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UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM LAMBERT, an individual, and BEVERLY LAMBERT, an individual, Plaintiffs, v. CITY OF SANTA ROSA, a chartered city; MATTHEW A SANCHEZ, individually and as a Police Officer of the Santa Rosa Police Department; et al.	Case No. C05-02931 CW **PLAINTIFFS' MOTIONS *IN LIMINE* REVISED FOLLOWING MEET AND CONFER; POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS *IN LIMINE***

COMES NOW, Plaintiffs, WILLIAM and BEVERLY LAMBERT, to move this Court for Orders *in limine* to exclude certain evidence pursuant to Federal Rules of Evidence (FRE) 104(c), 402, 403 and as more specifically set forth below to promote the orderly and efficient process of trial and to avoid having to make objections in the presence of the jury. *United States v. Sargent*, 98 F.3d 325, 327 (7th Cir. 1996). If granted, Plaintiffs' *in limine* motions should not only exclude the inadmissible or improper evidence to which they refer, but also preclude

counsel or any witness from making reference to such excluded evidence, asking questions pertaining to such evidence, or commenting on such evidence during argument. *Benedi v. McNeal PPC, Inc.*, 66 F.3d 1378 (4th Cir. 1995).

MOTION IN LIMINE NO. 1: EXCLUDE ANY REFERENCE TO FORMER ATTORNEYS EMPLOYED BY PLAINTIFFS OR THE SERVICES PERFORMED BY SUCH ATTORNEYS

The Plaintiffs respectfully request an order excluding any reference to the fact that the Plaintiffs were previously represented by an attorney who is no longer involved in this trial. Prior to retaining their present attorneys, the Plaintiffs were represented by a criminal defense attorney, Sam Libicki. When this matter was removed by the defense to Federal Court, Mr. Libicki ceased representing the Plaintiffs.

The reasons that Mr. Libicki ceased representing the Plaintiffs are his own, and may, in fact, involve privileged communications between Mr. Libicki and the Plaintiffs. To inquire at trial as to the time, circumstances or reasons why the Plaintiffs' first attorney ceased representing them would be improper and prejudicial, and has no probative value whatsoever as to the ultimate issues in this litigation. FRE 403.

In addition, the Plaintiffs request an order excluding any reference to, questions about, or comments on the CA Government Code section 910 tort claim prepared by Mr. Libicki and presented to the Defendants. In the tort claim, Mr. Libicki demanded the sum of approximately $3.5 million for the Plaintiffs. As stated above, Mr. Libicki is a criminal defense attorney, and does not have expertise in civil rights actions such as this one. Plaintiffs believe that Mr. Libicki's lack of expertise is reflected in the tort claim. Moreover, Plaintiffs are not presently seeking such amounts at trial. Therefore, allowing reference to the tort claim, particularly the monetary demand made therein, causes undue prejudice to the Plaintiffs by punishing them for the inexperience of their previous counsel. Furthermore, allowing the jury to juxtapose Mr. Libicki's demand with the amount the Plaintiffs' are currently seeking in damages runs the risk of misleading the jury into thinking that the Plaintiffs' no longer believe they have a strong or

viable case. Such a result would, again, be prejudicial to the Plaintiffs and would not add any probative value to the ultimate issues in this litigation.

Finally, the Plaintiffs request an order precluding any reference to the causes of action contained in the initial Complaint filed by Mr. Libicki. The Plaintiffs' current counsel and defense counsel agreed in good faith to voluntarily to limit the scope of the Plaintiffs' Complaint and to dismiss those causes of action that were without merit. Making reference to this voluntary agreement by the Plaintiffs in front of the jury, or questioning the Plaintiffs about their agreement to dismiss any of their initial causes of action, would cause undue prejudice to the Plaintiffs, potentially invade attorney-client privilege, and cause the jury to improperly question the viability of the Plaintiffs' case.

MOTION IN LIMINE NO. 2: EXCLUDE WITNESSES FROM THE COURTROOM

FRE 615 permits the Court, at the request of a party, or on its own motion, to exclude witnesses (not including parties and persons "essential" to the party's case) from the courtroom so that they cannot hear each other's testimony. The purpose of FRE is to prevent witnesses from tailoring their testimony to that of another witness and to discourage or expose fabrication, inaccuracy, and collusion. FRE 615, Adv. Comm. Note. A party's request to exclude a witness during trial must be granted as a matter of right, unless the witness is within one of the four exempt categories in FRE 615. FRE 615, Adv. Comm. Note. The party seeking sequestration bears the burden of proving that one of the exemptions applies. *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir. 1996); *United States v. Jackson*, 60 F.3d 128, 135 (2nd Cir. 1995).

MOTION IN LIMINE NO. 3: EXCLUDE REFERENCES TO WITNESSES AS "EXPERTS"

The Plaintiffs respectfully request an order precluding counsel or any witnesses from referring to any witnesses as "experts." Although the FRE refer to witnesses with specialized knowledge as "experts," it does not follow that the jury should be told that the witness is an "expert" or had been deemed an "expert" by the court. The Advisory Committee Notes to FRE

705 endorse the "practice that prohibits the use of the term 'expert' by both the parties and the court at trial," on the ground that referring to or qualifying the witness as an "expert" before the jury put an imprimatur of the court on the witness.

MOTION IN LIMINE NO. 4: EXCLUDE USE OF PLAINTIFF WILLIAM LAMBERT'S MUG SHOT

The Plaintiffs respectfully request an order excluding use of Plaintiff WILLIAM LAMBERT'S "mug shot" at the time of trial. As part of their pre-trial disclosure, the Defendants produced a copy of MR. LAMBERT'S "mug shot." A true and correct copy of MR. LAMBERT'S "mug shot" is attached hereto as Exhibit "A."

