

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DAVID J. ROBINSON,

Plaintiff

v.

JO MILLER, f/k/a/ Jo Pollock,

Defendant

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No. 2:11-cv-56-JHR
FILED UNDER SEAL
(UNSEALED 1/6/12)

**MEMORANDUM DECISION ON PLAINTIFF’S AND DEFENDANT’S MOTIONS TO
STRIKE**

The parties have each filed two motions to strike or exclude the testimony of two of the opposing party’s witnesses. I address each motion in the order filed and, for the reasons stated herein, deny each one.

I. Defendant’s Motion to Strike Hartog (Docket No. 46)

The defendant moves to strike the plaintiff’s designation of John A. Hartog as an expert witness. Defendant’s Motion to Strike Plaintiff’s Expert Designation of John A. Hartog or in the Alternative to Compel the Deposition of Mr. Hartog in Maine and to Permit the Defendant to Designate a Responsive Expert (“Hartog Motion”) (Docket No. 46) at 1. I deny the motion.

On August 19, 2011, I held a telephone conference with counsel in response to a letter from Attorney McGintee, one of the lawyers representing the defendant, “seeking clarification of the timetable for expert witness designations and expressing concern about whether the plaintiff intended to designate experts other than Attorney Hartog[.]” Report of Hearing and Order re: Discovery Dispute (Docket No. 45) at 1. Once it became clear that the parties’ dispute

concerned the adequacy of the plaintiff's designation of Hartog on June 20, 2011, the deadline for the plaintiff's designation of expert witnesses, and whether the plaintiff's supplementation of that designation on August 15, 2011, was permissible, I directed the defendant to file the instant motion. *Id.* at 2.

Prior to the conference, the plaintiff had requested on August 8, 2011, a 30-day extension of the discovery deadline to allow for three specified purposes, one of which was the supplementation of his expert witness designations. Plaintiff's Motion to Extend Discovery Deadline by Thirty (30) Days (Docket No. 39) at 5. After the defendant filed her opposition to the motion (Docket No. 41), I granted it with a docket entry dated August 15, 2011. Docket No. 42. However, while my August 15 docket entry allowed the plaintiff to supplement his expert witness designation, at the conference on August 19 I informed counsel that my August 15 entry "was not intended to alter the existing expert designation deadlines in any way." Docket No. 45 at 1.

A. The Merits

The first ground for the defendant's motion to strike is that the plaintiff "failed to make a sufficient designation by June 20, 2011 as required by the Court's Scheduling Order." Hartog Motion at 1. That designation included descriptions of Hartog's education, his experience, his hourly rates, and his memberships in law-related organizations, his curriculum vitae, and the following about his anticipated testimony:

Mr. Hartog will serve as an expert witness on the subject of California trusts and estates practice. He is expected to offer opinions about the proper professional practices and ethical obligations of California attorneys when longstanding estate plans are modified under circumstances of the sort presented in this case. He will base his opinions on his review of Herbert Miller's estate planning documents, Herbert Miller's medical records, the writings of attorneys representing

the Defendants, including any writing prepared or relied upon by Brian McCauley, Esquire and any testimony provided by Mr. McCauley in the course of this case, as well as his knowledge and experience as an estates, trusts and probate practitioner. He will also be available to testify in rebuttal to any facts, opinions and defenses offered in the defense case-in-chief relating to the subject of California trusts and estates practices.

Owing to the fact that the Plaintiff received the first installment of Mr. Miller's estate planning and medical records on May 27, 2011, Attorney McCauley's file on June 6, 2011 and additional medical records on June 17, 2011, Mr. Hartog has not completed a review of those documents and has, therefore, not formed his opinions as to the propriety of the measures taken by the attorneys involved in the modification of Herbert Miller's estate plan. In accordance with F.R.Civ.P. 26(a)(2)(E), Mr. Hartog's designation will be duly supplemented to reflect all opinions to be offered at trial, the facts and data he considered in forming them and any exhibits that will be used to summarize or support them.

Plaintiff's Expert Witness Designations ("Initial Designation") (Docket No. 46-2) at 4.¹

The plaintiff's supplementation of this designation, dated August 15, 2011, includes approximately two pages of text specifically describing Hartog's anticipated testimony. Plaintiff's Supplementa[t]ion of Expert Witness Designation (Docket No. 46-3) at 1-3.

