

Allen Shoff, ISB #9289
Davillier Law Group, LLC
414 Church St Suite 308
Sandpoint, ID 83864-1347
208-920-6140
Email: ashoff@davillierlawgroup.com

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO**

HEALTH FREEDOM DEFENSE FUND, INC.;
RYAN BLASER, on his own behalf and as
natural guardian for and on behalf of his minor
children, K.B.B. and K.S.B.; MICHELLE
SANDOZ, on her own behalf and as natural
guardian for and on behalf of her minor
children, R.S. and E.S.; BARBARA
MERCER, an individual; EMILY KNOWLES,
on her own behalf and as natural guardian for
and on behalf of her minor children, A.G.K.
and A.T.K.; and KENDALL NELSON, an
individual,

Plaintiffs,

vs.

CITY OF HAILEY, IDAHO, a municipal
corporation; and MARTHA BURKE, in her
official capacity as the Mayor of the City of
Hailey, as well as in her personal capacity for
purposes of Section 1983 claims asserted
herein.

Defendants.

Case No. 1:21-cv-389

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' DAUBERT
MOTION TO STRIKE THE
DECLARATIONS OF HARALD
WALACH, SUSANNE WAGNER,
AND DANIELA PROUSA**

I. INTRODUCTION

Defendants boldly proclaim that

“none of the Plaintiffs’ declarants are qualified to provide expert testimony. They have no basis on which to opine on the City of Hailey’s mask mandate during the on-going COVID-19 pandemic. Neither of the three declarants have the knowledge, skill, experience, training, or education to help the Court understand the evidence or determine a fact in issue... Further their declaration testimony is not based on sufficient facts or data and is not the product of reliable principles or methods.”

[DE 21]-1, *Defendant’s Motion to Strike*, at 3.

Defendants appear to equate disagreement with the expert’s views as grounds to strike expert witnesses under a *Daubert* analysis. Defendants are certainly welcome to disagree with the analysis brought forth by Plaintiffs’ experts; after all, in most cases which develop out of complex or scientific facts, expert witnesses from both parties do, in almost every case, disagree on their interpretation of the data and the facts. Yet this disagreement is not only common, it is *emblematic* of the scientific process. While not as strictly adversarial as the legal system, the root of all true scientific inquiry is the debate into the issues.

As will be discussed at length below, Defendants bring questions regarding the credibility of the Plaintiffs’ expert declarants. Yet credibility, in itself, is not the bar established by the *Daubert* court. Whether a witness’s theory of the case or of the facts at issue plays not to admissibility but to credibility, and therefore a Motion to Strike based purely on matters of credibility misstates *Daubert* and misapplies the Federal Rules of Civil Procedure governing expert witnesses. In short, an inappropriate attempt to forestall honest, if adversarial, presentation of expert opinions to the Court.

Plaintiffs will show below that not only are the experts in question reliable witnesses, they provide the court with scientific, technical, and specialized knowledge that is helpful to the finder of fact in understanding the medical and scientific issues at play, with particular relevance to the issue of the Motion for Temporary and Preliminary Relief before the Court.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure establish the standard for introduction of expert witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Civ. P. 702.

Attacking an expert's credibility does not render their opinions inadmissible under a Daubert analysis; rather "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798 (1993) "'General acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Id.*, 509 U.S. at 597, 113 S. Ct. at 2799. Some or all of additional factors like "testing, peer review, error rates, and 'acceptability' in the relevant scientific community," might "prove helpful in determining the reliability of a particular scientific theory or technique." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 1171 (1999).

ARGUMENT

1) Prof. Dr. Harald Walach is a qualified expert who meets the *Daubert* criteria

a. Summary of Defendants' arguments against Prof. Dr. Walach

Defendants bring only the most cursory of arguments against Prof. Dr. Walach himself. Of the only two paragraphs directly addressing his credentials as an expert in his field, one argues that he has no medical training or is a licensed physician. [DE 21]-1, *Memo in Support of Motion to Strike*, at 4. The other paragraph is dedicated to a review of the so-called notoriety of Prof. Dr. Walach, more suitable for a gossip column than a legal filing, including references to a so-called “Golden Blockhead” award he “received” a full decade ago. [DE 21]-1, at 5. Rather than addressing the scientific inquiry with a dispassionate and careful analysis, drawing alternate theories and contesting conclusions based upon the peer-reviewed papers Prof. Dr. Walach cites, Defendants instead credulously repeat *ad hominem* attacks without addressing the meat of the issue: what Prof. Dr. Walach is actually saying. Rather than presenting contrary evidence or cross-examining the sources that Prof. Dr. Walach cites, Defendants merely rest upon the fact that, to put it most simply, some individuals and organizations don't like him or some of his arguments.

