IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

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| Michael Gatto and Katherine Gatto, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | CIVIL ACTION FILE |
| v. | ) | NO. STCV2016000167 |
| | ) | |
| City of Statesboro, Georgia, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS CITY OF STATESBORO AND SUE STARLING'S MOTION AND MEMORANDUM OF LAW TO EXCLUDE PAMELA S. ERICKSON, PLAINTIFFS' PROPOSED EXPERT**

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## TABLE OF CONTENTS

PAGE

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| | | |
|---|---|---|
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| | ) | |
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**COME NOW** the City of Statesboro (the "City") and Sue Starling, Defendants, and file this Motion to Exclude Pamela S. Erickson, Plaintiffs' Proposed Expert and show as follows:

## INTRODUCTION

On August 28, 2014, Grant Spencer killed Michael Joseph Gatto following an altercation that started inside the premises of Rude Rudy's and ended in the parking lot of University Plaza, Inc. ("University Plaza"). It is undisputed that Rude Rudy's primary revenue was generated through the sale of alcohol. Pursuant to a pretrial intervention agreement signed by the Decedent just over three weeks before his death, he agreed not to be present at establishments like Rude Rudy's on the night in question, let alone to be drinking or otherwise violating the law (such as by using a fake ID or purchasing alcohol for minors). The concept that the City or Ms. Starling could have simply revoked Rude Rudy's or any other business's occupational tax certificate or alcohol license under the undisputed material facts of this case, or otherwise "abated" the nuisance by pursuing a public nuisance action in either municipal or superior court, is absurd. Such a theory requires speculation, guesswork, and innuendo about what may or might not have

been accomplishable if such an action were commenced and is far too attenuated to establish proximate cause.

Facing this reality, Plaintiffs retained a purported "expert," Pamela Erickson, who intends to testify that: (1) the City should have adopted more stringent alcohol ordinances; (2) the failure to adopt existing ordinances increased the risk of alcohol-associated injuries between 2009 and 2014; (3) Michael Joseph Gatto's beating was the foreseeable result of a "decision" not to enforce "reasonable" alcohol regulations; (4) the elimination of the City's Alcohol Control Board ("ACB"), the prolonged failure to present alleged violations of the City's ordinances against businesses at University Plaza, and the failure by city council to consider the imposition of sanctions contributed, and the dismissal of various citations by the City Attorney/City Solicitor purportedly increased the risk of underage drinking, consumption, and violence; (5) more "reasonable" and "effective" ordinances would have prevented the death of Mr. Gatto; (6) the City could have "responded to the reports of underage drinking and violence at the University Plaza businesses ... through one or another form of civil litigation"; (7) underage and college drinking can cause harm including deaths, assaults, sexual assaults, academic problems, and alcohol use disorder; and (8) there are a number of strategies for reducing underage and college drinking, such as community leadership initiatives, enforcement of laws, requiring food service, and "[a]voiding violence and nuisance incidents in parking lots used by several premises."

As this motion demonstrates, Ms. Erickson's opinions will not assist the trier of fact, are not based on any sound methodology, and otherwise fail to satisfy the rigors of O.C.G.A.§ 24-7-702 and Daubert. Her "opinions" are neither based on the evidence in this case or the law in general. She lacks the legal expertise necessary to render her opinions, and otherwise fails to satisfy the applicable standards. Moreover, the vast majority of her anticipated testimony would

only be relevant to the ordinance-created "environmental" nuisance claim that has already been dismissed. This Court should exercise its "gatekeeping" role and preclude Ms. Erickson's unfounded "junk science" testimony.

## SUMMARY OF RELEVANT UNDISPUTED MATERIAL FACTS

### A. The City's Government.

The City is a municipal corporation with a government consisting of a Mayor and a five-member City Council. (SMF 2-3.)[1] The City officially acts by and through the Mayor and City Council, who have the authority to adopt ordinances, resolutions, or motions pursuant to a quorum of votes at a properly noticed, public meeting. (SMF 4-6.)

### B. Relevant Factual Background.

#### 1. Municipal and State-Issued Alcohol Licenses.

O.C.G.A. § 3-3-2 requires a city or county permit to manufacture, distribute, or sell alcohol, and grants local governing authorities "*discretionary* powers within the guidelines of due process . . . as to the granting or refusal, suspension, or revocation of the permits or licenses..." (Emphasis added). Furthermore, O.C.G.A. § 3-3-2(b) provides that:

> The *granting or refusal* and the *suspension or revocation* of the permits or licenses shall be in accordance with the following guidelines of due process: (1) The governing authority shall set forth ascertainable standards in the local licensing ordinance upon which all decisions pertaining to these permits or licenses shall be based; (2) All decisions approving, denying, suspending, or revoking the permits or licenses shall be in writing, with the reasons therefor stated...; and (3) Upon timely application, any applicant aggrieved by the decision of the governing authority regarding a permit or license shall be afforded a hearing with an opportunity to present evidence and cross-examine opposing witnesses.

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[1] Due to the volume of the record, Defendants cite to the salient paragraphs of their Statement of Theories of Recovery and Material Facts as to Which There is no Genuine Dispute as "SMF." Thus, a citation to "SMF 1" and "SMF 44" directs the Court to the record evidence and/or the absence of record evidence cited in paragraphs 1 and 44 of the SMF.

(SMF 27) (Emphasis added.) In addition, a state license issued by the Georgia Department of Revenue ("DOR") is required. (SMF 28) If a local license is revoked, a state license automatically becomes invalid; likewise, if a state license is revoked, a local license becomes invalid.(SMF 29)[2]

**2. Relevant History of the City's Alcohol Ordinances.**

**a. 1997 to 2007 – Requirement of a "Final Disposition" Prior to Suspension or Revocation of an Alcohol License.**

On March 18, 1997, Chapter 6 of the City's Code of Ordinances was replaced "in its entirety" by a new Chapter. Section 6-35(a) of the new ordinance provided as follows:

> Upon *final disposition* of a case by any court of competent jurisdiction, a license *may* be suspended or revoked by the Mayor and City Council for any violation of this and/or other City Ordinances....

(Emphasis added.) The "final disposition" language remained until 2007. (SMF 30, 31)

**b. Creation and Powers of the Alcohol Control Board.**

Section 6-4 of the April 17, 2001 version of the City's Ordinances provided for the existence of an ACB consisting of a combination of council and citizens. (SMF 33.) Thereafter, until December 6, 2011, the ACB – rather than the Clerk – was vested with powers such as: (1) screening alcohol applications; (2) granting or denying a desired license; and (3) deciding whether to renew licenses. (SMF 34.) In addition, between April 17, 2001 and September 17, 2007, the ACB was empowered to suspend or revoke alcohol licenses following a hearing. (SMF 35-37.)

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[2] Actions against a state-issued license by the DOR's Alcohol and Tobacco Division are also subject to due process requirements as well as the right to appeal. (SMF 28.)

### c. The City's Pre-December 6, 2011 Ordinances.

The alcohol ordinances underwent additional revisions between September 17, 2007 and December 6, 2011. (SMF 38) During that period, the salient ordinance sections provided for suspensions or revocations depending upon the number of proven violations during a two-year look-back period. (SMF 39-42) In addition, Section 6-35(a) contained the following sentence: "A license *may* be suspended or revoked by the mayor and city council for any violation of this chapter...." (SMF 43) (Emphasis added.)[3] Section 6-35(b) instructed that the ACB was to conduct an initial hearing in accordance with O.C.G.A. § 3-3-2, and then "forward its *written recommendation* on the matter to the mayor and city council." (SMF 46) (Emphasis added.) "*Upon receipt of the written recommendations*," the City Clerk was to send a second letter to the licensee regarding an additional hearing with the same level of detail. But neither Section 6-35(a) nor (c) contained any directive as to ***when*** any such due process hearing must be heard relative to the violation, nor the ***process*** by which the City Clerk was supposed to receive notice of an alleged violation issued by law enforcement. (SMF 45-50)

### d. The City's December 6, 2011 Ordinances.

On December 6, 2011, the City Council again replaced Charter 6 "in its entirety." (SMF 53) Thereafter, until August 28, 2014, Section 6-3(b) provided that a license "may" be suspended or revoked based on the number of proven violations during a 12-month lookback period. (SMF 54)

The ACB was officially abolished with the adoption of the December 6, 2011 Ordinances. (SMF 55) In addition, Section 6-35(a) of the December 6, 2011 Ordinances removed the two-step hearing process. While the requirement to "schedule a due process

[3] Section 6-2 of the Pre-December 6, 2011 Ordinances, "Definitions," expressly stated that "the term 'may' is permissive and the term 'shall' is mandatory."

hearing ... for any license holder *alleged to have violated* any provision of this chapter" remained, there was still no directive as to ***when*** any such due process hearing must be heard relative to the violation, nor any directive as to the ***process*** by which the Clerk was supposed to receive notice of an alleged violation. (SMF 58-63)

### 3. The City's Longstanding Internal Procedure for Providing Notice to the City Clerk of Alleged Violations of the Alcohol Ordinances.

Judy McCorkle served as the City Clerk from 1994 until mid-August 2008, and was replaced by Defendant Starling. (SMF 70-71) In turn, Lyn Dedge served as the City's Tax Clerk between 1992 and April 20, 2009, and was replaced by Teresa Skinner, who held the Tax Clerk position between then and August 28, 2014. (SMF 72-73) These individuals testified that their standard practice of receiving notice of an alleged violation of the alcohol ordinances, and the concomitant need to schedule a hearing, was precipitated by receiving a copy of or the actual citation from either the Statesboro Police Department ("SPD") or the DOR. (SMF 74) If the City Clerk's office did not receive an actual citation alleging an alcohol violation, there was nothing to schedule, and the customary and longstanding practice was to await receipt of citations from the SPD. (SMF 67-68, 75-76)

### 4. The City Clerk's Internal Procedure for Awaiting Municipal Court Adjudication Prior to Scheduling a Due Process Hearing.

As noted above, between 1997 and 2007, the City's alcohol ordinances referenced the "final disposition of a case by any court of competent jurisdiction" as a prerequisite to the Council's or the ACB's ability to suspend or revoke an alcohol license. Both Ms. McCorkle and Mrs. Dedge testified that during McCorkle's tenure as the City Clerk, their practice was to wait to schedule a hearing against a licensee until *after* there was an adjudication of guilt at the municipal court levied against the underlying criminal offender. (SMF 73-75) The practice

implemented by Mrs. Dedge and Ms. McCorkle continued when Ms. Skinner and Ms. Starling replaced them. (SMF 75-76)

**5. University Plaza, Inc. and the "University Plaza Establishments".**

University Plaza's tenants ***controlled*** (1) the space within the properties they leased; (2) how their employees were trained and supervised; and (3) which employees served alcohol, who was served, and how much was served. (SMF 83) However, none of the tenants owned or controlled any portion of the ***parking lot*** at University Plaza. (SMF 84, 85) In addition, the parking lot at University Plaza was ***privately owned***, rather than a public street or sidewalk controlled by the City. (SMF 81, 82) There is no evidence that the City *ever* issued an alcohol license to University Plaza, Inc. (SMF 87) While Section 6-88(c) of the City's Pre-December 6, 2011 Ordinances and the December 6, 2011 Ordinances provided that "No licensee shall permit on the licensed premises any disorderly conduct, breach of peace, or noise or activity *which is disturbing to the surrounding neighborhood*," no provision set forth in the City's ordinance prohibited: (1) fights or other criminal activity which were not disturbing to the surrounding neighborhood; or (2) fights or criminal activity in parking lots or other spaces that are not "on the premises." (SMF 113)[4]

With respect to the "University Plaza Establishments," on April 2, 2001, the City approved an alcohol license application for Retrievers, Inc. (SMF 89) On July 16, 2002, the City's ACB approved an alcohol license application for Chrysha, Inc. d/b/a Rum Runners. (SMF 92) On October 19, 2005, the City's ACB approved an alcohol license for Jonathan Starkey d/b/a Rude Rudy's to serve beer and wine. (SMF 96) Then, on August 28, 2006, the City's ACB

[4] Therefore, Ms. Erickson's opinions are based largely on an incorrect premise, given that fighting and other forms of criminal activity are not actually grounds to issue an ordinance-related citation to an establishment such as Rude Rudy's.

approved Rude Rudy's to sell liquor, a decision that was upheld on appeal by the City Council. (SMF 98) On or about December 18, 2007, the ACB approved an alcohol license application for Rusty's Tavern. (SMF 105) The City's records have always indicated that Joshua "Rusty" Ledford was the owner/operator of Rusty's Tavern. (SMF 107)

### 6. Citations Alleging Alcohol Ordinance Violations Involving the University Plaza Establishment Between 2009 and August 2014.

#### a. 2009 to May 2011 – Abolition of the ACB and Personnel Changes.

In May 2009, the City Clerk was notified of an alleged alcohol ordinance violation by Rusty's Tavern, and scheduled a hearing before the ACB, which voted to issue a 3-day suspension of the license. (SMF 114) The City Council upheld the 3-day suspension. (SMF 118)

Even though the ACB "existed" on paper until the adoption of the December 6, 2011 Ordinances, it held its last meeting on December 14, 2009 and thereafter did not function until it was formally abolished. (SMF 119) Meanwhile, several significant personnel and departmental changes took place.[5] In January, February and May of 2011, Ms. Starling learned of and scheduled due process hearings against the alcohol licensees of Rusty's Tavern, Kevin's Food Mart, Sunny Food Mart, Buffalo's, Christopher's, Holiday Pizza, and Millhouse. The hearing against Rusty's Tavern resulted in a 10-day suspension of its alcohol license by unanimous vote

[5] In addition to Ms. McCorkle and Ms. Dedge leaving their respective positions in 2008 and 2009, in March 2010 Keith Barber resigned the City Solicitor position and accepted the position of Municipal Court Judge. (SMF 120) A few months later, the positions held by Stan York (Chief of Police), Frank Roach (SPD Lieutenant), Dennis Merrifield (Fire Chief), Emerson Melton (Fire Captain), and Mike Smith (Fire Captain) were eliminated in a reorganization and restructuring of the police and fire departments. (SMF 120-122) Wendell Turner was subsequently promoted to the position of Public Safety Director; (SMF 123) a short-time later, the City Manager, Shane Haynes, was terminated; (SMF 124) and in January 2011, Attorney Brannen passed away. (SMF 69)

of the City Council, whereas the remaining businesses were given a "warning," without any suspension. (SMF 127-131)

**b. July 2011 Citations, Leaphart's Dismissal of Underlying Criminal Actions, and Starling's Lack of Knowledge.**

In July 2011, the SPD conducted compliance checks resulting in the issuance of 42 uniform traffic citations ("UTC"). Of the 42 UTC's, six were issued to individuals employed by the Rude Rudy's establishment for alleged violations of the "hours of sale" provisions set forth within the Pre-December 6, 2011 alcohol ordinances, and one was issued for allegedly "Charging Cover Charge Which Discriminates [Against] Gender." The UTC's involving Rude Rudy's ordered the individual alleged offenders to appear at the Municipal Court on January 10, 2012. (Id.) No other University Plaza Establishments were cited in July 2011. (SMF 133-135)

Following the July 2011 operation, on August 3, 2011 Michael Graves emailed Rob Bryan and Scott Brunson of the SPD, stating "Council is holding all alcohol violations until a later time. I wanted to give you a heads up." (SMF 137) Graves testified he sent the 8/3/2011 email because he was leaving his employment with the City the next week. (SMF 138) When Mr. Graves sent the email to Brunson and Bryan, he expected them to "hold [the previously-issued citations] until another city attorney was in place," and was simply communicating that they should not expect the citations to be heard by the City Council until that time. (SMF 139)

The July 2011 citations were still pending in municipal court when Leaphart was hired as the City Attorney/Solicitor in December 2011, and he became aware of the citations. (SMF143) By that time, however, the December 6, 2011 Ordinance had been enacted, the non-functioning ACB abolished, and the Ordinance under which the July 2011 citations were issued replaced "in its entirety." (SMF 144) It was Mr. Leaphart's misunderstanding that a formal decision had been made that due process hearings against the licensees associated with the July 2011 citations

were not going to be heard by the City Council, which caused him to question whether it would be appropriate to go forward with the prosecution of the individuals. (SMF 145) While there is a dispute as to whether former City Manager Parker told, recommended, or advised Mr. Leaphart to dismiss the citations, what is ***materially undisputed*** is that Mr. Leaphart, acting as the City Solicitor, is the person who made the final decision to dismiss the charges, in fact dismissed the charges, and exercised his prosecutorial discretion when doing so.[6] (SMF 146) Critically, there is no evidence that Ms. Starling ever received ***written*** **or** ***actual*** **notice** of the nature of the alleged violations concerning Rude Rudy's issued by the SPD in July 2011 prior to August 28, 2014. There is also no evidence which demonstrates that Ms. Starling ever received copies of any of the citations issued by the SPD in July 2011, or any information from the municipal court or Mr. Leaphart concerning the dismissal of the underlying charges. There is also no evidence that the City Council ever actually "voted" or otherwise decided that due process hearings should be put on hold, and there is no evidence that the City Council ever issued a directive to the City Clerk, the SPD, or anyone else that they should not enforce the ordinances at any time between 2011 and August 28, 2014. (SMF 147-150, 243)

**c. <u>Minimal Citations Involving University Plaza from 2012-2014</u>.**

There is no evidence that any citations involving violations of the December 6, 2011 Ordinances were issued to the licensee or employees of Rum Runners between July 24, 2011 and

[6] While Ms. Erickson theorizes that the dismissal of these underlying citations resulted in an increase of violence or otherwise encouraged the licensees to sell to underage persons, there is no evidence to support this testimony. First and foremost, **none of the citations in question even dealt with underage drinking**. Second, she simply assumes with no factual or legal basis that the criminal process would have resulted in a conviction. However, the Honorable W. Keith Barber, who was the City's Municipal Court judge when the above-referenced citations were dismissed, testified that it is not possible, without having to speculate, for him to know how he would have ruled on any evidence that may have come before him or how he otherwise would have ruled had a hearing on any of those citations occurred. (SMF 153)

August 28, 2014. (SMF 152) No citations were issued to Rude Rudy's, Rusty's Tavern, or Retriever's between July 24, 2011 and March 27, 2013. (SMF 136, 151)

In March and August 2013, the SPD conducted city-wide compliance checked focused on underage alcohol sales using confidential informants. As a result of these operations, an employee of Rude Rudy's was cited on March 28, 2013; employees of Rusty's Tavern were cited on March 28, 2013 and August 22, 2013; and an employee of Retrievers was cited on August 22, 2013, all for allegedly violating state laws prohibiting the underage sale of alcohol. (SMF 154-159) There is no evidence that either the SPD or the DOR issued any other alcohol-related citations to employees of Rusty's Tavern or Retrievers until after August 28, 2014. (SMF 156) As for Rude Rudy's, the March 28, 2013 citation was "dismissed without adjudication of guilt" on May 14, 2013. (SMF 155)

The only evidence of the City Clerk's receipt of any type of notice concerning the March and August 2013 citations is reflected in an August 23, 2013 email from Wendell Turner to Mr. Leaphart, with a "cc:" to Mr. Parker, Ms. Starling, and Rob Bryan, in which he wrote:

> FYI...attached is the list documenting violations for alcohol establishments during recent PD operations. Call Sgt. Patrick Harrelson if you have any questions. All were cited with a UTC.

(SMF 161) Mr. Turner's 8/23/2013 email forwarded a separate email from Bryan to Turner, Brunson, and other SPD employees, in which Mr. Bryan wrote, in part, as follows:

> The business [sic] listed below sold to Underage sources last night during the Alcohol Compliance Check, the business [sic] checked last night were licensed for on premises consumption. Attached is a copy of all business [sic] that were checked during the month of August. A total of 14 businesses were found to be in violation of State Law during the month of August. 21 were found to be in violation in March when the first round of compliance checks were conducted.

