GREGORY G. KATSAS
Assistant Attorney General

KARIN J. IMMERGUT
United States Attorney
Mark O. Hatfield U.S. Courthouse
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

ERIC J. BEANE
eric.beane@usdoj.gov
BRIGHAM J. BOWEN
brigham.bowen@usdoj.gov
JULIE STRAUS
julie.straus@usdoj.gov
LILY S. FAREL
lily.farel@usdoj.gov
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 616-2035
Fax: (202) 616-8470

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

THE CHURCH OF THE HOLY LIGHT OF THE QUEEN, a/k/a The Santo Daime Church, *et al.*, Plaintiffs, v. MICHAEL B. MUKASEY, *et al.*, Defendants.	CIV. NO. 08-3095-PA **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE TESTIMONY OF HALPERN, GURULÉ, MACRAE, GERDING, WINKELMAN, AND COZZI**

INTRODUCTION

In response to Defendants' Motion in Limine to Exclude Testimony, Plaintiffs present an opposition brief that is procedurally defective and riddled with inaccuracies. There is very little contained in the filing that is, in fact, responsive to Defendants' motion. Plaintiffs fail to respond to Defendants' *Daubert* arguments about their witnesses, instead resorting to attacks on Defendants' experts. Plaintiffs also attempt to raise issues far outside the scope of the motion, inappropriately including arguments that should be contained in a separate motion and that have no place in an opposition brief. The brief, although captioned as an "opposition," is also a thinly-veiled rebuttal to Defendants' expert statements. The few points that actually are responsive to Defendants' Motion do nothing to cure the fundamental defects in Plaintiffs' witness statements.[1]

Plaintiffs' opposition brief fails to comply with the rules of this Court and should be striken on this basis. The brief is untimely, and its length exceeds the limit set by this Court. *See* LR 7.1(e)(1) (requiring all responses to be filed within 11 days) and LR 7.2(b) (stating that without prior Court approval, memoranda must be 35 pages or less). Moreover, the response has been filed less than two weeks before trial. The proximity to the trial date forces Defendants to reallocate resources away from preparing for trial and instead focus on issues that should have been raised earlier.

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[1] Plaintiffs' opposition brief fails to comply with the rules of this Court and should be striken on this basis. The brief is untimely, and its length exceeds the limit set by this Court. *See* LR 7.1(e)(1) (requiring all responses to be filed within 11 days) and LR 7.2(b) (stating that without prior Court approval, memoranda must be 35 pages or less). Moreover, the response has been filed less than two weeks before trial. The proximity to the trial date forces Defendants to reallocate resources away from preparing for trial and instead focus on issues that should have been raised earlier.

Defendants' Motion in Limine should be granted because Plaintiffs have failed to establish the admissibility of the testimony that is covered by that Motion. In addition, the Court should disregard Plaintiffs' unresponsive arguments.

DISCUSSION

I. PLAINTIFFS HAVE FAILED TO ESTABLISH THE ADMISSIBILITY OF CERTAIN WITNESS STATEMENTS OR PORTIONS THEREOF.

A. Plaintiffs' Arguments Cannot Compensate for the Fundamental Flaws in Dr. Halpern's Testimony.

Plaintiffs contend that Dr. Halpern's testimony should be admitted into evidence, but rather than attempting to justify Dr. Halpern's methodology (as would be expected in an opposition to a *Daubert* motion), Plaintiffs instead choose to attack Dr. Walker's academic critique of the Halpern study.

Plaintiffs argue that Dr. "Walker's Statement focuses primarily on attacking Dr. Grob and Dr. Halpern but offers no evidence in support of the defendants' burden of proof." Pls' Opp. at 15-16. Plaintiffs appear to misunderstand the purpose of Dr. Walker's testimony. Dr. Walker is not being presented as an expert in ayahuasca use. He is not discussing the toxicity of ayahuasca. He is not submitting a study or offering substantive evidence to establish that ayahuasca is not safe. Rather, he is explaining the numerous ways in which Halpern's study fails to meet acceptable scientific standards.

