

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(Central Division)

<p>LACI DROLL, an individual,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>THE CITY OF KEOTA, IOWA,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: right;">Case No. 4:20-cv-00088</p> <p style="text-align: center;">DEFENDANT’S BRIEF IN SUPPORT OF DAUBERT MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF’S EXPERTS</p>
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COMES NOW Defendant, The City of Keota, Iowa (“Keota”), by and through undersigned counsel, and hereby submits the following Brief in Support of its Daubert Motion to Exclude Testimony of Plaintiff’s Experts:

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ARGUMENT

Keota's Motion moves the Court to strike the following experts disclosed by Plaintiff from providing testimony on the following topics¹:

1. Victoria Voith
 - a. Breed determinations cannot be accurately made by visual inspection.

2. Kristopher Irizarry
 - a. Breed determinations cannot be accurately made by visual inspection;
 - b. A dog's breed cannot be used as predictor of dangerousness or aggression; and
 - c. There is no rational basis to ban certain breeds of dogs.

3. Randall Lockwood
 - a. Major advances in canine genome challenge old assumptions about connections between appearances of breeds and underlying genetic variation;
 - b. That studies have failed to find connections between genetic composition and behavior, including aggression;
 - c. Genetic background alone is a poor predictor of behavior and behavior is affected by environment and experiences;
 - d. Work with prior fighting dogs show variations in behavior and ability for dog to be rehabilitated;
 - e. Breed determinations cannot be accurately made by visual inspection; and

¹ To the extent one of Plaintiff's experts attempts to offer an opinion regarding a topic that is subject to this Motion but the topic is not directly discussed with that expert, Keota hereby states it intends for any such argument to be incorporated to the discussion of that expert.

f. Breed-specific legislation is not effective in limiting dog bites.

I. OVERVIEW OF PLAINTIFF'S EXPERTS AND THEIR CLEAR CONFLICTS OF INTEREST

Plaintiff's experts more closely represent a close-knit group of friends than a collection of experts from around the country. Indeed, outside of Randall Lockwood, the other three experts have incredibly close personal relationships with one another. Both Victoria Voith and Kristopher Irizarry are both employed by the College of Veterinary Medicine at Western University of Health Sciences and are close friends. Ex. A, Deposition of Kristopher Irizarry, p. 9:11–12. In addition, Mr. Irizarry was involved in Ms. Voith's published Studies 1 and 2 which Plaintiff attempts to rely upon. *Id.* at pp. 57:19–59:14. Likewise, Ms. Marder was Ms. Voith's resident at the University of Pennsylvania when Ms. Marder was a graduate student and she also served as a co-author in another of Ms. Voith's studies that Plaintiff attempts to rely upon. Ex. B, Deposition of Victoria Voith, p. 20:5–8.

Beyond being close personally, each of Plaintiff's experts—including Randall Lockwood—have a potential conflict of interest as each expert receives monetary compensation from organizations that are opposed to breed-specific legislation like the Keota Ordinance. As Mr. Lockwood has testified to, these organizations retain these experts to advance the organization's interests. In other words, Plaintiff's experts are compensated by organizations with a clear opinion on the Keota Ordinance, and their compensation is provided in exchange for the experts advancing the interests their employers wish to advance.

Specifically, Ms. Voith testified that she serves as an advisor to the National Canine Research Council (“NCRC”) which she is compensated for on a yearly basis, and that the Council has funded some of Voith’s previous studies and are providing funding to some of her future studies. Ex. B, pp. 18:2–19:2; 19:18–20. Likewise, Mr. Irizarry is also an advisor for the NCRC and receives a yearly stipend from the organization. Ex. A, pp. 19:15–22; 20:12–14. Additionally, the NCRC has provided funding for prior studies Mr. Irizarry has been involved in. *Id.* at p. 119:7–20. Ms. Amy Marder consults for the NCRC and receives a quarterly salary from the organization. Ex. C, Deposition of Amy Marder, pp. 10:22–11:6. In exchange for the salary, Ms. Marder provides a variety of services for the organization, including being involved in litigation challenging breed-specific legislation. *Id.* at p. 11:7–14. Finally, Mr. Lockwood serves as a contract consultant for the American Society for the Prevention of Cruelty to Animals and receives a monthly salary from the organization. Ex. D, Deposition of Randall Lockwood, p. 23:2–5. In exchange for the salary, Mr. Lockwood provides a variety of services for the organization, including being involved in litigation challenging breed-specific legislation. *Id.* at p. 23:6–13.

As is shown below, Plaintiff’s experts advance numerous “opinions” that are not explained or supported, that are based upon clearly unreliable methods, which ignore readily-available information which disagrees with the opinions,² and perhaps most critically, are contradicted in many cases by the expert’s own deposition testimony and/or

² Rational-basis review applies to each of Plaintiff’s claims. As the Court recognized in its Ruling granting in part and denying in part, Defendant’s Motion for Summary Judgment, “Defendant is correct that ‘the very admission that the facts are arguable...immunizes from constitutional attack’ the legislative judgment presented by its Pit Bull Ban.” Doc. 85, p. 15 (quoting *Vance v. Bradley*, 440 U.S. 93, 112 (1979)).

citations referenced in the expert's report. Taken as a whole, it is clear that Plaintiff's experts are not advancing "opinions" that are accurate to a reasonable degree of scientific accuracy, but instead are attempting to advocate for their employers' views and stances.

II. OVERVIEW OF *DAUBERT* AND ITS PROGENY

In *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court emphasized the district court's role as a "gatekeeper" in screening expert testimony for relevance and reliability. The Court created a number of nonexclusive factors in *Daubert*:

- (1) whether the theory or technique 'can be (and has been) tested';
- (2) 'whether the theory or technique has been subjected to peer review and publication';
- (3) 'the known or potential rate of error'; and
- (4) whether the theory has been generally accepted.

Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 297 (8th Cir. 1996). In explaining the factors, the Court stated in regards to the second factor:

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Daubert, 509 U.S. at 593-94 (internal citations removed). In regards to the third element, the Court explained that the district court is to analyze not only the rate of error, but also

the “existence and maintenance of standards controlling the technique’s operation.” *Id.* at 594. Finally, in regards to the fourth factor, the Court stated:

Finally, “general acceptance” can yet have a bearing on the inquiry. A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community, may properly be viewed with skepticism.

Id. (internal citations removed). *Daubert's* progeny provides additional factors such as: whether the expertise was developed for litigation or naturally flowed from the expert's research; whether the proposed expert ruled out other alternative explanations; and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case. *Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 479 (1st Cir.1997) (finding testimony of the expert and the plaintiff must be sufficiently related); *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir.1995) (addressing whether opinion was developed naturally out of research or solely for litigation); *Claar v. Burlington N.R. Co.*, 29 F.3d 499 (9th Cir.1994) (discussing whether the expert accounts for obvious alternative explanations). However, “[t]he polestar [] must always be ‘scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission.’” If the expert’s testimony is not accepted within the relevant industry or are untested, the testimony should be excluded. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible ...”). In determining whether an expert’s

theory is sufficiently accepted, courts look to evidence of whether there is widespread adoption of the theory. *E.g.*, *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 613 (7th Cir. 1993) (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

Further, *Daubert* and the court’s gatekeeping role applies to all expert testimony, not just “scientific” testimony. *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1082 (8th Cir. 1999). *Daubert* is closely intertwined with Federal Rule of Evidence 702. The Eighth Circuit has stated:

We recently explained Rule 702 and the *Daubert* standard, as follows:

The admissibility of expert testimony is governed by Federal Rule of Evidence 702; under Rule 702 the trial judge acts as a “gatekeeper” screening evidence for relevance and reliability. “Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony. The rule clearly is one of admissibility rather than exclusion.” “The exclusion of an expert’s opinion is proper only if it is so fundamentally unsupported that it can offer no assistance to the jury.”

Polski v. Quigley Corp., 538 F.3d 836, 838-39 (8th Cir. 2008). It is an abuse of discretion for a trial court to permit an expert witness to testify to matters outside the expert’s area of expertise. *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715–16 (8th Cir. 2001) (citing cases).

III. THE TESTIMONY OF PLAINTIFF’S EXPERT VICTORIA VOITH MUST BE LIMITED

Ms. Voith’s expert report and deposition testimony purport to provide scientific conclusions that the breed of mixed-breed dogs cannot be accurately determined by visual inspection. The basis for Ms. Voith’s conclusions is three studies, two of which were

previously published (Studies 1 and 2), and one that has not yet been published (Study 3). As is explained below, Studies 1, 2, and 3 are all predicated upon the same data set and same DNA-testing that are significantly flawed,³ thereby preventing the Studies from having any scientific reliability. In addition, these studies appear to be among very few studies to actually test whether dog breed can be accurately determined through visual inspection, as Plaintiff's experts have provided only scant articles that attempt to test Voith's findings.

A. Whether a Dog's Breed Can be Accurately Determined by Visual Inspection

1. Study 1

Study 1 was comprised of a sample of only 20 dogs. The DNA testing states that of those 20 dogs, only 2 had any of the breeds included in the Keota Ordinance within its breed composition. Ex. E, Voith Study 1, at pp. 5–6. Study 1 sought to compare the breeds assigned to mix-breed dogs that were adopted at shelters and the results of DNA testing of the dogs to determine whether the shelters accurately identified the dogs. *Id.* at p. 3. There were no purebreds in the study. *See id.* at pp. 5–6. The DNA testing only revealed dog breed ancestry if the breed made up at least 12.5% of the dogs' DNA. *Id.* at p. 3. As a result of this, the composition of the breeds making up the individual 20 dogs does not always add up to 100%. *See id.* at pp. 5–6.