(SMF 162) The attachment to Bryan's email contained a spreadsheet prepared by Sgt. Patrick Harrelson which related to the City-wide 2013 compliance checks, containing the name of each

licensee, the date of attempted sale, the address of the licensee, and whether there was a sale. (SMF 163) However, the *actual UTC's* referenced by Mr. Turner were *not attached*, and the spreadsheets contain no information about the specific violations of law cited in each case, or the name of any individual who was cited. (SMF 165) There is no evidence that Ms. Starling ***ever*** received either the actual citations referenced in Turner's 8/23/2013 or any subsequent information from the municipal court. (SMF 166)

SPD employees also issued UTC's involving alleged violations of Section 6-88(c), concerning "noise or activity which is disturbing to the surrounding neighborhood," to the manager of Rude Rudy's on February 23, March 8, March 9, and May 4, 2014. (SMF 167) After becoming aware of the four "noise" citations and taking steps to ensure the bar made efforts to remedy the issue, SPD Major Scott Brunson recommended to Mr. Leaphart that the underlying criminal citations be dismissed or reduced to a warning. (SMF 168) Mr. Leaphart then exercised his prosecutorial discretion and dismissed the four noise ordinance citations, which were marked with a "warning" label. (SMF 169-170) There is also no evidence that Ms. Starling ever received written or actual notice of the noise citations, let alone copies of the UTC's or the final disposition at the municipal court level. (SMF 171-174)

There is no evidence any alcohol-related citations were issued to the licensee or employees of Rude Rudy's between May 6, 2014 and August 28, 2014.[7] (SMF 175) Also, there

[7] While Ms. Erickson apparently intends to testify, or otherwise assumes as part of her opinion, that there was no alcohol enforcement whatsoever in the City between 2009 and 2014 other than as described above, her testimony is contrary to the evidence in this action. In addition to the City-wide operations in July of 2011 and March and August of 2013, Special Agent Ron Huckaby of the DOR testified that he did quarterly "walk-through's" of establishments licensed to sell alcohol in his assigned district, which included Statesboro and each of the University Plaza Establishments. (Huckaby Dep. 66:16-68:21, 70:24-71:10, 140:19-12:10.) In addition, Tom Woodrum – the former Captain over the SPD's Patrol Division – testified that between 2011 and 2014 he personally continued to conduct "spot checks" of

is no evidence the DOR's Alcohol and Tobacco Division ***ever*** issued a citation involving alleged alcohol violations against Rude Rudy's or its employees between August 1, 2009 and August 28, 2014. (SMF 176-179)

7. **The Decedent's Arrest and Violation of His Pre-Trial Agreement.**

On July 4, 2014, the Decedent was arrested in Athens and charged with theft of services and underage possession or consumption of alcohol. (SMF 181,182) On August 5, 2014, he entered into a Pretrial Intervention Agreement whereby he agreed to, among other things: (a) **"not violate any criminal laws"; (b) "not drink or consume any alcoholic beverage or have any alcoholic beverages in your possession"; and (c) "not visit, enter, or contact any *bar*, liquor store, night club or *other location* whose primary purpose is the sale or distribution of alcoholic beverages."** (SMF 183)

It is undisputed that Rude Rudy's primary source of revenue came through the sale of alcohol. (SMF 184) It is also undisputed that: (1) the Decedent drank alcohol between August 5, 2014 and August 28, 2014; (2) the Decedent drank alcohol at Rude Rudy's and purchased alcohol for underage persons who were present there; (3) the Decedent did so through the use of a fake ID; (4) the Decedent was attacked and beaten by Spencer on August 28, 2014, ultimately dying from his injuries; and (5) just prior to the attack, the Decedent was standing at the bar, where he had been accused of attempting to steal tip money while trying to purchase additional alcoholic beverages. On October 11, 2016, Spencer pled guilty to voluntary manslaughter. (SMF 185-197)

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establishments licensed to sell alcohol, including those at University Plaza. (Woodrum Dep. at 49:9-52:20.) Moreover, as Plaintiffs' counsel is well aware, there is ample evidence of a consistent law enforcement presence at University Plaza during the referenced time period. (Weatherly Dep. 12:23-13:12; Harrelson Dep. 20:24-21:14; Riggs Dep. 101:16-102:3; York Dep. 36:6-37:22.)

C. **Procedural Posture and Remaining Claims.**

Plaintiffs filed a complaint initiating this action on October 26, 2016. Factually, the original complaint alleged the Decedent was killed due to injuries he sustained on August 27-28, 2014 while at Rude Rudy's. (Compl. ¶¶ 13-19.) Also alleged was a history of criminal activity which purportedly transpired at or around Rude Rudy's prior to the Decedent's injuries. (Id. ¶¶ 27-29.) Plaintiffs' allegations set forth an historical background concerning the enactment and enforcement of ordinances regulating the provision of alcohol by establishments within the City, including allegations that Ms. Starling failed to carry out her duties as the City Clerk in enforcing parts of the ordinances. (Id. ¶¶ 35-64.) Plaintiffs' ultimate allegation was that the Decedent's death at the hands of Grant Spencer, a former bouncer of Rude Rudy's, was the result of the City's and/or Ms. Starling's alleged failure to take action against *Rude Rudy's* alcohol license and/or to eliminate crime-related dangers to patrons such as the Decedent. (Id. ¶¶ 65-71.)

The original Complaint also contained two separate nuisance claims. Specifically, Count II alleged a claim based on the Defendants' acts and/or omissions in allowing *Rude Rudy's* to remain in operation. (Id. ¶¶ 83-89.) The original Count III alleged nuisance as well; however, as noted by the Court in its January 26, 2017 Order, substantially differed from the original Count II claim in that its allegations were not limited to Rude Rudy's, but broadly allege the creation of a "*City-wide environment*" by the enactment of changes to the City's ordinances. (Id. ¶¶ 91-102.)

Defendants filed a Motion for Judgment on the Pleadings, which this Court granted on January 26, 2017. In doing so, the Court dismissed the Count III nuisance claim, which alleged "that the ordinance changes created a dangerous environment at establishments in the municipality by encouraging the sale of alcohol at underage college students by licenses inclined

to place financial profit above the safety of its patrons and thus constituted a nuisance that was injurious to the invitees to the premises and the general public." (Jan. 26, 2017 Order at p. 9.)

In an attempt to circumvent the Court's order, Plaintiffs amended their Complaint, and have done so twice more. The operative complaint is the Third Amended Complaint ("TAC"). Plaintiffs' current negligence claims are based on the premises that (1) the City Clerk breached a duty to set due process hearings concerning alleged alcohol violation against Rude Rudy's (and other University Plaza bars) "upon her receipt of notice of violations" against those establishments (TAC ¶¶ 147-152), and (2) the City allowed the renewal of the "alcohol and business licenses of the University Plaza Establishments" notwithstanding alleged knowledge of "criminal and dangerous activity." (Id. ¶¶ 154-156.) Plaintiffs' operative nuisance claim differs from the Count II nuisance claim set forth within the original Complaint (but is quite like the original Count III nuisance claim)[8] insofar as it is not based on the mere licensing of Rude Rudy's, but rather on the licensing of Rude Rudy's and *three other businesses* – Retrievers, Rum Runners, and Rusty's Tavern – which are collectively referred to in the TAC as the "University Plaza Establishments." (TAC ¶¶ 24-54, 157-164). Specifically, the TAC alleges that the City and Ms. Starling had knowledge of criminal activity occurring at University Plaza prior to August 27-28, 2014; that despite this knowledge, they renewed the alcohol and business licenses of the University Plaza Establishments; by doing so, allegedly created a nuisance that "was injurious to the invitees to the premises, the citizens of the City of Statesboro, and the general public"; allegedly failed to "abate the nuisance by revoking the alcohol licenses and business

[8] As noted above, the original Count III was premised upon the assertion that the City's changes to its alcohol ordinances created a "dangerous environment at establishments in the City ...by encouraging the sale of alcohol to underage college students," resulting in danger to the safety of their patrons. Plaintiffs have attempted to disguise virtually the same claim by limiting it to establishments at University Plaza.

licenses" of the University Plaza Establishments; and allegedly proximately caused the Decedent's death. (Id. at ¶¶ 157-164).

**D. Plaintiffs' Expert Discovery Responses and Mr. Erickson's Opinions.**

As shown, Plaintiffs' amendments to the complaint asserted additional allegations regarding the environmental claims of the previously dismissed Count III. Plaintiffs' proffered expert, Ms. Erickson, continues the same vein according to Plaintiffs' Responses to Defendants' Interrogatory Number 5.[9] The subject matter upon which she is expected to testify is listed as "The relationship between the actions and inaction on the part of the City of Statesboro in the area of alcohol public policy, **including the City's legislative actions** and the enforcement of existing alcohol codes, and the likelihood of violence and unlawfulness at businesses serving alcohol." (Emphasis supplied.) A complete summary of Ms. Erickson's opinions is as follows:

> i. College towns: Cities known as "college towns"-with a high concentration and a large number of college and university students -are places where it is particularly important to be diligent in the adoption, retention and enforcement of laws designed to ensure public safety. Of particular importance are laws intended to ensure students' safety from dangers associated with: (1) underage and excessive drinking and (2) violence associated with the effectively unregulated operation of businesses licensed to sell alcohol close to campus.
>
> ii. Alcohol associated injuries: In the period of time encompassed within the 911 Dispatch reports provided to Erickson, [August 2009 through August 2014] there

