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

DOMINIC HANNA,  
Plaintiff,

Case No. 1:14-cv-00142-LJO-SKO

v.

**ORDER GRANTING DEFENDANTS'  
MOTION FOR RULE 35 EXAMINATION  
OF PLAINTIFF**

FRESNO COUNTY, et al.,  
Defendants.

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**(Doc. 85)**

**I. INTRODUCTION**

Plaintiff Dominic Hanna ("Plaintiff") filed a Third Amended Complaint ("TAC") on July 27, 2014, that is currently the operative pleading. (Doc. 39.) Plaintiff's TAC states claims against the County of Fresno, Margaret Mims, Edward Moreno, Pratap Narayan, Karen Nunez, Rick Hill, Marilynn Weldon, Tricia Nekola, Thayin Vu, and DOES 1 through 50 (collectively "Defendants") for deprivation of Plaintiff's constitutional rights and their indifference to his medical care resulting in three suicide attempts while housed at Fresno County Jail. As a result of his final suicide attempt, Plaintiff alleges he suffered anoxic brain damage causing him permanent and severe physical and mental disabilities requiring total care for all his daily needs for the rest of his life. (Doc. 39.)

1 On October 13, 2015, Defendants filed a motion for a Rule 35 mental examination of  
2 Plaintiff. (Doc. 85.) On November 12, 2015, the parties filed a joint report pursuant to Local Rule  
3 251, setting forth their respective positions as to Defendants' request for a Rule 35 examination of  
4 Plaintiff. For the reasons set forth below, Defendants' motion for a Rule 35 examination is  
5 GRANTED.

## 6 II. BACKGROUND

7 Plaintiff was booked into Fresno County Jail around 9:30 p.m. on February 6, 2012. It was  
8 noted Plaintiff suffered from "a bipolar disorder, for which he required medications, treatments  
9 and periods of hospitalization for suicidal ideation, severe depression, and psychosis." Plaintiff  
10 "had previously been incarcerated both in Kings County, 2011, and Fresno County, 2009," and  
11 "his custodial and medical records were replete with information regarding his severe and  
12 debilitating mental health problems, and suicide attempts." (TAC, ¶ 25.) "A release of  
13 information was signed and faxed to the pharmacy at Target in Hanford . . . regarding the  
14 medications, Lamictal, [P]laintiff . . . had been prescribed, and had brought with him to the Jail."  
15 (TAC, ¶ 26.) However, Plaintiff was "never provided Lamictal or any similar medication" while  
16 housed in the Jail. (TAC, ¶ 26.)

17 On February 7, 2012, Plaintiff "repeatedly pounded the back of his head against the bars of  
18 his cell," which caused "a hematoma the size of a tennis ball on the back of his head." (TAC, ¶  
19 32.) After Plaintiff was observed by Jail staff, it was determined that he had suffered from self-  
20 inflicted trauma, he was provided 800 mg of ibuprofen, and he was evaluated by Jail psychiatric  
21 services and placed in a suicide cell. (TAC, ¶ 32.)

22 Later that day, Defendant Thayin Vu noted that he "responded to a call from [a  
23 correctional officer] on AJ3 stating that [an inmate] fell off his bunk." (TAC, ¶ 33.) The  
24 correctional officer told Vu that Plaintiff "does not want to go to trial [because] he wants to end  
25 it." (TAC, ¶ 33.) The correctional officer also indicated that custody staff saw Plaintiff taking  
26 something out of his mouth that looked like a sock. Vu "assessed [P]laintiff's mental health status  
27 while he was in a holding cell on the second floor of the Main Jail." (TAC, ¶ 33.) Plaintiff denied  
28 wanting to hurt himself or wanting to commit suicide. (TAC, ¶ 33.) Vu noted Plaintiff "appeared

1 evasive in answering questions and presented as if nothing had happened." (TAC, 33.) Despite  
2 this denial, Vu determined Plaintiff was a danger to himself and he was placed into a suicide cell  
3 for his own safety.

4 At approximately 3:30 a.m. on February 8, 2012, Defendant Nekola "determined that  
5 [P]laintiff . . . no longer met suicide cell criteria and recommended that he be removed." (TAC,  
6 ¶ 34.) It was agreed that Jail psychiatric services would follow up if scheduled and as needed for a  
7 crisis, and Plaintiff was returned to a regular cell.

