STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WAYNE COUNTY JAIL INMATES, et. al.,

Plaintiffs,

v.

WILLIAM LUCAS, et. al.,
Defendants.

Case No. 71 173 217 CZ

Hon. Timothy M. Kenny

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE THE REPORT OF FRED ROTTNEK, M.D., MAHCM

Plaintiffs and Defendants jointly proposed an order to this Court for an inspection of the Wayne County Jail and an accompanying report by Dr. Fred Rottnek to aid all parties in litigating the claims alleged in this suit.[1] The Joint Inspection Order set forth in detail the information Dr. Rottnek sought. There were no surprises. Defendants now seek to strike this Court-ordered report because they do not like what it says. Contrary to Defendants' claims, the report was prepared by a qualified expert, is sufficiently reliable, and contains factual information and recommendations relevant to the issues in this case. Defendants' Motion should be denied in its entirety.[2]

BACKGROUND

I. Procedural History

The jail inspection in this litigation is the product of hours of discussions between the parties and two orders from this Court. Defendants joined Plaintiffs in proposing the "Joint Proposed Inspection Order," and the Court subsequently entered this Order. In this Order, Defendants agreed that a jail inspection "shall take place," that "[t]he inspector shall be allowed to speak with and interview any person incarcerated at the Jail," and that "[t]he inspector shall provide a report to the parties and the Court" of the inspection. Ex. 2 at ¶¶ 1-4. Both parties were permitted to submit to the Court two candidates to serve as the inspector.[3] Defendants declined to submit any candidates.

As entered by the Court, the Joint Inspection Order defines the parameters of the inspection and requires the inspector to prepare an accompanying report. *See* Ex. 2. Specifically, the Joint

[1] *See* Ex. 1, Joint Proposed Inspection Order ("Joint Inspection Order").
[2] Plaintiffs agree that any personal identifying information in the report should be redacted.
[3] *See* Ex. 2, Stipulated Temporary Amendment to the Consent Order ("Stipulated Temporary Order"), at 3.

Inspection Order states that the inspection report "shall include any information [the inspector] was able to ascertain regarding the following:

- Conditions of the housing units during the COVID-19 pandemic;
- Conditions of and access to shower/bathroom facilities during the COVID-19 pandemic;
- Conditions of and access to medical, laundry, dining facilities and shared common areas during the COVID-19 pandemic;
- Availability and stock of cleaning supplies and personal protective equipment for inmates and Jail staff;
- Availability and stock of hygienic and disinfecting supplies for inmates and Jail staff;
- Availability of communications to inmates about COVID-19 including low-literacy and non-English-speaking people; and
- Social distancing measures."

Id. at 3. The Joint Inspection Order did not prohibit either party from communicating with or sending relevant materials to the inspector in advance of the inspection or afterwards. At Defendants' request, the Joint Inspection Order also required that the inspector would be made available for a deposition within 48 hours of submitting the inspection report. *Id.* at 2. Through the Joint Inspection Order, this Court selected and ordered Fred Rottnek, M.D., MAHCM to perform the inspection. *Id.* at 2.[4]

[4] Defendants inappropriately mischaracterize Dr. Rottnek as "Plaintiffs' expert." Defs. Mot. at 1. Plaintiffs did not retain Dr. Rottnek as a witness for this lawsuit. Plaintiffs' counsel do not represent Dr. Rottnek in any capacity. Under the Joint Inspection Order, both parties had the opportunity to depose Dr. Rottnek, which would be highly unusual if Dr. Rottnek was in fact "Plaintiffs' expert." Ex. 1 at 2.

II. Dr. Rottnek's Qualifications

Dr. Rottnek is currently a professor of family and community medicine at the Saint Louis University School of Medicine.[5] In addition to his work at the University, Dr. Rottnek currently serves on the staff of Saint Louis University Hospital, and he is board-certified in family medicine and addiction medicine.[6] Beginning next month, Dr. Rottnek will be the Medical Director of Family Courts and Juvenile Detention for the 22nd Judicial Court of St. Louis. *Id.* ¶ 2.

