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11 COUNTY OF FRESNO and TRACY SINK

12 **UNITED STATES DISTRICT COURT**

13 **EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION**

14 RICHARD P. BERMAN,

15 Case No. 1:13-cv-00597-LJO-SAB

16 Plaintiff,

17 v.

18 **STIPULATION FOR RULE 35**
19 **PHYSICAL EXAMINATION; ORDER**

20 DEPUTY T. SINK; SGT. GEORGE
21 BERTSCH; LT. JOHN REYNOLDS;
22 SHERIFF MARGARET MIMS; THE
23 COUNTY OF FRESNO, THE JUDICIAL
24 COUNCIL OF CALIFORNIA; DOES 1-
25 10,

26 Defendants.

27 Defendants COUNTY OF FRESNO and TRACY SINK (hereinafter
28 “Defendants”), and plaintiff RICHARD BERMAN (hereinafter “Plaintiff”) hereby submit
the following Stipulation for an order requiring Plaintiff to submit to a physical
examination, pursuant to Rule 35 of the Federal Rules of Civil Procedure (hereinafter
“Rule 35”).

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RECITALS

WHEREAS, on March 26, 2013, Plaintiff filed his complaint in the Fresno County Superior Court, alleging physical injuries resulting from an incident on March 13, 2012, when he was arrested in the lobby of the Fresno County Superior Court. Plaintiff alleges that when he was arrested by defendant Deputy Tracy Sink, he told her that "he was recovering from a recent, serious spinal surgery," and that as a result of the incident, he "injured his back, neck, arm and stomach/groin area." *Complaint*, para. 15.

WHEREAS, on April 23, 2013, Defendants removed Plaintiff's action to this Court. *Doc. Nos. 1-5.* Under the operative scheduling order, the non-expert discovery cut-off date is April 3, 2015. *Doc. No. 34.*

WHEREAS, counsel for the parties have conferred with respect to Defendants' desire to have Plaintiff submit to a physical examination pursuant to Rule 35. Plaintiff has no objection to submitting to such an examination, so long as he is allowed to record the proceedings by either video and/or audio sound recording.

WHEREAS, under Rule 35, the court may order a party whose physical condition is in controversy to submit to a physical examination "by a suitably licensed or certified examiner." *Fed. R. Civ. P.* 35, subd. (a)(1). For the proposed physical examination, Defendants will retain Donald R. Heune, M.D., 201 N. Valeria Street, Fresno, CA 93701. Dr. Heune is a licensed physician who specializes in orthopedic surgery. Dr. Heune will examine Plaintiff concerning the nature and extent of his alleged injuries, including the effect that the subject arrest may have had on Plaintiff's recovery from his spinal surgery, and will question Plaintiff only with respect to the issues set forth in this paragraph. An appointment has tentatively been scheduled for February 2, 2015, at 2:00 p.m.; however, the parties may change the date of the appointment if necessary.

WHEREAS, under subdivision (a)(2)(A) of Rule 35, it states that an order "may be made only on motion for good cause and on notice to all parties and the person to be examined." Based on this subdivision, on December 30, 2014, Defendants filed a Rule

1 35 motion. Doc. Nos. 35-37. As Plaintiff previously agreed to submit to a Rule 35
2 examination, he did not oppose this motion. However, on January 22, 2015, the Court
3 denied the motion without prejudice because there was no showing that the parties
4 attempted to meet and confer about the matter, as required by the Local Rules. Doc.
5 No. 39.

6 **STIPULATION**

7 Now, therefore, IT IS HEREBY STIPULATED AND AGREED, by and between
8 the parties, through their respective attorneys of record that good cause exists to have
9 Plaintiff submit for a Rule 35 examination, and that Plaintiff will submit to such an
10 examination at a day and time mutually agreeable between the parties, and on the
11 conditions set out in the recitals.

12 **IT IS SO STIPULATED.**

13 Dated: January 27, 2015

14 DANIEL C. CEDERBORG
County Counsel

16 By: /s/ Michael Linden
17 Michael R. Linden, Deputy
Attorneys for Defendants

18 Dated: January 27, 2015

19 LAW OFFICE OF JACOB WEISBERG

21 By: /s/ Jacob Weisberg
22 Jacob Weisberg
Attorney for Plaintiff

23 IT IS SO ORDERED.

25 Dated: January 27, 2015


26
27
28 UNITED STATES MAGISTRATE JUDGE