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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ANH TUYET THAI, et al.,
12 Plaintiffs,
13 v.
14 COUNTY OF LOS ANGELES;
15 WILLIAM VILLASENOR; DULCE
16 SANCHEZ; and STATE AND/OR
17 LOCAL AGENTS LADA DOES 1-10,
18 Defendants.

Case No.: 15cv583-WQH (NLS)

ORDER :

**(1) DENYING MOTION TO
COMPEL PLAINTIFFS TO SIT FOR
MENTAL EXAMINATION;**

**(2) GRANTING MOTION FOR
LEAVE TO SUBSTITUTE
PSYCHOLOGICAL EXPERT; and**

**(3) GRANTING IN PART AND
DENYING IN PART MOTION FOR
PROTECTIVE ORDER**

[ECF Nos. 261, 277, 282, 283]

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23 Before the Court are several related motions. First, Defendants filed a Motion to
24 Request an Order Pursuant to Federal Rule of Civil Procedure 35(a) Compelling
25 Plaintiffs to Submit to a Mental Examination. ECF No. 261. Second, Defendants filed a
26 Motion for Leave to Substitute their Designated Psychological Expert due to Illness.
27 ECF No. 277. Finally, Plaintiffs filed a Motion for Protective Order for all of Plaintiffs'
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1 Treating Physicians. ECF No. 283. After due consideration, the Court: (1) **DENIES** the
2 motion to compel a Rule 35 examination (ECF No. 261); (2) **GRANTS** the motion for
3 leave to substitute Defendants’ psychological expert; and (3) **GRANTS IN PART** and
4 **DENIES IN PART** the motion for protective order for Plaintiffs’ treating physicians.

5 **I. BACKGROUND**

6 This is a class action lawsuit in which Plaintiffs allege that Defendants violated
7 their constitutional rights when Los Angeles County investigators William Villasenor,
8 Dulce Sanchez, and other unknown agents entered Plaintiffs’ homes to question them
9 about their SSA applications for benefits. ECF No. 180.

10 **II. MOTION FOR MENTAL EXAMINATION**

11 In this motion, Defendants seek an order from the Court to permit Rule 35 mental
12 examinations of the named Plaintiffs. ECF No. 261.

13 **a. Legal Standards**

14 Federal Rule of Civil Procedure 35 governs mental examinations and authorizes
15 the court to “order a party whose mental or physical condition . . . is in controversy to
16 submit to a physical or mental examination by a suitably licensed or certified examiner.”
17 Fed. R. Civ. P. 35(a)(1). The order may be made “only on motion for good cause and on
18 notice to all parties and the person to be examined” and “must specify the time, place,
19 manner, conditions, and scope of the examination, as well as the person or persons who
20 will perform it.” Fed. R. Civ. P. 35(a)(2).

21 A Rule 35 examination requires a showing that the party’s mental or physical
22 condition is “in controversy” and that there is “good cause” supporting the order.
23 *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964). More than a showing of “mere
24 relevance” is required to meet this standard. *Id.* at 118. A claim of emotional distress
25 can place a person’s mental state “in controversy” if accompanied with one or more of
26 the following: “(1) a cause of action for intentional or negligent infliction of emotional
27 distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a
28 claim of unusually severe emotional distress; (4) plaintiff’s offer of expert testimony to

1 support a claim of emotional distress; or (5) plaintiff’s concession that his or her mental
2 condition is ‘in controversy.’” *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal.
3 1995). The following factors are considered in determining if there is “good cause” to
4 permit the examination: “(1) the possibility of obtaining desired information by other
5 means; (2) whether plaintiff plans to prove her claim through testimony of expert
6 witnesses; (3) whether the desired materials are relevant, and; (4) whether plaintiff claims
7 ongoing emotional distress.” *Mailhoit v. Home Depot U.S.A., Inc.*, No.
8 CV1103892DOCSSX, 2013 WL 12122580, at *4 (C.D. Cal. Jan. 24, 2013).

9 **b. Discussion**

10 Defendants argue that Plaintiffs have put their mental state “in controversy” since
11 they maintain a cause of action for intentional infliction of emotional distress, have made
12 allegations of specific mental/psychiatric injuries, and have made a claim of severe
13 emotional distress. ECF No. 261 at 15. Specifically, Defendants point to the inclusion of
14 the eighth cause of action in the case for intentional infliction of emotional distress. ECF
15 No. 180 at ¶¶ 78-80. In addition, Defendants point out that Plaintiffs have alleged
16 specific ailments—including post-traumatic stress disorder and major depressive order.
17 *Id.* at ¶¶ 50-52. Thus, Defendants argue that the allegations here amount to more than
18 garden variety claims of emotional distress. The Court agrees that Plaintiffs have likely
19 placed their mental state in “controversy” as defined under *Turner*.

20 However, in addition to having to place their mental state in “controversy,”
21 Defendants must establish good cause to permit the exam. As to these factors, first,
22 Plaintiffs have represented to the Court that they will not rely on expert testimony
23 regarding Plaintiffs’ mental state. ECF No. 261 at 27; ECF No. 261-2 at ¶ 24. Second, in
24 light of this, Plaintiffs argue that Defendants have access to sufficient alternative means
25 to get the needed information. On February 3, 2022, Plaintiffs supplemented their initial
26 disclosures to include the following treatment information:

27 Dr. James Grisolia, M.D., 4033 Third Av.,#410, San Diego, CA 92103,
28 (619)297-1155.

1 Dr. Jon Highum, M.D., 225 W. Madison Av., St#2, El Cajon, CA
2 92020,(619)971-1423.

3 Dr. Nadine Sidrick, M.D., 4440 Euclid Av., San Diego, CA 92115, (619)
4 582-5105.

5 Dr. Grisolia, Dr. Sidrick and Dr. Highum are treating physicians of Plaintiffs
6 for their neurologic and mental problems.

7 ECF No. 261-2 at ¶ 7. Plaintiffs argue that Defendants could retrieve the information
8 they need from treatment records. In addition, Plaintiffs argue that much medical records
9 have already been provided to Defendants and Defendants have taken hours of deposition
10 testimony already from Plaintiffs. ECF No. 261 at 28-32; *see also* ECF No. 281 (noting
11 that Defendants' expert Dr. Lee reviewed treating notes from Drs. Grisolia, Henderson,
12 Englehorn, Friedman, and Lessner). Thus, Plaintiffs argue that sufficient alternative
13 means exist to get the needed information, without having to further subject Plaintiffs to
14 an intrusive mental examination.

15 The Court agrees with Plaintiffs that insufficient good cause has been shown. In
16 light of the information already provided and the alternate means to get mental treatment
17 information, the Court **DENIES** the request for a mental examination of Plaintiffs.

18 **III. MOTION TO AMEND SCHEDULE**

19 The second motion in front of the Court is Defendants' motion for leave to
20 substitute their current psychological expert, Dr. Lee, due to illness and to serve an
21 amended Rule 26 expert report. ECF No. 277.

22 Specifically, Defendants state that they retained Dr. Lee in February 2022, without
23 any indication at that time that he could be incapable of performing the services he was
24 retained for. *Id.* at 3. Dr. Lee completed his expert report and served it on April 25,
25 2022. *Id.* at 4. Shortly thereafter on May 10, 2022, Dr. Lee was seen by his own doctor,
26 who found that his work exacerbated his physical conditions and recommended that he
27 stop working and retire. *Id.* After learning of Dr. Lee's condition, Defendants state that
28 they retained another expert, Dr. Lauren Mai, to substitute in. *Id.* at 4-5.

1 Plaintiffs oppose the request, arguing that Defendants should have been aware of
2 his potential issue given Dr. Lee's advance aged when he was retained, and Defendants
3 should have retained two expert witnesses before the expert opening report deadline due
4 to this risk.¹ ECF No. 281 at 5-6.

5 In light of the circumstances, the Court finds that Defendants have established
6 good cause for seeking a limited extension of the expert discovery deadlines in order to
7 substitute in Dr. Mai for Dr. Lee. The Court notes that there is a motion in limine
8 pending regarding Dr. Lee, but the motion deadline for filing such motions has not yet
9 passed. *See* ECF No. 276.

10 Thus, the Court **GRANTS** the motion and orders as follows:

11 (1) Dr. Mai may be designated as a substitute expert for Dr. Lee.

12 (2) Dr. Mai may submit a new expert report by **July 15, 2022**. However, her
13 expert report must be: (1) limited to only review of the materials reviewed by
14 Dr. Lee; and (2) she may not opine on any new topics that Dr. Lee did not opine
15 on in his expert report.

16 (3) Plaintiffs may request to depose Dr. Mai and/or submit a rebuttal report by
17 **July 29, 2022**.

18 (4) The current deadline to bring any pretrial motions is July 15, 2022. The Court
19 **EXTENDS** this deadline to **August 15, 2022**.

20 **IV. MOTION FOR PROTECTIVE ORDER**

21 The final motion in front of the Court is a motion by Plaintiffs for a protective
22 order to quash the deposition subpoenas served on their treating physicians by
23 Defendants. ECF No. 283. The motion involves five treating physicians: (1) Dr. John
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26 ¹ In Plaintiffs' opposition to the motion (ECF No. 281), Plaintiff also makes several
27 arguments regarding whether Dr. Lee and/or Dr. Mai are qualified under Federal Rule of
28 Civil Procedure 702. These arguments are not properly part of this motion and will not
be addressed.

1 Highum; (2) Dr. Nadine Sidrick; (3) Dr. James Grisiola; (4) Dr. Harry Henderson; and
2 (5) Dr. Don Miller.

3 It is not disputed how these treating physicians were disclosed to Defendants.
4 First, on February 2, 2022, Plaintiffs served “Supplemental Initial Disclosure Pursuant to
5 Federal Rules of Civil Procedure 26(a) and (e)” and listed Drs. Highum, Sidrick, and
6 Grisiola as “treating physicians of Plaintiffs for their neurologic and mental problems.”
7 ECF No. 287-1 at 10-11. Second, on May 20, 2022, Plaintiffs served a document titled
8 “Supplemental Disclosures” that included a section titled “MEDICAL TESTIMONY-
9 TREATING PHYSICIANS.” *Id.* at 6-7. This section listed the three previous doctors,
10 and also listed in addition Drs. Henderson and Miller. *Id.* at 7. The disclosure stated that
11 “Plaintiffs’ past and current treating physicians are designated as fact witnesses who
12 could be called to testify about Plaintiffs’ medical condition at trial pursuant to Rule
13 26(a)(1)(A)(ii).” *Id.* In addition, Plaintiffs claim that these doctors were also disclosed in
14 interrogatory responses as early as October 2021. ECF NO. 283-1 at 6-7. After receiving
15 the May 20, 2022 supplemental disclosures, Defendants issued deposition subpoenas.
16 *See* ECF Nos. 283-3; 283-4.

17 Plaintiffs argue that the deposition subpoenas came too late since fact discovery
18 closed on March 25, 2022. ECF No. 249. Plaintiffs argue that treating physicians are
19 treated like fact witnesses rather than expert witnesses, and that they have complied with
20 the disclosure requirements for fact witnesses. ECF No. 283-1 at 14. While
21 acknowledging that there are two types of expert witnesses under Rule 26—those
22 “retained or specially employed to provide expert testimony” that must provide expert
23 reports under Fed. R. Civ. P. 26(a)(2)(B) and those that are not required to provide expert
24 reports under Fed. R. Civ. P. 26(a)(2)(C)—Plaintiffs argue that the treatment notes and
25 evaluations have fulfilled these requirements as well. *Id.* at 15.

