

Text Comparison

Documents Compared

Politz nw opposition to plaintiff designate expert.pdf

Politz NW Opposition to Review Magistrate's order.pdf

Summary

3937 word(s) added

1764 word(s) deleted

1891 word(s) matched

55 block(s) matched

To see where the changes are, scroll down.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

HELEN POLITZ

Plaintiff

v.

Civil Action No.: 1:08cv18-LTS-RHW

**NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, U.S. SMALL
BUSINESS ADMINISTRATION, AND
JOHN DOES 1 THROUGH 10**

Defendants

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S
MOTION FOR ~~LEAVE TO DESIGNATE MENTAL HEALTH EXPERT~~**

Defendant Nationwide Mutual Fire Insurance Company (“Nationwide”), by and through counsel, hereby files this Response In Opposition To Plaintiff’s Motion for ~~Leave to Designate Mental Health Expert~~. In opposition to Plaintiff’s motion, Nationwide states as follows:

1. Plaintiff Helen Politz, together with her late husband, John Politz, owned a residence located at 116 Winters Lane, in Long Beach, Mississippi, which is merely 190 yards from the Gulf of Mexico. Although the single-story residence was reduced to its slab foundation during Hurricane Katrina, and Plaintiff concedes that at least 9.2 feet of storm surge reached above the ground elevation of her property, Plaintiff insists that the home was destroyed solely by wind before the storm surge arrived.

2. Nationwide has paid Plaintiff over \$38,000 under her homeowners policy. Nevertheless, Plaintiff filed a ~~lawsuit~~ on January 17, 2008, and continues to pursue this action against Nationwide, alleging that Nationwide breached its contractual obligations by failing to pay the full coverage limits under Plaintiff’s homeowners policy. In her Complaint, Plaintiff seeks not only contractual damages, but also damages for emotional distress she alleges to have suffered as a result of Nationwide’s partial denial of her insurance claim. Specifically, Plaintiff

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**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S
MOTION FOR REVIEW OF MAGISTRATE JUDGE'S ORDER**

Defendant Nationwide Mutual Fire Insurance Company ("Nationwide"), by and through counsel, hereby files this Response In Opposition To Plaintiff's Motion for Review of Magistrate Judge's Order. In opposition to Plaintiff's motion, Nationwide states as follows:

1. Plaintiff Helen Politz, together with her late husband, John Politz, owned a residence located at 116 Winters Lane, in Long Beach, Mississippi, which is merely 190 yards from the Gulf of Mexico. Although the single-story residence was reduced to its slab foundation during Hurricane Katrina, and Plaintiff concedes that at least 9.2 feet of storm surge reached above the ground elevation of her property, Plaintiff insists that the home was destroyed solely by wind before the storm surge arrived.

2. Nationwide has paid Plaintiff over \$38,000 under her homeowners policy. Nevertheless, Plaintiff filed a law suit on January 17, 2008, and continues to pursue this action against Nationwide, alleging that Nationwide breached its contractual obligations by failing to pay the full coverage limits under Plaintiff's homeowners policy. In her Complaint, Plaintiff seeks not only contractual damages, but also damages for emotional distress she alleges to have suffered as a result of Nationwide's partial denial of her insurance claim. Specifically, Plaintiff

has alleged that “Defendant’s failure to pay the claim for the loss of [her] home contributed to the stress, emotional upheaval, depression and other health problems that [she] suffered after the hurricane.” (See June 18, 2008 Pls.’ Answers to First Set of Interrogs. Propounded by Def., Nationwide Mut. Fire Ins. Co., at Resp. to No. 26 (Ex. 1).)

3. ~~Notwithstanding the fact that Plaintiff has alleged — as part of her case-in-chief — that she has suffered emotional distress as a result of Nationwide’s partial denial of her insurance claim, she now seeks to designate a mental-health expert nearly a year and a half after filing her complaint. But there is no reason why Plaintiff could not have retained and identified an expert to support her claim for emotional-distress damages within the time provided in the Court’s original expert-disclosure period. Under that framework, Plaintiff’s experts were due on or before July 16, 2008 — nearly a year ago. During that time, Plaintiff had all the information she needed to decide whether to use expert testimony. She knew her own mental-health history, indeed, she was the *only* party in this action who could have known when she visited her physicians and when she began taking antidepressant medications.⁺~~

4. ~~Nationwide, on the other hand, did not have access to this information until recently. This was not because Nationwide had not actively sought this information. Instead, back in June 2008, in her initial responses to Nationwide’s interrogatory requests, Plaintiff affirmatively testified that she had not sought treatment for emotional distress. (See *id.*) Only on November 14, 2008 — the day discovery was originally set to close in this case — did Plaintiff reveal that she had in fact sought treatment for emotional distress. (See Nov. 20, 2008 Mot. To Strike Pl’s. Claim for Emotional Distress (Dtk. 110).) Over the next several months, Nationwide~~

⁺ ~~The record in this case demonstrates that Plaintiff was taking antidepressant medications as early as February 2008, little more than a month after filing this action and well in advance of any expert disclosure deadline.~~

has alleged that “Defendant’s failure to pay the claim for the loss of [her] home contributed to the stress, emotional upheaval, depression and other health problems that [she] suffered after the hurricane.” (See June 18, 2008 Pls.’ Answers to First Set of Interrogs. Propounded by Nationwide Mut. Fire Ins. Co., at Resp. to No. 26 (Ex. 1).)

3. In support of her claim for damages for emotional distress, Plaintiff may rely on the testimony of her treating physician, Dr. Mark Babo, of the Oschner Clinic in Slidell, Louisiana (See May 11, 2009 Proposed Pretrial Order at 38 (Ex. 2)). Although Plaintiff has specifically disclaimed that she intends to offer expert testimony with respect to her claim for emotional distress (see Mar. 4, 2009 Pl.’s Resp. to [197] Nationwide’s Mot. to Strike Untimely Expert Disclosures (Dkt. 217)), she may offer Dr. Babo’s testimony, presumably so that he can testify about his treatment of Plaintiff, including the fact that he has prescribed her antidepressant medications. Even if Dr. Babo does not testify, Nationwide believes that Plaintiff will attempt to introduce her own testimony about the fact that she sought treatment from Dr. Babo for mental-health problems, and that he prescribed her antidepressants on several occasions. In order to rebut any suggestion or claim that Mrs. Politz suffered emotional distress or that she is taking antidepressant medications as a result of Nationwide’s partial denial of her insurance claim, Nationwide is entitled to have an opportunity to conduct a mental evaluation of Mrs. Politz.