Before he began his professorship at Saint Louis University, Dr. Rottnek was the Medical Director and Lead Physician at the Saint Louis County Jail for fifteen years. *Id.* ¶ 3. He saw patients three days per week and was responsible for the health and general well-being of detainees and jail staff. *Id.* The jail's daily census ranged from 900 to 1,400 individuals, and throughout the year, he also directed the intake screenings of 30,000 to 34,000 newly arrested individuals. *Id.* ¶ 4. In this role, he was instrumental in the development of the jail's policies, operating procedures, and infirmary, hygiene, and cleaning protocols in response to the outbreak of Methicillin-Resistant Staphylococcus Aureus ("MRSA"). *Id.* ¶ 5. Because of his leadership, MRSA infections at the jail decreased to a one-eighth of the rate of infection at its peak. *Id.*

In addition to his time spent working at the jail, Dr. Rottnek has years of other experience in the field of correctional medicine and healthcare otherwise related to the criminal justice system. Dr. Rottnek is a certified Correctional Health Care Physician through the National Commission on Correctional Health Care. *Id.* ¶ 1. In response to the ongoing COVID-19 pandemic, he has worked with Saint Louis courts to safely reopen and has given presentations on how to mitigate risk in

[5] Ex. 3, Affidavit of Fred Rottnek, M.D., ¶ 1.
[6] Ex. 4, Curriculum Vitae of Fred Rottnek, M.D., at 1.

direct patient care. *Id.* ¶ 7. He has twice conducted court-ordered inspections at correctional facilities and has been previously qualified to testify as a corrections healthcare expert. *Id.* ¶ 7-8.

He is a member of the Society of Correctional Physicians and has recently been a member of the Academy of Correctional Health Professionals. *See* Ex. 4, at 3.

He has served on the Board of Advisors of the Criminal Justice Ministry of the Society of Saint Vincent de Paul and has taught courses, given lectures, and made presentations on correctional healthcare. *Id.* at 5-6, 13-16.

He also spent over a decade testifying on behalf of a county prosecutor and other county counsel. *Id.* at 6. He has published numerous articles on correctional medicine. *Id.* at 9-10.

III. The Inspection of the Wayne County Jail

Pursuant to this Court's order, Dr. Rottnek inspected the Jail on May 16, 2020. He was accompanied by counsel for Plaintiffs and Defendants for the duration of the inspection. At this Court's direction, on May 17, 2020, Plaintiffs emailed Defendants a proposed memorandum to send to Dr. Rottnek that included the format of the report, as required by the Inspection Order, as well as suggested topics for inclusion.[7] Plaintiffs asked Defendants if they had anything they would like to modify or add to the memorandum. Defendants did not respond. Plaintiffs accordingly emailed Dr. Rottnek the memorandum in its original form on May 18, 2020, indicating that counsel for Defendants was copied and "may have additional thoughts."[8] In response, Dr. Rottnek, in pertinent part, wrote:

> Sue and Paul,
>
> Please let me know if there is something different you'd like on the format.

[7] Ex. 5, Email from plaintiffs' counsel to defense counsel, 5/17/20
[8] Ex. 6, Email from plaintiffs' counsel to Dr. Rottnek, 5/18/20

I plan to get back to this later this afternoon.

See Ex. 6.

Again, Defendants did not respond. Dr. Rottnek subsequently sent his report to both parties on May 19, 2020, three days after conducting his inspection. Defendants never sought to depose or otherwise challenge Dr. Rottnek's report despite the Joint Inspection Order permitting both Defendants and Plaintiffs to do so.

STANDARD OF REVIEW

Michigan Rule of Evidence 702 provides that if "the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a witness who is "qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." MRE 702. This language "incorporate[s] *Daubert*'s standards of reliability." *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 781 (2004) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)). Under *Daubert*, courts must admit expert testimony if it is both reliable and relevant to the issues in the litigation. *See Daubert*, 509 U.S. at 589. Rejection of expert testimony is "the exception, rather than the rule." *United States ex rel. TVA v. 1.72 Acres of Land*, 821 F.3d 742, 749 (6th Cir. 2016).