³ Keota is not claiming that all DNA testing is inaccurate as applied to dogs. As is explained below, Keota is only taking issue with the DNA testing underlying each of Voith's studies. Modern DNA tests for dogs are far more accurate than the test that Voith has used in each of her studies. *See* <https://www.wisdompanel.com/en-us/blog/most-accurate-dog-dna-test> (showing accuracy rate of over 98%) (last accessed 10/25/2021).

The sample of dogs was obtained by Ms. Voith sending emails to persons to determine whether they were interested in obtaining the breed composition of their dog. Ex. B, at p. 57:6–17. In total, 50 persons volunteered for their dog to be part of the study. Ex. E, at p. 3. Of the 50, 40 of the dogs met the sample requirements of: 1) being mature enough to have full set of teeth; 2) were obtained from a shelter or adoption agency; and 3) were available to have blood drawn on a specific day. *Id.* The 40 dogs were divided into 4 groups based on weight: 1) < 20 pounds; 2) 21-40 pounds; 3) 41-60 pounds; and 4) > 60 pounds. *Id.* 5 dogs each were randomly selected from each weight group, forming 20 total dogs that were used in the study. *Id.*

Under the study, Voith gave credit to the shelters if it accurately identified any of the DNA composition of the dogs, regardless of whether the DNA breed ancestry was dominant or less dominant. *See id.* at pp. 8–9. The study revealed that the shelters correctly identified a portion of the dog’s DNA ancestry 31% of the time. *Id.* at p. 9.

Voith’s study recognizes that there are limitations with it. For example, the DNA testing used in the Study is only 84% accurate. *Id.* at p. 4. Indeed, Voith cautions that the DNA test is not a “gold standard.” *Id.* at p. 10. She also recognizes that different DNA testing companies may arrive at different results, depending on which dogs were used to develop the DNA standards. *Id.*

2. Study 2

Study 2 was an extension of Study 1. Study 2 used the same 20 dog sample that was used in Study 1, of which the DNA testing states only 2 of which had any of the breeds included in the Keota Ordinance within its breed composition, but instead of comparing

whether the animal shelters accurately identified the dog, the Study had 923 participants review 1-minute color videos of each of the 20 dogs. Ex. F, Study 2, pp. 2, 3. The participants did not visually inspect the dogs in person. *See id.* at p. 3. The Study stated that a majority of the participants had/or were in animal control/sheltering/or veterinary medicine. *Id.* at p. 2. Notably, Study 2 did not use any new DNA testing; instead, it relied upon the prior DNA testing from Study 1 which is only 84% accurate for first-generation crossbred dogs of known parentage. *Id.* Additionally, participants were not permitted to access any materials when making their identifications, and were not permitted to consult with other participants. *See id.* at pp. 3–4.

Participants in Study 2 were told the age, weight, and sex of each dog. Following the video, the participant would then be asked several questions. *Id.* First, the participant would be asked if the dog was a pure breed. If the participant answered “yes,” they were then asked what the breed was. *Id.* at p. 3. If the participant answered “no,” they were then asked what they believed the most predominant DNA breed to be (“PVI”) and what they believed the second-most prevalent DNA breed to be (“SVI”). *Id.*

The results were broken down into three categories: 1) participant correctly determined the dog was not a pure-breed and the PVI matched one of the dog’s most dominant DNA breed identifications; 2) participant correctly determined the dog was not a pure-breed and PVI matched any of the dog’s DNA breed identifications; and 3) participant correctly determined the dog was not a pure-breed and the PVI and SVI correctly matched any of the dog’s DNA breed identifications. *Id.* at pp. 6–7.

The results for the 20 total dogs showed that only 6 of the 20 dogs were correctly identified in one of the three categories by over 50% of the participants. *Id.* at p. 7. Of particular note, there were 7 dogs in which less than 2% of the participants accurately identified, and 11 of the dogs were correctly identified by less than 30%. *Id.* The Study also looked at the overall agreement of the participants and found that more than 50% of participants agreed upon a dog's breed on only 6 of the dogs. *Id.*

3. Study 3

In Study 3, participants were recruited from organizations in dog-related fields, such as animal control, shelters, veterinary medicine, etc. Ex. B, at, p. 91:5–8. The participants were each shown video clips and still shots of the same 20 dog sample that was used in Studies 1 and 2. *Id.* at pp. 91:23–92:2. The participants did not view all 20 dogs, instead participants were shown 4 of the dogs that were randomly selected from the overall sample. *Id.* at p. 92:2–8. After the participants viewed the videos and images of the dogs, the participants were asked to provide what they believed the breed of the dog to be, without the assistance of any materials to assist them. *Id.* at pp. 92:18–93:8. The participants then went through the process again, after which they were asked to assign breeds to the dog, but this time with the assistance of materials which included an illustrated dog breed book, a pictorial chart published by the American Kennel Club, and a list of 177 dog breeds. *Id.*

4. Problems with the Studies Which Severely Limit the Reliability of the Studies

The data set underlying Studies 1, 2, and 3 (the same set of dogs are used in each of the studies) is highly problematic for several reasons. First, the sample size is miniscule.

The studies are based off the same set of twenty (20) dogs, only two of which have any of the breeds included in the Keota Ordinance within its breed composition. Unsurprisingly, federal courts have routinely found similarly small sample sizes to cut against the reliability of the study. *See e.g., Fish v. Kobach*, 309 F.Supp.3d 1048, 1090 (D. Kas. 2018) (holding that sample size of 37 “is too small to draw credible estimates” and “therefore has substantial uncertainty.”) (internal quotation removed); *Mastercard Intern. Inc. v. First Nat. Bank of Omaha, Inc.*, No. 02 Civ. 3691, 2004 WL 326708 at **9-10 (S.D.N.Y. Feb. 23, 2004) (excluding survey from being entered in at trial due to the fact that the survey’s small sample size of only 52 respondents); *Sanchez v. Boston Sci. Corp.*, No. 2:12-cv-05762, 2014 WL 4851989 at *27 (S.D.W.V. Sept. 29, 2014) (finding that sample size of 1 called into question the reliability of the study and “weighed heavily” against admittance under *Daubert* review).

Second, the sample size of Studies 1, 2, and 3 suffers from the fact that it is a “convenience sample” and the volunteers self-selected into the study. Ms. Voith admitted in her deposition that the sample underlying Studies 1 and 2 are convenience samples. Ex. B, p. 58:15-17. Convenience samples have been defined as being “non-random” and are “easy to take, but may suffer from serious bias.” 83 Reference Guide on Statistics, Ann. Reference Manual on Sci. Evid. 83, at *55 (2d ed).

Federal courts have likewise expressed reservations with scientific data derived from convenience samples. *See In re: Pella Corp. Architect & Designer Series Windows Marketing, Sales Practice & Prods. Liab. Litig.*, 214 F.Supp.3d 478 (D.S.C. 2016) (“But convenience is not a substitute for reliability under Daubert.... However, without other

indicia of reliability, when an expert attempts to draw conclusions about an entire population from a sample-based analysis, the sample[] must be chosen using some method that assures the sample[] [is] appropriately representative of the larger entity or population being measured.); *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 984 F.Supp.2d 1021, 1040 (C.D. Cal. 2013) (recognizing that convenience samples “may be easy to take but may suffer from serious bias.”) (citing FJC Ref. Guide on Statistics at 285); *In re Bextra and Celebrex Mktg. Sales Practices and Prod. Liab. Litig.*, 524 F.Supp.2d 1166, 1176 (N.D.Cal.2007) (rejecting expert testimony that “cherry-pick[ed]” studies to analyze in support of the expert's conclusion); *cf.* Mark Haug and Emily Baird, *Finding the Error in Daubert*, 62 Hastings L.J. 737, 739 (2011) (suggesting that an expert must account for both random error and bias before being permitted to testify under *Daubert*).

Third, the sample of Studies 1, 2, and 3 suffers from the fact that its participants self-selected into the studies, that is, the participants themselves chose whether or not they would participate, as opposed to the participants being randomly selected. Once again, federal courts have expressed concerns with this type of sampling. *See e.g., U.S. v. Monteiro*, 407 F.Supp.2d 351, 367 (D. Mass. 2006) (finding concern with expert's data regarding proficiency testing for firearms examiners, because “only those working in labs voluntarily seeking to be certified by the American Society of Crime Laboratory Directors (ASCLD), meaning that the sample is self-selecting and may not be representative of the complete universe of firearms examiners.”); *Williams v. Invenergy, LLC*, 2016 WL 1725990 at *16 (D. Or. April 28, 2016) (in matter involving a motion to exclude plaintiff's

expert witness who would testify that wind turbines omit low-frequency infrasound which causes adverse health effects, finding expert's data unreliable in part due to the fact that it was based upon self-selection, in which it collected data from persons who reported that their symptoms were caused by wind turbines).

