

Roy S. Haber, OSB No. 800501
haberpc@cyber-dyne.com
ROY S. HABER P.C.
570 East 40th Avenue
Eugene, OR 97405
Telephone: 541.485.6418
FAX: 541.434.6360

Don H. Marmaduke, OSB No. 53072
don.marmaduke@tonkon.com
TONKON TORP LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
Direct Dial: 503.802.2003
Direct FAX: 503.972.3703

Gilbert Paul Carrasco, California Bar No. 90838
(*Appearing pro hac vice*)
carrasco@willamette.edu
No. 451
245 Winter Street SE
Salem, OR 97301
Telephone: 503.370.6432
FAX: 503.370.6375

Jack Silver, California Bar No. 160575
warrioreco@yahoo.com
(*Appearing pro hac vice*)
PO Box 5469
Santa Rosa, CA 95402-5469
Telephone: 707.528.8175
FAX: 707.528.8675

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
(Medford Division)

THE CHURCH OF THE HOLY LIGHT OF THE QUEEN, a/k/a The Santo Daime Church, an Oregon religious corporation, on its own behalf and on behalf of all of its members, **JONATHAN GOLDMAN**, individually and as Spiritual Leader of the "Santo Daime Church," **JACQUELYN PRESTIDGE, MARY ROW, M.D., MIRIAM RAMSEY, ALEXANDRA BLISS YEAGER** and **SCOTT FERGUSON**, members of the Santo Daime Church,

Plaintiffs,

v.

MICHAEL B. MUKASEY, Attorney General of the United States; **KARIN J. IMMERGUT**, United States Attorney, District of Oregon; **HENRY M. PAULSON**, Secretary of the U.S. Department of the Treasury,

Defendants.

Civil No. 08-cv-03095-PA

AMENDED MEMORANDUM IN SUPPORT OF PLAINTIFFS' AMENDED MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERTS AS CUMULATIVE

Defendants have offered into evidence several expert witness statements which are virtually identical in many respects on several topics—evidence that already failed to carry the Defendants' burden before Judge Parker in the *O Centro* litigation. Relitigating these issues in this action, Defendants should be allowed only one expert witness to testify on such subjects, on the grounds that the presentation of more than one expert will be cumulative, and in violation of the Federal Rules of Evidence.¹

"Federal Rule of Evidence 403 allows even relevant evidence to be excluded if its admission would result in needless presentation of cumulative evidence." *Sparkman v. C.I.R.*, 509 F.3d 1149, 1157 (9th Cir. 2007). A district court is "free to exclude any expert testimony, including testimony of an announced expert, if the testimony is cumulative or redundant under Fed. R. Evid. 403." *In re Air Crash Disaster*, 86 F.3d 498, 527 (6th Cir.

¹ The testimony is also being challenged in *Daubert* motions for reliability. See Plaintiffs' Motion *In Limine* to Exclude Defendants' Experts' Testimony.

1996).

The District Court also found that the evidence was cumulative of testimony already in the record. It ruled that the prior testimony . . . essentially would be duplicated by the proposed expert witness' testimony. The exclusion of relevant, but cumulative, evidence is within the sound exercise of the trial court's discretion. *United States v. Elksnis*, 528 F.2d 236, 239 (9th Cir. 1975). See also Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed . . . by considerations of . . . needless presentation of cumulative evidence.").

U.S. v. Marabelles, 724 F.2d 1374, 1382 (9th Cir. 1984). The decision to exclude the testimony "rests within the sound discretion of the district court." *Goodwin v. MTD Products, Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) (quoting *United States v. Gardner*, 211 F.3d 1049, 1055 (7th Cir. 2000)).

Evidence is cumulative if it does "not present additional facts relevant to the trial judge's decision" *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370, 1373 (9th Cir. 1977).

The Seventh Circuit provided the following useful definition of cumulative evidence:

Evidence is "cumulative" when it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates.

United States v. Kizeart, 102 F.3d 320, 325 (7th Cir. 1996) (quoting *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996)); see also *Ahmed v. State of Washington*, 203 F.3d 830, 830 (9th Cir. 1999).

Defendants have offered into evidence the witness statements of Dr. Thomas R. Kosten, Dr. Srihari R. Tella, Dr. Jerry Frankenheim, Dr. Donald R. Jasinski, and Dr. George S. Glass. These statements are virtually identical, as they all testify to the same four issues: (1) whether ayahuasca is pharmacologically similar to LSD-like hallucinogens; (2) whether ayahuasca is toxic; (3) whether ayahuasca is likely to cause psychological disorders; and (4) whether the members of the Plaintiff churches are at risk of harm.

