

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JENNIFER ELLER,)
)
 Plaintiff,)
)
 v.)
)
 PRINCE GEORGE’S COUNTY)
 PUBLIC SCHOOLS, ET AL.,)
)
 Defendants.)
 _____)

Case No.: 18-cv-03649-TDC/TJS

**REPLY TO PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTION FOR ORDER FOR MENTAL EXAMINATION
AND MODIFICATION OF SCHEDULING ORDER**

Defendants Prince George’s County Public Schools, Board of Education of Prince George’s County, and Monica Goldson (“Defendants”), by and through undersigned counsel, hereby submit this Reply to Plaintiff’s Opposition (“Opposition ”) to Defendants’ Motion for Order for Mental Examination and Modification of Scheduling Order (“Motion”), and state as follows:

Introduction

Despite placing her own mental condition in controversy via the allegations contained in her Complaint, the designation of a psychologist as her expert witness, and the disclosure of her expert witness report containing her psychologist’s opinions, Plaintiff contends that she not be subjected to a mental examination by a board certified psychiatrist where psychological tests are to be administered. For the reasons set forth below, Plaintiff’s arguments should be categorically rejected, Plaintiff be ordered to submit to an IME, and that all remaining deadlines be extended by sixty (60) days from the date of the Court’s Order.

Argument

I. DEFENDANTS ARE ENTITLED TO A MENTAL EXAMINATION OF PLAINTIFF

A. *Governing Standard for Mental Examinations*

While Plaintiff cites to the black letter law regarding the standard for mental examinations, she completely ignores its application to this case, and instead seeks to challenge Defendants' proposed expert, Marcellus R. Cephas, M.D., MBA ("Dr. Cephas"), as if she was filing a *Daubert* motion.

Fed R. Civ. P. 35 ("Rule 35) provides, that "the court . . . may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1). Moreover, Rule 35 provides that "the order: may be made only on motion for good cause. . ." Fed. R. Civ. P. 35(a)(2)(A).

As this Court explained in *Machie v. Manger*, CV AW-09-2196, 2012 WL 2092814 at *5 (D. Md. June 7, 2012):

Good cause is present if the party's condition is necessary, not merely relevant, to the case. *EEOC v. Maha Prabhu, Inc.*, No. 3:07-cv-111-RJC, 2008 WL 2559417, at *2 (W.D.N.C. June 23, 2008) (citing *Guilford Nat'l Bank of Greensboro v. S. Ry. Co.*, 297 F.2d 921, 924 (4th Cir.1962)). "[N]ecessity ... is the element that separates the procedures involving independent medical examinations and other tools of discovery." *Id.* (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)). Good cause exists if "the average lay person would have difficulty evaluating the nature, extent, and cause of the claimant's injuries." *Id.* (citation omitted). Good cause does not exist if the party could have obtained the information sought "through less invasive tools of discovery." *Id.* (citation omitted).

Rule 35 also requires a party to show "that the mental or physical condition is truly 'in controversy.'" *Id.* (citing Fed. R. Civ. P. 35). A condition is "in controversy" if "the condition rises above the level of 'garden-variety' emotional distress." *Id.* at *3. Courts examine five factors in determining whether the condition is "in controversy": whether (1) the plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) the plaintiff has claimed unusually severe emotional distress; (3) the plaintiff has

alleged a specific type of disorder or other psychiatric injury; (4) the plaintiff has offered her own expert testimony to supplement her claim of emotional distress; or (5) the plaintiff concedes that her medical condition is “in controversy” pursuant to Rule 35. *Id.* (citing *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D.Cal.1995)).

Machie v. Manger, CV AW-09-2196, 2012 WL 2092814 at *5 (D. Md. June 7, 2012) (emphasis added).

Here, Plaintiff has failed to address in her Opposition the good cause requirements as is required under this Court’s jurisprudence (and which are set forth above). That is, Plaintiff has not, and cannot, argue that Plaintiff’s mental condition is not necessary to the case. In other words, Plaintiff has not, and cannot argue that a lay person would not have difficulty evaluating the nature, extent, and cause of her claims since she retained, designated, and disclosed a psychologist as her expert witness. Furthermore, Plaintiff concedes that her mental state is in controversy. Pl.’s Opp. at 9. As a result, good cause exists to submit Plaintiff to a mental examination as is requested by Defendants.