The defendant faults the initial designation for failing to "specifically reference the need to depose McCauley" and asserts that none of the documents produced to the plaintiff in discovery from third parties "had [any] bearing on Mr. Hartog's opinion, as summarized in Plaintiff's Supplemental Designation[.]" Hartog Motion at 2 n.4 & 3. The first objection makes too fine a point. The initial designation says that Hartog's opinion would be based on "any testimony provided by Mr. McCauley in the course of this case." That statement is sufficient to inform the defendant that Hartog would need to review any deposition testimony given by McCauley.

¹ The reference to defendants in the plural reflected that the designation pre-dated the death of defendant Herbert Miller. See Docket No. 40.

It is important to remember that this case is unusual in that the plaintiff wants to prove that he was wrongfully excluded from Herbert Miller's estate. Therefore, he must in essence respond to those who participated in Herbert Miller's estate planning, made changes to his estate documents, and from whom the defendant will elicit expert testimony concerning the legal adequacy of what was done. Neither Hartog nor the plaintiff's attorneys could be expected to anticipate all that McCauley might say at his deposition. Moreover, the plaintiff's attorneys have represented that Hartog's testimony "is only relevant to the extent that J. Brian McCauley's testimony is allowed by the Court." Plaintiff's Opposition to Defendant[']s Motion to Strike Plaintiff's Expert Witness Designation of John A. Hartog or in the Alternative Compel the Deposition of Mr. Hartog in Maine and to Permit the Defendant to Designate a Responsive Expert ("Hartog Opposition") (Docket No. 51) at 2 n.1.

The parties disagree strongly over the defendant's second argument, that none of the documents just produced by the plaintiff had any bearing on Hartog's testimony. The plaintiff says that he did not receive any estate planning documents until May 28, 2011, and no documents "regarding" McCauley until June 6, 2011, and offers a list of later dates upon which the defendant produced additional documents, through August 8, 2011. *Id.* at 3-5. Significantly, he does not say on which of those dates, if any, documents to be reviewed by Hartog were produced, although a footnote records that "additional records" from two law firms, not McCauley, were produced on August 8. *Id.* at 5 n.2. Hartog attended McCauley's deposition on July 12, 2011. Hartog Motion at 4. The transcript from McCauley's deposition was forwarded to Hartog on July 29, 2011. Hartog Opposition at 6.

Under these circumstances, the plaintiff's initial designation (made prior to McCauley's deposition) and supplementation (leave for which was requested 10 days after receipt of

McCauley's deposition transcript) are timely. The defendant's contention that the plaintiff should have produced a report from Hartog no later than June 20, 2011, the designation deadline, Motion at 4-5, is incorrect. Counsel for the defendant were well aware, at least as of their receipt of the initial designation, that the plaintiff took the position that he could not provide a full designation until Hartog had reviewed the requested legal documents and records and knew what McCauley would say in his testimony. To argue that the plaintiff should have anticipated the testimony to be offered by the defendant's expert witness before seeing all of the relevant documents and learning what that defense expert witness would say is to advocate the impossible.

The defendant's contention that the plaintiff was required to present his supplemental designation concerning Hartog in the form of a report, Motion at 5, is also in error. The parties were informed by the scheduling order that the information required to be included in the designation of an expert witness "may, but need not, be provided in the form of a written report[.]" Scheduling Order with incorporated Rule 26(f) Order (Docket No. 11) at 2. This term is the usual practice of this court, and is fully compliant with Fed. R. Civ. P. 26(a)(2)(B) ("Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report[.]").

Contrary to the defendant's argument, Hartog Motion at 6, nothing in my opinion in *Griffith v. Eastern Maine Med. Ctr.*, 599 F.Supp.2d 59 (D. Me. 2009), requires that the plaintiff's designation of Hartog be stricken. In that case, no reason was given for an initial designation that was not complete, other than an assertion that the expert witness's opinions "will be filed in a timely fashion before trial [,]" which in fact was not done. *Id.* at 63-64. Here, a reason was given frequently and consistently by the plaintiff's attorneys. Finally, the witness at issue in this

case will offer what is essentially rebuttal testimony, while the expert in the *Griffith* case was to be presented as an integral part of the plaintiff's case-in-chief.

