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June 7, 2007

**Re: Snyder v. Phelps, et al., No. 1:06-cv-01389-RDB**

Dear Judge Bennett:

This letter is filed pursuant to the Court's direction to file a letter concerning issues to be raised during a conference call with the judge.

The parties' conference call is scheduled with Your Honor Monday, June 11, 2007. I have coordinated the conference call whereby each participant will need to (1) call (877) 358-2156; and (2) enter the passcode, which is 254101.

This conference call is being set because, many weeks after the parties agreed on a June 18, 2007 independent psychiatric medical examination (IME) for Plaintiff without needing a court order for the IME, Plaintiff's counsel advised undersigned counsel that one Plaintiff's lawyers will be present in the examination room during the examination. Defendants Westboro Baptist Church and Fred Phelps, Sr., hope, through this conference call, to obviate needing to file a motion to compel the IME without the presence of witnesses.

By having previously agreed to a mental examination of Plaintiff without stating conditions thereon (other than knowing Neil Blumberg, M.D., will perform the examination at his office on the agreed date, without having any disrobing nor touching of plaintiff by Dr. Blumberg), it was unnecessary before now for Defendant to seek court intervention concerning the IME. The Rule governing the dispute that is at issue for the conference call is Fed. R. Civ. P. 35(a), which provides in pertinent part:

When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be

made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Fed. R. Civ. P. 35(a).

Attached hereto is the Declaration of IME psychiatrist Neil Blumberg, M.D., demonstrating in detail that the accuracy of the IME will be seriously compromised and skewed by the presence of any observers at or electronic recordation of the examination. Defendants reincorporate Dr. Blumberg's declaration by reference herein.

The caselaw supports prohibiting the presence of any witnesses or recordation devices at the IME. "[A]bsent a compelling determination of need ... a party's counsel should not be permitted to attend a Rule 35 examination." *McKitis v. Defazio*, 187 F.R.D. 225, 228 (D. Md. 1999); *accord, Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595, 598 (D. Md. 1960)

Where, as here, the plaintiff alleges emotional distress and defendants' IME doctor has demonstrated that the IME will be compromised by the presence of witnesses (absent being impeached), witnesses should not be permitted. *Galiati v. State Farm Mut. Auto. Ins. Co.*, 154 F.R.D. 262 (D. Colo. 1994). Similarly, based on Dr. Blumberg's attached affidavit demonstrating a compromised examination with any witness's presence, not even plaintiff's physician should be permitted to be present thereat. *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 196, 2002 (N.D. Tex. 1995).

Consequently, Defendants seek to exclude witnesses at the IME of plaintiff.

Respectfully submitted,

Jonathan L. Katz

P.S. Please permit the filing slightly past midnight of this submission. Undersigned counsel had a technical problem with locating his ECF password.

cc: All parties of record (by ECF filing system to Plaintiff's counsel, and by e-mail to the *pro se* defendants).