In Michigan, all relevant evidence is generally admissible. MRE 402. Evidence is relevant if it is material and has probative value. *See People v. Crawford*, 458 Mich. 376, 388 (1998). Evidence is material if it is related to "any fact that is of consequence to the action," and it is probative when it tends to make the existence of any such fact "more probable or less probable than it would be without the evidence." *Id.* at 388-390). This "threshold is minimal." *Id*. at 390

ARGUMENT

I. Dr. Rottnek is qualified to offer testimony on the issue of medical care at the Jail.

The Michigan Rules of Evidence allow witnesses to provide expert testimony if they are qualified "by knowledge, skill, experience, training, or education." MRE 702; *see also People v. Beckley*, 434 Mich. 691, 711 (1990) ("A witness is qualified as an expert by virtue of knowledge, skill, experience, training, or education in a pertinent field."). An expert need not have a specialty in the exact topic of the litigation to provide expert opinion in the case. *See People v. Yost*, 278 Mich. App. 341, 394 (2008) (finding plaintiff's expert qualified to offer an opinion about whether seven-year-old children are sufficiently mature to commit suicide because of his experience as a medical examiner who had performed thousands of autopsies). Michigan courts have recognized that any shortcomings in an expert's experience go to the weight, not admissibility, of his testimony. *Id.* (citing *Gilbert*, 470 Mich. at 788-89).

In their Motion, Defendants do not challenge Dr. Rottnek's education and qualifications as a medical doctor. Instead, they challenge his ability to opine on infectious disease and on COVID-19, how it spreads, and the science of combatting it. Defs. Mot. at 8-9. They argue that Dr. Rottnek is a medical doctor with a specialty only in family medicine and addiction medicine, *Id.* at 9. But Defendants' argument wholly ignores Dr. Rottnek's two decades of experience in correctional healthcare and asks this Court to do the same. Dr. Rottnek has substantial experience in correctional healthcare which qualifies to him provide expert testimony on healthcare at the Jail.

In the case at bar, Plaintiffs allege that Defendants response to COVID-19 at the Wayne County Jail does not meet the minimum standards required by the Eighth and Fourteenth Amendments. In other words, this lawsuit is about the quality of healthcare being provided at a correctional facility— here, the Jail—in the context of Defendants' response to the COVID-19

pandemic. Dr. Rottnek's experience in correctional healthcare plainly qualifies him to give expert testimony in this case regarding the measures being taken at the Jail to prevent the spread of the novel coronavirus. His years of professional and teaching experience involving the issue of healthcare at correctional facilities qualify him to give expert testimony on this topic. *Cf. Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 408-09 (1989) (holding that witness experienced in milk manufacturing was qualified to give expert opinion on whether a machine defect caused disease in plaintiffs' herd of cows even though he was not an expert in animal disease).

For fifteen years, Dr. Rottnek served as the Medical Director and Lead Physician at the Saint Louis County Jail. *See* Ex. 4, at 1. In his role as Medical Director, he assisted in developing policies, procedures, and protocols to address the spread of to contain and mitigate the initial outbreak of MRSA (methicillin-resistant staphylococcus aureus) in the facility in the early 2000's. Like COVID-19, MRSA is an extremely contagious infectious disease that can live on surfaces for days and go undetected in its hosts. Ex. 1 ¶ 5; *see also Stoudemire v. Michigan Dep't of Corrections*, 22 F. Supp. 3d 715, 721 (E.D. Mich. 2014) (denying jail's motion for summary judgment of plaintiff detainee's Eighth Amendment claims rooted in her exposure to MRSA) ("It is well understood that MRSA presents serious risks to the carrier and can be a source of community acquired infections."). In order to successfully contain the outbreak, he helped develop an educational video shown daily to all the housing pods explaining transmission, prevention, and proper hand-washing to mitigate spread of the bacteria. *Id*. He assisted with creating protocols for institutional cleaning, including cleaning schedules and instructions for detainees to effectively sanitize their own cells with disinfecting wipes and workers to mop floors and properly sanitize high-touch surfaces and shared spaces. *Id*. And he helped develop medical protocols to

standardized antibiotic prescribing based on Bureau of Prisons recommendations. *Id.* Under his leadership, MRSA infections decreased to one-eighth of the rate of infection at its peak. *Id.*

Presently, Dr. Rottnek is working with the City of Saint Louis to safely reopen their courts. *Id.* ¶ 7. He has also been invited to give presentations on how to mitigate risk during the COVID-19 pandemic in direct patient care. *Id.* And he has previously conducted court-ordered inspections and given expert testimony on corrections healthcare. *Id.* ¶¶ 6-7.

