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

7 HERARDO DIONICIO MARTINEZ, an) Case No.: 1:18-cv-00793-LJO-BAM
8 individual,)
9 Plaintiff,) ORDER DENYING PLAINTIFF'S MOTION RE
10 v.) DISCOVERY DISPUTE
11) (Doc. 32)
12 COUNTY OF FRESNO, a Public Entity;)
13 ANITA HARPER, Deputy Public Guardian;)
14 and DOES 1-15, inclusive,)
Defendants.)

15 Currently pending before the Court is Plaintiff Herardo Dionicio Martinez's Motion to Resolve
16 Discovery Dispute. (Doc. 32.) By the motion, Plaintiff requests that the Court order Defendant
17 County of Fresno to consent to a mental evaluation of Robert Camarillo, a non-party subject to
18 conservatorship, pursuant to Federal Rule of Civil Procedure 35. (Doc. 32.) Defendants County of
19 Fresno and Anita Harper opposed the motion on November 1, 2019. (Doc. 34.) Plaintiff did not file a
20 reply. The Court found the motion appropriate for resolution without oral argument and vacated the
21 November 15, 2019 hearing. *See* Local Rule 230(g). The matter is deemed submitted.

22 **BACKGROUND**

23 On March 26, 2018, Plaintiff commenced this lawsuit in Fresno County Superior Court
24 alleging discrimination by the County of Fresno and Anita Harper, Deputy Public Guardian, due to
25 Plaintiff's sexual orientation.¹ (Doc. 1.) In the complaint, Plaintiff alleged that Defendant Harper was
26 appointed as limited conservator of Robert Camarillo on June 3, 2013. Prior to the appointment,
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28 ¹ Defendant Harper retired from the County of Fresno in June 2019.

1 Plaintiff had a social and romantic same sex relationship with Mr. Camarillo. This relationship
2 continued until approximately the summer of 2016 when Defendant Harper allegedly interfered with
3 the relationship by accusing Plaintiff of being abusive toward Mr. Camarillo when there was no
4 evidence of any such abuse. Defendant Harper's interference with the relationship reportedly began
5 after Plaintiff made grievances in 2015 against the group home where Defendant Harper placed Mr.
6 Camarillo. (See Doc. 1, Compl. at ¶¶ 8-9.)

7 Plaintiff forwarded claims for violation of the Equal Protection Clause of the Fourteenth
8 Amendment against the County and Defendant Harper in her official capacity, violation of the
9 California Constitution, and violation of California Civil Code § 52.1. (*Id.* at ¶¶ 12-20.) The case was
10 removed to this Court on June 8, 2018, based on federal question jurisdiction. (Doc. 1.)

11 On September 5, 2018, the Court issued a Scheduling Conference Order, which set the initial
12 discovery deadlines in this action. The Scheduling Order expressly informed the parties that
13 compliance with the discovery cutoffs "requires motions to compel be filed and heard sufficiently in
14 advance of the cutoff so that the Court may grant effective relief within the allotted discovery time."
15 (Doc. 13 at 3.) The Scheduling Order also explicitly stated that a party's "failure to have a discovery
16 dispute heard sufficiently in advance of the discovery cutoff may result in denial of the motion as
17 untimely." (*Id.*)

18 On June 14, 2019, Plaintiff filed a motion to modify the Scheduling Conference Order pursuant
19 to Federal Rule of Civil Procedure 16(b)(4). (Doc. 18.) According to the motion, Plaintiff sought
20 modification due primarily to events involving current and former counsel, including other conflicting
21 matters. (*Id.*) In response to the motion, the Court held a telephonic status conference and directed
22 the parties to meet and confer to determine whether a stipulation could be reached resolving Plaintiff's
23 motion to modify the Scheduling Order. (Doc. 21.)

