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
LILY S. FAREL
lily.farel@usdoj.gov
JULIE STRAUS
julie.straus@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.*,	CIV. NO. 08-3095-PA
Plaintiffs, v. MICHAEL B. MUKASEY, *et al.*,	**[FILING CAPTION BELOW]**
Defendants.	

DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER ORDER EXCLUDING WITNESSES AS CUMULATIVE AND IN OPPOSITION TO PLAINTIFFS' FIRST AND SECOND MOTIONS *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Defendants respectfully submit this memorandum of law in support of their motion for reconsideration of this Court's Order dated January 9, 2009 (Dkt. #106), and in opposition to Plaintiffs' Amended Motion *in limine* to Exclude Testimony of Defendants' Experts as Cumulative (hereinafter "Plaintiffs' First Motion *in limine*") and Plaintiffs' Motion *in limine* to Exclude Testimony of Defendants' Experts (hereinafter "Plaintiffs Second Motion *in limine*"). Both motions suffer from the same flaws, most notably the false impression (1) that Defendants' experts opine on the same compelling interests from the same point of view and professional discipline and (2) that the Supreme Court's decision in another matter somehow bars the government from presenting evidence in this separate and distinct case.

Plaintiffs assert that their First Motion *in limine* should be granted "on the grounds that the presentation of more than one expert will be cumulative, and in violation of the Federal Rules of Evidence." Pls.' Mem. in Support of First Mot. in limine at 2. Plaintiffs are incorrect. Plaintiffs fail to apprehend the myriad complex compelling interests asserted by the government, as articulated in Defendants' Trial Brief and the witness statements of the government's experts. Moreover, although Plaintiffs clothe their request to exclude the government's experts as a motion to exclude cumulative testimony, their motion is more accurately viewed as an attempt to reassert the same estoppel arguments that this Court already rejected in denying Plaintiffs' Motion for Partial Summary Judgment. Dkt. #22.

Similarly, Plaintiffs contend in their Second Motion *in limine* that Defendants are estopped from presenting any evidence on health and safety concerns posed by Plaintiffs' ayahuasca consumption. Plaintiffs repeat their oft-made, erroneous assertion that Defendants

have "already lost [the health and safety] issues in the Supreme Court." Pls.' Mem. in Support of Second Mot. in Limine at 1 (hereinafter "Pls.' Second Mem."). This contention reflects their plain misreading of both the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006), and the government's defense in this case as articulated in Defendants' Trial Brief. First, the *O Centro* decision did not decide the health and safety issues before the court at all, let alone as applied to Plaintiffs. Second, aside from the fact that the Court has already denied Plaintiffs' Motion for Partial Summary Judgment on this very point, *see* Dkt. #19, Plaintiffs' estoppel theories are, as Defendants have repeatedly demonstrated, baseless. *See* Defs.' Trial Br. at 16-20, Dkt. #28. Finally, As Defendants explained in their trial brief, should Plaintiffs succeed in establishing a prima facie case under RFRA, the government has at least six interests that are sufficiently compelling to satisfy RFRA: (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; and (6) a compelling interest in full compliance with the CSA's closed regulatory scheme, which includes compliance with the exemption process. *See* Defs.' Trial Br. at 11-15, Dkt. #28. The rest of Plaintiffs' contentions are likewise flawed and unavailing, built on numerous faulty premises and imagined burdens of proof and foundation, as set forth in detail

below.

Defendants are entitled to determine the contents of their defense in this case. The government has asserted six governmental interests supporting their enforcement of the Controlled Substances Act, and the testimony by Defendants' experts is probative of the compelling nature of each of these interests. Thus, the Court should deny Plaintiffs' motions *in limine* and reconsider its order excluding Defendants' experts' testimony. Simply put, Defendants' multi-faceted testimony, addressing similar (but not identical) issues from a variety of professional and scientific perspectives, is far from cumulative. Defendants have thus far not been afforded any meaningful opportunity to make an offer of proof as to the relevancy, high probative value, and non-cumulativeness of their expert witnesses, as they should be entitled to make before they are deprived of presenting the testimony in their defense. Allowing the January 9, 2009 Order to stand would deny Defendants the opportunity to present their case concerning many of its compelling interests.

PROCEDURAL BACKGROUND

Under the Court's Amended Trial Management Order, Plaintiffs submitted their witness statements on December 1, 2008, and Defendants filed their witness statements on December 8, 2008. Dkt. #38. On December 18, 2008, in advance of the pretrial conference, Defendants filed a motion *in limine* to exclude testimony of Plaintiffs' expert witnesses. Dkt. #84. During the pretrial conference, the Court indicated that it would "reserve[] ruling on defendants' motion *in Limine*" until trial. Dkt. #87. In a January 5, 2009 letter to the Court, Plaintiffs' counsel informed the Court that "plaintiffs see no need to cross-examine any of the defendants' experts." *See* Letter from Don H. Marmaduke to Judge Panner (Jan. 5, 2009) (attached herein as Exhibit

A). On January 7, 2009, Plaintiffs filed their First Motion *in Limine*, asserting that the testimony of Dr Frankenheim, Dr. Jasinski, Dr. Tella, Dr. Kosten, and Dr. Glass is entirely cumulative. Less than 48 hours later, before Defendants had responded to Plaintiffs' motion, the Court granted in part Plaintiffs' motion *in limine* to exclude Defendants' experts' testimony as cumulative, ordering Defendants to "select the testimony of two expert witnesses to be used at trial." Dkt. #106. Just one day later, Plaintiffs filed their Second Motion *in limine* to Exclude the testimony of all of Defendants' expert witnesses. Dkt. #111.

ARGUMENT

I. DEFENDANTS' MOTION FOR RECONSIDERATION SHOULD BE GRANTED AND PLAINTIFFS' FIRST MOTION *In Limine* SHOULD BE DENIED.

A. Justice Requires Reconsideration of Plaintiffs' First Motion *In Limine* Because Defendants Did Not Have an Opportunity to Respond.