The defendant complains that the plaintiff "never requested an extension of the expert disclosure deadline for McCauley's deposition or Mr. Hartog's vacation." Hartog Motion at 7. But, the plaintiff's attorneys told me during discovery conferences on April 20 and 22, 2011, that they would like to do something of the kind, and I informed all counsel that I preferred that so much of a designation as could be made be made by the established deadline for doing so, with supplementation to follow as soon as practicable. Docket No. 24 at 2. Similarly, the defendant complains that the plaintiff "did not even notice the McCauley[] deposition and certainly never sought to accelerate it in order to make a timely expert disclosure[,]'" Hartog Motion at 7, but her lawyers indicated that they intended to conduct a videotaped deposition of McCauley in order to present his testimony at trial in that fashion. There was no need for the plaintiff to do either of these things.

The defendant next contends that "disclosure of an opinion attacking the sufficiency of Mr. McCauley's 2008 interview process . . . introduces an entirely new issue into the case, i.e. whether Mr. McCauley, as trusts and estate attorney, did a proper independent evaluation of Mr. Miller in 2008." *Id.* at 7. This argument also misses the mark. Such an opinion is within the scope of the plaintiff's initial designation of Hartog. If the defendant wishes to argue with respect to evidence to be introduced at trial that "this case is about whether Jo Miller improperly influenced Mr. Miller to remove the Plaintiff from his will; it is not about Mr. McCauley's alleged legal duties to Mr. Miller[,]'" *id.* at 8, and that, therefore, Hartog's testimony must be excluded, she may do so. I caution the defendant, however, that should she offer McCauley's testimony to the effect that he was hired to perform an "independent review" of any aspect of

Herbert Miller's estate plan or planning, and should McCauley opine (as he does in his summary statement that is reproduced in Docket No. 46-1, where he documents his two meetings with Mr. Miller on February 6 and 11, 2008), testimony from Hartog about the sufficiency of McCauley's independent evaluation procedures will most likely be admissible.

The motion to strike Hartog's testimony is denied.

B. Procedural Requests

In the alternative, the defendant asks "that the Plaintiff be directed to bring Mr. Hartog to Maine for his deposition and that the Defendant be afforded an additional period to locate and designate a responsive expert." Hartog Motion at 9-10. She asserts that the plaintiff "chose to engage an expert witness in California." *Id.* at 10. Again, this argument fails. The defendants lived in California, not Maine, when McCauley performed his independent evaluation under California law. An expert in California trusts, estates, and probate law, who lives and works in California, is wholly appropriate. Indeed, the defendant would undoubtedly have objected to any attempt by the plaintiff to engage a Maine lawyer to review McCauley's work.

The defendant contends that "it is unfair" for the court to accept the plaintiff's representation that he cannot afford to bring Hartog to Maine for deposition because "the Defendant has no way to test the *bona fides* of that assertion." *Id.* The plaintiff rejoins that "[t]here is simply no denying" that he is 70 years old, received no retirement or pension package when he was terminated from his employment, remains unemployed and "is now a man of modest financial means." Hartog Opposition at 10. This assertion would carry more weight if it were supported by an affidavit or citation to other sworn testimony.

The defendant is obviously entitled to depose Hartog before trial.

McCauley's deposition apparently took place in California. There is no suggestion in the briefs that the plaintiff intends the offer Hartog's testimony at trial other than in person. That presentation will obviously have to be at the plaintiff's expense. The defendant does not suggest that Hartog's discovery deposition cannot be taken by telephone or video conference or some other method less expensive than bringing Hartog to Maine. On balance, on the showing made, I conclude that the plaintiff need not bear the expense of bringing Hartog to Maine from California twice. The defendant can either depose Hartog now, in California, or by bringing him at her expense to Maine, or depose him in Maine immediately prior to trial, when he will presumably be present in this state.

Because Hartog's testimony will be offered only to rebut the testimony of McCauley,² I see no basis for allowing the defendant time to retain and designate an expert witness to be offered to rebut Hartog's rebuttal testimony. The defendant's request raises the specter of an endless loop of rebutting experts with no logical end point. If the defendant takes Hartog's deposition before trial, the transcript will presumably be made available to McCauley. That transcript will be sufficient.

