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

SHELLY J. IOANE, et al.,  
  
                    Plaintiffs,  
  
v.  
  
JEAN NOLL, et al.,  
  
                    Defendants.

Case No. 1:07-cv-00620-AWI-EPG  
  
**ORDER GRANTING MOTION FOR  
FOLLOW-UP PSYCHOLOGICAL  
EXAMINATION OF PLAINTIFF  
SHELLY IOANE PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 35**  
  
(ECF No. 565)

Before the Court is Defendant Jean Noll’s motion pursuant to Federal Rule of Civil Procedure 35, for an order compelling a follow-up psychological examination of Plaintiff Shelly Iaone by Defendant’s expert witness Ricardo Winkel, Ph.D. (ECF No. 565). The Court held a hearing on the motion on September 25, 2020. For the reasons set forth below as well as on the record at that hearing, the Court finds good cause for the follow-up psychological examination by Dr. Winkel and will accordingly grant the motion for a second examination (ECF No. 565). The Court will also deny Defendant’s motion to strike the declaration of Dr. Castillo. (ECF No. 573 at 6.)

As discussed during the hearing, Plaintiff and Plaintiff’s expert are claiming that the results from the previous examination by Dr. Winkel, which took place five years ago in September 2015, are invalid because of Plaintiff’s mental state during that examination, which

1 is purportedly different than Plaintiff’s current mental state. For example, Plaintiff’s counsel  
2 states in a declaration:

3           Among other things, the Borys Report criticizes the methodology of  
4 Defendant’s retained expert, Dr. Ricardo Winkel, used during a previous Rule 35  
5 mental examination of Mrs. Ioane in 2015. The Borys Report suggests that the  
6 results of the psychological testing conducted during the examination may be  
7 unreliable given that Mrs. Ioane was overmedicated at the time.

8 (ECF No. 571-3 at 2, ¶ 5.)

9           As another example, the Borys Report, which was prepared by Plaintiff’s expert, Debra  
10 Borys, Ph.D., who conducted an examination in June and July 2020, states:

11 Shelly described her mental state when she underwent the defense psychological  
12 evaluation with Dr. Winkel in 2015. . . . She said she saw him after she had  
13 started taking the anxiety medication that heavily sedated her. From Dr. Castillo’s  
14 records, this appeared to be Klonopin, which he does reduce due to over-sedation.  
15 She continued to report some difficulty awakening to him thereafter, and did so in  
16 self- report to this examiner, even on a lower doses.) Shelly said that as a result of  
17 her level of sedation at the time, she could not drive herself to the appointment  
18 with Dr. Winkel on her own. She said that her daughter “warned” Dr. Winkel  
19 about Shelly’s degree of sedation and told him about at least one of her first two  
20 big breakdowns.

21 . . . . [The combination of heavy sedation and the possibility of having MFAST or  
22 SIRS questions she seemed to be describing interposed between parts of the PAI  
23 or MCMI, if that is what happened, may have contributed to higher situational  
24 stress being experienced and certainly a disruption in focus]. . . .

25 . . . .

26 Shelly said that because her system has gotten acclimated to the medication she is  
27 on (and her records show that the original over-sedation from the Klonopin was  
28 dealt with by reducing her dose), she is able to drive safely again. . . .

29 . . . .

30 Shelly also showed poor memory for remote dates of all types. She said her  
31 medications have impaired her memory for dates. [Comment: This does occur  
32 with psychotropic medications for some patients; additionally, patients with  
33 trauma symptoms tend to have wavering memory for dates and chronology (order  
34 of events) that are a part of the trauma history. This is associated with the  
35 prototypical alternation between intrusion and avoidance of trauma memories].

36 . . . .

37 This strongly suggested she maintained her alertness and focus, and worked at a  
38 deliberate pace, neither obsessive nor rushed. She did not appear drained when  
39 finished and reported that her mental state and energy level completing the tests  
40 during this evaluation was vastly different than that while completing testing and  
41 indeed the entire evaluation with Dr. Winkel, which she attributed primarily to the  
42 difference in how much less sedated she felt from her medication now. (In

1 addition to taking less anxiolytic medication, she had not been taking the mood  
2 stabilizers Gabapentin and Lamotrigine yet at the time she saw Dr. Winkel).

3 (ECF No. 568-1 at 6-9.)

4 Thus, Plaintiff and her expert are taking the position that the results of the first Rule 35  
5 examination conducted by Dr. Winkel are invalid and unreliable and should not be believed due  
6 to Plaintiff's unstable, overmedicated, and sedated mental state at the time of the Dr. Winkel  
7 examination, and that the results of the examination by Dr. Borys are valid and reliable and  
8 should be believed because Plaintiff was in a different and more stable and alert mental state at  
9 the time of the Dr. Borys examination.

