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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 AL OTRO LADO, *et al.*,

11
12 Plaintiffs,

13 v.

14 ALEJANDRO MAYORKAS, Secretary
of Homeland Security, *et al.*,

15 Defendants.
16

Case No. 17-cv-02366-BAS-KSC

**ORDER DENYING PLAINTIFFS’
MOTION TO EXCLUDE
DEFENDANTS’ PURPORTED
EXPERT TESTIMONY**

(ECF No. 536)

17 Plaintiffs file a Motion to Exclude Defendants’ Purported Expert Testimony
18 (“Motion”) arguing that Defendants should not be allowed to admit the testimony of Mariza
19 Marin, Rodney Harris, or Samuel Cleaves as to operational capacity at the ports of entry
20 (“POEs”). (ECF No. 536.) Specifically, Plaintiffs argue that: (1) the witnesses were not
21 disclosed as expert witnesses and should not be admitted as non-retained experts under
22 Rule 26(a)(2)(C); (2) the witnesses have no methodology for calculating “operational
23 capacity” and thus should be excluded under *Daubert*; (3) Defendants fail to link any such
24 capacity to the number of asylum seekers that can be processed and inspected; (4) their
25 testimony regarding such capacity directly contradicts their previous testimony that
26 operational capacity could not be defined or calculated; and (5) even if their testimony is
27 allowed, it should be accorded no weight. (*Id.*) Defendants respond, and Plaintiffs reply.
28 (ECF Nos. 580, 592.) For the reasons stated below, the Court **DENIES** the Motion.

1 **I. BACKGROUND**

2 In the Second Amended Complaint (“SAC”), which is the operative pleading in this
3 case, Plaintiffs allege that Customs and Border Protection (“CBP”) had a pattern and
4 practice of systematically denying asylum seekers access to the asylum process along the
5 U.S.-Mexico border. (ECF No. 189.) Plaintiffs claim “CBP refused to inspect and
6 process” asylum seekers in accordance with governing statutes. (*Id.*) Instead, Plaintiffs
7 allege, CBP prevents asylum seekers from accessing the asylum process through various
8 means, including on the pretext that the POEs are at capacity (a process known as
9 “metering”), when the true intent is to deter individuals from seeking asylum in the United
10 States at all. (*Id.*) Defendants counter that although there may have been the physical
11 capacity to process more asylum seekers at the POEs, the operational capacity at the ports
12 limited the number of asylum seekers who could be processed at any given time.
13 Defendants proffer three CBP officers to testify about this operational capacity.

14 The Court has certified a class consisting of all non-citizens seeking asylum in the
15 United States by presenting themselves to a POE at the U.S.-Mexico border after January
16 1, 2016. (ECF No. 513). The Court also certified a subclass of all noncitizens denied
17 access to the U.S.-asylum process at a POE on the U.S.-Mexico border as a result of CBP’s
18 “Turnback Policy” after January 1, 2016. (*Id.*)

19 **A. Mariza Marin**

20 1. Rule 26(a)(2)(C) disclosure

21 Agent Mariza Marin is the Assistant Director of Field Operations at the San Diego
22 Field Office. Defendants intend to call Agent Marin to testify, in part, about the
23 “mandatory and discretionary factors” that impact the San Ysidro POE’s “operational
24 capacity to process individuals without documents sufficient for lawful entry to the United
25 States.” (Defs.’ Rule 26(a)(2)(C) Disclosures (“Defs.’ Disclosures”) at 2, Ex. 4 to Mot.,
26 ECF No. 536-6.)

27 Specifically, Agent Marin will testify to how the following factors effect operational
28 capacity: (1) “the requirements set forth in CBP’s National Standard on Transportation,

1 Escort, Detention and Search”; (2) “the length of time that individuals have spent in . . .
2 custody;” (3) “the number of individuals brought in on days prior and the extent to which
3 they are still pending intake and/or processing”; (4) “the necessity that CBP act
4 conservatively in taking individuals from the queue in order to safeguard operations against
5 inherent unknowns, such as the number of individuals who will enter CBP’s custody . . .
6 after being apprehended attempting to illegally enter the United States”; (5) “staffing and
7 other resource allocations and constraints”; and (6) “law enforcement operations and
8 significant incidents occurring or expected to occur at or near a particular POE,” as well as
9 “significant events impacting the community or society at large, such as the current
10 pandemic.” (*Id.*)