During his career, Dr. Rottnek has received multiple Correctional Health Professional certifications and is a member of the Society of Correctional Physicians and has recently been a member of the Academy of Correctional Health Professionals. *Id.* at 2-3. For years, he lectured and presented on the topic of correctional healthcare, including the effects of a decreased jail population on the prevalence of infection. *Id.* at 5-6, 13-16. He has published numerous articles on correctional healthcare. *Id.* at 9-10. Importantly, he has even testified on many occasions *on behalf of* county prosecutors and other county counsel. *Id.* at 6.

Defendants rely on *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 782 (2004), seemingly to argue that Dr. Rottnek is an expert in opioid addiction but not the COVID-19 pandemic. *Gilbert* is inapposite.

In *Gilbert*, the plaintiff sought to offer expert medical testimony by a social worker. *See Gilbert*, 470 Mich. at 782. The court there held that a social worker was not qualified to give expert medical opinion on the physiological effects of sexual harassment because he had no training nor experience in medicine. *Id.* at 789-91. The social worker had demonstrated no ability to "meaningfully" interpret medical records. *Id.* at 790. The same is not true here. Once again, Defendants' argument completely ignores the fact that Dr. Rottnek's findings and recommendations are directly within his extensive experience in correctional healthcare.

For example, Dr. Rottnek recommends that Defendants "[a]djust medical services to meet the demand of this population during the pandemic." Report at 11. He also recommends that the Defendants continue to reduce the Jail population because "fewer people in a facility means best practices will be more possible, fewer community resources will be needed, and other inmates and correctional staff will be safer." *Id.* at 10-11. Dr. Rottnek's experience in treating an infectious disease outbreak in his capacity as the medical director of a jail uniquely qualifies him to opine on the Jail's response to COVID-19 in this fashion. Indeed, *Daubert* was meant to "relax the admissibility requirements" for expert testimony, not increase them. *United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997); *see also Nelson v. Am. Sterilizer Co.*, 223 Mich. App. 485, 492 (1997) ("As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel."). In fact, the CDC Guidance encourages jail officials to contact "their state, local, territorial, and/or tribal public health department if they need assistance in applying these principles," without limitation to "infectious disease" providers.[9]

Defendants had the opportunity to depose Dr. Rottnek and ask about his qualifications but declined. They had the opportunity to contact him directly but declined. And they will have the opportunity to cross-examine him about his qualifications. At that time, the Court can decide what weight to give his testimony, but the report should not be stricken. *See Grow v. W.A. Thomas Co.*, 236 Mich. App. 696, 714 (1999) ("qualifications are relevant to the weight, not the admissibility, of [expert's] testimony.").

[9] Centers for Disease Control & Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID19) in Correctional and Detention Facilities, (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidancecorrectional-detention.html.

II. Dr. Rottnek's expert testimony is reliable because he reviewed relevant materials and facts made available to him.

Under Michigan rules, a qualified expert's testimony is admissible if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. MRE 702 incorporates the standards of reliability set forth by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).[10] *See Gilbert*, 470 Mich. at 782. A "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Expert testimony may be reliable if the expert reaches his conclusion by applying his experience in the relevant field. *See, e.g. Ruiz v. Johnson*, 37 F. Supp. 2d 855, 890-91 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001) ("Expert Allen Breed's decades of experience evaluating prisons all across the country, for example, cannot be disregarded based on quibbles over his methodology. In evaluating the conditions of a prison system, having extensive experience in and around the cellblocks of this country is a paramount qualification."). A court must admit an expert's testimony if the expert "sufficiently explained how his experience led to his opinions." *Lenawee Co. v. Wagley*, 301 Mich. App. 134, 163-64 (2013).