10 The Court finds that the significant time lag since the first examination by Dr. Winkel,  
11 in combination with the purported change in Plaintiff's mental status since that examination,  
12 provide good cause for a second examination by Dr. Winkel. *See, e.g., Sadler v. Acker*, 263  
13 F.R.D. 333, 336-37 (M.D. Louisiana 2009) (allowing second examination based on substantial  
14 time lag between initial examination and time of trial and where there was a change in  
15 plaintiff's circumstances); *Edson v. Liberty Mutual Ins. Co.*, 2002 WL 31946902, at \*1-\*2  
16 (N.D. Cal. 2002) (allowing second examination where two years had elapsed since plaintiff's  
17 last examination and where plaintiff's condition may have changed since then).

18 For the above reasons, and for the reasons stated on the record during the September  
19 25, 2020, hearing, IT IS ORDERED that:

20 1. Defendant's motion (ECF No. 565) is GRANTED:

21 2. Plaintiff, Shelly Ioane, shall sit for a second Rule 35 psychological examination by  
22 Dr. Ricardo Winkel, and will cooperate with Dr. Winkel during that examination.

23 3. The follow-up examination shall commence on either September 29 or September 30,  
24 2020 (with Plaintiff to select one of the two dates no later than the close of business on  
25 September 25, 2020). If additional time is required to complete the examination, Plaintiff and  
26 Dr. Winkel shall complete the examination on October 2, 2020.

27 4. The examination shall be conducted remotely, via a teleconference platform (such as  
28 Zoom, Doxy, or FaceTime), such platform to be agreed on by Dr. Winkel and Plaintiff.

1           5. Plaintiff is ordered to sit for the examination in an appropriate place, by herself, and  
2 shall not seek or obtain input or assistance from any person regarding the examination. Plaintiff  
3 shall not share, or consult with others about, any test items or responses while she is taking  
4 tests administered by Dr. Winkel.

5           6. Plaintiff and Dr. Winkel shall arrange for a workable setup for the remote  
6 examination, with Plaintiff utilizing a computer with an internet connection, keyboard and  
7 camera for purposes of a remote video interview with Dr. Winkel and to take the tests on-  
8 screen, and with Plaintiff setting up a second device with a camera and internet connection  
9 (e.g., computer, tablet or smart phone) in the same room or area, pointing in Plaintiff's  
10 direction while she is taking the tests administered by Dr. Winkel, so that Dr. Winkel may  
11 oversee the process.

12           7. The examination will commence at 10:30 a.m. on the date scheduled for the  
13 examination, and it will proceed, with breaks as needed, over two days, with the first day  
14 running no more than four hours of productive examination time (not including breaks or  
15 interruptions), and the second day running no more than three hours of productive examination  
16 time (not including breaks or interruptions), as needed. Alternatively, should Plaintiff and Dr.  
17 Winkel agree, the examination may proceed over a seven-hour period of examination time  
18 during one day.

19           8. The examination may be recorded using a court reporter or a professional  
20 videographer, with such recording being limited to only an audio recording if possible, but  
21 otherwise an audio and video recording. The audio/video recording shall be kept confidential  
22 and in the custody of the court reporter or videographer and is to be disclosed only upon further  
23 order of the Court.

24           9. No persons other than Dr. Winkel, Mrs. Ioane, and the court reporter or videographer  
25 will be present for the examination.

26           10. On the days of the examination, Plaintiff shall bring with her a complete list of  
27 medications that she is currently taking, including what she has taken that day.

28           11. In conducting the examination, Dr. Winkel shall not solicit from Plaintiff her

1 recollection of the June 8, 2006, incident, but Plaintiff is free to raise and discuss the incident  
2 on her own volition.

3 12. No later than close of business on September 28, 2020, Dr. Borys shall make her best  
4 efforts to transmit via email to Mr. Weaver, either directly or through Plaintiff's counsel,  
5 everything Dr. Borys relied upon in her examination of Plaintiff, including Plaintiff's medical  
6 records in Dr. Borys's possession. If Dr. Borys cannot provide everything that she relied upon  
7 by the close of business on September 28, 2020, Plaintiff shall file a statement no later than the  
8 close of business on 9/28/2020 setting forth what Dr. Borys was unable to transmit and why.

9 13. In conducting the examination, Dr. Winkel will in all respects exercise his  
10 professional judgment consistent with his professional and ethical obligations as a licensed  
11 psychologist in the state of California.

12 14. Defendant's motion to strike the declaration of Dr. Castillo (ECF No. 573 at 6) is  
13 denied.

14  
15 IT IS SO ORDERED.

16 Dated: September 25, 2020

17 /s/ Eric P. Gray  
18 UNITED STATES MAGISTRATE JUDGE  
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