[9] Ms. Erickson has apparently not rendered any written report. The only information regarding her opinions are those contained in Plaintiffs' Second, Third, Fourth and Fifth Supplemental Discovery Responses to Interrogatory #5. Defendants also sent Requests for Production of Documents to Plaintiffs related to any testifying expert. Defendants' Request 17 requested Plaintiffs produce "...any and all documents, reports, tapes recordings, data, summaries, and other tangible things (including, but not limited to, audio or video recordings and computer disks or files) submitted by you or on your behalf or received by you or on your behalf from any expert witness, including, but not limited to, any documents which evidence, reflect, or otherwise related to any facts provided by you or your attorney to the expert witness, any written report by the expert witness, or the substance of the facts and opinions to which he or she is expected to testify or which the potential expert would be expected to testify if retained to testify." Thus, in opposition to this motion, Plaintiffs may not use or rely on any materials not previously produced.

were an unreasonably large number of severe injuries reported to police. Despite the injuries' frequency and severity, they apparently did not result in the imposition of sanctions upon the alcohol license holders for the facilities studied. The City of Statesboro's failure to take action against the alcohol license holders would reasonably result in the alcohol license holders concluding that the City would tolerate incidents involving serious injuries.

iii. Foreseeability: Michael Gatto's beating and injury was the foreseeable result of the decision not to enforce of reasonable alcohol regulations.

iv. Increasing the Risk: Particular measures increased the risk of underage drinking and/or over-serving of alcohol and violence at the locations holding alcohol licenses. With the elimination of the Alcohol Control Board, the City Council was vested with the authority to sanction, suspend or revoke licenses to sell alcohol. The prolonged failure to present alleged violations of the alcohol code to city council or to otherwise take action against the establishments at University Plaza, and the concomitant failure by city council to consider the imposition of sanctions contributed to the risk of underage drinking, overconsumption, and violence. There were a number of alleged alcohol code violations which were the subject of citations issued by the City of Statesboro Police Department which, apparently by action of the City Attorney, were never prosecuted. The dismissal of charges at municipal court also increased the risk of underage drinking and violence at the locations licensed to sell alcohol.

v. Enforcement reduces Risk: If the City of Statesboro had retained and enforced reasonable and effective ordinances along with reasonable enforcement regimens designed to prevent sales of alcohol to minors and deter overconsumption of alcohol, it is unlikely that the violent death of Michael Gatto would have happened. And presumably the City could have responded to the reports of underage drinking and violence at the University Plaza businesses licensed to sell alcohol through one or another form of civil litigation. I have no information to the effect that this option was employed by the City with respect to the University Plaza businesses.

vi. Harm from underage and college drinking: While we have made great progress on underage drinking for younger age groups, drinking by college students remains stubbornly high. The consequences of harmful and underage college drinking are extensive and very serious. In its fact sheet on college drinking, the National Institute on Alcohol Abuse and Alcoholism reports annual deaths (1825), assaults (696,000), sexual assaults (97,000), academic problems (1 in 4 college students report academic consequences from drinking), alcohol use disorder (20% of college students meet the criteria for AUS). Source: NIAAA Fact Sheet available at www.nih.niaaa.gov.

vii. Factors impacting underage and college drinking: the NIAAA Fact Sheet, as well as many other credible sources, describe "the widespread availability of

alcohol, inconsistent enforcement of underage drinking laws, and limited interactions with parents and other adults..." Often college communities have clusters of bars which promote heavy drinking near but not on the campus. Thus, leadership and cooperation from the local community and the college administration is needed to effectively address drinking issues. Source: NIAAA Fact Sheet.

Strategies for Reducing Underage and College Drinking Problems

1. Comprehensive and Systematic: As with most social problems there is no silver bullet and a combination of multiple strategies is needed. With regard to underage drinking, the National Research Council, Institute of Medicine emphasized this point in their landmark study entitled, "Reducing Underage Drinking, A Collective Responsibility." ( 2003) Most of our citizens have a role including law enforcement, public health, parents, media, governments at all levels and students themselves.

2 . Leadership: Community leadership is essential to curtail excessive and underage drinking off campus even as college administrators also have a role to play. Unfortunately, because college-age youth are technically adults, they are often simply left to their own devices or subject to limited education programs that have little impact.

3 . Mix of strategies is most effective: NIAAA produces a website with helpful strategies categorized as those addressing the individual and those addressing the environment. They recommend a mix of both and provide a matrix with ratings on effectiveness and cost. That resource is available at:
http://www/collegedrinkingprevention.gov/college AIM.

4 . Specific strategies at issue in this case:

a . Enforcement of laws prohibiting sales to minors. Numerous sources indicate the effectiveness of performing compliance including the Centers for Disease Control's Community Prevention Task Force which evaluates research and makes policy recommendations. These recommendations are available at http://www.thecommunityguide.org/search/alcohol.

b . Maintaining a comprehensive and effective regimen of alcohol regulation. Ms. Erickson has written extensively on this topic particularly as it regards the United Kingdom's extensive deregulation and the alcohol epidemic which followed. Her reports and writings are available at www.healthyalcoholmarket.col11.

c . Requiring food service. To discuss this topic, Ms. Erickson will use her experience as the Executive Director of the Oregon Liquor Control Commission which included a regulation in the state constitution that liquor can only be served

in premises where food is cooked and served. She will also use research on factors relating to bar violence including the service of food.

d . Avoiding Violence and nuisance incidents in parking lots used by several premises. To discuss this topic, Ms. Erickson will use her experience as a regulator as well as research on bar violence.

e . Regulations related to serving practices and the age of employees and customers. As regards this topic, Ms. Erickson will use her experience as a regulator to describe measures necessary to prevent underage sales in these mixed environments.

In essence, Ms. Erickson's "opinions" attempt to usurp the legislative functions of the City's five-member, publicly-elected City Council, by opining about what laws it could or should have passed[10] and that the failure to take action against alcohol license holders foreseeably resulted in the death of Michael Joseph Gatto. The remainder of the "opinions" then turn to underage drinking by college-age persons and relies upon a Fact Sheet from the National Institute of Alcohol Abuse and Alcoholism. (See Plaintiffs' Second, Third, Fourth and Fifth Supplemental Responses to Defendants' Interrogatory 5, attached to this Motion as Exhibits A-D respectively.)[11]

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[10] Of course, Ms. Erickson lacks the ability to competently provide any expert testimony about whether a hypothetical motion, ordinance, or resolution to alter or amend the City's ordinances would have actually been passed, let alone what the public reaction to such proposals would have been. In fact, the Plaintiffs' discovery responses, which were required to set forth and describe the factual basis for Ms. Erickson's opinions, are silent as to this.

[11] Plaintiffs' counsel Brian Spears provided a privilege log on May 7, 2018 regarding communications to and *from Ms. Erickson.* A true and correct copy of the Privilege Log and the attachments to same is attached hereto as Exhibit "E". The belief of Plaintiffs' counsel must be that the facts he relayed and opinions used to influence the proffered expert must be "work product", such as the description of the case, the reply of the proffered expert to the case description, counsel's reference to the claims, communication of tasks, communications regarding theories (from Ms. Erickson), communication with counsel regarding "issues", and case preparation. All of these are noted to be work product. Additionally, Plaintiffs have represented to this Court that they did not intend to offer into evidence any of the dispatch summary reports or incident reports for the truth of the matter asserted. Specifically, in Plaintiffs' Response to Defendants' Original Motion in Limine, in an effort to defeat Defendants'

## E. Summary of the Argument.

The "opinions" of Ms. Erickson are conclusory and without foundation, irrelevant to the remaining claims, offer legal opinions that she is not qualified to provide and which are otherwise not admissible in Georgia, and would not aid the trier of fact. She opines that "Michael Gatto's beating and injury was the foreseeable result of the decision not to enforce of [sic] reasonable alcohol regulations." She continues the concept of legislative action or inaction by suggesting that without **"reasonable and effective ordinances along with reasonable enforcement regiments...it is unlikely that the violent death of Michael Gatto would have happened,"** even though the legislative "environmental" claim has been dismissed, and without providing any technical, scientific or other documents to support this statement. (Emphasis added.) In addition, Ms. Erickson relies upon "other credible sources" for her opinions but does not list or state what those are. No methodology whatsoever as to how Ms. Erickson reached any of her opinions, aside from apparently reviewing some websites with statistics on college-age drinking and strategies for reducing same, has been provided. She is a non-lawyer with no training about Georgia's municipal laws, rules, or regulations, and her opinion is based entirely on guesswork.

As set forth in greater detail below, the opinions of Ms. Erickson should be excluded in their entirety as they fall far well short of the exacting standards imposed pursuant to O.C.G.A.§

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motion to preclude the use of police incident reports, uniform traffic citations, EMS Reports and Dispatch Reports, they represented that "Plaintiffs will not be offering such evidence to prove the truth of the matter asserted in the records, and therefore, the records will not be susceptible to Defendants' hearsay objections." (See Plaintiffs' Response to Defendants' Motion in Limine, pg 2, 8-7-17.) They have however provided a listing of them, some compilations of information (presumably created by Plaintiffs' counsel) and supplied this to Ms. Erickson, who intends to rely on the information and testify that, as purportedly reflected in those reports, between 2009 and 2014 "there were an unreasonably large number of severe injuries reported to police."

24-7-702 and the gatekeeping analysis required by Daubert. For these reasons, the Court should grant Defendants' Motion and exclude the opinions of Ms. Erickson.

## APPLICABLE STANDARD OF REVIEW

### A. The Admissibility of Expert Testimony Under O.C.G.A.§ 24-7-702.

Expert testimony is appropriate, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue .... " O.C.G.A. § 24-7-702(b). An expert must be qualified "by knowledge, skill, experience, training, or education[,]" id., and may offer an opinion only if:

> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

O.C.G.A.§ 24-7-702(b). See also Moran v. Kia Motors Am., Inc., 276 Ga. App. 96, 97-8 (2005).