Dr. Rottnek's report contains relevant factual information, is reliable, and should remain a part of the record. In cases like the one currently before the Court which involve nonscientific expert testimony, courts are well within their discretion to find the testimony reliable based on the expert's "knowledge and experience." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998,

[10] *Daubert* applies to the admissibility of expert scientific testimony. *See* 509 U.S. at 590 n.8. Because this case does not involve scientific methodology, Defendants reliance on MCL 600.2955 is inapposite. MCL 690.2955 reflect the Michigan legislature's codification of the *Daubert*'s scientific factors, which are not persuasive here.

1018 (9th Cir. 2004); *see also United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) ("the witness had devoted years working with gangs, knew their 'colors,' signs, and activities. He heard the admissions of the specific gang members involved. . . . 702 works well for this type of data gathered from years of experience and special knowledge."); *United States v. Jones*, 107 F.3d 1147, 1160 (6th Cir. 1997) (finding that handwriting analysis expert's testimony was reliable because of his substantial experience examining and comparing handwriting samples); *Buechel v. United States*, No. 08-CV-132-JPG, 2012 WL 3154962, at *3 (S.D. Ill. Aug. 2, 2012) ("[H]e has the experience and training in correctional medicine and infectious diseases. As a result, the Court finds that the reasoning and methodology Dr. Greifinger used to develop his opinion is reliable."); *People v. Dado*, No. 266962, 2007 WL 778489, at *3 (Mich. App. 2007) ("Green's experience in investigating drug trafficking operations in Genesee County was sufficient to establish the reliability requirement. As an experienced police officer, he was capable of giving reliable testimony on how to recognize evidence of drug sales."). Here, Dr. Rottnek has years of experience, training, and special knowledge in correctional medicine on which to base his recommendations.

Defendants unpersuasively argue that Dr. Rottnek's report is unreliable because he, in part, relied on statements by interviewees, and the CDC's Guidance for Correctional and Detention Facilities during the COVID-19 pandemic. They also challenge his failure to review Jail policies.[11] These arguments are without merit.

[11] For instance, Defendants state that the Jail uses "Simple Green d Pro 3 Plus" cleaning solution. Defs. Mot. at 10. But there are no facts nor other evidence in the record stating that Defendants provide this solution at the Jail. In fact, the only evidence currently in the record – plaintiffs' declarations and Dr. Rottnek's report – establish that Defendants provide basic Simple Green solution. Both detainees and Jail staff report that Defendants provide basic Simple Green for cleaning. Report at 4, 7, 14. As of the time of this filing, Defendants have not provided evidence to the contrary. The only mention of Simple Green d Pro 3 Plus in this lawsuit is in Defendants'

First, it is uncontroverted that experts can offer expert testimony without ever having firsthand knowledge or personal observations of the subject at issue. *See Ogden v. Saint Mary's Med. Ctr.*, No. 06-11721-BC, 2007 WL 2746626, at *13 (E.D. Mich. Sept. 19, 2007) (citing *Daubert*, 509 U.S. at 589) ("the knowledge and experience of a particular discipline, provides the basis for relaxing the usual requirement of firsthand knowledge and permitting experts to opine with wider latitude."). Dr. Rottnek could have merely read the declarations that are on the record and reliably offered his opinion. But, pursuant to the Joint Inspection Order, this Court ordered Dr. Rottnek to inspect the Jail and submit a report. His opinion is based on his firsthand observations—a step beyond the reliability requirements of MRE 702—interviews with approximately *forty* detainees, and prevailing authority on best practices for mitigating the spread of COVID-19. Once again, Defendants will have ample opportunity to cross examine Dr. Rottnek, and they can subpoena each of the individuals Dr. Rottnek interviewed.[12] *See Ellis v. Grand Trunk W. Ry. Co.*, 109 Mich. App. 394, 399 (1981) (finding that admission of inspection report allows the individuals, who made statements, to be subject to cross examination).