Instead, Plaintiff has focused the Court’s attention on her own good cause requirements in an attempt to avoid a mental examination. However, even these requirements are satisfied as set forth below.

B. Dr. Cephas is Qualified to Examine Plaintiff

Plaintiff first contends that Dr. Cephas is unqualified to examine Plaintiff. This is untrue. Dr. Cephas is a board certified psychiatrist by the American Board of Psychiatry and Neurology. Ex. 1.¹ Dr. Cephas is an expert in psychiatry including the following areas: major depression, PTSD, trauma related disorders, determination of disorders, and causality. Ex. 2.² In addition, Dr. Cephas has diagnosed and treated multiple transgender people during the course of his career. *Id.*

¹ Ex. 1 is the CV of Dr. Cephas and is incorporated herein by reference .

² Ex. 2 is the Affidavit of Dr. Cephas and is incorporated herein by reference.

Plaintiff also contends that Dr. Cephas may not be qualified to administer psychological testing because he is a psychiatrist. In support of this remarkable position, Plaintiff does not offer any affidavit even from her own expert witness, but instead refers the Court to a website and an article. Nevertheless, Dr. Cephas has refuted this contention in his Affidavit attached hereto as Ex. 2.

Finally, this Court has permitted Dr. Cephas to perform mental examinations of plaintiffs and to administer the same tests sought here in this case on at least two occasions.³

C. *The Scope and Length of Examination is Appropriate*

Plaintiff next contends that the methodology and length of the examination may not be appropriate. As to testing, Plaintiff complains without any affidavit or other authority that the Minnesota Multiphasic Personality Inventory (“MMPI”), Mini-Mental State Examination (“MMSE”), and the Mental Status Examination (“MSE”) may be inappropriate. Dr. Cephas refutes these contentions in his Affidavit. *See* Ex. 2.

With regard to the length of the examination, Plaintiff complains of the need for a five (5) hour examination. However, while Dr. Cephas’ examination may last up to five (5) hours, it may be completed in as little as two and a half (2.5) hours depending on the cooperation of Plaintiff. Ex. 2. This time would be shorter than Plaintiff’s own expert witness’ examination, which lasted three and a half (3.5) hours. Surely, a difference of one and a half (1.5) hours in the *estimated* time for an examination is not grounds for denial.

D. *Good Cause Exists to Examine Plaintiff*

Finally, Plaintiff amazingly posits that Defendants should use other less intrusive discovery tools to test the claims of her mental injuries despite the fact that she submitted to a mental examination by her own expert witness. This is ridiculous.

³ *Edwards v. Edwards, et al.*, Case No.: 8:12-cv-3761-DKC; *Jones v. Mattis, et al.*, 8:18-cv-01678-PX.

Plaintiff cites to *Winstead v. Lafayette Cty. Bd. of Cty. Commissioners*, 315 F.R.D. 612 (N.D. Fla. 2016), in support of this contention. However, in *Winstead*, the Court categorized the case before it as a garden-variety claim for emotional distress not justifying a mental examination. However, the Court in *Winstead* explained that:

This is not to say that a psychological exam under Rule 35 would never be warranted in an employment case. If a plaintiff were to deny the opposing party access to records of treaters, citing some privilege; or **if a plaintiff were to claim some long list of psychological symptoms, many of them non-generic** (“loss of appetite, loss of libido, rapid weight gain, hair loss, headaches, nervous twitching ...”); or if a plaintiff were to claim that she could not work at all; **or if a plaintiff were to offer her own retained expert's assessment of her mental injuries based on some exam—under such circumstances, there would likely be “good cause” for ordering a psychological exam,** and ordering such an exam would serve the interests of justice even considering the policy goals behind anti-discrimination statutes. This case, however, does not appear to involve any such circumstances.

Winstead v. Lafayette Cty. Bd. of Cty. Commissioners, 315 F.R.D. 612, 617 (N.D. Fla. 2016) (emphasis added).

