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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SAINT BROWN, an individual, et al.,  
12 Plaintiffs,  
13 v.  
14 CAMP PENDLETON & QUANTICO  
15 HOUSING, LLC, a Delaware limited  
16 liability company, et al.,  
17 Defendants.

Case No.: 23-cv-567-JES-DDL

**ORDER GRANTING JOINT  
STIPULATION AND MOTION FOR  
FED. R. CIV. P. 35 EXAMINATION**

**[Dkt. No. 22]**

18 **I.**

19 **INTRODUCTION**

20 Before the Court is the parties' Joint Stipulation and Motion for an order permitting  
21 the medical examination of Plaintiffs Saint Brown and Christine Brown ("Plaintiffs")  
22 pursuant to Federal Rule of Civil Procedure 35 ("Joint Motion"). Dkt. No. 22.

23 **II.**

24 **LEGAL STANDARD**

25 Upon motion and for good cause shown, the Court may order any party "whose  
26 mental or physical condition . . . is in controversy to submit to a physical or mental  
27 examination by a suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1) and (2).  
28 "A [party's] mental or physical condition is 'in controversy' when such condition is the

1 subject of the litigation.” *Robertson v. City of San Diego*, No. 13cv1460W(JLB), 2014  
2 WL 6810726, at \*1 (S.D. Cal. Dec. 2, 2014).<sup>1</sup> “[T]o establish that [a] party’s mental  
3 condition is ‘in controversy’” for purposes of Rule 35, “the moving party must show more  
4 than that the party in question has claimed emotional distress.” *Turner v. Imperial Stores*,  
5 161 F.R.D. 89, 97 (S.D. Cal. 1995). However, where “the case[] involve[s], in addition to  
6 a claim of emotional distress, one or more of the following,” a Rule 35 examination may  
7 be warranted:

- 8 1) a cause of action for intentional or negligent infliction of
- 9 emotional distress; 2) an allegation of a specific mental or
- 10 psychiatric injury or disorder; 3) a claim of unusually severe
- 11 emotional distress; 4) plaintiff’s offer of expert testimony to
- 12 support a claim of emotional distress; and/or 5) plaintiff’s
- 13 concession that his or her mental condition is “in controversy”
- 14 within the meaning of Rule 35(a).

14 *Id.* at 95. “Although Rule 35 is to be construed liberally in favor of granting discovery,  
15 ‘garden variety’ emotional distress is insufficient to put a plaintiff’s mental condition in  
16 controversy.” *See Hung Nguyen v. Regents of the Univ. of Cal.*, No. 8:17-cv-00423-JVS-  
17 KES, 2018 WL 6112617, at \*2 (C.D. Cal. Jul. 26, 2018). “Garden variety” emotional  
18 distress is that which is “normally associated with or attendant to” the alleged injuries. *See*  
19 *Houghton v. M & F Fishing, Inc.*, 198 F.R.D. 666, 669 (S.D. Cal. 2001).

20 Rule 35 also requires any order for a mental examination be supported by a showing  
21 of good cause. *See Fed. R. Civ. P. 35(a)*. “‘Good cause’ generally requires a showing of  
22 specific facts justifying discovery.” *Montez v. Stericycle, Inc.*, No. 1:12-CV-0502-AWI-  
23 BAM, 2013 WL 2150025, at \*2 (E.D. Cal. May 16, 2013). To determine if good cause  
24 exists to order a party to submit to examination, the Court will consider “(1) the possibility  
25 of obtaining desired information by other means; (2) whether plaintiff plans to prove her  
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28 <sup>1</sup> All citations and internal quotation marks are omitted unless otherwise stated.

1 claim through testimony of expert witnesses; (3) whether the desired materials are relevant;  
2 and (4) whether plaintiff claims ongoing emotional distress.” *See Erhart v. BofI Holding,*  
3 *Inc.*, No. 15-CV-2287-BAS-NLS, 2018 WL 4961513, at \*2 (S.D. Cal. Oct. 12, 2018).