Second, Dr. Rottnek's reliance on the CDC Guidance does not render his report unreliable. This Guidance reflects our federal government's leading disease control agency's recommendations on how to limit the spread of coronavirus in a carceral setting. This is exactly

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Motion to Strike. Defendants have even failed to attach the relevant policies as exhibits to the Motion. The Court cannot consider this unsubstantiated claim when determining the reliability of Dr. Rottnek's Report.

[12] Defendants' argument that Dr. Rottnek "relied exclusively on his observations and the allegations relayed to him by inmates" are inaccurate and misleading. Defs. Mot. at 9. Dr. Rottnek's report expressly states that he interviewed various members of the Plaintiff Class, staff in the Sheriff's office, and medical staff at the Jail. Report at 2, 3. Defendants cannot mischaracterize undisputed facts merely because they disagree with the Report's opinions and findings.

the type of information an expert witness should consider in the context of constitutional litigation related to prison conditions for COVID-19. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 549 (2011) ("courts are not required to disregard expert opinion solely because it adopts or accords with professional standards. Professional standards may be helpful and relevant with respect to some questions."). As to the Defendants' directives at the Jail, the purpose of the inspection was to see exactly what was happening in *practice* at the facilities. In any event, Defendants have had every opportunity to provide Dr. Rottnek with their directives, and any other information, before he drafted or finalized his report. Indeed, he invited their input. *See* Ex. 6. Defendants also had an opportunity to provide him with that information at a deposition. Defendants chose to do neither. For three weeks, Defendants have sat on their hands and now seek to rely on the gap in the record for which they are in fact responsible. Regardless, Dr. Rottnek can be cross-examined on this topic, which goes to the weight, not the admissibility, of his recommendations. *People v. Traxler*, No. 314951, 2014 WL 2934293, at *2 (Mich. Ct. App. June 26, 2014).

The Defendants next rely on a Ninth Circuit case for the proposition that experts must "adequately account for obvious alternative explanations." Defs. Mot. at 10 (citing *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994). That duty, however, does not exist in the Ninth Circuit nor in Michigan.[13] *See Atencio v. Arpaio*, No. CV-12-02376-PHX-PGR, 2015 WL

[13] Regardless, *Claar* is wholly distinguishable from the facts before the Court in this case. It involved the reliability of scientific expert testimony, but here, Dr. Rottnek's expertise is based on his experience and specialized knowledge in correctional medicine. *See Claar*, 29 F.3d at 502. In *Claar*, the experts failed to "rule out other possible causes for the injuries plaintiffs complain of, even though they admitted that this step would be standard procedure before arriving at a diagnosis." *Id.* Defendants have not provided any authority which suggests that it is generally accepted in the field of correctional medicine to compare a jail's policies to the firsthand accounts of detainees, staff, and the expert himself. Even assuming arguendo that the Jail's policies are in accordance with the CDC Guidance and the outer bounds of the Constitution, this would have no bearing on Dr. Rottnek's opinion on whether Defendants' unconstitutional actions were in accordance with their own policies. *See Morgan v. Bd. of Cty. Commissioners of Oklahoma Cty.*,

11117187, at *17 (D. Ariz. Jan. 15, 2015) ("There is not, however, any requirement that an expert qualified based on his background and experience rely on literature or conduct independent research to support his opinions."); *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 414 (1989) ("to require for each expert an evidentiary basis sufficient to negate all of the possible causes which might be asserted by opposing counsel would virtually eliminate expert testimony.").

Dr. Rottnek's experience in correctional medicine and specialized knowledge in this field make his methodology here sufficiently reliable for admission. The Report should not be stricken.

III. Dr. Rottnek's opinions and findings on the current conditions at the Jail are relevant to the constitutional violations Plaintiffs have alleged.

Expert testimony is admissible in Michigan if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue," MRE 702, and is otherwise legally relevant. *People v. Peterson*, 450 Mich. 349, 363 (1995). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." MRE 401. An expert's testimony is relevant if it helps resolve an issue in the case. *Mulholland*, 432 Mich. at 344 n.3.