"If the data underlying the expert's opinion are so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded." Viking Yacht Co. v. Composites One LLC, 613 F. Supp. 2d 637, 643-44 (D.N.J. 2009). An expert's opinion should also be excluded when it is based on assumptions unsupported by the record. See Tyger Constr.Co. v. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1994). Further, an expert may not state a legal conclusion as to an ultimate issue in dispute. See Allen v. Columbus Bank & Trust Co., 244 Ga. App. 271, 277 (2000).[12] The determination of whether "a witness is qualified to render an opinion as an expert is a legal determination for the trial court and will not be

[12] In interpreting O.C.G.A. § 24-7-702, Georgia courts may draw upon from the opinions of the United States Supreme Court in Daubert and other federal courts applying the standards announced by the United States Supreme Court in these cases. See Cash v. LG Electronics, Inc., 342 Ga. App. 735 (2017). See also O.C.G.A.§ 24-7-702(f).

disturbed absent a manifest abuse of discretion." Moran v. Kia Motors America, 276 Ga. App. 96, 97 (2005).

"In determining the admissibility of expert testimony, the trial court acts as a gatekeeper, assessing both the witness' qualifications to testify in a particular area of expertise and the relevancy and reliability of the proffered testimony." Kumho Tire Co., supra, 526 U.S. at 141, 119 S.Ct. 1167. See also McDowell v. Brown, 392 F.3d 1283, 1298(IV) (11th Cir. 2004) (Daubert "impressed a gatekeeping role upon judges, and directed them to ensure that any and all scientific testimony or evidence is not only relevant, but reliable"); Cotten v. Phillips, 280 Ga. App. 280, 286 (2006) (recognizing trial court's role as gatekeeper of expert testimony). Reliability is examined through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training. See Kumho Tire Co., supra, 526 U.S. at 141; Daubert, supra, 509 U.S. at 592(II)(C); Moran, supra, 276 Ga.App. at 98. There are many kinds of experts and many different areas of expertise, and it follows that the test of reliability is a flexible one, the specific factors "neither necessarily nor exclusively applying to all experts in every case." Id. at 141. HNTB Georgia, Inc. v. Hamilton-King, 287 Ga. 641, 642-643, 697 (2010).

"[T]he importance of the trial court's gatekeeper role... cannot be overstated." United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004).

> [Daubert] ...is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field...The [trial] court's role is especially significant since the expert's opinion 'can be both powerful and quite misleading because of the difficulty in evaluating it...Indeed,

> no other kind of witness is free to opine about a complicated matter without any firsthand knowledge of the facts in the case, and based upon otherwise inadmissible hearsay if the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

Id. at 1260 (citations and punctuation omitted). Thus, regardless of an expert's experience or qualifications, the proffering party bears the burden of presenting evidence of reliability to meet the applicable standards. Mason, supra, 283 Ga. at 279–280. "To hold otherwise would eviscerate the trial court's gatekeeper role and allow all expert testimony, even that based on nothing more than the untested opinion of one individual." HNTB Georgia, Inc. at 645.

In fulling, this gatekeeping role, the trial court should note that:

> conclusions and methodology are not entirely distinct from one another.... [N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). Thus, when an expert opinion is based on data, a methodology, or studies that are inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable testimony. See Heller v. Shaw Indus., Inc., 167 F.3d 146, 153 (3d Cir. 1999). When considering qualifications, "the question before the trial court is specific, not general." Kumho Tire, 526 U.S. at 156. The qualifications must be specific to the opinions offered. See United States v. Brown, 415 F. 3d 1257, 1269 (11th Cir. 2005).

## ARGUMENT AND CITATION OF AUTHORITY

### Ms. Erickson's Opinions Should be Excluded

### A. The Proffered Opinions of Ms. Erickson Are Not Necessary to Assist the Trier of Fact and Should be Excluded Pursuant to O.C.G.A. § 24-7-702(b).

Expert testimony is appropriate only "[i]f scientific, technical, or other specialized knowledge *will assist the trier of fact* in any cause of action to understand the evidence or to

determine a fact in issue .... " O.C.G.A. § 24-7-702(b) (emphasis added). To make such a determination, this Court must determine what claims if any would be allowed to be presented to the jury. As noted in Defendants' Motion for Summary Judgment, the claims asserted for nuisance and negligence should be dismissed.[13]

But even if Plaintiffs' negligence and/or nuisance claims were to remain, none of Ms. Erickson's opinions can assist the trier of fact in regards to whether the City or Ms. Starling could or should have revoked an alcohol license, an occupational tax certificate, and/or breached a claimed ministerial duty that caused the death of Michael Gatto. As noted above, the remaining negligence claims are solely dependent upon whether: (1) the City Clerk failed to schedule due process hearings that she was made aware of; (2) the City negligently supervised Ms. Starling in connection with her duties; and (3) a nuisance existed at the "University Plaza Establishments" that the City could have abated and/or which proximately caused the Decedent's death. The only opinion Ms. Erickson seeks to offer that has any relevance at all towards these remaining claims is whether Michael Joseph Gatto's death was foreseeable, which for the reasons noted below is improper and she is unqualified to render.

Ms. Erickson's opinions are also not helpful towards assisting the trier of fact because she completely fails to account for the fact that decisions pertaining to the suspension or revocation of an alcohol license or an occupational tax certificate have been found to be "discretionary" and "governmental" as a matter of law. As explained in City of Albany v. Stanford, 815 S.E.2d 322, 327 (2018) (physical precedent only):

> the City [of Albany] was exercising a governmental function when it opted not to revoke the occupational tax certificate of Brick City. Activities that are undertaken primarily for public benefit rather than for revenue production are

[13] Defendants incorporate by reference their Motion for Summary Judgment and Theories of the Case and Material Facts Not in Dispute.

governmental functions' and the City of shielded from a nuisance claim by sovereign immunity.[14] Simply put, a municipality's issuance [or revocation] of a permit or license is a governmental function. (citing) Calloway v. City of Warner Robins, 336 Ga. App. 714, 715 (1) (a) (2016).[15]

While Plaintiffs and Ms. Erickson apparently believe both the City and Ms. Starling could simply revoke an alcohol license or occupational tax certificate, such actions are subject to sovereign immunity and the Defendants may not be held liable for the failure to revoke. Additionally, as reflected in Defendants' motion for summary judgment, the act of revoking an occupational tax certificate and alcohol license impacts the property interests of the license holders, such that a municipality or city clerk may not simply revoke same without certain abrogation of property rights held by the license holders, and even if a license was revoked, the possibility of an appeal would remain. Ms. Erickson's opinion would only confuse, and would not assist the trier of fact, because she fails to account for any of these factors.

In addition, even if an ordinance-related "environmental" claim remained, the "relationship between the City of Statesboro's [alleged] actions and inaction in the area of alcohol public policy, including the City's legislative actions and enforcement of its existing alcohol codes, and the likelihood of violence and unlawfulness at businesses serving alcohol" would not require any expertise to assess. The Court's job, not the expert's job, is the instruct the jury on the actual ordinances that were in place between 2009 and 2014, and what those

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[14] See also City of Atlanta v. Durham, 324 Ga. App. 563, 565 (2013) (demolition of a house claimed to be a nuisance was a government function). See also Mayor and Aldermen of City of Savannah v. Jones, 149 Ga. 139, 139 (99 SE 294) (1919) (performance of a duty connected with the preservation of the public health is a governmental function).

[15] In the concurring opinion, Justice Gobell wrote "**Notably, however, I am aware of *no case* in which Georgia's appellate courts have found a municipality liable for a private nuisance where the alleged nuisance resulted in personal injury to a member of the public, as opposed to the owner or occupier of the property...[In addition,] we have been shown *no cases* finding that the municipality exception to sovereign immunity applies to a claim for a public nuisance.**" Stanford, 815 S.E.2d at 330, n. 3 (Emphasis added).

ordinances required of the Defendants. In addition, while Ms. Erickson believes different or better ordinances could have been passed, she fails to account for the unique minds of the five-member City Council, let alone whether the public would have accepted the types of ordinances that she – a non-resident of Bulloch County – would prefer. Basically, Ms. Erickson's past vague experience as a "regulator" in other states somehow transforms her into the realm of fortune teller. Daubert and its progeny require much more.

The speculation and unfounded conjecture continues under Section "c" of Ms. Erickson's opinions, in which she surmises that "College Towns"—defined as those with a high concentration and a large number of college and university students—are places where it is "particularly important to be diligent in the adoption, retention and enforcement of laws designed to ensure public safety." One must raise the question "what, if anything, does this opinion have to do with the actual remaining claims in this case?" Moreover, such an opinion requires no expertise, as most, if not all jurors, would have a basic understanding of the importance of laws intended to "ensure students' safety from dangers associated with (1) underage and excessive drinking and (2) violence associated with the effectively underregulated operation of businesses licensed to sell alcohol close to campus."

What Ms. Erickson's opinion also fails to acknowledge is that the City in conjunction with the State of Georgia actually *does* regulate and always *has* regulated the license holders who provide and sell alcohol, as reflected in the statement of facts set forth above. No scientific evidence from a purported expert is needed to inform the jury about the City ordinances or the Official Code of Georgia – this is the Court's job. As this Court has previously ruled, this is not a case about what type of legislation the City could have had, should have had, or wished it could

have in the mind of Ms. Erickson. Since the former Count III claim has been dismissed, the vast majority of Ms. Erickson's testimony would not assist the jury at all.[16]

In addition, while Ms. Erickson opines that "[i]f the City ... had retained and enforced reasonable and effective ordinances along with reasonable enforcement regimens designed to prevent sales of alcohol to minors and deter overconsumption of alcohol, it is unlikely that the violent death of Michael Gatto would have happened," she completely fails to identify what types of ordinances would have been "effective" or "reasonable," let alone what is meant by "reasonable enforcement regimens" had there been this vague set of better laws. There is no possible way that this speculative, unreliable testimony would assist the trier of fact. It merely represents the ramblings of a hired regulator to espouse her belief against the sale of alcohol anywhere.