MR. LAMBERT'S "mug shot" has, thus far, been used solely (and unsuccessfully) to refresh the recollection of witnesses such as the EMTs that treated MR. LAMBERT on March 22, 2004. Aside from the fact that MR. LAMBERT'S "mug shot" has not been a successful tool to refresh witness recollection, its use as a tool to refresh witness recollection is not necessary at trial where witnesses will directly confront MR. LAMBERT and either be able to remember him or not. Therefore, the "mug shot" adds nothing to the orderly process of the trial.

The Defendants may also attempt to use MR. LAMBERT'S "mug shot" to portray MR. LAMBERT in a negative light or to call undue attention to the fact that MR. LAMBERT was arrested on March 22, 2004. This purpose is irrelevant and prejudicial. *U.S. v. Fosher*, 568 F.2d 207, 213-17 (1st Cir. 1978) [Trial judge should not have admitted mug shots in a manner that clearly let the jury know that they were mug shots. Photographs should have been altered and then presented to the jury in a manner that avoided their prejudicial effect.]

MOTION IN LIMINE NO. 5: EXCLUDE USE OF PHOTOGRAPHS TAKEN OF PLAINTIFF BEVERLY LAMBERT

The Plaintiffs respectfully request an order excluding the use of photographs taken of Plaintiff BEVERLY LAMBERT on or about March 22, 2004. True and correct copies of these photographs are attached hereto as Exhibit "B." These photographs were taken by Defendant

MATTHEW SANCHEZ in connection with his arrest of Plaintiff WILLIAM LAMBERT for violation of Penal Code section 243(e)(1).

In this case, the Plaintiffs do not dispute that Defendant SANCHEZ had probable cause to arrest MR. LAMBERT on March 22, 2004. This case is not like the situation presented in *United States v. Hall*, 419 F.3d 980, 986-87 (9th Cir. 2005) where photographs showing bruises on a domestic violence victim were admitted at an evidentiary hearing where the defendant *challenged* the sufficiency of the evidence supporting a domestic violence charge. Therefore, the photographs of MRS. LAMBERT have no probative value because there is no issue whether Defendant SANCHEZ should or should not have arrested MR. LAMBERT.

Although this case raises a cause of action under Section 1983, this case has no similarity to the situation presented in *Galen v. County of Los Angeles,* 322 F.Supp.2d 1045 (2004). In *Galen*, an arrestee for domestic violence brought a civil rights action under the Eighth Amendment, challenging a $1 million bail amount as being excessive. The *Galen* Court concluded that photographs of the domestic violence victim were relevant because they tended to show the nature and extent of the victim's injuries and the existence of a past history of violence, which the Court was "mandated to consider" in setting bail. *Id.* at 1052. Such issues are not relevant in this case.

The only purpose for using the photographs taken of MRS. LAMBERT on March 22, 2004 is to suggest to the jury that MR. LAMBERT had a violent and hostile demeanor on March 22, 2004. This rationale bears a slight similarity to the reasons for introducing the admittedly "disturbing" photographs in *Grayson v. Carey*, 2006 WL 2594458 (E.D. Cal.). However, unlike *Grayson,* where the photographs served the legitimate purpose of corroborating the testimony of a pathologist and eyewitnesses to a stabbing, MR. LAMBERT acknowledges that Defendant SANCHEZ had probable cause to arrest him for domestic violence. Therefore, the photographs have no probative value on the question of whether MR. LAMBERT did or did not strike MRS. LAMBERT.

Finally, in *Carey*, the "gruesome" nature of the photographs tended to corroborate the highly violent nature of the underlying crime and the defendant's mental state at the time of the crime. Here, there is **no substantial dispute** about whether or not MR. LAMBERT was hostile or violent toward Defendant SANCHEZ or Officer Johnson. In response to the Plaintiffs' Request for Admissions, the Defendants admitted that the MR. LAMBERT **did not threaten** the officers with a weapon on March 22, 2004, **did not physically assault** or attempt to assault either of the officers on March 22, 2004, and **did not make any verbal threat of harm** toward either of the officers on March 22, 2004. Therefore, allowing the Defendants to use the photographs taken of MRS. LAMBERT on March 22, 2004 for the purpose of suggesting to the jury that MR. LAMBERT had a violent and hostile personality on March 22, 2004 would be contradictory to the Defendants' own sworn admissions, irrelevant, and prejudicial to the Plaintiffs.

MOTION IN LIMINE NO. 6: EXCLUDE ANY REFERENCE TO PLAINTIFF WILLIAM LAMBERT'S PLEA AND SUBSEQUENT CONVICTION OF VIOLATION OF PENAL CODE SEC. 243(e)(1)

The Plaintiffs respectfully request an order excluding any reference to the fact that Plaintiff WILLIAM LAMBERT pled "no contest" to a violation of Penal Code section 243(e)(1) [spousal abuse], and was found guilty by the Sonoma County Superior Court, following his arrest by Defendant MATTHEW SANCHEZ on March 22, 2004. FRE 410 excludes, in any civil or criminal proceeding, evidence against the defendant who made the plea or who was involved in the plea discussions of, among other things, a plea of nolo contendere.

In this case, defense counsel has, on numerous prior occasions (both verbally and in written court documents) made reference to the fact that MR. LAMBERT pled "no contest" to a violation of Penal Code section 243(e)(1) and was found guilty. Therefore, the Plaintiffs anticipate that defense counsel may attempt to make similar references in the presence of the jury. As stated above, such evidence is inadmissible, and to permit references to such evidence in the presence of the jury would be improper. This exclusionary ruling should also apply to any

references to any other criminal charges that were brought against MR. LAMBERT, but dismissed as part of the aforementioned plea bargain.