8 Plaintiff was arraigned at 1:30 p.m. on February 8, 2012, and Vu assessed Plaintiff at 8:41  
9 p.m. the same day. Plaintiff told Vu that he was "alright" and that he had no suicidal ideation.  
10 (TAC, ¶ 34.) Plaintiff also stated that he had taken Lamictal previously when he was incarcerated  
11 in the Kings County Jail from February 2011 to January 19, 2012. Plaintiff alleges that Vu knew  
12 Plaintiff was still without his prescription or other medication. Vu determined Plaintiff was not a  
13 danger to himself, and a release for Plaintiff's Kings County Jail records was obtained. Plaintiff  
14 alleges he was allowed to remain in his regular cell with access to socks, a top bunk, but with no  
15 prescribed psychiatric medication and no mental health follow up.

16 At approximately 2:30 p.m. on February 9, 2012, Plaintiff attempted to commit suicide by  
17 stuffing two socks down his throat and ramming his head into the cell wall. (TAC, ¶ 37.) Medical  
18 personnel did not arrive for two to three minutes, during which time Plaintiff was unresponsive.  
19 Plaintiff was transported to Community Regional Medical Center emergency department, where  
20 he was treated. As a result, Plaintiff alleges that he suffered severe physical and mental injuries.  
21 (TAC, ¶ 38.) Plaintiff alleges that Defendants' deliberate policy of permitting unqualified and  
22 untrained personnel to make assessments and decisions regarding the custody and treatment of  
23 detainees with serious mental illness demonstrates Defendants knowingly denied, delayed, and  
24 interfered with the adequate medical needs of inmates, including Plaintiff. (TAC, ¶ 41.) Plaintiff  
25 states claims against Defendants under 42 U.S.C. §1983 for (1) denial of his rights under the  
26 Eighth and Fourteenth Amendments based on Defendants' deliberate indifference to his mental  
27 health needs; (2) Defendants' failure to train, supervise, and discipline employees; and (3) *Monell*  
28 liability. After a second motion to dismiss, Plaintiff's claim for Defendants' failure to train,

1 supervise, and discipline employees was dismissed; and Plaintiff's third claim under *Monell* was  
2 dismissed in part.

3 After Defendants filed an answer to Plaintiff's TAC, a scheduling conference was held and  
4 a litigation schedule under Federal Rule of Civil Procedure 16 was issued. (Doc. 54.) The  
5 litigation was stayed in February 2015 while competency proceedings regarding Plaintiff were  
6 held in Fresno County Superior Court in a separate criminal case. (Doc. 56.) In May 2015, the  
7 stay of litigation was lifted after the Fresno Superior Court determined Plaintiff was competent to  
8 stand trial in his criminal case. (Doc. 58.) The parties filed a stipulated request to set new case  
9 deadlines, but no modification to the deadline to amend the pleadings was requested, which was  
10 set for October 1, 2015. (Doc. 54.)

11 On October 13, 2015, Defendants filed this motion for an Independent Medical  
12 Examination ("IME") of Plaintiff to determine his current mental status under Federal Rule of  
13 Civil Procedure 35, which is currently pending before the Court. (Doc. 85.)

### 14 III. DISCUSSION

#### 15 A. Legal Standard

16 Rule 35 provides that a court may, for good cause shown, order a physical or mental exam  
17 by a "suitably licensed or certified examiner" of a party whose physical or mental condition is "in  
18 controversy." Fed. R. Civ. P. 35. The party seeking the mental examination must establish both  
19 that the proposed examinee's mental health is "in controversy" and that there is "good cause" for  
20 the examination. "Mental and physical examinations are only to be ordered upon a discriminating  
21 application by the district judge of the limitations prescribed by the Rule. To hold otherwise  
22 would mean that such examinations could be ordered routinely . . . The plain language of Rule 35  
23 precludes such an untoward result." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). The decision  
24 whether to order a Rule 35 examination rests in the sound discretion of the trial court. *Id.* Even  
25 when the "good cause" and "in controversy" requirements are met, the decision to order a Rule 35  
26 examination still remains a discretionary one. *Hardy v. Riser*, 309 F. Supp. 1234, 1241 (N.D.  
27 Miss. 1970); *Shirsat v. Mutual Pharm Co.*, 169 F.R.D. 68, 70 (E.D. Pa. 1996). A court must  
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1 balance the unnecessary invasion of privacy against the compelling party's right to a fair trial.  
2 *Curtis v. Express, Inc.*, 868 F. Supp. 467, 468 (N.D.N.Y. 1994).