1. **"Ayahuasca is pharmacologically similar to LSD-like**

hallucinogens." This argument is repeated numerous times in the statements of Jasinski, Frankenheim, and Tella. A cursory look at some of the witness statements demonstrates this. Jasinski testifies: "The effects of DMT are similar to those produced by LSD. Scientifically, DMT is properly classified as an LSD-like hallucinogen." Witness Statement of Donald R. Jasinski, M.D., at 2 ¶ IV-B ("Jasinski Statement"); *see also id.* at 2 ¶¶ A-B, 3 ¶ 7, 3 ¶ 8, 3-4 ¶ 9 ("For all the foregoing reasons, it is appropriate to characterize DMT as an LSD like hallucinogen and to draw comparative conclusions regarding DMT from known information regarding LSD and other LSD-like hallucinogens"), 4-5 ¶ 11, 6 ¶ 12 ("DMT is among the LSD-like hallucinogens that have a history of abuse in the United States"). Frankenheim testifies that "DMT has been studied far less than LSD. However, the molecular structure, mechanisms, and effects of DMT have been shown to greatly overlap those of LSD." Witness Statement of Jerry Frankenheim, Ph.D., at 5 ¶ 7(c) ("Frankenheim Statement"); *see also id.* at 4-5 ¶ 7(a), 5 ¶ 7(b), 6 ¶ 7(i) ("Subjects given ayahuasca reported the same psychological and somatic effects, qualitatively and quantitatively, as those of LSD"), 8 ¶ 7(j). Tella states that "the pharmacology of DMT is substantially similar to numerous other tryptamines and classical hallucinogens (e.g. LSD and DOM). . . ." Witness Statement of Srihari R. Tella, Ph.D, at 6 ¶ 27 ("Tella Statement"); *see also id.* at 6 ¶¶ 26, 28; 7 ¶ 31 ("DMT produces discriminative stimulus effects that are substantially similar to those produced by classical hallucinogens such as DOM and LSD. Thus, it is likely to a reasonable degree of scientific probability that DMT shares similar subjective effects in humans with LSD"); 7 ¶ 32 ("Numerous other tryptamines that are related to DMT also produce discriminative stimulus effects similar to those of DOM and LSD"); *id.* at 7-8 ¶¶ 33-38. As is clear from the above, these doctors overlap and repeat each other's testimony. In fact, Tella actually cites to Frankenheim's witness statement twice in her own witness statement. *See id.* at 4, 5 ¶¶ 16, 20. Clearly this is cumulative and the contribution of such evidence to the determination of

truth is slight.

2. **"Ayahuasca is toxic."** In his witness statement, Glass states: "The ayahuasca mixture used in the Church's ceremonies poses risks to an individual's health and safety," and "the amount and potency of ayahuasca given to participants varies and may result in serious injury to a participant." *See* Glass Statement at 4 ¶¶ 11, 13; *see also* Kosten Statement at 6 ¶ 13. Likewise, Tella testifies that ayahuasca has the potential for toxic effects, can interact with other drugs, and is harmful to church members. Tella Statement at 3, 8-12 ¶¶ 10(b), 39-54. Kosten testifies that ayahuasca is toxic, reacts with medication, and can have an adverse effect on someone with a mental illness. Kosten Statement at 6 ¶ 13. Jasinski also testifies that ayahuasca is toxic. Jasinski Statement at 12 ¶ 26.² Frankenheim testifies that the "sacramental use of ayahuasca results in pharmacological effects from the ayahuasca, and can result in toxicological effects." Frankenheim Statement at 20 ¶ 13(a).

The relationship of DMT with harmine is testified to by multiple witnesses. *See* Jasinski Statement at 2 ¶ D ("The health risks of ayahuasca are greater than DMT alone due the additional effects of the monoamine oxidase inhibitor in ayahuasca, harmine."); *id.* at 9-10 ¶ 19; *id.* at 12 ¶ 26; Glass Statement at 7 ¶ 24; Kosten Statement at 2-4 ¶ 7(b); Frankenheim Statement at 8-9 ¶ 8; *id.* at 12-13 ¶ 11.

Physical effects of MAOIs such as elevation of blood pressure³ and "serotonin syndrome," and "minor side effects" are testified to by Jasinski at 10-11 ¶¶ 20-21, Glass Statement at 5 ¶ 18; Tella Statement at 12 ¶ 54 (same); Kosten Statement at 2-4 ¶ 7

² As Frankenheim's statement demonstrates, the government's proffered analysis is inapplicable to the case at bar and thus any (much less cumulative) such testimony lacks relevance: "A toxic dose of a drug is usually compared with a beneficially efficacious dose to determine the risk/benefit ratio However, possible benefits of ayahuasca have not been recognized by the U.S. Food and Drug Administration" Frankenheim Statement at 8-9 ¶ 8(d). *See id.* at 20 ¶ 13(a) ("No benefits of the use of this drug are scientifically established,")

³ Apparently "low blood pressure" is also a potential side effect. Glass Statement at 5-6 ¶ 19.