11 Additionally, Defendants plan to call Agent Marin to testify about the number of
12 people in custody on June 17, 2018, the reasons for that number, and the facts and
13 conclusions set forth in her declaration. (*Id.*)

14 2. Deposition testimony

15 At her deposition, Agent Marin was asked about operational capacity for processing
16 undocumented migrants at the San Ysidro POE. She explained that this is an important
17 concept at San Ysidro. (Dep. of Mariza Marin (“Marin Dep.”) 111:4-7, Ex. 6 in supp. of
18 Mot., ECF No. 536-8.) She testified that there are different capacities at POEs: a physical
19 capacity and “an operational capacity that fluctuates from day to day, minute to minute.”
20 (Marin Dep. 68:1-5.) As she explained, “[o]perational capacity—for us is not a hard
21 number or hard ceiling. It’s a ballpark that we attempt to stay around to safely have the
22 resources available to process and adequately care for people in our custody. This does
23 not mean that there is a maximum ceiling of capacity for us.” (Marin Dep. 101:8-14.)

24 Although Agent Marin stated she was unaware of any specific or written guidance
25 on what is and what is not operational capacity, she attested that POEs “have always had
26 an operational capacity.” (Marin Dep. 69:4-8; 69:23–70:2; 70:22–71:4.) She has never
27 seen a standard operating procedure that defines operational capacity but testifies that
28 “[CBP] ha[s] always used [it].” (Marin Dep. 70:4-13.) Despite the lack of official

1 definition, she testified that she understands what the term means. (Marin Dep. 71:11-24.)
2 Further, Agent Marin testified that “the decision-makers in the [admissibility and
3 enforcement] unit clearly understood what operational capacity was and that it fluctuated
4 on any given day.” (Marin Dep. 110:19-22.)

5 According to Agent Marin, the definition of operational capacity would differ from
6 POE to POE, from day to day, and sometimes even from hour to hour. (Marin Dep. 72:7-
7 13.) She was unable to reconstruct the daily operational capacity. (Marin Dep. 129:7-14.)
8 Since the number “is fluid and varies from day to day,” she testified that she did not believe
9 anyone could reconstruct it. (Marin Dep. 129:15-21.) She could, however, provide
10 “several factors that would change operational capacity at any given time.” (Marin Dep.
11 130:24–131:1.)

12 **B. Samuel Cleaves**

13 1. Rule 26(a)(2)(C) disclosure

14 Agent Samuel Cleaves is the Assistant Port Director in El Paso. Defendants intend
15 to call Agent Cleaves to “testify to the factors the Port of El Paso deems relevant in
16 determining the port’s operational capacity to process undocumented migrants.” (Defs.’
17 Disclosures at 4.) Agent Cleaves will testify that operational capacity takes into account
18 the “characteristics and demographics of individuals in custody; the ability to transfer
19 individuals to third party federal or state agencies . . . ; port staffing levels; the resources
20 available to the port on a given day; and the need to re-allocate resources when necessary.”
21 (*Id.*) He will also attest to the “physical characteristics and infrastructure” of the port and
22 how they impact operational capacity, including “the concerns that arise . . . such as the
23 potential for overcrowding, officer safety, and limited resources[.]” (*Id.* at 4–5.)

24 Agent Cleaves will also testify that on June 17, 2018, “the Port of El Paso was
25 operating beyond its operational capacity during its midnight shift and at or near its
26 operational capacity for all other shifts” that day. (*Id.*)

1 2. Deposition testimony

2 At his deposition, Agent Cleaves testified that he has collected and compiled data
3 on the capacity at the El Paso POE, including counting the number of people being held
4 three times a day. (Dep. of Samuel Cleaves (“Cleaves Dep.”) 47:20-24; 48:2-4, Ex. 7 in
5 supp. of Mot., ECF No. 534-9.)

6 According to Agent Cleaves, when determining how many asylum seekers can be
7 admitted, “you have to take in[to] consideration both physical capacity, the actual facility
8 itself, and operational capacity, what you can process and . . . what’s going on at that time
9 throughout the port” (Cleaves Dep. 53:5-9.) He admitted there is no definition of
10 operational capacity in any rule or regulation governing the port and no actual set
11 definition. (Cleaves Dep. 50:4–41:14.) However, he explained that in the past the port had
12 used the “wrong parameters” for capacity. (Cleaves Dep. 52:10-11.) For example, Agent
13 Cleaves testified that the “facilities were never designed for overnight detention,” but it
14 was an important parameter for migrant processing because they typically required an
15 overnight stay. (Cleaves Dep. 52:14–53:20; 54:3-8.)