3 "Good cause" under Rule 35 requires more than just showing that the mental health  
4 condition is "in controversy." Good cause generally requires a showing of specific facts justifying  
5 the examination. *Nava v. City of Shafter*, No. 1:12-cv-00010-AWI-JLT, 2013 WL 5278890, at \*1-  
6 2 (E.D. Cal. Sept. 18, 2013). The good-cause inquiry generally requires a court to consider such  
7 things as whether the information can be obtained through other means and whether the result of  
8 the examination would yield information that is relevant. *Schlagenhauf*, 379 U.S. at 118-19. A  
9 party's mental condition is "in controversy" when the condition is the subject of the litigation. For  
10 example, courts have held that a separate tort claim for emotional distress places the plaintiff's  
11 mental condition in controversy. *See Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal.  
12 1995).

## 13 **B. Analysis**

### 14 **1. Plaintiff's Mental Condition is In Controversy**

15 Defendants seek an IME of Plaintiff regarding his mental condition. Plaintiff alleges that  
16 his psychiatric problems, including bipolar disorder, require medication. Because he was not  
17 provided psychotropic medication in jail, Plaintiff alleges he suffered a "recurrence of suicidality"  
18 while detained at Fresno County Jail in February 2012. Plaintiff claims that because he was not  
19 provided adequate or necessary mental health services, he attempted suicide and suffered  
20 permanent anoxic brain damage and permanent and profound injuries for which he will require 24-  
21 hour care for the rest of his life. According to Defendants, experts will opine during the course of  
22 the litigation on the nature of Plaintiff's mental condition, which will factor into whether his  
23 mental condition was responsible for his suicide attempts. Plaintiff's treating physicians and  
24 psychiatrists have rendered opinions on his mental condition when they treated him, and their  
25 opinions differ. Defendants expect Plaintiff to call a treating physician to testify as to his mental  
26 condition. As such, Defendants maintain Plaintiff's mental health is in controversy under Rule 35.

27 Plaintiff states he was deemed mentally incompetent by Napa State Hospital physician  
28 Michael Coburn, but this evaluation changed "toward the end of 2014" with Dr. Coborn's opinion

1 and Plaintiff's admission that Plaintiff "had been pretending his mental injuries and memory loss."  
2 Plaintiff was then returned to Fresno County in January 2015 and found competent to stand trial  
3 on pending criminal charges. Plaintiff maintains that it is now "incumbent upon [him] to strike  
4 allegations of memory loss and mental injuries" from the complaint, so that the parties may "focus  
5 the litigation on the remaining allegations and not on claims which cannot be substantiated by the  
6 evidence." (Doc. 92, 7:21-23.) To that end, Plaintiff has filed a proposed Fourth Amended  
7 Complaint as an exhibit to the parties' joint statement. (Doc. 92-1.) Based on the proposed  
8 amended complaint, Plaintiff contends the only facts in controversy are whether Defendants were  
9 deliberately indifferent to Plaintiff's mental health needs and whether Defendants developed  
10 policies or customs that exhibited deliberate indifference to Plaintiff's constitutional rights. Any  
11 assessment by Defendants' expert as to Plaintiff's current mental health state sheds no light on the  
12 question of liability. Rather, it is Plaintiff's mental condition at the time of his incarceration that is  
13 potentially relevant to the question of liability, not his present mental condition.

