

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
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY RAY RICHARDSON,
Plaintiff,
v.
FLUOR CORPORATION, et al.,
Defendants.

Case No. [13-cv-01908-SBA](#) (MEJ)

DISCOVERY ORDER

Re: Dkt. No. 58

The Court is in receipt of the parties’ Joint Letter regarding the Stipulation for the Rule 35 mental examination of Plaintiff, Timothy Ray Richardson (“Plaintiff”). Jt. Ltr., Dkt. No. 58. Defendant has scheduled two Federal Rule of Civil Procedure (“Rule”) 35 examinations of Plaintiff. *Id.* at 3. Plaintiff has not yet scheduled his own expert examinations because he wishes to provide the Rule 35 reports to his own experts prior to their examination of him. *Id.* Plaintiff maintains he is entitled to receive a copy of any reports made by Defendant’s examiners, and any raw data generated from their examination, “upon request” as provided by Rule 35(b)(1). *Id.* at 1. Defendants contend that the examiners’ reports are expert reports, and thus they are not required to provide these reports or data until the expert discovery deadline as mandated by Rule 26(a)(2). *Id.* at 3. Both parties’ examiners will testify as experts at trial. *Id.* at 1.

Rule 35(b)(1) provides that “the party who moved for the examination must, on request, deliver the requester a copy of the examiner’s report, together with like reports of all earlier examinations of the same condition.” Rule 35(b)(3) provides that “after delivering the reports, the party who moved for the examination may request - and is entitled to receive- from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition.” The statute does not provide any specific time limits.

1 Rule 26(a)(2) provides that “[A] party must disclose to the other parties the identity of any
2 witness it may use at trial to present evidence. . . . [T]his disclosure must be accompanied by a
3 written report -- prepared and signed by the witness -- if the witness is one retained or specially
4 employed to provide expert testimony in the case or one whose duties as the party’s employee
5 regularly involve giving expert testimony.”

6 There is no uniform approach to the question of whether Rules 26 and 35 should be
7 applied independently or read in conjunction with one another. *See Manni v. City of San Diego*,
8 2012 WL 6025783, at *3 (S.D. Cal. Dec. 4, 2012). A number of district courts have found that
9 Rules 26 and Rule 35 operate independently of each other with respect to the timing of a Rule 35
10 expert report. *See Furlong v. Circle Line Statue of Liberty Ferry, Inc.*, 902 F.Supp. 65, 71
11 (S.D.N.Y. 1995); *Waggoner v. Ohio Cent. R.R., Inc.*, 242 F.R.D. 413, 414 (S.D. Ohio 2007); *Bush*
12 *v. Pioneer Human Servs.*, 2010 WL 324432, at *5 (W.D. Wash. Jan. 21, 2010).

13 In contrast, a number of courts hold that Rule 35 expert reports are subject to Rule
14 26(a)(2)’s timing requirements. *See Manni*, 2012 WL 6025783, at *3; *Diaz v. Con-Way*
15 *Truckload, Inc.*, 279 F.R.D. 412, 419 (S.D. Tex. 2012); *Minnard v. Rotech Healthcare Inc.*, 2008
16 WL 150502, at *3 (E.D. Cal. Jan. 15, 2008) (if a Rule 35 examining physician is intended to be
17 called as a witness at trial, the Rule 35 report must be produced at the time established for other
18 Rule 26(a)(2) disclosures); *Shumaker v. West*, 196 F.R.D. 454, 456 (S.D. W.Va. 2000)(if a Rule
19 35 examining physician is intended to be called as a witness at trial, the Rule 35 report must be
20 produced at the time established for other Rule 26(a)(2) disclosures)).

21 In the situation presented here, because the examining physicians are intended to be called
22 as witnesses at trial, and the examinations will be held within a few weeks of the expert disclosure
23 deadline, the Court ORDERS Defendant to produce the Rule 35 report and accompanying raw
24 data at the time established for the disclosure of experts pursuant to Rule 26.

25 **IT IS SO ORDERED.**

26 Dated: June 9, 2014

27
28



MARIA-ELENA JAMES
United States Magistrate Judge