16 He also clarified that “operational capacity is more complex” than physical capacity,
17 which just refers to the size of the facility. (Cleaves Dep. 56:2-3, 8-14.) For example, he
18 stated that operational capacity “takes into account the Port of El Paso is very spread out,
19 it’s very unique, so it has ten different locations and processes. So it takes into account all
20 of the operations that are ongoing and what it would take for these operations to . . . operate
21 well and successfully.” (*Id.*) Additionally, he added that operational capacity considers
22 workload issues: keeping migrants overnight requires food contracts, medical services,
23 transportation, and guards. (Cleaves Dep. 56:15-22.)

24 Agent Cleaves also testified that no one tracks the operational capacity of the port
25 on any given day because “it is a culmination of multiple factors” and changes quickly and
26 frequently, making it “impossible to track.” (Cleaves Dep. 66:10-16.) Further, he confirms
27 that no reports capture operational capacity. (Cleaves Dep. 68:1-6.)

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1 **C. Rodney Harris**

2 1. Rule 26(a)(2)(C) disclosure

3 Agent Rodney Harris is the Deputy Assistant Director of Field Operations, Border
4 Security, at the Laredo Field Office. Defendants intend to call Agent Harris to testify that
5 queue management (or metering) is a tool POEs use to manage their operational capacity.
6 (Defs.’ Disclosures at 4.) Agent Harris will testify that the Port of Laredo’s and all POE’s
7 operational capacity is fluid and based on many factors. (*Id.*) These factors include, but
8 are not limited to: “the missions of the port and how it prioritizes these mission sets;
9 resources available to the port . . . such as funds, personnel, durable assets, and [p]ort
10 facility constraints; the number, nature, and complexity of seizures, arrests, and
11 admissibility issues; the volume, characteristics, demographics and medical needs of the
12 individuals in custody; and the functionality of the [p]ort’s resources such as physical space
13 and assets designated for migrant processing.” (*Id.*)

14 Agent Harris would also testify that on June 17, 2018 the Port of Laredo balanced
15 competing priorities “such as processing trade and travelers.” (*Id.*) He would provide an
16 overview of significant events that occurred on this date and the impact these events had
17 on the Port’s operational capacity to process undocumented migrants. He also would
18 explain what factors the Port considered on this date and why those factors impacted
19 operational capacity. (*Id.*)

20 2. Deposition testimony

21 At his deposition, Agent Harris testified that although the POEs may have had a
22 higher detention capacity, it was just “not operationally feasible to hold a migrant at a lot
23 of those locations.” (Dep. of Rodney Harris (“Harris Dep.”) 129:4-5, Ex. 8 in supp. of
24 Mot., ECF No. 536-10.) Around June 2018, CBP started using the term “operational
25 capacity” in relation to queue management or metering. (Harris Dep. 137:25–138:4.) At
26 that point, according to Agent Harris, there was no clear definition of operational
27 capacity—it was subject to “interpretation.” (Harris Dep. 140:19–141:1.) Thus, the port
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1 staff and ultimately the port director had discretion to decide how many asylum seekers to
2 process in a given day. (Harris Dep. 146:22–147:5.)

3 Agent Harris also testified that there has never been a calculation for “operational
4 capacity,” and it has never “really been defined.” (Harris Dep. 107:1-7; 286:10-13.) Agent
5 Harris has ever seen a textbook definition of operational capacity and there is no official
6 list of factors that go into operational capacity. (Harris Dep. 286:10-13; 294:13-15.)
7 Nonetheless, Agent Harris uses several factors to define it, including: “what else is going
8 on at the port”; the port’s other prioritized “mission sets”; how many and what types of
9 people are already in custody; detention capacity; language barriers; prior criminal or
10 immigration history of the detainees; whether the migrants are a part of a family unit or an
11 unaccompanied minor; their genders; the “downstream process” and whether CBP has to
12 wait for other agencies to respond; necessity for hospital or medical clinic runs; and how
13 many personnel are assigned to the port in a given day. (Harris Dep. 286:9-10; 286:25–
14 287:7; 287:25-288:12; 288:13–20; 289:1–18; 290:4–13; 290:20–21.)

