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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BERNARDO LUQUE-VILLANUEVA,
12 et al.,
13 Plaintiffs,
14 v.
15 COUNTY OF SAN DIEGO, et al.,
16 Defendants.

Case No.: 16cv2945-GPC (NLS)

ORDER :

(1) GRANTING EX PARTE MOTION FOR PLAINTIFF TO SIT FOR MENTAL EXAMINATION; and

(2) GRANTING IN PART AND DENYING IN PART MOTION TO AMEND SCHEDULING ORDER

[ECF No. 37]

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21 Before the Court is Defendants' *ex parte* motion for an order (1) requiring Plaintiff
22 Bernardo Luque-Villanueva to submit for a mental examination by their retained expert
23 witness and (2) amending the scheduling order. ECF No. 37. The Court ordered Plaintiff
24 to respond to the motion, and Plaintiff filed an affidavit in opposition. ECF Nos. 38, 39.
25 Defendants requested an opportunity to respond, which the Court granted, and filed a
26 reply. ECF No. 40. For the reasons set forth below, the Court (1) **GRANTS** the motion
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1 for Plaintiff to sit for a mental examination; and (2) **GRANTS IN PART AND DENIES**
2 **IN PART** the motion to amend the scheduling order.

3 **I. MOTION FOR MENTAL EXAMINATION**

4 **a. Background**

5 This case arises from an altercation between Plaintiffs and Defendant San Diego
6 County Deputy Sheriff James Steinmeyer that took place January 23, 2016. ECF No. 19
7 ¶¶ 26. Plaintiffs allege that they exited a bar early that morning, went into a 7-Eleven
8 store with their friends, and when they exited the store, Defendant Steinmeyer and other
9 officers approached them and pointed a taser at them, ordering them to put their hands
10 behind their backs. *Id.* ¶¶ 31-40. Plaintiffs allege that they were not drunk or acting
11 disorderly at the time. *Id.* ¶ 43. Plaintiffs allege that Defendants then sprayed them with
12 pepper-spray, and officers physically forced Plaintiff Luque-Villaneuva to pull his hands
13 behind his back and strangled and choked him as he was tackled and held on the ground.
14 *Id.* ¶¶ 55-56.

15 Defendants request that Plaintiff Luque-Villanueva be ordered to sit for a mental
16 examination. On March 30, 2018, the date on which the parties exchanged initial expert
17 witness disclosures, Plaintiff designated a clinical and forensic psychologist, Dr. Nina
18 Rodd, as a retained expert witness and submitted her expert report. ECF No. 37 at 1; *see*
19 *also* ECF No. 39, Ex. A. Dr. Rodd was referred in order to evaluate whether Plaintiff
20 “suffer[s] from any psychological disorder” as a result of the alleged wrongful arrest and
21 physical violence against him, and if so, what the effects were on his psychological,
22 social, and occupational functioning. ECF No. 39, Ex. A at 1. In order to complete this
23 evaluation, Dr. Rodd performed a clinical interview, mental status examination, and
24 various psychological tests on Plaintiff (including the MMPI-2, Trauma Symptoms
25 Inventory, Personal Assessment Inventory, and Beck Depression Inventory), all of which
26 took 6.25 hours. *Id.* at 11.

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1 **b. Legal Standards**

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

9 A Rule 35 examination requires a showing that the party’s mental or physical
10 condition is “in controversy” and that there is “good cause” supporting the order.
11 *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964). More than a showing of “mere
12 relevance” is required to meet this standard. *Id.* at 118. A claim of emotional distress
13 can place a person’s mental state “in controversy” if accompanied with one or more of
14 the following: “(1) a cause of action for intentional or negligent infliction of emotional
15 distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a
16 claim of unusually severe emotional distress; (4) plaintiff’s offer of expert testimony to
17 support a claim of emotional distress; or (5) plaintiff’s concession that his or her mental
18 condition is ‘in controversy.’” *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal.
19 1995). The following factors are considered in determining if there is “good cause” to
20 permit the examination: “(1) the possibility of obtaining desired information by other
21 means; (2) whether plaintiff plans to prove her claim through testimony of expert
22 witnesses; (3) whether the desired materials are relevant, and; (4) whether plaintiff claims
23 ongoing emotional distress.” *Mailhoit v. Home Depot U.S.A., Inc.*, No.
24 CV1103892DOCSSX, 2013 WL 12122580, at *4 (C.D. Cal. Jan. 24, 2013).

25 **c. Discussion**

26 Here, the Court finds that ordering Plaintiff to submit for a mental examination is
27 appropriate. Plaintiff has put his mental state “in controversy” since he maintains a cause
28 of action for intentional infliction of emotional distress (*see* ECF No. 19 at 40-41), and

1 has submitted supporting expert testimony. Factors that establish “good cause” to order
2 the examination include the submission of the expert report as evidence of Plaintiff’s
3 claim and because the expert report also states that Plaintiff claims ongoing mental
4 distress symptoms. In addition, because the expert report was based on a mental
5 examination of Plaintiff, Defendants should have a fair opportunity to have their expert
6 perform a similar examination in order to rebut the expert testimony.

7 Plaintiff argues that the examination should not be allowed because it is degrading
8 and invasive and Defendants’ request is untimely because Dr. Rodd’s report was
9 disclosed to Defendants earlier on during discovery.¹ ECF No. 39 at 4-5. As to the
10 invasive nature of the exam, this is likely true for any mental examination to some degree
11 and Plaintiff puts forth no reason why this is exacerbated in his case or why it should
12 prevent the examination when there is good cause otherwise. As to timeliness, as
13 Defendants point out, Dr. Rodd was only formally designated as an expert on March 30.
14 Moreover, in light of the posture of the claims at issue and the Court’s preference for
15 deciding cases on the merits, the Court finds it appropriate to permit the exam.

16 **d. Scope of Examination**

17 Defendants propose to have their rebuttal expert, Dr. Dominick Addario, a board
18 certified psychiatrist, evaluate Plaintiff Luque-Villaneuva at Dr. Addario’s office, located
19 at 3010 First Avenue, San Diego, CA 92103. ECF No. 37 at 2-3. Dr. Addario intends to
20 conduct a face-to-face clinical interview with Plaintiff, during which background
21 information/history will be collected and a mental status examination will be conducted.
22 *Id.* at 3. He also plans to conduct psychological testing, which may include (1) the
23 MMPI-2 and the Millon Clinical Multiaxial Inventory-III, which assess depression,
24 personality features, symptoms and thought processes, and (2) self-assessment tests

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27 ¹ Plaintiff spent three pages of his five-page opposition filing complaining of discovery conduct that was
28 wholly unrelated to the issues in Defendants’ *ex parte* motion. *See* ECF No. 39 at 2-4. The Court admonishes that the filing was not the appropriate forum to air any such grievances and does not take into consideration any of the unrelated content filed therein.

1 depending on symptomology, such as the Beck Depression Inventory Test and the Beck
2 Anxiety Inventory Test. *Id.* Dr. Addario's expert report will be offered to address/rebut
3 the opinions of Dr. Rodd and will be shared promptly with Plaintiffs once completed. *Id.*
4 Dr. Addario estimates that the time to complete the examination will be four to six hours.
5 *Id.*

6 The Court finds this scope of the examination to be appropriate for the rebuttal
7 expert report. Accordingly, the Court **GRANTS** the motion and **ORDERS** as follows:

8 (1) Plaintiff Bernardo Luque-Villanueva is ordered to undergo a mental
9 evaluation with Defendants' board certified psychiatrist, Dr. Dominick Addario, to be
10 conducted on **June 5, 2018** at **12:00 p.m.** at 3010 First Ave., San Diego, CA 92103.

11 (2) The examination will be conducted for the purpose of determining the nature
12 and extent of plaintiff's severe emotional distress as alleged in the first amended
13 complaint in this action. The examination shall last no more than six hours,
14 encompassing both the clinical interview and psychological testing components.

15 **II. MOTION TO AMEND SCHEDULE**

16 Defendants request an extension to all case schedule dates in order to (1)
17 accommodate the mental examination, and (2) in light of Defendants' counsel's
18 upcoming maternity leave. ECF No. 37 at 5-6. While the Court will grant a brief
19 extension on dates that will necessarily be affected by the discovery ordered above, the
20 Court declines to grant the full extension requested on other dates at this time.

21 Accordingly, the dates that will be modified are as follows:


22 CASE LITIGATION	23 PRESENTLY	24 NEW ENLARGED
25 EVENT	26 SCHEDULED DATES	27 DATES
28 Deadline for Dr. Addario's Report		June 12, 2018
Expert Witness Discovery Deadline (for all but Dr. Addario)	May 7, 2018	May 21, 2018

1	Expert Witness Discovery		June 26, 2018
2	Deadline for Dr. Addario (if		
3	any)		
4	All Pre-Trial Motions filing	May 11, 2018	May 25, 2018
5	deadline		
6	Mandatory Settlement	May 16, 2018 at 2:30 p.m.	June 11, 2018 at 2:30 p.m.
7	Conference		
8	Pre-trial disclosure	June 15, 2018	June 29, 2018
9	requirements of Fed. R.		
10	Civ. P. 26(a)(3)		
11	Local Rule 16.1(f)(4)	June 22, 2018	July 6, 2018
12	requirements and meeting		
13	Pretrial order and meeting	June 29, 2018	July 13, 2018
14	pursuant to Civil Local		
15	Rule 16.1(f).		
16	Proposed Final Pretrial	July 6, 2018	July 20, 2018
17	Conference Order		
18	Final Pretrial Conference	July 13, 2018 at 1:30 p.m.	July 27, 2018 at 1:30 p.m.

16 All other dates will remain as previously set.

17 **IT IS SO ORDERED.**

18 Dated: May 10, 2018

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