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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 IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR DISCOVERY SANCTIONS**

(ECF No. 339)

Pending before the Court is a Motion by Defendants for Discovery Sanctions against *pro se* Plaintiffs Michael S. Ioane, Sr. and Shelly Ioane (collectively, "Plaintiffs") based on Ms. Ioane's failure to appear for a previously ordered psychological examination. (ECF Nos. 329, 339.) The matter was heard on August 14, 2015 before the Honorable Gary S. Austin, United States Magistrate Judge. G. Patrick Jennings personally appeared and Aaron Bailey appeared telephonically on behalf of Defendants. Shelly Ioane personally appeared and Michael S. Ioane, Sr. appeared telephonically. Plaintiffs have also filed an opposition brief objecting to portions of the Motion. (ECF No. 345.) After considering the pleadings and arguments by the parties and for the reasons set forth below, the Motion for Discovery Sanctions is **GRANTED IN PART** and **DENIED IN PART**.

1 **I. BACKGROUND**

2 Plaintiffs are a married couple involved in tax disputes with the United States. Defendants
3 are federal agents who assisted in searching Plaintiffs’ residence in 2006. Mr. Ioane was
4 convicted of tax fraud conspiracy on October 3, 2011 as a result, in part, of evidence that was
5 obtained during the search. Plaintiffs allege that they have suffered and continue to suffer
6 emotional distress as a result of the search. In particular, both Plaintiffs have described their
7 emotional distress damages as including:

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

24 (Declaration of Lauren Castaldi (“Castaldi Decl.”), Exh. 6 (Michael Ioane’s Responses to
25 Defendants’ First Set of Interrogatories 5:10-26), ECF No. 248-12.) Both Plaintiffs allege these
26 damages. (Castaldi Decl., Exh. 5 (Shelly Ioane’s Responses to Defendants’ First Set of
27 Interrogatories 5:12-28), ECF No. 248-11.)

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

 On June 30, 2015, the Court granted a motion compelling both Plaintiffs to appear for
psychological examinations per Federal Rule of Civil Procedure 35. (ECF No. 329.) In particular,
the Court’s order required Ms. Ioane to appear for an examination on Wednesday, July 15, 2015

1 at 10:00 a.m. at 2500 Tulare Street, Suite 4401, Fresno, California, 93721. The order was served
2 on both Mr. and Ms. Ioane by U.S. mail. On July 8, 2015, Mr. Ioane filed a motion for
3 reconsideration of the order compelling psychological examinations. (ECF No. 331.)

4 On July 10, 2015, Defendants received a handwritten note from Mr. Ioane informing them
5 that “Niether [sic] my wife or myself will be participating in the medical examine; [sic] until and
6 unless the issues we have raised are addressed. Shelly will not be appearing on 1/15/2015.”
7 (Declaration of G. Patrick Jennings (“Jennings Decl.”) Exh. E, ECF No. 340-3.)

8 The motion for reconsideration was denied by United States District Judge Anthony W.
9 Ishii on Monday, July 13, 2015. (ECF No. 335.) On the same day, Defendants sent Ms. Ioane, via
10 FedEx, a copy of the order denying the motion for reconsideration and a cover letter informing
11 her that they expected her to show up for the examination on Wednesday, July 15, 2015 and that
12 they would move for sanctions if she did not appear. (Jennings Decl. Exh. F, ECF No. 340-4.)

13 At 7:19 p.m. (EDT) on Tuesday, July 14, 2015, Ms. Ioane emailed Defendants and stated
14 that “Michael Just [sic] informed me that I needed to inform you that I would not be available for
15 medical examinations, based on the Objection that was filed last week.” (Jennings Decl. Exh. G,
16 ECF No. 340-5.) Early the next morning, at 10:25 a.m. (EDT), Defendants responded with an
17 email stating:

18 Ms. Ioane,

19 Your objections to the exam were incorporated in the order. Your appeal was
20 deemed by the Court a motion for reconsideration and denied. You are under
21 Court order to appear today. We will seek serious sanctions, including dismissal, if
22 you do not appear in Fresno at 10 a.m. today. Our expert is traveling there and is
23 prepared to take your exam today. A motion to stay does not stay proceedings until
24 an order is issued, if any. Please confirm that you will appear, or be prepared to
25 face the consequences.