4. Accordingly, Nationwide filed a motion seeking an order permitting it to conduct a mental examination under Rule 35 of the Federal Rules of Civil Procedure. Under Rule 35, 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). The Supreme Court has held that where a plaintiff “asserts mental or physical injury” as part of her legal action against a defendant, she “places that mental or physical injury clearly

~~worked diligently to secure Mrs. Politz's medical records and depose her treating physicians. But none of that discovery revealed that Mrs. Politz's alleged emotional distress was caused by Nationwide. (See Apr. 7, 2008 Nationwide's Supplemental Mot. For Summ. J. (Dkt. 258).)~~

~~5. Nevertheless, Plaintiff still sought to pursue her claim for emotional distress damages — without the support of expert testimony and with only her (and potentially her treating physician's) testimony to support the claim. Nationwide therefore believes that Mrs. Politz will attempt to create the impression that she sought treatment for emotional injuries from her treating physician, Dr. Mark Babo, and that he prescribed her antidepressant medication as a result of Nationwide's adjustment of her claim. Indeed, Plaintiff has listed Dr. Babo as a "may call" witness on the parties' proposed pretrial order. (See May 11, 2009 Proposed Pretrial Order at 38 (Ex. 2).)~~

~~6. As such, Nationwide filed a motion for leave to have Mrs. Politz undergo a Rule 35 mental evaluation. (See May 26, 2009 Nationwide Mut. Fire Ins. Co. Mot. For Mental Examination of Pl. Pursuant to Fed. R. Civ. P. 35 (Dkt. 344).) As Nationwide argues separately in its Response to Plaintiff's Motion For Review and Objection To Magistrate's Order, it sought this examination solely to rebut Mrs. Politz's allegation that Nationwide caused or contributed in any way to her alleged emotional distress. And this examination is the only way, in light of the history of discovery in this case, Nationwide believes that it will get an accurate and complete picture of Plaintiff's mental health. After briefing from the parties, this Court granted Nationwide's motion on June 1, 2009.² But the fact that Nationwide has sought, and the Court~~

~~² Plaintiff has filed a Motion For Review of Magistrate's Order on June 3, 2009 ("Motion for Review,") which Nationwide responded to on June 15, 2009. Nationwide incorporates all of its arguments made in support of that Response here.~~

in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.” See *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964). Mrs. Politz’s allegations that she has suffered emotional distress and mental anguish as a result of Nationwide’s partial denial of her claim squarely places her mental health in controversy in this action.

5. This Court, through an order issued by Judge Walker, granted Nationwide’s Motion for a Mental Examination under Rule 35 of the Federal Rules of Civil Procedure on June 1, 2009. Plaintiff is scheduled to appear on June 25, 2009 at 10 a.m. at the Gulfport offices of Watkins Ludlam Winter & Stennis for an evaluation before Dr. Mark Webb of the Mississippi Neuropsychiatric Clinic. Plaintiff filed a motion to review Judge Walker’s decision on June 3, 2009.

6. Although Plaintiff’s motion is filled with much rhetoric, it lacks any legitimate reason for this Court to reverse course. Plaintiff insists that the Court should reverse Judge Walker’s decision for several reasons, including: 1) Judge Senter granted a limited extension of discovery, and, therefore, any Rule 35 evaluation would expand the Court’s order; 2) Nationwide has not shown “good cause” to support a Rule 35 evaluation; 3) Plaintiff has not proffered any new information, and therefore, Nationwide’s request is untimely; 4) Plaintiff does not intend to call Dr. Babo and, even if she does, he will not offer expert opinion testimony; and 5) Nationwide’s sole intent in seeking a mental evaluation is to prove that Plaintiff is lying and to harass Mrs. Politz (See June 3, 2009 Mot. for Review of and Objection to the U.S. Magistrate Judge’s [348] (Dkt. 350) (“Pl.’s Mot.”)). But each of these reasons is belied by the facts and law, and none prevents Nationwide from pursuing a mental evaluation under Rule 35.

~~has granted, a Rule 35 evaluation is not a basis to grant *Plaintiff's* motion to disclose her own mental-health expert now.~~

~~7. *First*, as previously mentioned, Plaintiff (not Nationwide) had all the relevant information about her treatment and use of antidepressant medications in order to properly retain and disclose a mental-health expert. Moreover, she had all of this information at the time she filed this action and, thus, well in advance of the Court's original expert deadline. Nationwide's request for a Rule 35 evaluation does not change that fact.~~

~~8. *Second*, Nationwide's motion to seek a Rule 35 evaluation was not untimely, as Plaintiff has argued in her Motion for Review. Nationwide intends to use the testimony of Dr. Mark Webb (to the extent Dr. Webb actually makes such a conclusion after evaluating Mrs. Politz) only to impeach and/or rebut any claim Mrs. Politz makes that Nationwide caused or contributed to her emotional distress. Under this Court's longstanding rules of practice, parties are not obligated to disclose rebuttal witnesses even as late as the pretrial order. (See Proposed Pretrial Order ¶ 13 ("The following is a list of witnesses Defendant anticipates calling at trial (*excluding witnesses to be used solely for rebuttal or impeachment*).").)⁹ Moreover, there is no provision within Rule 35 that delineates the timing for seeking a mental evaluation. Nationwide timely sought consent from Plaintiff merely four days after the Court reopened discovery during the pretrial conference on May 18. (See May 22, 2009 E. Locke Email to K. Carter (Ex. 3).) And nothing in the Court's May 18 Order that extended discovery in any way limited Nationwide's ability to request a Rule 35 evaluation or to add an additional rebuttal witness. The minute entry on the docket from that order simply states that "[d]iscovery for both parties is re-~~

⁹ ~~Emphasis added unless otherwise indicated.~~

7. As an initial matter, Plaintiff attempts to limit Nationwide's ability to have an opportunity to evaluate Mrs. Politz's mental health by claiming that any order granting Nationwide's motion would be outside the limited scope of Judge Senter's extension of discovery in this case. (See Pl.'s Mot. at 2, 6.) Not so. Tellingly, Plaintiff fails to cite Judge Senter's discovery order on this score. The minute entry on the docket from May 18, 2009 simply states that "[d]iscovery for both parties is re-opened for 60 days, followed by 15 days in which to file any further motions to the Court." (See May 18, 2009 Minute Entry, http://ecf.mssd.uscourts.gov/cgi-bin/DktRpt.pl?428943292913645-L_801_0-1). But nothing in the that order limited Nationwide's ability to request a Rule 35 evaluation or to add a rebuttal witness, which, as discussed below, is precisely the function Dr. Webb will serve.