The present circumstances certainly qualify as "extraordinary" because Plaintiffs' motion was granted before Defendants had an opportunity to respond. *See United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993), *Community Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002). Here, Plaintiffs filed their First Motion *in Limine* on Wednesday, January 7, 2009, at 7:18 p.m. E.S.T., after close of business on the east coast and just before close of business on the west coast. Dkts. #96, 97. Additionally, Plaintiffs filed an amended version of their First Motion *in Limine* on Thursday, January 8, 2009, at 6:40 p.m. E.S.T., also after close of business on the east coast and shortly before close of business on the west coast. Dkts. #102, 103. The Court issued an order granting Plaintiffs' amended First Motion *in Limine* on Friday, January 9, 2009, at 5:39 p.m. E.S.T., less than 48 hours after Plaintiffs filed their original First Motion *in Limine*, and less than 24 hours after Plaintiffs filed

their amended First Motion *in Limine*. Dkt. #106.

Under the Local Rules, a party has eleven days after service of a motion to respond to that motion. Local Rule 7.1(e)(1). Although the government was acting quickly to respond to Plaintiffs' motion, and intended to so well in advance of the eleven day allowance, the government had no reason to anticipate that the Court would act so swiftly in granting Plaintiffs' motion before the government had responded. In the course of the instant litigation, the Court has only once acted on a motion by a party before the opposing party had an opportunity to respond and, in that case, the Court denied the moving party's motion. *See* Dkt. #22 (September 25, 2008 order denying Plaintiffs' September 22, 2008 motion for summary judgment). In that situation, the opposing party was not prejudiced by the Court's ruling before the party had a chance to respond, because the Court *sua sponte* denied the relief sought by the moving party. These extraordinary circumstances were "beyond [the government's] control" and thereby "prevented timely action to protect its interests" – that is, by filing a response to Plaintiffs' motion in advance of the Court's consideration of that motion. *See Alpine Land*, 984 F.2d at 1049.

Moreover, although Defendants were moving expeditiously to prepare a response to Plaintiffs' First Motion *in Limine*, Defendants reasonably expected the Court to defer ruling on Plaintiffs' motion until trial, as the Court did with Defendants' own motion *in Limine*, which was timely filed in advance of the pretrial conference. *Cf. Mallinckrodt, Inc. v. Masimo Corp.*, 254 F. Supp. 2d 1140, 1156 (C.D. Cal. 2003) (finding that Fed. R. Civ. P. 16 explains "'the use of the pretrial conference as a means to familiarize the litigants and the court with the issues actually involved in a lawsuit so that the parties can accurately appraise their cases and substantially

reduce the danger of surprise at trial.' The 1983 Amendments added a new subdivision (f), which . . . 'reenforces the rule's intention to encourage forceful judicial management'") (citing Wright, Miller & Kane, *Fed. Practice & Proc.: Civ.* 2d § 1522 (1990), and Fed. R. Civ. P. 16(f), Advisory Comm. Note to 1983 Amendment).

In addition to clearly demonstrating that "circumstances beyond its control prevented timely action to protect its interests," the government further can demonstrate injury resulting from the Court's order. Here, the government is not simply injured by the adverse decision that deprived the government of the ability to prove its case with relevant, non-prejudicial evidence of its choosing, but also by the deprivation of the opportunity to "make [its] offer of proof" that the testimony is not needlessly cumulative, as is permitted before a court excludes evidence under Rule 403. *See United States v. Hooton*, 662 F.2d 628, 636 (9th Cir. 1981) (finding that trial judge properly exercised discretion in excluding evidence under Rule 403 when judge "allowed [the defendant] to make his offer of proof and then exercised his authority to prevent needless presentation of cumulative evidence"). Moreover, absent Defendants' offer of proof that the testimony of Defendants' experts was not needlessly cumulative, the Court did not have before it all factors relevant to the balancing required under Rule 403. *Cf. United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (citations and internal quotations omitted) (noting denial of a Rule 60(b) motion may be reversed if relevant factors are not considered). As such, and in light of the argument that follows, the government respectfully requests that the Court reconsider its order granting in part Plaintiffs' First Motion *in Limine*.

B. Defendants' Experts' Testimony Is Clearly Relevant.

The Federal Rules of Evidence begin with the premise that "[a]ll relevant evidence is

admissible," which is broadly defined to be evidence having "*any* tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." Fed. R. Evid. 401-02 (emphasis added). The Rules also state that "[i]f 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 qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. Thus, under the Federal Rules, so long as the testimony of an expert qualified by knowledge, skill, experience, training, or education would tend to make the existence of a fact of consequence more or less probable than without the evidence, that expert's testimony should be admitted. *See Baker v. Delta Airlines, Inc.*, 6 F.3d 632, 641 (9th Cir. 1993).

Whether evidence is relevant in a particular case is determined by reference to the legal questions involved. *See United States v. Vallejo*, 237 F.3d 1008, 1015 (9th Cir. 2001) (holding "[t]he particular facts of the case determine the relevancy of a piece of evidence"). Here, the pertinent legal questions are those arising out of the Religious Freedom Restoration Act ("RFRA"). Clearly relevant to RFRA's legal formulation is an examination of the government's asserted interests to determine if they are, in fact, compelling. 42 U.S.C. §§ 2000bb-1 *et seq*.

Defendants' experts testify to a wide range of risks to individual, as well as public, health and safety posed by Plaintiffs' ayahuasca consumption. Testimony about these risks goes directly to the question of whether the government has a compelling interest in banning Plaintiffs' use of ayahuasca. Moreover, the specific testimony addressing whether and how Plaintiffs might adequately safeguard against the occurrence of these risks speaks to whether, as RFRA requires, governmental action is the least restrictive means of advancing the

government's compelling interest in protecting individuals and the public from the risks posed by Plaintiffs' ayahuasca use. Therefore, the testimony of Defendants' experts is unquestionably relevant.

C. Exclusion of Defendants' Experts' Testimony Is Unwarranted Under Rule 403.

Federal Rule of Evidence 403 delineates the specific, narrow circumstances in which relevant evidence may be excluded. Rule 403's first set of circumstances permitting the exclusion of relevant evidence – "danger of unfair prejudice, confusion of the issues, or misleading the jury" – carries little weight in a bench trial such as this one, where the Court can give the testimony whatever weight the Court deems appropriate after listening to the full testimony and cross-examination. *See E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994) ("[I]n a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial."). Thus, only the Rule's second set of circumstances permitting the exclusion of relevant evidence – "considerations of undue delay, waste of time, or needless presentation of cumulative evidence" – carries any likelihood of applicability in this case. Fed. R. Evid. 403.

