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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

GLEN HALLIDAY,  
MICHAEL S. IOANE, *et al.*,

Plaintiffs,

v.

KENT R. SPJUTE, *et al.*,  
Defendants.

**Case No. 1:07-cv-00620-AWI-GSA**

**ORDER GRANTING MOTION TO  
COMPEL PSYCHOLOGICAL  
EXAMINATIONS OF MICHAEL AND  
SHELLY IOANE**

(ECF No. 318)

Pending before the Court is a Motion by Defendants to Compel Psychological Examinations of Plaintiffs Michael S. Ioane, Sr. and Shelly Ioane (“Plaintiffs”). (ECF No. 318.) The Court previously granted in part an order shortening time and set a briefing schedule for the Motion. (ECF No. 320.) Plaintiffs filed an Opposition to the Motion and Defendants Jean Nole, Jeff Hodges, and Brian Applegate (“Defendants”) filed a Reply. (ECF Nos. 325, 327.) After the briefing of the Motion was completed, the Court took the Motion under submission. Based on a review of the pleadings and for the reasons set forth below, the Motion is GRANTED.

**I. BACKGROUND**

Plaintiffs are a married couple involved in tax disputes with the United States. Defendants are federal agents who assisted in searching Plaintiffs’ residence in 2006. Mr. Ioane was convicted of tax fraud conspiracy on October 3, 2011 as a result, in part, of evidence that was

1 obtained during the search. Plaintiffs allege that they have suffered and continue to suffer  
2 emotional distress as a result of the search. In particular, both Plaintiffs have described their  
3 emotional distress damages as including:

4 1) mental anguish and suffering, 2) pain and suffering from physical injury caused  
5 by the trauma, 3) emotional distress; such as anxiety, depression, 4) loss of  
6 enjoyment of life 4) [sic] loss of consortium, (husband and wife) 5) loss of  
7 potency due to drugs required to take, [sic] 6) traumatic neurosis, 7) weight gain,  
8 8) high blood pressure, 9) loss of sleep, 10) shock and fear of being murdered, 11)  
9 shock and fear of being shot, 12) impairment of earning capacity, 13) potential  
10 development of future diseases and disorders caused by the traumatic event of  
11 being fearful of death, 14) Additionally, the trauma of the even triggered various  
12 personality disorders of Michael Ioane; such as delusional personality disorder,  
13 adjudicated by Judge Lawrence O'Neill in Case # 1:09-cr-0142, Narcissistic  
14 personality disorder touched on during sentencing in Case # 1:09-cr-0142 and in  
15 the probation report. As a natural and proximate consequence of the defendants  
16 [sic] wrongful acts Michael Ioane was in indicted [sic] and convicted to 9 years in  
17 Federal prison. Each day Mr. Ioane spends in prison because of the wrongful acts  
18 of defendant increase the emotional and mental damage and consequently the loss  
19 of income real and potential.

20 (Declaration of Lauren Castaldi ("Castaldi Decl."), Exh. 6 (Michael Ioane's Responses to  
21 Defendants' First Set of Interrogatories 5:10-26), ECF No. 248-12.) Both Plaintiffs allege these  
22 damages. (Castaldi Decl., Exh. 5 (Shelly Ioane's Responses to Defendants' First Set of  
23 Interrogatories 5:12-28), ECF No. 248-11.)

24 Although non-expert discovery in the case has concluded, the Court previously issued an  
25 order providing a limited window for the parties to designate expert witnesses with respect to  
26 Plaintiffs' claims for medical and mental suffering and discovery concerning those experts. (ECF  
27 No. 307.) Plaintiffs have identified two expert witnesses and one substitute expert witness to  
28 testify at trial regarding their medical and mental distress damages. (ECF No. 314.)

Defendants now seek leave to have Ricardo Winkel, Ph.D. conduct an independent  
psychological examination of Michael and Shelly Ioane so that he may testify as a rebuttal expert.  
Plaintiffs acknowledge that their respective mental statuses are at issue in the litigation, but  
oppose the specific proposed conditions of the psychological examinations.

## II. DISCUSSION

Defendants seek an independent medical examination of Plaintiff pursuant to Federal Rule  
of Civil Procedure Rule 35. In relevant part, Rule 35(a) provides that: "The court where the

1 action is pending may order a party whose mental or physical condition--including blood group--  
2 is in controversy to submit to a physical or mental examination by a suitably licensed or certified  
3 examiner.”