Here, Plaintiff has asserted non-generic psychological symptoms and offered her own retained expert's assessment of her mental injuries. As a result, even by Plaintiff's own relied upon authority, good cause is established here for a mental examination.

In sum, Plaintiff's issues can and should be addressed by her during discovery in this case. That is, Plaintiff should depose Dr. Cephas and inquire as to his qualifications, his testing of Plaintiff, and his expert opinions. If unsatisfied, Plaintiff may challenge Dr. Cephas' ability to testify via a *Daubert* motion. However, until then, Plaintiff's concerns are unjustified and misplaced.

II. THE SCHEDULING ORDER SHOULD BE MODIFIED

Plaintiff contends that the Scheduling Order should not be modified because Defendants did not retain an expert and seek a Rule 35 examination during the five (5) months preceding her

designation of an expert witness. This is beyond reason.

First, without divulging into the litigation strategy of Defendants, Defendants did not decide to designate and utilize Dr. Cephas as their expert witness until the designation and disclosure of Plaintiff's expert witness and report on August 5, 2019, which addressed Plaintiff's psychological issues. This is not unusual or demonstrative of lack of due diligence. In fact, in most employment discrimination cases, plaintiffs do not designate a psychological expert witness and thus do not take their cases out of the category of garden-variety emotional distress cases necessitating the need for a mental examination by defendants.

Second, Plaintiff complains that it took Defendants ten (10) days to begin the process to schedule the examination with Plaintiff, an examination which Plaintiff did not consent to. Nevertheless, at the time Plaintiff served her Fed. R. Civ. P. 26(a)(2) disclosures on August 5, 2019, Dr. Cephas was on an international vacation with his family and did not return until August 15, 2019. Counsel for Defendant sought the consent of counsel for Plaintiff on August 15, 2019. Counsel for Plaintiff did not respond until August 19, 2019. Defendants filed their Notice with the Court on August 21, 2019, pursuant to the Case Management Order issued on November 29, 2018 (ECF No. 3), which tolled the deadline for designation.

Third, a modification of the Scheduling Order is required because Defendants can not disclose their expert report until an examination is conducted of Plaintiff. Such an examination required a Court Order under Fed. R. Civ. P. 35. Because Plaintiff did not consent to such an examination, the parties were required to brief this issue and the deadline for Defendants' designation passed on September 3, 2019.

Fourth, a modification of the Scheduling Order is required because Defendants can not disclose their expert report until Dr. Cephas reviews Plaintiff's medical records, which have yet

to be produced. In her Responses to Requests for Production of Documents, Plaintiff provided that “Plaintiff will supplement this production with additional documents as soon as possible after the completion of a review for privilege and confidentiality and, for those documents determined to contain confidential information, after the Parties’ finalization of an agreement concerning the protection of confidential documents.” To date, the parties are still negotiating such an agreement and no medical records have been provided.

Fifth, Defendants do not intend to respond to Plaintiff’s hypocritical complaints regarding discovery issues that are not before the Court. Needless to say, Defendants have complied with their discovery obligations. Plaintiff is also not without fault. Plaintiff failed to provide her initial answers to interrogatories under oath and failed to provide substantive responses and promised to supplement 9 out 17 interrogatories. In addition, Plaintiff promised to supplement 19 out of 22 requests for production of documents and initially produced only 191 pages of documents, none of which contained Plaintiff’s medical records.

Finally, it is worth noting that the Parties have *jointly* moved to stay discovery and amend the scheduling order (ECF No. 27) and moved twice to extend time to complete discovery (ECF Nos. 30 and 34). Somehow, time has now become of the essence for Plaintiff.

III. DEFENDANTS’ MOTION IS PROCEDURALLY PROPER

Counsel for Defendants have, in good faith, sought the consent of counsel for Plaintiff prior to seeking the relief requested herein. Counsel for Plaintiff indicated that they do not consent to either the IME or the request for modification.

Interestingly, on the one hand, Plaintiff contends that Defendants’ Motion was untimely, yet on the other hand, claims that more time should have been spent negotiating a mental examination that she now opposes.

