



1 IT IS FURTHER ORDERED that Plaintiff shall appear for a mental examination (as limited  
2 by the provisions of this order) by Dr. James R. Missett at 1187 University Drive, Menlo Park,  
3 California, 94025, on a date and time to be determined after further briefing. It has come to the  
4 court's attention that Defendants' cite one date (December 9<sup>th</sup>) in the notice of motion and a different  
5 date (December 15<sup>th</sup>) in the body of their motion. *See* Defendants' moving papers (docket no. 108)  
6 at 1:9-10 & 9:8-9. Because it is unclear which date has been scheduled for the examination, the  
7 court cannot order the examination without further information. In light of the delay caused by the  
8 court's need to obtain such further information, it appears the examination will have to be cancelled  
9 and re-scheduled. No later than December 9, 2008, Defendants shall serve and file a supplemental  
10 brief setting forth a new date (and time) on or after December 29, 2008 for the examination.

11 IT IS FURTHER ORDERED that, if Plaintiff files an objection to this order by December 23,  
12 2008,<sup>2</sup> the provisions of this order will be automatically stayed pending District Judge Fogel's ruling  
13 on Plaintiff's objection.

14 IT IS FURTHER ORDERED that the discovery cut-off date is January 16, 2009.

15 IT IS FURTHER ORDERED that for the reasons discussed herein, absent further order of  
16 this court, counsel for Defendants shall treat all of Plaintiff's medical and mental health information  
17 as confidential, shall not disclose it to anyone other than to Plaintiff, Dr. Missett, and the court, and  
18 shall not use the information for any purpose unrelated to this lawsuit. *See* FED.R.CIV.PRO 26(c)

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20 **I. BACKGROUND**

21 In this action, Plaintiff alleges racial discrimination in housing. Specifically, she alleges that  
22 she made an appointment to see an apartment, and that when she arrived for the appointment  
23 Defendants became aware of her race and refused to show her the apartment. Plaintiff claims she  
24 has suffered, and continues to suffer, mental and emotional distress as a result of Defendants'  
25 conduct.

26 On March 10, 2008, Defendants served Plaintiff with a First Set of Requests for Production  
27 of Documents. Request No. 14 requested "ALL DOCUMENTS CONCERNING ALL damages

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<sup>2</sup> *See* FED.R.CIV.PRO. 72(a), 6(a)(2) & 6(d).

1 YOU claim to have suffered as a result of any conduct by G&K.” Plaintiff responded to Request  
2 No. 14 as follows: “Written statement from my doctors telling you about my illnesses. Other  
3 documents will come later. They are confidential.” The court deems the last sentence to be an  
4 objection based on grounds of privacy.

5 In the present motions, Defendants seek to compel Plaintiff to produce any further records  
6 she has concerning her mental and emotional distress. They also seek an order requiring Plaintiff to  
7 appear for a Rule 35 mental examination. Plaintiff objects based on grounds of privacy. Plaintiff  
8 also argues that the motions should be denied because discovery is purportedly closed.

## 10 II. LEGAL STANDARDS

### 11 A. PRIVACY RIGHTS AND WAIVER

12 Plaintiff argues that the instant motions seek to violate her constitutional and statutory  
13 privacy rights. Federal courts recognize a constitutional right to privacy. *See, e.g., Caesar v.*  
14 *Mountanos*, 542 F.2d 1064, 1066-70 (9<sup>th</sup> Cir. 1976). That right, however, is conditional rather than  
15 absolute, and is waived when a plaintiff raises before the court issues concerning her mental and  
16 emotional condition and seeks damages for mental and emotional injuries. *See ibid.*

17 Federal courts also recognize the existence of a psychotherapist privilege under federal  
18 common law. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). However, as the Supreme Court noted  
19 in *Jaffee*, a plaintiff can waive the psychotherapist privilege. *Id.* at 15 n. 14.

20 A litigant’s waiver of privacy rights by putting private matters at issue in a lawsuit is limited  
21 to the private information that is relevant to the lawsuit. *See, e.g., Doe v. City of Chula Vista*, 196  
22 F.R.D. 562, 569-70 (S.D. Cal. 1999) (a plaintiff’s claim for emotional distress damages “does not  
23 entitle defendants to invade the whole of [the plaintiff’s] medical history”).