(same); Kosten Statement at 8-11 ¶¶ 15-19 (discussing "serotonin syndrome" and elevated blood pressure); *id.* at 16-17 ¶ 25(b) (discussing "serotonin syndrome"); Frankenheim Statement at 14-19 ¶ 12 (discussing "hypertensive crisis" and "accumulation of serotonin").

Testimony regarding the purging effect of the Daima Tea is testified to by Jansinski at 11-12 ¶ 24 and Kosten at 17 ¶ 26(a); *id.* at 21-22 ¶ 27(a). And various witnesses speak of "unknown" risks due to lack of studies.⁴ Jasinski Statement at 2 ¶ E; *id.* at 13-14 ¶ 29; Kosten Statement at 2-4 ¶ 7, Frankenheim Statement at 8-9 ¶ 8(a)-(d) (discussing "lack of studies"); *id.* at 14-19 ¶ 12.

3. **"Ayahuasca can cause psychological disorders."** Likewise, the government's proffered experts are extremely cumulative on the issues of supposed "psychological" harms that potentially may affect church members. Jasinski testifies that ayahuasca causes "changes in mood, thinking, behavior and perception." *See* Jasinski Statement at 12 ¶ 26; *see id.* at 7-9 ¶¶ 16-17 (same). *See also* Kosten Statement at 6 ¶ 13 ("Vulnerable populations at high risk for adverse events from ayahuasca consumption include anyone who has a severe mental illness or is medically unstable."); Frankenheim Statement at 14-19 ¶ 12; Glass Statement at 6-7 ¶ 21 ("Dimethyltryptamine (DMT) is a psychedelic drug. It has been noted to cause hallucinations, a feeling of euphoria, visual distortions, and an awareness of being in contact with aliens."); Frankenheim at 10-11 ¶ 10(a)(i) ("Visual delusions, distortions, and pseudohallucinations usually occur.")

Experts also redundantly testify about pharmacological effects including "distorted perception, hallucinations, delusions, anxiety, panic and psychosis." Jasinski Statement at 2 ¶ D; *See also id.* at 5-7 ¶¶ 13, 14. They variously testify about individuals become "psychotic." Glass Statement at 7 ¶ 22. *See id.* at 7 ¶ 24 (discussing "depersonalization, bizarre, destructive behavior, and acute psychosis"); Tella Statement at 6

⁴ Although Kosten admits that such studies are "not likely" to be undertaken. Kosten Statement at 2-4 ¶ 7(b).

¶ 26 (discussing "psychedelic effects"); Kosten Statement at 9-10 ¶ 14 (risk to individuals with certain mental illnesses); *id.* at 13 ¶ 20 (discussing effects such as "panic, severe depression, sustained visual, auditory and other hallucinations, delusions, depersonalization, cognitive impairment and other less common forms of pathology such as catalepsy"); *id.* at 13 ¶ 21 ("[O]ther subjects will develop severe and persistent mental illnesses that are often minimally responsive to standard anti-psychotic medications used to treat schizophrenia and related psychoses."); Frankenheim Statement at 10-11 ¶ 10(a)(i) ("Anxiety often occurs while using hallucinogens, and some users experience terrifying thoughts, nightmarish feelings, despair, and fears of insanity, death, and losing control.").

4. **"Ayahuasca is harmful to church members."** Glass claims that church members are at risk of harm from ayahuasca use. *See* Glass Statement at 4 ¶ 12 ("The screening process utilized by the Church is not sufficient to prevent harmful and potentially life-threatening interactions. People who may be at risk to suffer such an interaction are not effectively screened out"); *id.* at 4 ¶ 13 ("The amount and potency of ayahuasca given to participants varies and may result in serious injury to a participant"); *id.* at 4 ¶¶ 14-15, 6 ¶ 20, 9-13 ¶¶ 27-29, 31-36 ("It is highly problematic that the dosing of ayahuasca—a tea with significant adverse physiological and psychological effects—is done by non-medical professionals who employ a subjective, unscientific method for determining what would be an optimal dose for up to 130 different individual participants, which has the potential for causing significant harm to the participants"); *id.* at 14 ¶ 38; 16 ¶ 40 ("In my medical opinion, the use of the Daime, an ayahuasca tea preparation combining an MAO inhibitor, and the hallucinogenic drug DMT, in a religious ceremony is a dangerous procedure"). Tella echoes Glass' opinion that the Daime is harmful to church members. *See* Tella Statement at 3 ¶ 10, 9-10 ¶¶ 41-44 ("Thus, the consumption of Daime tea, due to its variable and undefined composition, has a potential to cause unpredictable and potentially adverse health effects in individuals"); *id.* at 10 ¶¶ 45-47 ("Thus, it appears likely that an individual