Finally, Ms. Erickson's opinions concerning additional or different "Strategies for Reducing Underage and College Drinking Problems" is nothing more than an **infomercial** for what she peddles. This type of opinion is completely irrelevant to each of the remaining claims, and has no probative value at all because it has nothing to do with whether the City or Ms. Starling was negligent in the scheduling of due process hearings, whether the City could or

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[16] Ms. Erickson sprinkles in "legislative action and inaction" throughout her opinions. For example, she opines that "Michael Gatto's beating and injury was the foreseeable result of the decision not to enforce of reasonable alcohol regulations" and opines that the legislative abolition of the ACB also impacted sales of food and alcohol and violence at University Plaza. She also opines that the decision of the City Attorney not to prosecute the July 2011 citations increased the risks of injury. What is lacking however is how or why these actions actually and in fact increased the risk to Michael Gatto that an off-duty bouncer would beat him to death on August 28, 2014 at Rude Rudy's. As noted above, **none of the citations in July 2011 even *involved* sales to underage persons, let alone a type of violence**. And of course, there is no evidence whatsoever that Mr. Spencer was somehow motivated to attack Michael Joseph Gatto on August 28, 2014 ***because of*** the dismissal of citations that happened **years before** he was even employed at Rude Rudy's.

should have revoked an alcohol license or occupational tax certificate, and whether or not any nuisance existed and/or was the proximate cause of Mr. Gatto's death.

**B. Ms. Erickson is Not Qualified to Render Her Opinions.**

Ms. Erickson is not qualified to render opinions as an expert in this matter. As noted above, when considering the qualifications of an expert, "the question before the trial court is specific, not general." Kumho Tire, 526 U.S. at 156. The qualifications of the expert must be specific to the opinions offered. See United States v. Brown, 415 F. 3d 1257, 1269 (11th Cir. 2005). Here, an examination of the qualifications proves there is far too great an analytical gap between the actual "data" and the opinions of Ms. Erickson. Plaintiffs bear the burden of demonstrating the qualifications and competence of the expert proffered.

An examination of the information supplied by Plaintiffs regarding Ms. Erickson in their Fifth Supplemental Responses to Interrogatory No. 5 reveals a complete lack of anything to establish her qualifications to provide the opinions at issue.[17] According to the interrogatory response, Ms. Erickson is the CEO of "Public Action Management, P.L.C.," which has a **Nevada** address, and she previously served as the "Executive Director of the **Oregon** Liquor Commission which included a regulation in the state constitution that liquor can only be served in premises where food is cooked and served." (See Ex.'s A-D.) Other than that, no information has been provided, not even a *Curriculum Vitai*, even though Ms. Erickson claims to have spent several

[17] "The Court's 'gatekeeping' obligation applies not only to 'scientific' testimony but all expert testimony." Kumho Tire, supra at 137. This is a critical function and requires an "exacting analysis" of the foundations of expert opinions to ensure they meet the standards of admissibility. Kumho Tire at 147. "It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." 526 U.S. at 152. The trial court's role is especially significant since the expert's opinion "**can be both powerful and quite *misleading* because of the difficulty in evaluating it.**" Daubert, 509 U.S. at 595 (emphasis added); U.S. v. Frazier, 387 F.3d 1244, 1259 (2004).

hours revising one specific to this case. (See Exhibit "F", invoice from Erickson dated January 18, 2018 to Brian Spears, with entries for "reviewed/revised Curriculum Vitai for case 0.5"; Worked on revised CV and researched needs for additional information 1" and "Completed CV, reviewed sources for prevention of violence in bars 2"). Presumably one can only conclude that Plaintiffs do not intend for Ms. Erickson to testify as to her qualifications and her CV because they did not deem it necessary to provide any information as to Ms. Erickson's qualifications up to the date of this Motion, aside from referencing her experience as a former "regulator."[18] .

Ms. Erickson also has no training whatsoever as a lawyer, let alone any degree, practical job-related experience, or expertise specific to *Georgia* municipal law or *Georgia's* regulations related to alcohol. Nevertheless, she attempts to opine that "presumably the City could have responded to the reports of underage drinking and violence at the University Plaza businesses licensed to sell alcohol through one or another form of civil litigation." There is also no information provided to support that she is in any respect familiar with the City Charter, the City's process and procedure for enacting ordinances, and the members of the voting public of the City of Statesboro, Bulloch County, or the State of Georgia. **She is *completely* unqualified to render such opinions.** As a non-lawyer, non-municipal expert, and a fortune teller, Ms. Erickson utterly fails to meet the exacting standard required by Daubert.

No information whatsoever has been provided to establish how or why Ms. Erickson has the ability to testify that "Michael Gatto's beating and injury was the foreseeable result of the decision not to enforce of [sic] reasonable alcohol regulations." How does Ms. Erickson's experience as a former regulator in Oregon have any bearing on her ability to testify about issues pertaining to proximate cause with respect to the beating death of Michael Joseph Gatto by Grant

[18] Plaintiffs should be prohibited from now attempting to offer her qualifications when they have had such information for well over a year.

Spencer in Bulloch County? Does she in any relevant respect consider the family, educational, societal, or employment background of Mr. Spencer, the convicted felon, let alone the background of Mr. Gatto? **Absolutely not.**

Having clearly not met their burden of establishing the qualifications of Ms. Erickson as Plaintiffs' proffered expert, this Court need look no further in excluding her from testifying and granting this Motion, and precluding the use of an affidavit or other form of testimony from Ms. Erickson at summary judgment. **It would be *reversible error* for this Court to admit the testimony of Ms. Erickson.** This is junk science at its lowest form.

**C. The Test of Reliability Mandates that the Proffered Opinions of Ms. Erickson Should be Excluded.**

The opinions of Ms. Erickson likewise show the complete lack of foundational support and her lack of methodology in reaching her conclusions. She employs no scientific or legal connections to the actual undisputed facts of the case. There is "simply too great an analytical gap between the data and the opinion proffered" and, as here, where the expected testimony "rests upon mere assumption" and "circumstantial evidence," Hawkins, 290 Ga. App. at 893, or where "the record indicates that the expert failed to consider necessary factors or that [her] analysis rests on faulty assumptions the testimony must be excluded."

An examination of the opinions and "substance of facts and/or opinions" of Ms. Erickson quickly shows there is no scientific or legal foundation for her conclusions and assumptions, and that they are tethered to an alternate reality entirely separate from the actual evidence of this case. A careful look at each one of opinions supports this conclusion.

i. "College towns": Nowhere does Ms. Erickson define with an actual percentage of the population what may constitute a "college town." Ms. Erickson does not reflect or offer any insight into the number of students who attend college within the city limits of the City. Ms.

Erickson does not opine as to what is meant by the term "excessive drinking" nor does she relate any statistical information in regards to "violence associated with the effectively unregulated operation of businesses licensed to sell alcohol close to campus." Ms. Erickson does not define what is meant by the term "effectively unregulated operation of businesses." Obviously, the City enacted ordinances applicable to the regulation of businesses that sell alcohol and has been doing so for years. Additionally, the State of Georgia has enacted laws regarding the regulation and sale of alcohol and has been doing so for years. In addition, both the SPD and the DOR conducted compliance checks and other "spot checks" or "walk throughs" of the University Plaza Establishments, and citations were issued on various occasions, during the time period she claims the businesses were simply "unregulated." It is an incorrect statement and assumption by Ms. Erickson to even *imply* that businesses within the City are completely unregulated in regards to their alcohol-related business practices.

ii. Alcohol associated injuries and iii. Foreseeability: In these particular opinions and conjecture, Ms. Erickson relies upon reports from a 911 dispatch center showing that from August 2009 through August 2014, there were "an unreasonably large number of severe injuries reported to police." As this Court is aware, the incident involving Michael Joseph Gatto occurred at Rude Rudy's on August 28, 2014. Yet Ms. Erickson does not supply any factual data in regards to the type of incidences involving violence at *Rude Rudy's* specifically. Ms. Erickson does not define what would be "an unreasonably large number of severe injuries," nor does she confine this speculative statement to Rude Rudy's. Further, while she claims that events such as the abolition of the ACB and the dismissal of citations in July of 2011 may have led to an increase in violence, there is no indication that she actually studied – **let alone even *considered*** – the rate of "severe injuries" at University Plaza or anywhere else in the City during any period of

time ***prior*** to the period of 2009 to 2014. In other words, this is simply an opinion without any foundation.

In order to meet the exacting standard, one would at the bare minimum have expected Ms. Erickson to have offered a statistical analysis revealing what *types* of injuries occurred, the *circumstances* of each injury, the specific *location* of each injury, the *number* of injuries per population, and what number of injuries had occurred in the *previous five years* from 2003 to 2009, given that her opinions relate to the five-year period of 2009-2014. Moreover, to state the obvious, this case involves the beating death of Michael Joseph Gatto. Yet, nowhere in the information supplied regarding the proffered expert's expected testimony is there any statistical data showing how often someone had been beaten to death inside *Rude Rudy's* or any other establishment, let alone an analysis of any *substantially similar* incidents.[19]

Also problematic is the fact that the incident reports and dispatch summary reports simply reflect that there may have been a call to the police to appear at a given location without describing the circumstances under which someone may have claimed to have been injured. Many of these incidents occurred in parking lots *outside* of the location of Rude Rudy's. While the Defendants contend there is no viable nuisance claim available to the Plaintiffs, in essence the opinions of Ms. Erickson appear to reflect more of a premises liability type of foreseeability than anything else. As reflected in the City's contemporaneously-filed motion in limine,

[19] An examination of the information supplied regarding the "incident reports" which Plaintiffs have already acknowledged would not be offered for the truth of the matter asserted, shows only the one event involving Michael Joseph Gatto resulting in the death of an individual. Jon Starkey, owner of rude Rudy's, testified that employees of Rude Rudy's had escorted hundreds of people out of the bar prior to Michael Gatto's death without incident or injury. (Starkey Dep. at 28-30). One other person was injured when someone stepped on his hand while at Rude Rudy's. (Id.)

generally, it is not permissible, for establishing whether a condition at one place is dangerous, to show conditions at places other than the one in question.