MOTION IN LIMINE NO. 7: EXCLUDE ANY REFERENCE TO A HISTORY OF DOMESTIC VIOLENCE BETWEEN THE PLAINTIFFS

The Plaintiffs respectfully request an order excluding any references or questions at trial to an alleged history of domestic violence between the Plaintiffs. No evidence exists in this case to support such references. MR. LAMBERT has **no criminal history** of domestic violence against MRS. LAMBERT or violence against any individual. There are **no medical records** suggesting that MRS. LAMBERT reported any incidents or domestic violence to any health care providers. MRS. LAMBERT **has never exhibited injuries** to any health care providers that are consistent with domestic violence. The Defendants' expert acknowledged on page 120, lines 1-4 of his deposition that he saw no evidence that suggested a history of domestic violence between MR. and MRS. LAMBERT. In all respects, the family squabble on March 22, 2004 was a completely isolated event.

Allowing the Defendants to make reference to, ask questions about, or comment on, an alleged history of domestic violence between the Plaintiffs – even if the answer is ultimately that there is no history – is prejudicial because a question like, "Had you ever slapped your wife before March 22, 2004?", carries with it an inherent ability to plant unfounded suspicions in the minds of jurors. For that reason, in a case such as this one where the evidence lacks probative value and there is no corroborating evidence, such references or questions are prejudicial.

MOTION IN LIMINE NO. 8: PRECLUDE POLICE OFFICERS FROM PROVIDING EXPERT OPINION

The Plaintiffs anticipate that Defendant SANCHEZ and/or Officer Johnson will be called to testify at the time of trial and asked to express opinions about several matters requiring expert opinion, including but not limited to the following:

A. The cause of Plaintiff WILLIAM LAMBERT'S injuries on March 22, 2004; and

B. Whether Plaintiff BEVERLY LAMBERT suffers or suffered from battered spouse syndrome.

At the subsequent Case Management Conference on September 22, 2006, this Court instructed counsel that it did not want to have more than one expert on a given issue. Here, both sides have retained and disclosed orthopaedic experts who will proffer an opinion as to the cause of MR. LAMBERT'S injuries on March 22, 2004. The Defendants did not disclose any of its police officers as experts in their Rule 26 disclosures.

In addition, neither side's orthopaedic experts contest that MR. LAMBERT'S injuries were, in fact, caused by the maneuver performed by Defendant SANCHEZ on March 22, 2004. Therefore, the Defendants should not be permitted to provide expert opinion testimony that may differ or contradict the expert opinion provided by the Defendants' own, retained expert orthopaedist. This is particularly true of Officer Johnson who testified at her deposition that she did not personally witness Defendant SANCHEZ taking MR. LAMBERT to the ground.

In addition, the Defendants should be precluded from eliciting expert testimony from the police officers that MRS. LAMBERT exhibits or exhibited behavior consistent with "battered spouse syndrome." "Battered spouse syndrome" is a psychological syndrome. Because it is a subject of testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702," testimony on the subject of battered spouse syndrome is only admissible as expert testimony even if the witness is offered as a lay witness. FRE 701. In short, a party may not avoid the reliability requirements of FRE 702 by proffering an expert witness in the guise of a lay witness.

Even if the police officers in this case have some practical experience dealing with domestic violence victims, it does not necessarily follow that the police officers are experts on the subject of battered spouse syndrome. Moreover, the training records of Defendant SANCHEZ and Officer Johnson seem to indicate that neither of these officers had any specialized training dealing with domestic violence situations at the time of the incident on

March 22, 2004. Attached hereto as Exhibit "C" is a true and correct copy of the training records for Defendant SANCHEZ and Officer Johnson disclosed by the Defendants.

Finally, and most significantly, even if the police officers would otherwise qualify as experts on the subject of "battered spouse syndrome," the defense did not disclose any of its police officers in its Rule 26 expert disclosures.

MOTION IN LIMINE NO. 9: EXCLUDE ANY EVIDENCE THAT CONTRADICTS DEFENDANTS' PRIOR, SWORN TESTIMONY

The Plaintiffs respectfully request an order excluding any evidence proffered by the Defendants at trial which contradicts the Defendants' prior, sworn deposition testimony or responses to the Plaintiffs' Interrogatories. Specifically, the Plaintiffs request an order excluding any evidence that *contradicts* Defendant MATTHEW SANCHEZ'S prior sworn testimony/admissions that the leg sweep/take down maneuver that he performed on Plaintiff WILLIAM LAMBERT was the maneuver he had read about in Police Combatives. In addition, the Plaintiffs request an order excluding any evidence that *contradicts* the Defendants' admission and/or acknowledgment that MR. LAMBERT was not armed at the time of his encounter with the police officers in this case, that he did not attempt to physically assault Defendant SANCHEZ or Officer Johnson, and that he did not verbally assault Defendant SANCHEZ or Officer Johnson.

At his deposition, Defendant SANCHEZ testified:

Q: And what did you do in order to get Mr. Lambert down onto the ground?	A: I performed a leg sweep.
Q: Now, first of all, did you have training - when you were at the police academy, did you have training on how to do a leg sweep?	A: There are certain leg sweeps that we are trained on.