Plaintiffs also try, albeit unsuccessfully, to attack the foundation of Dr. Walker's knowledge, stating that "Dr. Walker does not have the professional qualifications or the expertise to assess the scientific methodology or conclusions reached by the Halpern or Grob studies." Pls.' Opp. at 13. Even the most cursory glance at Dr. Walker's experience and

education proves this statement false. *See* Walker CV, Doc. #70. As an epidemiologist and a medical doctor with over thirty years of experience, Dr. Walker has "published as principal author or coauthor, over 275 research papers, editorials, commentaries, book chapters and reviews." Report of Dr. Walker at 1. In addition to his extensive list of publications, Dr. Walker also teaches courses in epidemiologic methods and in the science of pharmacoepidemiology (the epidemiologic study of drug effects) to graduate students at Harvard University School of Public Health. With this educational and professional background, Dr. Walker is exceptionally qualified to offer a methodological analysis. Plaintiffs then claim that Dr. Walker has never published any studies regarding controlled substances such as DMT, LSD, mescaline, and peyote, but Dr. Walker never mentions these substances in his statement. Rather, Dr. Walker's statement is narrowly tailored based on his professional experience as a medical doctor and an epidemiologist. Even more dubiously, Plaintiffs state that, according to Dr. Walker's curriculum vitae, his "only written work regarding these issues are opinions that were generated solely for the purpose of this litigation." Pls.' Opp. at 12. While his opinion is obviously based on the particular facts of this

case, his conclusions rest on decades of experience evaluating studies

Finally, despite numerous references to Dr. Grob's study in their own witness statements, Plaintiffs accuse Dr. Walker of repeating his criticisms of the Grob study from prior testimony. Pls.' Opp. at 15. This accusation is baseless. Dr. Walker addresses the methodology of the Grob study simply because Dr. Halpern relies so heavily on its conclusions. *See* Pls.' Ex. 7 at SR20. As an underlying source for Dr. Halpern's research, it is perfectly reasonable to inquire into the soundness of Dr. Grob's studies. Since Dr. Grob has not published a study correcting the

numerous methodological errors in the original study, Dr. Walker has no alternative study to examine. Such an inquiry revealed, as Dr. Walker recounted in his statement, so many methodological flaws as to render the study as unreliable as Dr. Halpern's own work. Because of his exclusive reliance on studies that do not comport with even the most basic principles of scientific methodology, Dr. Halpern's witness statement is inadmissible.

B. Plaintiffs Cannot Justify the Admission Into Evidence of Mr. Gurulé's Improper Legal Opinions.

Instead of offering a legal basis for the admissibility of Mr. Gurulé's witness statement, Plaintiffs resort to pointing fingers at Defendants' experts, perhaps attempting to draw attention away from the deficiencies of their own witness.

Plaintiffs' sole objection to Defendants' motion to exclude Mr. Gurulé's testimony is that Ms. Curry bases her own statements on legal experience. *See* Pls.' Opp. at 29. Plaintiffs seem to suggest that because both Mr. Gurulé and Ms. Curry are attorneys, their statements should warrant the same examination and standard for admission. Ms. Curry is a party to this lawsuit and thus permitted (in fact, expected) to discuss facts that support the Drug Enforcement Administration's legal argument. Moreover, Ms. Curry is an official in the office responsible for considering exemptions to the Controlled Substances Act ("CSA") and is often called upon to opine on matters involving allegedly religious drug use. Her witness statement is fact-based and unquestionably permissible. In contrast, Mr. Gurulé bases his opinions on reading Plaintiffs' statements and on his experience as an attorney. He does not evaluate facts or describe how any of his professional experience has led to the conclusions he reaches, an omission that renders his testimony inadmissible. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (holding that "[e]xpert testimony is not proper for issues of law. Experts interpret and analyze

factual evidence. They do not testify about the law . . . .") (citations and quotations omitted). Mr. Gurulé's statement is made up entirely of impermissible legal opinion and should be excluded. *See* Def. Mot. in Limine at 13-15.

C. Plaintiffs' Theory About the Relevance of Dr. MacRae's Testimony is Incorrect.

Defendants noted two main defects with Dr. MacRae's testimony: that his remarks on Brazilian drug policy are irrelevant to this case and that he has no foundation for his opinions about drug categorization, diversion control, or pharmacology. *See* Def. Mot. in Limine at 15-19. Plaintiffs respond by asserting that "drug use and abuse obviously transcends national borders." Pls.' Opp. at 31. That statement is of no consequence. The manner in which the Brazilian government addresses its country's drug problem is simply not informative for this case and does nothing to vitiate the inadmissibility of Dr. MacRae's statement. In addition, Dr. MacRae admits that he knows nothing about the practices of the Plaintiffs, further underscoring the irrelevance of his testimony in this case. *See* Rebuttal Statement of Dr. MacRae at 4 ("I admit that I did not address in any detail the Santo Daime activities in the United States"), Doc. #107.

Plaintiffs' efforts to overcome Dr. MacRae's lack of foundation for his statements about drug categorization, diversion, or pharmacology are unavailing. Plaintiffs' suggest that Dr. MacRae, if he is an expert in one area, can read expert reports in other areas, restate them, and stamp them with his seal of expertise. *See* Pls.' Opp. at 31 (insisting that as "an expert, he has the absolute right to and does draw on the experience of other plaintiffs' experts . . . .). This statement is erroneous under the Federal Rules of Evidence and related case law. Under *Daubert* and its progeny, courts are obligated to serve a "gate-keeping" function and make individualized assessments about the soundness of any expert's testimony. *See* Fed. R. Evid. 702; *United States*

v. Hermanek, 289 F.3d 1076, 1093 (9th Cir. 2002) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (internal quotations omitted)). As part of this assessment, courts look at "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 U.S. at 592. Plaintiffs seem to suggest that if an expert in area A reads statements concerning areas B and C, he could testify as an expert in areas A, B, and C. Any proposed testimony must naturally arise from the expert's professional experience; otherwise, there would be no reason for the individualized examination mandated in *Daubert* because anyone could testify on any subject. Here, Dr. MacRae presents no foundation for his opinions on drug categorization, diversion, or pharmacology. His experience is solely as a policy-maker in the Brazilian government. Any testimony outside this limited area should be excluded for lack of foundation, consistent with Federal Rule of Evidence 702. Any testimony on Brazilian drug policy should also be excluded because it has no relevance to this case.

D. Plaintiffs Have Not Supplied a Foundation for the Testimony of Mr. Gerding.

Following their pattern with previous experts, Plaintiffs defend Mr. Gerding by calling attention to Defendants' witnesses instead of addressing the deficiencies of their own witnesses. Plaintiffs attack Ms. Curry because she, like Mr. Gerding, lacks a degree in pharmacology. *See* Pls.' Opp. at 34. Yet Plaintiffs fail to acknowledge that Ms. Curry is not testifying as a pharmacologist. Instead, she testifies from her position as a government official who evaluates petitions for exemptions from the CSA. An analogy between Mr. Gerding's testimony or experience and that of Ms. Curry is inapplicable. Mr. Gerding seeks to testify as to matters of pharmacology but without the requisite experience in either his professional or educational

background. Each witness is testifying to a different matter and should be assessed individually, pursuant to the requirements set forth in *Daubert*. *See* 509 U.S. at 592.

Plaintiffs try to explain away the deficiencies in Mr. Gerding's experience by stating that as "an expert, Gerding is able to utilize the opinions and conclusions of experts in other fields to assist him in forming his opinions." Pls.' Opp. at 34. This argument echoes Plaintiffs' explanation that Dr. MacRae is somehow qualified to testify in fields he has read about, a complete deviation from the standards set by *Daubert* and Rule 702. Pharmacologists and toxicologists have advanced degrees in their areas of expertise. While Mr. Gerding's pharmacy experience might relate to pharmacology and toxicology on a superficial level, he is simply not a pharmacologist and should not be permitted to testify as one.

Finally, Plaintiffs persist in their argument that peyote and the Native American Church's ("NAC") use of peyote is applicable to this case. It is not. Mr. Gerding's experience with the Oregon Pharmacy Board's approval of peyote use does not inform this case, and any discussion of the NAC's peyote use by any other witness is wholly irrelevant. This Court indicated as much in the pre-trial conference held on December 22, 2008, where the Court sustained Defendants' relevance objections to Plaintiffs' interrogatories about peyote. *See* Doc. #87. To briefly restate Defendants' arguments, the NAC has a statutory and regulatory exemption from the CSA for the ceremonial use of peyote. *See* 42 U.S.C. § 1996a; 21 C.F.R. § 1307.31. The NAC's exemption was enacted by Congress to reflect the federal government's historically unique relationship with Native Americans. This relationship is firmly rooted in constitutional jurisprudence and is based on a political distinction, not a religious one. The NAC and its peyote exemption are simply *sui generis* and have no bearing on this case.

E. Plaintiffs Offer No Legal Justification for Permitting Dr. Winkelman to Testify Outside His Defined Area of Expertise.

Dr. Winkelman is not qualified to testify as to pharmacology, toxicology, or diversion control because he has established no foundation for his opinions in any of these areas. In an effort to qualify Dr. Winkelman to opine on these subjects, Plaintiffs assert that "Winkelman's formal training and his experience render him fully capable to review the other expert reports to form part of the factual predicate for his conclusions." Pls.' Opp. at 36. What Plaintiffs fail to note is that an expert can review and opine on other reports only if they have relevant experience to do so. But the mere act of reading other expert reports does not make one an expert in those areas. If Dr. Winkelman proposes "to testify as to matters growing naturally and directly out of research he has conducted," he must, as any other expert would be required to do, lay the proper foundation as required by Rule 702. *Id*. With no background in toxicology or diversion control, Dr. Winkelman's testimony as to those subjects should be excluded.

F. Dr. Cozzi's Proffered Opinions on Drug Policy Are Inadmissible.

Under Rule 702, an expert must provide evidence of "specialized knowledge" in order to give testimony. In defense of Dr. Cozzi, Plaintiffs contend that since there is no degree in "drug policy," anyone is qualified to discuss the subject. Pls.' Opp. at 37. However, Rule 702's requirement applies to all expert testimony, whether the expert seeks to testify as to policy or anything else. Plaintiffs even acknowledge this requirement, noting that experts must "possess sufficient knowledge from formal training, education, or experience to assist the trier of fact." *Id*. Despite reciting this rule, Plaintiffs make no attempt to satisfy its standard. Dr. Cozzi has no relevant training, education, or experience in drug policy; accordingly, his testimony in that area must be excluded.

II. PLAINTIFFS' NON-RESPONSIVE ARGUMENTS SHOULD BE DISREGARDED.

In addition to failing to adequately address the defects in Plaintiffs' witness statements that were enumerated by Defendants, Plaintiffs attempt to insert non-responsive arguments that go well beyond the scope of Defendants' motion. Because many of these arguments misstate and mischaracterize either the law or Defendants' position, a brief response is necessary.

A. Plaintiffs Mischaracterize Defendants' Burden of Proof.

In their zeal to rebut Defendants' witnesses, Plaintiffs misstate the burden of proof in this case. *See* Pls.' Opp. at 1-2 (arguing that the government must "establish by a preponderance of the evidence that sacramental ingestion of the Daime tea is, to a medical probability, likely to cause significant ill health effects to a significant number of people who might imbibe the tea at Santo Daime religious services, and that the tea poses a significant danger to the public health."). When bringing a claim under RFRA, a plaintiff bears the burden of demonstrating that the government's action substantially burdens his sincere religious exercise in violation of RFRA. *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (citing *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996), *superseded on other grounds by statute*). Under RFRA, the plaintiff's obligation to "demonstrate[]" a substantial burden "means meet[ing] the burden of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). Absent such a demonstration, a plaintiff cannot make a prima facie case under RFRA. If a plaintiff "cannot prove" the elements of a prima facie case, "his RFRA claim fails." *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). Only if a plaintiff succeeds in establishing a substantial burden on his religious exercise does the burden then shift to the government "to prove that the challenged government action is in furtherance of a

'compelling governmental interest' and is implemented by 'the least restrictive means.'" *Id.*

Even if Plaintiffs were to persuade the Court that their prima facie case has been established, the Court would then evaluate whether any of the six government interests outlined by Defendants are sufficiently compelling to satisfy RFRA. *See id.* Defendants have asserted the following six compelling interests: (1) a compelling health and safety interest in banning the use of ayahuasca; (2) a compelling interest in banning the use of ayahuasca by high-risk groups; (3) a compelling interest in verifying the quantity of ayahuasca imported or manufactured and the concentration of DMT and all other active substances contained in the ayahuasca; (4) a compelling interest in preventing the diversion of ayahuasca to non-religious use or to participants who are not sincere adherents to the Santo Daime Church; (5) a compelling interest in requiring requests for exemptions from the CSA and/or for petitions for rescheduling to be addressed first through an administrative process; (6) a compelling interest in full compliance with the CSA's closed regulatory scheme, which includes compliance with the exemption process. *See* Def. Trial Br. at 11-15, Doc. #28. The Court should evaluate each of these compelling interests rather than relying on Plaintiffs' interpretation of Defendants' arguments.

Even if Plaintiffs were permitted to determine the specific factual issues that Defendants must prove, Plaintiffs are wrong to assert that the government must prove "perceived harm is, to a medical probability, likely to ripen into actual, significant harm.." *See* Pls.' Opp. at 11. The Supreme Court has stated that where there is medical uncertainty, legislative protections are afforded significant breadth. "The question becomes whether the Act can stand when this medical uncertainty persists . . The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v.*

Carhart, 550 U.S. 124 n.20 (2007).

B. Plaintiffs Impermissibly Cite Testimony from an Untimely, Unqualified Witness.

Plaintiffs present Dr. Michael T. Ghiselin as a rebuttal witness, explaining that he has reviewed "the [defense] experts' statements in light of whether their proposed testimony satisfies the standards of the scientific method under *Daubert*, *Kumho Tire*, and *Joiner*." Pls.' Opp. at 8-9. An opposition brief is an inappropriate vehicle for admission of an eleventh-hour rebuttal witness statement, the admissibility of which will be challenged in a forthcoming motion. Should the Court grant that motion, the extensive citations to Dr. Ghiselin's witness statement in Plaintiffs' opposition brief should similarly be excluded from evidence.

C. Plaintiffs' Renewed Claims of Collateral Estoppel Should Be Disregarded.

Plaintiffs reprise their claim that the collateral estoppel doctrine should be applied. *See* Pls.' Opp. at 1; *see also* Mot. for Partial Summ. J. at Doc. # 19. Plaintiffs acknowledge that this argument has already been made and rejected by this Court. Pls.' Opp, at 1, n. 1 (admitting that "Plaintiffs initially raised the issue of collateral estoppel before the defendants had submitted their witness statements, and the motion was denied."). Plaintiffs have not provided any reason for the Court to revisit that opinion.

As they have done previously, Plaintiffs contend that Defendants are estopped from raising various arguments regarding (1) the CSA; (2) the government's compelling interests in regulating and/or banning use of DMT; and (3) application of the CSA to Plaintiffs' purported use of ayahuasca. Rooted in numerous misconstructions and misinterpretations of the *O Centro* litigation, these contentions lack merit. As previously explained, the so-called nonmutual offensive collateral estoppel may not be asserted against the federal government. *Nat'l Med.*

Enters., Inc. v. Sullivan, 916 F.2d 542, 545 (9th Cir. 1990) (noting "the well-established rule that nonmutual offensive collateral estoppel cannot be asserted against the government") (citing *United States v. Mendoza*, 464 U.S. 154, 159-60 (1984)); *see also Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-90 (9th Cir. 2004) (citing *Sullivan*, 916 F.2d at 545).

Even if the collateral estoppel doctrine *could* be asserted against the government, it is far from satisfied here. The doctrine requires that the following three elements be met: (1) the issue necessarily decided in the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006). Neither the first nor the second criteria is satisfied in this case. Instead of advancing the discussion of the legal issues before the Court, Plaintiffs instead choose to ignore unfavorable jurisprudence and repeat discredited arguments.

D. Defendants Have Not Acted in "Bad Faith."

The most egregious of Plaintiffs' non-responsive and unsupported accusations is contained on pages 25-26 of their opposition. Plaintiffs assert that, in presenting its opposition to analogies between peyote and ayahuasca, Defendants have acted in "bad faith." Pls.' Opp. at 26. Despite their numerous discussions of the *O Centro* litigation (both in this brief and in other filings), Plaintiffs never fairly characterize the holding of the Supreme Court's decision in that case. *See Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 436 (2008). Plaintiffs' accusation that Defendants' accurate description of existing law (that the government must undergo a "case-by-case consideration of religious exemptions") has been

offered in "bad faith" should be summarily rejected. *See id*. at 436. Defendants have no doubt that this Court is well aware of that litigation and the related decisions, and therefore will not insert any further discussion of that case here.

E. Plaintiffs Falsely Claim That "Defendants' Experts Have Agreed that Santo Daime Is a Legitimate Religion."

Plaintiffs state that "Defendants' experts have agreed that the Santo Daime is a legitimate religion." Pls.' Opp. at 2. This statement is categorically untrue. Neither Defendants nor their witnesses intend to convey, either explicitly or implicitly, that they have investigated or concluded anything about the bona fides of the Plaintiff church as a religion. The legitimacy of Plaintiffs' religion and sincerity of their faith is part of Plaintiffs' prima facie case under RFRA that must be proven at trial. *See Worldwide Church of God*, 227 F.3d 1110, 1121 (9th Cir. 2000) (citing *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996), *superseded on other grounds by statute*). Although Defendants have acknowledged that the Church of the Holy Light of the Queen "is a religious corporation formed under the laws of the State of Oregon," Defs.' Answer at 3, Doc. #88, Defendants have never stipulated to the sincerity of all members, visitors, and donors to the Santo Daime Church or to the fact that the Plaintiff branches of the Santo Daime Church are "religions" as defined by RFRA and related case law.

CONCLUSION

For the foregoing reasons, the Court should exclude the portions of testimony by Dr. Halpern, Mr. Gurulé, Dr. Winkelman, Dr. MacRae, Dr. Cozzi, and Mr. Gerding that fail to comply with the methodological and foundational requirements of Rule 702 and/or the relevance requirement of Rule 401 and 402.

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Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

KARIN J. IMMERGUT
United States Attorney
District of Oregon
Mark O. Hatfield U.S. Courthouse
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

s/ Lily Farel
ERIC J. BEANE
BRIGHAM J. BOWEN
JULIE STRAUS
LILY FAREL
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 616-2035
Fax: (202) 616-8470
eric.beane@usdoj.gov
brigham.bowen@usdoj.gov
julie.straus@usdoj.gov
lily.farel@usdoj.gov

Attorneys for Defendants