4 Accordingly, to justify a mental examination under Rule 35, Defendants must  
5 demonstrate: (a) that Plaintiffs have placed their mental condition “in controversy”; and (b) “good  
6 cause” for the examination. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). “Good cause”  
7 generally requires a showing of specific facts justifying discovery. Factors that courts have  
8 considered include, but are not limited to: the possibility of obtaining desired information by  
9 other means, whether plaintiff plans to prove his claim through testimony of expert witnesses,  
10 whether the desired materials are relevant, and whether plaintiff is claiming ongoing emotional  
11 distress. *See Turner v. Imperial Stores*, 161 F.R.D. 89, 97-98 (S.D.Cal.1995) (expert testimony);  
12 *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D.Cal.1995) (ongoing emotional  
13 distress); *Schlagenhauf*, 379 U.S. at 118-119 (availability by other means).

14 Plaintiffs concede that their mental condition is in controversy here; they have also alleged  
15 that they suffer from ongoing emotional distress and intend to prove their damages through the  
16 testimony of expert witnesses. Likewise, good cause for the psychological examinations exists  
17 because Plaintiffs have designated experts who can testify to their mental condition. *Nguyen v.*  
18 *Qualcomm Inc.*, No. 09-1925-MMA (WVG), 2013 WL 3353840, at \*7 (S.D. Cal. July 3, 2013)  
19 (“A defendant should have a ‘balanced opportunity to assess the plaintiff’s allegations and proof  
20 concerning emotional distress damages,’ and a plaintiff’s chosen expert should not be the only  
21 expert who ‘ever actually examined the plaintiff’”); *Tarte v. U.S.*, 249 F.R.D. 856, 860 (S.D. Fla.  
22 2008) (consent to Rule 35 examinations concedes good cause under Rule 35).

23 Plaintiffs challenge only the specific parameters of the psychological examinations,  
24 including the duration and location of the examinations. Plaintiffs also request that they be  
25 allowed to conduct audio recordings of the examinations. Courts have the discretion to set the  
26 specific parameters of a psychological examination under Rule 35. *Newman v. San Joaquin Delta*  
27 *Comm. Coll. Dist.*, 272 F.R.D. 505, 511 (E.D. Cal. 2011).

#### 28 **A. Duration of the Examinations**

1 In the Motion, Defendants explain that the examinations may include tests that will take  
2 approximately 220 minutes (or 3 hours and 40 minutes) to complete, although they do not request  
3 a specific amount of time be designated for the entire exam. In their reply briefing, Defendants  
4 clarify that Dr. Winkel will require up to eight hours for each examination. Plaintiffs assert that  
5 they should not be required to spend more than 3 hours with the examiner and believe that any  
6 longer will cause them mental and emotional fatigue. Defendants have conceded that Dr. Winkel  
7 may be able to spread each examination over two days so that each Plaintiff need only spend four  
8 hours per day for two days each undergoing their examinations.

9 A number of courts have entertained requests to limit the duration of psychological  
10 examinations. Few courts have found limits of only three hours reasonable, however. *See, e.g.,*  
11 *Nguyen*, 2013 WL 3353840 at \*9 (rejecting plaintiff's request of two hour limitation and  
12 approving defendant's proposed duration of four to five hours); *Simonelli v. Univ. of California-*  
13 *Berkeley*, No. C 02-1107 JL, 2007 WL 1655821, at \*3 (N.D. Cal. June 4, 2007) (rejecting  
14 plaintiff's request of three hour limitation because "the interests of both parties in the examiner's  
15 arriving at an accurate diagnosis militates against setting an artificially short time limit" and  
16 setting an eight hour limit for a psychiatric examination); *Greenhorn v. Marriot Int'l, Inc.*, 216  
17 F.R.D. 649, 653 (D. Kan. 2003) (rejecting plaintiff's request for two hour limitation and  
18 approving defendant's anticipated three to five hour time frame). Courts that have set limitations  
19 have also done so only where some specific circumstance demanded it. *Nicholas v. Wyndham*  
20 *Int'l, Inc.*, 218 F.R.D. 122, 123 (D. V.I. 2003) (approving five hour limit where plaintiff-  
21 examinee was a minor child and allegations involved inappropriate sexual conduct by defendant).