24 Plaintiff also cites the Privacy Act. However, while the Privacy Act precludes disclosure of  
25 certain kinds of personal information by federal agencies, it does not protect information from  
26 disclosure in litigation pursuant to a valid discovery request. *See, e.g., Laxalt v. McClatchy*, 809  
27 F.2d 885, 889 (D.C.Cir. 1987). The Privacy Act is thus irrelevant to the present motion.

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1           **B.       STANDARDS FOR RULE 35 MENTAL EXAMINATION**

2           Federal Rule of Civil Procedure 35 (“Rule 35”) permits a court to compel a party to submit to  
3 a mental examination by a suitably licensed or certified examiner when that party’s mental condition  
4 is in controversy. The order may be made only on motion for good cause shown, and notice to the  
5 person to be examined and all parties, specifying time, place, manner, conditions, and scope of the  
6 examination and the person or persons by whom it is to be made. FED. R. CIV. P. 35(a). The  
7 Supreme Court held that evaluating a Rule 35 motion “requires discriminating application by the  
8 trial judge, who must decide, as an initial matter in every case, whether the party requesting a  
9 mental...examination...has adequately demonstrated the existence of the Rule’s requirements of ‘in  
10 controversy’ and ‘good cause.’” *Schlagenhauf v. Holder*, 379 U.S. 104, 118-119 (1964).

11           **1.       Policy Concerns and Rule 35**

12           Generally, “the deposition-discovery rules are to be accorded a broad and liberal treatment.”  
13 *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The *Hickman* Court found that a policy favoring  
14 liberal discovery facilitates proper litigation. *Id.* This policy is evidenced by Federal Rule of Civil  
15 Procedure 26(b)(1) (“Rule 26(b)(1)”), which states that parties may obtain discovery of any matter,  
16 not privileged, that is relevant to the claim or defense of any party.

17           In *Schlagenhauf*, the Supreme Court contrasted the lowered relevance standard of Rule  
18 26(b)(1) with the standard prescribed by the text of Rule 35. *See Schlagenhauf*, 379 U.S. at 117.  
19 The *Schlagenhauf* Court observed that in addition to relevance, Rule 35 required that before a court  
20 may order a mental or physical examination, the matter be “in controversy” and the moving party  
21 demonstrate “good cause.” *Id.* The Supreme Court reasoned that these two requirements  
22 demonstrated a heightened standard that could not be met merely by the relevancy standard of Rule  
23 26(b)(1). *Id.* at 118. Finally, the court concluded that the express limitations in Rule 35 were  
24 designed to guard against “sweeping examinations of a party who has not affirmatively put into issue  
25 his own mental or physical condition,” and “to hold otherwise would mean that such examinations  
26 could be ordered routinely.” *Id.* at 121-122.

27           **2.       The “In Controversy” Requirement of Rule 35**

28           In ruling on a motion for a Rule 35 examination, a court must determine whether the moving

1 party affirmatively demonstrates that the other party’s mental condition “is really and genuinely in  
2 controversy.” *Schlagenhauf*, 379 U.S. at 118. The district court in *Turner v. Imperial Stores*, 161  
3 F.R.D. 89 (S.D. Cal. 1995), conducted an extensive analysis of case law to determine whether a  
4 party’s claim of “emotional distress” is sufficient to place that party’s mental state in controversy.  
5 The *Turner* Court found that courts will order a mental examination where, in addition to emotional  
6 distress, cases involve one or more of the following: 1) a cause of action of Intentional Infliction of  
7 Emotional Distress; 2) an allegation of a specific mental or psychiatric injury or disorder; 3) a claim  
8 of unusually severe emotional distress; 4) a plaintiff’s offer of expert testimony to support a claim of  
9 emotional distress; and/or 5) a plaintiff’s concession that her mental condition is “in controversy”  
10 within the meaning of Rule 35. *Id.* at 95. In *Turner*, the court found that the weight of authority  
11 suggested that “garden-variety” emotional distress alone is not sufficient to place a party’s mental  
12 state in controversy. *Id.* at 97. The court in *Turner* explained that Rule 35 was not meant to be  
13 applied in so broad a fashion as to allow courts to order a mental examination whenever a plaintiff  
14 claimed emotional distress. *Id.* at 97. Courts evaluating a Rule 35 motion also consider whether a  
15 party has alleged some type of *ongoing* mental injury. *See, e.g., Bridges v. Eastman Kodak Co.*, 850  
16 F.Supp. 216, 221-22 (S.D.N.Y. 1994) (ongoing severe mental injury); *Duncan v. Upjohn*, 155 F.R.D.  
17 23, 25 (D.Conn. 1994) (ongoing psychiatric harm); *Hodges v. Keane*, 145 F.R.D. 332, 334 (S.D.N.Y.  
18 1993) (ongoing mental illness).

