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U.S. DISTRICT COURT  
DISTRICT OF MARYLAND

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DISTRICT OF MARYLAND  
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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND – BALTIMORE DIVISION

ALBERT SNYDER,

Plaintiff,

vs.

Case No. 1:06-cv-1389-RDB

FRED W. PHELPS, SR.;  
SHIRLEY L. PHELPS-ROPER;  
REBEKAH A. PHELPS-DAVIS; and,  
WESTBORO BAPTIST CHURCH, INC.,

Defendants.

**RESPONSE TO PLAINTIFF'S MOTION IN LIMINE  
TO PRECLUDE DR. BLUMBERG FROM PRESENTING HEARSAY EVIDENCE  
OF DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER**

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, make the following response to "Plaintiff's Motion in Limine to Preclude Dr. Blumberg from Presenting Hearsay Evidence:"

1. Plaintiff has asked the Court to disallow the expert witness, Dr. Neil Blumberg, from testifying about tests/assessments administered by others working under his direction as part of the independent medical exam conducted on plaintiff.

2. Any argument that an expert witness may not rely on tests and assessments by other doctors is contrary to the federal rules of evidence and case law. For example, Rule 703, Federal. Rules of Evidence, provides:

**Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, **the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.** Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect (emphasis added).

In other words, hearsay evidence may be admitted under Rule 703. See *United States v. Leeson*, 453 F.3d 631, 636-638 (4<sup>th</sup> Cir. 2006) (where expert witness sufficiently established that inmates in a federal mental health facility, in general, are reasonably relied upon by experts in his field, including information from the inmates about the criminal defendant approaching them to recruit them in assisting him in looking crazy as part of the basis for the expert's opinion that the defendant was not suffering from a severe mental illness which prevented him from appreciating the nature and quality or wrongfulness of his actions was proper). See also *United States v. Garcia*, 447 F.3d

1327, 1336 (11<sup>th</sup> Cir., 2006). See also *Binakonsky v. Ford Motor Company*, 4 Fed.Appx. 161, 2001 WL 127337 (4<sup>th</sup> Cir. 2001).

In *Sosna v. Binnington*, 321 F.3d 742, 746 (8<sup>th</sup> Cir., 2003) the Court pronounced the commonly understood rule in this regard: “Rule 703 permits an expert to ‘rely on otherwise inadmissible hearsay evidence in forming his opinion if the facts and data upon which he relies are of a type reasonably relied upon by experts in his field.’ *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1182 (8th Cir. 1997) (citing Fed. R. Evid. 703).” So long as Dr. Blumberg establishes that the tests/assessments whose results he considered are of the type relied upon by experts in his field, rendering an expert opinion which rests on those tests and assessments, in part, is admissible under Rule 703.

3. Further, entries in medical records relied upon by the expert witness are not hearsay in any event. See Rule 803(4) and (6), which provide respectively:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: \* \* \* \* \*

**4) Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. \* \* \* \*

**(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from

information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

See *Willingham v. Crooke*, 412 F.3d 553, 561-562 (4<sup>th</sup> Cir. 2006) (admitting medical records with doctors' statements about what plaintiff said was proper under Rule 803[4]); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 204-205 (4<sup>th</sup> Cir. 2000) (reports and documents prepared in the ordinary course of business are an exception to hearsay).

Any argument that a medical expert witness may not rely on medical records and reports of other doctors is contrary to the federal rules of evidence and case law. Therefore, a motion in limine to preclude Dr. Blumberg from presenting evidence from the tests/assessments by others, in the normal course of the independent medical exam, should be disallowed as contrary to the rules of evidence.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

We hereby certify that the foregoing response was served on October 12, 2007, as follows:

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