In Raines v. Maughan, 312 Ga. App. 303, 306 (2011), a highly instructive case, the proffered expert attempted to testify about the content of certain service call lists, on which the expert had relied in forming his opinion about the adequacy of security at an apartment complex. The service call lists reflected all request for police officers to respond to the apartment complex and other locations within 1 mile of the complex in the five years preceding the murder of Raines' son and show more than 5800 requests for police assistance. With respect to requests originating in the complex itself, the list include a unique incident number for each request, a numeric code indicating the nature of each request, and the date and location of each request. For requests originating outside the complex, the list included an incident number, the number, street address, and general description of each request and the, confusingly enough, multiple dates and times and an unidentified code for each request. As such, the trial court allowed that the expert properly could base his opinions on these lists but refused to admit *the list themselves* of any testimony about their content, noting that the lists "contain multiple layers of hearsay, references to incidents of questionable are no relevance, and numerous unexplained codes and data." Raines, id. at 306-307. The same is true here.

"An expert properly may base his opinion on inadmissible facts and data, so long as those facts and data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Raines, 312 Ga. App. at 306-07.

> But the inadmissible facts and data upon which an expert relies are not rendered admissible simply because an expert has relied upon them. To the contrary, such facts and data remain inadmissible unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect...Raines has made no showing that the circumstances of the various incidents reflected on the lists are substantially similar to the murder of

> her son, such that they would bear directly upon the question of foreseeability... Moreover, the lists are confusing, and substantial explanation would have been required for the jury to understand them. These reasons are enough to warrant the exclusion of the content of the service call lists.

Raines, Id. at 307.

Just as with the opinions of Ms. Erickson, the expert in Raines attempted to opine that the murder of her son was foreseeable and that security deficiencies at the complex were the proximate cause of his death. The Court of Appeals noted "[W]e have explained before that [e]xpert opinion testimonial issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors could not ordinarily be able to draw for themselves,' or, put another way, where 'the conclusion is beyond the ken of the average layman."[20] But "where the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge, and ... the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony." Id. (Citing Carlock, 227 Ga.App. at 361(3)(b)). "In other words, an expert cannot opine on the ultimate issue when the jury could reach the same conclusion on its own." Id. at 307-308 (Holding that expert could not testify as to foreseeability of injury) (emphasis added).

Here, as in Raines and Carlock, Plaintiffs are offering a purported expert to testify based on inadmissible incident reports and dispatch summary reports (as well as EMS records maintained not by the City, but by Bulloch County) and reach conclusions as to foreseeability of the City and Ms. Starling to know that Michael Joseph Gatto would be beaten on August 28, 2014 while in Rude Rudy's by an off-duty bouncer. Of course, Ms. Erickson completely fails to

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[20] See Carlock v. Kmart Corp., 227 Ga.App. 356, 361(3)(b) (1997) (refusing to allow expert to testify that attempted robbery and murder near shopping center was foreseeable); Thurman v. Applebrook Country Dayschool, Inc., 278 Ga. 784, 787(2) (2004).

recognize in her opinions that Mr. Gatto had agreed, pursuant to a pretrial intervention program agreement, not to enter establishments like Rude Rudy's and not to drink alcohol or otherwise violate the law. Moreover, there is no evidence of any other murder or attack of this type under similar circumstances occurring at Rude Rudy's prior to August 28, 2014.[21]

For Ms. Erickson to opine that the death of Michael Joseph Gatto was foreseeable, because of the "incidents" of serious injury being greater (greater than what one must ask), and without any consideration whatsoever of whether the City's pre-2009 ordinance and penalty scheme, which included the ACB, had resulted in injuries of a less severe nature and of a lower frequency during the five-year period prior, let alone the backgrounds of Mr. Spencer and Mr. Gatto, does not meet Daubert's or O.C.G.A. § 24-7-702's exacting standards. There is simply far too great an analytical gap between Ms. Erickson's conclusory opinions and the facts. Also, the jury would be able to assess the facts of this case without the assistance of Ms. Erickson's unfounded and unsubstantiated opinions. As such her opinions regarding "alcohol associated injuries" should be stricken in their entirety and excluded.

iv. Increasing the Risk; v. Enforcement Reduces Risk: In these opinions, we are left again with nothing but conclusions without foundation in support. Ms. Erickson opines that "[p]articular measures increased the risk of underage drinking and/or over-serving of alcohol and violence at the locations holding alcohol licenses," yet she does not provide any insight into what

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[21] In addition, Ms. Erickson completely fails to note while Section 6-88(c) of both the City's Pre-December 6, 2011 Ordinances and the December 6, 2011 Ordinances provided that "No licensee shall permit on the licensed premises any disorderly conduct, breach of peace, or noise or activity which is disturbing to the surrounding neighborhood," no provision set forth in the City's ordinance prohibited: (1) fights or other criminal activity which were not disturbing to the surrounding neighborhood; or (2) fights or criminal activity in parking lots or other spaces that are not "on the premises." Instead, she simply assumes that this type of activity actually could have led to a citation or punishment against the actual businesses. (See Ex. C, Erickson Opinion, "Despite the injuries' frequency and severity, they apparently did not result in the imposition of sanctions upon the alcohol license holders for the facilities studied.").

the "particular measures" were or how these undefined measures increased the risk of underage drinking or over serving of alcohol and violence. There is no scientific or legal study or examination referenced which reveals an increase in underage drinking or over-serving alcohol or violence, much less applied to the City on August 27-28, 2014. Certainly, the elimination of the ACB in and of itself could not have increased the risk that Michael Joseph Gatto would have died on August 28, 2014 at the hands of an off-duty bouncer since, as noted above, the ACB only had recommendation authority. The actual authority to issue fines and sanctions always lay with the City Council and Mayor, as well as the Municipal Court. Moreover, Ms. Erickson fails to demonstrate by any scientific, legal, or other specialized method that the elimination of the ACB increased the risk that Michael Joseph Gatto would be killed at the hands of an off-duty bouncer at Rude Rudy's on August 28, 2014.[22] [23]

Ms. Erickson opines that if the City had retained and enforced "reasonable and effective ordinances along with reasonable regimens designed to prevent sales of alcohol to minor and deter overconsumption of alcohol, it is unlikely that the violent death of Michael Gatto would have happened." Again, Ms. Erickson is suggesting a different legislative pathway and is speculating without any support that had different legislation been in place – without the

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[22] In addition, while Plaintiffs have tirelessly attempted to make this case about alcohol enforcement, they have not actually proven that Michael Joseph Gatto's injury was related to alcohol. What we understand is that he was attacked while attempting to purchase alcohol for his friends even though he was 18, and was accused of stealing tip money from the bar, prompting the attack, but there is no evidence that the attack happened *because* either he or Mr. Spencer was drinking alcohol. This is not an alcohol case, but rather a case about why certain places licensed to sell alcohol *were not punished* based on past business practices.

[23] And how would a person with Ms. Erickson's background – not in law enforcement – have any idea how to credibly offer such an opinion? In addition, how is she qualified to opine that commercial real estate developments like University Plaza, which share a parking lot, is the type of place where nuisance abatement actions are important?

analytical foundation of whether such legislation was even possible, let alone whether it would have been passed and stayed in place, which is rebutted by the evidence in this case, showing that the City's ordinances were constantly being changed – Michael Joseph Gatto would be alive today. As noted earlier, this Court dismissed claims involving legislation allegedly preventing a foreseeable risk of injury. But even if such a claim had not been dismissed, there is no viable methodology by which Ms. Erickson could set forth such an opinion.[24]

Ms. Erickson also opines that "[t]he prolonged failure to present alleged violations of the alcohol code to city council or to otherwise take action against the establishments at University Plaza, and the concomitant failure by city council to consider the imposition of sanctions contributed to the risk of underage drinking, overconsumption, and violence." But Ms. Erickson fails to take into account the *process* by which the City Clerk received notice of alleged violations, and the lack of evidence to *show this occurred.*[25] Once again this opinion is

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[24] Presumably she would be relying upon her strategies for reducing underage college drinking, which centers around possible theories which are designed to play upon the sympathies of jurors as opposed to an acceptable scientific method or specialized knowledge. Once again the jury could determine what may or may not have caused the death of Michael Joseph Gatto without the opinions of Ms. Erickson. She even suggests that the City could have utilized "one or another form of civil litigation" as a method to respond to reports of underage drinking and violence at University Plaza businesses license that sold alcohol. However, she does not delineate what type of civil litigation the City could commence or whether it would have likely been successful, which is of course not surprising since **she is not a lawyer and has no legal training**. She also completely fails to consider the requirements of due process and the avenues for appeal.

[25] If this court were to examine the sting operations conducted by the DOR, it would notice that Rude Rudy's was not cited for *any* violation of the State alcohol laws. This included underage sale of alcohol. Only once did the DOR cite anything at the location of Rude Rudy's. This involved a citation to a patron who was charged with underage possession of alcohol. Ron Huckaby, DOR Special Agent, testified that this is the only writeup of a citation by the DOR at the location of Rude Rudy's between 8-1-2009 and 8-28-14 and it was not against Rude Rudy's or any of its employees. (See Huckaby Dep. at 50:11-51:23; 73:18-74:4; 117:6-119:19, 20-120:9) Further during the 12-month period of time preceding October 17, 2014, the DOR did not issue a citation that alleged alcohol violations involving the businesses at University Plaza.

unsupported by any scientific method or reliable standards, none of which are actually necessary – either there was notice or there wasn't – this is not a subject of expert testimony.

Since Ms. Erickson had not identified any specific facts upon which she relied or the method of correlating any facts to her conclusory opinions about the death of Michael Gatto, this Court is not required to speculate as to how Ms. Erickson reached her opinions. This is hardly the exacting standard required under O.C.G.A.§24-7-702 and Daubert. Nevertheless, Defendants believe it important for the Court in conducting the exacting analysis necessary to consider Ms. Erickson's proffered opinions.