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20 **III. DISCUSSION**

21 **A. PLAINTIFF HAS WAIVED HER PRIVACY RIGHTS**

22 Plaintiff acknowledges that she is seeking damages for her mental and emotional distress.  
23 On July 24, 2007, Plaintiff filed a document entitled “Plaintiff’s Request for Relief” (docket no. 39  
24 herein) in which she states she is requesting \$100,000.00 in “actual damages for emotional trauma,  
25 humiliation, embarrassments and physical injuries as a result of the emotional trauma, including  
26 inability to sleep, depression and associated mental health injuries requiring continuing medical  
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1 treatment.”<sup>3</sup> By law this allegation of serious on-going mental and emotional distress, along with the  
2 request for damages for those injuries, constitutes a waiver of Plaintiff’s right to privacy with respect  
3 to her mental health records to the extent her mental health information is relevant to this lawsuit.

4 Plaintiff has not cited any legal authority that would support her implicit contention that only  
5 her discussions with her mental health providers that are expressly about Defendants are relevant to  
6 this lawsuit. As Defendants note, they are entitled to discover what other causes exist for Plaintiff’s  
7 emotional distress, regardless of whether any such other causes occurred before the events at issue in  
8 the lawsuit or afterwards. *See, e.g., Doe v. City of Chula Vista*, 196 F.R.D. at 570 (finding one year  
9 time limit on records sought was too restrictive where Doe had received counseling earlier than that  
10 time period).

11 **B. A RULE 35 EXAM IS WARRANTED BECAUSE DEFENDANTS HAVE SHOWN THAT**  
12 **PLAINTIFF’S MENTAL STATE IS “IN CONTROVERSY” AND THAT THERE IS “GOOD**  
**CAUSE” FOR THE EXAMINATION**

13 In Plaintiff’s “Request for Relief,” she alleges her damages include “depression and  
14 associated mental health injuries.” The fact that Plaintiff is alleging *ongoing* mental injury is shown  
15 by her statement that her mental health injuries require “continuing medical treatment.” Thus,  
16 Plaintiff’s mental and emotional state is “in controversy.”

17 Further, Plaintiff attached to her Request for Relief a note from her doctor which states that  
18 the additional stress of this court case is worsening Plaintiff’s bipolar disorder and depression, thus  
19 indicating that at least some portion of Plaintiff’s current emotional distress may not be compensable  
20 in this lawsuit. *See, e.g., Knussman v. Maryland*, 272 F.3d 625, 642 (4<sup>th</sup> Cir. 2001) (“Generally  
21 speaking, litigation-induced emotional distress is never a compensable element of damages”).

22 Because Plaintiff has put her mental state in controversy, and particularly in light of the  
23 evidence already in the record suggesting that not all of Plaintiff’s *ongoing* emotional distress is a  
24 result of the acts complained of in the complaint, there is good cause for a Rule 35 examination.  
25 However, the examination must be limited to the nature, extent and cause(s) of Plaintiff’s emotional  
26 distress, depression and related mental health injuries. Further, as Defendants have not sought any  
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28 <sup>3</sup> Plaintiff has repeated this request in subsequent filings, such as the request for a  
subpoena she filed on June 2, 2008 (docket no. 66).