15 **II. LEGAL STANDARD**

16 **A. Rule 26**

17 Rule 26 of the Federal Rules of Civil Procedure requires the parties to disclose the
18 identity of each expert. Written reports are required for all experts “if the witness is one
19 retained or specially employed to provide expert testimony in the case or one whose duties
20 as the party’s employee regularly involve giving expert testimony.” Fed. R. Civ. P.
21 26(a)(2). However, the court must distinguish “between a percipient witness who happens
22 to be an expert and an expert who, without knowledge of the facts giving rise to the
23 litigation, is recruited to provide expert opinion testimony.” *Downey v. Bob’s Furniture*
24 *Holdings, Inc.*, 633 F.3d 1, 5–6 (1st Cir. 2011). If the expert was not retained or specially
25 employed in connection with the case, and his opinion is premised on personal knowledge
26 and observations, no report is required under the terms of Rule 26(a)(2). *Id.* at 7.

1 **B. Rule 702**

2 Federal Rule of Evidence 702 establishes several requirements for admissibility of
3 expert opinion evidence: (1) the witness must be sufficiently qualified as an expert by
4 knowledge, skill, experience, training, or education; (2) the scientific, technical, or other
5 specialized knowledge must “assist the trier of fact” either “to understand the evidence” or
6 “to determine a fact in issue”; (3) the testimony must be “based on sufficient facts and
7 data”; (4) the testimony must be “the product of reliable principles and methods”; and (5)
8 the expert must reliably apply the principles and methods to the facts of the case.

9 Under *Daubert* and its progeny, the trial court is tasked with assuring that expert
10 testimony “both rests on a reliable foundation and is relevant to the task at
11 hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). “Expert opinion
12 testimony is relevant if the knowledge underlying it has a valid connection to the pertinent
13 inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the
14 knowledge and experience of the relevant discipline.” *Primiano v. Cook*, 598 F.3d 558,
15 565 (9th Cir. 2010) (citation and quotation marks omitted). “Expert testimony is
16 inadmissible if it is speculative, unsupported by sufficient facts or contrary to the facts of
17 the case.” *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006).

18 “Shaky but admissible evidence is to be attacked by cross-examination, contrary
19 evidence, and careful instruction on the burden of proof, not exclusion.” *Primiano*, 598
20 F.3d at 564. The judge is “to screen the jury from unreliable nonsense opinions, but not
21 exclude opinions merely because they are impeachable.” *Alaska Rent-A-Car, Inc. v. Avis*
22 *Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013). In its role as gatekeeper, the trial
23 court “is not tasked with deciding whether the expert is right or wrong, just whether his [or
24 her] testimony has substance such that it would be helpful to a jury.” *Id.* at 969–70; *see*
25 *also Daubert*, 43 F.3d at 1318 (“[T]he test under *Daubert* is not the correctness of the
26 expert’s conclusions but the soundness of his methodology.”). “Courts should resolve
27 doubts regarding the usefulness of an expert’s testimony in favor of admissibility.”
28 *Marmo*, 457 F.3d at 758.

1 *Daubert* requires that the Court apply its gatekeeping role to all expert testimony,
2 not just scientific testimony. But the tests for admissibility in general, and reliability in
3 particular, are flexible. *Primiano*, 598 F.3d at 564 (citing *Kumho Tire Co. v. Carmichael*,
4 526 U.S. 137, 152 (1999)). The court “has discretion to decide how to test an expert’s
5 reliability as well as whether the testimony is reliable, based on the particular
6 circumstances of the particular case.” *Primiano*, 598 F.3d at 564 (citations and quotation
7 marks omitted). Particularly when considering the reliability of non-scientific testimony,
8 reliability “depends heavily on the knowledge and experience of the expert rather than the
9 methodology or theory behind it.” *Hangerter v. Provident Life & Acc. Ins. Co.*, 373 F.3d
10 998, 1017 (9th Cir. 2004).