However, exclusion of the testimony of Defendants' experts is unwarranted because none of the circumstances provided for in Rule 403 are present here. Plaintiffs have already informed the Court that they do not intend to cross-examine any of Defendants' witnesses during trial. *See* Letter from Don H. Marmaduke to Judge Panner (Jan. 5, 2009) (Exhibit A). Thus, the full extent of the testimony Defendants' experts would give in this case is contained within the written witness statements already submitted to the Court on December 8, 2008. Therefore,

inclusion of Defendants' experts' testimony will have no bearing on the length of the trial. Because inclusion of Defendants' experts' testimony will not cause any undue delay or waste of time, considerations thereof do not substantially outweighing the probative value of this testimony.

Plaintiffs' argument misreads the plain language of Rule 403, under which relevant evidence "*may* be excluded if its probative value is *substantially* outweighed by . . . considerations of . . . *needless* presentation of cumulative evidence." Fed. R. Evid. 403 (emphasis added). Although Plaintiffs' memorandum suggests that evidence that is in any way cumulative of other evidence must be excluded, Rule 403 does not go nearly so far. First, with the use of the word "may," the Rule clearly establishes that exclusion of cumulative evidence is not mandatory, but discretionary. *See Williams v. Neb. State Penitentiary*, 57 F.3d 667, 670 (8th Cir. 1995) (finding the language of Fed. R. Evid. 403 "permissive" based in part on use of the word "may"). Moreover, Rule 403's requirement that probative value be "*substantially* outweighed" by another enumerated consideration highlights that a balancing analysis must be carefully performed by a court before excluding evidence under the Rule. *See Blind-Doan v. Sanders*, 291 F.3d 1079, 1083 (9th Cir. 2002) (finding "testimony should not have been excluded by a global ruling that showed no evidence of any balancing" by court). Finally, under Rule 403, it is not a sufficient ground for exclusion that evidence be cumulative; rather, the evidence must rise to the level of "needless[ly] . . . cumulative" to justify exclusion under the Rule. Fed. R. Evid. 403, *see also United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1991) (holding that when party carries difficult burden of proof, evidence must be needlessly cumulative to justify exclusion) (cited in *United States v. Taylor*, 127 F.3d 1108, 1997 WL 661153, slip op. at *2-3

(9th Cir. 1997) (unpublished) (holding that evidence must be "needlessly cumulative" to warrant exclusion, "evidence is not cumulative merely because it supports evidence that has already been admitted," and "even repetitive evidence may be admitted in order that the government be able to satisfy its very high burden" of proof)). *See also Hooton*, 662 F.2d at 636 (government's reliance on testimony from twenty witnesses did not rise to level of "needlessly cumulative" to invoke Fed. R. Evid. 403).

Thus, under the plain language of the Rule, it is not sufficient for a party to assert that testimony is simply cumulative, as Plaintiffs do here. But the party must demonstrate that the testimony is needlessly cumulative. Plaintiffs have failed to make such a demonstration. Instead, Plaintiffs pick and choose short phrases from the written statements of Defendants' experts to show that several of Defendants' experts employ similar language choice and phrasing and focus on similar topics. These carefully-selected excerpts, taken out of the context in which they were made, do not represent the bulk of the testimony Defendants' experts present. To suffice under the balancing test required by Rule 403, Plaintiffs would need to demonstrate that, when carefully considered as a whole, none of the five of Defendants' experts whose testimony is placed at issue by Plaintiffs' motion offers a single unique fact or opinion that might tend to be probative of the issues before the Court. *Cf. Blind-Doan*, 291 F.3d at 1083. As explained more fully below, Plaintiffs cannot make such a demonstration and, as such, their Motion *in Limine* to exclude the testimony of Defendants' experts as cumulative must be denied.

For similar reasons, Plaintiffs' suggestion that the inclusion of Defendants' experts' testimony will "waste" the Court's time, Pls.' Second Mem. at 8, rings hollow because the Court will have spent the time reading the Defendants' experts' written statements whether they are

included or not. Under either scenario, the Court has spent similar amounts of time reading and considering the statements. Thus, excluding Defendants' experts' testimony does not serve judicial economy, and Plaintiffs' request for its exclusion should be denied.

D. Defendants' Experts' Testimony Is Not Cumulative.

Contrary to Plaintiffs' suggestion otherwise, the mere fact that most of Defendants' witnesses have expertise in areas of science and medicine, and testify to issues of health and safety, does not render their testimony needlessly cumulative. Here, each of the five of Defendants' expert witnesses that Plaintiffs seek to exclude offer testimony from a unique professional and scientific perspective supporting different compelling interests asserted by the government in this case in different ways. Several federal courts of appeals have clarified what expert testimony qualifies as cumulative warranting exclusion under Rule 403. As the Sixth Circuit found in *Bowman v. Corrections Corp. of Am.*, a party's experts are not cumulative when they "possess expertise in . . . distinct areas" within science and medicine, nor when each "testified as to different aspects" of health and safety risks. 350 F.3d 537, 547 (6th Cir. 2003). Similarly, in *Johnson v. United States*, 780 F.2d 902, 906 (11th Cir. 1986), the Eleventh Circuit found that a district court's decision to exclude a third medical expert on the basis that the third medical expert's testimony was cumulative of the first two medical experts' testimony was an abuse of discretion. Because the third medical expert's "analysis was somewhat different" than that of the first two medical experts, and he had "different . . . qualifications than the other experts," the court found the third expert's testimony "at least partially non-cumulative" and therefore the district court's exclusion of his testimony constituted reversible error. *Id.* *See also Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 243 (7th Cir. 1989) (holding that

testimony does not meet Rule 403 standards for exclusion as cumulative when party seeking to introduce such testimony makes offer of proof that each expert "would have added . . . a new angle or argument, as opposed to the refrain 'me too'"). None of these interpretations provides a legal basis for excluding as cumulative the testimony of Defendants' experts here. Therefore, Plaintiffs' motion to exclude the testimony of Drs. Frankenheim, Tella, Glass, Jasinski, and Kosten should be denied.