8. Next, Plaintiff claims that Nationwide has not shown "good cause" to conduct a mental evaluation as required under Rule 35. (Pl.'s Mot. at 4-5). First, it bears emphasis that Plaintiff does not dispute that she has put her mental health squarely "in controversy" in this case by: (i) including a claim for emotional distress in her complaint; and (ii) actively pursuing that claim for damages. See *Schlagenhauf*, 379 U.S. at 119. It is, of course, necessary for a court to conduct an analysis in each case to determine "whether the party requesting a mental or physical examination ... has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause'[,] which ... are necessarily related." *Id.* at 118-19. Notwithstanding this review, "courts have held that Rule 35(a) should be construed liberally in favor of granting discovery." *Lahr v. Fulbright & Jaworski*, 164 F.R.D. 196, 198 (N.D. Tex. 1995) (citing *In re: Certain Asbestos Cases*, 112 F.R.D. 427, 432 (N.D. Tex. 1986) & 4 A.J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 35.04 at 35-20, 21 (2d Ed. 1985)). But where, as here, a plaintiff seeks damages as a result of mental injury, courts have frequently

opened for 60 days, followed by 15 days in which to file any further motions to the Court.” (See

May 18, 2009 Minute Entry, <http://ecf.mssd.uscourts.gov/cgi-bin/DktRpt.pl?428943292913645->

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9. ~~Any~~ argument that Nationwide should have disclosed its intent to use Dr. Webb within the Court’s expert-disclosure period under the scheduling order in this case cannot be the basis for denying Nationwide’s request now. Indeed, Nationwide *could not* have disclosed its intent to use Dr. Webb as an expert at that ~~time precisely because Plaintiff had not:~~ (i) ~~disclosed that she ever sought treatment for emotional distress,~~ (ii) ~~identified her own treating physician from which Nationwide could seek her medical records for an expert to review,~~ and (iii) ~~provided Nationwide any indication that she would use her own mental-health expert in the first instance.~~

10. ~~Third, as set out more fully in Nationwide’s Response to Plaintiff’s Motion for Review, Nationwide has shown “good cause” to seek a Rule 35 evaluation. But that good cause is a result of Plaintiff’s repeated discovery violations.~~ As Nationwide has repeatedly argued, it has been unable — due to the various discovery abuses by Plaintiff — to secure this information. ~~Indeed, the~~ record in this case is replete with instances where Nationwide has sought, but Plaintiff has refused access, to relevant, discoverable information. For example, Plaintiff has not properly supplemented her response to Nationwide’s interrogatory No. 26 to include her complete medical history regarding her claim for emotional distress.⁴ ~~Instead, Nationwide has~~

⁴ Specifically, that request asks Plaintiff to “[i]dentify all medical personnel ... from whom you have sought advice and/or treatment for any emotional distress ... and *describe any related diagnoses and/or prognoses.*” (See May 19, 2008 First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. Co., at Request No. 26 (Ex. 4).) Only after the Court’s January 27, 2009 Order (Dkt. 170) did Plaintiff comply with that request *in part* by providing a list of Mrs. Politz’s treating physicians. Still, Plaintiff has not provided a history of her treatment for mental-health issues, including her use of antidepressant medications.

held that this satisfies the “actual controversy” prong of Rule 35. See, e.g., *id.*; *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 221-22 (S.D.N.Y. 1994); *Johns v. Evergreen Presbyterian Ministries, Inc.*, 826 F. Supp. 1050 (E.D. Tex. 1993); *Zabkowitz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984) (holding that allegations of emotional distress from sexual harassment are an appropriate basis for allowing order to compel psychiatric examination); *Everly v. United Parcel Servs., Inc.*, No. 89-C-1712, 1991 WL 18429, at *1-2 (N.D. Ill. Feb. 5, 1991).

9. Not only is Nationwide’s intent to seek a mental evaluation of Mrs. Politz well within the scope of Rule 35’s “actual controversy” requirement, but also Nationwide has shown there is “good cause” to seek such an examination in light of the procedural history in this case. To be clear, Nationwide seeks this evaluation in order to secure a complete evaluation of Mrs. Politz’s mental health — including a complete history of her use of antidepressant medications — solely in order to rebut Plaintiff’s claim that Nationwide caused her emotional distress. Under Mississippi Supreme Court precedent, Mrs. Politz is obligated to show “that she actually suffered mental anguish.” *University of S. Miss. v. Williams*, 891 So.2d 160, 173 (Miss. 2004). That means Mrs. Politz is required to demonstrate “specific suffering during a specific time frame,” and “generalization [such] as ‘it made me feel bad,’ or ‘it upset me’ are not sufficient” to make this showing. *Id.* As Nationwide has repeatedly argued, it has been unable — due to the various discovery abuses by Plaintiff — to secure this information. (See Nov. 20, 2008 Mot. To Strike Pl.’s Claim for Emotional Distress (Dkt. 110); Jan. 7, 2009 Nationwide Mut. Fire Ins. Co. Mot. for Summ. J. (Dkt. 159); Apr. 7, 2009 Nationwide Supplemental Mot. for Summ. J. (Dkt. 258); Apr. 23, 2009 Nationwide Mut. Fire Ins. Co. Resp. to Pl.’s Mot. for Clarification and/or Reconsideration (Dkt. 267).)

attempted to piece this information together by issuing subpoenas for, and searching through, literally hundreds of pages of Mrs. Politz's medical records. Plaintiff has also been unable during her depositions to answer specific questions about her use of antidepressant medications. For example, she was unable to identify the names of her medications. (See Nov. 13, 2008 Dep. of Helen Politz at 245-46 (Ex. 5); March 24, 2009 Dep. of Helen Politz at 34 (Ex. 6).) She was also unable to explain precisely when she began taking those medications. (See Mar. 24, 2009 Politz Dep. at 31-33.) She also was unable to remember if one of her doctors prescribed her antidepressant medications at all. (See *id.* at 35-36.)

