conferences on criminal
8 justice/mental health issues. (*Id.*)
9

10 Finally, during his deposition, Bruno clarified that, in addition to his CIT work, he
11 has been and continues to work as an active officer and responds to all kinds of calls for
12 service, including those that involve mental health issues, and that he has used force
13 against suspects too many times to count and, in fact, has to utilize force at some point
14 during most of his shifts, with the most recent time in the month prior to his deposition.
15 (Doc. 291-1 at 10-11, 13.)
16
17

18 Contrary to Defendants’ contention, Bruno’s inability to name applicable
19 constitutional provisions and lack of familiarity with case law does not render his opinion
20 unreliable. Bruno does not need to be an expert on the law in order to qualify as an
21 expert on the use of force. *Cf. Wood v. Ostrander*, 879 F.2d 583, 604 (9th Cir. 1989)
22 (“police officers are not held to the standards of legal scholars”).
23

24 Further, that Bruno has not worked as a detention officer or in a correctional
25 facility, but instead has training and experience as a law enforcement officer “on the
26 street,” does not render his opinion unreliable. The standard for whether force was
27 excessive is “whether the officers’ actions [were] ‘objectively reasonable’ in light of the
28

1 facts and circumstances confronting them, without regard to their underlying intent or
2 motivation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). This standard is the same
3 whether the force was used “on the street” or in a detention center. *See id.* (investigatory
4 stop); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006)
5 (arrest); *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003) (pretrial detention).
6 Moreover, Bruno’s lack of experience in a jail or detention facility goes to the weight, not
7 the admissibility, of his opinions. *See Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187,
8 1192 (9th Cir. 2007); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998)
9 (“Disputes as to the strength of [an expert's] credentials, faults in his use of [a particular]
10 methodology, or lack of textual authority for his opinion, go to the weight, not the
11 admissibility, of his testimony.”) (citation omitted); *United States v. Garcia*, 7 F.3d 885,
12 890 (9th Cir. 1993) (“lack of particularized expertise goes to the weight accorded her
13 testimony, not to the admissibility of her opinion as an expert”).

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18 Finally, although law enforcement is not required to use the least intrusive amount
19 of force possible, “the existence of less forceful options to achieve the governmental
20 purpose is relevant” in a use-of-force case. *Marquez v. City of Phoenix*, 693 F.3d 1167,
21 1174 (9th Cir. 2012). Bruno’s opinions are relevant to this use-of-force inquiry because
22 “a rational jury may rely upon expert evidence in assessing whether an officer’s use of
23 force was unreasonable.” *Sheehan v. City and County of San Francisco*, 743 F.3d 1211,
24 1225 (9th Cir. 2014) (citations omitted).
25
26
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28

1 2. Eldon Vail: City Defendants' *Daubert* Motion to Exclude the Testimony of
2 Ron Bruno and Eldon Vail (Doc. 291)

3 City Defendants seek to exclude Vail from testifying during the phase of trial
4 involving the individual officers. Plaintiffs make clear that Vail is being offered to opine
5 only on issues involving Maricopa County and will not be offered against City
6 Defendants. The Court will therefore grant the motion to the extent it seeks to exclude
7 Vail from testifying against City Defendants, but will otherwise deny the motion.
8

9 3. Ron Bruno: Joint Motion to Exclude Testimony of Plaintiffs' Use of Force
10 Expert Ron Bruno (Doc. 297)

11 Defendants argue that Bruno's report fails to meet the legal standards for
12 admissibility, including Bruno's lack of knowledge of relevant legal standards governing
13 use of force, lack of experience in detention settings or use of force therein, and failure to
14 focus on the relevant facts. Defendants contend that Bruno is not qualified as an expert
15 and that his opinions are not reliable or relevant. Many of Defendants' arguments have
16 been addressed above and will not be re-addressed here. For the reasons previously
17 discussed, and the following reasons, the Court will deny the motion to exclude Bruno
18 from testifying.
19
20
21

22 Defendants contend that Bruno relies on 20/20 hindsight vision in rendering his
23 opinions. However, a review of the deposition testimony cited by Defendants does not
24 convince the Court that Bruno actually relied on a 20/20 hindsight standard in forming
25 his opinions.
26

27 During questions related to the use of the Taser on Atencio, Bruno expressed the
28 opinion that the Taser should not have been used for numerous reasons. These reasons

1 included the number of officers that were involved, the setting, and Atencio's lack of
2 combativeness. After agreeing that it is possible that the likelihood of injury increases
3 the longer a struggle, such as that with Atencio, continues, Bruno was asked: "So, is it
4 your opinion that it would have been more reasonable for the officers to continue to
5 struggle to control Mr. Atencio rather than to use the taser?" Bruno responded:
6 "Absolutely, especially with 20/20 hindsight that the TASER was reported to not have
7 any effect on Mr. Atencio. So obviously the physical attempts by the officers were the
8 things that brought him into restraints and custody." (Doc. 297-1 at 42; Ex. 2 at 124.)
9
10 At another point in the deposition, Bruno was asked "One . . . or two times you used the
11 phrase '20/20 hindsight,' and my question is to you do you believe that officers are –
12 officers' actions, when they use force, are to be judged using 20/20 hindsight?" Bruno
13 responded: "If I've been asked to render my opinion, that's the only way I could render
14 my opinion." (Doc. 297-1 at 60; Ex. 2 at 195.)
15
16
17

18 These references to 20/20 hindsight do not convince the Court that Bruno has
19 actually rendered his opinion based on an improper 20/20 hindsight legal standard.
20 Instead, it appears to the Court that Bruno was merely expressing that, in rendering his
21 opinion, he is forced to look in hindsight at what happened, including the officer's actions
22 in employment of force. The Court will not, therefore, exclude Bruno's testimony on this
23 ground.
24
25

26 Defendants contend that Bruno based his opinion on what he personally would
27 have done, rather than on the proper standard of what a reasonable officer on the scene
28 would have done. Again, a review of the deposition testimony cited by Defendants in

1 support does not convince the Court that Bruno's opinions are based on an improper legal
2 standard.

3
4 Responding to questions regarding training materials and whether it was important
5 to know an officer's training in determining whether the officer's use of force complies
6 with their training, Bruno clarified that he was asked to base his opinion on his
7 experience, his training, and his education and not on "somebody else's policy." (Doc.
8 297-1 at 61; Ex. 2 at 197.) Bruno was then asked: "So what you would have done if you
9 were in that situation?" to which he responded, "Correct." (*Id.*) Then when asked, "Not
10 whether it was reasonable for what that officer did based on what he perceived at the
11 time?" Bruno responded, "No. From what a reasonably trained officer would have
12 utilized." (*Id.*) Bruno then clarified further that his opinion was based on a reasonably
13 trained officer, and that he "was not asked to base [his] opinion on law or policy. It was
14 based on my experience as a law enforcement officer and my training as a law
15 enforcement officer. However, I had applied what I believe a reasonably trained law
16 enforcement officer would have reasonably done." (*Id.*)

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21 The Court finds Bruno's deposition testimony, read in full and taken in context,
22 demonstrates that Bruno did indeed apply the correct legal standard in rendering his
23 opinions. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a
24 particular use of force must be judged from the perspective of a reasonable officer on the
25 scene, rather than with the 20/20 vision of hindsight.").