26 (Jennings Decl. Exh. G, ECF No. 340-5.)

27 Ms. Ioane did not appear for the psychological examination on July 15, 2015. Ricardo
28 Winkel, Ph.D., Defendants’ expert witness, traveled to the site of the scheduled examination on
July 15, 2015, waited approximately one hour for Ms. Ioane, and then traveled back to his office
in the Bay Area. (Declaration of Ricardo Winkel, Ph.D. (“Winkel Decl.”) ¶¶ 2, 3, ECF No. 339-

1 2.) Mr. Ioane sat for his psychological examination on July 24 and July 25, 2015. On July 30,
2 2015, Defendants filed the current Motion, which asks the Court to issue terminating sanctions as
3 a result of Ms. Ioane's failure to comply with a court order and appear for her psychological
4 examination. (ECF No. 339.)

5 In the alternative, Defendants request:

- 6 • Monetary sanctions of \$2,070, the amount in fees incurred by Dr. Winkel for his
7 travel to and from Fresno from Oakland, along with travel expenses. At the
8 hearing, Plaintiffs also requested attorneys' fees incurred as a result of G. Patrick
9 Jennings's personal appearance at the hearing;
- 10 • A second order compelling Ms. Ioane to appear for a Rule 35 psychological
11 examination;
- 12 • An order striking the Plaintiffs' three expert witnesses;
- 13 • An order precluding Plaintiffs' from introducing any evidence in support of Ms.
14 Ioane's alleged medical damages; or
- 15 • Dismissal of Ms. Ioane's claims.

16 Defendants point to the Ioanes' extensive history in pursuing claims against various
17 parties in U.S. District Courts which they construe as a "pattern of harassment and delay" that
18 continues in the present case.¹ (Memorandum of Points and Authorities in Support of Application
19 for Order to Show Cause 4:12, ECF No. 339-1.)

20 Plaintiffs concede that Ms. Ioane should be required to "appear for a mental examination
21 with appropriate language advising of the potential imposition of severe sanctions, including
22 dismissal for a non-appearance," but object to the imposition of dispositive sanctions in this
23 instance. (Opposition 9:14-19, ECF No. 345.)

24 **II. DISCUSSION**

25 **A. Legal Standard**

26 Pursuant to the Federal Rules of Civil Procedure, if a party "fails to obey an order to
27 provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the

28 ¹ Plaintiffs were deemed "vexatious litigants" by the U.S. District Court for the Northern District of California after filing over twenty separate actions in a four year period. *Ioane v. Smith, et al.*, No. 99-21119 SW (N.D. Cal. Aug. 25, 2000). A copy of the decisions imposing the sanction of pre-filing review on Plaintiffs was filed by Defendants in a supplemental declaration. (Supplement Declaration of G. Patrick Jennings Exhs. A, B, ECF No. 342.)

1 action is pending may issue further just orders.” Fed. R. Civ. P. 37(b). “Just orders” may include,
2 among other things, the following:

- 3 (i) directing that the matters embraced in the order or other designated facts
4 be taken as established for the purposes of the action, as the prevailing
5 party claims;
- 6 (ii) prohibiting the disobedient party from supporting or opposing designated
7 claims or defenses, or from introducing designated matters in evidence;
- 8 (iii) striking pleadings in whole or in part;
- 9 (iv) staying further proceedings until the order is obeyed; or,
- 10 (v) dismissing the action or proceedings in whole or in part.

11 Fed. R. Civ. P. 37(b)(2).

12 “Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to
13 impose a wide range of sanctions when a party fails to comply with the rules of discovery or with
14 court orders enforcing those rules.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th
15 Cir.1983), *citing Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). In
16 addition, Rule 37 provides for an award of monetary sanctions: if a party fails to obey a discovery
17 order, the party may be required to “pay the reasonable expenses . . . caused by the failure, unless
18 the failure was substantially justified or other circumstances make an award of expenses unjust.”
19 Fed.R.Civ.P. 37(b)(2)(C) (emphasis added). Notably, “sanctions may be imposed even for
20 negligent failure to provide discovery.” *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1343
21 (9th Cir.1985), *citing Lew v. Kona Hosp.*, 754 F.2d 1420, 1427 (9th Cir.1985); *Marquis v.*
Chrysler Corp., 577 F.2d 624, 642 (9th Cir.1978).

