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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TRICIA MULLINS,
12 Plaintiff,
13 v.
14 HORIZON PHARMA USA, INC., and
15 DOES 1-10, inclusive,,
16 Defendants.

Case No.: 18cv399-BAS (NLS)

ORDER:

**(1) GRANTING JOINT MOTION
FOR INDEPENDENT MEDICAL
EXAMINATIONS OF PLAINTIFF;
and**

**(2) GRANTING JOINT MOTION TO
EXTEND EXPERT DISCLOSURE
DEADLINE**

[ECF Nos. 23, 24]

21 Before the Court is the parties' joint motion for an Independent Medical
22 Examination ("IME") of Plaintiff Tricia Mullins ("Plaintiff"). ECF No. 24.
23 Additionally, the parties also request that the Court extend certain expert disclosure
24 deadlines. ECF No. 23. For the reasons set forth below, the Court (1) **GRANTS** the
25 motion for Plaintiff to sit for an IME; and (2) **GRANTS** the motion to extend the expert
26 disclosure deadline.

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1 **1. MOTION FOR INDEPENDENT MEDICAL EXAMINATION**

2 Since the reason parties assert for requesting the extension of expert disclosure
3 deadlines is the need for an IME, the Court will first address whether an IME will be
4 granted.

5 **a. Background**

6 In her complaint, Plaintiff alleges that she was wrongfully terminated by
7 Defendant Horizon Pharma USA, Inc. (“Defendant”). ECF No. 1 at ¶ 1. Prior to
8 working for Defendant, in 2013 Plaintiff alleges that she filed a whistleblower action
9 against her then employer, Aegerion Pharmaceuticals, Inc. (“Aegerion”), pursuant to the
10 False Claims Act. *Id.* at ¶ 12. In September 2017, Aegerion plead guilty to criminal
11 charges and agreed to pay a \$28.8 million settlement, which resolved Plaintiff’s
12 whistleblower action. *Id.* at ¶ 14. Plaintiff alleges that three months after Defendant was
13 notified that she had been a whistleblower in the Aegerion case, she was terminated. *Id.*
14 at ¶ 19. Plaintiff alleges that she had received positive feedback from her supervisors
15 regarding her job performance, yet was terminated due to misconduct, which she denies
16 and categorizes as pretext. *Id.* at ¶¶ 20, 22. As a result of her termination, Plaintiff
17 alleges that she has “suffered damages in the form of severe emotional distress, . . .
18 mental anguish, and trauma[.]” *Id.* at ¶ 40. Among other relief, Plaintiff seeks emotional
19 distress damages from her retaliation and wrongful termination claims. *Id.* at ¶¶ 29, 32,
20 36. In addition, she alleges a cause of action for intentional infliction of emotional
21 distress, and seeks damages pertaining to this claim as well. *Id.* at ¶¶ 40-41.

22 **b. Legal Standard**

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

1 will perform it.” Fed. R. Civ. P. 35(a)(2).

2 A Rule 35 examination requires a showing that the party’s mental or physical
3 condition is “in controversy” and that there is “good cause” supporting the order.
4 *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964). More than a showing of “mere
5 relevance” is required to meet this standard. *Id.* at 118. A claim of emotional distress
6 can place a person’s mental state “in controversy” if accompanied with one or more of
7 the following:

- 8 (1) a cause of action for intentional or negligent infliction of emotional
9 distress; (2) an allegation of a specific mental or psychiatric injury or disorder;
10 (3) a claim of unusually severe emotional distress; (4) plaintiff’s offer of
11 expert testimony to support a claim of emotional distress; or (5) plaintiff’s
concession that his or her mental condition is ‘in controversy.’

12 *Turner v. Imperial Stores*, 161 F.R.D. 89, 95 (S.D. Cal. 1995). The following factors are
13 considered in determining if there is “good cause” to permit the examination: “(1) the
14 possibility of obtaining desired information by other means; (2) whether plaintiff plans to
15 prove her claim through testimony of expert witnesses; (3) whether the desired materials
16 are relevant, and; (4) whether plaintiff claims ongoing emotional distress.” *Mailhoit v.*
17 *Home Depot U.S.A., Inc.*, No. CV1103892DOCSSX, 2013 WL 12122580, at *4 (C.D.
18 Cal. Jan. 24, 2013).

19 c. Discussion

20 Here, the Court finds that ordering Plaintiff to submit for an IME is appropriate.
21 Several of the factors under *Mailhoit* are met here. Plaintiff has put her mental state “in
22 controversy” since she maintains a cause of action for intentional infliction of emotional
23 distress. *See* ECF No. 1 at ¶¶ 38-41. Plaintiff has also indicated that certain “non-
24 retained expert witnesses, her treating physicians, will offer testimony regarding the
25 effect of stress on her multiple sclerosis symptoms and/or treatment[.]” ECF No. 24 at 2.
26 Additionally, the desired IME is relevant to her claim of intentional infliction of
27 emotional distress, as well as her request for emotional distress damages for other claims.
28 Moreover, in light of the posture of the claims at issue and the Court’s preference for

1 deciding cases on the merits, the Court finds it appropriate to permit the exam.

2 **d. Scope of Examination**

3 The parties propose that Dr. Ben Frishberg and Dr. Mark Kalish evaluate Plaintiff
4 at Dr. Frishberg's office, located at 6010 Hidden Valley Rd, Suite 200, Carlsbad, CA
5 92011. ECF No. 24 at 2. Dr. Frishberg intends to conduct an exam regarding Plaintiff's
6 multiple sclerosis diagnosis, and Dr. Kalish intends to conduct a psychiatric interview
7 and psychiatric testing, which may include the Minnesota Multiphasic Personality
8 Inventory 2 ("MMPI-2"). *Id.* The parties estimate that the IME will take seven hours,
9 exclusive of breaks. *Id.* The parties also plan to record the IME via audio tape. *Id.*

10 The Court agrees that Dr. Kalish's examination is needed because of Plaintiff's
11 emotional distress claims, and finds that Dr. Frishberg's examination is also needed, and
12 not duplicative, because Plaintiff has claimed that the emotional distress exacerbated her
13 multiple sclerosis. *See id.* at 2. Thus, the Court finds the scope of the examination to be
14 appropriate.

15 Accordingly, the Court **GRANTS** the motion and **ORDERS** as follows:

- 16 (1) Plaintiff is ordered to undergo an IME with Dr. Ben Frishberg and Dr. Mark
17 Kalish, to be conducted on **April 16, 2019** at **8:30 a.m.** at 6010 Hidden
18 Valley Rd, Suite 200, Carlsbad, CA 92011.
- 19 (2) The examination will be conducted for the purpose of determining the nature
20 and extent of plaintiff's emotional distress as alleged in the first complaint in
21 this action. The examination shall last no more than seven hours,
22 encompassing both doctor's exams, interviews, and the psychological testing
23 components.

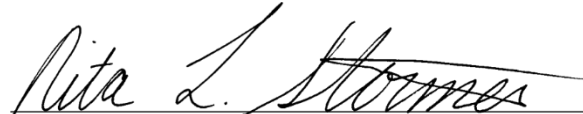
24 **2. MOTION FOR EXTENSION OF EXPERT DISCLOSURE DEADLINE**

25 The parties request a limited extension of expert disclosure deadlines, only as to
26 the doctors performing the IME, Dr. Frishberg and Dr. Kalish. ECF No. 23. The parties
27 contend that they have been working diligently and in good faith to find available dates
28 for the IME, but were unable to identify any mutually agreeable dates in March. *Id.* at 2.

1 Since the Court has granted the IME, the Court finds good cause to **GRANT** the request
2 for a limited extension; however this extension will not alter any other dates in the
3 scheduling order. The Court will extend the expert disclosure deadline for Dr. Ben
4 Frishberg and Dr. Mark Kalish to **April 30, 2019**. All other dates shall remain as
5 previously set.

6 **IT IS SO ORDERED.**

7 Dated: March 18, 2019



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9 Hon. Nita L. Stormes
10 United States Magistrate Judge
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