26
27 Defendants contend that Bruno is not qualified to testify as an expert due to his
28 lack of experience and training in the use of force and mental illness. The Court has

1 already discussed above Bruno's extensive experience and qualifications. Factors such as
2 Bruno's lack of experience in a jail or detention setting, and lack of special knowledge
3 and training in use of force, go to the weight, not the admissibility of his opinions. *See*
4 *Stilwell*, 482 F.3d at 1192; *Kennedy*, 161 F.3d at 1231; *Garcia*, 7 F.3d at 890.
5

6 Finally, Defendants contend that Bruno's opinions are not based on an
7 independent review of the relevant information available in the case, but that he instead
8 relied almost exclusively on the testimony of only two officers who did not have any
9 hands-on contact with Atencio and were only briefly in the search area. However, the list
10 of materials reviewed by Bruno includes the deposition testimony and/or interviews of
11 numerous officers, including Hatton and Weiers. That Bruno may have discounted the
12 statements of some officers and relied more heavily on statements of other officers, are
13 issues that Defendants are free to explore on cross-examination of Bruno. These issues,
14 again, go to the weight, not the admissibility, of Bruno's opinions.
15
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18 4. Eldon Vail: Motion to Exclude the Testimony of Plaintiffs' Expert Eldon
19 Vail and Alternative Motion for *Daubert* Hearing (Doc. 354)

20 Defendants seek to exclude the testimony of Vail on the grounds that his opinions
21 are irrelevant, unreliable, and/or constitute a legal conclusion.
22

23 a. Opinion Regarding "Planned" Uses of Force

24 Defendants contend that Vail's opinion regarding "planned" use of force is
25 irrelevant because the use of force in this case was not a planned use of force but was
26 instead unplanned. However, a review of Vail's deposition testimony demonstrates that
27 his testimony is indeed relevant. Specifically, although Vail admitted that the use of
28

1 force on Atencio was unplanned, he further expressed the opinion that the use of force
2 should have been a planned use of force: “It’s my opinion that if force needed to be used
3 ultimately in order to get [Atencio] to do what the County needed him to do, that it
4 should have been planned.” (Doc. 354-1 at 10.) Vail further explained that it was his
5 opinion that Atencio should have been moved back to the holding cell so that, if
6 necessary, the use of force could have been planned. (*Id.*) Vail also explained in his
7 report that the MCSO makes no reference to mental health intervention in a planned use
8 of force event, and in fact makes no reference at all to planned use of force, and opined
9 that the absence of such requirements “is likely to result in unnecessary harm to mentally
10 ill prisoners.” (Doc. 354-1 at 37-38.) Finally, Vail opined that the failure of MCSO to
11 involve mental health staff in planned use of force events results in unnecessary and
12 unavoidable use of force, subjecting mentally ill inmates to a significant risk of
13 substantial physical and psychological harm. (Doc. 354-1 at 43.)

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18 Defendants also contend that Vail’s opinion regarding planned uses of force is
19 unreliable because, in offering his opinion that MCSO was “out of step” with practices in
20 other jurisdictions relating to planned uses of force and mental health intervention, Vail
21 considered policies from only three other jurisdictions – Los Angeles County, the State of
22 Washington Department of Corrections, and the Mississippi Department of Corrections.
23 (Doc. 354 at 6; Doc. 354-1 at 42-43.) The Court finds that although the consideration of
24 policies from only three other jurisdictions may go to the weight given to Vail’s opinion,
25 it does not render Vail’s opinion inadmissible.
26
27

28 b. Opinion on Adequacy of Training to Recognize Mental Illness

1
2 Vail was retained by Plaintiffs to evaluate and offer an opinion regarding the
3 policy and operational practices of the MCSO on the use of force procedures for mentally
4 ill inmates. Defendants seek to exclude Vail's opinion regarding the adequacy of MCSO
5 training on supervision and treatment of inmates known or suspected to have serious
6 mental illness, contending Vail is not qualified to render such an opinion. The Court
7 disagrees and concludes that Vail is qualified to render his opinion based on his
8 background and experience.
9

10
11 Vail has almost thirty-five years of experience working in and administering
12 correctional institutions. This experience includes rising through the ranks in the
13 Washington Department of Corrections (WDOC), serving as a superintendent of three
14 different correctional institutions, and reaching the level of Secretary of WDOC in 2007-
15 2011; working side by side with mental health professionals, including making sure that
16 policies work for those professionals and are designed to assist in managing the mentally
17 ill prison population; establishing an intensive treatment program for mentally ill inmates
18 with behavioral problems; pioneering extensive family based programs resulting in
19 reductions in use of force incidents and infractions; and engaging in a long-term
20 collaboration with the University of Washington focusing on the mentally ill in prisons
21 and the management of prisoners in and through solitary confinement. (Doc. 354-1 at 50-
22 53.) Vail's background and experience is further detailed in his declaration, which
23 explains his experience dealing with the mentally ill population in a correctional setting.
24 (Doc. 291-1 at 106-08.) To the extent Vail lacks particularized expertise in mental
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27
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1 health, this goes to the weight of his testimony, not its admissibility. *See Stilwell*, 482
2 F.3d at 1192; *Kennedy*, 161 F.3d at 1231; *Garcia*, 7 F.3d at 890.

3
4 Defendants also contend that Vail’s opinion is unreliable because it misstates the
5 opinion of another of Plaintiffs’ experts, Katsaris. In his deposition, Katsaris testified
6 that he was not rendering an opinion on force or mental illness in the case (Doc. 306-1 at
7 13), and that, instead, he looked at the history of the policies, practices, and procedures of
8 the MCSO, and the operation of MCSO under Arpaio’s administration. (Doc. 306-2 at
9 5.) Katsaris’s opinions were thus focused on the actual practices implemented, and the
10 culture influenced by, Arpaio’s actions. (*See id.*) Katsaris clarified in his deposition that
11 he “did not attack the training in any way, shape or form,” and noted that there “is even
12 some evidence of some praise that the training was in order,” but that his focus was not
13 on the training but on “the posture of the Sheriff, what is the leadership of the Sheriff and
14 how does that leadership appear when reviewing a historical review of interviews, court
15 cases, Department of Justice investigations.” (Doc. 306-1 at 13-14.) Katsaris further
16 testified that he did not “find the training given to detention officers regarding mental
17 illness to be deficient”; and that he was of the opinion that as of the mid 2000s, the
18 training at the MCSO “was well above the standard of care throughout the country,” but
19 that he had not reviewed the recent information on training. (Doc. 306-1 at 15, 47-48.)

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23
24 Vail, in contrast to Katsaris, concludes that a review of the *incidents* listed in
25 Katsaris’s report “establish, beyond a doubt that Maricopa County had notice . . . that it is
26 out of step with respect to its policies and the national standards and practices.” (Doc.
27 354-1 at 62.) Thus, Vail did not “misstate” Katsaris’s opinion, but instead merely relied
28

1 on information in Katsaris’s report regarding incidents that have occurred over the years
2 involving the MCSO, and opined that the County had notice it is “out of step.”
3
4 Moreover, Vail clarified that even if adequate training is being offered at MCSO, that
5 training was not being reinforced and not followed up as required to make the training
6 effective and make officer performance consistent with that training. (Doc. 361 at 18-
7
8 21.)

9 c. Opinion on Whether MCSO Policies, Procedures, and Practices were
10 a “Moving Force” Contributing to Atencio’s Death

11 In his report, Vail states: “Maricopa County’s policies, procedures and practices
12 are a moving force that contributed to Marty Atencio’s death.” (Doc. 354-1 at 45.)
13 Defendants seek to exclude this opinion, contending it is an inadmissible legal
14 conclusion.
15

16 The Court agrees that, viewed in isolation, Vail’s “moving force” statement
17 appears to be excludable as a legal conclusion. *See Nationwide Transp. Fin. v. Cass Info.*
18 *Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (expert may not “give an opinion as to her *legal*
19 *conclusion*, i.e., an opinion on an ultimate issue of law”); *Berry v. Baca*, 379 F.3d 764,
20 767 (9th Cir. 2004) (to impose liability a plaintiff must demonstrate that the policy at
21 issue was “the moving force behind the constitutional violation”). However, in his
22 deposition, when asked what he meant by the term “moving force,” Vail explained:
23
24 “That what was going on relative to the policy or lack of policy, to the training or lack of
25 follow-through on the training or lack of actually being able to observe what was in the
26 lesson plan, found its way to the shop floor, so to speak, that all of those contributed to an
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28

1 environment that made possible Marty's death. I mean, that's what I mean by moving
2 force." (Doc. 361 at 13.)

3
4 Vail's explanation makes clear that his "moving force" statement is not an
5 inadmissible legal conclusion, but is instead merely his opinion regarding causation,
6 which is admissible. *Cf. City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (plaintiff must
7 establish not only requisite fault on the part of the municipality, but also "the causal
8 connection between the 'policy' and the constitutional deprivation"). However, to the
9 extent Vail uses the term "moving force," that term shall be struck from his opinion, and
10 use of such terminology, or any other terminology that expresses an opinion on an
11 ultimate issue of law, prohibited.
12
13

14 Finally, Defendants contend that Vail's opinion is inadmissible because the sole
15 basis for his opinion that the MCSO "facility culture" disregards the needs and challenges
16 of mentally ill inmates is a single incident – the incident involving Atencio. The Court
17 disagrees.
18

19 When Vail was questioned during his deposition regarding his "facility culture"
20 opinion, he stated that the video of Atencio demonstrated the result of that facility culture
21 – the use of force that was likely unnecessary or, at minimum, used prematurely. (Doc.
22 354-1 at 7-8.) Vail clarified that the incident involving Atencio did not, in isolation,
23 demonstrate the facility culture, but it did show the need for further examination. (*Id.* at
24 9.) Vail contends that his facility culture opinion is based on his extensive knowledge of
25 the MCSO culture, gained through, among other things, his position as an expert in the
26 *Graves* case and his review of the report of Plaintiffs' expert Katsaris, which listed
27
28

1 various historical incidents that have occurred at the jail.

2 Defendants contend that to the extent Vail relied on information obtained from the
3 *Graves* case in reaching his opinion, Vail has violated the disclosure requirements of Fed.
4 R. Civ. P. 26 because Vail did not indicate that he relied on such information in his
5 report. Vail did, however, list in his report the *Graves* case as a case in which he is
6 retained as an expert witness. (Doc. 354-1 at 53.) To the extent Vail's disclosure
7 regarding the *Graves* case could be deemed inadequate, the Court does not find exclusion
8 of Vail's opinion to be the appropriate remedy.

9 In sum, to the extent Vail uses the term "moving force," that term shall be struck
10 from his opinion, and Vail shall be prohibited from using such terminology, or any other
11 terminology that expresses an opinion on an ultimate issue of law, in his testimony. The
12 motion to exclude Vail from testifying will be otherwise denied. In so ruling, the Court is
13 not making a definitive determination as to the admissibility of this expert's testimony,
14 nor is the Court absolving Plaintiffs of their obligation at trial of establishing foundation
15 for the admissibility of the expert/expert's testimony.

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20 **D. City Defendants' Daubert Motion to Exclude the Causation Opinions of**
21 **Plaintiffs' Expert Dr. Wilcox and a Portion of His Untimely Rebuttal Report**
22 **(Doc. 294); and Defendants' Motion to Exclude Plaintiffs' Expert Todd**
23 **Wilcox (Doc. 308).**

24 Defendants seek to exclude Dr. Wilcox from testifying (Doc. 294, 302, 303, 308,
25 309, 312, 313).

26 1. Wilcox's Qualifications

27 Defendants contend that Wilcox is not qualified to render opinions on the use of
28

1 force or on the cause of death. As to the use of force, Defendants argue that Wilcox has
2 never taken a physical, hands-on practical course on use of force, has never used or
3 received instruction on the use of a Taser, has never received any instruction on defensive
4 tactics, and has never taught defensive tactics. Plaintiffs clarify that Wilcox is not
5 offering a use of force opinion from the perspective of a police practices expert, but is
6 instead opining that *any* use of force against Atencio was *per se* unreasonable, and that it
7 was the County's procedures and culture that led to the force being used against Atencio.
8
9 The Court will thus grant the Motion to Exclude only to the extent it seeks to exclude
10 Wilcox from testifying as to the use of force from a police practices expert perspective.
11
12

13 As to the cause of death, Defendants argue that Wilcox does not possess the
14 necessary skill and knowledge to give a reliable opinion on Atencio's cause of death
15 because he is not a medical examiner, is not a forensic pathologist, and has never
16 performed an autopsy.
17

18 Wilcox is a medical doctor with over seventeen years of experience in the design,
19 administration, and delivery of correction health care, and actively practices in
20 correctional healthcare as the Medical Director of the Salt Lake County Jail System.
21 (Doc. 308 at 13.) Wilcox is frequently called as a consultant to assist facilities nationally
22 in improving delivery of care. (*Id.*) He is certified at the advanced level in correctional
23 health care from the National Commission on Correctional Health Care and frequently
24 presents on pertinent topics in this field of medicine to national audiences. (*Id.*)
25
26

27 Wilcox also has a unique understanding of the environment at the Maricopa
28 County Jails. He was part of a management team hired in November 2004 to try to

1 reform the healthcare system within the Maricopa County Jails, served as Medical
2 Director for the Maricopa County Jails from November 2004 to February 2006, and
3 remained on staff as a consultant to Maricopa County until February 2008. (*Id.*) He had
4 extensive exposure during that time to the decision makers within Maricopa County and
5 had direct access to the underlying management decisions that occurred prior to the
6 events that resulted in Atencio's death. (*Id.*)
7

8
9 In addition, Wilcox has published extensively in various areas of medicine,
10 including most recently in correctional health care. (Doc. 308 at 38-40.) He has been a
11 member of expert panels on correctional healthcare, and has made numerous professional
12 presentations, including presentations on effective correctional medical/mental health
13 intake screening, correctional healthcare jail standards, and excited delirium and sudden
14 in-custody death syndrome. (*Id.* at 40.) He also has testified as an expert witness in other
15 cases, including testimony on the cause of death. (*See* Doc. 308 at 42; Doc. 362-1 at 37.)
16
17

18 The Court finds Wilcox's background and experience sufficient to qualify him to
19 opine on the cause of death in this case, with the lack of his particularized expertise going
20 to the weight, not the admissibility, of his cause of death opinion. *See Kennedy*, 161 F.3d
21 at 1231 (disputes regarding the strength of an expert's credentials go to the weight, not
22 the admissibility, of his testimony); *Garcia*, 7 F.3d at 890 (same).
23

24 2. Reliability of Wilcox's Opinions

25 a. Autopsy Report and Stano Deposition

26
27 Defendants contend that Wilcox's opinion is inadmissible because he did not
28 review the autopsy report or deposition of the medical examiner – Stano – before writing

1 his initial report. However, Wilcox’s initial report actually cites to the autopsy report,
2 and quotes from that report. (Doc. 294-1 at 16.) Wilcox also testified that he reviewed
3 the autopsy report prior to preparing his initial report. (Doc. 318-1 at 8, 10.) Further,
4 Plaintiffs’ counsel confirmed to City Defendants’ counsel through an email that the
5 autopsy report was erroneously left off of the list of documents reviewed by Wilcox, but
6 that Wilcox had, consistent with his deposition testimony, considered the autopsy report
7 in preparing his initial report. (Doc. 318-9 at 3; *see* Doc. 294-1 at 16.) In addition,
8 Wilcox’s invoice to Plaintiffs’ counsel lists time spent by Wilcox reviewing the Stano
9 deposition – to which the autopsy report was attached – prior to the date of Wilcox’s
10 initial report. (Doc. 318-1 at 19.)

14 This evidence indicates that Wilcox reviewed the autopsy report prior to his initial
15 report, and perhaps also reviewed the Stano deposition prior to the initial report.
16 Moreover, even assuming that Wilcox did not review the Stano deposition prior to
17 drafting his initial report, that factor would go to the weight rather than the admissibility
18 of his opinions. *See Kennedy*, 161 F.3d at 1231.

21 b. “Suffocation” and Choke Hold/Carotid Hold Opinion

22 Defendants contend that Wilcox’s opinion that Atencio was “suffocated” is
23 inadmissible because he does not discuss how the suffocation occurred and what physical
24 evidence suggests suffocation. Defendants further contend that to the extent Wilcox
25 opines that the use of a carotid hold or choke hold caused the suffocation, such opinion
26 was untimely/not properly disclosed and lacks scientific, factual, and medical support.

28 In his report, Wilcox opined that Atencio was “suffocated, beaten and shocked to

1 death.” (Doc. 294-1 at 23.) Plaintiffs have clarified that Wilcox will not testify that
2 Atencio was beaten to death, or that Atencio was suffocated to death, but will instead
3 testify that it was a combination of factors that led to Atencio’s death, including the
4 “suffocation” and “beating.”
5

6 Wilcox also opined in his report that, but for Atencio’s interaction with law
7 enforcement and his subsequent “violent subdual by law enforcement, there is no
8 evidence that he had any prodromal condition, symptom, or exam finding consistent with
9 impending cardiac failure or anoxic brain injury.” (Doc. 294-1 at 23.) Wilcox also notes
10 in the report that the medical examiner had determined the cause of death to be
11 “Complications of Cardiac Arrest in the setting of acute psychosis, law enforcement
12 subdual, and multiple medical problems.” (Doc. 294-1 at 16.) Wilcox notes that in the
13 linescan room, there was a “dogpile” of officers on top of Atencio, and that there were
14 eleven officers on or around Atencio; and that in the safe cell, officers are on top of
15 Atencio. (*Id.* at 14-15.)
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19 During his deposition, Wilcox explained that his opinion was not that there was a
20 “single, solitary cause of death,” but that there were several factors that contributed to the
21 death. (Doc. 318-1 at 6.) He believed that Atencio was suffocating during the incident
22 based on his observation of the videos showing the events that occurred. (Doc. 294-2 at
23 15.) Wilcox testified that his review of the videos led him to believe a choke hold or a
24 carotid hold was applied to Atencio, and that the autopsy report also indicated that
25 Atencio suffered injuries to the neck area, but that the bruising found on Atencio’s neck
26 was not conclusive. (Doc. 294-2 at 8-9, 11-12.) Wilcox also opined that there may have
27
28

1 been some weight force placed on Atencio, although he could not quantify the exact
2 poundage of weight placed on him. (*Id.* at 16.)

3
4 Wilcox testified that “decreased ability to breathe instills fear” and “activates the
5 fight-or-flight mechanism which activates the sympathetic nervous system”; and that his
6 opinion that suffocating was a contributing factor to Atencio’s death was based on both
7 his observation of the videos and his knowledge that “air hunger causes an activation of
8 the sympathetic nervous system.” (Doc. 318-1 at 8.) Wilcox explained that he believed
9 Atencio’s ability to breath was only “partially” impacted and that he did not know
10 whether this caused Atencio to actually lose consciousness. (*Id.* at 15-16.)

11
12
13 Wilcox further opined that the “situation is one of a sudden death” and that he
14 ruled out other alternative possible causes of death based on the medical records,
15 Atencio’s vital signs, his past history, and what Wilcox saw on the videos. (Doc. 318-1
16 at 12-13.) Wilcox explained that he did not parse out each of the forces used against
17 Atencio as to causation because he did not believe that you could realistically do that
18 because it “really is sort of a sum total of the uses of force that caused his sympathetic
19 nervous system to go into overdrive, and that was ultimately the cause of his sudden
20 cardiac death.” (*Id.* at 14.) Wilcox testified that he believed a combination of pain and
21 fear activated Atencio’s “sympathetic system, which dumped epinephrine and
22 norepinephrine into his system and caused sudden cardiac death.” (*Id.* at 15.)

23
24
25
26 Although Wilcox’s report was not entirely clear regarding his “suffocation”
27 opinion, and did not explicitly mention a choke hold or carotid hold, Defendants had the
28 opportunity to and did explore these topics during Wilcox’s deposition. Wilcox’s

1 deposition testimony expanded on, clarified, and adequately explained the bases of his
2 suffocation opinion. The Court will therefore decline to exclude the suffocation opinion
3 and will further decline to exclude the opinion regarding the choke hold or carotid hold.
4

5 c. Lack of Reliance on Literature/Independent Research

6 Defendants contend that Wilcox’s opinion is inadmissible because he does not rely
7 on any literature and has not conducted independent research to support his suffocation
8 opinion. There is not, however, any requirement that an expert qualified based on his
9 background and experience rely on literature or conduct independent research to support
10 his opinions. *See U.S. v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (“The Daubert
11 factors (peer review, publication, potential error rate, etc.) simply are not applicable to
12 this kind of testimony, whose reliability depends heavily on the knowledge and
13 experience of the expert, rather than the methodology or theory behind it.”); *see also*
14 *Hangerter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004)
15 (“Given that, unlike scientific or technical testimony, the reliability of [the expert’s]
16 testimony was not contingent upon a particular methodology or technical framework, the
17 district court did not abuse its discretion in finding [the expert’s] testimony reliable based
18 on his knowledge and experience.”).
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23 d. “Beating” Opinion

24 Defendants contend that Wilcox’s opinion is inadmissible because his “beating”
25 opinion is without support. The Court disagrees.
26

27 In his report, Wilcox noted that in the linescan room, a detention officer appeared
28 to strike Atencio several times, and that officers had formed a “dogpile” on top of

1 Atencio. (Doc. 294-1 at 14-15.) Further, Wilcox testified during his deposition that his
2 opinion regarding Atencio being beaten was based on his review of the videos and “the
3 evidence from the officers” that indicated the use of force and strikes against Atencio.
4 (Doc. 318-1 at 7.) Wilcox testified that there were two incidents on the videos to which
5 he was referring to. One was in the linescan room where an officer strikes Atencio three
6 times and the second was in the safe cell where an officer “appears to drop his weight
7 through his knee onto” Atencio. (*Id.*) This information provides adequate support to
8 Wilcox’s statement that Atencio was beaten.
9
10

11 e. Failure to Specify Responsible Defendants
12

13 Defendants contend that Wilcox’s opinion is inadmissible because he does not
14 delineate which of the defendants allegedly suffocated, electrocuted, or beat Atencio to
15 death and instead grouped all defendants together. The Court disagrees. The
16 admissibility of Wilcox’s cause of death opinion is not contingent on Wilcox forming or
17 expressing an opinion regarding which defendants used the forces he opines caused
18 Atencio’s death.
19

20 f. Failure to Review Certain Evidence
21

22 To the extent Defendants challenge the admissibility of Wilcox’s opinions because
23 he did not review certain other evidence prior to rendering his opinions, or consider
24 different alternative theories or hypotheticals, such arguments go to the weight, not the
25 admissibility of his opinions. *See Kennedy*, 161 F.3d at 1231. Further, to the extent
26 Defendants challenge the conclusions reached by Wilcox, these are issues of credibility
27 reserved for the jury rather than the judge. *See Daubert v. Merrell Dow*
28

1 *Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993).

2 g. “Culture of Punishment” Opinions

3
4 Wilcox opined that the culture created by Arpaio in the Maricopa County Jail is
5 “one of the moving forces” behind Atencio’s death. (Doc. 308 at 20-21.) Defendants
6 contend that Wilcox bases his “culture of punishment” opinions on unreliable and
7 misleading data. Specifically, Defendants challenge Wilcox’s reliance on lawsuits
8 against Maricopa County and “dated news articles.”

9
10 Defendants’ reliance on *Thomas v. City of Chattanooga*, 398 F.3d 426 (6th Cir.
11 2005) in support of their contention that Wilcox’s opinion should be excluded is
12 misplaced. In *Thomas*, the expert inferred that the defendant police department “had an
13 unwritten policy condoning excessive force” based solely on the number of complaints
14 filed against the police department, and without conducting any qualitative analysis of the
15 cases or how those cases were similar to the case before the court. *Id.* at 430-32.

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17
18 In contrast, in the present case, Wilcox did not rely solely on the number of
19 conditions of confinement lawsuits filed against Maricopa County. To the contrary,
20 Wilcox relied on his comparison of the number of conditions of confinement lawsuits in
21 Maricopa County with the number of similar lawsuits in jails in New York City, Los
22 Angeles, Chicago, and Houston, which showed that Maricopa County had one-sixth the
23 number of prisoners but over forty times the number of lawsuits filed. Wilcox also relied
24 on a staffing study complete for Maricopa County Correctional Health Services (“CHS”),
25 which noted the amount of money paid by Maricopa County to claimants to settle health
26 care claims and lawsuits and the bases for those lawsuits; Wilcox’s own experience and
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1 observations while working with Maricopa County as medical director and as a senior
2 consultant in the jails, including the abuses he had to address while in those positions and
3 his day-to-day observations; and the “very well-known opinion of the sheriff that he
4 wants the jails to be a place of punishment,” found in the materials Wilcox reviewed and
5 which Wilcox personally heard the sheriff express at high-level staff meetings. (Doc.
6 308 at 32-33; Doc. 362-1 at 14, 17-19, 29-30.)
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8

9 Further, although the materials Wilcox relied on include news articles and other
10 information dating back to 1995, he also relied on more recent information, including
11 articles, reports, cases, and news releases dated as recently as November 2013.⁷ Wilcox
12 reasonably relied on this type of information in assessing whether there was a “culture of
13 punishment” at the Maricopa County Jails. *See, e.g., Walden v. City of Chicago*, 755 F.
14 Supp. 2d 942, 953 (N.D. Ill. 2010) (approving expert’s methodology, including reliance
15 on newspaper articles, in conducting historical research regarding police department
16 practices or customs); *Katt v. City of New York*, 151 F. Supp. 2d 313, 356-57 (S.D.N.Y.
17 2001) (finding interviews, commission reports, research articles, scholarly journals,
18 books, and newspaper articles to be the types of data reasonably relied upon by social
19 science experts).
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23 In sum, the Court does not find Wilcox’s “culture of punishment” opinion to be
24 excludable on the grounds raised by Defendants in their motion. In so ruling, the Court is
25 not, however, making a definitive determination as to the admissibility of Wilcox’s
26

27 _____
28 ⁷ To the extent Defendants challenge whether Wilcox actually read the *Phoenix New Times* article, this is a subject Defendants can explore on cross-examination.

1 “culture of punishment” opinion. *Cf. Richard v. Hinshaw*, 2013 WL 6632122, *4 (D.
2 Kan. 2013) (excluding as speculative opinion that there “was a prevailing ‘culture’ of
3 bias against inmates in general and mentally impaired inmates in particular throughout
4 the jail ‘chain of command’” because it opines “on what was, or was not, known by
5 others and therefore amount[s] to speculation”). Moreover, this and the Court’s other
6 rulings regarding this expert do not absolve Plaintiffs of their obligation at trial of
7 establishing foundation for the admissibility of the expert/expert’s testimony.
8

9
10 3. Disclosure Requirements of Federal Rule of Civil Procedure 26

11 Defendants contend that Wilcox’s rebuttal opinions are not proper rebuttal, but
12 instead are simply an attempt to bolster Plaintiffs’ case in chief and that his rebuttal
13 report was thus untimely and must be excluded. Defendants’ contention relates to the
14 references in the rebuttal report to the Stano deposition and/or autopsy report, and the
15 timing of Wilcox’s review of that evidence. The issues relating to Wilcox’s review of the
16 Stano deposition and the autopsy report already have been addressed above. To the
17 extent Defendants seek to limit to rebuttal testimony from Wilcox regarding the autopsy
18 report and/or information from the Stano deposition, the Court will deny the motion.
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22 4. Court’s Bifurcation Order

23 Finally, Defendants argue that if Wilcox is permitted to testify during the first
24 phase of trial, there is a high danger of a mistrial or unfair prejudice to the individual
25 Defendants. Pursuant to the Court’s Bifurcation Order (Doc. 93), Plaintiffs’ claims
26 against the individual officers will be tried first; if the trier of fact finds one or more of
27 the individual defendants violated Atencio’s constitutional rights, then the municipal
28

1 liability claims will proceed to trial before the same jury. At this time, there is no
2 indication that Plaintiffs would not be able to limit Wilcox's testimony to those issues
3 relevant to individual defendant liability during the first phase of the trial. The Court will
4 therefore deny the motion to exclude on this ground, but notes that Defendants may raise
5 the issue again prior to trial through a motion *in limine*.
6

7
8 **E. Motion to Exclude the Testimony of Plaintiffs' Expert Ken Katsaris and**
9 **Alternative Motion for Daubert Hearing (Doc. 306).**

10 Defendants move to exclude the testimony of Plaintiffs' expert Ken Katsaris and
11 alternatively move for a Daubert hearing. (Doc. 306.)