II. Defendant's Motion to Strike Stamey (Docket No. 56)

The defendant moves to strike the plaintiff's designation of Dr. William P. Stamey as an expert witness. Defendant's Motion to Strike Plaintiff's Expert Designation of Dr. William P. Stamey ("Stamey Motion") (Docket No. 56). The defendant's argument with respect to Dr. Stamey is essentially the same as her argument with respect to Hartog.

Thus, the defendant points out that the deadline for the plaintiff to designate his expert witnesses was June 20, 2011, that on that date the plaintiff served a designation of Dr. Stamey as

² The plaintiff has filed a motion to bar any testimony from McCauley, Docket No. 58, discussed below.

one of his expert witnesses, and that the designation stated that Dr. Stamey had not yet formed his opinions because he did not yet have all of the medical information he deemed necessary to review before he formed an opinion. On August 25, 2011, the plaintiff provided “a substantive statement of Dr. Stamey’s intended opinions under the title Plaintiff’s Supplementation of Expert Witness Designation.” Stamey Motion at 4. The defendant contends that this sequence of events violates Federal Rule of Civil Procedure 26(a)(2)(b), and this violation means that the plaintiff should not be allowed to present any testimony from Dr. Stamey at trial as a result. *Id.* at 4-7.

As was the case with the defendant’s attempt to exclude any testimony from John A. Hartog, counsel for the defendant were well aware, as of the time of their receipt of the initial designation, that the plaintiff took the position that he could not provide a full designation until Dr. Hartog had reviewed all of the medical records that the defendant had requested, some of which had not yet been provided. The defendant made no objection at the time.

The defendant asserts that “by the first week of July [] Plaintiff had all of Herbert Miller’s relevant medical records, including the complete file from his neurologist (with the exception of the actual CT scan image), and had been informed by this Court that his request for a medical examination [of Herbert Miller] pursuant to Rule 35 was denied.” Stamey Motion at 5-6. She argues that Dr. Stamey’s opinions should have been provided shortly thereafter, at the latest. *Id.* at 6.

However, as the plaintiff points out, the defendant apparently did not provide the CT scan image until August 12, 2011. Plaintiff’s Opposition to Defendants’ Motion to Strike Plaintiff’s Expert Witness Designation of Dr. William P. Stamey (“Stamey Opposition”) (Docket No. 65) at 2. It is not unreasonable for a medical expert to want to review actual scans and test results

before expressing an opinion. The supplemental designation was made in this instance on August 23, 2011, 11 days after the production of the CT scan image.³

The defendant asserts that “it would be grossly unfair to allow the Plaintiff to wait to disclose the opinion of Dr. Stamey until after Defendant had designated Dr. Drasby under the guise of ‘supplementation’ so that Dr. Stamey in effect becomes a rebuttal witness.” Stamey Motion at 7. If, in fact, Dr. Stamey will testify, at least in part, as a rebuttal witness, the defendant had no right to be informed of that fact in advance of trial, as she asserts has now happened. As to any “rebuttal” testimony, therefore, no prejudice to the defendant has occurred. Allowing Dr. Stamey to testify, under the particular circumstances of this case, neither causes “gross unfairness” nor lowers the standard expected of attorneys under this court’s local rules governing discovery. My ruling applies only to the facts of this case.

The defendant’s motion to strike the testimony of Dr. Stamey is denied.

III. Plaintiff’s Motion to Strike McCauley (Docket No. 58)

The plaintiff moves to exclude any testimony of J. Brian McCauley, Esquire. Plaintiff’s Motion to Exclude the Testimony of J. Brian McCauley, Esquire (“McCauley Motion”) (Docket No. 58). He states that the defendant “intends to have McCauley [an attorney] testify as to his ‘independent review’ of the late Mr. Miller’s susceptibility to undue influence, and whether in fact Mr. Miller was being unduly influenced” at the time changes were made in his estate plan. *Id.* at 1-2. He contends that this is expert testimony, and McCauley has not been designated as an expert witness. *Id.* at 2.

The defendant responds that such testimony from McCauley would be lay opinion testimony, admissible as such. Defendant Jo Miller’s Opposition to Motion to Exclude

³ The defendant incorrectly describes this interval, in italics, as “a mere week.” Stamey Opposition at 4.