14 Defendants respond that even if Plaintiff removes mental damages from his complaint, his  
15 mental condition nonetheless remains in controversy. The nature of Plaintiff's existing mental  
16 health problems, which Plaintiff alleges were the basis for the care he contends he required but did  
17 not receive at the Fresno County Jail at the time of the incident, will factor into causation.  
18 Specifically, there is a question whether Plaintiff's mental condition was responsible in whole or in  
19 part for his suicide attempts during his detention in February 2012, and this causation issue  
20 remains whether or not Plaintiff claims additional mental injury damages as a result of his suicide  
21 attempts. Defendants also argue Plaintiff has been able to convince staff and physicians at Napa  
22 State Hospital that he had extensive mental injuries and was mentally incompetent as a result of  
23 his suicide attempt. Plaintiff's malingering of complaints and his ability to convince mental health  
24 staff of his condition at Napa State Hospital pertains to liability and Plaintiff's presentation of his  
25 condition in February 2012. During the course of events in February 2012, Plaintiff was observed  
26 banging the back of his head on his cell bars and staff saw him remove something from his mouth;  
27 he was thereafter placed in a safety cell. Eleven hours later, "he convinced Defendants he was  
28 [no] longer a danger to himself," and then he attempted suicide. Plaintiff claims Defendants were

1 deliberately indifferent to his medical needs, but if Plaintiff can convince Napa State Hospital staff  
2 and physicians – who have access to him 24 hours a day – regarding the nature of his condition,  
3 Defendants argue he could certainly convince Fresno County Jail staff he no longer intended to  
4 harm himself. This goes directly to Defendants' subjective knowledge of the threat posed by  
5 Plaintiff's mental condition.

6 Plaintiff's mental condition has been placed into controversy because it is the basis for the  
7 level and type of care Plaintiff contends Defendants failed to render to him at Fresno County Jail  
8 in February 2012. It has been determined Plaintiff subsequently feigned the nature of his  
9 symptoms to his treating physicians at Napa State Hospital, which raises questions about how he  
10 presented to Fresno County Jail personnel in February 2012, and whether they had reason to know  
11 the extent and nature of his condition and the necessary treatment. In addition to Plaintiff's  
12 admitted malingering to his treating physicians and manufacturing symptoms, his treating and  
13 examining physicians are not in agreement regarding the diagnosis and nature of Plaintiff's  
14 condition. Plaintiff's mental condition, its symptom manifestation in February 2012, and the  
15 subsequent nature of care he was entitled to receive from medical providers at Fresno County Jail  
16 for this condition are disputed facts that are relevant to Defendants' alleged deliberate indifference  
17 to his medical needs. *See Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155, 1160 (9th Cir. 2013)  
18 (deliberate indifference has both subjective and objective components). There is disagreement  
19 about the nature of Plaintiff's mental condition, and his symptom presentation in February 2012 is  
20 more questionable now given his concession of malingering. Defendants are entitled to have an  
21 independent medical examination of Plaintiff to formulate an opinion about the nature of  
22 Plaintiff's mental health condition, the degree to which his symptoms and his presentation of his  
23 condition are authentic, and the type of care he should have received in February 2012.

24 Plaintiff argues his malingering of certain symptoms to treating physicians at Napa State  
25 Hospital is entirely irrelevant to his suicide attempt in February 2012. Plaintiff also argues his  
26 statement to Fresno County Jail officials that he had no intention to harm himself when he was  
27 assessed was not an act of malingering since he had already attempted suicide "and obviously had  
28 the intent to do so again, as in fact the next day he did so." (Doc. 94.) First, Plaintiff's capacity to

1 feign symptoms casts doubt on his prior mental health records and evaluations and whether his  
2 mental health condition has been accurately characterized. Defendants' expert, therefore, cannot  
3 simply rely on prior medical records to formulate an opinion about the nature of Plaintiff's  
4 condition, the extent of his symptoms, and the medication Plaintiff was taking and how that would  
5 have impacted his condition. Second, Plaintiff's known ability to malingering certain mental health  
6 symptoms to treating physicians adds a new dimension to the causation question about whether it  
7 was actually Plaintiff's underlying mental condition that led him to attempt suicide and why he  
8 told jail personnel that he had no plans to harm himself. Because these are disputed issues in  
9 Plaintiff's inadequate medical care claim, Plaintiff's mental condition is in controversy.<sup>1</sup>