Q: And the one that you were going to perform on Mr. Lambert, was that one that you had been trained on?	A: Not in the academy, no.
Q: Were you trained on it at some point later?	A: No.
Q: And with regards to the leg sweep that you described for me, you said that was something that was not taught to you at the police academy, correct?	A: That's correct.
Q: Where did you learn it?	A: There's – in trying to improve myself as an officer, several – you read books. You read publications to try to improve. That's one of the ones I came across...
Q: Do you recall what book it was that you saw this technique?	A: Actually, yes, I do.
Q: What was the name of it?	A: It was called "Police Combatives." ...
Q: And with regards to the technique that you had used, had you trained in that technique prior to the event with Mr. Lambert?	A: As far as?
Q: Attempting it on someone else, whether it's practicing with another officer or using it out in the field.	A: I had not used it in the field. Only techniques I'd have is obviously going through it in my mind. And I *may* have tried it on somebody just as practice. *I don't remember who...*[1]

In addition, in response to Plaintiffs' Interrogatories, the Defendants provided testimony which makes it clear that the leg sweep/take down maneuver that Defendant SANCHEZ read

[1]Deposition of Defendant MATTHEW SANCHEZ, pages 54:10-22, 71:20-72:3, 72:12-16, 118:5-15. *See,* Exhibit "D," attached hereto.

about in Police Combatives is a different type of maneuver than Defendant SANCHEZ was trained on or had performed in the field prior to March 22, 2004.[2] The Defendants should not, therefore, be permitted to take a position at trial that is inconsistent with this prior testimony.

In addition, in the Defendants' responses to the Plaintiffs' Request for Admissions, the Defendants admitted 3 relevant factors. First, the Defendants admitted that, at no time during their encounter with MR. LAMBERT, was MR. LAMBERT armed. Second, the Defendants admitted that, at no time during their encounter with MR. LAMBERT, did MR. LAMBERT attempt to physically assault either Defendant SANCHEZ or Officer Johnson. Third, the Defendants admitted that, at no time during their encounter with MR. LAMBERT, did MR. LAMBERT verbally threaten harm to either Defendant SANCHEZ or Officer Johnson.

MOTION IN LIMINE NO. 10: EXCLUDE ANY REFERENCE TO DRINKING BY PLAINTIFF WILLIAM LAMBERT ON MARCH 22, 2004 OR DRINKING HABITS OF THE PLAINTIFFS PRIOR TO MARCH 22, 2004

An issue of considerable dispute in this litigation is whether the Plaintiff WILLIAM LAMBERT was intoxicated on March 22, 2004. MR. LAMBERT concedes that he had consumed a glass of wine with dinner prior to the incident, but was not intoxicated. Although no objective evidence has been presented that proves that MR. LAMBERT was intoxicated on March 22, 2004, the Plaintiffs believe that the defense will attempt to portray the Plaintiffs as having *both* been intoxicated on March 22, 2004.

Defendant's own expert witness, Joseph Callanan, provided the following testimony at his deposition:

> "Q: Did you make any assumption as to whether or not Mr. Lambert was under the influence of alcohol during the course of the arrest?
>
> A: No, I did not, but the literature that I read has both pro and con references to it...[M]y assumption is he may have had a glass of

[2] *See*, Exhibit "E," attached hereto.

> wine. He may have had a glass of wine and a glass of bourbon. It really doesn't matter to the force dynamics...[I]t doesn't increase anything in my estimation...I don't think him having had a glass of wine or a glass or wine in combination with a glass of bourbon changes any of my opinions...[S]ome people hold liquor better and some people are happy drunks, and some people get mean, and some people shouldn't drink at all."[3]

Because there is such a dearth of evidence in this case suggesting that MR. LAMBERT was intoxicated on March 22, 2004, coupled with the fact that the Defendant's own expert witness testified that the fact that MR. LAMBERT may have had a glass of wine or a glass of bourbon, is irrelevant to his analysis of whether or not excessive force was used, any evidence of MR. LAMBERT drinking on March 22, 2004 should be excluded.

In addition, the Plaintiffs respectfully request an order excluding any reference to alleged alcohol or drinking habits of *either* of the Plaintiffs prior to March 22, 2004. The Plaintiffs believe that the Defendants will attempt to elicit such evidence particularly to prove that MR. LAMBERT was not only drinking at the time of his encounter with Defendant SANCHEZ, but also that *both* of the Plaintiffs were drunk (or worse, that they are "drunks").

Evidence of prior habits, particularly habits like drinking, "...is never to be lightly established, and evidence of example, for purpose of establishing such habit, is to be carefully scrutinized before admission." *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 511 (4th Cir. 1977). Such an attitude toward the evidence of habit is based on "the collateral nature of [such] proof, the danger that it may afford a basis for improper inferences, the likelihood that it may cause confusion or operate to unfairly prejudice the party against whom it is directed." *Id.* at 511, citing *Nelson v. Brunswick Corp.*, 503 F.2d 376, 380 (9th Cir. 1974). It is only when examples offered to establish such pattern of conduct or habit are "numerous enough to base an

[3]Deposition of Joseph Callanan, page 69:6-70:13. *See,* Exhibit "G," attached hereto.

inference of systematic conduct," that examples are admissible. *Id.*, citing *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1158 (2nd Cir. 1968).

This cautious judicial approach to alleged habits of drinking or using drugs is also reflected in California's case law concerning prejudicial evidence. See, e.g., *People v. Cardenas,* 31 Cal.3d 897 [Trial court erred in admitting such habit evidence]; *People v. Moten*, 229 Cal.App.3d 1318 (1991) [Trial court erred in admitting such habit evidence]. Even in a case where the issue to be determined was whether a defendant had been driving under the influence of alcohol, evidence that defendant was drunk on prior occasions was held to be inadmissible and immaterial under California law. *People v. Alfonso*, 77 Cal.App. 377, 380 (1926).

MOTION IN LIMINE NO. 11 - PLAINTIFFS' MOTION TO EXCLUDE EXPERT TESTIMONY BY JOSEPH CALLANAN

Plaintiffs further move this Court for an Order *in limine* to exclude the testimony of the Defendants' expert, Joseph Callanan, pursuant to Federal Rules of Evidence (FRE) 104(c), 402, 403, 701-703, and as more specifically set forth below.

I. The *Daubert* Standard

Effective December 1, 2000, Federal Rules of Evidence 701, 702, and 703 were amended to create additional restrictions on the admissibility of expert opinion testimony. In particular, Rule 702 was amended to increase the reliability of expert witness testimony.

