

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ADRIANNA WORMUTH, SCOTT  
WORMUTH and H.W., a minor, by and  
through his guardians ad litem  
ADRIANNA WORMUTH AND SCOTT  
WORMUTH,

Plaintiffs,

v.

LAMMERSVILLE UNION SCHOOL  
DISTRICT, JAMES YEAGER, DAWN  
IBBS, TERESA HAUN, KIRK  
NICHOLAS, and KHUSHWINDER GILL,  
and DOES 1-30,

Defendants.

No. 2:15-cv-1572-KJM-EFB

ORDER

This case was before the court on August 9, 2017, for hearing on defendants Lammersville Joint Unified School District, James Yeager, Dawn Ibbs, Kirk Nicholas, and Khushwinder Gill's motion to compel plaintiff H.W. to submit to an independent mental examination (ECF No. 95-1) and H.W.'s motion to strike defendants' statement regarding the parties' discovery disagreement (ECF No. 109).<sup>1</sup> Attorney Rhonda Kraeber appeared on behalf of plaintiff H.W. and attorney Stephanie Wu appeared on behalf of defendants.

---

<sup>1</sup> This matter was referred to the undersigned under Local Rule 302(c)(1). *See* 28 U.S.C. § 636(b)(1).

1 For the reasons stated on the record and as discussed further below, both motions are  
2 denied.

3 I. Background

4 This action proceeds on the first amended complaint. ECF No. 14. The crux of that  
5 complaint is that while attending Altamont Elementary School, plaintiff H.W. (“plaintiff”)<sup>2</sup> was  
6 bullied and physically and sexually abused by a classmate, A.S., from the beginning of the 2014-  
7 2015 school year through October 8, 2014, the date A.S. was removed from the school. ECF No.  
8 14. Plaintiff contends that defendants were aware of the abuse committed by A.S., but took  
9 insufficient measures to protect H.W. Of particular relevance to the instant motion, the amended  
10 complaint alleges that as a result of A.S.’s recurring attacks, plaintiff was diagnosed with post-  
11 traumatic stress disorder (“PTSD”) and required psychological counseling. *Id.* ¶ 30. Thus,  
12 plaintiff’s mental/psychological status has been in issue since the filing of the complaint. But the  
13 instant motion to compel a medical examination was filed after the close of discovery and after  
14 the due date for designation of expert witnesses and the service of their expert reports.

15 II. Discussion

16 Defendants seek to compel plaintiff to submit to a mental examination by their expert,  
17 Jacqueline Singer, Ph.D. ECF No. 95-1. Plaintiff does not dispute that he has placed his mental  
18 condition in controversy and therefore a timely mental examination would be appropriate  
19 pursuant to Federal Rule of Civil Procedure (“Rule”) 35. But plaintiff opposes the motion on the  
20 grounds that the time for seeking such an examination has passed and defendants’ motion to  
21 compel is untimely. ECF No. 107 at 4-9.

22 The court issued its Rule 16 Status (Pretrial Scheduling) Order on February 5, 2016. ECF  
23 No. 22. That order fully scheduled this case, including setting deadlines for the completion of  
24 discovery and designation of expert witnesses and the service of expert reports. The court

25 ////

---

26  
27 <sup>2</sup> The amended complaint also asserted claims on behalf of H.W.’s parents, Scott  
28 Wormuth and Adrianna Wormuth. Their claims were recently dismissed, leaving H.W. as the  
only remaining plaintiff. *See* ECF No. 105.

1 subsequently approved the parties' stipulation to modify the scheduling order. ECF No. 35. As  
2 modified, the scheduling order provides that discovery was to be completed by June 23, 2017.

3 Defendants filed the instant motion on July 21, after discovery had closed and on the same  
4 day they were required to serve their expert disclosures.<sup>3</sup> Rather than address whether a showing  
5 of good cause can be made to warrant modification of the scheduling order to extend these  
6 deadlines, defendants argue that the scheduling order does not apply to Rule 35 examinations and  
7 thus there is no need to establish good cause. Thus, notwithstanding the passage of these  
8 deadlines, defendants content that their motion is timely. Under defendants' reading of Rule 35,  
9 rather than establishing a deadline by which a demand for examination must be made, the rule  
10 "permits the Court to grant a request for an IME whenever a case is 'pending.'" ECF No. 108 at  
11 6 (citing *Silva v. Mercado Food Enter., Inc.*, 2012 WL 174926, at \*5).

12 Defendants misread Rule 35. It provides that "[t]he court *where* the action is *pending* may  
13 order a party . . . to submit to a physical or mental examination . . . ." Fed. R. Civ. P. 35(a)  
14 (emphasis added). The word "pending" identifies which district court may order an examination  
15 to proceed, not the timing of the examination or the request for the examination.