Fourth, even if the Court were to set aside the issues with the sampling, there exists significant issues with the underlying tests and information that the data from Studies 1 and 2 is based upon, thereby preventing any finding of legitimate reliability of the results. The issues are multi-layered, and apply to the manner in which dog breed assigned to each dog was determined at the front end, as well as in how the dog breed was determined through DNA testing at the back end.

First, Voith's Study 1 makes clear that the breed assigned to the dog by the shelter where it was adopted was determined through the dog owner simply filling out a form. Ex. E, p. 3. In other words, the accuracy of this data is dependent upon the owner properly remembering the breed assigned to the dog by the shelter. Study 1 does not state that the owners were required to provide any documentation supporting the claimed breed. *See generally*, Ex. E.

Second, the DNA testing that was used to determine the breed composition of the dogs was significantly flawed. As Voith's Study 1 states, the Mars Veterinary Wisdom Panel MX test that was used "reported an average of 84% accuracy." *Id.* at p. 4. Indeed, Voith states in Study 1 that this DNA testing is not a "gold standard." *Id.* at p. 10. However, the 84% accuracy—which already contains a significant error rate—is only applicable for "first-generation crossbred dogs of known parentage." *Id.* at p. 4 (citing

WISDOM Panel Analysis Summary, 2007). This means that the 84% accuracy rate only applies when the dog being tested is derived from two purebred dogs of known origin. Ex. G, Trembath Affidavit, ¶ 5. If the tested dog is not derived from two purebred dogs of known origin, it is scientifically impossible to know what the accuracy rate of the DNA test is. *Id.* at ¶ 8. Genetic researchers involved with the company that created the Wisdom Panel DNA testing have stated that the accuracy rate of the tests decreases with each subsequent additional breed added into a dog's breed composition. *Id.* at ¶ 6. In other words, the accuracy would be less than 84% if the dog tested was derived from one parent who was a purebred dog and one parent who was a mix of two-separate breeds. *Id.* Likewise, the accuracy would be even less if both parents were mixed breeds of two-separate breeds. *Id.*

Third, the Studies are simply not relevant to how the Keota Ordinance would be enforced. The Keota Ordinance is not concerned with whether any dog with any particular breed composition can be identified, it is whether a dog that falls within the breed of dogs that is prohibited under the statute can be identified.⁴ Ex. G, at ¶ 12. In other words, the issue is not whether an individual dog (which hypothetically, is half pug, half dalmatian) can be properly identified, but rather, whether a dog that is of the breeds listed within the Keota Ordinance can be properly identified. Voith's Studies have no bearing on the actual issue. *Id.* Indeed, only two of the dogs show any of the prohibited breeds within their

⁴ A person believed to own one of the prohibited breeds under the Ordinance will not be permanently deprived of the dog solely based upon visual identification. Rather, the visual identification serves only to provide Keota reasonable suspicion to seize the dog. Once the dog has been seized, DNA testing will then be performed to determine the dog's breed composition.

breed composition.⁵ Ex. E, pp. 5–6.⁶ Of those two, one of the dogs was accurately identified by the shelter as being a “Terrier” mix. *Id.* at p. 5. Therefore, as it relates to the Keota Ordinances, this Study only shows that one of those breeds was mis-identified. *Id.* This is hardly a basis to invalidate a duly acted ordinance.

By contrast, Dr. Trembath included within her report a study that actually tested the ability to properly identify “pit bull” breeds, which revealed that shelter workers in Richmond, Virginia were able to do so with 96% accuracy. Ex. H, Dr. Felicia Trembath Report, p. 5. Study 1 is not sufficiently accepted or tested to be permitted into evidence. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible....”). Indeed, Plaintiff’s experts have failed to demonstrate that Voith’s Study 1 has been widely accepted, as there are very few—if any—studies cited to which adopt the Study. *Porter*, 9 F.3d at 613 (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

In regards to Study 2’s conclusion that there is considerable disagreement among participants regarding what the particular breed composition of a dog is, the Study itself contains a flawed methodology that does not mimic the identification of dogs in actual practice. The federal courts have made clear that the focus of *Daubert* ““must be solely on

⁵ Of course, it is not possible to know whether this is accurate.

⁶ At the time that Dr. Voith’s studies were conducted, the Mars Wisdom Panel reference database did not include reference samples from American pit bull terriers or Staffordshire terriers. Ex. G, at ¶ 10. Of the 3 dog breeds regulated by the ordinance, the Mars database only contained information from American Staffordshire terriers. *Id.* Owing to this, it would have been impossible for the testing done by Dr. Voith to determine that a dog was an American pit bull terrier or Staffordshire terrier, even if the dog actually was one of those breeds. *Id.* Consequently, it would be disingenuous of Dr. Voith to compare visual identification of dogs to DNA results and claim that participants were not accurate at identifying pit bulls using visual identification. *Id.*

principles and methodology, not on the conclusions they generate.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 615 (8th Cir. 2011) (quoting *Daubert*, 509 U.S. at 595). When analyzing an expert’s methodology, the court must determine whether the methodology used by the expert can be properly applied to the case to assist the trier of fact. *Daubert*, 509 U.S. at 592-93. “To warrant admissibility, however, it is critical that an expert’s analysis be reliable at every step.” *Amorgianos v. Nat’l. R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). “[The] requirement that the expert testify to scientific knowledge—conclusions supported by good grounds for each step in the analysis—means that *any* step that renders the analysis unreliable under the *Daubert* factors renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis in original).

Here, Study 2 was designed in such a way that skewed the results towards disagreement and is contrary to how visual identification would actually be performed under the Ordinance, thereby rendering the Study’s methodology unreliable. As explained previously, none of the participants were able to physically touch the dogs—there were only shown videos. This is significant, as certain defining characteristics of dogs, including, but not limited to, the texture of the fur cannot be determined from video. Further, the participants were not permitted access to any materials, such as a list of defining characteristics of breeds created by the American Kennel Club, when making their determinations. Nor were they permitted to consult with any other individuals to arrive at a conclusion.

Voith's decision to take away the participant's ability to physically examine the dogs and prohibit the participants from using other materials to identify the dogs renders Study 2 unreliable. To understand the unreliability, Study 2 needs to be put into context. Plaintiff's expert Amy Marder stated in her report that there are over 1,000 different types of recognized dog breeds and that some breeds look quite similar to other breeds. Ex. I, p. 1. In other words, Study 2 sought to determine the ability of the participants to agree on the breeds of 20 mixed-breed dogs, when the participants had over 1,000 different options to choose from, subtle physical differences differentiated many of the breeds from one another, and participants could not physically inspect the dogs. It is difficult to understand how any degree of reliableness could be gleaned from such methodology, or how this methodology has any application to the Keota Ordinance, where a physical inspection of the dog could occur, access to sources to aid in identifying the dog would not be prohibited, and where consultation with others regarding breed identification could occur. Simply put, Study 2 advances methodology that is completely contrary to how visual identification would be performed under the Ordinance and fails to demonstrate widespread acceptance. *See Daubert*, 509 U.S. at 594 ("Widespread acceptance can be an important factor in ruling particular evidence admissible"); *Porter*, 9 F.3d at 613 ("A known technique that has gained only a minimal following may be viewed with some skepticism.").

Finally, Study 3 is not yet completed. It has not been published in a peer-review journal or examined for accuracy. Regardless, its results are based upon the same DNA testing for the same 20-dog samples as Studies 1 and 2 for which there is a significant but unknown rate of error. Accordingly, Study 3 cannot be found sufficiently reliable to be

admitted into evidence. *See id.* (“Widespread acceptance can be an important factor in ruling particular evidence admissible”).

IV. THE TESTIMONY OF KRISTOPHER IRIZARRY MUST BE LIMITED

Mr. Irizarry’s expert report contains three conclusions which the Court must prohibit him from testifying to: 1) dog breeds cannot be reliably identified by visual inspection; 2) a dog’s breed is not a predictor of dangerousness or aggression; and 3) there is no rational or scientific basis to ban certain breeds of dogs due to the breed being more aggressive and dangerous. Ex. J, Irizarry Expert Report, p. 4. Mr. Irizarry cannot be permitted to testify on any of these opinions, because: 1) his visual inspection opinion is based solely upon the severely flawed and unreliable studies performed by Ms. Voith which are not well-accepted or reliable; 2) his dog breed not being a basis to predict dangerousness is not accepted within the scientific community (indeed, the opinion is contradicted by some of Plaintiff’s other experts) and Mr. Irizarry lacks sufficient knowledge on topics to testify; and 3) Mr. Irizarry is unqualified to speak to the effectiveness of breed-specific legislation as he has not studied or reviewed the effectiveness of such legislation. Keota will address each point in turn.

A. Mr. Irizarry’s Sole Basis for His Opinion Regarding the Ability to Accurately Identify Dog Breed by Visual Inspection are the Flawed and Unreliable Studies Written by Ms. Voith

Mr. Irizarry’s claim that dog breeds cannot be accurately identified by visual inspection is based entirely upon Ms. Voith’s unreliable Studies 1, 2, and 3. *See id.*, at p. 1 (mentioning only Ms. Voith’s studies). Indeed, in his deposition, Mr. Irizarry was asked about other studies he has participated in that have sought to examine the ability of persons

to accurately identify dog breed by visual inspection. Mr. Irizarry stated he had not participated in any other studies beyond those that were conducted by Ms. Voith:

Q. Okay. Have you been involved in any studies regarding dog breed identification?

A. Yes.

Q. How many?

A. It was the one study with Dr. Voith that spanned a few years and resulted in a couple papers.

Q. Okay. And we'll talk about those. So there is two studies that you're referring to?

A. Yes.

Q. Okay. Are there any other ones?

A. There's no other papers.

Q. I'm sorry?

A. I said there's no other papers.

Q. Okay. Any other studies that you've been involved in?

A. For –

MR. SUMMERLIN: On that topic?