Defendants complied with the Court's Case Management Order dated November 29, 2018. The relief sought, a mental examination and modification of the scheduling order as a result of the need for a mental examination are clearly related to one another. Plaintiff's suggestion that two (2) separate motions should have been filed and briefed is perplexing to say the least.

Closing

For all of the foregoing reasons, Defendants respectfully request that their Motion for Order for Mental Examination and Modification of the Scheduling Order be granted, that Plaintiff be ordered to submit to an IME, and that all remaining deadlines be modified by sixty (60) days from the date of the Court's Order.

Respectfully submitted,

/s/ James E. McCollum, Jr.

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Federal Bar No. 06448

/s/ Amit K. Sharma

Amit K. Sharma
Federal Bar No. 16660

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the Court's CM/ECF system
on this 24th day of September, 2019, to:

Paul Pompeo, Esquire
Thomas D. McSorley, Esquire
Elliott Mogul, Esquire
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120 Wall Street, 19th Floor
New York, New York 10005

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/s/ James E. McCollum, Jr.
James E. McCollum, Jr.

Curriculum Vita

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Email: bhi2@mac.com

EDUCATION

Doctor of Medicine 1987
University of Montemorelos Montemorelos, N.L., Mexico

Bachelor of Science Health Science 1983
University of Montemorelos Montemorelos, N.L., Mexico

Master of Business Healthcare Administration 2003
Ana Maria College Paxton, MA

ACADEMIC AND PROFESSIONAL EXPERIENCE

| | |
|---|---|
| CEO | Behavioral Healthcare of Maryland LLC Executive leadership of the organization Quality assurance and over sight of regulatory compliance 2012-Present |
| Medical Director Community Recovery Center rome, NY | Rome Memorial Hospital Addictions Medicine 2017-Present |
| Attending Washington Adventist Hospital | Case load of 15 Acute Psychiatric patients Psychiatric ICU 2014-2019 |
| Medical Director/Chair Attending | Department of Psychiatry Senior Behavioral Health Unit Rome Memorial Hospital Rome New York 2012-Present |
| Utilization/Disability Determination Physician | Metlife Utilization reviews, Disability Determination. Doctor to Doctor communication and reviews 2011-2013 |
| Medical Director /COO | Behavioral Healthcare Inc. Multi-specialty Group. Washington DC/Maryland Oversight of all operation of multistate clinics. Procurement and implementation of all contracts. Quality assurance and over sight of regulatory compliance 2005-2012 |
| Attending Physician | Rome Memorial Hospital Senior Behavioral Health Unit |

- Physician for inpatient seniors 65 and above
2003-2012
- Medical Director Peace of Mind Counseling Baltimore MD
Oversight of all clinician and staff
2006-2011
- Medical Advisory Board Prince George's County Maryland
Review and determination of Fitness for duty, Disability Retirement, work status
for all civil servants of Prince George's County MD
Appointment by Jack Johnson County Executive
2006, 2008, 2010, -2012, Present
- President/ Medical Director MRC Behavioral Healthcare Services
Responsible for all operations and clinical services.
2003- Present
- Medical Director Behavioral Health Service Washington Adventist Hospital Maryland
Clinical supervision of 40 bed Psychiatric Unit with an 18 bed psychiatric ICU
Partial Hospitalization and Intensive Out patient Program
2002-2003
- Medical Director/Chairman of the Dept. of Psychiatry St. Elizabeth's Medical Center Utica NY
Complete and total responsibility for the department of Psychiatry.
Everything from strategic planning for the department to financial forecasting and
budgeting. Clinical Instruction for Family practice residents and oversight of their Psych
rotations. Extensive experience with the JACHO recertification process.
1997-2003
- Oneida County Consulting Physician, Assisted Outpatient Treatment Program Oneida County NY
Evaluate and consult with the commissioner of Mental Health on the implementation of
psychiatric patients in the community who were legal committed to the AOTP under
Megan's Law in NY. The Psychiatrist responsible for the creation and implementation of
the treatment plan of the county for forced medication.
2001-2003
- Medical Director, Crisis Evaluation Team Oneida County NY
Supervision of the clinicians and systems of the collaborating hospital for countywide
mobile crisis team. This included diversion planning and bed management for the county.
- Medical Director, Neighborhood Center Utica NY
Clinic that provides Child and adolescence services.
2001-2003
- President/Medical Director New Hartford Psychiatric Services
Psychiatric clinic that provides services to families, adults and adolescence.
Over seeing 5 specialty clinic for the developmentally disable.
1998-present
- Medical Director, Adirondack Behavioral Healthcare Network, IPA, LLC
Integral part of the management team that developed and implemented a Behavioral
Health Organization that united a consortium of companies fro the sole purpose of
responding to the demands of manage care.