24 On July 8, 2019, the Court issued an amended order partially granting the parties' stipulation to
25 modify the Scheduling Order. The Order extended the expert disclosure deadline to July 31, 2019, the
26 supplemental expert disclosure deadline to August 17, 2019, the non-expert discovery cutoff to August
27 23, 2019, and the expert discovery cutoff to September 26, 2019. (Doc. 24 at 3.)

1 On October 15, 2019, Plaintiff filed a motion to permit the filing of a first amended complaint,
2 to resolve an outstanding discovery dispute, and to modify the scheduling order. (Doc. 29.) The
3 Court determined that the motion did not comply with this Court's Local Rules and should not
4 consolidate multiple issues in a single motion. Accordingly, the Court directed Plaintiff to re-notice
5 the matter as two separate motions. (Doc. 30,)

6 On October 18, 2019, Plaintiff filed the instant motion to order that Defendant County of
7 Fresno consent to an in-person evaluation of Robert Camarillo by a qualified psychiatrist or
8 neuropsychologist.² (Doc. 32.) In his moving papers, Plaintiff reports that Defendants, as part of their
9 expert witness disclosure, submitted a neuropsychological evaluation of Mr. Camarillo by their
10 designated expert, Dr. Howard J. Glidden. Dr. Glidden performed a battery of tests and conducted an
11 extensive interview. Dr. Glidden assertedly concluded that Mr. Camarillo did not have the requisite
12 capacity to consent to having a sexual relationship at this time. Plaintiff indicates that Defendants'
13 expert disclosure stated that Dr. Glidden would opine at trial about Mr. Camarillo's "ability to consent
14 to a relationship with a person who is not his peer; potential adverse effect on the conservatee from a
15 romantic relationship with someone who is not his peer." (*Id.* at 3.) Plaintiff contends that these
16 statements indicate that Defendants intend to utilize Dr. Glidden as an attempt to influence the jury
17 against the relationship that Plaintiff had formed with Mr. Camarillo.

18 In response to Dr. Glidden's report, Plaintiff's counsel hired a local psychiatrist, Dr. Stuti
19 Bhandari, to evaluate Mr. Camarillo. On July 12, 2019, Plaintiff's counsel informed defense counsel
20 that Plaintiff would be engaging Dr. Bhandari to perform a mental examination. Plaintiff's counsel
21 provided a stipulation for the evaluation to be scheduled before the expert and non-expert discovery
22 cutoff dates, but Defendants rebuffed the stipulation asserting that there was no good cause for the
23 evaluation of Mr. Camarillo. (*Id.* at 10.) Following meet and confer efforts to resolve the dispute, in
24 August 2019 the parties prepared, but did not file, a Joint Statement re Discovery Dispute Concerning
25 Mental Examination of Conservatee. (*Id.*) As indicated, Plaintiff now seeks an order compelling
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27 ² Plaintiff simultaneously filed a motion to permit the filing of a first amended complaint and to
28 modify the scheduling order. (Doc. 31.) Findings and recommendations to deny the motion have
been issued. (Doc. 39.)

1 Defendant County of Fresno to consent to Mr. Camarillo's examination. Plaintiff claims that with Dr.
2 Glidden's report and proposed expert testimony, Defendants have now put Mr. Camarillo's mental
3 capacity and ability to form certain relationships at issue and Plaintiff therefore should be entitled to
4 an examination in order to respond to Dr. Glidden's report.

