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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

HEALTH FREEDOM DEFENSE
FUND, INC., et. al.,

Plaintiffs,

v.

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
her personal capacity for the purposes
of Section 1983 claims

Defendants.

Case No. 1:21-cv-389-DCN

**MEMORANDUM IN
SUPPORT OF DEFENDANTS'
DAUBERT MOTION TO
STRIKE THE
DECLARATIONS OF
HARALD WALACH,
SUSANNE WAGNER, AND
DANIELA PROUSA**

Defendants move to strike the expert declarations of Harald Walach, Susanne Wagner, and Daniela Prousa that Plaintiffs have offered to the Court in support of their motion for preliminary injunctive relief (Docket Nos. 18, 18-2,

**MEMORANDUM IN SUPPORT OF DEFENDANTS' DAUBERT MOTION TO
STRIKE THE DECLARATIONS OF HARALD WALACH, SUSANNE
WAGNER, AND DANIELA PROUSA - 1**

18-3, and 18-4). Defendants file this Daubert motion because none of these declarants are qualified to provide expert testimony to the Court under Federal Rule of Evidence 702, as all lack expert qualifications.

Rule 702 provides: "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." *See Reiffin v. Microsoft Corp.*, 270 F. Supp. 2d 1132, 1145 (N.D. Cal. 2003). Although Rule 702 affords a court wide latitude to admit expert testimony, such testimony is inadmissible if it does not meet two related requirements: (1) it must be based on the special knowledge of the expert; and (2) it must be helpful to the finder of fact. *See Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589-91 (1993); *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989) ("For an expert's testimony to be admissible... it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help."); *United*

States v. Jackson, 425 F.2d 574, 576 (D.C. Cir. 1970) ("To warrant the use of expert testimony ... two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in its search for truth.") (quoting McCormick, Evidence § 13)).

The burden is on the party offering the proposed expert opinion testimony to prove by a preponderance of the evidence that the testimony satisfies the requirements for admissibility. *See Daubert*, 509 U.S. at 592 n.10.

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. *Compare Elosu v. Middlefork Ranch Inc.*, No. 1:19-CV-00267-DCN, 2021 WL 230038, at *5 (D. Idaho Jan. 22, 2021) (where unlike here, this Court begins by noting that the movant of a motion to strike an expert did not challenge the expert's credentials.) Further their declaration testimony is not based on sufficient facts or data and is not the product of reliable principles or methods.

This motion will focus on the threshold issue of the lack of qualifications of the three declarants, discussing each declarant in turn.¹

I. Plaintiffs' Declarations should be stricken as the Declarants lack the qualifications to serve as experts.

A. Harald Walach

Like the other two declarants, in identical language Harald Walach declares under penalty of perjury that “because of my education, training, work experience, research and publications, I am an acknowledged expert...” Walach Declar., ¶2. *See also*, Wagner Declar., ¶3; Prousa Declar., ¶3. But Walach does not identify who acknowledges him as an expert or disclose if he has ever provided expert testimony to any other court in the United States, or in Germany where he resides, or elsewhere in the world.

Harald Walach professes a very broad span of expertise that encompasses a vast array of multifaceted fields. He asserts expertise in “the field of medical research, evaluation of health technology, clinical and experimental studies, research methodology, including meta-analyses and systematic reviews.” Walach Declar., ¶4. Harald Walach’s c.v. does not reflect that he has any medical training, or that he is a licensed physician in Germany,

¹ The Court should also note that while each declarant “affirms under penalty of perjury under the laws of the United States of America” that their statements are true and correct, *see* Walach Declar., ¶ 57; Wagner Declar., ¶ 29; Prousa Declar., ¶24, all reside in Germany and are not readily subject to this Court’s jurisdiction.

where he resides, or the United States, or in any other country. He indicates he has two PhDs, one in philosophy/the history of science, and the other in psychology. *Id.*

Walach does however have some notoriety. He is considered by many to be a conspiracy theorist and peddler of misinformation. Just this year, Walach published two papers relating to COVID-19 that were widely criticized and later redacted.²³ In fact, numerous highly respected virologists and vaccinologists resigned as editors of the journal *Vaccines* in protest of the publication of Walach's redacted article, calling the article "grossly irresponsible" and a case of "garbage in, garbage out."⁴ Walach's vaccine article also prompted the Poznań University of Medical Sciences in Poland, where Walach had been an associate professor, to sever its ties with him.⁵ Prominent newspapers have described Walach as "the researcher contributing misinformation about the Covid-19 pandemic,"⁶ and in 2012 Walach received the facetious "Goldenes Brett" award (the Golden Blockhead award), a sardonic "prize" awarded by the Society

² [https://jamanetwork.com/journals/jamapediatrics/fullarticle/2782288;](https://jamanetwork.com/journals/jamapediatrics/fullarticle/2782288)

³ <https://retractionwatch.com/2021/07/02/journal-retracts-paper-claiming-two-deaths-from-covid-19-vaccination-for-every-three-prevented-cases/#more-122544>

⁴ <https://www.science.org/content/article/scientists-quit-journal-board-protesting-grossly-irresponsible-study-claiming-covid-19>

⁵ <https://retractionwatch.com/2021/07/07/university-terminates-affiliation-with-researcher-who-had-paper-on-covid-19-vaccines-retracted-as-mask-study-comes-under-scrutiny/#more-122582>

⁶ <https://english.elpais.com/usa/2021-07-22/harald-walach-the-researcher-contributing-misinformation-about-the-covid-19-pandemic.html>

for the Scientific Investigation of Pseudoscience for the "most astonishing pseudo-scientific nuisance" of the year.⁷

Considering the complete absence of medical training, qualifications, or expertise the Court should strike the Walach declaration as he lacks expert knowledge, skill, experience, training, or education to guide this Court in any aspect of "health hygiene" regarding the SARS-CoV-19.

B. Susanne Erika Wagner

Likewise, Susanne Wagner is not a qualified expert under FRE 702. Her opinions regarding "possible toxicity of chronic carbon dioxide exposure associated with mask use" are not informed by knowledge, skill, experience, training, or education. She claims to be "acknowledged as an expert in the field of industrial drug research, the use of pre-clinical *in-vivo* testing and its applicability to human health, and the effects of exposure to foreign substances on embryonic and adolescent development." Wagner Declar., ¶ 3. The subject areas of her alleged expertise have no bearing on the city of Hailey's mask mandate.

Like Harald Walach, Susanne Wagner resides in Germany and is not a medical doctor although she may be a veterinarian by training. It is unclear.

⁷ *Id.* and https://en.wikipedia.org/wiki/Goldenes_Brett

She states she attended the Freie Universitat Berlin between September 1983 through February 1989, and the entirety of her education consists of:

“Veterinary Medicine State Examination with ‘good’; Doctorate Degree 1993 with ‘Magna Cum Laude’”. She does not reveal the subject of that doctorate degree. Wagner Declar., Ex. A. Since 2016 she has been working (in her own words) as a “freelancer medical writing, fundraising, research liaison for start-up companies.” *Id.* The bullet points after her job description inform the Court she has written grant applications, consulted start-ups, and engaged in strategies for raising public funds and for patent applications. None of this activity is relevant to the City of Hailey’s mask mandate.

Neither her possible education in veterinary medicine or her freelance work experience as a grant writer or fundraiser qualify her to provide the Court as an expert in possible toxicity of chronic carbon dioxide exposure associated with mask use. Because of the complete absence of medical training, qualifications, or expertise the Court should strike her expert declaration in support of the Plaintiffs’ motion for a preliminary injunction. Ms. Wagner has no expertise or basis to opine on a mask mandate in Hailey, Idaho during a public health crisis.

C. Daniela Prousa

Likewise, Daniela Prousa is not a qualified expert under FRE 702. Her opinions regarding the psychological, physical, and sociological effect of mandatory mask requirements are not informed by expert knowledge, skill, experience, training, or education, but instead her personal opinions. She too resides in Germany like Plaintiffs' other declarants. According to her c.v., she received a Diploma/M.A. from the University of Bremen in Germany in 2003 where she studied psychology, and she has participated in some continuing professional education in psychology. In her c.v. Ms. Prousa describes her current professional career since May of 2020 which includes "correspondence with important institutions" as follows:

Psychological and Human Rights Commitment across a Broad Spectrum (situation analyses; research; advice for affected persons; correspondence with important institutions; legal actions at numerous courts and organizations, including the European Court for Human Rights and the High Commissioner of Human Rights at the United Nations in Geneva, with the support of the high-ranking human rights expert Prof. Dr. Hannes Tretter).

According to her c.v. prior to her current activist activities, Ms. Prousa was a psychologist in a specialist clinic for orthopedics and rheumatology at a German pension insurance company.

Like the other declarants, she baldly asserts that she is an acknowledged expert but does not reveal who has acknowledged her as an expert in the field of psychology, or if she has ever before served as an expert in a lawsuit. Prousa Declar., ¶3. There is also no indication that Ms. Prousa is fluent in English or that she has had any communication with the individual Plaintiffs in this case about their asserted harms or anything else.

In their request for injunctive relief, Plaintiffs rely on Prousa to argue that “[a] large percentage of individuals who feel burdened by the mask mandate report multiple symptoms of chronic stress, like anxiety, fatigue, headaches, discomfort, and trouble concentrating,” Prousa Declar.¶6; Pl.’s PI Memo at 8. The declaration, in turn, cites a paper written by Prousa herself and published in “Psych Archives,” a literature repository created by the Leibniz Institute for Psychology. *Id.* The Leibniz Institute for Psychology has “explicitly distance[d] itself from all content linked to [Prousa’s] publication,” noting that it “would not withstand the scientific review process undertaken by any reputable scientific journal.” Nonetheless, Plaintiffs rely on Prousa, and her publication, to substantiate their developmental and psychological claims.

There is nothing in Prousa’s experience or education that would qualify her as an expert to offer a professional opinion to this Court on the issue of the psychological or developmental impacts of the City of Hailey’s mask mandate.

II. No hearing is required before striking Plaintiffs' expert declarations

District courts are not required to hold a Daubert hearing before ruling on the admissibility of scientific evidence. *In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1138 (9th Cir. 2002) citing *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir.2000).

Defendants do not request a hearing on this motion, unless the Court believes a hearing would aid in its determination. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B). In that event, Defendants ask that this motion be heard on February 16, 2022 with the Defendants' pending motion to dismiss and the Plaintiffs' motion for an injunction. Should the Court grant the motion to strike, the request for a preliminary injunction would be unsupported and it should also be denied.

In sum, Plaintiffs' motion for a preliminary injunction rest on the three declarations they have provided the Court in their attempt to prove masks are ineffective as a medical intervention and may increase the risk of infection (Walach Declaration); masks lead to serious short- and long-term harms (Wagner Declaration); and masks cause serious psychological ramifications as well (Prousa Declaration) (Plaintiffs' PI Memo, pp 5-9). None of the individuals are qualified to provide expert testimony to the Court as they lack the

knowledge, skill, experience, training, or education required under FRE 702 to support their respective opinions. Accordingly, the Defendants respectfully move the Court to strike the declarations of Walach, Wagner and Prousa.

DATED this 30th day of December, 2021.

/s/ Deborah A. Ferguson

Deborah A. Ferguson

FERGUSON DURHAM, PLLC

CERTIFICATE OF SERVICE

I CERTIFY that on the 30th day of December 2021, 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:

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