10 That Plaintiff is now disavowing *additional* mental or cognitive impairment as a result of  
11 the suicide attempts does not diminish the fact that the nature of Plaintiff's underlying mental  
12 condition and how he presented to Defendants during the events in February 2012 is in  
13 controversy. For example, police officers accused of excessive force have been ordered to sit for  
14 an IME under Rule 35 when they have offered expert reports indicating some facet of their mental  
15 or physical functioning impacted their conduct at the time of the alleged underlying events. *Jones*  
16 *v. Prince George's County*, No. 00-2902-RWR-JMF (D.D.C. Oct. 29, 2001); *Estate of Heenan v.*  
17 *City of Madison*, No. 13-cv-00606-WMC, 2015 WL 685870 (W.D. Wis. Feb. 18, 2015). When a  
18 party's mental or physical health is relevant in some manner to substantively support their position  
19 in the litigation, their mental or physical health has been placed "in controversy." By asserting  
20 that his pre-existing mental condition required particular treatment from Fresno County Jail  
21 personnel, Plaintiff has placed the nature of his condition, its symptoms, and the required  
22 treatment squarely into controversy, regardless of whether or not the alleged failure to render  
23 appropriate care caused *additional* mental health or cognitive-function problems. Moreover, there  
24 is no evidence presented by the parties – particularly based on Plaintiff's concession of  
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26 <sup>1</sup> Defendants' motion was taken off calendar and deemed submitted for decision on November 17, 2015. Without  
27 obtaining leave to do so, the parties submitted additional briefs. The content of both briefs was information that could  
28 have been placed in their joint statement filed pursuant to Local Rule 251. The Court's election to take a motion under  
submission without oral argument is not an invitation for the parties to submit additional briefing without leave to do  
so. The parties are cautioned that any future additional briefs filed without leave or good cause will be stricken and  
disregarded.



1 malingering – that Plaintiff's underlying mental health (i.e., bipolar disorder) has changed or  
2 deteriorated such that a current mental status examination would be irrelevant or unrelated to that  
3 condition in February 2012.

4 **2. There is Good Cause for An Independent Mental Examination of Plaintiff**

5 Defendants contend they cannot obtain information regarding Plaintiff's mental condition  
6 during the course of a deposition or other discovery; rather, a psychiatrist needs to examine  
7 Plaintiff to form opinions regarding the nature of his condition and its symptomatology. Plaintiff  
8 has been evaluated by many psychiatrists and psychologists since the underlying events in 2012,  
9 but Defendants argue they are not required to accept those physicians' evaluations of Plaintiff's  
10 condition and his ability to remember and communicate events. Moreover, a review of Plaintiff's  
11 prior medical records is not sufficient to inform an expert about Plaintiff's condition. Defendants'  
12 expert, Alan A. Abrams, M.D., submitted a declaration indicating that the professional staff at  
13 Napa State Hospital determined Plaintiff was malingering at least his account of brain damage.  
14 (Doc. 85-3, Abrams Decl., ¶ 6.) According to Dr. Abrams, a psychiatric assessment of Plaintiff's  
15 mental state cannot be reliably performed by reviewing records because of Plaintiff's frequent poor  
16 cooperation and indications of malingering of mental health symptoms. (Doc. 85-3, Abrams  
17 Decl., ¶ 8.)

18 Plaintiff maintains Defendants cannot justify an IME without first showing that the  
19 information could not be obtained during Plaintiff's deposition. Plaintiff cites *Nava v. City of*  
20 *Shafter*, 2013 WL 5278890, where the court ordered a Rule 35 examination of one of the plaintiffs  
21 following his deposition. The neurologist who was proposed to perform the IME stated in his  
22 declaration that he was unable to ask the necessary follow-up questions during the course of the  
23 plaintiff's deposition, and thus the deposition was insufficient to formulate his opinion. The court  
24 concluded it was not apparent that the information could be obtained by any other means, and  
25 ordered the examination. *Nava* does not stand for the proposition that there is no good cause for  
26 an IME until a deposition of the individual proves insufficient. The deposition in *Nava* had  
27 already taken place and the neurologist selected for the IME pointed out the obvious: the  
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1 deposition simply did not allow him to obtain the necessary information in assessing the plaintiff's  
2 alleged seizure disorder.