5 Defendants opposed the motion on November 1, 2019. (Doc. 34.) Defendants report that Dr.
6 Glidden conducted the evaluation of Plaintiff on July 13, 2018, and the report was provided to
7 Plaintiff's former counsel on September 26, 2018. About a year later, on May 31, 2019, Defendants
8 also disclosed Dr. Glidden as an expert under Federal Rule of Civil Procedure 26(a)(2) and provided
9 Plaintiff's current counsel with a copy of Dr. Glidden's report. (Doc. 34 at 4-5, 8; Doc. 34-1,
10 Declaration of Michelle Pepper ("Pepper Decl.") at ¶¶ 2-3.) After an extension of the discovery
11 deadlines, on July 19, 2019, Plaintiff's counsel requested that Defendants stipulate to a mental
12 evaluation of Mr. Camarillo on July 26, 2019 and August 12, 2019. (*Id.* at ¶ 4.) Defendants did not
13 believe there was good cause for the evaluation and indicated that Mr. Camarillo would not be
14 produced. On August 5, 2019, Defendants informed Plaintiff's counsel that they were not amenable to
15 the Court's informal procedures to resolve the dispute. (*Id.*; Doc. 34-2, Ex. B). Defendants now
16 oppose Plaintiff's current request for an examination, arguing, in part, that Plaintiff has not
17 demonstrated good cause to compel a mental examination under Rule 35.

18 DISCUSSION

19 Rule 35 provides that the court "may order a party whose mental or physical condition ... is in
20 controversy to submit to a physical or mental examination by a suitably licensed or certified
21 examiner." Fed. R. Civ. P. 35(a)(1). "The court has the same authority to order a party to produce for
22 examination a person who is in its custody or under its legal control." *Id.* "The order: (A) may be
23 made only on motion for good cause and on notice to all parties and the person to be examined; and
24 (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the
25 person or persons who will perform it." *Id.* 35(a)(2).

26 Rule 35 does not specify a deadline for conducting an independent medical examination.
27 *Buffington v. Nestle Healthcare Nutrition Inc.*, No. SACV 18-00106-JVS (JDEx), 2019 WL 3063516,
28 at *2 (C.D. Cal. Apr. 18, 2019). District courts have noted a split concerning the proper timing for a

1 Rule 35 examination. *Id.* However, courts within the Eastern District of California have previously
2 held that a Rule 35 examination is properly part of expert discovery. *Narayan v. Compass Grp. USA,*
3 *Inc.*, No. 2:17-cv-00999-MCE-CKD, 2019 WL 265109, at *3 (E.D. Cal. Jan. 18, 2019) (determining
4 that a Rule 35 medical examination may occur as part of expert discovery and noting that courts in this
5 district have held that such an examination is properly part of expert discovery); *Wormuth v.*
6 *Lammersville Union Sch. Dist.*, No. 2:15-cv-1572-KJM-EFB, 2017 WL 3537257, at *3 (E.D. Cal.
7 Aug. 17, 2017) (determining that expert's Rule 35 mental examination report was required to be
8 produced at time of expert's designation and defendants' request to proceed with examination after
9 expert disclosure deadline would require modification of scheduling order); *Minnard v. Rotech*
10 *Healthcare Inc.*, No. S-06-1460 GEB GGH, 2008 WL 150502, at *2 (E.D. Cal. Jan. 15, 2008)
11 (concluding that where defendant's expert will be using the requested psychological interview to
12 support defendant's overall position, or attacking the position of plaintiff's expert, the Rule 35 exam
13 and the retained expert's opinions are inextricably intertwined); *see also Hung Nguyen v. Regents of*
14 *the Univ. of California*, No. 817CV00423JVSKESEX, 2018 WL 6112617, at *5 n. 3 (C.D. Cal. July 26,
15 2018) (noting that where an independent medical examiner will offer opinions and conclusions
16 regarding facts derived from an examination, that discovery is akin to expert discovery and it appears
17 proper for the terms of the scheduling order regarding expert witness discovery to dictate the timing of
18 the independent medical examination); *Rowland v. Paris Las Vegas*, No. 13CV2630-GPC DHB, 2015
19 WL 4662032, at *4 (S.D. Cal. Aug. 6, 2015) (finding the proposed independent medical examination
20 falls within the realm of expert discovery)

21 In this case, expert discovery closed on September 26, 2019. (Doc. 24 at 3.) Because Plaintiff
22 did not move to compel Defendant County of Fresno to permit Mr. Camarillo's examination until
23 October 15, 2019, several weeks after expiration of the expert discovery deadline, the Court finds the
24 motion untimely.