22 No circumstances demand such limitations in this instance. Plaintiffs are adults and have  
23 not demonstrated any factual basis to limit the length of the requested examinations. Given  
24 Plaintiffs' concerns about mental and emotional fatigue, however, the Court will permit each  
25 examination to occur over a two day period. Each examination will consist of two, four hour  
26 testing sessions. This schedule adequately protects Defendants' need for discovery and Plaintiffs'  
27 concerns of mental fatigue. *Newman*, 272 F.R.D. at 513 (approving schedule of ten hour  
28 examination split over two days).

1           **B. Location of the Examinations**

2           Plaintiffs also challenge the proposed locations of the examinations—Defendants request  
3 that Mr. Ioane’s examination take place at Taft Correctional Facility, where he is currently held,  
4 and Ms. Ioane’s examination take place at the U.S. Attorney’s Office in Fresno, California. Citing  
5 privacy objections, Plaintiffs propose that both examinations take place at an outside medical  
6 office, preferably in Merced, Fresno, or San Francisco. As an initial matter, courts “have rejected  
7 general privacy challenges to Rule 35 examinations where a party has placed his mental health at  
8 issue.” *Nguyen*, 2013 WL 3353840 at \*8; *Mandujano v. Geithner*, No. C 10-1226 LB, 2011 WL  
9 825728, at \*7, (N.D. Cal. March 7, 2011) (“the government’s right to the information outweighs  
10 Mandujano’s privacy rights”); *Ortiz v. Potter*, No. 2:08-cv-01326 LKK KJN, 2010 WL 796960,  
11 at \*5 (E.D. Cal. March 5, 2010) (“reliance on such privacy protections are at a minimum  
12 misplaced with respect to a mental examination when plaintiffs have . . . suggested their intent to  
13 offer the testimony from their treating physicians regarding treatment sessions and potentially  
14 expert witnesses on the issue of emotional distress”).

15           When challenging the location of a medical examination, the burden is “on the plaintiff to  
16 show that traveling to the examination poses undue burden or hardship.” *Ornelas v. S. Tire Mart,*  
17 *LLC*, 292 F.R.D. 388, 400 (S.D. Tex. 2013); *Prado v. Cnty. of Siskiyou*, No. CIV S-08-1835-  
18 GEB-CMK, 2009 WL 1657537, at \*2 (E.D. Cal. June 12, 2009); *Pierce v. Brovig*, 16 F.R.D. 569,  
19 570 (S.D.N.Y. 1954). Plaintiffs have not demonstrated an undue burden here. As to Ms. Ioane,  
20 Plaintiffs merely state that she would prefer not to submit to examination at the U.S. Attorney’s  
21 Office “for obvious reasons.” (Opposition 3:14-15, ECF No. 325.) Without further elaboration or  
22 articulation, such a statement does not establish that Ms. Ioane faces an undue hardship in  
23 traveling to Fresno to undergo a mental examination. Nor is there any evidence that the U.S.  
24 Attorney’s Office lacks suitably private facilities for a mental examination involving the kinds of  
25 tests Dr. Winkel intends to administer.

26           Similarly, there is no reason that Mr. Ioane’s examination cannot take place at the Taft  
27 Correctional Facility. Plaintiffs argue that the examination should take place at an outside medical  
28 office because “[p]risons are not private places,” but this general statement is inadequate to meet

1 their burden. (Opposition 3:17-18, ECF No. 325.) Absent a more specific showing of hardship, it  
2 is reasonable to conduct the examination at Taft Correctional Facility, subject to the discretion of  
3 the Facility’s Warden and Dr. Winkel.

