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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

**EUGENE DIVISION**

**UNITED STATES OF AMERICA**

**10-CR-60066-HO**

**v.**

**GOVERNMENT'S RESPONSE TO  
DEFENDANTS' MOTION TO  
CONTINUE *DAUBERT* HEARING**

**STEVEN DWIGHT HAMMOND, and  
DWIGHT LINCOLN HAMMOND, Jr.**

**Hearing Date: February 21, 2012**

**Defendants.**

The United States of America, by and through S. Amanda Marshall, United States Attorney for the District of Oregon, and Frank R. Papagni, Jr., Amy Potter and AnneMarie Sgarlata, Assistant United States Attorneys, hereby submits the following reply to Defendants' motion to continue the *Daubert* hearing (Defets' motion) presently scheduled for February 21, 2012.

The government urges the Court to deny defendants' continuance motion, keep the *Daubert* hearing as scheduled for February 21, 2012, and calendar a continuation of the *Daubert* hearing, thereby decreasing by more than half the number of expert witnesses defendants must be prepared to examine at the February 21, 2012 hearing. Because defendants are to provide notice of their expert witnesses on February 22, 2012, the government suggests for purposes of judicial efficiency that the remainder of the government's expert witnesses and defendants' expert witnesses be heard at the same hearing.

### **PROCEDURAL POSTURE**

After an indictment was returned in June 2010, trial was continued three times on defendants' motions (CR 11,42, 52). It is currently scheduled for April 2, 2012 (CR 52).

On November 1, 2011, the Court ordered defendants to file pretrial motions including challenges to expert witness testimony by January 17, 2012 (CR 54). A motions hearing was set for February 21, 2012 at 10:30 a.m.. On January 17, 2012, defendants filed a motion *in limine* to exclude expert opinion testimony and requested a pretrial evidentiary hearing (CR 59). On January 31, 2012, the government filed a Rule 16 Expert Witness Notification, identifying 26 witnesses who may be subject to pretrial screening under *Daubert* (CR 60, 61). *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

On February 9, 2012, defendants filed a motion to continue the *Daubert* hearing, on grounds that a multi-day hearing should be set to accommodate the number of witnesses and defendants' right to a meaningful inquiry pursuant to *Daubert* (CR 63). Defendants assert it would be an abuse of discretion to attempt to conduct a 26-witness *Daubert* hearing in less than one day (CR 63 at 5). Discovery as to each of the 26 witnesses has been provided to defendants.

Travel arrangements for each of the government's potential expert witnesses have already been secured. A bifurcated approach should satisfy defendants' concerns while also allowing the Court ample opportunity to evaluate the scope of the hearings.

### DISCUSSION

Rather than continue the *Daubert* hearing scheduled over three months ago, the government respectfully requests that the Court schedule a second hearing date for defendants' *Daubert* challenges and the government's *Daubert* challenges to defendants' expert witnesses.

If this approach is taken, on February 21, 2021, the government will present witnesses 1 through 8 (fire cause and behavior experts), 10 through 11 (degradation experts), as identified in its notice of expert witnesses (CR 61), and 12 (lightning experts – two witnesses who were subsequently identified). This will reduce the number of witnesses and areas of expertise defendants must prepare to examine at the February 21<sup>st</sup> hearing from 26 to no more than 12.

If needed, the government will present witnesses 13 through 24 who are "fact" witnesses whose expert opinions are based on specialized knowledge, training and experience regarding fire cause, behavior, firefighting, fire suppression costs, and fire safety issues (CR 61)<sup>1</sup>. One witness, Joe Glascock, has an education, experience and specialized training pertaining to cattle ranching.

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<sup>1</sup>In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court tasked district judges with the responsibility of acting as "gatekeepers" to exclude unreliable expert testimony, and the Court in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), clarified that the trial court's gatekeeping function applies to all expert testimony, not just to scientific testimony. *See* Fed. R. Evid. 702, Advisory Comm. Notes to 2000 Amendments.

Witnesses 25 and 26 also are fact witnesses whose testimony relies on their familiarity with Federal Aviation Administration rules, regulations and certifications, and who will not provide the expert opinion testimony which requires the Court conducting the gate-keeping function contemplated by *Daubert*. By removing them from the list of potential expert witnesses, the number of witnesses defendants must be prepared to examine at the second hearing date will be no more than 12.

### CONCLUSION

For the foregoing reasons, the government respectfully suggests the hearing on the parties' expert witnesses be bifurcated to permit defendants adequate time to examine the government's expert witnesses and enable the Court to efficiently perform its "gatekeeping" function.

Dated this 13th day of February 2012.

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