Testimony of Brian J. McCauley (“McCauley Opposition”) (Docket No. 66) at 4-5. In the alternative, she contends that the plaintiff has not been harmed by the failure to designate Attorney McCauley as an expert because his “anticipated testimony was fully disclosed . . . far in advance of Defendant’s expert designation deadline,” *Id.* at 8.

Because McCauley, as I understand it, was hired by Mr. Miller’s estate attorney specifically to conduct an “independent review” under California law of the propriety of a planned bequest to a “disqualified person” and to determine whether the proposed transfer was the product of fraud, menace, duress, or undue influence, McCauley Motion at 3; McCauley Opposition at 5, presenting the reason for the time McCauley spent with Mr. Miller to a jury could only give McCauley’s testimony the imprimatur of an expert. It is true that a lay person may testify about a person’s mental competence generally, *e.g.*, *Bell v. United States*, 265 F. Supp. 311, 317 (N.D. Miss. 1966), but, in the circumstances of this case, I do not see how McCauley could reasonably be characterized as the lay person contemplated by that general principle.

Ordinarily, an opposing attorney could cross-examine a true lay witness about the basis for his opinions, in an attempt to create doubt about the validity of the opinions. Here, such cross-examination could only strengthen McCauley’s testimony, as he would presumably testify that he has been making such observations professionally for many years.

I conclude that the defendant should have designated McCauley as an expert witness, at least in part because I cannot envision how, as a practical matter, his testimony could be presented to a jury without revealing his experience and the reason why he visited with Mr. Miller, but I also note that the defendant has made no secret of her intention to present McCauley’s testimony at trial, and I believe that she is entitled to demonstrate to the jury that she

believes she took some precautions to ensure that Mr. Miller was in fact free of undue influence when he made the changes denying the plaintiff what he had expected to inherit.

The plaintiff does not dispute the defendant's assertion, McCauley Opposition at 8, that he was in possession of McCauley's entire file "far in advance" of the plaintiff's deadline for designation of expert witnesses. In addition, and most importantly, less than two weeks *prior to* the defendant's deadline for designation of expert witnesses, McCauley sat for his deposition in California on July 12, 2011, during which the plaintiff had a full opportunity to examine him, with the added benefit of the plaintiff's own expert, John Hartog, who, as noted previously, was also present. Thus, there has been no prejudice to the plaintiff as a result of the defendant's failure to designate, and to require an expert designation after McCauley had been deposed seems a largely empty exercise.

I conclude that McCauley's testimony should be allowed, and the motion to exclude it is denied.

IV. Plaintiff's Motion to Exclude Drasby (Docket No. 74)

The plaintiff moves to exclude the expert testimony of Edward J. Drasby, M.D., a neurologist who treated Mr. Miller in 2005. Plaintiff's Motion to Exclude the Expert Testimony of Edward J. Drasby, M.D. ("Drasby Motion") (Docket No. 74). The plaintiff apparently has no objection to testimony from Dr. Drasby limited to "his neurological treatment and diagnosis of Mr. Miller in 2005," with the exception noted below, but complains that the defendant plans also to elicit testimony that Mr. Miller was then "capable of making 'judicious' decisions; . . . was not susceptible to undue pressure by Mrs. Miller, who was a caring and devoted spouse; and . . . was able to exercise his faculties as a free agent and could not have been susceptible to undue pressure from his wife." *Id.* at 3.

The plaintiff first asserts that any testimony from Dr. Drasby would be irrelevant, as it is too far removed from Mr. Miller's revision of his estate planning documents in 2008, given what he characterizes as my conclusion that "Mr. Miller's mental and physical condition in 2011 was irrelevant to the events giving rise to the Amended Complaint." *Id.* at 6. The plaintiff's assertion is based on the following sentence in my Memorandum Decision on Motion Under Rule 35 (Docket No. 34):

I do not agree with the plaintiff that Herbert Miller's execution of estate planning documents in January 2011, well after the events giving rise to the amended complaint, whatever his then physical or mental condition, "cast[s] serious doubt on the bona fides of similar representations about his claimed volitional actions made earlier."

Docket No. 34 at 3.