11. Plaintiff also has a history of providing "newly discovered" information late into discovery, thereby attempting to prevent Defendant from securing more information about these new disclosures. For example, in her *second* deposition on March 24, 2009, Plaintiff revealed for the first time that she may have been prescribed antidepressant medications by an OB-GYN who had not been previously disclosed. This revelation was, of course, in direct violation of the Court's January 27, 2009 Order mandating that "[o]n or before February 2, 2009, Plaintiff shall provide to Nationwide the names and addresses of *all* treating physicians of plaintiff Helen Politz." (Jan. 27, 2009 Order at 1.) Moreover, on May 14, 2009 Plaintiff revealed for the first time in her response to Nationwide's Motion *In Limine* No. 10 that she is currently taking Lexapro. (See May 14, 2009 Pl.'s Resp. to Nationwide's [287] Mot. in *Limine* No. 10 to Preclude Pl.'s Test., Argument, Evidence & Op. re Alleged Emotional Distress by Nationwide at 2 (Dkt. 313).) As Nationwide argued in its reply brief in support of that motion, Plaintiff had only revealed in discovery that she had taken Prozac, Klonopin, and Celexa — none of which are generic forms for Lexapro. (See May 15, 2009 Nationwide's Reply In Supp. of Mot. in *Limine* No. 10 at 1-2 (Dkt. 322).) In short, the facts of this case and the discovery abuses by Plaintiff

10. Thus, Plaintiff's argument that "there need not be a mental examination where the party seeking the examination has adequate alternative discovery procedures available, such as having the opportunity to explore the issue through documents, interrogatories and depositions" cannot be the basis for denying Nationwide's request here.¹ (Pl's Mot at 5) (emphasis omitted). The record in this case is replete with instances where Nationwide has sought, but Plaintiff has refused to provide Nationwide with access to relevant, discoverable information. For example, Plaintiff has not properly supplemented her response to Nationwide's interrogatory No. 26 to include her complete medical history regarding her claim for emotional distress. Specifically, that request asks Plaintiff to "[i]dentify all medical personnel ... from whom you have sought advice and/or treatment for any emotional distress ... and *describe any related diagnoses and/or prognoses.*" (See May 19, 2008 First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. Co. to Pls., at Req. No. 26 (Ex. 3)).² Only after the Court's January 27, 2009 Order did Plaintiff comply with that request *in part* by providing a list of Mrs. Politz's treating physicians. Still, Plaintiff has not provided a history of her treatment for mental-health issues, including her use of antidepressant medications. Instead, Nationwide has

¹ Plaintiff's reliance on *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990) to support her argument on this score provides her no solace. There, a panel of the Fifth Circuit determined that a Rule 35 examination was not appropriate for several reasons. First, the Fifth Circuit held that defendant had *not* satisfied the "in controversy" requirement because plaintiff had filed only a claim for age discrimination under Title VII. Mr. Acosta had not filed a claim for intentional or negligent infliction of emotional distress, he had not alleged any mental injury whatsoever, nor was he seeking damages for emotional distress. Thus, the Fifth Circuit concluded that "[a] ruling in [the defendant's] favor would sanction a mental examination in *every* age discrimination case." *Id.* at 209 (emphasis added). Second, the defendant's expert was not a licensed physician, unlike Dr. Webb here. As such, defendant's request for an examination failed to satisfy the plain language of Rule 35. Finally, the Court concluded that defendant had also failed to demonstrate "good cause" for the examination because defendant had the opportunity, not only to use interrogatories, but also to depose plaintiff's witnesses who were able to provide relevant information about the plaintiff's claim at issue. As such, the examination in *Acosta* would have been "repetitive." *Id.* Here, of course, Nationwide has argued that it has repeatedly sought, but has been unable, to obtain information about Plaintiff's claim that she suffered emotional distress.

² Emphasis added unless otherwise indicated.

~~demonstrate that, although Nationwide has attempted to secure the complete basis for Plaintiff's claim that Nationwide caused her emotional distress, it has been unable to do so. Dr. Webb's evaluation of Plaintiff's mental condition is a reasonable solution to help Nationwide pursue that discovery. Thus, this factual history is what led Nationwide to seek a Rule 35 evaluation. But it should not be the basis upon which the Court permits Plaintiff to disclose a new expert to support her case in chief.~~

12. ~~Fourth,~~ Plaintiff will not be prejudiced by Nationwide's use of a rebuttal witness to counter her claim that Nationwide caused her emotional distress. Pursuant to the Court's original expert-disclosure framework, Plaintiff was obligated to disclose whether she would be using expert testimony *in advance* of Nationwide's disclosure. Thus, even if Nationwide had disclosed the fact that it was seeking a Rule 35 mental evaluation, it could have done so after Plaintiff's decision not to secure an expert to support her case. And under that scenario, Plaintiff would not have had the opportunity to ~~re-~~designate her own expert after failing to do so in the first instance. It too would have been untimely. Therefore, Plaintiff is in no worse position now than she would have been if Nationwide had disclosed its intent to retain Dr. Webb during the Court's initial expert-disclosure period.

13. ~~Fifth,~~ to the extent Plaintiff claims that she is prejudiced by the Rule 35 evaluation, it is the result of her own discovery abuses. Although Plaintiff has claimed ~~in her Motion for Review~~ that Nationwide is merely seeking a second bite at the apple ~~to reframe its litigation strategy,~~ such an allegation is belied by the extensive procedural history of this case. ~~(See June 3, 2009 Mot. for Review of and Objection to the U.S. Magistrate Judge's [348] at 6 (Dkt. 350).)~~ Nationwide's preference was to go to trial in this case long ago — indeed, it was “Nationwide [who] was virtually forced to file its own [71] Motion to Extend Discovery and

attempted to piece this information together by issuing subpoenas for, and searching through, literally hundreds of pages of Mrs. Politz's medical records.