The United States Supreme Court has made clear that expert testimony regarding prison conditions is relevant when plaintiffs allege constitutional violations related to prison conditions. In *Brown v. Plata*, 563 U.S. 493, 522 (2011), the Supreme Court affirmed a three-judge panel's reliance on expert testimony in a case alleging Eighth Amendment violations caused by prison overcrowding in California, where the panel had "relied extensively on the expert witness reports" that "based their conclusions on recent observations of prison conditions." 563 U.S. at 522. Courts

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No. CIV-08-1317-R, 2010 WL 11508854, at *9 (W.D. Okla. Mar. 11, 2010) ("A reasonable jury could also find from the evidence concerning conditions at the jail that the need for enforcement of existing policies . . . was so obvious and so likely to result in the violation of detainees' Fourteenth Amendment rights") (emphasis added).

across the country have widely affirmed this basic understanding. *See, e.g.*, *Walker v. Schult*, 365 F. Supp. 3d 266, 288 (N.D.N.Y. 2019) (admitting expert testimony in case alleging Eighth Amendment violations from a licensed medical doctor who had served as clinical director of mental health system for Massachusetts's prison system); *Braggs v. Dunn*, 317 F.R.D. 634, 651 (M.D. Ala. 2016) (admitting expert testimony of plaintiffs' correctional mental health expert in an action brought by disabled prisoners alleging Eighth and Fourteenth Amendment violations where expert served as chief psychiatrist of state department of rehabilitation and correction); *Hadix v. Johnson*, No. 4:92-CV-110, 2005 WL 2243091, at *6 (W.D. Mich. Sept. 14, 2005) (finding credible expert testimony of family medicine board-certified doctor who had previously worked as the chief medical officer of a correctional facility in prisoner suit alleging Eighth Amendment violations); *see also Cameron v. Bouchard*, -- F. Supp. 3d --, 2020 WL 2569868 at *2, *10, *11, *22 (E.D. Mich. May 21, 2020) (relying on inspection of jail by medical expert to grant plaintiffs' motion for preliminary injunction seeking immediate relief in suit alleging Eighth and Fourteenth Amendment violations during COVID-19 pandemic in Oakland County Jail).

Here, Plaintiffs have alleged violations of the Eighth and Fourteenth Amendments, rooted in Defendants' failure to maintain sufficiently safe conditions at the Jail during the COVID-19 pandemic. Dr. Rottnek, a licensed medical doctor with significant experience managing healthcare in correctional facilities—including an outbreak of a very contagious infectious disease—has based his conclusions on his personal observations of current conditions at the Jail: detainees' inability to socially distance and the inability to properly clean facilities to prevent infection. His report is therefore relevant to this Court's ultimate determination of whether emergency measures are needed to ameliorate those conditions and prevent any further spread of COVID-19.

Defendants argue that, because Dr. Rottnek has recommended that the Jail comply with the CDC's Guidance for Correctional and Detention Facilities during the COVID-19 pandemic, he is impermissibly offering the testimony of another set of experts and is thus operating as a "conduit for hearsay testimony." Defs. Mot. at 11. Once again, Defendants are incorrect.

In his 23-page report, Dr. Rottnek includes, where appropriate, a handful of citations or references to the COVID-19 guidelines promulgated by CDC—the federal government's leading national public health institute. Dr. Rottnek does not adopt the CDC Guidance as his own or otherwise offer it to prove the truth of the information therein.[14] *See* MRE 801(c). Regardless, a publication from the CDC, a federal agency housed under the Department of Health and Human Services, falls under the catch-all hearsay exception of MRE 803(24) because it is an "official (formal) statement by [a] government agenc[y]." *Kagen v. Kagen*, 2014 WL 7217819 at *5 (Mich. App. 2014). Finally, even if the inclusion of hyperlinks to the CDC Guidance *did* constitute hearsay—which it plainly does not—Dr. Rottnek, as an expert witness, is permitted to "testify to an opinion based on hearsay information." *Swanek v. Hutzel Hosp.*, 115 Mich. App. 254, 260 (1982) (citing *Dayhuff v. General Motors Corp.*, 103 Mich. App. 177, 184-85 (1981); *see also Tiffany v. The Christman Co.*, 93 Mich. App. 267, 279-80 (1979). In fact, hearsay statements may support an expert's opinion, without forming the basis of that opinion. *See People v. Bynum*, No. 307028, 2013 WL 1689660, at *17 (Mich. App. 2013), *aff'd*, 496 Mich. 610 (2014) (finding