3 Plaintiff also cites *Azevedo v. City of Fresno*, No. 1:09-cv-0375-AWI-DLB, 2009 WL  
4 5216877 (E.D. Cal. Dec. 30, 2009) and *Kob v. County of Marin*, No. C. 07-2211 JL, 2009 WL  
5 3706820 (N.D. Cal. Nov. 3, 2009) for the proposition that Plaintiff's deposition or other discovery  
6 must occur before an IME is ordered. However, neither *Azevedo* nor *Kob* involved a malingering  
7 patient, multiple conflicting mental health diagnoses, or sufficient evidence prior to deposition  
8 testimony to warrant an IME.

9 In *Azevedo*, the plaintiff was claiming garden variety mental distress following alleged  
10 police excessive force, but he had testified at his deposition that his emotional distress was severe.  
11 2009 WL 5216877, at \* 1. The court agreed that, based on his deposition testimony, his emotional  
12 distress was beyond the "garden variety" alleged in the complaint, and the additional testimony  
13 squarely placed his condition into controversy for purposes of Rule 35. *Id.* at \*3. Thus, the  
14 plaintiff's deposition testimony gave rise to the need for the mental examination – it was not a  
15 required predicate to establishing good cause for the IME.

16 Similarly, in *Kob v. County of Marin*, No. C. 07-2211 JL, 2009 WL 3706820 (N.D. Cal.  
17 Nov. 3, 2009), the plaintiff alleged severe emotional distress and continuing harm. At her  
18 deposition, she expounded on the severity of her distress and medical conditions which allegedly  
19 resulted from the defendants' conduct. Again, like *Azevedo*, the deposition supplied additional  
20 information beyond the complaint that showed how the plaintiffs' conditions were placed in  
21 controversy, despite that the plaintiffs had alleged only general garden variety emotional distress  
22 in their complaints.

23 Here, the issues surrounding Plaintiff's mental condition are sufficient to place Plaintiff's  
24 condition "in controversy" even in the absence of his deposition, and Dr. Abrams has indicated  
25 how prior medical record review would be insufficient to assess Plaintiff under these  
26 circumstances. Moreover, it is not clear how a deposition of Plaintiff will narrow the scope of an  
27 IME, but it is clear that Dr. Abrams will not be positioned to evaluate Plaintiff by reviewing  
28 deposition testimony where questions and follow-up inquiries are posed by lawyers and not a

1 medical expert. As the neurologist noted regarding the plaintiff's deposition testimony in *Nava*, a  
2 deposition does not allow a physician or psychologist to formulate follow-up questions. *Nava*,  
3 2013 WL 5278890, at \*3. Defendants have made a sufficient showing that an examination is  
4 required to obtain the necessary information and have set forth why deposition testimony or other  
5 discovery devices will not provide them with the level of information, particularly as to diagnoses  
6 and assessment of malingering, that Dr. Abrams will require in formulating his opinion.

7 As there is evidence that review of Plaintiff's mental health treatment records alone would  
8 not be sufficient to render an opinion regarding Plaintiff's mental condition, Plaintiff's deposition  
9 will not provide Dr. Abrams with an opportunity to ask follow-up questions and conduct the  
10 testing requested, and because the mental examination is likely to reveal relevant information,  
11 Defendants' motion is sets forth good cause for an examination. *Schlagenhauf*, 379 U.S. at 118-  
12 19.

### 13 **3. Scope and Manner of Examination**

14 The proposed time, place, manner, and conditions of the examination also appear  
15 reasonable. Defendants propose that the mental examination be performed by Dr. Abrams, a  
16 medical doctor specializing in Psychiatric Medicine. The examination would occur on January 11,  
17 2016, and begin at 9:00 a.m., and would not last longer than 8 hours over a two-day period. The  
18 place of the examination is requested to be Plaintiff's hospital room at Golden Cross, unless he is  
19 moved prior to the date of examination, and then Defendants request that the examination occur at  
20 a facility convenient for Plaintiff. Some psychological testing such as malingering tests and the  
21 MMPI-2 will be conducted, but the examination will not be painful. Defendants request that  
22 Plaintiff's attorneys not be present at the examination, but Defendants agree to videotape the  
23 examination if Plaintiff so wishes. Plaintiff maintains there is no reason to extend the examination  
24 beyond 3 hours.