By MR. PALMER:

Q. Yes, on that topic.

A. No. That was the study that I did with Dr. Voith that resulted in two papers.

Ex. A, pp. 57:19–58:14.

Further, Mr. Irizarry was asked in his deposition regarding his knowledge of other studies that have found that dog breed cannot be accurately determined by visual inspection. Mr. Irizarry's testimony shows that his knowledge is incredibly limited on the subject:

Q. Okay. We were talking about the two studies that you were involved in with Dr. Voith and then Study 3. Do you know of other studies dealing with the visual ID of dog breeds compared to DNA analysis besides those two that you were involved in and Study 3?

A. I've vaguely heard of them, but I couldn't tell you the names of papers or point to it and say that's the study.

Q. Okay. Do you know how many?

A. No.

Q. Okay. Do you have an approximate number?

A. No.

Id., at, p. 132:7–18. However, as was explained above, the Studies performed by Ms. Voith are incredibly unreliable and the results they show—without corroboration from other sources—cannot be trusted. Without further basis to support this position, Mr. Irizarry cannot be allowed to testify as to this topic. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible”); *Porter*, 9 F.3d at 613 (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

B. Mr. Irizarry’s Opinion That a Dog’s Breed Cannot be Used as Predictor of Dangerousness or Aggression is Not Accepted within the Scientific Community Which Recognize There are Measurable Differences in Aggression Between Breeds and that Behavior is Heritable

Mr. Irizarry cannot testify to whether the breed of a dog can be used to determine that the dog may be more dangerous or aggressive than another type of dog breed because Mr. Irizarry’s report and deposition testimony undercut his claim that this opinion is correct to a reasonable degree of scientific certainty. To support his claim, Irizarry puts forward two arguments: 1) that behavior cannot be inferred from the existence of physical characteristics (i.e. cannot say dog is aggressive due to the fact that the dog has a rounded skull)⁷; and 2) that all dogs have inherited the same behavioral traits and behavior is a complex trait that is influenced by each dog’s own lifetime of experiences. Ex. J, pp. 3–4.

⁷ This argument mischaracterizes Defendants’ position. Defendants are not advocating for “phrenology,” that is, that the breeds included in the Keota Ordinance are aggressive because of their round heads and/or shiny coats. Defendants agree that certain behaviors—such as aggressiveness—are not the result of certain physical characteristics. Rather, Defendants’ position is that many of the dogs within the populations of the breeds included in the Keota Ordinance

This topic boils down to two critical questions for purposes of this litigation. First, can certain behaviors (specifically aggression) be passed down from one generation of dogs to the next? Second, assuming that all dogs have inherited the same behavioral traits, are there differences between breeds regarding the frequency in which certain breeds actually exhibit the behavioral trait (that is, are some dog breeds more likely to be aggressive than other breeds? Are other breeds more likely to point, retrieve, etc. than others?). These two questions work in conjunction with one another. For example, if the specific breeds listed in the Keota Ordinance are more likely to exhibit aggressive behaviors than other dog breeds, and aggressive behavior can be passed down from one generation to the next, there would appear to be a rational basis for why the breeds listed in the Ordinance were included while other breeds were not. However, when reading Mr. Irizarry’s deposition testimony, it is clear he does not have the requisite knowledge to provide any answers to these questions.

1. Whether Aggressive Behaviors Can Be Passed from One Generation to Subsequent Generations

First, in regards to the ability for aggressive behavior to be passed from one generation of dogs to the next, Irizarry is not qualified to testify to this subject because he lacks sufficient knowledge on the topic. While his expert report has a section dedicated to “heritability” in which he discusses the ability of traits—including behavior—to be passed

were bred to be more aggressive than other breeds and that such behaviors are passed down from generation to generation. Like all other dog breeds, the breeds listed in the Keota Ordinance have an accepted list of defining physical characteristics which are used to identify the dog’s breed. In other words, Defendants do not contend that the prohibited breeds are aggressive because of certain physical characteristics, but rather, the physical characteristics allow Defendants to identify breeds that are more aggressive and dangerous than other breeds. Accordingly, this argument is irrelevant to this litigation.

from one generation to the next, his report fails to actually address whether behavior is heritable and instead attempts to avoid answering the question altogether by discussing a history of the domestication of dogs:

The genetic heritability of a trait is the fraction of the total variation in the trait among the animals in a population that can be accounted for by genetics. Heritability is measured on a scale between 0 and 1. Some traits have a high genetic heritability, while other traits are influenced by multiple factors which include genetics and environment. For example, coat color and almost all other physical traits are controlled solely by genetics. As a result, we know that offspring inherit coat color solely from the genes of its parents and that environment or other facts will not alter the manner in which coat color is expressed.

Behavior is a complex trait that results from a lifetime of experiences. Domestic dogs were selected to live among humans and conform to the social and familial structure of humans. The domestication of dogs resulted in companion animals that were more attuned to human communication and more easily adapted and trained by their human counter parts (sic). All domesticated dog breeds inherited these and share these traits and no specific breed of dog is genetically lacking in these artificially selected traits that were carefully acquired over a 30,000 year domestication period.

Id., at, p. 4.

However, Irizarry's failure to address the heritability of behavior does not appear to be an attempt to overlook an issue that contradicts his position. Rather, Irizarry's deposition testimony shows that Irizarry simply has no idea how heritable behavior is:

Q. Are you aware as it relates to dogs of any behavioral traits that are heritable?

A. I know the average person thinks that herding dogs are the only dogs that can herd or that pointers are the only dogs that point, and so there's this misconception that only certain breeds have certain behaviors, and so you have to get a dog in this breed to be able to get this behavior. And from that perspective I think the idea that breeds are based on behaviors and that those are heritable is – kind of flourishes.

But those behaviors aren't – you know, you don't just go to the store – or you don't just pick up a Labrador Retriever, go to Petco, buy a leash,

and give a blind person a dog. That's not a seeing-eye dog. There's a lot of training and plasticity and molding of behaviors to make a working dog do the thing it does. It's not just a member of a breed. I know individual dogs can have individual behaviors. **So I don't know the heritability of specific behaviors in dogs.**

Q. So as a scientist, in this case are you saying that behavioral traits in dogs are not heritable.

A. **No.⁸ I'm saying I don't know the extent to which behavioral traits are more or less heritable among different individuals in dogs and across breeds.**

Ex. A, pp. 50:2–51:2 (emphasis added). By contrast, Plaintiff's expert Victoria Voith had no such difficulties in her deposition, although admittedly, she did attempt to backtrack when she stated something she had wished she had not:

Q. What behavior traits are heritable in a dog?

A. Well, I think some, and I can't state where I read this all, but reactivity to noises seems to be more predominant in some breeds of dogs. Fear of objects seems to be somewhat inheritable. Ability to be a good racing sled dog appears to be heritable.

Q. Any other behavioral traits that you are aware of that are heritable?

A. **Almost all behavior has some heritable components or the animal couldn't execute the behavior.**

Q. When you mentioned two specific examples of some dog breeds are more dominant in terms of reaction to noises and fear of objects, do you recall that?

A. More dominant?

Q. You said predominant. That's what I wrote down.

A. I'm not sure what I said. I'd have to play that back. I don't remember what I said.

Q. I'll ask the question again. In terms of when I asked you what behavioral traits are heritable, you mentioned reaction to noises and reaction of fear of objects; is that right?

A. Well, there is reactivity to noises appears to be in more, comes up more frequently in some breeds of dogs, and I was thinking more of foxes, just fearful behavior to people in general.

⁸ In other words, Irizarry is not stating that aggressive behavior is not heritable.

Ex. B, pp. 48:9–49:10. Regardless of whether Ms. Voith’s backtracking was legitimate or not, her testimony remains that “[a]lmost all behavior has some heritable components....” *Id.* at p.48:17–19.

Mr. Irizarry was then asked about the heritability of specific instances of behaviors that the Keota Ordinance is aimed at preventing, specifically non-owner-directed aggression, dog-directed aggression, and stranger-directed aggression. Mr. Irizarry attempted to evade the questions and avoid providing a direct answer. However, when pushed to do so, Irizarry made a couple stunning admissions: 1) that he personally had no basis on which to provide an answer for the heritability of these behaviors; and 2) that he was not qualified to answer these types of questions:

Q. Okay. I’m not sure if I got an answer to my question because I think you just said that you weren’t aware of that study, but do you agree that non-owner-directed aggression and dog-directed aggression are heritable?

A. I have no basis on which to make that – I have no idea. I would have to read the paper and see what the paper did.

Q. All right. And I’m not asking you about the paper. I’m asking you as a scientist and an expert in this case and studying genetics, would you agree based upon your training and education and experience that non-owner-directed and dog-directed aggression are heritable?

MR. SUMMERLIN: Okay. I’m going to object on form and foundation.