4 Any privacy concerns the Plaintiffs may have are easily remedied by instructions  
5 restricting third party observers from observing the exam. Similarly, Dr. Winkel can be instructed  
6 to use his best professional discretion to determine an appropriate location within the Facility to  
7 conduct his examination. Nothing suggests that these measures are inadequate to protect the  
8 privacy interests at stake.<sup>1</sup>

### 9 **C. Audio Recording of the Examinations**

10 Plaintiffs request leave to conduct audio recording of the examinations in the event that  
11 later “disputes concerning what the plaintiff said or didn’t say erupt during the course of the  
12 expert’s testimony.” (Opposition 2:15-18, ECF No. 325.) In the alternative, Plaintiffs propose that  
13 a third party be allowed to sit in on the examination. The use of audio or video recording devices  
14 during Rule 35 examinations is strongly disfavored. *Newman*, 272 F.R.D. at 514 (“In the same  
15 way third party observation of mental exams is disfavored, the presence of recording devices  
16 during such exams is also disfavored”), citing *Holland v. U.S.*, 182 F.R.D. 493, 496 (D.S.C.  
17 1998). However, Defendants have indicated that they would have no objection if Dr. Winkel  
18 conducted audio recording of the examinations. Defendants would then be willing to provide  
19 Plaintiffs with the recordings after the examinations have taken place. This adequately resolves  
20 Plaintiffs’ objections and the Court need not consider whether a third party observer should be  
21 allowed into the proceedings.<sup>2</sup>

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22 <sup>1</sup> Notably, both parties have an interest in using a venue for the examinations that is suitably private and secure.  
23 Plaintiffs have an interest in ensuring that their privacy is respected, while Defendants have an interest in ensuring  
24 the integrity of the examinations so that the Rule 35 reports that the examinations produce will have evidentiary  
25 value. Both interests are preserved by holding the examinations at Taft Correctional Facility and the U.S. Attorney’s  
26 Office.

27 <sup>2</sup> In any case, such an observer would affect the integrity of the examination and would not be allowed, absent special  
28 circumstances. *Nguyen*, 2013 WL 3353840 at \*9 (“third parties . . . cannot sit in on physical and mental examinations  
under FRCP 35 unless special circumstances require it”). Such special circumstances have been confined to cases  
involving parties with communication issues, such as limited English fluency. *See, e.g., T.B. ex rel. G.B. v. Chico  
Unified Sch. Dist.*, No. CIV S-07-0926-GEB-CMK, 2009 WL 837468, at \*2 (E.D. Cal. March 26, 2009) (allowing  
video recording of autistic child’s examination where recording of “facial expressions, body language, movements  
and behavioral enactments” was requested by examiner for diagnosis and recording would not impact integrity of the

1           **D. Privacy Admonishments**

2           Finally, Plaintiffs request a series of admonishments aimed at protecting their privacy.  
3           First, Plaintiffs request that correctional staff not be present during the examination. Second,  
4           Plaintiffs ask that the Court admonish defense counsel and Dr. Winkel not to “discuss Mr. Ioane  
5           with prison staff other than as necessary to arrange for the examination.” (Opposition 4:4-6, ECF  
6           No. 325.) Third, Plaintiffs argue that defense counsel and Dr. Winkel should be prohibited from  
7           obtaining Mr. Ioane’s prison file or records.

8           As indicated above, privacy concerns are rarely grounds on which to challenge a Rule 35  
9           examination. *See, e.g., Nguyen*, 2013 WL 3353840 at \*8; *Mandujano*, 2011 WL 825728 at \*7;  
10          *Ortiz*, 2010 WL 796960 at \*5. However, the Court recognizes (and Defendants acknowledge) that  
11          third party observers in Mr. Ioane’s examination would damage the integrity of the examination.  
12          (Declaration of Ricardo Winkel, Ph.D. ¶ 3, ECF No. 327-1.) To the extent possible (and in the  
13          Warden of Taft Correctional Facility and Dr. Winkel’s discretion), Mr. Ioane’s examination  
14          should thus take place in an appropriately private location within Taft Correctional Facility and  
15          without the presence of third parties, including correctional staff.

16          As to the other privacy admonishments, Plaintiffs do not articulate any specific basis for  
17          their concerns about defense counsel or Dr. Winkel’s communications with correctional staff. The  
18          Court thus does not find any cause to restrict the course of Dr. Winkel’s medical inquiry.  
19          *Abdulwali v. Wash. Metro Area Trans. Auth.*, 193 F.R.D. 10, 15 (D. D.C. 2000) (approving Rule  
20          35 examination that included “review of all relevant records and documents” and “gathering of  
21          past history including medical history”); *Lahr v. Fulbright & Jaworski, LLP*, 164 F.R.D. 196, 202  
22          (N.D. Tex. 1995) (“For the court to intervene and limit the type of examination an expert has  
23          indicated is necessary in order to analyze the plaintiff’s claims would subvert the truth finding  
24          function inherent in Rule 35 examinations”).