1 psychological testing (such as an MMPI), no such testing will be ordered.

2 In their moving papers, Defendants indicate “the exam will provide insight into Plaintiffs  
3 mental condition, such as whether she suffers from a personality or mood disorder which might  
4 affect her perception of events.” Such an assessment of Plaintiff’s credibility by Defendants’ expert  
5 would be improper because a party may not use psychiatric expert testimony to impugn another  
6 party’s credibility. *See Nichols v. Am. Nat’l Ins. Co.*, 154 F.3d 875, 883 (8<sup>th</sup> Cir. 1998).  
7 Accordingly, Dr. Missett shall not make any inquiry into, nor assessment of, the issue of whether any  
8 of Plaintiff’s mental health conditions affect her perception of events.

9 Before the examination, Defense counsel shall send a copy of this order to Dr. Missett, along  
10 with a cover letter advising him of this court’s order that he abide by the limitations set forth herein.

11 **C. DISCOVERY CUT-OFF**

12 Plaintiff also argues that the motions should be denied because discovery is purportedly  
13 closed. Plaintiff has not directed the court’s attention to any order where Judge Fogel set a  
14 “discovery cut-off” date. *See Civil L.R. 26-2*. There is a reference to “5/30/08 as the discovery  
15 deadline” in a minute order entered after the April 25, 2008 Case Management Conference. (*See*  
16 *Docket No. 59*.) From the file herein, it appears that this deadline refers to an extension of time  
17 Plaintiff sought for responding to certain discovery requests Defendants had propounded.<sup>4</sup>  
18 Moreover, Plaintiff cannot now assert that May 30, 2008 was a discovery “cut-off” in light of the  
19 fact that she herself served discovery subpoenas after that date, and successfully moved to compel  
20 compliance with those subpoenas.

21 Because at the hearing of these motions it appeared no discovery cut-off had yet been set, the  
22 court set a discovery cut-off of January 16, 2009.<sup>5</sup>

23 **D. PROTECTIVE ORDER**

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25 <sup>4</sup> *See* Defendants’ Amended Case Management Conference Statement (docket no. 58) at 4:22 –  
26 5:6, Plaintiff’s “Ordered Schedule Date For Completion of Discoverys (Admission/Interrogatories)” (docket no.  
60), and Defendants reply thereto (docket no. 61) at 2:26 – 3:4.

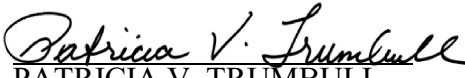
27 <sup>5</sup> At the hearing the court initially indicated it would close discovery as of the hearing date.  
28 However, after Defendants noted they had not yet completed their discovery, the court set the deadline  
for January 16, 2009. It would be inequitable to immediately close discovery without any advance notice  
where, in reliance on the absence of any pending discovery cut-off date, the party had not yet completed  
their discovery.

1 Rule 26(c) of the Federal Rules of Civil Procedure authorizes the court to “for good cause,  
2 issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue  
3 burden or expense.” Given the sensitive nature of mental health information, there is good cause to  
4 protect Plaintiff’s mental health information from disclosure beyond what is necessary to allow  
5 Defendants to prepare their defense.

6  
7 **III. CONCLUSION**

8 Because Plaintiff has put her mental and emotional state at issue in this lawsuit, she has  
9 partially waived her right to privacy. The waiver is limited to information Defendants reasonably  
10 need in order to test Plaintiff’s claim that Defendants’ conduct caused her to suffer serious, ongoing  
11 mental and emotional distress. Defendants are entitled to evaluate how much of Plaintiff’s mental  
12 and emotional distress is attributable to their conduct, so that they have a fair opportunity to prepare  
13 their defense for trial. The protective order issued herein is warranted to protect Plaintiff’s privacy to  
14 the extent possible in the context of this litigation.

15 Dated: 12/3/08

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17 PATRICIA V. TRUMBULL  
18 United States Magistrate Judge  
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*Counsel automatically notified of this filing via the court's Electronic Case Filing system.*

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