Q. And, Doctor, I guess based upon Plaintiff’s counsel’s objection, I mean, if you think you’re not qualified to answer that, just tell me.

MR. SUMMERLIN: Well, so let me explain my objection for you, Jason. It’s the fact that you’re asking about a complex set of behaviors with a question that says, “Is this heritable?” without considering whether there is a genetic component to that and an environmental component to that. That’s the basis for my objection.

Q. Okay. Doctor, go ahead, please.

A. I think a lot of these conclusions that you’re citing, I would like to see the papers on and read to understand what the authors are trying to convey with those sentences or those conclusions.

Q. And I'm not talking about a study right now. I'm talking about, again, your training, education, and experience. Do you agree that non-owner-directed aggression is heritable?

MR. SUMMERLIN: Object to form and foundation. But you can answer to the extent you can.

A. I think behavior is a combination of what the brain has at birth and what an animal is trained to do and the experiences it has, and I am not sure how much one statement like that is relying on environmental controls in the study. I don't know what to make of it.

I mean, I would tell you that I believe that all of the traits that make dogs amenable to live among humans are heritable, and that's why for 30,000 years we refined them to the point where they're man's best friend. And then to ask me if there's heritability in a subset of terms or in this and that, I don't feel that I'm prepared to answer that question. It's not that I'm not qualified. I'm not prepared.

I would like to see the studies that you're referring to because I'm under the impression that you're not just making these sentences up but that you have some resources that you're using that have informed you, and I would like the opportunity to be informed by those same resources in order to assess them with my trained ability to read, interpret, and understand scientific studies.

And I mean no disrespect by that, but I think that that's what it would take me to be able to answer to your question. That sentence is just one sentence. No one publishes just a single sentence, so I don't know what that means.

Q. Based upon your training, education, and experience, do you agree that dog-directed aggression is heritable?

MR. SUMMERLIN: Same form and foundation objection. You can answer to the extent you can.

A. I believe that dogs inherit – that's with an "in" – inherit the traits that make them to be companion animals and suitable as living among families and that individual dogs may have traits that are undesirable, but I'm not sure that that dog's undesirable trait is a result of a specific genetic marker or a certain genetically inherited set of traits.

* * *

Q. Do you believe that stranger-directed aggression is a heritable trait?

A. **I'm not really familiar with stranger-directed aggression. My expertise is in genetics, and I would love to answer some genetics questions.**

Q. Okay.

A. **But, you know, you keep asking me these questions that aren't genetics, and I say I need to see the papers or get more information. You asked me if I felt qualified to answer your questions, and I put on – I put**

my answer as I feel unprepared to answer some questions that are covering topics that were not part of my formal training when I took genetics classes. My genetics textbooks did not have sections on these topics. So for you to keep referring to me and my formal training, I would stay that deviates from my formal training, and my training is in genetics.

What I would love to talk to you about is the idea of breed and genetic basis for breed. That's what I thought you were going to ask me.

You haven't really asked me any of those questions. You know –

Q. So my question is – my question is, which don't think you provided an answer, and if you don't know that's fine. then I'll move on. Do you know whether stranger-direction aggression is a heritable trait?

MR. SUMMERLIN: So I'll object on form to the extent you've not identified what you mean by stranger-directed aggression.

MR. PALMER: Based off of the speaking objections – I mean, you can just object to the form based on foundation.

MR. SUMMERLIN: Well, then you'd never fix the question, Jason.

MR. PALMER: You know what? That's okay. Speaking objections are not allowed.

MR. SUMMERLIN: That's not a speaking objection, but go ahead.

MR. PALMER: Sure it is.

Q. Doctor, are stranger-directed aggressions a heritable trait? If you don't know, that's fine.

MR. SUMMERLIN: Object on form to the definition of “stranger-directed aggression.”

Q. Go ahead.

A. Can we move on?

Q. What's your answer?

MR. SUMMERLIN: You have to answer the question.

A. **I don't know.**

Ex. A, pp. 71:3–74:7; 77:18-79:18 (emphasis added).

In sum, Mr. Irizarry is unable to testify to the heritability of aggressive behavior, other than to state that such behavior can be heritable—which is confirmed by Dr. Voith. Further, he has admitted that the specific heritability of non-owner-directed aggression, dog-directed aggression, and stranger-directed aggression are outside the scope of his formal training and that he has no basis on which to provide an answer on these topics.

Wheeling Pittsburgh Steel Corp., 254 F.3d at 715–16 (holding it is an abuse of discretion to permit an expert to testify to matters outside their area of expertise).

2. Whether Certain Breeds May Exhibit Certain Behaviors More Frequently than Other Breeds

Second, Irizarry’s report completely fails to address the second critical question: whether certain breeds exhibit certain behaviors more frequently than others. If there is a scientific basis to believe that the breeds listed within the Keota Ordinance are more likely to exhibit aggressive behavior than other breeds, there would be a basis for Keota’s enactment of the Ordinance. Accordingly, the existence of general breed-specific behaviors becomes critical.

In his report and throughout his deposition, Mr. Irizarry has resisted providing any opinion regarding this critical question, and instead, has made the conscious effort to change the focus from breed populations as a whole to individual dogs within each population. Repeatedly throughout his deposition, Mr. Irizarry was asked questions about general differences between breeds or generally among all breeds of dogs and he responded by providing answers specifically relating to comparisons of individual dogs within the same breed. *See id.* at pp. 50:2–22; 50:25–51:2; 69:23–70:6; 73:20–74:7; 74:9–20. In other words, Irizarry has repeatedly attempted to shift from the macro to the micro when answering questions of dog behavior. Indeed, Mr. Irizarry does not explicitly state

anywhere whether certain breeds as a whole may be more likely than other breeds to engage in certain behaviors.⁹

His unwillingness to provide a clear answer is unsurprising considering Plaintiff's expert Victoria Voith testified that such distinctions in proportionality of behaviors **can be drawn** at a breed-wide level:¹⁰

Q. But certain breeds of dogs behave differently than other breeds of dogs, correct?

A. There are similar behaviors in most breeds of dogs. Most breeds of dogs share a lot of similar behaviors.

Q. And they also have differences, correct?

A. Many of the dogs in those breeds would not have differences.

Q. I'm not saying within those breeds. I'm saying comparing one breed to another, dogs behave differently.

A. No, not necessarily.

Q. So it's your testimony under oath here that behavioral traits is not what separates one breed from another?

A. **Generally, what you might get an (sic) increase in the frequency of those traits in different breeds, but that's not necessarily mean (sic) all the dogs in those breeds share that same trait. It's a matter of proportion.**

Q. When you say in the breed, what are you referring to?

MR. SUMMERLIN: Would you read the witness's last answer back and then the question.

(Record read back.)

Q. Are you thinking doctor?

A. Yeah, I'm trying to think of an example for you. Let's just say pointing. **There are dogs in all breeds that will point when they see a game or something they're interested in. the breed of pointers, many of**

⁹ This is incredibly telling. If there were no measurable differences in behavior between dog breeds, Plaintiff and her experts would be jumping up and down screaming this. Instead, they are attempting to subtly frame answers discussing individual dogs as opposed to general breed differences.

¹⁰ The American Kennel Club recognizes general differences in breed behaviors. Indeed, the Club's website provides viewers with basic overview of each of the recognized dog breeds, and provides general information regarding each breeds' personality, including: affectionateness, how good the breed is with children and other pets, energy level, barking level, and openness to strangers, among other personality information. For example, here is the personality information provided by the Club for the Dalmatian breed: <https://www.akc.org/dog-breeds/dalmatian/> (last accessed 10/11/2021).

them, will more probably, at least originally, in the pointer breed, especially if you are looking at breed dogs, you are going to get a higher percentage of pointers in the breed pointer that point, but not necessarily all of them will.

Ex. B, pp. 42:24–44:9 (emphasis added). Mr. Irizarry’s claim is further contradicted by citations included in the report and deposition testimony of Plaintiff’s expert Amy Marder. In her report, Ms. Marder cited to a scholarly article in her report which states in the abstract, “**there is convincing scientific evidence for reliable differences between breeds and breed groups with respect to some behaviors (e.g., aggression, reactivity)...**” Ex. K, Lindsay Mehrkam, *Behavioral differences among breeds of domestic dogs (Canis lupus familiaris): Current status of the science*, in APPLIED ANIMAL BEHAVIOUR SCIENCE (March 2014) (emphasis added). The article goes on to provide numerous studies that provide a rational basis for the Keota Ordinance. “For example, Sacks et al. (2000) found that **Pit Bull-type dogs and Rottweilers were involved in more than half of 238 total human deaths caused by a dog bite-related injury in the United States between the years 1979 and 1998...**” *Id.* at p. 4 (emphasis added). “Bollen and Horowitz (2008) assessed over 2000 shelter dogs and found that **failure on a behavioral evaluation (e.g., exhibiting serious aggression, including lunging while growling and snarling, and any attempts to bite) was significantly higher for “high risk” (Pit Bull, Rottweiler, Chow Chow, Husky) than for “low risk” (all other) breeds.**” *Id.* at p. 5 (emphasis added). This article—**from 2014**—sets forth the “current status of the

science.”¹¹ *Id.* at p. 1. In addition, another article cited by Ms. Marder demonstrates that her opinions that there are not differences in behavior between breeds is not well-established. Indeed, as Fernanda Ruiz Fadel et al. stated in their article:

Behavioural differences between breeds and attempts to delineate breed-typical behavioural profiles is a controversial topic, especially when it might relate to tendencies for aggressive behaviour. There is a valid concern that breed level tendencies are sometimes inappropriately generalized to make predictions about the individual. **Nonetheless it should be recognized that dog breeds are distinct genetic units which originated through inbreeding that express specific phenotypic traits (including specific working behaviour) and vary in behaviour.** Therefore, if some behavioural traits are highly heritable, **behavioural differences, on average, between breeds selected for different working purposes may be expected.** **While some scientists emphasize that there are very specific behavioural characteristics to each breed,** others draw attention to the fact that the differences between individual dogs’ behaviour within a breed often exceed variation among breeds.

