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Of Attorneys for Defendant Steven Dwight Hammond

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Eugene Division

UNITED STATES OF AMERICA,	)	No. **CR 10-60066-HO**
	)	
Plaintiff,	)	**DEFENDANTS' MOTION TO**
v.	)	**CONTINUE *DAUBERT* HEARING;**
	)	
STEVEN DWIGHT HAMMOND, and	)	**REQUEST FOR STATUS**
DWIGHT LINCOLN HAMMOND, JR.,	)	**CONFERENCE**
	)	
Defendants.	)	

Defendant Steven Dwight Hammond, by and through his attorneys Lawrence H. Matasar and Lawrence Matasar, P.C., and defendant Dwight Lincoln Hammond, Jr., by and through his attorneys Marc D. Blackman and Ransom Blackman LLP, move to continue the *Daubert* hearing scheduled for February 21, 2012 on the grounds that the government's January 31, 2012 notice identifying 26 witnesses subject to pretrial screening under *Daubert* does not provide defendants with sufficient time to prepare or for the Court to conduct a meaningful *Daubert* hearing on that day.

Defendants further request that the Court schedule a telephonic status conference at its earliest convenience.

In support of this motion, the Court is respectfully referred to the Points and Authorities below.

Dated this 9th day of February, 2012.

Respectfully submitted,

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POINTS AND AUTHORITIES

1. A Meaningful *Daubert* Hearing regarding 26 Proposed Expert Witnesses Cannot be Held in the Time Available on February 21, 2012.

On November 1, 2011, the Court ordered defendants to file pretrial motions - including any challenges to potential expert testimony - by January 17, 2012 and set a motions hearing for February 21, 2012 beginning at 10:30 a.m. November 1, 2012 Minute Order [Docket No. 54]. On January 17, 2012, defendants filed their Motion *in Limine* to Exclude Expert Opinion Testimony [hereafter "*Daubert* Motion"] and request for a pretrial evidentiary hearing. Docket No. 59. In preparation of this motion, defendants identified 10 witnesses in discovery that they believed the government might seek to qualify as experts. Defendants identified these persons in their *Daubert* Motion.

On January 31, 2012, the government filed a Rule 16 Expert Witness Notification. Docket No. 61. This notice identified 26 witnesses who would be subject to pretrial screening under *Daubert*. It did not include three of the persons defendants had identified in their *Daubert* Motion; it did include 19 persons defendants had not identified.

When the Court set the February 21, 2012 motions hearing, neither the Court nor the defendants had reason to believe that the government would seek to have 26 witnesses qualified as experts. Defendants believe that if the Court had known this in November, it would have set a multi-day hearing; the meaningful inquiry required by *Daubert* simply cannot be conducted in a partial court day when 26 witnesses are at issue. Because the

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purposes of a *Daubert* hearing cannot be fulfilled in the time currently allotted on February 21, 2012, defendants believe that hearing must be rescheduled.

The purpose of a *Daubert* hearing, of course, is to provide the Court with sufficient information to exercise its crucial "gatekeeper" function under Federal Rules of Evidence [FRE] 104 and 702. As reiterated by the Ninth Circuit in *Jinro America Inc. v. Secure Investments, Inc.,* 266 F.3d 993, 1004 (9th Cir. 2001), this requires the trial court to hear and consider information about each of the three Rule 702 admissibility criteria:[1]

> [A]lthough the district judge has "the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case," *Kumho* [*Tire Co., Ltd. v. Carmichael*], 526 U.S. [137] at 158, 119 S. Ct. 1167, the proper exercise of that gatekeeping function is critically important "to ensure the reliability and relevancy of expert testimony." *Id.* at 152, 119 S. Ct. 1167; *see also Daubert,* 509 U.S. at 590, 594–95, 113 S. Ct. 2786. "[I]t is not discretion to perform the [gatekeeping] function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky." *Kumho,* 526 U.S. at 159, 119 S. Ct. 1167 (Scalia, J., concurring). *Jinro America Inc. v. Secure Investments, Inc*., 266 F.3d at 1005.

It is simply not feasible to screen 26 proposed expert witnesses in a one-day hearing set to begin at 10:30 a.m. While there may not be a rule of thumb for how long it takes to screen a proposed expert, the time restrictions the Court would have to impose to screen 26 witnesses in half a morning and a long afternoon would deny defendants their constitutional rights to due process and confrontation. As the Ninth Circuit observed in *United States v. Stanfield*, 521 F.2d 1122, 1128-29 (9th Cir. 1975):

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[1] (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. FRE 702.

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> [L]limitation of the scope and extent of cross-examination will not result in reversal in criminal cases unless it is made clear that the defendant has been denied his constitutional right to confrontation. *United States v. Haili*, 443 F.2d 1295 (9th Cir. 1971). At the same time the right of cross-examination remains as a fundamental tool to insure the full play of the Sixth Amendment right to confront the witnesses against him. *United States v. Miranda*, 510 F.2d 385 (9th Cir. 1975). Wide latitude should ordinarily be afforded where there exists a serious issue of the credibility of the witness. *Harris v. United States*, 371 F.2d 365 (9th Cir. 1967).
>
> Since this case must be remanded for a new trial on other grounds, we feel it sufficient to note that, under the facts disclosed by the record before us, the limitation on cross-examination of the police officers appears to have been unduly restrictive. *United States v. Stanfield*, 521 F.2d at 1128-29.

See also McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), *cert. den.,* 499 U.S. 919, 111 S. Ct. 1306, 113 L. Ed.2d 241 (1991) ["to impose arbitrary limitations (on the time allowed for cross-examination), enforce them inflexibly, and by these means turn a federal trial into a relay race is to sacrifice too much of one good—accuracy of factual determination—to obtain another—minimization of the time and expense of litigation"]. Indeed, it would appear to be an abuse of discretion to attempt to conduct a 26-witness *Daubert* Hearing in less than one day. *See Dodge v. Cotter Corp.*, 328 F.3d 1212, 1228 (C.A.10 (Colo.) 2003) ["Though the court was put on notice of specific challenges to certain experts' methodology and reasoning, it insisted on the exclusive use of argument and proffers at the *Daubert* hearing instead of meaningful live witness testimony....Although a detailed, in-depth hearing addressing disputed reasoning and methodologies was critical to a proper resolution of the entire case, the *Daubert*

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hearing lasted just over four hours and allowed for little more than a cursory review of the contested issues."].

Hence, even if defendants were able to prepare to examine the additional 19 persons who appeared on the government's January 31, 2012 list, sufficient time is not available to effectively examine these witnesses on February 21, 2012.

2. Defendants Cannot Adequately Prepare by February 21, 2012 to Examine the 19 Proposed Expert Witnesses They Had Not Foreseen at the Time they Filed their *Daubert* Motion.

In addition to the time restrictions that would necessarily undermine an effective *Daubert* hearing on February 21, 2012, the additional number of witnesses identified by the government in its January 31, 2012 notice renders it practically impossible for defendants to be prepared for that hearing on that date. Their preliminary review of the résumés and reports of these persons have identified numerous potential grounds for challenging their general expertise, the relevance of their expertise to their proposed testimony, and the factual bases of their conclusions or opinions. This latter issue, which bears on the first and third criteria for admissibility under FRE 702, requires detailed analysis and comparison of the proposed witness's testimony and the actual evidence regarding the event about which they propose to opine. Significant portions of that evidence and data were not provided to the defense until December, 2011 and January, 2012. Defendants simply do not have enough time between January 31, 2012 and

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February 21, 2012 to analyze, digest, and integrate that information into their challenges to the admissibility of 19 additional experts.

A party is entitled to adequate time to prepare. The *Daubert* Hearing is a critical stage of this proceeding. The circumstances warrant a continuance of the *Daubert* Hearing to permit the defendants adequate time to challenge the 26 persons the government intends to offer as experts. *United States v. Delgado*, 424 Fed. Appx. 616, 618, 2011 WL 1097773, 1 (9th Cir. 2011) [Factors that must be considered when ruling on continuance include: "[1] whether the continuance would inconvenience witnesses, the court, counsel, or the parties; [2] whether other continuances have been granted; [3] whether legitimate reasons exist for the delay; [4] whether the delay is the defendant's fault; and [5] whether a denial would prejudice the defendant." *quoting United States v. Thompson*, 587 F.3d 1165, 1174 (9th Cir. 2009)].

The February 21, 2012 *Daubert* Hearing should be continued to allow defendants adequate time to prepare.

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3. Defendants Request that the Court Schedule a Telephonic Status Conference.

Defendants request that the Court schedule a telephonic status conference at its earliest convenience to address the issues presented by this motion.

Dated this 9th day of February, 2012.

Respectfully submitted,

RANSOM BLACKMAN LLP	LAWRENCE MATASAR, PC
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' MOTION TO CONTINUE *DAUBERT* HEARING; REQUEST FOR STATUS CONFERENCE on the following attorneys:

Frank R. Papagni, Jr.
Amy E. Potter
Assistant United States Attorneys
United States Attorney's Office
405 East 8th Avenue
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Eugene, OR 97401

by electronic file notice of a true copy on the 9th day of February, 2012.

RANSOM BLACKMAN LLP

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