1998-2001

Medical Director H.B. Zachary Company IMSD LaPorte, Texas
Responsible for all clinical aspects of IMSD site
8/92 -7/93

Medical Director H.B. Zachary Company ARCO Chemical Company
Responsible for all clinical aspects of site
8/90 8/92

Medical Director/Safety Pricor of Houston Reintegration Center Houston, Texas
Responsible for all clinical aspects of pre-release center
Government service
6/88 8/90

Residency

Boston Psychiatric Group
Administrative director responsible for the scheduling and backup of moonlighting residents at The Shattuck Hospital Boston Mass
7/95 -6/97

Psychiatry Resident 4 Chief Resident New England Medical Center/Tufts University Boston Mass
Responsible for all residents' administrative issues.
7/96 -6/97

Psychiatry Resident 2&3 New England Medical Center/Tufts University Boston Mass
7/94 -6/96

Psychiatry Resident 1 Morehouse School of Medicine Department of Psychiatry Atlanta Georgia
3 mos. Neurology, 6 mos. Medicine, 3 mos. Psychiatry
7/93 -6/94

Internship University Hospital of Montemorelos Montemorelos, Mexico
3 mos. Obgyn/3 mos. Medicine 3 mos. Surgery, ER/3 mos. Pediatrics
6/87 6/88

PROFESSIONAL SERVICE AND AFFILIATION

Elder Briklow Seventh Day Adventist Church Brinklow MD Present

Member American Society of Safety Engineers 1993-1994

| | |
|--------------------|---|
| Member | Texas Rehabilitation Commission 1992-1994 |
| Advisor | CCM (Christian Characters in the Making) 1990-1994 |
| Vice President | ALMAA (Medical Missionary Association) 198-1988 |
| Member | American Psychiatric Association 1994-1998 |
| Board of Directors | South East Kellar Corporation 1992-1995 Nonprofit organization treats, counsels and employs substance abusers and first time offenders). |
| Secretary | South East Kellar Corporation 1992-1995 |
| Treasurer | Jesus Behind Bars 1992 |
| Director | VOM English Speaking Church 1987-1988 |
| Elder | Belfort SDA Church 1993 |

Grants

State of Texas, Department of Corrections Treat, lodge, and reintegrate substance abusers which are first time offenders \$800,000 (1994)

State of Texas, Department of Corrections Treat, house and rehabilitate substance abusers and first time offenders \$187,000 (1993)

City of Houston, Housing Authority to use substance abusers for emergency housing repairs \$5,000/house (1990 1994)

Licenses

Certification American Board of Psychiatry and Neurology 2004
Recertification American Board of Psychiatry and Neurology 3/2015
Maryland Medical License #D0059532
New York State Medical License #207888
Massachusetts Medical License #150747
Private Pilots License (80)
Instructor Community CPR Red Cross not current
Instructor SFA Red Cross not current

Presentations

Schizophrenia vs. Delusional Disorder (Case Presentation)
Department of Psychiatry, VAMC
Tuskegee, AL
August 1993

PTSD Diagnosis and Treatment (Case Presentation)
Department of Psychiatry, VAMC
Tuskegee, AL
September 1993

Depression Diagnosis and Treatment in Aphasic Post CVA Patient
Morehouse Department of Psychiatry
November 1993

Sudden Death in OBS Patient (Case Presentation)
Multidisciplinary Morbidity/Mortality Conference, VAMC
Tuskegee, AL
December 1993

HONORS

National Merit Awards in Mathematics

Who's Who of Business Executives 2003

Top Doctor Washington Metropolitan Area 2010

Speaker Bureaus

Bristol Myers Squibb Present
Astrazeneca Present
Eli Lilly 2001
Pfizer 2002
Smithkline Beecham 2002

Reference: Upon request

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JENNIFER ELLER,)

Plaintiff,)

v.)