11. Additionally, Plaintiff has been unable during her depositions to answer specific questions about her use of antidepressant medications. For example, she was unable to identify the names of her medications. (*See* Nov. 13, 2008 Dep. of Helen Politz at 245-46 (Ex. 4); March 24, 2009 Dep. of Helen Politz at 34 (Ex. 5).) She was also unable to explain precisely when she began taking those medications. (*See* Mar. 24, 2009 Politz Dep. at 31-33 (“Q. Through the course of this litigation we’ve requested medical records from some of your physicians. And we have reason to believe based on those medical records that you started taking antidepressants in approximately February 2008. Is that consistent with your recollection of when you first began taking antidepressants? A. I’m not sure exactly when it was. Q. We have reason to believe that you changed your medication in October of 2008. Is it possible that you first began taking medication, this antidepressant medication in February of 2008 and then changed in October 2008? A. No. It didn’t happen like that. Q. (By Mrs. Locke) Okay. To the best of your recollection, when did you first began taking antidepressants? A. Sometime in 2007. Q. Do you recall what season -- A. No. Q. -- it would have been? What month? A. I don’t remember. I was very depressed. Q. Do you recall if it was at the beginning or towards the end of the year? A. I don’t remember.”)) She also was unable to remember if one of her doctors prescribed her antidepressant medications at all. (*See id.* at 35-36.) Thus, Plaintiff’s argument that Nationwide has “alternative discovery procedures” to seek information regarding Mrs. Politz’s emotional distress is incongruous with the history of discovery in this case.³

³ Plaintiff also misleadingly claims that Nationwide deposed Dr. Babo three times, which leaves the impression that Nationwide has had three separate opportunities to question Dr. Babo about his treatment of Mrs. Politz. (Continued...)

Reset Motions Deadline because of difficulties it encountered in scheduling discovery,” and it was Nationwide who opposed Plaintiff’s December 3, 2008 Motion to Extend Discovery. (Jan. 26, 2009 Order (Dkt. 166); *see* Dec. 17, 2008 ~~Opp. To Pl’s. Mot. to Supplement PreDisc. Disclosures and for an Extension of the Disc. Deadline~~ (Dkt. 150).) The only reason the parties have not already gone to trial is because Plaintiff has repeatedly provided late disclosures, refused to cooperate with Defendant’s discovery requests, and sought extensions of the discovery deadline. (~~See, e.g.,~~ June 12, 2008 Pls.’ Unopposed Mot. For Extension of Deadlines (Dkt. 13) (requesting an extension of the ~~expert-disclosure~~ deadline); Sept. 8, 2008 Pls.’ Unopposed Mot. for Extension of the Disc. Deadline (Dkt. 36); Oct. 29, 2008 Pls.’ Supplement to Pre-Disc. Disclosure of Core Information (Ex. 7) (disclosing several additional fact witness only sixteen days before the initial close of discovery); Nov. 3, 2008 Nationwide’s Mot. To Compel Pl. To Sign Privacy Act Release For U.S. Small Business Administration Disc. (Dkt. 66); Nov. 5, 2008 ~~Nationwide’s Mot. To Extend Disc. and Reset Mots. Deadline~~ (Dkt. 71) (which this Court recognized that “Nationwide was virtually forced to file ... because of difficulties it encountered in scheduling discovery”); Nov. 14, 2008 Pls.’ Supplement to ~~Pre-disc. Disclosures of Core Information~~ (Ex. 8) (revealing for the first time on the day discovery closed two additional fact witnesses); Nov. 18, 2008 Pls.’ Mot. To Supplement Expert ~~Report~~ (Dkt. 108) (~~seeking to supplement Ted Biddy’s expert report~~); Dec. 3, 2008 Pls.’ Mot. To Supplement Pre-disc. ~~Disclosures and For~~ an Extension of the Disc. Deadline (Dkt. 136); Dec. 9, 2008 Pls.’ Supplement to ~~Pre-disc. Disclosures of Core Information~~ (Ex. 9) (~~-serving hundreds of additional pages of documents three weeks after the close of discovery~~); May 8, 2009 ~~Pl’s. Mot. to Stay Proceedings~~ (Dkt. 278) (seeking a stay of this action pending the outcome of the ~~Corban case~~). ~~The Court, therefore, should not reward Plaintiff now by permitting her to retain a new expert~~

12. Plaintiff also insists that the Court should reverse Judge Walker's decision because Nationwide's motion was not based on any "newly discovered information" (See Pl.'s Mot. at 6.) Again, not true. In her second deposition on March 24, 2009, Plaintiff revealed for the first time that she may have been prescribed antidepressant medications by her OB-GYN — a treating physician she had never previously disclosed. This revelation was, of course, in direct violation of the Court's January 27, 2009 Order mandating that "[o]n or before February 2, 2009, Plaintiff shall provide to Nationwide the names and addresses of all treating physicians of plaintiff Helen Politz." (Jan. 27, 2009 Order at 1 (Dkt. 170).) Moreover, on May 14, 2009 Plaintiff revealed for the first time in her response to Nationwide's Motion In Limine No. 10 that she is currently taking Lexapro. (See May 14, 2009 Pl.'s Resp. to Nationwide's [287] Mot. in Limine No. 10 to Preclude Pl.'s Test., Argument, Evidence & Op. re Allege Emotional Distress by Nationwide at 2 (Dkt. 313).) As Nationwide argued in its reply brief in support of that motion, it has been able to piece together from Mrs. Politz's medical records only that she had taken Prozac, Klonopin, and Celexa — none of which are generic forms for Lexapro. (See May 15, 2009 Nationwide's Reply In Supp. of Mot. in Limine No. 10 at 1-2 (Dkt. 322).) This is further evidence that Plaintiff has not provided Nationwide a complete history of her mental health problems for which she claims Nationwide is responsible.