25          In any case, Plaintiffs will have adequate remedies under Rule 35 to challenge the basis of  
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27          exam); *Di Bari v. Incaica Cia Aramadora, S.A.*, 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (court reporter allowed where  
28          plaintiff had “difficulty with the English language” and thus “his ability to communicate to his counsel what occurred  
        during the psychiatric examination may be seriously impaired”). Plaintiffs’ reasons for seeking an observer do not  
        fall within the “special circumstances” required.

1 Dr. Winkel's opinion. Because Defendants intend to offer Dr. Winkel as an expert witness at trial,  
2 Plaintiffs will have the ability to conduct a thorough cross-examination, as well as offer testimony  
3 of their own experts. Defendants have also acknowledged the requirement that they produce a  
4 copy of Dr. Winkel's report to Plaintiffs under Rule 35(b) for Plaintiffs' use in preparing to  
5 dispute his testimony. Should Defendants fail to comply with this requirement, the examiner's  
6 testimony may be excluded at trial. Fed. R. Civ. P. 35(b)(5). These safeguards provide adequate  
7 remedies for the disputes that Plaintiffs envision with respect to the examiner's conduct at the  
8 examination. *Morrison*, 244 F.R.D. at 407-08. Nonetheless, the Court will admonish the examiner  
9 to conduct the examinations consistent with his professional and ethical obligations as a  
10 psychologist licensed by the state of California.

### 11 **III. CONCLUSION**

12 Based on the above, the Court GRANTS Defendants' Motion to Compel Psychological  
13 Examinations (ECF No. 318) pursuant to Federal Rule of Civil Procedure 35. Accordingly:

- 14 1. The Court determines that Ricardo Winkle, Ph.D., is qualified to conduct a mental  
15 examination under Federal Rule of Civil Procedure 35(a);
- 16 2. Plaintiff Michael S. Ioane, Sr. is ORDERED to appear for a psychological exam  
17 before Ricardo Winkel, Ph.D. at the Taft Correctional Facility between the dates of  
18 July 1, 2015 and July 31, 2015, at the convenience of Dr. Winkel and the Warden  
19 of the Taft Correctional Facility;
  - 20 a. The Warden of Taft Correctional Facility is ORDERED to make Michael  
21 S. Ioane, Sr. available for said examination and to coordinate with Dr.  
22 Winkel to determine a suitable location within which to conduct a  
23 psychological examination;
  - 24 b. Defense counsel G. Patrick Jennings is ORDERED to provide a copy of  
25 this order to the Warden of Taft Correctional Facility and to facilitate  
26 communications between Dr. Winkel and Taft Correctional Facility in  
27 scheduling the examination;
  - 28 c. The examination will occur over two four-hour sessions in a two-day



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period, with breaks at Dr. Winkel’s discretion;

d. Provided that the Warden of Taft Correctional Facility allows recording devices to be present, Dr. Winkel may record the examination, with a digital copy of the examination to be provided to defense counsel and to Shelly Ioane with the production of his Rule 35 report;

3. Plaintiff Shelly Ioane is ORDERED to appear for a psychological exam before Dr. Winkel at the office of the United States Attorney for the Eastern District of California, 2500 Tulare Street, Suite 4401, Fresno, California, 93721, on July 15, 2015, at 10:00 a.m., and thereafter as required by Dr. Winkel for the completion of the examination;

a. The examination will occur in a private location within the U.S. Attorney’s office, to be selected at Dr. Winkel’s discretion;

b. The examination will occur over two four-hour sessions in a two-day period, with breaks at Dr. Winkel’s discretion;

c. Dr. Winkel may record the examination, with a digital copy of the examination to be provided to defense counsel and to Shelly Ioane with the production of his Rule 35 report;

4. No third party observers will be present in the examination rooms during the examinations; and

5. In conducting the examinations, Dr. Winkel will in all respects exercise his professional judgment consistent with his professional and ethical obligations as a licensed psychologist in the state of California.

IT IS SO ORDERED.

Dated: June 30, 2015

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE