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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESUS LOPEZ,)	Civil No.13-0597-BEN(WVG)
)	
Plaintiff,)	ORDER GRANTING
)	DEFENDANTS' <i>EX PARTE</i>
v.)	MOTION COMPELLING
)	INDEPENDENT MEDICAL
CITY OF IMPERIAL, et al.,)	EXAMINATIONS OF PLAINTIFF
)	(DOC. NO. 19)
Defendants.)	
)	
)	

Defendants have filed an *Ex Parte* Motion Compelling Independent Medical Examinations ("IMEs") of Plaintiff ("Motion"). Plaintiff has filed an Opposition to Defendants' Motion. Defendants have filed a Reply to Plaintiff's Opposition and a Supplemental Brief. The Court, having reviewed the moving, opposition, reply and supplemental papers of counsel, and the record in this case, HEREBY GRANTS Defendants' Motion.

A. BACKGROUND

On December 12, 2012, Plaintiff filed his Complaint in the Imperial County Superior Court. On March 14, 2013,

1 Defendants removed the case to this Court. The Complaint
2 contains, *inter alia*, allegations regarding the damages
3 suffered by Plaintiff as a result of the incident de-
4 scribed in the Complaint. The damages alleged in the
5 Complaint stem from (a) a severe concussion; (b) torn
6 ligaments in Plaintiff's knees and forearm; (c) severe
7 burns from mace or pepper spray; and (d) Plaintiff may
8 need surgery on his knee and removal of a testicle.
9 (Complaint at 4, para. XII).

10 On July 1, 2013, the Court issued a Case Management
11 Conference Order Regulating Discovery ("CMC Order"). The
12 CMC Order states, in pertinent part, that (a) on or before
13 December 20, 2013, all fact discovery shall be completed;
14 (b) on or before January 24, 2014, the parties shall
15 exchange a list of all expert witnesses to be called at
16 trial; (c) any party may supplement its expert designation
17 by February 7, 2014; (d) designated expert witnesses shall
18 provide to all other parties their expert witness reports
19 by March 7, 2014; and (e) designated expert witnesses may
20 supplement their expert reports to contradict or rebut
21 evidence on the same subject matter identified in an
22 expert report submitted by another party, by April 4,
23 2014.

24 On June 14, 2013, Defendants received Plaintiff's
25 medical records which presumably supported^{1/} Plaintiff's
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28 ^{1/}Defendants do not inform the Court about the contents of the medical records received.

1 allegations regarding the injuries Plaintiff sustained as
2 a result of the incident described in the Complaint.

3 On December 3, 2013, Defendants took Plaintiff's
4 deposition. At the deposition, Plaintiff testified regard-
5 ing his injuries. His testimony included that he suffers
6 from (a) neck, back and leg pain; (b) testicle pain; (c)
7 memory loss; (d) headaches; and (e) jaw pain.

8 On December 13, 2013, Plaintiffs and Defendants
9 filed a Joint Motion For Continuance of Discovery Dates.
10 On December 17, 2013, the Court issued an Order Granting
11 In Part And Denying In Part the Joint Motion. In the
12 Order, the Court quoted from paragraph 5 of the CMC Order
13 issued in this case, which clearly states:

14 ... all discovery under **Rules 30-36** of the
15 Federal Rules of Civil Procedure must be
16 initiated a sufficient period of time in
17 advance of the (discovery) cut-off date, so
18 *that it may be completed* by the cut-off date,
taking into account the times for services,
notice and response as set forth in the Fed-
eral Rules of Civil Procedure. (emphasis
added).

19 The Order also allowed further discovery to be
20 conducted, but limited that discovery "to only that
21 reasonably raised by Plaintiff's deposition." ("December
22 17, 2013 Order," at 3). The Order extended the discovery
23 cut-off date to January 20, 2014 for the above-noted
24 discovery.

25 Defendants now seek the IMEs of Plaintiff by a
26 neurosurgeon, orthopedist, dentist/oral surgeon^{2/}, and

27 _____
28 ^{2/}On December 27, 2013, Plaintiff's counsel agreed to allow Defendants to
conduct an IME by a dentist. Therefore, the Court will not address the propriety
of that IME in this Order.

1 urologist. Defendants argue that at Plaintiff's December
2 3, 2013 deposition, they became aware of Plaintiff's
3 continuing complaints of (a) neck, back and leg pain; (b)
4 testicle pain; (c) memory loss; (d) headaches; and (e) jaw
5 pain. Plaintiff opposes the IMEs as requested by Defen-
6 dants because the sought IMEs are not follow-up to discov-
7 ery on issues raised in Plaintiff's deposition.

8 B. FEDERAL RULE OF CIVIL PROCEDURE 35

9 Federal Rule of Civil Procedure 35 authorizes a
10 court to "order a party whose... physical condition... is
11 in controversy to submit to a physical... examination by
12 a suitably licensed or certified examiner." Fed. R. Civ.
13 P. 35(a)(1). However, the order "may be made only on a
14 motion for good cause." Fed.R. Civ. P. 35(a)(2)(A). These
15 requirements necessitate "an affirmative showing by the
16 movant that each condition as to which the examination is
17 sought is really and genuinely in controversy and that
18 good cause exists for ordering each particular examina-
19 tion." Juarez v. Autozone Stores, Inc., 2011 WL 1532070 at
20 *1 (S.D. Cal. 2011), citing Schlagenhauf v. Holder, 379
21 U.S. 104, 118 (1964).

22 Factors that courts have considered in assessing
23 whether "good cause" exists include, but are not limited
24 to, "the possibility of obtaining the desired information
25 by other means, whether Plaintiff plans to prove (his)
26 claim through the testimony of expert witnesses, whether
27 Plaintiff is claiming ongoing (injury)." Juarez, supra at
28 *1, citing Impey v. Office Depot, Inc., 2010 WL 2985071 at

1 *21 (N.D. Cal. 2010), Turner v. Imperial Stores, 161
2 F.R.D. 89, 97-98 (S.D. Cal. 1995).

3 Fed. R. Civ. P. 35 does not specify a deadline for
4 conducting an IME. Guitron v. Wells Fargo Bank, 2011 WL
5 6012595 at *1 (N.D. Cal. 2011). Some courts do not catego-
6 rize Rule 35 examinations as either "non-expert" or
7 "expert" discovery. Lester v. Mineta, 2006 WL 3741949 at
8 *1-2 (N.D. Cal. 2006). However, some courts have found
9 that Fed.R.Civ. P. 26(a)(2) requires that the IME report
10 be produced at the time of expert witness disclosures,
11 meaning that an IME must occur before expert witness
12 disclosures. Miksis v. Howard, 106 F.3d 754, 758 (7th Cir.
13 1997). But in Minnard v Rotech Health, Inc., 2008 WL
14 150502 at *2-3 (E.D. CA 2008), the court determined that
15 an IME report is an expert witness report because the
16 examining expert would not merely recite the objective
17 results of the examination, but would interpret the
18 results and offer conclusions and opinions for the trier
19 of fact. Minnard has been followed by Silva v. Mercado
20 Food Enterprise, Inc., 2012 WL 174926 at *5 (E.D. CA
21 2012).

22 The law in this area does not appear to be well
23 settled. Whether IMEs are fact or expert witness discovery
24 certainly could influence the outcome of this dispute.
25 Perhaps IMEs are best described as hybrid, both fact and
26 expert witness discovery, depending on which view one
27 finds most persuasive. One view of Rule 35 is that IME
28 examiners are "experts employed only for trial prepara-

1 tion," pursuant to Fed. R. Civ. P. 26(b)(4)(B). As such,
2 a court will typically allow an examinee to depose or call
3 a Rule 35 IME examiner as a witness on a showing of
4 "exceptional circumstances." Lehan v. Ambassador Programs,
5 Inc., 190 F.R.D. 670, 671-672 (E.D. WA 2000); Carroll v.
6 Praxair, Inc., 2007 WL 437697 at *2 (W.D. LA 2007). Of
7 course, Rule 35 IMEs often arise in the context of devel-
8 oping expert testimony for trial with the expert witnesses
9 then subject to the discovery obligations of Rules 26 and
10 30.

11 As discussed later in footnote 3 of this Order,
12 clearly the parties, and especially Defendants, were
13 dilatory in not moving for IMEs before now, notwithstand-
14 ing that Plaintiff has just recently been deposed. Defen-
15 dants had sufficient information available to them from
16 the Complaint alone and from Plaintiff's medical records
17 they obtained during discovery, to give them ample reason
18 and sufficient justification to seek Rule 35 IMEs before
19 now during fact discovery. Fortunately for Defendants,
20 given the lack of clarity as to whether IMEs are relegated
21 to fact discovery or cross over into expert discovery, the
22 Court will give the benefit of the doubt to Defendants,
23 especially in light of the delay in deposing Plaintiff.

24 Accordingly, the Court tends to agree with Minnard
25 and Silva. If the IME examiner will offer opinions and
26 conclusions regarding the objective facts derived from an
27 examination, the IME and the report produced by the IME
28 examiner is expert discovery, not fact discovery. There-

1 fore, the timing of a motion for an IME is dictated by the
2 terms of the scheduling order regarding expert witness
3 discovery, as set forth in the case.

4 Here, the CMC Order issued in this case states that
5 Plaintiff and Defendants have until January 24, 2014 to
6 designate expert witnesses to be called at trial. There-
7 fore, Defendant's Motion To Compel the requested IMEs is
8 timely.

9 C. GOOD CAUSE EXISTS TO ORDER THE IMES REQUESTED BY
10 DEFENDANTS

11 As previously noted in this Order, Plaintiff testi-
12 fied at his deposition that he continues to suffer from
13 (a) neck, back and leg pain; (b) testicle pain; (c) memory
14 loss; (d) headaches; and (e) jaw pain. Defendants seek
15 IMEs by a neurosurgeon (presumably to examine Plaintiff
16 and offer a report and testimony regarding Plaintiff's
17 concussion, memory loss and headaches), an orthopedist
18 (presumably to examine Plaintiff and offer a report and
19 testimony regarding Plaintiff's neck, back, knee, and leg
20 pain), and a urologist (presumably to examine Plaintiff
21 and offer a report and testimony regarding Plaintiff's
22 testicle pain).

23 1. Good Cause Factors

24 The Court must find good cause to order the IMEs
25 requested by Defendants. Therefore, the Court analyzes
26 below the factors commonly used to find good cause:

27 a. The possibility of obtaining the information
28 by other means

Here, there is no possibility that Defendants can
obtain the information, opinions and conclusions of an

1 expert witness pursuant to Rule 35 in any other way, but
2 to have Plaintiff submit to the IMEs. Defendants are not
3 required to simply rely on Plaintiff's expert witnesses
4 regarding Plaintiff's injuries and the damages he suffered
5 therefrom. Therefore, this factor weighs in favor of
6 Defendants.

7 b. Whether Plaintiff intends to prove his claims
8 of injuries sustained through the testimony of
9 expert witnesses

10 At this time, the Court can not conclude that
11 Plaintiff intends to prove his sustained injuries through
12 the testimony of expert witnesses. As previously noted in
13 this Order, Plaintiff's and Defendants' expert witness
14 disclosures have been ordered to be made on January 24,
15 2014. The Court notes that if Plaintiff does not designate
16 an expert witness to testify about one or some of his
17 alleged injuries, an IME regarding that alleged injury may
18 not be necessary or required. As a result, this factor
19 does not weigh in favor of Plaintiff or Defendants.

20 c. Whether the desired materials are relevant

21 Plaintiff claims numerous injuries that resulted
22 from the incident described in the Complaint. The alleged
23 injuries serve as the basis for Plaintiff's claimed
24 damages. There can be little dispute that the information,
25 opinions, and conclusions pertaining to Plaintiff's
26 alleged injuries that will be presented after the re-
27 quested IMEs are relevant to Plaintiff's claims in this
28 action. Therefore, this factor weighs in favor of Defen-
dants.

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d. Whether Plaintiff claims ongoing injuries

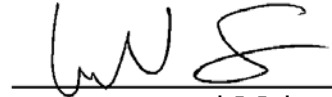
As previously noted in this Order, Plaintiff testified at his December 3, 2013 deposition that he continues to suffer from numerous injuries sustained in the incident described in the Complaint. Therefore, this factor weighs in favor of Defendants.

The analysis of the factors noted above show, and the Court finds, that good cause exists to order the IMEs as requested by Defendants. Plaintiff's Ex Parte Motion Compelling Independent Medical Examinations of Plaintiff is GRANTED. The IMEs requested by Defendants shall be scheduled immediately and shall comply with the require-

1 ments of Fed. R. Civ. P. 35.^{3/}

2 IT IS SO ORDERED.

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4 DATED: January 21, 2014

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7 Hon. William V. Gallo
8 U.S. Magistrate Judge

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18 ^{3/}The Court notes that Defendants' Motion, Plaintiff's Opposition and
19 Defendants' Reply are severely lacking in the analysis of whether Plaintiff's
20 Motion was timely filed, whether IMEs are subject to the fact discovery cut-off
or the expert witness discovery cut-off, and whether good cause exists for the
Court to order the IMEs requested by Defendants. As previously noted in the
December 17, 2013 Order of this Court, it appears that Plaintiff and Defendants
have not been diligent in pursuing and defending this action.

21 As soon as Defendants were served with Plaintiff's Complaint, they were
22 aware that some of Plaintiff's alleged damages stemmed from orthopedic and
23 testicular injuries. Yet, Defendants waited until December 3, 2013, almost one
24 year after the Complaint was filed, to take Plaintiff's deposition at which they
25 confirmed that Plaintiff's injuries were ongoing. The Court has not been made
26 fully aware of how long Plaintiff's deposition was delayed due to his health
27 problems. However, had Defendants taken Plaintiff's deposition earlier in this
28 litigation, they would have learned about Plaintiff's other alleged injuries.
Instead, they waited until approximately three weeks before the fact discovery
cut-off to learn about Plaintiff's other alleged injuries, and to seek IMEs of
Plaintiff, without analyzing whether an IME is fact or expert witness discovery,
thereby believing that they needed to file an ex parte motion to compel the
requested IMEs.

Despite the court's warning in the December 17, 2013 Order that the parties
immediately begin discovery to follow-up on Plaintiff's December 3, 2013
deposition, Plaintiff requested that Defendants not file their motion to compel
the IMEs for at least one week, thereby further delaying the resolution of their
dispute.

The recalcitrant behavior displayed by counsel in this case as noted above,
will no longer be countenanced by the Court.