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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' REPLY TO  
GOVERNMENT RESPONSES  
TO DEFENDANTS' MOTION**

v.

)

**IN LIMINE AND MOTION**

)

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

)

**TO EXCLUDE EXPERT  
OPINION TESTIMONY**

)

Defendants.

)

)

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**DEFENDANTS' REPLY TO GOVERNMENT RESPONSES TO  
DEFENDANTS' MOTION *IN LIMINE* AND MOTION TO EXCLUDE  
EXPERT OPINION TESTIMONY**

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, hereby respond to the government's Response to Defendants' Motion to Exclude Expert Testimony [CR 60] and its Response to Defendants' Motion to Continue *Daubert* Hearing [CR 65].

1. General Principles Regarding Daubert Hearing

The government acknowledges that “a *Daubert* hearing of some type will be required because defendants are challenging the qualifications of some of the experts and the reliability of the science...” Response to Defendants' Motion to Exclude Expert Testimony [CR 60] at 3. The government does not concede that the *Daubert* hearing must address whether: (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. *Ibid.* Defendants believe that the authorities cited in their prior memoranda demonstrate that the government's position is incorrect.

2. Proposed Witnesses to be Screened at the February 21, 2012 Hearing

The government appears to concede that the time available on February 21, 2012 is insufficient to screen the 26 experts identified in its January 31, 2012 Notice [CR 61].

Response to Defendants' Motion to Continue *Daubert* Hearing [CR 65] at 3. It proposes

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that the Court attempt to screen 11 witnesses that day - eight “fire cause and behavior” experts, two “depredation” experts, and two “lightning” experts.

Defendants believe it is overly ambitious to attempt to examine 11 witnesses in the time available on February 21, 2012. As the Court will learn at the time of the hearing, the “fire cause” and “depredation” experts viewed different areas within the August 2005 and August 2006 fire complexes at different times and under different circumstances. The *Daubert* hearing must explore the sources of information and circumstances of each witness’s work as well as whether each applied reliable principles and methods reliably to the actual facts and data. The defense does not believe that an appropriate *Daubert* examination of 11 such witnesses can be completed in the time available on February 21, 2012.

Defendants are willing to begin the *Daubert* hearing on February 21, 2012. However, they believe that attempting to screen 11 witnesses in the allotted time would unavoidably deprive them of their constitutional and evidentiary rights to test the expertise and opinions of the government’s proposed experts. They therefore suggest that the expectations for the February 21, 2012 hearing be limited to the “fire cause” and “depredation” witnesses who appeared on both the defendants’ and the government’s lists - Charles Miller, Janice Madden, John Bird, Jeffrey Rose, and Daniel Gonzalez. If the government believes that there will be time on February 21, 2012 to screen additional “fire cause” and “depredation” witnesses, the defense further suggests that the

government advise them of which of these persons [Charley Martin, Jeff Stampfly, Lynn Miracle, Carrie Bilbao, and Gary White] it plans to ask to be in Eugene that day, with the understanding that their presence will not be used to limit defendants' thorough examination of Messrs. Miller, Bird, Rose, and Gonzalez or Ms. Madden.

3. Impact on Trial Date

Shortly after defendants learned that the government intended to seek to qualify 26 witnesses as experts, they notified the Court of their concern that it would not be possible to conduct the *Daubert* hearing in the time available on February 21, 2012. In response, the parties were advised that "if we are unable to conclude the hearing on the 21st, it would appear that the trial date is in jeopardy." February 8, 2012 e-mail from Jill Wright, Courtroom Deputy, to Larry Matasar, Marc Blackman, and Amy Potter. The government now essentially concedes that we will be unable to conclude the *Daubert* on February 21, 2012. In addition, discovery problems continue to plague the case. Attached as Exhibit 104 is defendants' January 30, 2012 request addressing these problems. Attached as Exhibit 105 is the government's February 9, 2012 letter identifying additional discovery problems.

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Under all of the circumstances, it appears that the April 2, 2012 trial date has become problematic. Defendants ask that the Court address this issue during the February 21, 2012 hearing.<sup>1</sup>

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<sup>1</sup> At this time, defendants believe a continuance of the trial date is going to be necessary because of the significant discovery that has not yet been produced as well as the number of witnesses, both fact and expert, that the government intends to call.

In the government's Response to Defendant's Motion to Continue, CR 65, p. 2, it notes that trial "was continued three times on defendants' motions." Defendants acknowledge this to be the case. What the government fails to mention in its memorandum is something it conceded during an August 11, 2011 hearing before Magistrate Judge Coffin; that these continuances were necessitated by the numerous problems that plagued its discovery. During that hearing, Mr. Papagni advised Judge Coffin: "And now that Ms. Root is on it, I think it's getting organized...I don't see us getting them everything they need for a trial in this case, if I was on their side of the bar, until late September".

And problems regarding discovery persist, as confirmed by the government's February 9, 2012 letter to the defense [Exhibit 105]. For example, with respect to the 1982 Steens Mountain Loop fire, the letter advises the defense:

In July, 2011, you were provided with a CD containing discovery which was marked as Bates page numbers 82.00001 thru 82.00087. The photographs located at Bates 82.00013 through 82.00087 are not related to the Steens Mountain Loop arsons, but are in fact duplicates of photographs which were taken by Fire Cause Investigator Chuck Miller as part of the [2006] Grandad arson investigation...Please discard Bates documents 82.00013 thru 82.00087 and replace them with Bates numbered documents 82.00013 thru 82.00221 located on the enclosed CD.

The re-organized government discovery provided in late September, 2011, consisted of approximately 20,000 pages of documents, 1,000 photographs, numerous maps, and several large computer files, many of which were unreadable. The government provided additional discovery in December, January, and February, and the defense continues to await a response to its January 30, 2012 letter regarding discovery that has yet to be produced. *See* Exhibit 104.

Dated this 14th day of February, 2012.

Respectfully submitted,

RANSOM BLACKMAN LLP

LAWRENCE MATASAR, P.C.

/s/ MARC D. BLACKMAN

/s/ LAWRENCE H. MATASAR

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Dwight Lincoln Hammond, Jr.

Steven Dwight Hammond

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' REPLY TO GOVERNMENT RESPONSES TO DEFENDANTS' MOTION *IN LIMINE* AND MOTION TO EXCLUDE EXPERT OPINION TESTIMONY on the following attorneys:

Frank R. Papagni, Jr.  
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by electronic file notice of a true copy on the 14th day of February, 2012.

RANSOM BLACKMAN LLP

/s/ MARC D. BLACKMAN

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