1. Dr. Jerry Frankenheim

Dr. Frankenheim is a pharmacologist at the National Institutes of Health's ("NIH") National Institute on Drug Abuse ("NIDA"), where he is responsible for initiating, planning, building, and managing national and international research grant programs in neuroscience and neuropharmacology of drug abuse, addiction, and their consequences. As such, his testimony is unique from that of the other witnesses. The National Institute on Drug Abuse plays an important role in DEA policy development surrounding the scheduling of controlled substances. Under the Controlled Substances Act, 21 U.S.C. § 811(b), the Department of Health and Human Services ("HHS"), of which the NIH and NIDA are parts, plays an important role in decisions about classifications of drugs and other substances. When determining whether to make a scheduling change for a drug or other substance, the Attorney General is obligated to "request from the Secretary [of HHS] a scientific and medical evaluation" of the drug or substance at issue. *Id.* Moreover, "[t]he recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters." *Id.* NIDA is one of several agencies within HHS that is responsible for conducting the scientific and medical evaluation necessary for the Secretary's binding recommendation to the Attorney General. *See*

Food & Drug Admin., FDA Compliance Policy Guide 7155e.09, Memorandum of Understanding Between the National Institute on Drug Abuse and the Food and Drug Administration (1984) (concerning cooperative interaction in expediting domestic scheduling of drugs of abuse). In his position at NIDA, Dr. Frankenheim oversees national and international research grant programs in neuropharmacology of drugs of abuse and addiction. It is his responsibility to be aware of and make decisions concerning existing and new areas of research on pharmacology of controlled substances. Included within his duties is review of animal and human studies of DMT, MAO inhibitors, and ayahuasca. As such, Dr. Frankenheim is perfectly situated to testify as to the pharmacology of ayahuasca and offer opinions comparing ayahuasca to other controlled substances.

Dr. Frankenheim's testimony focuses on the basic pharmacology and toxicology of ayahuasca as well as the sources of variation in ayahuasca components. It is Dr. Frankenheim's opinion that the pharmacological variation in ayahuasca's composition can produce a diverse array of adverse reactions in humans, some deriving from the variation in human responses to hallucinogens (including unpredictable short-term psychological effects; short-term risk of accidental injury or death; long-term persistent psychosis; hallucinogen persisting perceptive disorder; variable response to stacked doses; effects on fetuses; effects on developing adolescent brain; and addiction potential) and others deriving from the risks of drug-to-drug or drug-to-food interactions (including central serotonin syndrome and hypertensive crisis). Dr. Frankenheim's comprehensive testimony about the variation in ayahuasca composition strongly supports the government's compelling interests in general, and especially supports the government's 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 (compelling interest #3, *see* Defs.' Trial Br. at 12).

2. Dr. Srihari Tella

Dr. Tella, while also a pharmacologist, works in the Drug and Chemical Evaluation Section of the Office of Diversion Control of the Drug Enforcement Administration, where he has been involved in scheduling review actions (requests to add, remove, or move a drug or other substance from the schedules contained in the CSA) for tryptamine-based substances that are chemically and pharmacologically related to DMT. When performing a scheduling review action, Dr. Tella researches and evaluates the drug or substance with consideration for the following factors: actual or relative abuse potential; pharmacological effects; scientific knowledge; history and current pattern of abuse; scope, duration and significance of abuse; risk to the public health; physical and psychological dependence liability; and whether the substance is an immediate precursor of an already-controlled substance. While at DEA, Dr. Tella has served as principal reviewer for scheduling review actions for a variety of tryptamines that are structurally related to DMT including 5-MeO-DMT, AMT, 5-MeO-DIPT ("Foxy"), 5-MeO-AMT, 5-MeO-DET, DIPT, 4-OH-DIPT, and 5-MeO-MIPT. Thus, Dr. Tella has extensive experience evaluating numerous health and safety-related factors for a wide variety of substances which are similar to DMT.

Dr. Tella's testimony is non-cumulative for two reasons: (1) his experience at DEA gives him unique qualifications shared by no other witness – for either side – in this case; (2) he approaches his analysis with knowledge of both the factors DEA considers in making scheduling decisions and the variety of known DMT analogues and other substances similar to DMT. As

such, he is uniquely situated to offer testimony about the comparisons that can be drawn between DMT, one of the psychoactive substances in ayahuasca, and other, better-studied drugs. Dr. Tella's testimony also demonstrates not simply that DMT/ayahuasca consumption carries significant health and safety risks, but also that DEA is well-informed regarding current science regarding DMT, related tryptamines, and recreational markets, and that in its own independent evaluation, DEA considers DMT to be dangerous and deserving of Schedule I status. Of *all* of the witnesses testifying in this case on both sides regarding aspects of the health and safety risks associated with ayahuasca use, Dr. Tella's experience and expertise is most directly on point, particularly with regard to the government's compelling interest in requiring requests for exemptions from the CSA and/or for petitions for rescheduling to be addressed first through the administrative process (compelling interest #5, *see* Defs.' Trial Br. at 14).

3. Dr. George Glass

Dr. Glass is a psychiatrist and an addictionologist with over 30 years of experience. He has done research regarding and counseled individuals who struggle with addiction, including those who suffered severe consequences, such as an acute psychotic break or ongoing psychosis, after their first experience with hallucinogens. In the early 1970s, Dr. Glass wrote two papers characterizing hallucinogen-induced psychosis, in which he identified a variety of common factors associated with individuals suffering from hallucinogen-induced psychosis. As such, Dr. Glass is in a unique position to evaluate Plaintiffs' screening process and the risks to all participants in their works.

In preparing to offer his expert opinion on this case, Dr. Glass reviewed depositions of the Plaintiffs, Dr. Doe, and John Seligman, as well as a series of redacted intake forms from

people interested in participating in the Church's works. After reviewing all of these materials, and considering his own professional clinical experience, Dr. Glass came to the following unique conclusions: (a) the ayahuasca mixture used in the Church's ceremonies poses risks to an individual's health and safety; (b) the screening process utilized by the Church is not sufficient to prevent harmful and potentially life-threatening interactions and people who may be at risk to suffer such an interaction are not effectively screened out; and (c) the Church seems to attract a vulnerable population.