b. The Fed. R. Civ. P. 702 analysis of Prof. Dr. Walach demonstrates his reliability as an expert

i. *The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue*

Prof. Dr. Walach possess two Ph.D.s, one in clinical psychology which he earned in 1991, and one in Philosophy and History of Science, in 1995. Contrary to Defendants' statement that his “c.v. does not reflect that he has any medical training,” Prof. Dr. Walach is a *trained clinical psychologist* with a Ph.D., who has served in a wide variety of positions in the medical and scientific research field, and on staff at numerous hospitals. His career is as varied as it is impressive, from lecturer and professor on psychology to research and evaluating complementary medicine in a department of epidemiology. He has also served as a visiting professor at universities

in Germany, Brazil, and Poland. He has written more than two hundred peer-reviewed papers and one hundred book chapters on a variety of subjects, but sharing the same essential fact: they are peer-reviewed papers—that is, analyzed by peers in the medical field, and published in a wide breadth of reputable international scientific journals.

His breadth of knowledge and incredibly impressive career is, in many ways, one of a kind. Few others could bring this level of productive output, and this intimate understanding of the processes that go into the creation of a peer-reviewed paper, than Prof. Dr. Walach.

ii. The testimony is based on sufficient facts or data

It is this unique basis in the scientific method that Prof. Dr. Walach relies upon for his testimony. Rather than speak purely from personal experience, Prof. Dr. Walach analyzes at least nineteen independent peer-reviewed papers and scientific articles about masks, their efficacy, and their potential harms, consisting of hundreds of authors in total from all over the world. He delves deep into papers contrary to his position; rather than scurrilously accusing their authors of receiving dubious awards, he instead presents their arguments fairly, and from careful analysis describes why he believes they are not an accurate assessment of the situation. In short, his testimony is based on the scientific process as it is intended to function: healthy debate of the issues, with civility and detachment. There can be no question—and indeed, Defendants do not raise one—about the sufficiency of the facts and data he draws to arrive at his conclusions, because he presents a detailed look into the evidence, based in comprehensive studies of masks worldwide, to develop his expert opinion.

iii. The testimony is the product of reliable principles and methods; and

iv. The expert has reliably applied the principles and methods to the facts of the case.

As above, Prof. Dr. Walach lays out all the analysis in the open. He discusses the methods used by the cited study authors, why he believes them to be appropriate or inappropriate, and draws

his conclusions accordingly. These are the fundamental principles that are consistent throughout the scientific world, and his broad experience in different facets of that world empower him to provide an useful overview to the Court. Prof. Dr. Walach's declaration and accompanying C.V. and list of publications illustrate his reliability and the reliability of his testimony, as well as its helpfulness to the finder of fact.

2) Dr. Susanne Wagner is a qualified expert who meets the *Daubert* criteria

a. Summary of Defendants' arguments against Dr. Wagner

Similarly to Prof. Dr. Walach, Defendants misstate her training. They argue that Dr. Wagner has a "complete absence of medical training, qualifications, or expertise." [DE 21]-1, at 7. They bring no arguments against her analysis of the relevant studies, nor against her conclusions drawn from her review of the serious medical concerns regarding carbon dioxide toxicity, yet purely attack her on the basis of their misunderstanding of her C.V.

b. The Fed. R. Civ. P. 702 analysis of Dr. Wagner demonstrates her reliability as an expert

i. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue

Contrary to Defendants' assumptions, Dr. Susanne Wagner holds a doctorate in veterinary medicine, and has spent three decades in the development of human therapeutics and medicines, with numerous papers to her name and five patent applications based on her work. The reasonable question that arises: why a doctor of veterinary medicine? The simple answer is that whether carbon dioxide is toxic, and in what amounts, cannot be tested in humans, as that would be a serious ethical violation. Therefore, this knowledge is developed through *in vivo* animal testing. However, data gained from animal tests cannot be simply assumed to affect humans in the same way, as the unique physiologies interacts with chemicals and compounds differently than in humans. Through decades of research, the medical field has developed a sophisticated set of

scalability factors to understand how to extrapolate critical information about drug and chemical toxicity to human beings without subjecting them to dangerous and illegal testing.

This is why Dr. Susanne Wagner is not only qualified to discuss this issue based on her specialized knowledge, but her detailed three decades of expertise is critical to truly understanding the dangers facing the citizens of and visitors to the City of Hailey. Her whole career is based in designing and implementing animal testing of compounds, analyzing their benefits and harms in a repeatable, detailed fashion, and writing the papers proving those interactions in peer-reviewed, prestigious journals. She, more even than a purely human-focused physician, has the unique knowledge and experience to provide useful, relevant, important information for this Court.

ii. The testimony is based on sufficient facts or data

Much like with Prof. Dr. Walach, Dr. Wagner does not merely pontificate from her own experience. Like any good scientist she understands that she stands on the shoulders of giants. Therefore, her testimony is heavily based on scientific papers establishing the facts, and she analyzes it to develop her opinions. Dr. Wagner's declaration cites twenty-seven unique scientific studies or articles, totaling at least dozens of authors working over a span of decades to develop a better understanding of the deleterious effects of carbon dioxide upon the human body. And much more than a mere recitation, she goes into depth as to the mechanisms and the theories explaining why carbon dioxide has a negative effect, for instance, on a developing child in the womb, as compared to the effects it has in large enough concentrations in the body of an adult healthy individual. Her testimony is entirely based on the facts.

iii. The testimony is the product of reliable principles and methods; and

iv. The expert has reliably applied the principles and methods to the facts of the case.