Case No.: 18-cv-03649-TDC/TJS

PRINCE GEORGE'S COUNTY)

PUBLIC SCHOOLS, ET AL.,)

Defendants.)

AFFIDAVIT OF MARCELLUS R. CEPHAS, M.D., MBA

I, Marcellus R. Cephas, M.D., MBA, am over the age of twenty-one (21) years, and am competent to affirm under oath all of the following of which I have personal knowledge.

1. Psychiatry is the branch of medicine focused on the diagnosis, treatment and prevention of mental, emotional and behavioral disorders.
2. A psychiatrist is a medical doctor who specializes in mental health.
3. Psychiatrists are qualified to assess both the mental and physical aspects of psychological problems.
4. Because they are physicians, psychiatrists can order or perform a full range of medical laboratory and psychological tests which, combined with discussions with patients, help provide a picture of a patient's physical and mental state. Their education and clinical training equip them to understand the complex relationship between emotional and other medical illnesses and the relationships with genetics and family

history, to evaluate medical and psychological data, to make a diagnosis, and to work with patients to develop treatment plans.

5. The focus of psychiatrists and psychologists is the same: diagnosis and treatment of mental illness.

6. I am a board certified psychiatrist by the American Board of Psychiatry and Neurology.

7. I am currently serving as Medical Director/Chair of the Department of Psychiatry, Senior Behavioral Health Unit, at Rome Memorial Hospital in Rome, New York.

8. I have substantial experience in the following areas: major depression, PTSD, trauma related disorders, determination of disorders, and causality.

9. I have performed independent mental examinations for almost twenty (20) years.

10. I have diagnosed and treated multiple transgender people during the course of my career.

11. I have never been denied the ability to perform as an expert witness an independent mental examination on the basis that I am a psychiatrist and not a psychologist.

12. I also have a Master of Business Healthcare Administration (“MBA”).

13. My MBA degree allows me to objectively look at the financial impact of mental illness on patients.

14. My examination of Plaintiff is expected to include a standard forensic psychiatric evaluation, assessing pertinent background information including past personal history and experiences, psychiatric history, medical history, and Plaintiff's description of the

nature and origin of her alleged psychiatric injury, and how it has unfolded over time to the present.

15. During the course of my examination, I may also administer the following psychological tests: Davidson Trauma Scale, Hamilton Rating Scale for Depression (HAM-D), the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV and V Criteria for PTSD, the Mini-Mental State Examination (MMSE), the Mental Status Examination (MSE), the Minnesota Multiphasic Personality Inventory (MMPI), and the Beck Depression Scale.

16. The DSM V is used to diagnose and classify mental disorders. All psychiatrists and psychologists are well versed and equipped to use this as the standard of care for mental illness.

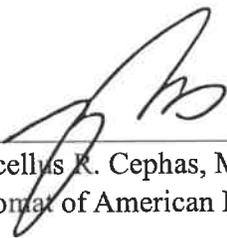
17. All of the tests above, with the exception of the MMPI, are diagnostic tools utilized to objectively diagnose mental illness.

18. The MMPI is a psychological test that assesses personality traits and psychopathology. Personality testing is always a consideration into the diagnosis of mental illness. The MMPI is useful because it helps to distinguish what is a personality disorder from a mental illness.

19. The MMSE and MSE are psychological tests that assess cognitive function or impairment. The MMSE and MSE are useful because cognitive deficits and memory disturbances are higher in patients with PTSD than general population.

20. My examination of Plaintiff may last between 4-5 hours and may be completed in as few as 2.5 hours depending on the cooperation of Plaintiff.

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief.



Marcellus R. Cephas, M.D., MBA
Diplomat of American Board of Psychiatry and Neurology