The amendments to Rule 702 incorporated the decision of the U.S. Supreme Court in *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under the amended Rule 702, the trial court acts as a "gatekeeper" to assess whether expert testimony is *both* reliable and relevant, before admitting it into evidence. Rule 702 requires that the trial judge may no longer simply determine that the proposed expert is qualified and helpful to the jury and then allow the jury to decide whether the expert's theories apply to the facts. The court must take the additional step of determining whether the expert's opinions are applied reliably to the facts of the case. Only then should the jury be allowed to hear the expert's testimony.

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II. "Gatekeeping" Duties of the Trial Court Apply to all Experts

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court clarified the scope of *Daubert*, holding the rule 702 "gatekeeping" duties of the trial court apply to all expert testimony, whether it is based on scientific, technical or other specialized knowledge. *Kumho* made it clear that the "gatekeeping" function is a flexible and commonsense undertaking in which the trial judge is granted "broad latitude" in deciding both how to determine reliability as well as in ultimately deciding whether the testimony is reliable. *Id.* at 141-142. The *Daubert* "gatekeeping" function is not intended to measure every expert by an inflexible set of criteria but to undertake whatever inquiry is necessary to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

III. Application of the *Daubert* Standard to Joseph Callanan's Expert Testimony

Mr. Callanan is clearly familiar with and, indeed, seemed to accept the correct standard for evaluating the reasonableness of the officers' actions and conduct in this case when he provided deposition testimony on July 13, 2006. However, upon close reading of Mr. Callanan's testimony, he emerges as a mouthpiece for the defense in the guise of an "expert," accepting defense allegations and espousing assumptions as though they were fact without any basis in the evidence of this case. Further, Mr. Callanan expresses opinions for which he lacks proper qualifications. In a nutshell, we have here the personal views of a retired police officer who earns a substantial livelihood by testifying in depositions and in court – virtually 100% of the time – for law enforcement officers and the agencies who employ them. Such a witness cannot withstand a *Daubert* challenge.

For the Court's convenience, Mr. Callanan's Expert Declaration is attached hereto as Exhibit "F." Pertinent portions of Mr. Callanan's deposition testimony are attached as Exhibit "G," and are referenced in footnotes.

A. Mr. Callanan Is A Biased Witness Who Testifies Almost Exclusively For Law Enforcement Officers And Law Enforcement Agencies

Under a *Daubert* analysis, reliability is of the utmost concern. Key to the concept of reliability is that a party's expert witness must be objective. Obviously, an expert witness may render an opinion that is favorable to one party versus another. However, an expert witness who renders subjective and biased opinions in favor of one side over another without proper foundation is not "helpful" to the trier of fact and should be viewed with great suspicion.[4] Mr. Callanan is precisely this type of grossly biased witness, and should be excluded under *Daubert*.

Mr. Callanan retired from the L.A. County Sheriff's Dept. in 1989, and since that time, has been a full-time consultant.[5] Mr. Callanan is self-employed by Joe Callanan & Assoc.[6] He earns $10,000 per month from his company.[7] That, in and of itself, would not be sufficient to establish either bias or unreliability. However, when coupled with Mr. Callanan's lop-sided employment as an expert witness, it appears that Mr. Callanan testifies almost exclusively for the defense in police misconduct cases and earns a substantial livelihood doing so.

Primarily, by his own admission, Mr. Callanan consults with police agencies, designs training programs for police agencies, and assists police agencies with formulation of their policies.[8] Mr. Callanan testified, "I mostly deal with government attorneys at the city, state or federal level."[9] In the past 15 years, Mr. Callanan has worked with the CITY OF SANTA ROSA

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[4]In fact, so-called experts that render biased opinions risk misleading the jury and prejudicing the entire fact-finding mission of a trial.

[5]Deposition of Joseph Callanan, page 23:9-14.

[6]Deposition of Joseph Callanan, page 23:23-24:1

[7]Deposition of Joseph Callanan, page 23:21-22.

[8]Deposition of Joseph Callanan, page 24:19-25:25.

[9]Deposition of Joseph Callanan, page 28:6-8.

10-20 times and has testified for the CITY OF SANTA ROSA in court 5-10 times.[10] Other than the CITY OF SANTA ROSA, Mr. Callanan's "list of clients" disclosed as part of his CV contains almost solely government law enforcement agencies, security companies, and nightclubs. *See*, Exhibit "D" attached hereto. Mr. Callanan admitted at his deposition that he has been retained by plaintiff's counsel in only a "very small number" of cases in the last five years.[11] When pressed to give a specific number of occasions when he has been retained by plaintiff's counsel, Mr. Callanan testified that he could only document "six occasions" when he "accepted retention and performed services" by plaintiff's counsel.[12] What is most shocking, however, is that these "six occasions" Mr. Callanan referred to in his deposition are not just in the last 5 years – these "six occasions" go back to 1971 when he first started his consulting business.[13] In other words, in 35 years of police procedures consulting work, Mr. Callanan has only "accepted retention and performed services" for plaintiffs 6 times.

Mr. Callanan further indicated that he reviews approximately 100 cases per year, and of that number, returns an opinion that the police did something substandard only 10% of the time.[14] He added that, in his experience, plaintiffs' attorneys are "exactly looking for an expert witness not a consultant. They're hoping to get you to subscribe to their particular fact presentation."[15] The implication of this testimony is two-fold. First, defense experts are more honest and upstanding than plaintiffs' experts. Second, plaintiffs' attorneys proffer dishonest experts upon the Court, while defense attorneys do not.

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[10]Deposition of Joseph Callanan, page 19:2-16, 20:16-21.

[11]Deposition of Joseph Callanan, page 27:24-28:1.