Ex. N, Fernanda Ruiz Fadel, et al., *Differences in trait impulsivity indicate diversification of dog breeds into working and show lines*, in SCIENTIFIC REPORTS 6 (2016) (full article accessible at <https://www.nature.com/articles/srep22162>) (last accessed 10/12/2021).

Notably, Mr. Irizarry’s report does not mention either of these articles, nor any of the articles highlighted in Ms. Mehrkam’s article. *See generally*, Ex. J. In fact, Mr. Irizarry’s report does not contain one single citation in it to provide the basis for his opinions. *See id.*

¹¹ This finding of differences between breeds is consistent with numerous articles cited to by Defendant’s expert Dr. Trembath. *See e.g.*, Ex. L, JA Serpell & DL Duffy, *Dog breeds and their behavior*, DOMESTIC DOG COGNITION AND BEHAVIOR 31-57 (Feb. 2014) (research demonstrating clear differences between numerous breeds in levels of aggression); Ex. M, EL MacLean, et al., *Highly heritable and functionally relevant breed differences in dog behaviour*, PROCEEDINGS OF THE ROYAL SOCIETY (2009) (“We found that a large proportion of behavioural variance across breeds (among-breed heritability) is attributable to genetic factors”). As these studies show, specific behaviors, such as aggression, are heritable, casting further doubt on Irizarry’s claim that a dog’s breed cannot be used to determine whether the dog may be disproportionately aggressive.

Likewise, Ms. Marder's deposition testimony also contradicts Mr. Irizarry's claim, which was taken in a similar case, *Danker et al. v. City of Council Bluffs, Iowa*, 1:20-cv-00016-JAJ-SHL,¹² that Plaintiff's counsel is pursuing:

Q. But there are – you would also agree with [Mehrkam's article's] conclusions that there are differences in behavior evidenced among breeds of dogs.

A. Right.

Q. In general.

A. Right.

Ex. C, pp. 49:23–50:3.

But this leads to a fundamental question: if Plaintiff's own experts cannot agree on material issues regarding Plaintiff's case, how can we trust anything Mr. Irizarry (or Ms. Voith or Ms. Marder or Mr. Lockwood for that matter) is saying?

However, Mr. Irizarry's testimony suffers from another fundamental issue: he lacks crucial knowledge regarding the breeds listed in Keota's Ordinance:

Q. Let me ask you this, Doctor: Do you know the origin of the dogs that are generally described as pit bulls as you have described them?

A. I don't.

Q. Okay. Do you know what makes the American Stafford Terriers, Bull Terriers, and Stafford Terriers different than other breeds of dogs?

A. No.

Ex. A, at p. 42:13–20. In addition, Mr. Irizarry has no knowledge of their use in dog fighting:

Q. Okay. Are you aware of what breeds are commonly used for dog fighting?

A. I don't know much about dog fighting. Honestly, I don't know which breeds or how they train them. I'm really not familiar. I hear about it in the news from time to time, or I see it in a headline. I remember the Michael

¹² Plaintiff unsuccessfully moved to have this and the *Danker* consolidated. Doc. 91.

Vick case that was kind of in the media, but that's not really my area of expertise.

Q. Are you aware that pit bulls are the most common type of dog or breed that's used in dog fighting?

MR. SUMMERLIN: Object based on foundation. You can answer if you can.

A. I don't know which breeds are used, and I don't know what people – how people put fight clubs together or fight dogs.

Id., at pp. 63:13–64:4. By contrast, Ms. Voith was aware of the breeds' origins:

Q. Do you know any origins of the dogs that are generally described as Pit Bulls?

A. Well, some of them had the origin of dogs that were a proportion of – dog breeds that didn't really come into existence until about sometime in the 1800's, and until that time, there were dogs that were used for different things, and one of which was bear biting, bear baiting and fighting, et cetera, but dogs that were similar to those or probably even identical to those were companions or dogs that were not used for that.

So there was a percentage of dogs that had that morphology that were used for these activities, and because they were put in pits for that, they were called Pit Bulls, but that doesn't mean that all of the dogs at that time that looked like that were used for that activity.

Ex. B, at pp. 44:16–45:7. Likewise, Ms. Voith stated that her understanding is that dogs that look like the breeds prohibited by the Keota Ordinance are used for dog fighting and were also bred for that purpose. *Id.* at pp. 27:20–29:21.

Mr. Irizarry's lack of knowledge is absolutely critical. If both Ms. Voith and the American Kennel Club recognize that there are general differences in the ways in which breeds will behave, it stands to reason that the breeds most likely to exhibit aggressive behavior are those in which a segment of the population was bred to be aggressive. However, Mr. Irizarry has no knowledge of the origins of a significant portion of the breeds included in the Keota Ordinance.

This case is about the banning of breeds referred to as “Pit Bulls.” It is Defendants’ position—a position that is supported by numerous scientific studies and articles—that the breeds included in the Keota Ordinance are disproportionately aggressive and dangerous as compared to other dog breeds. This disproportionate dangerousness stems from the origins of pit bulls, where a segment of the population was bred to be aggressive by nature. These aggressive behaviors were passed down to future generations, rendering these breeds disproportionately dangerous. By his own words, Mr. Irizarry has no formal knowledge or training to state one way or the other whether such aggression can be passed from one generation to the next. Nor does Mr. Irizarry have any knowledge regarding the origins of the breeds included in the Keota Ordinance. If he cannot speak to the breeds’ origins and what portions of the populations have been bred and used for over hundreds of years, how can he offer any testimony in this case regarding whether the dog breeds included in the Keota Ordinance are disproportionately dangerous? The answer is that he cannot, and his testimony on this topic must be excluded. *Wheeling Pittsburgh Steel Corp.*, 254 F.3d at 715–16 (holding it is an abuse of discretion to permit an expert to testify to matters outside their area of expertise).

C. Mr. Irizarry is Not Qualified to Testify That No Rational or Scientific Basis to Ban Certain Breeds of Dogs Because He Has No Knowledge of Breed-Specific Legislation and Has Never Researched the Topic

Mr. Irizarry cannot testify to whether bans upon whether there exists a scientific basis to ban certain breeds of dogs, because he is not qualified to do so. As was explained in the preceding section: 1) Mr. Irizarry has no knowledge of whether aggressiveness can

be passed from one generation to another other than not being able to rule out such passing down may occur (Ms. Voith stated virtually all behavior can be passed down) or of whether the specific behaviors of non-owner-directed aggression, dog-directed aggression, and stranger-directed aggression can be passed down from one generation to the next; 2) Mr. Irizarry failed to state one way or the other whether breeds generally may exhibit certain behaviors with more frequency than other breeds (Ms. Voith again stated they do, as did Ms. Amy Marder); and 3) Mr. Irizarry has no knowledge of the fact that a significant segment of the breeds included in Keota's Ordinance were bred to be aggressive, either in fighting bears or fighting other dogs (Ms. Voith stated they were).

In addition, Mr. Irizarry's claim is contradicted by the scholarly article written by Lindsay Mehrkam—cited to by Plaintiff's expert Amy Marder—which included studies showing the current status of the science showing that: 1) there are differences in breeds relating to aggression levels; 2) that Pit-Bulls are disproportionately responsible for human deaths resulting from dog attacks; and 3) that a study of shelter dogs revealed that Pit-Bulls demonstrated a much greater level of aggression, including lunging while growling and snarling, and any attempts to bite than did other dog breeds. Ex. K, at pp. 1, 4, and 5. Mr. Irizarry's claim that there is no scientific basis to support the Keota Ordinance—made without any supporting citations—is thus, at best, debatable, and at worst, completely contradicted. Regardless, his claim is not sufficiently well-accepted within the scientific community to be deemed reliable.

Further, Mr. Irizarry is clearly not qualified to testify to whether there is a rational basis to ban certain breeds of dogs, that is, Mr. Irizarry confirmed he is wholly ignorant of

whether such bans actually work to reduce dog bites and dog attacks. There are several portions of his deposition testimony that demonstrate his unfitness to testify on this topic:

Q. Are you a – or do you consider yourself an expert in breed-specific legislation?

A. No.

Q. Okay. Have you conducted any studies in breed-specific legislation?

A. No.

Q. Have you wrote any papers regarding breed-specific legislation?

A. I have not.

Q. Have you spoken at any seminars on breed-specific legislation?

A. Nope.

Ex. A, pp. 15:20-16:6. Mr. Irizarry's deposition continued:

Q. Okay. Have you ever done a study evaluating the effectiveness of breed-specific legislation?

A. I have not.

Q. Have you ever read any studies dealing with breed-specific legislation?

A. Any studies. I don't think so.

Q. Okay.

A. But, I mean, that's like a vague question. I mean, I'm aware of breed-specific legislation. I mean, I've come across information on it. I'm not acting like I'm ignorant of it, but I don't go out of my way to search to look breed-specific legislation papers to read.