This observation was made only in response to the plaintiff's above-quoted assertion, in support of his request for a court order requiring Mr. Miller to undergo a physical and mental examination by a physician or physicians of the plaintiff's choosing. The plaintiff asserted that, because Mr. Miller's attorneys were "unable to communicate with him" "a mere two months" after he executed certain estate planning documents, those documents could not have been executed "volitionally and independently by Mr. Miller[.]" and that conclusion in turn necessarily "cast[s] serious doubts" upon any assertion that his earlier estate planning changes, made several years earlier and challenged by the plaintiff, were made volitionally and independently. Plaintiff's Motion Pursuant to F.R.Civ.P. 35 for Order Directing Defendant Herbert A. Miller to Submit to Physical and Mental Examination (Docket No. 27) at 6. To read into my observation, as both parties apparently have done, a ruling that no information will be admitted at trial about Mr. Miller's mental and physical condition three years after, or for that matter before, the execution of the documents, is to read my observation too broadly. All that I

rejected was the specific quoted language advanced by the plaintiff as justification for an independent Rule 35 examination.

The plaintiff next argues that the defendant should have provided a report from Dr. Drasby concerning his “non-medical opinions.” Drasby Motion at 6-7. The only testimony from Dr. Drasby that falls within this characterization of “non-medical opinion” that the defendant indicates that she will present is “Dr. Drasby’s opinion that Mr. Miller was capable of making independent decisions and not susceptible to undue influence by [the defendant] in 2005.” Defendant’s Response to Plaintiff’s Motion to Exclude the Expert Testimony on Edward. J. Drasby, M.D. (“Drasby Opposition”) (Docket No. 92) at 3.⁴ The defendant may be correct that “Dr. Drasby’s neurological treatment and evaluation of Mr. Miller in [2005] is highly relevant.” *Id.* at 5. But, what is not correct is the necessarily-implied assumption that assessing an individual’s capability of making independent decisions and susceptibility to undue influence from others is part and parcel of regular neurological treatment.

There is simply too much uncertainty in the record for me to make a definitive ruling on this portion of Dr. Drasby’s proposed testimony. The defendant has not demonstrated the truth of the implied assumption that is essential to her position. The plaintiff asserts that Dr. Drasby only saw Mr. Miller three times, which the defendant does not deny, but that fact, if indeed it is one, goes to the weight of Dr. Drasby’s proposed testimony, not its admissibility.

⁴ Should the defendant offer Dr. Drasby’s opinions to the effect that the defendant “was a caring and devoted spouse” and that Mr. Miller was “a strong-willed and successful gentleman who . . . was able to exercise his faculties as a free agent and could not have been susceptible to undue pressure from his wife[.]” as the plaintiff expects, Plaintiff’s Reply to Defendant’s Response to the Plaintiff’s Motion to Exclude the Expert Testimony of Edward J. Drasby, M.D. (Docket No. 98) at 2, I will require the same foundational evidence that is currently missing before I will consider allowing Dr. Drasby so to testify.

While I agree that no report from Dr. Drasby was required given Fed. R. Civ. P. 26(a)(2)(B) as interpreted by the First Circuit in *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 8 (1st Cir. 2011), because he presumably formed his proffered opinions “based on his personal knowledge and information gleaned in the course of” his treatment of Mr. Miller, I will need a more developed record in order to make a definitive ruling and thus must defer ruling until such time as that information is made available.

When and if Dr. Drasby’s testimony is offered, counsel are cautioned that they should approach sidebar before eliciting from him opinions that are not part of a normal neurological treatment and diagnosis or within the scope of lay testimony, as I will be wary of giving the imprimatur of “expert testimony” to such testimony before a finder of fact.

For these reasons, the motion to strike Dr. Drasby’s testimony is denied, without prejudice to its being raised again at the appropriate time.

V. Conclusion

For the foregoing reasons, the defendant’s motions to strike (Docket Nos. 46 & 56) are **DENIED**, as are the plaintiff’s motions to exclude (Docket Nos. 58 & 74).

VI. Sealing of This Decision

I **DIRECT** the Clerk of the Court to seal this opinion when docketed. The parties shall notify me by noon on Wednesday, January 4, 2012, with due regard to the public’s interest in access to court proceedings, whether this opinion contains any confidential information that should remain sealed and, if so, indicate explicitly what language is proposed to be redacted, and why. If I do not hear from the parties by noon on Wednesday, January 4, 2012, this opinion will be unsealed.

Dated this 30th day of December, 2011.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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