22 A court is permitted to impose the sanction of dismissal or default under Rule 37 only in
23 “extreme circumstances” where the violation is “due to willfulness, bad faith, or fault of the
24 party.” *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir.1996). In determining whether to dismiss
25 an action or enter default pursuant to Rule 37(b)(2)(C), a district court should consider five
26 factors:

- 27 (1) the public's interest in expeditious resolution of litigation; (2) the court's need
28 to manage its docket; (3) the risk of prejudice to the [opposing party]; (4) the
public policy favoring disposition of cases on their merits; and (5) the availability

1 of less drastic sanctions.’ *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir.
2 1997), quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir.1987).
3 Where a court order is violated, the first and second factors will favor sanctions
4 and the fourth will cut against them. *Id.*

5 *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir.2004).

6 The Ninth Circuit Court of Appeals has stated that this multi-factor test is “not
7 mechanical,” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th
8 Cir. 2007), and the court “need not make explicit findings regarding each of these factors,” *Leon*
9 *v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Rather, the test “provides the district court
10 with a way to think about what to do, not a set of conditions precedent for sanctions or a script
11 that the district court must follow.” *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096. “What is most
12 critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is
13 whether discovery violations threaten to interfere with the rightful decision of the case.” *Id.* at
14 1097.

15 Courts may also impose sanctions, including terminating sanctions, as part of their
16 inherent power “to manage their own affairs so as to achieve the orderly and expeditious
17 disposition of cases” or based on a failure to comply with court orders. *Chambers v. NASCO,*
18 *Inc.*, 501 U.S. 32, 43 (1991); *Pagtalunan v. Galazza*, 291 F.3d 639, 642 (9th Cir. 2002). In both
19 instances, the Ninth Circuit has held that the same five-factor test utilized in the context of Rule
20 37 sanctions applies. *Leon*, 464 F.3d at 958 n. 4; *Pagtalunan*, 291 F.3d at 642.

21 **B. Dispositive Sanctions**

22 Plaintiff Shelly Ioane failed to appear for the psychological examination on July 15, 2015
23 as ordered by the Court. Plaintiffs argue that Ms. Ioane’s failure to appear was “due to confusion
24 over the status of Plaintiffs’ objection” to the order compelling psychological examinations, but
25 Plaintiffs’ objections (in the form of their motion for reconsideration) were overruled on July 13,
26 2015, two days before the scheduled examination. Defendants provided Ms. Ioane notice of the
27 denial of the motion for reconsideration and she acknowledged that she received that notice. The
28 notice also contained the date and time of the scheduled examination. Moreover, the Court served
Ms. Ioane with the original order granting the motion to compel psychological examination,

1 which also contained the date, time, and specific location of the examination. Ms. Ioane was thus
2 on notice that she was required to appear.

3 Defendants request dispositive sanctions based on Ms. Ioane’s disobedience of the Court’s
4 order compelling psychological examinations. As explained above, the Court must consider five
5 factors in deciding whether to issue terminating sanctions.

6 The first and second factors (the public’s interest in expeditious resolution of the litigation
7 and the court’s need to manage its docket) both favor the issuance of dispositive sanctions, while
8 the fourth (the public policy favoring disposition of cases on their merits) disfavors it. *Li v. A*
9 *Perfect Day Franchise*, 281 F.R.D. 373, 392 (N.D. Cal. 2012) (“Where a court order is violated,
10 the first and second factors weigh in favor of default, while the fourth weighs against default; the
11 third (risk of prejudice to the party seeking sanctions) and fifth factors (availability of less drastic
12 sanctions) are therefore decisive”), *citing Malone*, 833 F.2d at 130.