Similarly to Prof. Dr. Walach above, Dr. Wagner bases her declaration not on argument, but on the science. She has spent her whole career understanding those unique interactions in the body of various animal species, and how we can take that information and understand it in the context of human physiology. Just as with Prof. Dr. Walach, the Defendants do not contest her principles,

methods, and their application to her theory; they merely base their objection on their misunderstanding of the focus of her work and how it applies to the present matter.

3) Daniela Prousa is a qualified expert who meets the *Daubert* criteria

a. Summary of Defendants' arguments against Ms. Prousa

Defendants also provide limited justification for their motion to strike the testimony of Ms. Prousa. Specifically, they attempt the same limiting of the “damage” of her C.V. by understating her credentials and experience in the field of psychology. Then, as with Prof. Dr. Walach, cast aspersions upon her credibility by addressing the subject of a paper that the original publisher “explicitly distanced” itself from. [DE 21]-1, at 9. As in the two examples above, Defendants provide no alternative analysis to the facts put forth or the papers cited in Ms. Prousa’s declaration, nor detail why her specifically articulated methods and analysis fail to meet the standards of Fed. R. Civ. P. 702.

b. The Fed. R. Civ. P. 702 analysis of Dr. Wagner demonstrates her reliability as an expert

i. The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue

As her C.V. demonstrates, Ms. Prousa studied as a psychotherapist and psychologist, earning a graduate level certification in psychotherapy from the University of Bremen and a license in the practice of psychotherapy. For more than a decade she has worked as a psychologist and psychotherapist for both children and adults in a variety of settings, from group homes and social pediatric centers to specialist clinics affiliated with the German Pension Insurance program. As such, she is qualified to speak from her technical and specialized knowledge about the human mind and psychological issues to assist the Court in its analysis of the psychological issues pertaining to the short- and long-term wearing of masks.

ii. The testimony is based on sufficient facts or data

As with Prof. Dr. Walach and Dr. Wagner, Ms. Prousa relies not only upon her own knowledge, but bases her opinions upon facts and data by dozens of authors working together to create fourteen peer-reviewed studies, described in detail in her declaration. It is true that the fifteenth document cited in Ms. Prousa's declaration is a study performed by Ms. Prousa herself as lead author, and which was tagged with the statement Defendants address. Yet Defendants themselves fail to do what the Leibniz Institute suggests, which is to "critically examine publications" and "encourage further discourse," not providing a psychologist or psychotherapist of their own to contest the arguments raised by Ms. Prousa in her declaration.

Even setting aside the information gathered by Ms. Prousa herself, the remainder of the declaration is uncontroverted, providing important, widely acknowledged studies that point to the negative health effects of chronic stress, the developmental and empathetic development issues already noticed due to the widespread use of masks, and the overall negative psychological effects of mask mandates.

iii. The testimony is the product of reliable principles and methods; and

iv. The expert has reliably applied the principles and methods to the facts of the case.

Finally, Ms. Prousa relies upon the standard practices of her field: psychology. Her discussion of the "critical phase" of childhood development, a fundamental part of developmental psychology, cites to a standard encyclopedia of cognitive science. Her arguments are based on reliable, widely held methods.

CONCLUSION

Plaintiffs have demonstrated that each of their three expert witnesses has provided in their declarations evidence-based, objective scientific analyses of the efficacy of, and harms caused by, the Mask Mandate imposed upon the citizens of and visitors to the City of Hailey. Defendants' cursory examination under *Daubert* fails to bring a threshold argument against the reliability of their testimony, and Plaintiffs have demonstrated far beyond a preponderance of the evidence the reliability and utility of the expert testimony to assist the Court in making its determination as to

the Plaintiffs' Motion for Preliminary Injunctive Relief. Therefore, Plaintiff respectfully requests this Court DENY Defendants' Daubert Motion to Strike the Declarations of Harald Walach, Susanne Wagner, and Daniela Prousa, for the reasons so provided and the oral arguments to be made on the matter before this honorable Court.

DATED this 20th day of January, 2022.

DAVILLIER LAW GROUP, LLC

By: /s/ Allen Shoff

Allen Shoff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of January, 2022, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Attorneys for Defendants

Deborah A. Ferguson, ISB No. 5333
Craig H. Durham, ISB No. 6428
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 235
Boise, Idaho 83702
Phone: 208-484-2253
Fax: 208-906-8663
Email: daf@fergusondurham.com
chd@fergusondurham.com

DAVILLIER LAW GROUP, LLC

By: /s/ Allen Shoff
Allen Shoff