Q. That's fair. And I think we've covered it. You don't consider yourself an expert in breed-specific legislation; correct?

A. Well, I consider myself an expert in genetics, and I feel qualified to discuss the limitation of breed-specific legislation as it is used to try and provide a genetics argument for or against things.

Q. Okay. Well, you have not reviewed any breed-specific legislation studies; correct?

A. No.

Q. And you're not aware of any studies discussing the effectiveness of breed-specific legislation; correct?

A. I couldn't name a specific study that said something one way or the other.

Id. at pp. 25:4–26:6. Likewise, Mr. Irizarry has no knowledge of critical data relating to the frequency of bites and attacks carried out by the breeds included in Keota's Ordinance:

Q. Okay. Do you know the general percentage of the U.S. dog population are what's known as pit bulls, as you've described them, American Stafford Terriers, Bull Terriers, and Stafford Terriers?

MR. SUMMERLIN: Object on foundation. You can answer.

A. If I don't know the absolute value, I probably wouldn't be able to give you the percentage of that value.

Q. Okay. That's fair. Would you agree with me that pit bulls are disproportionately responsible for dog bites in the United States?

A. I don't know the answer to that question.

Q. Do you know what breed is responsible for the greatest number of dog bites?

A. I don't.

Q. Are you aware of any studies that have researched the breeds that are the most responsible for dog bites?

A. I'm not.

Id. at p. 43:15–44:11.

In other words, Mr. Irizarry has no knowledge of breed-specific legislation or whether they are effective or not. Nor does Mr. Irizarry have any knowledge on the percentages of dog bites attributable to the breeds included in the Keota Ordinance or of any studies analyzing the issue. If Mr. Irizarry has no knowledge or expertise in such legislation or of dog bite data for pit bull breeds in general, simply put, he is not qualified to opine whether there is a rational basis for the enactment of legislation prohibiting pit bulls. He simply has no knowledge on the subject. Mr. Irizarry must be precluded from testifying on this subject. *Wheeling Pittsburgh Steel Corp.*, 254 F.3d at 715–16 (holding it is an abuse of discretion to permit an expert to testify to matters outside their area of expertise).

V. **NO EXCLUSION OF AMY MARDER'S TESTIMONY IS REQUIRED BECAUSE PLAINTIFF'S COUNSEL HAS INFORMED DEFENDANT'S COUNSEL THAT MS. MARDER WILL NOT BE CALLED AS A WITNESS**

Keota initially intended to have the opinions of Plaintiff's expert, Amy Marder excluded from being admitted into evidence in this case. However, Plaintiff's counsel has informed Defendant's counsel [REDACTED] and that Plaintiff will therefore not be called as a witness in this matter or presenting Ms. Marder's deposition testimony at trial. Based upon these representations, Keota will not be requesting that Ms. Marder's opinions be excluded from evidence.

VI. THE TESTIMONY OF RANDALL LOCKWOOD MUST BE LIMITED

In his report, Mr. Lockwood sets forth the following opinions: 1) major advances in canine genome challenge old assumptions about connections between appearances of breeds and underlying genetic variation; 2) studies have failed to find connections between genetic composition and behavior, including aggression; 3) genetic background alone is a poor predictor of behavior and behavior is affected by environment and experiences; 4) work with prior fighting dogs show variations in behavior and ability for dog to be rehabilitated; 5) dog breeds cannot be determined by visual inspection; 6) breed-specific legislation is not effective in limiting dog bites. Ex. O, Lockwood Expert Report, pp. 2-3. Mr. Lockwood must be prevented from testifying to these subjects because they are either unreliable, not well-accepted within the scientific community, and/or irrelevant. Keota will take each claim in turn:

A. Advancements in Canine Genome Revealing Lack of Connection Between Appearances of Dogs and Genetic Variation

Mr. Lockwood's report states this opinion at the beginning of his report when he sets forth each of his opinions. However, in the actual body of the report, where Mr. Lockwood explains his opinions, there is no discussion whatsoever on the topic. It is unclear what the relevance of this opinion is to the litigation because whether there is a connection between genetic variation and appearances of dogs has nothing to do with the fundamental issues in this litigation: whether breed-specific legislation is effective and whether there are differences in behaviors between breeds. Mr. Lockwood should not be permitted to testify on this topic because it is not relevant. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311–12 (11th Cir. 1999) (stating the judge's gatekeeping role under *Daubert* is to keep out unreliable and irrelevant information).

B. Connection Between Genetics and Behavior

Mr. Lockwood attempts to claim that studies fail to show a connection between breed and behavior. This claim has been raised by several of Plaintiff's other experts as well. Just like the other experts, Mr. Lockwood also contradicted this claim in his deposition and stated that there are differences in behavior between breeds:

Q. Okay. So we were not there for any of those findings, that breed specific behavior, temperament do occur?

A. **They do.** But again we don't understand the genetic basis for them. And again, those differences are often overshadowed or exceeded by individual differences.

Ex. D, p. 114:10–16 (emphasis added). As was explained above, Plaintiff's other experts have testified to this same point—that there are differences between breeds in terms of behavior—and have cited scholarly articles stating the same. If Plaintiff's experts all state this, but all have contradicted this claim, why should this “opinion” be allowed in? As

Plaintiff's experts have made clear, this statement is simply not true. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible”); *Porter*, 9 F.3d at 613 (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

C. Differences in Behavior of Former Fighting Dogs and Ability for Rehabilitation

Mr. Lockwood's report states this opinion at the beginning of his report when he sets forth each of his opinions. However, in the actual body of the report, where Mr. Lockwood explains his opinions, there is no discussion whatsoever on the topic. Regardless, it is not at all clear what purpose this opinion sought to serve or how it is relevant to this litigation. It is possible that Mr. Lockwood is attempting to claim that behaviors such as aggression cannot be determined solely by breed and that behaviors within breeds vary. However, as was explained above in Sections IV.B and VII.B, that claim is contradicted by statements made by Plaintiff's other experts, as well as by scholarly articles cited to by Plaintiff's experts. Accordingly, there is no basis to permit Mr. Lockwood to testify on this subject. *See id.* (“Widespread acceptance can be an important factor in ruling particular evidence admissible”). Lockwood has failed to cite any authority showing that this theory is widely-adopted. *Porter*, 9 F.3d at 613 (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

D. Inability to Accurately Determine Dog Breed by Visual Inspection

Like each of the other experts listed above, Mr. Lockwood also attempts to claim that dog breed cannot be determined by visual inspection. In support of this claim, Mr. Lockwood also relies upon Ms. Voith's studies as well as an article by K.R. Olson. The issues and unreliability of Ms. Voith's studies are set forth above.

The K.R. Olson article is similar to Voith's study, in that it had participants attempt to identify the breed of dogs by visual inspection and those results were compared to the results of a DNA testing that was performed on each dog in the sample. Ex. P, K.R. Olson et al., *Inconsistent identification of pit-bull type dogs by shelter staff*, THE VETERINARY JOURNAL 206, pp. 198–99 (2015). However, the Olson study also contains the same fundamental problems as Voith's. Indeed, the results of the study are dependent upon the exact same DNA testing that is claimed to have an 84% accuracy rate when offspring with purebred parents of known origin are tested. *Id.*, at p. 201. Interestingly, the article points out the unreliability of the testing in its text (something Voith did not do), stating, “**The accuracy of the test in dogs with more than two breeds and in dogs lacking any pure-bred heritage is unknown.**” *Id.* (emphasis added).¹³ The Olson study contained 120 dogs within its sample,¹⁴ each of which underwent the inaccurate DNA testing. However, the article does not provide a breakdown of how many of the 120 dogs were pure-bred as opposed to mix-breed. Likewise, of those that are mix-breed, the article does not provide

¹³ K.R. Olson includes the inaccuracy of the DNA testing as a potential limitation of the study. Ex. P, at p. 202.

¹⁴ Out of the 120 dogs, it is not fully known how many had the restricted breeds within its breed composition. The DNA testing revealed that 21 of the dogs had at least 12.5% American Staffordshire Terrier or Staffordshire Bull Terrier within its breed composition. Ex. P, p. 199. However, as has been explained, the DNA results are not trustworthy.

a full breakdown of the DNA results of the dogs, thereby prohibiting any insight as to the number of mixed-breeds that contained too many breeds within its composition to be in the class of dogs on whom the DNA testing could be 84% accurate. In other words, just as with Voith's study, the Olson study also suffers from the fact that it is based upon DNA testing with no known rate of error. Accordingly, any results from it cannot be deemed reliable.

However, in addition, the Olson study is almost devoid of any citations to other papers finding visual inspection to determine dog breed to be inaccurate other than to Ms. Voith's studies. This is significant, because if it were actually accepted among scientists that dog breed could not be determined by visual inspection, one would expect that a paper written in 2015 would have more it could point to than two studies that are based upon a DNA test with an unknown error rate.

As such, there is simply no basis to conclude that the premise that Mr. Lockwood is advancing—that dog breed cannot be determined by visual inspection—is either reliable or accepted within the scientific community. For these reasons, Mr. Lockwood must be prevented from testifying on this subject. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible”); *Porter*, 9 F.3d at 613 (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

E. Breed-Specific Legislation Not Effective in Limiting Dog Bites

Finally, Mr. Lockwood's claim that breed-specific legislation like the Keota Ordinance is not well-accepted within the scientific community. In support of this position,

Mr. Lockwood points to claims. First, he points to the untested, unproven, theoretical NNB formula. Ex. O, p. 4. Second, Mr. Lockwood engages in some fancy word-play and states that “no well-designed peer-reviewed study” has shown breed-specific legislation to be effective. Lockwood then goes on to discuss other studies that he apparently deems to be “well-designed” which suggested that such legislation was not effective.

Mr. Lockwood’s opinion in his report regarding the lack of effectiveness of legislation like the Keota Ordinance which prohibits ownership of certain breeds of dogs is based in large part upon a theoretical mathematical formula that Ms. Marder helped create, which has been called the “number needed to ban” (“NNB”). This theory is unproven, untested, and not well-accepted within the scientific community.¹⁵ The purpose of this theoretical¹⁶ formula is to determine the number of dogs that would need to be banned in order to prevent a single dog bite. Ms. Marder opines that the number needed to prevent a single bite or trip to the emergency room would require the banning of thousands of dogs.¹⁷ Based upon this number, Ms. Marder opines that the Keota Ordinance cannot have any actual effect in reducing the number of dog bites and would be too expensive to implement.¹⁸ If Mr. Lockwood’s claim were true, it would be expected that in each of the

¹⁵ Indeed, Ms. Marder could not provide a single citation to any other scholarly work testing the accuracy of the NNB theory. Ex. I, p. 3.

¹⁶ Ms. Marder admitted in her deposition that the formula was purely theoretical in nature. Ex. C, pp. 53:23–54:1.

¹⁷ This is based upon an assumption that the specific breed is responsible for 15% of all dog bites.

¹⁸ Ms. Marder’s report also makes the claim that implementation of the Keota Ordinance would be “too expensive” and “too difficult.” However, none of the articles referenced by Ms. Marder make any mention of the actual costs or difficulty of instituting the Ordinance. It is clear from Ms. Marder’s credentials that she is not an expert in the implementation of ordinances restricting ownership of certain types of breeds of dogs. As such, these claims are unsupported and baseless, and indeed, seem to be derived from thin air. Indeed, Ms. Marder testified in her deposition

municipalities that have previously enacted similar ordinances to Keota’s that there was no difference in the number of dog bites following the passage of the ordinance. However, the studies that have actually examined this issue in raw statistics—not a theoretical model advanced by Mr. Lockwood—show that the majority of municipalities have experienced the opposite.

Indeed, as was explained by Keota’s expert Dr. Felicia Trembath who conducted a review of the studies comparing the data prior to the enactment of the passage of an ordinance similar to Keota’s to the data following the enactment—something Plaintiff’s experts did not do—the majority of studies reveal a reduction in the number of dog bites:

Lead author	Year	Country	Effect seen
Clarke	2013	Canada	0.1 difference in bite rate between municipalities with and without breed-specific legislation.
Klaassen	1996	Scotland	No effect- 134 dog bites recorded in both time periods studied.
Mariti	2015	Italy	25% reduction in injuries was recorded after implementation of the ordinance.
Nilson	2018	Denmark	15% reduction in dog bite injuries; 17% reduction for dog bite injuries in private spaces.
Raghavan	2012	Canada	-25.5 lower rates of DBIH ¹⁹ ; -27.4% lower rates DBIH for those aged <20 years.
Rosado	2007	Aragon, Spain	68% reduction in reported dog bites in urban areas. 2% increase in reported dog bites in rural areas.
Villalbí	2010	Catalonia, Spain	-38% lower rates of DBIH

that she had no information to support her claim that ordinances similar to Keota’s were too difficult or expensive to implement. Ex. C, p. 77:17–20.

¹⁹ DBIH is an acronym for “dog bite injury hospitalizations.”

Ex. H, p. 12.

Ms. Marder and her co-authors created the NNB by attempting to repurpose a mathematical formula called “number needed to treat” (“NNT”) that is used for evaluating medical treatments. Neither Ms. Marder nor Plaintiff’s other experts provide any evidence demonstrating that Ms. Marder’s NNB theory is either widely-accepted or has been tested to determine its accuracy. Further, there is no evidence provided that Ms. Marder’s extrapolation of the NNT formula is appropriate in evaluating dog bites or that the NNT has ever been extrapolated in a similar manner previously. Indeed, this seems unlikely as Ms. Marder states in the study that the creation of the NNB was a “novel method” that the authors had created. In other words, the NNB is nothing more than a novel, untested theory with unknown levels of accuracy and support within the scientific community.

The inability of the NNB theory to match the actual data of the effectiveness of ordinances like Keota’s is not surprising, as the methodology used to arrive at its conclusions is clearly flawed. The NNB is based upon **reported** dog bites, including those that require emergency room visits, hospital visits, and/or insurance claims. Ex. Q, Gary J Patronek et al., *Use of a number-needed-to-ban calculation to illustrate the limitations of breed-specific legislation in decreasing the risk of dog bite-related injury*, JOURNAL OF THE AMERICAN VETERINARY MEDICAL ASSOCIATION, at p. 790 (2010). The issue with this, is that it is well-documented that dog-bites are underreported. Ex. H, p. 6 (citing Alan M. Beck & Barbara A. Jones, *Unreported Dog Bites in Children*, PUBLIC HEALTH REPORTS 1985; 100:315. However, in analyzing the NNB theory, there is no control put into place

to account for the underreporting of bites. *See* Ex. Q. In other words, the NNB theory fails to account for a significant portion of the applicable data. By ignoring the unreported bites, the untested conclusions of the theory cannot be said to be reliable in any scientific sense. Similar to Voith’s Studies, we simply do not know what the actual accuracy of the NNB theory actually is. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible”).

In regards to Mr. Lockwood’s “well-designed” comment, he is not claiming that no studies show data indicating that dog bites have gone down following the enactment of breed-specific legislation. Nor could he, as he stated in his deposition, Dr. Trembath cited to numerous studies showing a reduction. Ex. D, p. 135:12–14. However, he attempts to discredit Trembath’s reliance upon these articles by stating they were “cherry-picked” to support her position. *Id.* at p. 135:15–17. However, contrary to Lockwood’s claim, Trembath went into considerable detailing how she arrived at those seven articles, and it is clear that they were not “cherry-picked,” they were chosen due to having good data both pre- and post-enactment of breed-specific legislation.²⁰ By contrast, Lockwood provides no explanation for how he selected the NNB or the studies demonstrating the breed-specific legislation may not have been effective. Once again, when evaluating Lockwood’s claim that the studies showing breed-specific legislation has a positive effect on limiting bites are not “well-designed,” it is important to keep in mind Lockwood’s affiliation with the ASPCA:

²⁰ Unlike Lockwood or any of Plaintiff’s other experts, Trembath’s “cherry-picked” report actually includes discussion of articles that do not support her position.

Q. What is your compensation with the ASPCA?

A. Basically, I retired in 2013. And I've stayed on as a contract consultant at 25 percent salary, so basically a flat monthly fee.


Q. And as part of this contract, they contact you and you present for them? Would that be fair?

A. Yes. I mean, much of my activity is stuff that I've generated myself and I will be requested to become involved in various issues, either by our law enforcement department, our litigation department, government affairs. Basically, you know, we'll – duties as assigned.

Id. at p. 23:2–13. So if Lockwood is compensated by the ASPCA to advance their interests, what is the ASPCA's stance on breed-specific legislation? Perhaps unsurprisingly, Mr. Lockwood states in his report that the ASPCA opposes such legislation. Ex. O, p. 4 (“Among the US animal-related organizations opposed to breed-specific regulation are...the American Society for the Prevention of Cruelty to Animals...”). Because Lockwood is compensated by the ASPCSA to represent its interest, which include opposition to legislation similar to Keota's Ordinance, is it really all that surprising that Lockwood would opine that there are no “well-designed” studies showing breed-specific legislation is effective? Regardless, the studies available show that at most, there is considerable debate on whether breed-specific legislation is effective. Lockwood's report is unreliable for several reasons, and he should be prohibited from testifying on the subject. *See Daubert*, 509 U.S. at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible ...”); *Porter*, 9 F.3d at 613 (“A known technique that has gained only a minimal following may be viewed with some skepticism.”).

WHEREFORE, for the reasons set forth above, the Defendant, the City of Keota, Iowa, respectfully request the Court limit the testimony of Plaintiff's experts in the manner set forth above.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for all parties to the above-entitled cause by serving the same on such attorney at his/her respective address/fax number as disclosed by the pleadings of record herein, on the 25th of October, 2021 by:

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| <input type="checkbox"/> U.S. Mail | <input type="checkbox"/> FAX |
| <input type="checkbox"/> Hand Delivered | <input type="checkbox"/> UPS |
| <input type="checkbox"/> Federal Express | <input checked="" type="checkbox"/> Other <u>electronic transmission</u> |

/s/ Theresa L. Birch

ATTORNEYS FOR PLAINTIFF