26 Rule 26 contemplate two different classes of experts: those “retained or specially
27 employed to provide expert testimony,” and witnesses who are not retained or specially
28 employed but, nevertheless, may provide expert testimony. *Carrillo v. B & J Andrews*

1 *Enterprises, LLC*, No. 2:11-CV-01450-RCJ, 2013 WL 394207, at *3 (D. Nev. Jan. 29,
2 2013). Those specially retain expert witnesses under Rule 26(a)(2)(B) must provide
3 expert reports, whereas other expert witnesses under Rule 26(a)(2)(C) must only be
4 disclosed with the following information: “(i) the subject matter on which the witness is
5 expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a
6 summary of the facts and opinions to which the witness is expected to testify.” Fed. R.
7 Civ. P. 26(a)(2)(C).

8 “Treating physicians are clearly experts” where they will testify regarding their
9 medical opinions. *Langermann v. Prop. & Cas. Ins. Co. of Hartford*, No. 2:14-CV-
10 00982-RCJ, 2015 WL 4724512, at *4 (D. Nev. Aug. 10, 2015). Listing a physician in
11 initial disclosures and providing medical records does not suffice to meet the disclosure
12 obligation under Rule 26(a)(2)(C). *Id.* (“These disclosures are insufficient to comply
13 with Plaintiff’s obligations under Rule 26(a)(2)(C). The disclosure contains no
14 information about the facts and opinions on which each provider is expected to testify as
15 required by Rule 26(a)(2)(C)(ii). The disclosure contains only the most generic, unhelpful
16 description of the subject matter on which each provider is expected to present evidence
17 under Rules 702, 703, or 705 Federal Rules of Evidence as required by Rule
18 26(a)(2)(C)(i) of the Federal Rules of Civil Procedure. Providing voluminous treating
19 provider medical records is simply insufficient to enable [defendant] to determine what
20 opinions the treating physicians will offer.”).

21 Based on this framework, it is clear that Plaintiffs cannot have it both ways. If
22 they want to want the five treating physicians to testify regarding their medical opinions
23 that would be considered expert opinions under Rule 702, they must be disclosed as
24 detailed in Rule 26(a)(2)(C). The way that they have been disclosed so far—through
25 supplemental initial disclosures and interrogatory responses—does not meet Rule
26 26(a)(2)(C)’s requirements. Conversely, if Plaintiffs do not want the treating physicians
27 to testify regarding medical opinions that would be considered expert opinions under
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1 Rule 702, they must be prepared to limit the testimony as such or risk *in limine* motions
2 that would exclude certain testimony.

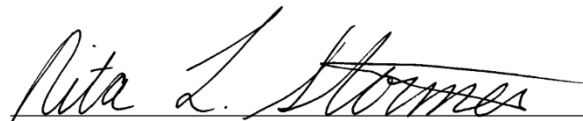
3 Plaintiffs have made contradictory statements in their filings with regard to
4 whether they consider these treating physicians as fact or expert witnesses. Thus, the
5 Court will **GRANT IN PART** and **DENY IN PART** this motion to allow the Plaintiffs
6 to clarify their position. The Court **ORDERS** as follows:

7 (1) By **July 8, 2022**, Plaintiffs must disclose to Defendants whether they are
8 designating the five treating physicians as experts under Fed. R. Civ. P.
9 26(a)(2)(C). If they are so designating, they must concurrently provide
10 disclosures as required under that rule. Providing treatment records does not
11 suffice to satisfy this requirement. If they are not designating the physicians as
12 such, the subpoenas will be quashed.

13 (2) If the treating physicians are timely designated as experts under Rule
14 26(a)(2)(C), the motion to quash the subpoenas is denied and Defendants will
15 be permitted to take depositions if desired on or before **July 29, 2022**.

16 **IT IS SO ORDERED.**

17 Dated: July 1, 2022

18 

19 Hon. Nita L. Stormes
20 United States Magistrate Judge