13 The third factor, the risk of prejudice to the party seeking sanctions, considers whether
14 “the [non-moving party’s] actions impair the [moving party’s] ability to go to trial or threaten to
15 interfere with the rightful decision of the case.” *Id.* Ms. Ioane’s failure to appear at her Rule 35
16 examination does interfere with the ability of the parties to receive a rightful decision in this case.
17 As explained in the order compelling psychological examinations, Plaintiffs have offered expert
18 witnesses who have examined Plaintiffs and will testify to their emotional distress damages at
19 trial. (ECF No. 329.) Fairness thus dictates that Defendants have an opportunity to rebut this
20 testimony with their own expert. *Nguyen v. Qualcomm Inc.*, No. 09-1925-MMA (WVG), 2013
21 WL 3353840, at *7 (S.D. Cal. July 3, 2013) (“A defendant should have a ‘balanced opportunity to
22 assess the plaintiff’s allegations and proof concerning emotional distress damages,’ and a
23 plaintiff’s chosen expert should not be the only expert who ‘ever actually examined the
24 plaintiff”).

25 The fifth factor, however, the availability of lesser sanctions, counsels against dismissal at
26 this point in the case. As Defendants acknowledge, there are other avenues and sanctions
27 available. Dismissal of a case as a sanction “is ‘the most severe penalty,’ and is authorized only in
28 ‘extreme circumstances.’” *Li*, 281 F.R.D. at 392, *quoting United States ex rel. Wiltec Guam, Inc.*

1 *v. Kahaluu Constr. Co.*, 857 F.2d 600, 603 n. 5 (9th Cir. 1988). Dismissal of the entire case is
2 also not warranted here because it was only Ms. Ioane who failed to obey a court order. Mr. Ioane
3 appeared for his psychological examination, so it would make little sense to dismiss his claims
4 based solely on Ms. Ioane's failure. *Id.* ("This 'most severe penalty' is not warranted in this case
5 because Defendants are not equally culpable for the discovery violations that have occurred").

6 The Court thus finds that dispositive sanctions are not justified in this instance. Ms.
7 Ioane's evasion of the psychological examination can be remedied by a second order directing her
8 to appear for examination, which Plaintiffs concede is appropriate. Ms. Ioane is advised,
9 however, that future failures to appear for examination or obey court orders will be grounds for
10 additional sanctions, up to and including dismissal of her claims.

11 **C. Monetary Sanctions**

12 As mentioned above, Defendants have requested monetary sanctions in addition to, or as
13 an alternative to, terminating sanctions. Specifically, Defendants request expert fees incurred by
14 Dr. Winkel in traveling to and from Fresno, the site of the medical examination, as well as
15 attorneys' fees incurred by G. Patrick Jennings in his personal appearance for the hearing on this
16 Motion.

17 Federal Rule of Civil Procedure 37(b)(2)(C) requires that monetary sanctions be imposed
18 on the disobedient party or attorney "unless the failure was substantially justified or other
19 circumstances make an award of expenses unjust." Such sanctions can include expert fees
20 incurred after a failure to appear for a Rule 35 medical examination. *Rachel-Smith v. FTData,*
21 *Inc.*, 247 F.Supp.2d 734, 739-40 (D. Md. 2003). Plaintiffs bear the burden of establishing that
22 their failure to comply with the order was substantially justified. *Yeti by Molly, Ltd. v. Deckers*
23 *Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). The fact that Ms. Ioane may appear for a
24 new examination does not preclude the further imposition of monetary sanctions. *N. Am. Watch*
25 *Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) ("Belated compliance with
26 discovery orders does not preclude the imposition of sanctions").

27 In this case, Ms. Ioane was not substantially justified in failing to attend the medical
28 examination as ordered. While a "good faith dispute concerning a discovery question might, in

1 the proper case, constitute ‘substantial justification,’” there was no good faith dispute here. *Hyde*
2 & *Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994). Ms. Ioane’s attendance at the examination
3 was specifically ordered on June 30, 2015. Even assuming Mr. Ioane’s motion for reconsideration
4 created a good faith dispute as to the order compelling psychological examinations, the dispute
5 was resolved when the motion for reconsideration was denied on July 13, 2015.² (ECF No. 335.)
6 She was thus not substantially justified in failing to appear for the examination on July 15, 2015.
7 *Reddy v. Precyse Solutions LLC*, No. 1:12-cv-02061-AWI-SAB, 2015 WL 3407447, at *4 (E.D.
8 Cal. May 26, 2015) (“Plaintiff’s disagreement with this Court’s order does not substantially
9 justify her failure to appear”).