12 Defendants argue that Katsaris's opinion should be excluded because it is based on
13 non-authoritative sources and because Katsaris did not do independent research.
14 Specifically, Defendants argue that rather than conducting any independent research,
15 Katsaris relied on newspaper articles and the research and reports of others in forming his
16 opinions, and that many of the documents Katsaris relies upon were more than fifteen
17 years old, yet he did nothing to confirm whether the conditions reported in those
18 documents still existed in 2011.
19

20
21 A review of Katsaris's report and deposition testimony demonstrates that Katsaris
22 relied not only on newspaper articles, but also on such things as press releases,
23 newsletters, letters, memoranda, reports, and documents from various legal proceedings
24 in conducting his historic research and forming his opinions. The Court finds Katsaris's
25 reliance on this type of information, in reviewing the historical impact of the "leadership"
26 of Arpaio on the custom, practice, culture, and operation of the Maricopa County Jails
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1 and its employees, to be reasonable. *See, e.g., Walden*, 755 F. Supp. 2d at 953; *Katt*, 151
2 F. Supp. 2d at 356-57. Further, the documentary information relied on by Katsaris
3 spanned the years 1995 through 2013, and thus did address the circumstances that existed
4 in 2011.
5

6 Defendants argue that Katsaris’s theory – that Arpaio’s rhetoric and leadership
7 over a period of time has had an influence on personnel and the operation of the jail and
8 has caused employees to follow the rhetoric rather than the official policy and training –
9 has not been tested or subject to peer review, and is thus unreliable. However, Katsaris’s
10 opinion is based on his knowledge and experience, and *Daubert* factors of peer review
11 and independent testing do not necessarily apply to this kind of testimony. *See Hankey*,
12 203 F.3d at 1169; *see also Hangarter*, 373 F.3d at 1018.
13
14

15 Defendants point to numerous things that Katsaris did not review in support of
16 their contention that Katsaris did not engage in intellectual rigor and that his opinions
17 should therefore be excluded. For example, Defendants argue that Katsaris did not
18 determine whether detention officers emphasize loyalty to Arpaio over the rules, policies,
19 and procedures they are trained to follow; did not review training the detention officers
20 receive; and did not interact with, observe, or read the deposition or interview of a single
21 MCSO officer in formulating his opinions.
22
23

24 Plaintiffs explain that Katsaris’s opinion does not relate to the particular
25 defendants who had contact with Atencio, but instead relates to whether Arpaio’s
26 statements regarding his desire that the jails be places of punishment “have fostered a
27 culture consistent therewith” and cause MCSO employees to disregard their training and
28

1 written policies. (Doc. 366 at 2.) Specifically, Plaintiffs explain that Katsaris’s opinion
2 relates to the actual practices at the jail, and the culture that he opines has been influenced
3 by Arpaio’s “posturing for a public image” that is inconsistent with “recognized and
4 accepted jails practices and procedures.” Katsaris opines that MCSO employees
5 disregard their training due to the culture in the jails and Arpaio’s comments and
6 leadership style, which conflict with their training. Katsaris explained that in forming his
7 opinions he relied, among other things, on the historical circumstances of the jail,
8 including depositions of MCSO employees in other cases that demonstrated both
9 knowledge of Arpaio’s public rhetoric and that employees were influenced by that
10 rhetoric, and the lack of change and continued bad outcomes at the jail despite having
11 what appeared to be appropriate training and policies in place.

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15 Mindful that the questions of whether an expert is credible, and whether his
16 theories are correct under the circumstances of a particular case, are factual ones left for
17 the jury, *see Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th
18 Cir. 2014), the Court will deny the motion to exclude Katsaris’s opinion on the grounds
19 raised in the motion. In so ruling, the Court is not, however, making a definitive
20 determination as to the admissibility of Katsaris’s opinion. *Cf. Richard*, 2013 WL
21 6632122 at *4 (excluding as speculative Katsaris’s opinion that there “was a prevailing
22 ‘culture’ of bias against inmates in general and mentally impaired inmates in particular
23 throughout the jail ‘chain of command’” because it opines “on what was, or was not,
24 known by others and therefore amount[s] to speculation”). Moreover, the Court’s ruling
25 does not absolve Plaintiffs of their obligation at trial of establishing foundation for the
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1 admissibility of the expert/expert’s testimony.

2 **F. Plaintiffs’ Motion to Exclude Testimony of Tim Gravette (Doc. 352).**

3
4 Plaintiffs seek to exclude the opinions of defense expert Tim Gravette on several
5 grounds. Arpaio Defendants clarify that they disclosed Gravette as an expert on, and that
6 his opinions are limited to, the actions of Defendants Carrasco, Dominguez, Foster,
7 Kaiser, Scheffner, Vazquez, and Weiers (“Detention Defendants”). (Doc. 393 at 2.)

8
9 1. Collective Analysis of Use of Force

10 Plaintiffs seek to exclude Gravette’s opinion regarding the reasonableness of the
11 use of force on Atencio because Gravette analyzed the use of force collectively rather
12 than individually. Detention Defendants do not deny that, with the exception of
13 Defendant Weier, discussed below, Gravette’s report does not make any effort to state an
14 opinion regarding the reasonableness of the use of force by any individual defendant.
15 They argue that Gravette is not required to analyze each Defendant’s use of force
16 separately, and that Gravette’s opinions are appropriate and admissible in light of
17 Plaintiffs’ theory that Detention Defendants are liable by virtue of their group
18 participation in a “dogpile” on top of Atencio.⁸

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22 _____
23 ⁸ Plaintiffs allege Defendants Carrasco, Dominguez, Foster, and Vazquez each used
24 excessive force on Atencio by forming a “dog pile” on top of Atencio with other officers;
25 by holding Atencio down while Defendant Weiers used excessive force on Atencio by
26 tasing him multiple times; and, after Atencio was placed in the safe cell, by holding
27 Atencio down, making it so that Atencio was unable to move, while Defendant Hatton
28 struck Marty several times with his knee. (Doc. 393 at 60-61, 62-65, 76, 79-83.)

Plaintiffs allege Defendant Kaiser used excessive force on Atencio by forming a “dog
pile” on top of Atencio with other officers; and by holding Atencio down while
Defendant Weiers used excessive force on Atencio by tasing him multiple times. (*Id.* at
62, 78-79.)

1 Gravette explained during his deposition that he did not make any effort to look at,
2 or form an opinion regarding, the actions of the individual officers, but instead looked at
3 the Detention Defendants collectively. (Doc. 352-1 at 28.) He did not focus on what
4 individual officers did, but instead focused on “the overall totality of the event,” the
5 “totality of the situation,” or “totality of the circumstances” in concluding that the
6 collective action of the detention officers was reasonable and justified, and that “they did
7 a wonderful job.” (Doc. 352-1 at 32, 39, 40, 41.) Gravette admitted, however, that
8 Defendant Hatton’s use of a knee strike and placing of weight on Atencio’s back the way
9 that he did was not necessary and was not a reasonable use of force, and that in forming
10 his opinions, Gravette did not consider the actions of Defendant Hatton. (Doc. 352-1 at
11 16-17, 32, 33-34.) Further, Gravette testified that even if one or more of the officers used
12 excessive force, his opinion was that under the totality of the circumstances, the officers
13 did a “wonderful job,” and that taking an “overall” view (and excluding the actions of
14 Defendant Hatton), the force used on Atencio was reasonable and consistent with the
15 policies of the MCSO, Arizona law, and the American Correctional Association’s
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22 Plaintiffs allege Defendant Scheffner used excessive force on Atencio, after Atencio
23 was placed in the safe cell, by looking on while Defendants Carrasco, Dominguez,
24 Foster, and Vazquez held Atencio down, making it so that Atencio was unable to move,
25 while Defendant Hatton struck Marty several times with his knee. (*Id.* at 61-62, 77-78.)

26 Plaintiffs allege Weiers used excessive force against Atencio by tasing Atencio
27 multiple times during the time that Defendants Carrasco, Dominguez, Foster, Vazquez,
28 and Kaiser used excessive force by forming a “dog pile” on top of Atencio, and after
which Defendant Hatton used excessive force by striking Atencio in the face, with a
closed fist; and, after Atencio was placed in the safe cell, by looking on while Defendants
Carrasco, Dominguez, Foster, and Vazquez held Atencio down, making it so that Atencio
was unable to move, while Defendant Hatton used excessive force by striking Marty
several times with his knee. (*Id.* at 59-60, 75.)

1 standard of care. (Doc. 352-1 at 16-17, 32, 33-34, 39, 40-41, 41-42.)

2 The Court finds that Gravette's testimony and report reflect a fundamental
3 misunderstanding of the law and, accordingly, the Court will exclude Gravette from
4 testifying.
5

6 Although the reasonableness of the force used against a pretrial detainee is based
7 on the totality of the circumstances, *see Plumhoff v. Richard*, 134 S. Ct. 2012, 2020
8 (2014), this does not mean that individual officer action is ignored in favor of an analysis
9 of the overall action of the group. To the contrary, where multiple officers are involved
10 in an alleged use of excessive force, a "team effort" approach that simply lumps all
11 defendants together, rather than examining each individual officer's own conduct, is
12 prohibited. *See Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002). This prohibition
13 against the lumping of defendants together for liability purposes generally comes into
14 play when a plaintiff is seeking to impose group liability based on one or more individual
15 defendant's conduct. However, the prohibition is just as applicable here, where a group
16 of defendants is seeking to avoid liability based on the theory that their conduct, viewed
17 "overall," was reasonable or justified, even if another defendant's conduct that was
18 occurring at the same time was unreasonable and not justified.
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23 The proper inquiry in cases, such as this one, where multiple officers are involved
24 in the alleged use of excessive force is (1) whether *any* excessive force was used against
25 and, if so, (2) whether an individual officer was either personally involved in, or was an
26 "integral participant in," the use of that excessive force. *See Chuman v. Wright*, 76 F.3d
27 292, 294 (9th Cir. 1996); *see also Jones*, 297 F.3d at 936. Further, "integral participation"
28

1 does not “require that each officer’s actions themselves rise to the level of a constitutional
2 violation.” *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004). Thus, if one or
3 more of the individual officer’s conduct constituted excessive force against Atencio,
4 liability could be imposed on any of the other officers that were either personally
5 involved in, or were integral participants in, the use of that excessive force, even if that
6 officer’s conduct does not itself rise to the level of a constitutional violation. *See id.*;
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8 *Chuman*, 76 F.3d at 294. For example, officers who provide armed backup or act as
9 armed guards during an unconstitutional search can be considered to be full, active
10 participants in the search and thus be subject to liability. *See Boyd*, 374 F.3d at 780; *see*
11 *also Jones*, 297 F.3d at 937 (supervisor may be held liable if (1) he or she is personally
12 involved in the constitutional deprivation or (2) there is ““a sufficient causal connection
13 between the supervisor’s wrongful conduct and the constitutional violation””) (citation
14 omitted); *Lolli v. County of Orange*, 351 F.3d 410, 418 (9th Cir. 2003) (supervisor who
15 either encourages or allows the use of excessive force by subordinates can be held liable);
16
17 *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) (same).

20
21 Gravette’s opinions that, “overall,” the Detention Defendants’ conduct was
22 “wonderful,” “justified,” and/or “reasonable,” without an analysis of the actions of
23 individual officers involved in the incident, and explicitly not considering the actions of
24 Defendant Hatton, is not relevant and accordingly will be excluded. The Court will,
25 however, provide Defendants with the opportunity to disclose a supplemental report in
26 which Gravette expresses an opinion consistent with this Court’s decision.
27

28 2. Opinions based on “subjective analysis of the officers’ beliefs and

1 motivations about the force used”

2 Because Gravette’s opinions regarding the reasonableness of Detention
3 Defendants’ conduct will be excluded, the Court finds it unnecessary to address
4 Plaintiffs’ argument that the opinions should also be excluded because the opinions are
5 based on a subjective, rather than objective, analysis.
6

7 3. Opinions regarding Weier’s use of the Taser

8 Plaintiffs seek to exclude Gravette’s opinions regarding the reasonableness of
9 Weier’s use of the Taser on Atencio, arguing that Gravette is not qualified to render that
10 opinion. Arpaio Defendants respond that Gravette is qualified to opine on whether
11 Weiers properly considered and employed an “intermediate level of force,” such as a
12 Taser, based on his twenty years of corrections experience, and that Gravette should not
13 be precluded from offering opinions regarding the reasonableness and feasibility of using
14 various force options as long as he does not specifically opine on whether Weiers
15 correctly deployed the Taser. The Court disagrees and will exclude Gravette from
16 testifying as to the reasonableness of Weiers’ use of the Taser.
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20 During his deposition, Weiers testified that he is not a Taser expert, that he has
21 had no training on the use of a Taser, that he has never used a Taser on a person, and that
22 has never taught Taser use to officers. (Doc. 352-1 at 35, 36-37; Doc. 404 at 14.)
23 Gravette further testified that the only information he has regarding the Taser was gained
24 from working on this case. Specifically, Gravette testified that, from going through the
25 materials in this case, he knows that correctional officers carry Tasers and that it was
26 “another tool” that a detention officer “would have in his tool kit to control a disruptive
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1 inmate.” (Doc. 404 at 13.) Finally, Gravette testified that he is not “qualified to opine on
2 whether a Taser is used properly or improperly in any context.” (*Id.* at 14.)
3

4 Although Gravette is clearly qualified under Federal Rule of Evidence 702
5 as an expert on the general topic of the use of force in correctional settings, the Court
6 finds he is not qualified to render an opinion on the reasonableness of Weier’s use of the
7 Taser. *Cf. Lee v. Metropolitan Gov’t of Nashville and Davidson County*, 596 F. Supp. 2d
8 1101, 1121 (M.D. Tenn. 2009) (finding expert’s substantial experience as a Taser
9 instructor and as a deputy sheriff qualified him to opine on whether Taser use was
10 reasonable in excessive force case); *Engman v. City of Ontario*, 2011 WL 2463178, *7
11 (C.D. Cal. 2011) (same). The Court will therefore exclude Gravette’s opinion regarding
12 the reasonableness of Weiers’ use of the Taser on Atencio. The Court will, however,
13 provide Defendants with the opportunity to disclose a substitute expert to address the
14 reasonableness of Weier’s use of the Taser.
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19 IT IS ORDERED that Plaintiffs’ Motion to Exclude Testimony of Kathryn Wild
20 on the Reasonableness of Defendant McLean’s Care Under Arizona Law (Doc. 277) is
21 Granted.
22

23 IT IS FURTHER ORDERED that discovery is reopened as follows: Defendant
24 McLean may disclose a substitute expert witness regarding the standard of care under
25 Arizona law. Defendant McLean shall disclose such substitute expert witness, if any, and
26 their report in compliance with Fed. R. Civ. P. 26(a)(2)(B), by **February 20, 2015**. A
27 rebuttal expert witness, if any, and their report, must be disclosed by **March 20, 2015**.
28

1 Expert witness depositions related to such disclosures must be completed by **May 15,**
2 **2015.**

3
4 IT IS FURTHER ORDERED that Plaintiffs' Motion to Exclude Testimony of
5 William Gause on the Reasonableness of Defendant P.A. Cranmer's Care (Doc. 287) is
6 Denied.

7
8 IT IS FURTHER ORDERED that Plaintiffs' Motion to Exclude Testimony of
9 Joan Cairns (Doc. 322) is Granted.

10 IT IS FURTHER ORDERED that discovery is reopened as follows: Defendant
11 Scarpati may disclose a substitute expert witness regarding the standard of care under
12 Arizona law. Defendant Scarpati shall disclose such substitute expert witness, if any, and
13 their report in compliance with Fed. R. Civ. P. 26(a)(2)(B), by **February 20, 2015.** A
14 rebuttal expert witness, if any, and their report, must be disclosed by **March 20, 2015.**

15
16 Expert witness depositions related to such disclosures must be completed by **May 15,**
17 **2015.**

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19 IT IS FURTHER ORDERED that Defendants Maricopa County and Monica
20 Scarpati's Motion to Disqualify/Exclude Plaintiffs' Standard of Care Expert Robert J.
21 Wimmer (Doc. 391) is Granted.

22
23 IT IS FURTHER ORDERED that discovery is reopened as follows: Plaintiffs
24 may disclose a substitute expert witness regarding the standard of care under Arizona
25 law. Plaintiffs shall disclose such substitute expert witness, if any, and their report in
26 compliance with Fed. R. Civ. P. 26(a)(2)(B), by **February 20, 2015.** Defendants
27 Maricopa County and Scarpati shall disclose its expert witness in response to this
28

1 substitute expert witness, if any, and their report in compliance with Fed. R. Civ. P.
2 26(a)(2)(B), by **March 20, 2015**. A rebuttal expert witness, if any, and their report, must
3 be disclosed by **April 17, 2015**. Expert witness depositions related to such disclosures
4 must be completed by **May 15, 2015**.

6 IT IS FURTHER ORDERED that City Defendants' Motion to Strike/Exclude
7 Plaintiffs' Untimely Disclosed Rebuttal Expert Dr. Trepeta (Doc. 288) is Granted in part
8 and Denied in part as follows:

10 1. Dr. Trepeta's testimony will be limited to rebuttal, and will be allowed
11 only if Defendants present testimony from the defense pathologists.

12 2. To the extent Plaintiffs have not yet disclosed to Defendants
13 Dr. Trepeta's Curriculum Vitae or otherwise provided to Defendants information
14 regarding Dr. Trepeta's qualifications, Plaintiffs shall do so by **January 30, 2015**.

15 3. City Defendants' Motion to Strike/Exclude Plaintiffs' Untimely
16 Disclosed Rebuttal Expert Dr. Trepeta (Doc. 288) is otherwise Denied.

17 IT IS FURTHER ORDERED that the City Defendants' Motion to Strike Portions
18 of Plaintiffs' Response (Doc. 329, 341) is Denied.

19 IT IS FURTHER ORDERED that City Defendants' *Daubert* Motion to Exclude
20 the Testimony of Ron Bruno and Eldon Vail (Doc. 291) is Granted in Part and Denied in
21 Part. The motion is Granted to the extent it seeks to prevent Vail from testifying against
22 City Defendants. The Motion is otherwise Denied.

23 IT IS FURTHER ORDERED that the Defendants' Joint Motion to Exclude
24 Testimony of Plaintiffs' Use of Force Expert Ron Bruno (Doc. 297) is Denied.
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1 IT IS FURTHER ORDERED that the Motion to Exclude the Testimony of
2 Plaintiffs' Expert Eldon Vail and Alternative Motion for *Daubert* Hearing (Doc. 354) is
3 Granted in Part and Denied in Part as follows:
4

5 1. To the extent Vail uses the term "moving force" in his opinion, that
6 term is ordered stricken.

7 2. Vail is prohibited from using the term "moving force," or any other
8 terminology that expresses an opinion on an ultimate issue of law, in any
9 testimony.
10

11 3. The Motion to Exclude the Testimony of Plaintiffs' Expert Eldon
12 Vail and Alternative Motion for *Daubert* Hearing (Doc. 354) is otherwise Denied.
13

14 IT IS FURTHER ORDERED that the City Defendants' *Daubert* Motion to
15 Exclude the Causation Opinions of Plaintiffs' Expert Dr. Wilcox and a Portion of His
16 Untimely Rebuttal Report (Doc. 294) is Denied.
17

18 IT IS FURTHER ORDERED that the Motion to Exclude Plaintiffs' Expert Todd
19 Wilcox (Doc. 308) is Granted in part and Denied in part as follows:
20

21 1. The motion is Granted to the extent it seeks to exclude Wilcox from
22 testifying as to the use of force from a police practices expert perspective.

23 2. The Motion to Exclude Plaintiffs' Expert Todd Wilcox (Doc. 308) is
24 otherwise Denied.
25

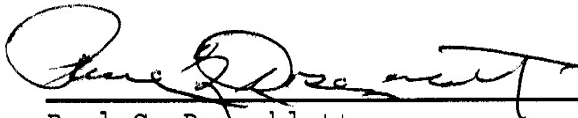
26 IT IS FURTHER ORDERED that the Motion to Exclude the Testimony of
27 Plaintiffs' Expert Ken Katsaris and Alternative Motion for *Daubert* Hearing (Doc. 306) is
28 Denied.

1 IT IS FURTHER ORDERED that Plaintiffs' Motion to Exclude Testimony of Tim
2 Gravette (Doc. 352) is Granted.

3
4 IT IS FURTHER ORDERED that discovery is reopened as follows: Arpaio
5 Defendants may disclose a supplemental report from Gravette consistent with the Court's
6 decision regarding the analysis required on the use of force. Arpaio Defendants shall
7 disclose such supplemental report, if any, in compliance with Fed. R. Civ. P. 26(a)(2)(B),
8 by **February 20, 2015**. A rebuttal expert witness, if any, and their report, must be
9 disclosed by **March 20, 2015**. Expert witness depositions related to such disclosures
10 must be completed by **May 15, 2015**.

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12
13 IT IS FURTHER ORDERED that discovery is reopened as follows: Arpaio
14 Defendants may disclose a substitute expert regarding the reasonableness of the use of
15 the Taser by Weiers. Arpaio Defendants shall disclose such substitute expert witness, if
16 any, and their report in compliance with Fed. R. Civ. P. 26(a)(2)(B), by **February 20,**
17 **2015**. A rebuttal expert witness, if any, and their report, must be disclosed by **March 20,**
18 **2015**. Expert witness depositions related to such disclosures must be completed by
19 **May 15, 2015**.

20
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22 Dated this 15th day of January, 2015.

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27 Paul G. Rosenblatt
28 United States District Judge