### 4 **III.**

#### 5 **DISCUSSION**

6 The Court agrees with the parties that Rule 35 examinations of Plaintiffs are  
7 warranted because Plaintiffs’ mental condition is “in controversy,” and the circumstances  
8 surrounding the request support a finding of good cause. First, Plaintiffs assert a claim for  
9 negligent infliction of emotional distress (“NIED”). *See* Dkt. No. 1 at 49. In support of  
10 this claim, Plaintiffs allege that they “have suffered severe and substantial emotional  
11 distress, worry, anxiety, loss of sleep, frustration, and pain and suffering as a result of the  
12 exposure to toxic mold, and as a result of the physical and psychological impact such  
13 exposure has had on Plaintiffs.” *Id.* at ¶ 110. Having alleged these facts in support of their  
14 NIED claim, Plaintiffs have made their mental condition “the subject of the litigation” such  
15 that it satisfies Rule 35’s “in controversy” requirement. *Robertson*, 2014 WL 6810726,  
16 at \*1. Further, in the Joint Motion, the parties “agree the existence and extent of Plaintiffs’  
17 mental health claims remain at issue in the instant action,” which indicates Plaintiffs’  
18 concession that their mental condition is “in controversy.” Dkt. No. 22 at 2-3.

19 Plaintiffs further allege they “have suffered severe, substantial, enduring, serious  
20 emotional distress.” *Id.* at ¶ 111. The requested Rule 35 examination is relevant to a  
21 determination regarding the severity and duration of Plaintiffs’ emotional distress.  
22 Moreover, the allegedly “enduring” nature of Plaintiffs’ emotional distress supports a  
23 finding of good cause for the Rule 35 examinations. *See Erhart*, 2018 WL 4961513, at \*2.

### 24 **IV.**

#### 25 **CONCLUSION**

26 For the foregoing reasons, the Joint Motion for an order permitting the Rule 35  
27 examinations of Plaintiffs is **GRANTED**. Pursuant to the parties’ stipulation, the Court  
28 **ORDERS** as follows:

- 1 1. The Rule 35 examiner shall be a clinical and forensic psychologist, Bruce  
2 Yanofsky, Ph.D., retained as an expert by Defendants.
- 3 2. Plaintiff Christine Brown's examination will be conducted by remote  
4 videoconference beginning at **10:00 a.m.** on **November 28, 2023.**
- 5 3. Plaintiff Saint Brown's examination will be conducted by remote  
6 videoconference beginning at **10:00 a.m.** on **November 30, 2023.**
- 7 4. Plaintiffs agree to bring a list of all medications that they are presently taking,  
8 as well as their dosage, to the examination.
- 9 5. The examinations shall consist of a mental examination involving a taking of  
10 a history and symptoms relative to the alleged incident. The session will focus  
11 on assessing Plaintiffs' present mental health, as well as a forensic evaluation  
12 of Plaintiffs' past mental health concerns, as well as the extent of the  
13 exacerbation of those concerns by the incident, if any.
- 14 6. Dr. Yanofsky may administer psychiatric tests verbally or by providing  
15 Plaintiffs the opportunity to draft a written response. The examinations will  
16 not include any test or procedure that is painful, protracted, or intrusive. No  
17 audio or videotaped recordings of the examination will be taken.
- 18 7. Dr. Yanofsky shall make written reports of the examinations within a  
19 reasonable amount of time after the completion of the examination.
- 20 8. The written reports shall be detailed and set forth Dr. Yanofsky's findings,  
21 including diagnoses, conclusions, and the results of any tests.
- 22 9. Defendants' counsel shall cause a copy of Dr. Yanofsky's reports to be sent  
23 to Plaintiffs' counsel within a reasonable amount of time after their receipt by  
24 Defendants' counsel.
- 25 10. After the delivery of the report, Plaintiff shall have the right to take a  
26 discovery deposition of Dr. Yanofsky.
- 27 11. No person, other than Dr. Yanofsky, shall participate in any way in the  
28 examination or in the evaluation or diagnosis of Plaintiffs.

1           12. This examination shall be the only Rule 35 examination that shall be  
2           conducted in this case absent a Court order or an additional stipulation  
3           between the parties.

4           **IT IS SO ORDERED.**

5 Dated: November 14, 2023



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7 Hon. David D. Leshner  
8 United States Magistrate Judge

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