Because Dr. Glass's opinions are rooted in his experience counseling and treating individuals who have struggled with abuse of hallucinogens, as well as his work identifying background health characteristics associated with a risk of developing hallucinogen-induced psychosis, his testimony is critical for at least two reasons: (1) Dr. Glass is the only one of Defendants' experts with experience identifying and treating individuals with hallucinogen-induced psychosis (none of Plaintiffs' experts have remotely similar experience); (2) Dr. Glass analyzes a different aspect of Plaintiffs' practice, that is, the particular psychiatric vulnerability of current and prospective participants to hallucinogen-induced psychosis, than do Defendants' other experts. Based on the foregoing and the testimony in Dr. Glass's witness statement, it is clear that Dr. Glass is uniquely situated to present evidence supporting the government's compelling health and safety interests in general, and specifically in banning Plaintiffs' use of ayahuasca (compelling interest #1, *see* Defs.' Trial Br. at 11), as that is the only effective way to prevent the onset of hallucinogen-induced psychosis in the vulnerable population attracted to the Plaintiff church.

4. Dr. Donald Jasinski

Dr. Jasinski, a physician and board-certified clinical pharmacologist, is Chief of the Center for Chemical Dependence at Johns Hopkins Bayview Medical Center, a Professor of Medicine at the Johns Hopkins University School of Medicine, and an Adjunct Professor in the Department of Pharmacology and Experimental Therapeutics at the University of Maryland School of Medicine. As a physician-scientist, Dr. Jasinski's research focuses on evaluating therapeutic drugs for the treatment of drug abuse and addiction. As such, Dr. Jasinski evaluates the safety of chemicals for consumption by human patients suffering from substance abuse and addiction. In this context, a primary critical focus of Dr. Jasinski's research is the abuse and addiction potential of the studied therapeutic substances. Because Dr. Jasinski is uniquely situated to offer testimony on the abuse and addiction potential of DMT and ayahuasca, and particularly to critique Plaintiffs' experts' claims that ayahuasca can provide therapeutic benefit to individuals with past or present histories of substance abuse or dependence, or that Plaintiffs' consumption has been proven safe, at any meaningful level, his testimony is non-cumulative. Moreover, the opinions Dr. Jasinski offers concerning the abuse potential of DMT and ayahuasca provide essential support for each of the government's compelling interests, and specifically for the government's 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 (compelling interest #4, *see* Defs.' Trial Br. at 13).

5. Dr. Thomas Kosten

Dr. Kosten is a physician-scientist and clinical psychiatrist, holds the J.H. Waggoner Chair and Professorship of Psychiatry and Neuroscience at Baylor College of Medicine, and has

over 30 years of experience in clinical practice and research in addiction psychiatry. Of all the experts in this case – on both sides – Dr. Kosten's extensive expertise uniquely combines both the clinical, patient-based experience with experience researching abuse and addiction. Dr. Kosten offers opinions arising out of deep experience in both clinical practice and research with psychoactive substances, and, as such, his testimony is non-cumulative.

Dr. Kosten has treated many patients who he suspects had taken DMT or related hallucinogenic substances. In his testimony, Dr. Kosten focuses on identifying background health conditions and prescription drug use posing an increased risk for adverse events from ayahuasca consumption, identifying behavior posing known and possible but unknown risks associated with ayahuasca use, and critiquing Plaintiffs' medical screening practices and expert witnesses' conclusions. Specifically, Dr. Kosten reviewed several completed "medical screening forms" and highlights many individuals who were permitted to participate in Church works despite contraindicative medical histories and prescription drug use. He also outlined the elements which must be included in Plaintiffs' medical screening practice for that practice to be comprehensive, and identifies where it falls short of comprehensive. (compelling interest #2, *see* Defs. Trial Br. at 12).

Therefore, the testimony of each witness addresses a different compelling interest: Dr. Frankenheim's testimony supports the government's 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; Dr. Tella testifies as to the government's compelling interest in requiring requests for exemptions from the CSA and/or for petitions for rescheduling to be addressed first through the administrative process; Dr. Glass presents

evidence supporting the government's compelling health and safety interests in general, and specifically in banning Plaintiffs' use of ayahuasca; Dr. Jasinski offers testimony concerning the government's 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; and Dr. Kosten's testimony provides essential evidence in support of the government's compelling health and safety interest in banning the use of ayahuasca by high-risk groups.

E. Precluding Defendants' Experts' Highly Probative Testimony Unduly Prejudices Defendants.

In *De Anda v. City of Long Beach*, the Ninth Circuit held that the exclusion of evidence was not harmless when the district court exclusion of testimony "impaired [the defendant's] ability to prove [his case]." 7 F.3d 1418, 1423 (9th Cir. 1993). Here, each of the five of Defendants' expert witnesses that Plaintiffs seek to exclude offer testimony from a different professional and scientific perspective supporting different compelling interests asserted by the government in this case in unique ways. Striking even one of these expert witnesses will deprive Defendants of the ability to prove their case on at least one of the government's asserted interests related to enforcement of the CSA against Plaintiffs' ayahuasca use. Moreover, as Defendants have clearly demonstrated that each expert's testimony is non-cumulative, exclusion of that testimony is entirely unwarranted under Rule 403 and relevant case law. Therefore, precluding the highly probative testimony of any of Defendants' experts unduly and unjustifiably prejudices Defendants by depriving them of the opportunity to present evidence essential to their case. Plaintiffs' First Motion *in Limine* thus should have been denied, and Defendants respectfully request reconsideration of the Court's Order granting that motion in part.

II. PLAINTIFFS' SECOND MOTION *In Limine* SHOULD BE DENIED BECAUSE DEFENDANTS' EXPERTS' TESTIMONY IS RELIABLE AND HIGHLY PROBATIVE.