[12]Deposition of Joseph Callanan, page 27:24-28:1.

[13]Deposition of Joseph Callanan, page 28:9-12.

[14]Deposition of Joseph Callanan, page 50:22-25.

[15]Deposition of Joseph Callanan, page 52:11-53:5.

At one point during Mr. Callanan's deposition, the subject of Amnesty International, an advocacy group that has taken some well-known positions on the use of Tasers, came up. On this subject, Mr. Callanan stated: **"Amnesty International has been a human speed bump in the highway of progress."**[16] In support of this opinion, Mr. Callanan stated that "...[I]t's clearly my report and my opinion. And it's based not only on Amnesty's misrepresentation of the taser but their history of misrepresenting other police procedures, including carotid restraint holds, including the pepper sprays that are used...They make outrageous, unfounded allegations as to fatalities...They are not helping the problem at all."[17]

An expert's bias is grounds for disqualification of the expert and the expert's report. *In re Med Diversified, Inc.*, 346 B.R. 621 (E.D.N.Y. 2006). Whether expert testimony is biased and unreliable because it was developed solely for litigation is an important factor in determining admissibility of the expert testimony. *In re Breast Implant Litigation*, 11 F.Supp.2d 1217 (D. Colo. 1998). In this case, Mr. Callanan's bias goes far beyond slightly favoring the defense in police misconduct cases. Mr. Callanan's history of representing almost exclusively law enforcement officers and their employing agencies speaks for itself. Moreover, Mr. Callanan's hyperbole regarding Amnesty International is troubling in a case where the allegations of misconduct against Defendant SANCHEZ include his use of a Taser gun against MR. LAMBERT after MR. LAMBERT had already been taken forcefully to the ground. For these reasons, Plaintiffs request that Mr. Callanan be disqualified from testifying at the trial in this matter.

B. Mr. Callanan Provided Unreliable Testimony Based On His Decision To Accept The Defendants' Version Of The Events Of March 22, 2004 Over The Plaintiffs'

Bias, standing alone, might not necessarily be grounds for disqualifying Mr. Callanan. *Di Carlo v. Keller Ladders, Inc.*, 211 F.3d 465 (8th Cir. 2000) [Expert testimony was admissible

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[16]Deposition of Joseph Callanan, page 71:3-4.

[17]Deposition of Joseph Callanan, page 70:22-71:7.

despite bias where jury could determine credibility of witness and party opposing expert could offer evidence of bias]. However, Mr. Callanan has also offered unreliable opinions that stem from a clear decision to accept the Defendants' version of the events of March 22, 2004 over the Plaintiffs'. Such a decision on Mr. Callanan's part is improper for an objective expert under *Daubert,* and he should be disqualified from testifying at trial.

Initially, in his deposition, Mr. Callanan acknowledged that he is not a fact-finder, and that he has "no capacity to validate one version of the events versus another."[18] Mr. Callanan indicated that he had not accepted one version of the events of March 22, 2004 over another.[19] In fact, Mr. Callanan testified that if you "accept the plaintiffs' accounts, the police procedures seem substandard. On the other hand, if you accept the police accounts then I have a different opinion."[20]

From that point, however, Mr. Callanan makes the inappropriate "leap of logic" and fully accepts Defendant SANCHEZ's and Officer Johnson's version of the events of March 22, 2004 over the Plaintiffs' version. Mr. Callanan testified that it was not important to him to have a good grasp of MR. LAMBERT'S description of the take down versus Defendant SANCHEZ's description.[21] Mr. Callanan stated, "I don't expect Mr. Lambert to give me an educated professional opinion as to what happened to him. It would certainly be subjective..."[22] In short, Mr. Callanan dismisses MR. LAMBERT'S description of what happened to him as unbelievable.

By contrast, Mr. Callanan's testimony resolved many key factual disputes in favor of the Defendants. For example, Mr. Callanan testified that if he believed MR. LAMBERT'S version

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[18]Deposition of Joseph Callanan, page 52:11-14, 53:6-10.

[19]Deposition of Joseph Callanan, page 53:11-14.

[20]Deposition of Joseph Callanan, page 53:17-19.

[21]Deposition of Joseph Callanan, page 82:3-8. This is, of course, an important issue in this case where the Defendants dispute the significance of the take down maneuver used by Defendant SANCHEZ against MR. LAMBERT.

[22]Deposition of Joseph Callanan, page 82:10-12.

of the events, then MR. LAMBERT was not resisting arrest. If he believed the police officers' version, then MR. LAMBERT was resisting arrest.[23] From that point, Mr. Callanan testified that MR. LAMBERT'S behavior "would be wrapped under the idea of 148 of the Penal Code, which is obstructing, delaying, interfering with police officer."[24] On the question of how much resistance MR. LAMBERT offered the police officers, Mr. Callanan explained that "there's two officers reporting his pulling away and twisting at various times in the dynamic. That's active, that's not passive at all."[25] Ultimately, Mr. Callanan concludes that MR. LAMBERT was doing something "forcefully...to get his hands away from the officers."[26]

These are by no means the only examples of how Mr. Callanan subjectively chose to believe the police officers' version of the events of March 22, 2004 over the Plaintiffs. In addition to the above examples, Mr. Callanan asserts that "the son and the wife...become active [resistors]..."[27] The allegation that MRS. LAMBERT and Jon Lambert somehow interfered with the police officers – an offense for which neither of them were charged – has been disputed by the Plaintiffs from the outset of this case. Nevertheless, Mr. Callanan accepted this allegation as a fact. Accepting this allegations as a fact reveals the unreliable nature of Mr. Callanan's testimony, particularly when it is grouped with the above examples.

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C. Mr. Callanan Provided Unreliable Testimony Based On Made Up "Facts" For Which There Is No Evidentiary Support

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[23]Deposition of Joseph Callanan, page 61:22-62:2, 62:21-25.