25 The record shows that, at a minimum, Plaintiff was aware of the need for a Rule 35
26 examination in September 2018, when Dr. Glidden's report was provided to Plaintiff's former counsel.
27 Plaintiff again was made aware of the need for a Rule 35 examination in May 2019, when Dr.
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1 Glidden's report was produced a second time and he was identified in Defendants' expert disclosures.³
2 Nevertheless, Plaintiff did not take appropriate action to complete the examination prior to the
3 deadlines for disclosing experts and concluding expert discovery. Plaintiff knew of Defendant County
4 of Fresno's refusal to permit the requested examination as early as July 24, 2019, (Pepper Decl. at ¶ 4
5 and Doc. 34-2, Ex. B), and the parties apparently prepared a Joint Statement of Discovery
6 Disagreement in August 2019 (Doc. 32 at 5 and Ex. A). Yet, no motion was presented to the Court
7 before expiration of the expert discovery deadline, and no expert disclosures were made by Plaintiff in
8 the year after Dr. Glidden's report was first submitted to Plaintiff's counsel. That Defendants may not
9 have agreed to participate in the Court's informal discovery procedures to resolve the dispute is not a
10 sufficient reason to explain not complying with the discovery deadlines. Defendants informed
11 Plaintiff's counsel on August 5, 2019, that they were not amenable to the Court's informal procedures
12 (Doc. No. 34-1, Pepper Decl. at ¶ 4 and Doc. 34-2, Ex. B), but the motion was not filed until October
13 15, 2019.⁴

14 In addition to the foregoing, the Scheduling Order in this case expressly stated that a party's
15 "failure to have a discovery dispute heard sufficiently in advance of the discovery cutoff may result in
16 denial of the motion as untimely." (Doc. 13 at 3.) Plaintiff does not explain why the instant motion
17 was not filed and heard sufficiently in advance of the extended expert discovery cutoff in order to
18 permit the Court to grant effective relief within the allotted discovery time.

19 The Court acknowledges that Plaintiff moved to modify the discovery deadlines in conjunction
20 with a separately filed motion to amend the complaint. (See Doc. 31.) However, Plaintiff has not
21 shown good cause for again modifying the Court's Scheduling Conference Order as required under the
22 applicable Federal Rules of Civil Procedure for purposes of the Rule 35 examination. See Fed. R. Civ.
23 P. 16(b). The good cause standard primarily considers the diligence of the party seeking the
24 modification of the schedule, and Plaintiff has shown no evidence of diligence here. See *Johnson v.*

25 ³ The Court does not address in this order whether the expert testimony is relevant to the claims in the
26 case.

27 ⁴ A party seeking to compel discovery must protect itself by filing a motion promptly. *Pac. Marine*
28 *Ctr., Inc. v. Philadelphia Indem. Ins. Co.*, No. 1:13-cv-00992-DAD-SKO, 2016 WL 110291, at *4
(E.D. Cal. Jan. 11, 2016) (observing that courts within the Ninth Circuit have frequently denied
motions to compel filed after the close of discovery).

1 *Mammoth Recreations*, 975 F.2d 604, 607–08 (9th Cir. 1992). Moreover, the discovery deadlines in
2 this action already have been extended to accommodate Plaintiff and his counsel, and the Court has
3 indicated that “further requests for continuances on the basis of counsel’s lack of preparation will be
4 looked upon with disfavor and no further extension or modifications of the deadlines in this case will
5 be granted absent a demonstrated showing of good cause.” (Doc. 24 at 3.)

6 **CONCLUSION AND ORDER**

7 Based on the foregoing factors, Plaintiff’s motion seeking to compel Defendant County of
8 Fresno to permit a Rule 35 examination of Mr. Camarillo is untimely and is HEREBY DENIED.

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10 IT IS SO ORDERED.

11 Dated: November 18, 2019

12 /s/ Barbara A. McAuliffe
13 UNITED STATES MAGISTRATE JUDGE
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