16 Defendants also argue that their motion is not untimely under the scheduling order  
17 because the order "does not set forth any timeline for completing an IME, nor does it set forth any  
18 deadlines or timelines for the filing of motions seeking an IME . . . or the disclosure, if any, of  
19 IME reports under Rule 35."<sup>4</sup> ECF No. 108 at 6-7. This argument is based on an untenable

---

20  
21 <sup>3</sup> Defendants filed expert witness disclosures on July 21, 2016, which identified  
22 Jacqueline Singer as their retained expert. ECF No. 98. However, defendants did not serve a  
23 written report prepared and signed by the witness as required by Rule 26(a)(2)(B). Defendants'  
24 expert witness disclosures indicate that Ms. Singer's "report will be issued following her Rule 35  
25 mental examination of Plaintiff." *Id.*

26 <sup>4</sup> The fact that the order does not list each type of available discovery device in setting the  
27 deadline is beside the point. Instead the order categorically states, "All discovery shall be  
28 completed by" July 21, 2017. ECF No. 22 at 2. That necessarily includes depositions,  
interrogatories, requests for production of documents, and requests for admissions, as well as  
Rule 35 examinations or any other device for obtaining discovery. As one court appropriately  
observed, "the Rule 35 examination is a discovery tool not unlike depositions under Rule 30 and  
31, Rule 33 interrogatories, or Rule 34 requests for production. [citations]. Similar to Rule 35,  
Rules 30, 31, 33, and 34 do not provide a specific deadline by which to submit these discovery

1 reading of the court's order. The scheduling order specifically required that: "All discovery shall  
2 be completed by March 24, 2017 (subsequently extended to June 23). In this context,  
3 'completed' means that all discovery shall have been conducted so that all depositions have been  
4 taken and any disputes relative to discovery shall have been resolved by appropriate order if  
5 necessary and, where discovery has been ordered, the order has been obeyed." ECF No. 22 at 2  
6 (modified by ECF No. 35). The order also set deadlines for the disclosure of expert witnesses and  
7 the service of expert witness reports. Any expert witness the defense intends to present at trial  
8 had to be disclosed by July 11, 2017. Further, the scheduling order explicitly required that expert  
9 designations "be accompanied by a written report prepared and signed by the witness" in  
10 noncompliance with Rule 26(a)(2)(B). ECF No. 22 at 2. It further warned that "[f]ailure of a party  
11 to comply with the disclosure schedule as set forth above in all likelihood will preclude that party  
12 from calling the expert witness at the time of trial." *Id.* at 3. The order further instructed the  
13 parties that "All experts designated are to be *fully prepared at the time of designation* to render  
14 an informed opinion, and give the bases for their opinion, so that they will be able to give full and  
15 complete testimony at any deposition taken by the opposing party." *Id.* (emphasis added). In  
16 short, defendants' expert should have been fully prepared for deposition at the time of the  
17 designation and the written report should have informed plaintiffs' counsel of the opinions to be  
18 offered by the expert.<sup>5</sup> That was not done here.

---

19 requests because it is understood that all discovery tools are generally subject to the overall  
20 discovery deadline." *Diaz v. Con-Way Truckload, Inc.*, 279 F.R.D. 412, 418 (S.D. Tex. 2012).  
21 Because the IME constitutes discovery, the scheduling order required it be completed by June 23,  
22 2017.

23 <sup>5</sup> There is some division among courts as to whether Rule 35 examinations are governed  
24 by deadlines imposed for Rule 26(a)(2) disclosures. *See e.g., Waggoner v. Ohio Cent. R.R., Inc.*,  
25 242 F.R.D. 413, 414 (S.D. Ohio 2007) (Rule 35 examination not required to be completed prior to  
26 the expert witness disclosure deadline); *Minnard v. Rotech Healthcare Inc.*, 2008 WL 150502  
27 (E.D. Cal. Jan. 15 2008) (rejecting *Waggoner*, noting that "[t]he Rule 35 exam and the retained  
28 expert's opinions are inextricably intertwined" and "[u]nless a scheduling order otherwise  
permits, a general policy routinely allowing a party's medical expert to be unprepared at time of  
designation does not comport with the needs of litigation or common sense."). The relationship  
between the Rule 35 exam and the Rule 26(a)(2)'s report, as observed by *Minnard*, is exemplified  
by the instant case. As noted above, defendants seek the Rule 35 exam to acquire information  
needed by their expert to prepare her Rule 26(a)(2) report. By defendants' own admission, the

1           It is clear from defendants' motion that they seek the IME to allow their expert witness to  
2 complete her now overdue Rule 26(a)(2)(B) report. *See* ECF No. 98 (defendants' expert witness  
3 disclosures indicating that Jacqueline Singer's "report will be issued following her Rule 35  
4 mental examination of Plaintiff."). That report, however, was required to be produced at the time  
5 Ms. Singer was designated as an expert, a designation that had to be completed no later than July  
6 11, 2017. Consequently, defendants' motion to proceed with an IME that could be used at trial in  
7 the testimony of designated expert necessitates modification of the scheduling order and  
8 defendants offer nothing in the way of good cause to warrant such modification.

9           At the hearing defendants also suggested that granting the EMI at this late juncture could  
10 be justified as preparation to provide their rebuttal expert disclosure. But this is not rebuttal  
11 information. It is information that should have already been developed and presented in the  
12 expert report at the time of the expert's disclosure. Furthermore, by defendants' own admission,  
13 they cannot complete an IME by the time they must file their rebuttal expert disclosures; i.e. by  
14 August 11, 2017. Defendants represent that their expert is not available to perform the IME until  
15 August 14, 2017. *See* ECF No. 95-1 at 9. Accordingly, even under this new theory for justifying  
16 the belated motion, defendants still must demonstrate good cause for modification of the  
17 scheduling order, a prerequisite which defendants utterly ignore.

18           Although the defendants disavow the need to show good cause, the court has examined  
19 the record and cannot find any basis to support such a finding here. Rule 16 requires courts to  
20 enter scheduling orders that establish deadlines for joinder of parties, amending pleadings,  
21 completing discovery, and filing motions. Fed. R. Civ. P. 16(b)(3)(A). Once a scheduling order  
22 issues, it "controls the course of the action unless the court modifies it." Fed. R. Civ. P. 16(d).  
23 "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly  
24 disregarded by counsel without peril." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610  
25 (9th Cir. 1992). Disregard of scheduling orders undermines "the court's ability to control its  
26 docket, disrupt[s] the agreed-upon course of litigation, and reward[s] the indolent and the

---

27 Rule 35 exam is directly related to defendants' expert disclosures, which they were required to  
28 complete on July 21.

1 cavalier.” *Id.* Accordingly, a scheduling order “may be modified only for good cause and with  
2 the judge’s consent.” Fed. R. Civ. P. 16(b)(4).

3 District courts are to consider the following factors in deciding whether to amend a  
4 scheduling order to reopen discovery:

- 5 1) whether trial is imminent, 2) whether the request is opposed, 3)  
6 whether the nonmoving Party would be prejudiced, 4) whether the  
7 moving party was diligent in obtaining Discovery within the  
8 guidelines established by the court, 5) the foreseeability of the need  
for additional discovery in light of the time allowed for discovery  
by the district court, and 6) the likelihood that the discovery will  
lead to relevant evidence.

9 *City of Pomona v. SQM North America*, No. 15-56062, 2017 WL 3378770, at \*4 (9th Cir. Aug. 7,  
10 2017) (quoting *United States ex rel. Schumer v. Hughes Aircraft Co.*, 62 F.3d 1512, 1526 (9th  
11 Cir. 1997)).

12 However, the Rule 16 good cause inquiry “primarily considers the diligence of the party  
13 seeking the amendment. The district court may modify the pretrial schedule if it cannot  
14 reasonably be met despite the diligence of the party seeking the extension.” *Johnson*, 975 F.2d at  
15 609 (quotations omitted). “While a court may take into account any prejudice to the party  
16 opposing modification of the scheduling order, ‘the focus of the [Rule 16(b)] inquiry is upon the  
17 moving party’s reasons for seeking modification . . . [i]f that party was not diligent, the inquiry  
18 should end.” *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 737  
19 (9th Cir. 2013) (quoting *Johnson*, 975 F.2d at 609).

20 The record before the court evidences an unacceptable lack of diligence by defendants.  
21 The first amended complaint, which was filed prior to issuance of the scheduling order,  
22 specifically alleges that as a result of the alleged abuse, plaintiff was diagnosed with PTSD and  
23 required psychological counseling. ECF No. 14 ¶ 30. The scheduling order issued on February  
24 5, 2016, and discovery did not close until June 23, 2017. Despite having ample notice that  
25 plaintiff’s mental condition was central to this case and more than 16 months to complete the  
26 IME, defendants failed to do so. Moreover, defendants’ arguments undermine any finding of due  
27 diligence. According to defendants the parties met and conferred on June 2, 2017, regarding the  
28 very issue of completing an IME. ECF No. 108 at 3. Obviously, defendants were well aware on

1 that date that there was a need for the examination. And defendants point out that during that  
2 meet and confer plaintiffs' counsel would not agree to an IME. Despite this knowledge,  
3 defendants did not promptly move to compel the examination. Instead, defendants' counsel  
4 waited until July 13, 2017 (42 days later), to contact plaintiffs' counsel for another meet and  
5 confer regarding the IME. *Id.* According to defendants, "Plaintiffs' counsel refused Defendants'  
6 request, outright, and, again, provided no explanation for such refusal." *Id.* at 3. Again  
7 defendants delayed. Instead of immediately moving to compel an IME, defendants waited more  
8 than a week to file the instant motion. ECF No. 95.

9 While defendants should have known that plaintiff's mental condition is at issue in the  
10 case in December 2015, the record shows that, at the very latest, defendants were aware of the  
11 need for the IME on June 2, 2017, but failed to take appropriate action to complete the  
12 examination prior to the deadlines for completing discovery and disclosing experts. Defendants  
13 have not been diligent in pursuing the discovery they now seek, and they offer no basis for  
14 modifying the scheduling order.

15 III. Conclusion

16 Accordingly, it is hereby ORDERED that defendants' motion to compel plaintiff H.W. to  
17 submit to an independent medical examination (ECF No. 95-1) is denied.

18 DATED: August 17, 2017.

19   
20 EDMUND F. BRENNAN  
21 UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26  
27  
28