11 After admissibility is established to the court’s satisfaction, attacks aimed at the
12 weight of the evidence are the province of the fact finder, not the judge. *Pyramid Techs.,*
13 *Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014). The court should not
14 make credibility determinations that are reserved for the jury. *Id.*; *see also Primiano*, 598
15 F.3d at 565 (“When an expert meets the threshold established by Rule 702 as explained in
16 *Daubert*, the expert may testify and the jury decides how much weight to give that
17 testimony.”),

18 **III. ANALYSIS**

19 Plaintiffs first argue that the above three witnesses are experts under Rule 26(a)(2)
20 and thus Defendants were required to provide expert reports under this section. Fed. R.
21 Civ. P. 26(a)(2)(B). However, the witnesses are not retained, specially employed to
22 provide expert testimony in the case, or employees who regularly provide expert testimony
23 for the Government. Their testimony largely concerns their opinions about the constraints
24 placed on the respective POEs where they work and those ports’ ability to process asylum
25 seekers. As such, they are percipient witnesses whose opinions are premised on personal
26 knowledge and observations and no report was required under Rule 26.

27 Defendants next argue that the testimony lacks relevance and reliability and
28 therefore should be excluded under *Daubert* and its progeny. Relevant evidence is

1 evidence that has “any tendency to make the existence of any fact that is of consequence .
2 . . . more probable or less probable than it would be without the evidence.” *Divero v.*
3 *Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) (quoting Fed. R. Evid.
4 401). One of the issues in this case is whether asylum seekers were denied access to the
5 asylum process because the POEs truly had a capacity limit that prevented processing them
6 or, as alleged by Plaintiffs, whether the claimed capacity limit was simply a pretext when
7 the true intent was to deter individuals from seeking asylum in the United States altogether.
8 Testimony from the Assistant Director of Field Operations at the San Ysidro POE, the
9 Assistant Port Director at the El Paso POE, and the Deputy Assistant Direct of Field
10 Operations, Border Security at the Laredo POE about what they believed to be the capacity
11 limits on processing asylum seekers at their respective POEs is clearly relevant to this issue.

12 Furthermore, Plaintiffs do not challenge the qualifications of these witnesses to offer
13 these opinions; in fact, each witness has spent many years working for CBP at their
14 respective POEs. In addition, the testimony is within each witness’s area of expertise and
15 based on his or her perception as to what the capacity at each port consists of and what
16 factors are considered in that capacity.

17 Plaintiffs’ most vehement argument is that the witnesses each admitted in their
18 depositions that there is no written or established definition of “operational capacity” and
19 that the operational capacity at any given time is ever-changing and impossible to
20 reconstruct. Therefore, citing *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir.
21 1991), Plaintiffs argue the witnesses should not be allowed to contradict their deposition
22 testimony. The Court in *Kennedy* reiterated the general rule in the Ninth Circuit that “a
23 party cannot create an issue of fact by an affidavit contradicting his prior deposition
24 testimony.” *Id.* at 266. However, the Court reversed the district court’s rejection of expert
25 testimony in that case, concluding that the general rule “does not automatically dispose of
26 every case in which a contradictory affidavit is introduced to explain portions of earlier
27 deposition testimony.” *Id.* at 266–67. Only in cases where the contradiction is actually
28 “sham” testimony that flatly contradicts deposition testimony, solely concocted to “create”

1 an issue of fact and avoid summary judgment, should the sanction of rejecting the expert
2 testimony be imposed. *Id.* at 267.

3 In this case, Defendants’ Rule 26 disclosures outline testimony about the factors that
4 comprise “operational capacity”—as opposed to a hard-and-fast number indicating
5 physical capacity—at any given time. These factors were all outlined by the witnesses in
6 their deposition testimony and thus there is no contradiction. To the extent any of the
7 witnesses attempts to reconstruct the operational capacity of a port on any given day,
8 Plaintiffs can certainly attack this by using the deposition testimony as impeachment, but
9 the Court finds this is not sham testimony and thus should not be excluded under *Kennedy*.

10 Finally, to the extent Plaintiffs argue that, even if the Court does not exclude the
11 testimony, it should afford the testimony no weight, the Court will address this argument,
12 if necessary, in its Order regarding Summary Judgment.

13 **IV. CONCLUSION**

14 Accordingly, Plaintiffs’ Motion to Exclude the testimony of Agents Marin, Cleaves,
15 and Harris (ECF No. 536) is **DENIED**.

16 **IT IS SO ORDERED.**

17
18 **DATED: September 2, 2021**


Hon. Cynthia Bashant
United States District Judge