13. Next, Plaintiff claims that the Court should deny Nationwide's request for a Rule 35 evaluation because, "[a]s things currently stand, Plaintiff does not intend to call Dr. Mark Babo as a witness at all," but she reserves her right to do so because "he is listed on the pretrial order in the 'may call' list in an abundance of caution" (Pl.'s Mot. at 3.) In other words,

But Plaintiff fails to explain that two of those three depositions related exclusively to Dr. Babo's treatment of **Mr. Politz**.

~~where, unlike the position Nationwide was in, there was no reason preventing her from doing so within the Court's original scheduling order.~~

~~14. Sixth, Plaintiff should not be permitted to retain an expert now that discovery has revealed that Mrs. Politz's primary treating physician is unable to conclude that Nationwide's partial denial of her claim caused or contributed to her emotional distress. (See Apr. 1, 2009 Dep. of Mark Babo at 44-46 ("Q. Is it fair to say that based on the documents we've reviewed today that you never actually diagnosed Mrs. Politz with clinical depression, is that correct? A. Yes. Q. Instead you characterized Mrs. Politz's symptoms as a grief reaction, correct? A. Yes. Q. And that grief reaction was a result of her husband's health condition and subsequent death, is that correct? A. Yes. ... Q. (By Mrs. Locke) Is it fair to say that based on the documents we've reviewed today you never referred her to a specialist for emotional health, is that right? A. That's correct. Q. And there's no indication that she needed psychiatric therapy, correct? A. Correct. ... Q. (By Mrs. Locke) There's certainly no indication that Nationwide caused Mrs. Politz's anxiety, correct? ... A. There's nothing indicated in the medical records. ... Q. (By Mrs. Locke) Is it fair to say that you developed no professional opinion that Nationwide's partial denial of Mrs. Politz's insurance claim caused her anxiety? A. Correct.") (Ex. 10).) Indeed, Plaintiff expressly disclaimed that she was going to identify Dr. Babo as an expert in this case. Thus, Plaintiff simply seeks to retain a new expert, who has no history of treating Plaintiff, to rebut her own treating physician's testimony. But she should not be permitted to avoid the unfavorable testimony of her own doctor by designating a new expert — nearly a year after the expert-disclosure deadline.~~

~~15. Finally, unlike Plaintiff, Nationwide will be prejudiced if the Court permits Plaintiff to add a new expert to support her case-in-chief. Nationwide will be forced to spend~~

because Plaintiff only “may call” Dr. Babo (as opposed to “will call”) there is no need for Nationwide to seek a Rule 35 evaluation. But that ambiguous statement of intent is hardly reason to reverse Judge Walker’s order. And even if Dr. Babo does not testify about Mrs. Politz’s alleged emotional distress, Mrs. Politz certainly will.

14. Additionally, Plaintiff insists that Dr. Babo will not provide expert opinion testimony, and therefore this Court should deny Nationwide’s request. Specifically, Plaintiff claims that “[o]ne factor reviewed by courts in making a ‘good cause’ determination is ‘whether the plaintiff plans to prove [her] claim through the testimony of [her own] expert witness.’” (Pl.’s Mot. at 5 (citing *Lahr*, 164 F.R.D. at 200).) But Plaintiff did not dig deeply enough into the facts or the holding of *Lahr*. There, the court actually *permitted* a Rule 35 examination despite the fact that the plaintiff had not determined that she would use an expert to support her claim for emotional distress. Thus, the court specifically held that “[i]t should be emphasized that this finding [to permit a Rule 35 evaluation] is not based upon a belief by the [court] that there is any certainty that plaintiff will offer expert testimony with regard to her mental condition.” *Lahr*, 164 F.R.D. at 201. In short, the fact that Plaintiff is not proffering expert testimony is not dispositive of whether Judge Walker properly determined Nationwide is entitled to a Rule 35 evaluation.

15. Absent a limiting instruction by the Court pursuant to Nationwide’s Motion in Limine No. 10, Dr. Babo likely *will* be able to testify about the fact that he prescribed Mrs. Politz antidepressant medication. This will leave the impression for the jury that it was Nationwide’s partial denial of Mrs. Politz’s insurance claim that caused (or even partially caused) her emotional distress. But in reality Mrs. Politz never sought treatment for emotional distress until more than two years *after* Nationwide partially denied her claim. (See May 8, 2009 Def.’s Mot.

~~additional time and money to have Dr. Webb review and respond to Plaintiff's expert report, as well as the time and cost associated with deposing the newly-disclosed expert. Nationwide has already incurred considerable expense in deposing Mrs. Politz's treating physicians and reviewing her medical records in light of Plaintiff's last request of an extension of the discovery deadline. The equities simply do not favor yet another delay on behalf of Plaintiff.~~

~~16.~~ Because all the relevant legal authorities have been provided in this Response, Nationwide respectfully requests that the Court waive its usual requirement that a separate memorandum of authorities to be filed. *See* Unif. Local Rule 7.2.

~~17.~~ In further Support of its Motion, Nationwide attaches and incorporates by reference the following exhibits:

Exhibit 1: June 18, 2008 ~~Pls.~~² Answers to First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. Company

Exhibit 2: May 11, 2009 Proposed Pretrial Order

Exhibit 3: May ~~22, 2009 E. Locke Email to K. Carter~~

Exhibit 4: May 19, 2008 First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. ~~Co~~

~~Exhibit 5:~~ Nov. 13, 2008 Dep. of Helen Politz

Exhibit ~~6:~~ March 24, 2009 Dep. of Helen Politz

Exhibit 7: Oct. 29, 2008 Supplement to Pre-Disc. Disclosure of Core Information for Pls.

Exhibit 8: Nov. 14, 2008 Supplement to Pre-disc. Disclosures of Core Information for Pls.

Exhibit 9: Dec. 9, 2008 Supplement to Pre-disc. Disclosures of Core Information for Pls.

Exhibit 10: ~~Apr. 1, 2009 Dep. of Mark Babo~~

In Limine No. 10 to Preclude Pl.'s Test, Argument, Evidence and Op. Regarding Alleged Emotional Distress at 6 (detailing that it appears that Mrs. Politz first began taking antidepressant medications in February 2008 as part of a "grief reaction" to her late husband's health condition) (Dkt. 281.)