25 Plaintiff argues the proposed length of examination is too long because of Plaintiff's severe  
26 limitations which prevent him from sitting on his own, standing, walking, or completing any  
27 bodily function without assistance. However, the parties have already anticipated the need for  
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1 accommodations of Plaintiff's physical difficulties for purposes of his 7-hour deposition and it is  
2 unclear why an examination of a similar length would be too long.

3 Plaintiff also objects that the scope of the examination is too broad, and Defendants fail to  
4 provide sufficient information for determining the scope of the examination. As noted by the  
5 court in *Azevedo*, Rule 35 does not require the moving party to describe the particular testing  
6 procedures that will be used. Dr. Abrams' curriculum vitae and his educational background have  
7 been provided (Doc. 85-3), and he has indicated the types of testing he will perform in addition to  
8 his mental status evaluation (Doc. 85-3, ¶ 10).

9 Plaintiff cites *Marroni v. Matey*, 82 F.R.D. 371 (E.D. Penn. 1979) where the moving party  
10 failed to specify whether a medical doctor or a psychologist would evaluate the plaintiff's seizure  
11 disorder which the court found too unspecific for an examination order. *Marroni* is  
12 distinguishable. Here, Defendants have identified the psychiatrist they propose to conduct the  
13 examination, Dr. Abrams has provided a declaration regarding the information he needs to obtain  
14 and the types of testing he would perform during the examination, and Dr. Abrams' background  
15 and expertise is set forth in his curriculum vitae. This is a sufficient showing as to who will  
16 conduct the examination, the types of information sought, and the general manner of the  
17 examination. Defendants have provided much more information than was before the court in  
18 *Marroni*, where not even the type of medical professional – medical or mental health physician –  
19 was identified by the moving party.

20 Like his deposition, Plaintiff's mental examination by Dr. Abrams shall be limited to 7  
21 hours. The examination may be continued at any time upon recommendation of Plaintiff's  
22 physician at Golden Cross.

#### 23 **4. Counsel's Presence at Examination**

24 The examination shall be videotaped at Defendants' expense, if requested by Plaintiff's  
25 counsel. Counsel shall not be present at the examination.

26 Rule 35 is silent as to who may attend a mental examination, and Plaintiff presents no  
27 authority that a party has an absolute right to have an attorney present. *See Holland v. United*  
28 *States*, 182 F.R.D. 493, 495 (D.S.C. 1998) ("The weight of federal authority, however, favors the

1 exclusion of the plaintiff's attorney from a Rule 35 examination absent a compelling reason."). As  
2 noted by several courts, a Rule 35 examination should be divested as far as possible of any  
3 adversary character, and the presence of an attorney at the examination injects a partisan element  
4 into what should otherwise be an objective medical inquiry. *McDaniel v. Toledo, Peoria &*  
5 *Western R.R. Co.*, 97 F.R.D. 525, 526 (C.D. Ill. 1983). Further, "by attending the medical  
6 examination, the attorney may be placing himself in the position of having to choose between  
7 participating in the trial as the litigator or as a witness." *Wheat v. Biesecker*, 125 F.R.D. 479, 480  
8 (N.D. Ind. 1989). All objections to the admissibility of Plaintiff's examination statements will be  
9 preserved, however, even though the objection will not be made contemporaneously with the  
10 examination statements.

11 The parties may stipulate to a confidentiality agreement or move for a protective order  
12 regarding the information garnered at the mental examination if necessary to protect Plaintiff's  
13 privacy interests.

#### 14 IV. CONCLUSION AND ORDER

- 15 1. Defendants' Motion for a Rule 35 Mental Examination of Plaintiff is GRANTED;
- 16 2. The Rule 35 Mental Examination shall be conducted pursuant to Defendants'  
17 proposal set forth above, but will be limited to 7 hours and subject to continuation  
18 as determined by Plaintiff's physician at Golden Cross; and
- 19 3. The parties are to discuss and stipulate whether the examination shall be  
20 videotaped, but counsel shall not be present for the examination.

21  
22 IT IS SO ORDERED.

23 Dated: November 24, 2015

24 /s/ Sheila K. Oberto  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28