10 To the extent her failure to appear was the result of mere “confusion” on the part of
11 Plaintiffs, as suggested in the Opposition Brief, monetary sanctions are still justified. *Lew v. Kona*
12 *Hosp.*, 754 F.2d 1420, 1426 (9th Cir. 1985) (“in view of the possibility of light sanctions, even a
13 negligent failure” can justify monetary sanctions); *Bergeron v. Leo Inns, Inc.*, 87 F.R.D. 486,
14 486-87 (M.D. Pa. 1980) (imposing sanctions on defendant for failure to appear despite
15 recognition that defendant received inadequate notice of deposition); *see also Bosworth v. Record*
16 *Data of Maryland, Inc.*, 102 F.R.D. 518, 521 (D. Md. 1984) (imposing sanctions despite assertion
17 that party was indigent because “[a] flat per se policy against the imposition of sanctions under
18 Federal Civil Rule 37 upon any party who is financially indigent does not accord with the
19 purposes of the rule and would open the door to many possible abuses”). The Court thus finds
20 that it is appropriate to award sanctions for Dr. Winkel’s expert fees incurred in traveling to and
21 from Fresno and waiting for Ms. Ioane’s appearance in the amount of \$2,070.

22 **III. CONCLUSION**

23 Based on the above, the Court GRANTS IN PART and DENIES IN PART Defendants'
24 Motion for Discovery Sanctions (ECF No. 339). Accordingly:

- 25 1. Defendants’ request for dismissal sanctions is DENIED;

26
27 ² Notably, the motion for reconsideration purports to be brought on behalf of both Plaintiffs, but is only signed by
28 Mr. Ioane. (ECF No. 331.) At the hearing on the instant Motion, Ms. Ioane informed the Court that she had given Mr.
Ioane permission to execute filings on her behalf and represent her interests in this case. Such an arrangement is
prohibited by Local Rule 183(a).

- 1 2. Defendants' request for evidentiary sanctions is DENIED;
- 2 3. Defendants' request for monetary sanctions against Plaintiff Shelly Ioane to
- 3 account for Dr. Winkel's expert fees in the amount of \$2,070 is GRANTED;
- 4 4. Defendants' request for monetary sanctions against Plaintiff Shelly Ioane to
- 5 account for G. Patrick Jennings's attorney fees incurred to personally appear for
- 6 the motion hearing is DENIED;
- 7 5. The parties are encouraged to meet and confer to discuss a payment plan, if
- 8 necessary, for the payment of the monetary sanctions;
- 9 6. Plaintiff Shelly Ioane is ORDERED to appear for a psychological exam before Dr.
- 10 Winkel;
- 11 a. The examination shall take place at Dr. Winkel's office at 5665 College
- 12 Avenue, Suite 330D, Oakland, California 94618;
- 13 b. The examination shall occur on September 14, 2015 at 10:00 a.m., or at
- 14 such earlier date as agreed upon between Plaintiff Shelly Ioane,
- 15 Defendants, and Dr. Winkel;
- 16 c. The examination will occur in one eight hour session, with breaks at Dr.
- 17 Winkel's discretion;
- 18 d. Dr. Winkel may record the examination, with a digital copy of the
- 19 recording to be provided to defense counsel and to Shelly Ioane with the
- 20 production of his Rule 35 report;
- 21 e. Defendants shall serve Dr. Winkel's Rule 35 report within ten calendar
- 22 days following the completion of the psychological examination;
- 23 7. No third party observers will be present in the examination room during the
- 24 examination; and
- 25 8. In conducting the examinations, Dr. Winkel will in all respects exercise his
- 26 professional judgment consistent with his professional and ethical obligations as a
- 27 licensed psychologist in the state of California.

28 Plaintiffs are advised that future failures to adhere to court orders may subject them to

1 further sanctions, up to and including dismissal of claims.

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3 IT IS SO ORDERED.

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Dated: August 18, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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