The testimony and opinions of an expert witness are admissible when they satisfy the requirements of Federal Rule of Evidence 702. In determining whether or not an expert satisfies these requirements, courts conduct a two-part analysis. First, courts must determine "whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'" *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) ("*Daubert II*") (quoting *Daubert*, 509 U.S. at 590, 599). The reliability of an expert's testimony is based on "not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert II*, 43 F.3d at 1318 (9th Cir. 1995). Moreover, expert opinion testimony "is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of [the relevant] discipline." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006) (brackets in original) (citations and internal quotations omitted). Second, a court must "ensure that the proposed expert testimony is 'relevant to the task at hand.'" *Daubert II*, 43 F.3d at 1315 (quoting *Daubert*, 509 U.S. at 580). *See also Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002) ("Whether testimony is helpful within the meaning of Rule 702 is in essence a relevancy inquiry."); *Baker*, 6 F.3d at 641. While all relevant evidence is generally admissible, Fed. R. Evid. 402, "[t]he particular facts of the case determine the relevancy of a piece of evidence," *Vallejo*, 237 F.3d at 1015. In a bench trial such as this, relevancy and reliability challenges to expert testimony are afforded less weight because "'the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial.' So, too, for potentially unreliable

evidence." *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2008) (quoting *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994)).

A. Dr. Alexander Walker

Plaintiffs complain that "Dr. Walker's curriculum vitae does not indicate that he has any expertise or special knowledge regarding the biological mechanisms that would support a conclusion that the tea would be toxic at doses served in the Santo Daime rituals." Pls.' Second Mem. at 8. In leveling such an attack, 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 Dr. Halpern's study fails to meet acceptable scientific standards.

In an equally meritless argument, Plaintiffs state 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." *Id.* at 9. Even the most cursory glance at Dr. Walker's experience and education proves this statement wrong. *See* Walker CV, Dkt. #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. Any relevant testimony he

offers that is based in this extensive experience is admissible.

B. Dr. Jerry Frankenheim

Plaintiffs cite no objections to Dr. Frankenheim's underlying qualifications as a pharmacologist with significant expertise in the area of drugs of abuse, likely because his credentials and the basis for his expert opinions are unimpeachable. As explained above, Dr. Frankenheim possesses superb credentials and a broad catalogue of relevant research experience which surely renders him qualified to opine on subjects related to the pharmacology and toxicology of drugs of abuse and other substances. This is likely why Plaintiffs' criticisms of Dr. Frankenheim's testimony largely take two forms – irrelevancy or speculation – neither of which provides a basis for exclusion under *Daubert*.

Plaintiffs' attempt to exclude Dr. Frankenheim's testimony on the basis of irrelevance must be denied for two reasons. First, as the Court explained in its January 9, 2009 order denying Defendants' Motion *in Limine* to Exclude Plaintiffs' Expert Testimony, expert opinion testimony "is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of [the relevant] discipline." *Sandoval-Mendoza*, 472 F.3d at 654 (brackets in original) (citations and internal quotations omitted) (*cited in* Dkt. #119 at 2). Furthermore, as the Court also clarified, *id.* at 3, in a bench trial such as this, relevancy challenges to expert testimony are afforded less weight because "'the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial.'" *Flores v. Arizona*, 516 F.3d at 1 1166 (*cited in* Dkt. #119 at 3) (citations omitted).

Second, Plaintiffs' claim that Dr. Frankenheim's testimony is irrelevant is based on Plaintiffs' gross misstatement of the burden of proof in this case. *See* Pls.' Second Mem. at 18,

22, 25-26. *See also* Pls.' Opp. to Defs.' Motion *in Limine* 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). If a plaintiff successfully makes a prima facie case under RFRA, the burden then shifts 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." 42 U.S.C. § 2000bb-1 *et seq.* Plaintiffs wrongly assert that to meet its burden under RFRA, the government must prove "perceived harm is, to a medical probability, likely to ripen into actual, significant harm.." *See* Pls.' Opp. to Defs.' Motion *in Limine* at 11. The Supreme Court has repeatedly 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's precedents instruct that the Act can survive this facial attack. 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). Thus, Plaintiffs' misguided claims that Dr. Frankenheim's testimony is "irrelevant" have no basis in the applicable case law and should be rejected.

Plaintiffs also object to much of Dr. Frankenheim's testimony as "speculation" or, impliedly, *ipse dixit*. *See, e.g.*, Pls.' Second Mem. at 19, 22. What Plaintiffs label as

"speculation" is, more accurately, well-informed opinions based on education and experience. As the Supreme Court explained in *Daubert*, it is "[o]f course, . . . unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." *Daubert*, 509 U.S. at 590. Plaintiffs' objection highlights the very purpose of the distinction made between lay and expert opinion testimony in the Federal Rules. Unlike lay witnesses, such as the individual plaintiffs themselves, expert witnesses – by virtue of their demonstrated expertise – are given wide latitude to opine on matters within their area of expertise. *See Kumho Tire*, 526 U.S. at 148 ("Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'") (quoting *Daubert*, 509 U.S. at 592). With Dr. Frankenheim's unquestioned educational and professional credentials, he is qualified under *Daubert* and *Kumho Tire* to offer his opinions on the pharmacology and toxicology, and associated risks arising therefrom, of ayahuasca.

C. Dr. Donald Jasinski

Dr. Donald Jasinski, Chief of the Center for Chemical Dependence at the Johns Hopkins Bayview Medical Center, is a physician and researcher with decades of experience in the research and treatment of substance abuse and drug evaluation. He is undeniably qualified to opine regarding the abuse potential and pharmacology of DMT.

Many of Plaintiffs' attacks on his testimony are premised on the notion that Dr. Jasinski's expert testimony in *O Centro* somehow *undercuts* (rather than supports) his qualifications to opine regarding the abuse potential and health risks associated with DMT. And Plaintiffs' assertion that Dr. Jasinski should somehow be "estopped" from offering opinions on the same

subject in this litigation gets it precisely backwards: given Dr. Jasinski's prior testimony and established expertise, he is particularly qualified to revisit the subject of DMT in this new litigation by offering new, separate testimony. Certainly, there is no principle of law which "estops" the government from requesting him to do so.

Plaintiffs' other objections, most of which go to the weight of Dr. Jasinski's testimony, rather than its admissibility, are of no moment. For example, their contention that, despite his lifetime of work in studying hallucinogens and their properties relative to abuse, his conclusions regarding their similarities – particularly those related to their abuse potential – should be excluded, is baseless. Mischaracterizing Dr. Jasinski's testimony as stating that "all LSD-like hallucinogens act the same way in every circumstance," Pls.' Second Mem. At 10, Plaintiffs assert that the conclusions he draws based on the similar behaviors of related chemicals are unsound. However, these conclusions, drawn from decades of experience and from well-established research, are firmly established in Dr. Jasinski's testimony and are beyond reproach. *Kumho Tire*, 526 U.S. at 148 ("Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'") (quoting *Daubert*, 509 U.S. at 592). Likewise, Plaintiffs assert that Dr. Jasinski "does not advise whether" deaths have occurred from ayahuasca consumption, notwithstanding Dr. Jasinski's direct citation to medical evidence that ayahuasca consumption has been reported to cause death. Jasinski Stmt. at 8 (citing Sklerov, et al., "Fatal Intoxication Following the Ingestion of 5-Methoxy-*N,N*-Dimethyltryptamine in an Ayahuasca Preparation, J. Anal. Toxicol. 2005 Nov-Dec; 29(8):838-41).

Equally meritless is Plaintiffs' tangential assertion that, because Dr. Jasinski suggests that further study of ayahuasca and DMT is necessary before their consumption can be deemed safe – a demonstrably sound conclusion drawn from years of experience in the evaluation of drug safety – *his* testimony is somehow impeached because an insufficient number of studies to Plaintiffs' liking have been conducted in general (let alone by DEA, which Plaintiffs incorrectly assume is tasked with conducting or "obtaining funding" for studies). Plainly, the lack of reliable evidence, drawn from scientific study, demonstrating that ayahuasca consumption is safe, particularly in light of currently known risks of both DMT and related chemicals, is relevant to whether Plaintiffs should be permitted to consume ayahuasca. Plaintiffs' unsupported assertions to the contrary are, simply put, *ipse dixit*. Finally, Plaintiffs' reliance on the unsigned, unsworn testimony of a biologist with no experience in the study of hallucinogenic substances – unlike Dr. Jasinski – merely demonstrates Plaintiffs' unavailing attempt to poke holes in otherwise perfectly proper expert testimony. Dr. Jasinski's decades of experience with the study of abused drugs, and hallucinogens in particular, as well as his statement, establish that the known properties of DMT and of other LSD-like hallucinogens are sufficiently similar to allow for extrapolations regarding their health risks and abuse potential. Should Plaintiffs seek to discredit this sound conclusion, the proper arena for such an effort is via cross-examination, rather than a misguided *Daubert* motion.

D. Dr. Lorne Dawson

Dr. Lorne Dawson is a well-respected scholar with relevant expertise in a number of fields (beyond "religions," as his field is inaccurately characterized by Plaintiffs). Most specifically, Dr. Dawson has established expertise in two highly relevant specialties: (a) the

social scientific study of religion (the "methodology of the social sciences" in general, and the specific and well documented issues that are debated in the study of religious phenomena from a social scientific (i.e., not theological or humanistic) perspective); and (b) the study of new religious movements, which raises specific empirical and methodological issues that are not commonly debated by other sociologists of religion. In both of these specialties, Dr. Dawson has numerous publications in long-standing and highly reputable refereed academic journals in the fields of sociology, religious studies, and the sociology of religion (e.g., Religion, Studies in Religion, Journal for the Scientific Study of Religion, Sociology of Religion, Journal of Contemporary Religion, Journal of the American Academy of Religion, and Religion). The specialized knowledge Dr. Dawson has developed is pertinent to the inquiry into all religious phenomena, whether from a medical, psychological, or other disciplinary perspective. Dr. Dawson is eminently qualified, therefore, to opine on subject-specific issues (such as those identified by Dr. Dawson regarding Santo Daime specifically), as well as on general social scientific methodological principles (such as the methodological problems Dr. Dawson identified in the Halpern and Grob studies).

Plaintiffs' attacks on Dr. Dawson's qualifications and lack of particular expertise in "medical/pharmacological matters," Pls.' Second Mem. at 27, are without merit. Quite unlike many of Plaintiffs' experts, Dr. Dawson openly acknowledges the limitations of his expertise, as his testimony does not pretend to opine on health and safety, or pharmacology, or medicine *per se*. To the contrary, his testimony deals directly with methodological and substantive issues that call into question the accuracy and reliability of other people's claims about the safety of ayahuasca usage. Expertise in medicine or pharmacology is simply not required to detect and

discuss, with expertise, issues of social scientific method bearing directly on the quality of these studies. These observations are far from irrelevant, as Plaintiffs assert, but bear directly on the limited and preliminary value of Plaintiffs' most-relied-upon research for their mistaken and unproven contention that ayahuasca consumption is safe.

Plaintiffs' other critiques of Dr. Dawson, nearly all of which go to the weight of Dr. Dawson's testimony, rather than its admissibility, devolve primarily into *ad hominem*, but Defendants will offer a few limited responses to clarify the record. First, Plaintiffs devote much of their argument to the same makeweight arguments regarding prior testimony in *O Centro* as they did with Dr. Jasinski. These arguments take them nowhere. And Plaintiffs' block-quoting of transcript portions from *O Centro* is even less meaningful in the case of Dawson, as Plaintiffs offer *no argument whatsoever* as to its impact on his separate testimony in this action.

Their other arguments are likewise baseless and warrant only brief comment. For example, they (1) attempt to create inconsistencies where there are none (e.g., taking issue with the perfectly consistent observation that not much is known about the UDV, but that it is known that UDV maintains strict control over its religious ceremonies and admissions criteria (Pls.' Second Mem. at 27)); (2) revert to simple name calling (e.g., referring to Dr. Dawson's careful, methodical explication of charismatic leadership in religious movements, and his entire field of specialty, as "junk science" (*id.* at 30) and calling Dr. Dawson a "layman" (*id.* at 29)); (3) mischaracterize the subject matter of Dr. Dawson's testimony (e.g., erroneously claiming that the Halpern study "indicates that people who have taken the tea for extended times fare as well or better than the" fabricated "nation's control group" (*id.* at 29)); (4) mischaracterize Dr. Dawson's testimony itself (e.g., asserting that Dr. Dawson "seems to believe that the study was

an epidemiological study with control groups" (*id.* at 29) when Dr. Dawson's actual observation (shared by Dr. Halpern) was that a study lacking a control group, particularly in the context of a new and esoteric religious practice, is of limited value); (5) challenge Dr. Dawson's summary of conclusions, rather than the statement itself, which provides the foundation for Dr. Dawson's conclusions (*id.* at 27 (arguing that "[t]here are no data to support his conclusions"); *cf.* Dawson Stmt. ¶¶ 37-41, 44, 45 (providing evidence and citing to numerous sources)); and (6) unilaterally seek to impose burdens on Dr. Dawson (e.g., asserting that Dr. Dawson fails to offer data to "contradict" Dr. Halpern (Pls.' Second Mem. at 29) – Dr. Dawson does not seek to "contradict" anything with data of his own, which he is not obligated to offer in the context of a methodological critique). None of these flawed tactics are grounds for even impeachment, let alone exclusion under the principles of *Daubert* and its progeny.

E. Dr. George Glass

Plaintiffs correctly note that "Dr. Glass is qualified to give his expert opinion in this case." Pls.' Second Mem. at 34. Dr. Glass is a well-respected psychiatrist who has practiced for over 30 years. *See* Report of Dr. Glass. He specializes in addiction and drug abuse, and he approaches any analysis on the foundation of this experience. Plaintiffs' Motion fails to present any legitimate reason why Dr. Glass's testimony should be excluded. Plaintiffs accuse Dr. Glass of using unreliable methods because he does not take the same view of the CHLQ as Plaintiffs. According to their Motion *in Limine*, Dr. Glass's failure to commend their interview process and support their ayahuasca use is "bias." Pls.' Second Mem. at 37. As such, Plaintiffs object to much of the wording that Dr. Glass, as a psychiatrist who has worked with hundreds of patients struggling with addiction, utilizes in his statement. Plaintiffs complain that "Dr. Glass gives his

concluding opinion that taking the tea 'in a religious ceremony is a dangerous procedure'" and insist that "a religious ceremony does not involve a 'procedure.'" Pls.' Second Mem. at 37-38. In reducing their argument to word-choice, Plaintiffs undermine their own argument. Plaintiffs are clearly unhappy with Dr. Glass's testimony, complaining that he is presenting "personal opinion" rather than his professional analysis of the Plaintiffs' situation. Yet this complaint rings hollow with their admission that he is qualified to give an expert opinion. Plaintiffs cannot object to testimony simply because it does not support their position.

In his role as an expert witness, Dr. Glass looked at statements by, depositions of, and exhibits provided by the Plaintiffs. *See* Glass Report at 3. Using his extensive experience treating addiction and counseling drug users, along with reputable psychiatric sources such as the Kaplan and Sadocks "Comprehensive Textbook of Psychiatry," Dr. Glass formed his opinions about the health and safety of CHLQ's use of ayahuasca. *Id*. As an expert, he has researched and prepared a professional opinion based on the information provided by the Plaintiffs. In doing so, Dr. Glass has exceeded the standards set by *Daubert* and his testimony should be admitted.

F. Dr. Thomas Kosten

As Plaintiffs admit, "Dr. Kosten is a psychiatrist who is generally qualified to opine on the subjects under review." Pls.' Second Motion *in Limine* at 38. As explained above, Dr. Kosten possesses superb credentials and a broad catalogue of relevant clinical and research experiences which surely renders him qualified to opine on subjects related to psychiatry, drug abuse and addiction. Plaintiffs do not – and cannot – question the reliability of Dr. Kosten's testimony under *Daubert*. Rather, Plaintiffs' criticism of Dr. Kosten's witness statement charges

simply that his opinions are irrelevant or wrong. *See, e.g.*, *id.* at 40 ("This is an example of the fallacy of the irrelevant conclusion.").

As they do with other witnesses, Plaintiffs repeatedly claim that Dr. Kosten's testimony should be excluded when he "does not define" particular words or phrases. *See, e.g.*, Pls.' Second Mem. at 39 ("[Kosten] does not define what he means by 'reverses the effects of medications'"). However, the so-called undefined terms are not technical but are, rather, common usages of words and phrases according to their dictionary definitions. Moreover, Plaintiffs' argument provides no legal basis for excluding such testimony. Rather, by labeling a word or phrase as "undefined" Plaintiffs attempt to complicate easily understandable conclusions that are simply adverse to Plaintiffs' case.

Again, as they do with other witnesses, Plaintiffs rely on a misstatement of Defendants' burden of proof to suggest that testimony is "irrelevant" and therefore excludable. *Compare id.* at 38, 39, 40 *with* Section II-B, *supra*, at 22-24. As explained above in the section defending the relevancy of Dr. Frankenheim's testimony, Plaintiffs' argument here has no basis in law and should be rejected.

Finally, several of Plaintiffs' objections to Dr. Kosten's testimony are directly contradicted by the testimony of the Plaintiff Church's own members, including those Plaintiffs designated as Rule 30(b)(6) deponents. *Compare, e.g.*, Pls.' Second Mem. at 40 ("No one is permitted to take Daime until they have stopped the anti-depressant, which only occurs when their own physician believes it is the correct thing to do.") *with* Dep. of John Seligman at 62:25-63:18, Defs.' Ex. 1035 ("Q: Were they advised to consult with their doctor before stopping the Prozac? A: Yes. Q: Do you know if that advice was followed? A: No. Q: So, am I correct in

saying that when you learned that someone was taking Prozac, you advised them that they should not take the Prozac for possibly two or three days prior to the work, and then you're not sure what they did with that information, then they were permitted to attend the work? A: Yes, that's correct. Q: So it's possible that the person did take the Prozac before coming to the work? A: It's possible. Q: It's also possible that the person chose to stop the Prozac without consulting their physician and then come to the work? A: It is possible."); Dep. of Dr. Doe at 117:13-15, Defs.' Ex. 1020 ("Q: Do you do anything to make sure that the person has spoken to their doctor before going off the SSRI? A: Hunh-uh."). Plainly, Plaintiffs' criticisms are based on incorrect information and thus, their challenge to Dr. Kosten's testimony as unreliable based on that false information should be rejected.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration of the Court's Order excluding witnesses as cumulative should be granted and Plaintiffs' Second Motion *in Limine* to Exclude Testimony of Defendants' Experts should also be denied.

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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
LILY S. FAREL
JULIE STRAUS
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