16. Moreover, Plaintiff now seeks to designate a new mental-health expert. Specifically, Plaintiff filed a motion on June 5, 2009 stating that she is "currently scheduled to see a licensed psychiatrist, Dr. Harold Ginzburg, in Metairie, Louisiana, on June 17, 2009" and that she "requests leave to designate said psychiatrist as her expert witness on the issue of her mental health and the effect of Nationwide's conduct on her mental health" (June 5, 2009 Mot. For Leave To Designate Mental Health Expert at 2 (Dkt. 352)). As Nationwide explains in its separately-filed response to that motion, Nationwide opposes any such late-disclosed designation. Contrary to Nationwide's disclosure of Dr. Webb as a *rebuttal witness*, Plaintiff wants to designate a new expert to support her *affirmative case-in-chief*. This the Court should not allow.

17. Unlike Plaintiff, Nationwide has shown good cause why it seeks to add Dr. Webb as a rebuttal witness. First, Nationwide's disclosure of Dr. Webb is not untimely. Under this Court's longstanding rules of practice, the parties are not obligated to disclose rebuttal witnesses even as late as the pretrial order. (See Proposed Pretrial Order ¶ 13 ("The following is a list of witnesses Defendant anticipates calling at trial (*excluding witnesses to be used solely for rebuttal or impeachment*)).") Moreover, there is no provision within Rule 35, which delineates the timing for seeking a mental evaluation. Nationwide timely sought consent from Plaintiff merely four days after the Court reopened discovery after the pretrial conference on May 18. (See May 22, 2009 E. Locke Email to K. Carter (Ex. 6).)

WHEREFORE, PREMISES CONSIDERED, Nationwide requests that this Court deny Plaintiff's Motion for ~~Leave To Designate Mental Health Expert.~~

THIS, the 15th day of June, 2009.

Respectfully submitted,

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, Defendant

By Its Attorneys,
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18. And any argument that Nationwide should have disclosed its intent to use Dr. Webb within the Court's expert-disclosure period under the original scheduling order in this case cannot be the basis for denying Nationwide's request now. Indeed, Nationwide *could not* have disclosed its intent to use Dr. Webb as an expert at that time. Simply put, Plaintiff failed to disclose until *after* the expert-disclosure period that she did seek treatment for emotional distress. In Plaintiff's initial discovery responses, Mrs. Politz affirmatively represented that she "did not seek mental health treatment" (See June 18, 2008 Pls' Answers to First Set of Interrogs, at Resp to No. 26.) Mrs. Politz personally verified and swore to the accuracy of these interrogatory responses (See *id.* at 14.) Instead, only on November 14, 2008 — the day discovery was originally set to close in this case — did Plaintiff reveal that she had in fact sought treatment for emotional distress (See Nov. 20, 2008 Mot. To Strike Pl's Claim for Emotional Distress (Dtk. 110) (detailing the timeline of Plaintiff's disclosure of this information).)

19. Moreover, Plaintiff never designated a mental-health expert to support her case-in-chief within the Court's expert-disclosure deadline. This, of course, was consistent with Plaintiff's sworn testimony that she never sought treatment for emotional distress. And, therefore, Nationwide had no reason to designate an expert at that time.

20. Once Plaintiff finally revealed that she had sought treatment for emotional distress in November 2008, at the outset Nationwide had no idea what Mrs. Politz's physicians would say regarding her claim for emotional distress. Thus, Nationwide worked diligently to secure Mrs. Politz's medical records and depose her treating physicians. But that was not an easy feat. Through the course of that discovery, this Court had to order Plaintiff "[o]n or before February 2, 2009, [to] provide to Nationwide the names and addresses of all treating physicians" (Jan. 27, 2009 Order at 1.) Additionally, Nationwide spent hundreds of hours reviewing

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This, the 15th day of June, 2009.

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Plaintiff's medical records, as well as to prepare and take five physicians' depositions. Despite this tedious process, none of that discovery revealed that Mrs. Politz's alleged emotional distress was caused by Nationwide. (See Supplemental Mot For Summ I)

21. Then, when Nationwide re-deposed Mrs. Politz in late March 2009, she again was unable to confirm the dates of her use of antidepressant medications or even their names. (See March 24, 2009 Politz Dep. at 31-36.) And now one of her most recent pleadings claims she is taking an additional medication never previously revealed to Nationwide throughout months of additional discovery related to this claim. (See Pl.'s Resp. to Nationwide's [287] Mot. in Limine No. 10 at 2.)

22. Unlike Nationwide, there was no reason why Plaintiff could not have retained and identified an expert to support her claim for emotional-distress damages within the time provided in Court's original expert-disclosure period. Under that framework, Plaintiff's experts were due on or before July 16, 2008 — nearly a year ago. During that time, Plaintiff had all the information she needed to decide whether to use expert testimony. She knew her own mental-health history; indeed, she was the *only* party in this action who could have known when she visited her physicians, and when she began taking antidepressant medications.

23. Plaintiff will not be prejudiced by Nationwide's use of a rebuttal witness to counter her claim that Nationwide caused her emotional distress. Pursuant to the Court's original expert-disclosure framework, Plaintiff was obligated to disclose whether she would be using expert testimony *in advance* of Nationwide's disclosure. Thus, even if Nationwide had disclosed the fact that it was seeking a Rule 35 mental evaluation, it could have done so after Plaintiff's decision not to secure an expert to support her case. And under that scenario, Plaintiff would not have had the opportunity to designate her own expert after failing to do so in

the first instance. It too would have been untimely. Therefore, Plaintiff is in no worse position now than she would have been if Nationwide had disclosed its intent to retain Dr. Webb during the Court's initial expert-disclosure period.