[14] The cases cited by Defendants are plainly inapposite. *See Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991) (expert witness read aloud documents prepared by three other physicians "who were not disclosed as experts during discovery and whom plaintiff had no opportunity to examine"); *see Thorndike v. DaimlerChrysler Corp.*, 266 F. Supp. 2d 172, 185 (D. Me. 2003) (finding that opinions of expert witness were "unnecessarily duplicative" if other experts already admitted in the case). Defendants will have an opportunity to cross examine Dr. Rottnek, and there currently are no other experts admitted to testify in this litigation.

that an expert's opinion "would be supported by statements in police reports and people in the neighborhood, not that these statements formed the basis for his opinion.").

Dr. Rottnek's report contains opinions, findings, and recommendations that are relevant to the constitutional issues that Plaintiffs have raised in this lawsuit. The report should not be stricken.

IV. Dr. Rottnek's report does not exceed the scope of the Inspection Order.

In a last-ditch effort to strike Dr. Rottnek's report, Defendants argue that Dr. Rottnek's recommendation that Defendants "stop housing inmates in Division II" exceeds the bounds of the Inspection Order. This argument, too, must fail. The Inspection Order states that the Report should include information about the "**conditions** of the housing units during COVID-19." Ex. 2 at 3 (emphasis added). The Report recommends that Defendants "should stop housing inmates in Division II" because:

> The **physical conditions** are filthy and cannot be adequately cleaned due to pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold. Individuals in this **facility** are at an increased risk of, but not limited to, contracting the following: tetanus, contact and airborne infection, worsening of chronic conditions, and exacerbation of respiratory conditions.

Report at 12 (emphasis added). Put simply, after conducting a seven-hour inspection of the Jail, Dr. Rottnek opined about the **conditions** of the Division II housing units. Nothing more, nothing less. There is, thus, no basis for redacting the Report.[15]

[15] Plaintiffs are willing to file a motion to redact the names of detainees on the psychiatric floor and in the quarantine units.

V. Dr. Rottnek's report contains relevant facts independent of his qualification as an expert.

Regardless of whether Dr. Rottnek is qualified as an expert in this action, his report contains relevant facts from the inspection of the Jail as ordered by this Court that warrant admission. Plaintiffs have alleged that they do not have sufficient access to adequate sinks, showers, toilets, clean laundry, medical care, cleaning supplies, or PPE. They have alleged that Jail staff do not properly clean Jail facilities or wear PPE themselves. And they have alleged that their current conditions of confinement do not permit them to engaging in social distancing—the single-most important precaution anyone can take to prevent the spread of COVID-19. Separate from any expert opinions or recommendations, Dr. Rottnek memorialized in his report his first-hand observations, including but not limited to: to the design and cleanliness of the Jail; the number and quality of sinks, toilets, and showers; the provision of medical, laundry, and dining services; and whether he witnessed Jail staff and detainees wearing personal protective equipment (PPE) and practicing social distancing. As a result, Dr. Rottnek is as much a fact witness as an expert, and his observations are both material and have probative value and should be admitted. *See* MRE 401-02; *Crawford*, 458 Mich. at 388.

CONCLUSION

Dr. Rottnek's report contains relevant factual information and recommendations that bear directly on the issues in this case. He is immensely qualified to provide expert opinion on correctional healthcare. He used reliable methodology for his findings and recommendations. The Defendants had the opportunity to cross-examine him in deposition (but declined) and will again at the upcoming hearing. There is no compelling reason for the Court to strike Dr. Rottnek's report. Defendants' Motion should be denied.

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Respectfully submitted,

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**Pro hac vice admission pending*

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed with the Clerk of Court using this Court's electronic filing system.

/s/ Allison L. Kriger