Ms. Erickson opines that failure of the City Council to consider sanctions, citations which were never prosecuted and dismissed at the municipal court level, *all* increased the risk of underage drinking and violence at locations licensed to sell alcohol. What Ms. Erickson fails to do is set forth *how* the risks increased and *what method* she evaluated that risks increased at all of the establishments licensed to sell alcohol in the City. Again, ***none*** of the citations dismissed in July 2011 had anything to do with ***underage drinking***, let alone ***violence***. This Court is therefore left with a conclusion without any foundation whatsoever. Moreover, there is no evidence that any citations involving alleged violations of the December 6, 2011 Ordinances alleging violations of state alcohol laws, such as the unlawful sale of alcohol to an underage person, were issued to the licensee or employees of Rude Rudy's between March 29, 2013 and March 7, 2014.[26] [27] She also fails to take into consideration the various personnel changes in the City

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(Huckaby Dep. 130:1-10.) When asked at his deposition, "So, even though there was a period where you – your agency wasn't prosecuting matters in the Statesboro municipal court, it's not like there were all these incident reports involving businesses at University Plaza that weren't making their way into the City, right?", Agent Huckaby responded, "No. What you have is actually what we - - what we done." (Huckaby Dep. 140:5-13.)

[26] Ms. Erickson also completely ignores, and failed to even consider, the testimony of the

between 2008 and 2010.[28] In addition, there is of course no evidence whatsoever that any of the above had any impact whatsoever on Grant Spencer's decision to attack Mr. Gatto on August 28, 2014.

Given this, the assumptions made by Ms. Erickson are premised upon information that does not accurately depict the facts. Ms. Erickson also fails to mention the facts surrounding and concerning a forwarded e-mail from Wendell Turner dated 8-23-13 of Rob Bryan's email. All of the above is missing from Ms. Erickson's opinions. The jury does not need to rely upon a

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two former City Attorneys, Michael Graves and Alvin Leaphart, and their testimony of why certain citations may not have been heard or dismissed. What is even more concerning is the lack of reference by Ms. Erickson to the sequence of events *leading up* to the citations not being heard by the City Council. According to the information she claims to have relied upon when actually rendering her opinions, she did not even read the testimony of Ms. Starling, Michael Graves, or Alvin Leaphart, let alone any of the current or former SPD employees deposed in this action. That is incredible, given her "expert" opinions. Instead, she was provided selected portions of items from Plaintiffs' counsel. She also fails to take into consideration the various personnel changes in the City between 2008 and 2010.

[27] Had she read the 40-plus depositions in this action, Ms. Erickson would have learned that there is no record evidence which demonstrates that Ms. Starling ever received written notice of the nature of the alleged violations concerning Rude Rudy's issued by the SPD in July 2011 prior to August 28, 2014. (Leaphart Dep. 200:2-6; Turner Dep. 148:23-149:7.) There is also no record evidence which demonstrates that Ms. Starling ever received actual notice of nature of the alleged violations concerning Rude Rudy's issued by SPD in July 2011 prior to August 28, 2014. There is no record evidence which demonstrates that Starling ever received copies notice of any information from the City's municipal court regarding the dismissal by Leaphart of the alleged violations concerning Rude Rudy's issued by the Statesboro Police Department in July 2011 prior to August 28, 2014. There is also no record evidence that she ever received written or actual notice of the "noise" warnings issued to Rude Rudy's between February and May of 2014.

[28] Robert Cheshire was the Interim City Manager in July, 2014 after Mr. Parker left. Mr. Cheshire was tasked with looking into why the City Council had not received administrative hearings for several years. In this regard, Ms. Cheshire conducted research, interviews and prepared a report to the Mayor and City Council. (See Cheshire dep. 18:2-24; 19:6-11, 19-21; 20:2-5, 21:20-22; 22:4-13; 22:14- 23:11; 24:17-25:2). That report notes that many *personnel changes*, rather than ordinance changes or the dismissal of alcohol-relate citations, may have contributed to the lack of hearings before Mayor and Council. Ms. Erickson neither considered nor was even provided a copy of this report, according to the discovery responses.

regulator's conjecture to determine whether Ms. Starling and the City could have reasonably foreseen that Michael Gatto would have been beaten to death by an off-duty bouncer on August 28, 2014 (an impossible conclusion to reach). In fact, the evidence shows that the neither the City nor Ms. Starling were ever supplied sufficient detail of the various citations and even if they had, it would not have created a situation in which Rude Rudy's would have been closed on August 28, 2014, let alone that they would or should have foreseen the beating death of an underage person who had been court-ordered to avoid places like Rude Rudy's. There is no reliable specialized knowledge put forth by Ms. Erickson in this regard.

vi. Harm from underage drinking and college drinking: vii: Factors impacting underage and college drinking: Ms. Erickson relies upon a "Fact Sheet" issued by the National Institute on Alcohol Abuse and Alcoholism without listing which Fact Sheet. Assuming it is the one referencing alcohol-related deaths, the deaths listed in Ms. Erickson's expected testimony (1,825) include those stemming from motor vehicle crashes, without reference to whether the person was driving or a passenger or in innocent victim of the crash, let alone was precipitated by the victim going to a bar like Rude Rudy's; the assaults listed (696,000) do not report any circumstances of how the perpetrator consumes the alcohol, such as store-bought, illegally-obtained, in or not in a bar, etc.); and the same lack of specificity is noted in the students who were the "victim" of sexual assaults and those who qualify for alcohol use disorder.[29] Ms. Erickson does not allow how these reported numbers actually relate to the specific facts and

[29] Unless Plaintiffs are willing to somehow admit that Michael Joseph Gatto was the victim of a *sexual* assault and/or had an alcohol abuse disorder, this testimony is irrelevant to any triable issue. Defendants would concede, however, that Michael Joseph Gatto was a serial consumer of alcohol, if not an addict, and that his parents condoned in this virtually every weekend of his high school career, which are additional facts the "expert" ignores as contributory factors despite the studies she cites referencing the impact of parents on their children's usage and abuse of alcohol.

claims in the Gatto case. It is unknown how many of the persons drinking alcohol in this "Fact Sheet" were of legal drinking age (it covers ages 18-24); how many had drinks at their homes; what was the legislation where the alcohol consumers lived and the enforcement there of alcohol-related laws; what type of injuries are being referenced; whether any of the "victims" were, like Michael Joseph Gatto, under the terms of a pretrial intervention program agreement; and how many involved assaults to the head and subsequent droppings on the floor of a bar and, later, a parking lot, resulting in death by a murderer. In the absence of this, the testimony regarding the "Fact Sheet" has no probative value to the case and should be excluded.

The remaining portion of Ms. Erickson's testimony concerns "Strategies for Reducing Underage and College Drinking Problems (see part vul.) This is again an infomercial for what Ms. Erickson peddles. She notes that "most of our citizens have a role including law enforcement, public health, parents, media, governments at all levels and students themselves." It goes further to suggest new legislation that she would recommend (see items b, c and e) without referencing a particular law, fails to identify with any specificity what the research is on "bar violence" and its correlation to Rude Rudy's nor do the topics describe the "measures" she believes are necessary to prevent underage sales. As noted throughout this Memorandum, Plaintiffs do not relay what such measures are, nor the research she references even though they have the burden to do so. As such, this Court must exclude this testimony and bar Ms. Erickson from testifying in this trial.

**D. Ms. Erickson's Opinions Are Legal Conclusions and Legal Implications and as Such Should be Excluded.**

An expert whose opinions are otherwise admissible (not the case before this Court) "may not merely tell the jury what result to reach and may not testify to the legal implications of conduct." Montgomery v. Aetna Casualty & Surety Co., 898 F.2d 1537,1541 (II) (B) (11th Cir.

1990)"; Clayton County v. Segrest, 333 Ga. App. 85, 91 (2015). Ms. Erickson's opinion surround the concept that "it is highly unlikely that the violent death of Michael Gatto would have happened;" "Michael Gatto's beating an injury was a foreseeable result of the decision not to enforce reasonable alcohol regulations." Besides the various reasons already set forth herein for exclusion of the testimony or opinions of Ms. Erickson, this Court should also exclude the testimony based on the legal conclusions she has drawn. In essence, Ms. Erickson is telling the jury what result to reach and would therefore be inadmissible testimony if this were a live trial. The issue of foreseeability is an essential element of the Plaintiffs' claims. Ms. Erickson is opining as to the element of the claim which lies within the sole province of the jury.

"[E]xpert testimony that usurps either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it by definition does not aid the jury in making a decision; rather, it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's. Nimely v. City of New York , 414 F.3d 381, 397 (2d Cir. 2005). The opinions of Ms. Erickson are filled with blanket generalizations, unsupported assumptions and fail to take into account any alternative possibilities for the death of Michael Joseph Gatto.[30] She offers no actual method for her conclusions other than we should take her word for it as a regulator. Such is not permitted and she should be excluded from testifying in this matter.

## CONCLUSION

This Court should grant Defendants' Motion to Exclude the Proffered Expert of the Plaintiffs' Ms. Erickson based on O.C.G.A. § 24-7-702 and the Daubert standards. In the event

[30] Ms. Erickson is silent as the actions of Grant Spencer, who killed Michael Gatto; is silent as to the fact Michael Gatto, only weeks before he was killed, was under a Court order not to enter an establishment that's primary purpose was serving alcohol or that he could not violate the law such as using a fake ID.

this Court deems it necessary to inquire further into the competency of Ms. Erickson, her opinions, qualifications, and reliability, Defendants request a hearing pursuant to O.C.G.A. § 24-7-702(d).

Respectfully submitted this the 30th day of August 2018.

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IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

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| Michael Gatto and Katherine Gatto, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | CIVIL ACTION FILE |
| v. | ) | NO. STCV2016000167 |
| | ) | |
| City of Statesboro, Georgia, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2018, I electronically filed the foregoing **DEFENDANTS CITY OF STATESBORO AND SUE STARLING'S MOTION AND MEMORANDUM OF LAW TO EXCLUDE PAMELA S. ERICKSON, PLAINTIFFS' PROPOSED EXPERT** with the Clerk of Court using the PeachCourt system, which will automatically send email notification of such filing to all counsel of record.

/s/ John C. Stivarius, Jr.
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