participating in a Santo Daime Church work will be exposed to doses of DMT which are large enough to put his or her health at risk"); and 11 ¶ 48. Kosten continues the argument that church members are at risk of harm from the Daime. *See* Kosten Statement at 11 ¶ 21 ("[S]creening procedures and personnel are not adequate to identify individuals at high risk for adverse behavioral outcomes from ayahuasca use"); *id.* at 12 ¶ 23 (No quality control or standards at Works to ensure minimum safety); 12-13 ¶ 24; 17 ¶ 26 (Vomiting does not terminate further consumption of ayahuasca). Frankenheim echoes this last statement about the inability of vomiting to prevent further ingestion of ayahuasca. *See* Frankenheim Statement at 22 ¶ 17(a)-(d). In sum, all of the witness statements have the same theme: ayahuasca is harmful to the plaintiffs.

The presentation of virtually identical testimony is certainly cumulative, and would waste the time of this Court. The Defendants can present their defenses and proof through one expert witness, as the doctors' witness statements all address the same four issues. Even if there are minor variations in the substance of each of the witness statements, the purpose of each of them is to address this issue. "Evidence is cumulative if repetitive, *and* if the small increment of probability it adds may not warrant the time spent in introducing it." *Elwood v. Pina*, 815 F.2d 173, 178 (1st Cir. 1987) (quoting 1 WEINSTEIN'S EVIDENCE ¶ 401[07] at 401-47-48 (1985)). The amount of time wasted in plowing through five lengthy and time-consuming witness statements overrides any probative value from the negligible amount of additional information each of the statements may provide.

Other federal courts have excluded the testimony of expert witnesses as cumulative. The Sixth Circuit in *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577 (6th Cir. 2000), upheld the district court's exclusion of a plaintiff's expert witness on the basis that this evidence would be cumulative, redundant and a waste of time. *Id.* at 588. In *In re Air Crash Disaster*, 86 F.3d 498, the district court excluded expert witness testimony offered by defendants on the grounds that it would be cumulative and redundant. The court relied upon

its authority to control the number of expert witnesses at trial. The Sixth Circuit upheld the district court's decision, also noting that it would be unfair to give the defendants a "double helping" of experts. *Id.* at 527. The quintuple "helping" of experts offered by the government should fare no better.

CONCLUSION

Thus, the exclusion of expert witnesses is within the discretion of this Court. It would be sound act of discretion for this court to only allow into evidence one witness statement. This would prevent the presentation of cumulative and redundant testimony and the waste of precious judicial time.

WHEREFORE, Plaintiffs request that the instant motion be granted in its entirety.

Dated this 8th day of January, 2009.

ROY S. HABER, P.C.

By /s/ Roy S. Haber

Roy S. Haber
OSB No. 800501
Direct Dial: 541.485.6418
Direct Fax: 541.434.6360
Email: haberpc@cyber-dyne.com

TONKON TORP LLP

By *Don H. Marmaduke*

Don H. Marmaduke
OSB No. 530727
Direct Dial: 503.802.2003
Direct Fax: 503.972.2003
Email: don.marmaduke@tonkon.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing AMENDED MEMORANDUM IN SUPPORT OF PLAINTIFFS' AMENDED MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERTS AS CUMULATIVE on:

Eric Joseph Beane / Brigham J. Bowen / Julie Straus / Lily Farel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883, Room 7124
Washington, DC 20044
Attorneys for Defendants

by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each attorney's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below;

by causing a copy thereof to be hand-delivered to said attorneys at each attorney's last-known office address on the date set forth below;

by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to each attorney's last-known address on the date set forth below;

by faxing a copy thereof to each attorney's last-known facsimile number on the date set forth below; or

by filing electronically via the court's CM/ECF system.

DATED this 8th day of January, 2009.

TONKON TORP LLP

By Don H. Marmaduke
Don H. Marmaduke
OSB No. 530727
Direct Dial: 503.802.2003
Direct Fax: 503.972.2003
Email: don.marmaduke@tonkon.com
Attorneys for Plaintiffs