[24]Deposition of Joseph Callanan, page 62:7-10.

[25]Deposition of Joseph Callanan, page 62:17-63:2.

[26]Deposition of Joseph Callanan, page 64:12-25.

[27]Deposition of Joseph Callanan, page 66:13-14.

One of the most glaring examples of the lack of reliability in Mr. Callanan's testimony can be found in his willingness to create facts out of whole cloth. This practice is not condoned in Federal Courts, where an expert's opinion must be based on sufficient facts or data. FRE 702. An expert's testimony may be excluded from trial if its factual basis is insufficient or clearly wrong. *Bradley v. Armstrong*, 130 F.3d 168, 177 (5th Cir. 1997); *Guillory v. Domtar Industries, Inc.*, 95 F.3d 1320, 1330 (5th Cir. 1996).

1. Mr. Callanan Testified That Defendant SANCHEZ Practiced The Leg Sweep/Take Down Maneuver From Police Combatives In A Classroom With Other Students, Which Is Simply False

An important issue in this case is whether or not Defendant SANCHEZ practiced the leg sweep/take down maneuver he read about from Police Combatives before he used the maneuver against MR. LAMBERT on March 22, 2004. In reaching his conclusion that Defendant SANCHEZ had practiced the maneuver, Mr. Callanan testified to facts that plainly do not exist in any of the records he claims he reviewed, and which contradicts Defendant SANCHEZ's own sworn testimony.[28]

At Mr. Callanan's deposition, Mr. Callanan acknowledged that it was his understanding that Defendant SANCHEZ had used the leg sweep maneuver he had read about in Police Combatives.[29] However, Mr. Callanan further testified that he had a "vague recall" that Police Combatives was something that Defendant SANCHEZ "read, studied, practiced, and in this case practiced."[30]

As if that "leap of logic" was not far enough from the actual facts testified to by Defendant SANCHEZ, Mr. Callanan leapt even further, testifying that he recalled Defendant SANCHEZ had practiced the technique with another human prior to using the technique on MR.

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[28] *See*, Exhibit "D," attached hereto.

[29] Deposition of Joseph Callanan, page 57:16-25, 58:9-13.

[30] Deposition of Joseph Callanan, page 58:1-6, 59:19-22.

LAMBERT.[31] He went on to construct a completely fictitious fact: "...[I]t is my recall today as I sit here that he attended some course and practiced these techniques and that the students practiced amongst themselves...That's the extent of my memory today."[32] Of course, not only is Mr. Callanan's memory faulty on this point, but the scenario he constructed contradicts Defendant SANCHEZ's own sworn deposition testimony.

2. Mr. Callanan Refused To Believe That Defendant SANCHEZ Had Actually Used The Leg Sweep/Take Down Maneuver From Police Combatives Even Though Defendant SANCHEZ Admits That He Did

Although he initially accepted the fact that Defendant SANCHEZ had used the leg sweep/take down maneuver from Police Combatives, Mr. Callanan later changed his mind. Mr. Callanan testified: "Because he tried to do what's described [in Police Combatives] doesn't mean that's what happened..."[33] When reminded of his prior testimony that an expert does not sit as a fact-finder, Mr. Callanan replied: "True, *but* I don't want any of us to leave here today and

believe what's described [in Police Combatives] is exactly what happened to your client because **I won't believe that for a moment**. **It may be but you can't prove it to me**."[34]

Why the jury in this case would not leave the courtroom believing that Defendant SANCHEZ used the leg sweep/take down maneuver from Police Combatives is a mystery because **that is precisely what Defendant SANCHEZ testified happened**. Allowing Mr. Callanan – in the cloak of an "expert" – to contradict Defendant SANCHEZ's testimony is improper under *Daubert*. Moreover, the fact that Mr. Callanan insists that he believes a version of the facts that contradicts Defendant SANCHEZ's own sworn testimony shows exactly how unreliable Mr. Callanan's testimony is.

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[31]Deposition of Joseph Callanan, page 60:2-6.

[32]Deposition of Joseph Callanan, page 60:12-22.

[33]Deposition of Joseph Callanan, page 113:9-11.

[34]Deposition of Joseph Callanan, page 113:14-19.

Another area in which Mr. Callanan adopted a fact not supported in the evidence in this case is when he testified that "there is someone at the hospital, maybe a nurse or paramedic or ambulance attendant, who perceived an odor [of alcohol on MR. LAMBERT]."[35] Mr. Callanan's testimony as to this fact is unsubstantiated and runs contradictory to the sworn testimony of the EMT, Rob McKay, who treated MR. LAMBERT. Mr. McKay testified that if he had smelled an odor of alcohol on MR. LAMBERT, he would have noted that fact in MR. LAMBERT'S patient records – which he did not. Similarly, the emergency room nurse, Cathy Capobianco, did not recall whether MR. LAMBERT appeared intoxicated or not.

Allegations of intoxication are inflammatory to many jurors. Therefore, Mr. Callanan's testimony on this point lacks any foundation, is improper, and it should be excluded.

V. Mr. Callanan's Testimony Should Also Be Excluded Under Rule 403

The Court can take clear notice of the potential prejudice arising from admission of Mr. Callanan's testimony, particularly those areas where Mr. Callanan provides testimony that contradicts Defendant SANCHEZ's own sworn testimony. In addition to being prejudicial to the Plaintiffs, Mr. Callanan's testimony is likely to confuse and mislead the jury, especially if he is given a judicial stamp of approval and allowed to testify as an "expert." Finally, to the extent that Mr. Callanan's testimony opens up matters not reasonably in dispute because of Defendant SANCHEZ's sworn admissions, Mr. Callanan's testimony is waste of time and frustrates the orderly process of the trial itself.