24. Plaintiff's insistence that Nationwide is merely seeking a second bite at the apple does not withstand even cursory review. (*See* Pl.'s Mot. at 6.) It would have been Nationwide's preference to have trial in this case long ago — indeed, it was “Nationwide [who] was virtually forced to file its own [71] Motion to Extend Discovery and Reset Motions Deadline because of difficulties it encountered in scheduling discovery,” and it was Nationwide who opposed Plaintiff's December 3, 2008 Motion to Extend Discovery. (Jan. 26, 2009 Order (Dkt. 166); *see* Dec. 17, 2008 Opp'n To Pl.'s Mot. to Supplement Pre-Disc. Disclosures and for an Extension of the Disc. Deadline (Dkt. 150).) The only reason the parties have not already gone to trial is because Plaintiff has repeatedly provided late disclosures, refused to cooperate with Defendant's discovery requests, and sought extensions of the discovery deadline. (*See* June 12, 2008 Pls.' Unopposed Mot. For Extension of Deadlines (Dkt. 13) (requesting an extension of the expert-disclosure deadline); Sept. 8, 2008 Pls.' Unopposed Mot. for Extension of the Disc. Deadline (Dkt. 36); Oct. 29, 2008 Pls.' Supplement to Pre-Disc. Disclosure of Core Information (Ex. 7) (disclosing several additional fact witness only sixteen days before the initial close of discovery); Nov. 3, 2008 Nationwide's Mot. To Compel Pl. To Sign Privacy Act Release For U.S. Small Business Administration Disc. (Dkt. 66); Nov. 5, 2008 Nationwide's Mot. To Extend Disc. and Reset Mots. Deadlines (Dkt. 71) (which this Court recognized that “Nationwide was virtually forced to file ... because of difficulties it encountered in scheduling discovery”); Nov. 14, 2008 Pls.' Supplement to Predisc. Disclosures (Ex. 8) (revealing for the first time on the day discovery closed two additional fact witnesses); Nov. 18, 2008 Pls.' Mot. To Supplement Expert

Report (Dkt. 108); Dec. 3, 2008 Pls.' Mot. To Supplement Pre-disc. Disclosures and for an Extension of the Disc. Deadline (Dkt. 136); Dec. 9, 2008 Pls.' Supplement to Pre-disc. Disclosures of Core Information (Ex. 9) (including several hundred additional pages of documents after the close of discovery); May 8, 2009 Pls.' Mot. to Stay Proceedings (Dkt. 277) (seeking a stay of this action pending the outcome of the *Corban v. USAA* case). The Court, therefore, should not reward Plaintiff by now permitting her to retain a new expert where, unlike Nationwide's position, there was no reason preventing her from doing so within the Court's original scheduling order.

25. Plaintiff insists that the only reason Nationwide seeks to conduct a mental evaluation is to prove that Plaintiff is "lying" and to "harass" her. (See Pl's Mot. at 3, 7.) With all due respect, it is Plaintiff who has filed an action against Nationwide in which she has put her mental health squarely in dispute. As such, Nationwide is entitled to defend itself vigorously against Plaintiff's serious allegations that Nationwide somehow caused her severe mental injury. Dr. Webb's evaluation of Plaintiff's mental condition is a reasonable solution to help Nationwide secure a complete understanding of Plaintiff's claim for emotional distress. As set forth more fully in Dr. Webb's affidavit, Dr. Webb believes that it is necessary to evaluate Mrs. Politz in-person to provide a complete assessment of her psychiatric well-being. This is because a "psychiatrist needs to learn about events that occurred prior to the incident that the individual claims caused his or her psychiatric injury. Additionally, inquiring into a full psychiatric history of a patient allows the psychiatrist to fully understand how the patient handled and dealt with other stressors in his or her life. This is necessary to better assess how the incident at issue may have affected her and/or caused her mental injury." (See June 15, 2009 Dr. Mark Webb Affidavit at 2 (Ex. 10).)

26. Finally, Plaintiff's allegation that Dr. Webb "has a reputation for testifying to exactly what insurance companies want him to" is without foundation and is irresponsible. (Pl's Mot. at 8.) Plaintiff's attempt to impugn the reputation and integrity of a well-respected Mississippi psychiatrist in a publicly-filed pleading, before Dr. Webb has even had an opportunity to evaluate and develop an opinion about Plaintiff's mental health, is unwarranted and should not be tolerated. Moreover, the allegation is belied by Dr. Webb's resume on its face. Dr. Webb has over twenty years experience in the field of psychiatry, working on behalf of both plaintiffs and defendants alike. He received his medical degree from the Tulane University School of Medicine in 1986, and completed an internship and residency in 1990 at the Department of Psychiatry at the Duke Medical Center in Durham, North Carolina. Dr. Webb is currently a board-certified psychiatrist with the Mississippi Neuropsychiatric Clinic in Ridgeland, Mississippi. He is the Chairman of the Mississippi Psychiatric Association, and has authored several journal articles in the field of psychiatry. Moreover, he has given over 450 presentations to the general public and medical professionals about various psychiatric illnesses and treatment. Also, Dr. Webb has performed many Rule 35 mental examinations in the past. In short, Dr. Webb is eminently qualified to perform a mental evaluation of Mrs. Politz under Rule 35. See *Lahr*, 164 F.R.D. at 202-03 (holding that absent a "serious objection," the court will "appoint the doctor of the moving party's choice" for a Rule 35 evaluation (citing *Powell v. United States*, 149 F.R.D. 122, 124 (E.D. Va. 1993)).

27. To the extent Plaintiff seeks to challenge Dr. Webb's credentials, she can certainly do so during cross-examination. *Id.* at 203 ("Cross-examination provides an adequate safe-guard against [a party's claims of] bias on the part of a witness" (citing *Duncan v. Upjohn*

Co., 155 F.R.D. 23, 26 (D. Conn. 1994)). But, of course, that should not be the reason to reverse Judge Walker's decision now.

28. Because all the relevant legal authorities have been provided in this Response, Nationwide respectfully requests that the Court waive its usual requirement that a separate memorandum of authorities to be filed. *See* Unif. Local Rule 7.2.

29. In further Support of its Motion, Nationwide attaches and incorporates by reference the following exhibits:

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Exhibit 9: Dec. 9, 2008 Supplement to Pre-disc. Disclosures of Core Information for Pls.

Exhibit 10: June 15, 2009 Dr. Mark Webb Affidavit

WHEREFORE, PREMISES CONSIDERED, Nationwide requests that this Court deny Plaintiff's Motion for Review of Magistrate Judge's Order.

THIS, the 15th day of June, 2009.

Respectfully submitted,

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, Defendant

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