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VI. Mr. Callanan Should Not Be Permitted To Give Testimony On Matters For Which He Is Not Qualified To Render An Expert Opinion

[35]Deposition of Joseph Callanan, page 69:13-15.

Even if the Court is inclined to permit Mr. Callanan to provide *some* expert testimony at the time of trial, Plaintiffs request that the Court limit the scope of Mr. Callanan's expert testimony to those subject areas for which he is qualified to render an expert opinion.

1. Mr. Callanan Has Not Been Retained To Provide Expert Testimony On Take Down Techniques

Mr. Callanan testified at his deposition that he was not retained as an expert on take down techniques.[36] Despite not being retained as an expert on take down techniques, Mr. Callanan went on to testify that the leg sweep/take down maneuver from Police Combatives, in terms of its severity, is "somewhere between a foot sweep, leg sweep and a hip throw taught by the military.[37] Mr. Callanan further testified that the leg sweep technique in Police Combatives "is one of several recognized and accepted police procedures..."[38] Mr. Callanan's testimony is improper, lacks foundation, and it should be excluded.

2. Mr. Callanan Lacks Sufficient Qualifications To Express An Opinion That MRS. LAMBERT Suffers From Or Suffered From "Battered Spouse Syndrome"

In both his Rule 26 report and at his deposition, Mr. Callanan expressed the opinion that MRS. LAMBERT suffers from "battered spouse syndrome," particularly in connection with a letter MRS. LAMBERT wrote to the Sonoma County District Attorney following the incident. Courts look at state law in determining whether "battered spouse syndrome" evidence is admissible. *Lannert v. Jones*, 321 F.3d 747 (8th Cir. 2003); *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003). Under California law, "battered spouse syndrome" evidence is only admissible in criminal actions. CA Evid. Code, § 1107.

Aside from these legal obstacles, Mr. Callanan lacks sufficient professional qualifications to testify about "battered spouse syndrome." Other than one vague reference to a course in the 1980s entitled "Domestic Violence Training Course," Mr. Callanan's CV is devoid of any

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[36]Deposition of Joseph Callanan, page 78:11-79:15.

[37]Deposition of Joseph Callanan, page 104:24-105:4.

[38]Deposition of Joseph Callanan, page 83:3-15.

education or specialized training that would render him an expert on a condition like "battered spouse syndrome." An expert in this area should be someone with significant work experience dealing with domestic violence victims. *See, e.g., People v. Williams,* 78 Cal.App.4th 1118 (2000) [Testimony of domestic violence counselor admissible]. Mr. Callanan is neither a psychologist, psychiatrist, social worker, or domestic violence counselor.

Moreover, when asked at his deposition if he had seen any evidence indicating that there was a history of abuse between MR. and MRS. LAMBERT prior to March 22, 2004, Mr. Callanan indicated that he had not seen any such evidence.[39] Therefore, Mr. Callanan's testimony on this subject lacks any foundation and should be excluded – as should any reference to "battered spouse syndrome" based on the aforementioned letter written by MRS. LAMBERT.

3. Mr. Callanan Lacks Sufficient Qualifications To Express A Medical Opinion About Why MR. LAMBERT Was Panting And Moaning After Defendant SANCHEZ Had Taken MR. LAMBERT To The Group With The Leg Sweep/Take Down Maneuver And Tasered Him

Mr. Callanan acknowledges that he is not "medically competent" to assess how badly MR. LAMBERT'S leg was broken on March 22, 2004.[40] Furthermore, Mr. Callanan acknowledges that he did not request any medical records in connection with his evaluation of this case and stated "that would exceed my capability to express an opinion on that."[41]

Despite these self-imposed disqualifications, Mr. Callanan proceeded – both in his Rule 26 report and at his deposition – to express a medical opinion as to why MR. LAMBERT was "panting and moaning" after Defendant SANCHEZ had brought MR. LAMBERT to the ground with the leg sweep/take down maneuver.[42] Without any medical background whatsoever, Mr.

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[39]Deposition of Joseph Callanan, page 120:1-4

[40]Deposition of Joseph Callanan, page 85:19-24.

[41]Deposition of Joseph Callanan, page 69:25-70:6.

[42]The phrase "panting and moaning" is a phrase MR. LAMBERT used in a letter written to the SANTA ROSA POLICE DEPARTMENT, 6/11/2004.

Callanan testified: "...[W]hen I read 'panting and moaning' I'm thinking, well, then this man was actively engaged in some exertion which put a strain on his respiratory system."[43]

Similar to the issues of reliability discussed, *supra*, it is interesting to note that Mr. Callanan immediately assumed a set of facts that portrays MR. LAMBERT in the most negative light possible and which refused to acknowledge a different possible explanation. It is possible that MR. LAMBERT was "panting and moaning" because he had just been thrown violently to the ground by a 255 pound police officer almost 40 years younger than him. It is also possible that MR. LAMBERT was panting and moaning because he had just suffered a severe, right tibial plateau fracture. Finally, it is possible that MR. LAMBERT was "panting and moaning" because Defendant SANCHEZ had just used his Taser gun on him, shocking him with 50,000 volts of electricity.

These considerations overlap with Plaintiffs' concerns about Mr. Callanan's reliability as an expert witness. Notwithstanding these concerns, however, is the fact that Mr. Callanan has no medical expertise that would qualify him to judge whether MR. LAMBERT'S "panting and moaning" was due to respiratory exertion, due to his broken leg, or due to being Tasered.

Respectfully submitted.

Dated: October 17, 2006

LAW OFFICES OF ERIC G. YOUNG

By:_____
Eric G. Young, Attorneys for Plaintiffs
WILLIAM and BEVERLY LAMBERT

[43]Deposition of Joseph Callanan, page 90:17-19.