

1 examination. Dr. Neiman-Kimel’s proposed IME would consist of review of the records, an
2 interview with the parents, and administration of 12 standard tests that measure the emotional,
3 social and cognitive functioning of the child. The IME would take place over two days to make it
4 more tolerable for the minor child and there is no recording or outsider observation permitted due
5 to the proprietary nature of the tests and threat of influence that could undermine the reliability of
6 the tests. Defendant agreed to provide the list of testing to be administered to Plaintiffs’ Counsel
7 along with the raw data to Plaintiffs’ qualified experts – but not to counsel due to ethical
8 obligations. The parties attempted to meet and confer until March 1, 2021, but ultimately were
9 not able to agree on the need for the examination and parameters, which necessitated this motion
10 practice.

11 Plaintiffs respond that the minor child should not have to undergo a medical examination
12 by a defense expert. (ECF No. 37). They emphasize the underlying circumstances under which
13 this action was brought, including repeated examinations by police, doctors, counselors, and Dr.
14 Roitman that the minor child has already endured. Plaintiffs insist that an observer should be
15 permitted to be present during the IME. They also seek for it to be recorded and object to the two
16 day time frame.

17 Defendant replies that the proposed IME is not a two day marathon, but rather, is a
18 carefully selected set of testing to provide a guide into the impact that the subject incident had on
19 the minor child’s emotional, social, developmental, and cognitive status. (ECF No. 38). The
20 Court notes that it will consider the reply to be timely filed in an effort to fully consider this
21 matter on the merits. Defendant also emphasizes that the tests are standard test for this type of
22 examination and their contents cannot be fully disclosed due to proprietary reasons. Further,
23 Defendant highlights that Plaintiffs do not dispute that the minor child’s mental injury is in
24 controversy so the good cause standard has been satisfied. Moreover, Defendant notes that it
25 even selected a female examiner rather than the typical local male neuropsychologist such that the
26 minor child would feel more comfortable. Ultimately, Defendant contends that it has a right to
27 prepare its defense and needs the IME to level the playing field given Plaintiffs’ use of Dr.
28 Roitman and his expert report.

1 **II. DISCUSSION**

2 Fed.R.Civ.P. 35 governs the IME requested here. Rule 35 expressly states that it is within
3 the Court’s discretion to order a party whose mental and physical condition is in controversy to
4 submit to a mental examination by a suitably licensed or certified examiner. Courts have utilized
5 the following factors to determine if an examination is appropriate: in addition to a claim of
6 emotional distress, one or more of the following – (1) a cause of action for intentional or
7 negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric
8 injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff’s offer of expert
9 testimony to support a claim of emotional distress; and/or (5) plaintiff’s concession that his/her
10 mental condition is in controversy within the meaning of Rule 35(a). *Turner v. Imperial Stores*,
11 161 F.R.D. 89, 95 (S.D. Cal. 1995); *see also Gurshin v. Bank of America, N.A.*, 2016 WL 384929
12 (D. Nev. Jan. 27, 2016). Moreover, this District Court has found it appropriate to permit a
13 defense examination where a plaintiff has had ample opportunity for examination by her own
14 expert. *See Painter v. Atwood*, 2013 WL 548059 (D. Nev. Sept. 26, 2013). Furthermore, courts
15 have denied the request for the presence of a third party when the examination involves a minor
16 in light of concerns that an observer may invalidate the testing results, fail to provide a level
17 playing field, and create an adversarial environment rather than a neutral examination. *See*
18 *Ashley v. City & Cnty. of San Francisco*, 2013 WL 2386655 (N.D. Cal. May 30, 2013).

19 First, there is no doubt that the minor child’s mental condition is in controversy in this
20 action. Indeed, Plaintiffs retained their own expert, Dr. Roitman, to opine on the minor child’s
21 mental condition. Plaintiffs have also disclosed a computation of damages that includes over
22 \$70,000 in medical specials for therapy, of which the majority is future care recommended by Dr.
23 Roitman. There is no other means to obtain the desired information as a review of the medical
24 records or Dr. Roitman’s report alone will not suffice. Notably, Plaintiffs’ opposition never
25 suggests that the minor child has been subject to the mental testing proposed by Defendant.
26 Rather, they list other testing like interviews by police detectives and nurses at UMC, which are
27 not comparable. Additionally, Plaintiffs intend to submit Dr. Roitman to prove the claimed
28 damages of emotional distress. To ensure that Defendant is able to adequately prepare its defense

1 and for this matter to be tried on the merits, the principles of fairness and equity justify permitting
2 Defendant to have its own expert opine on the minor child's mental condition after an
3 examination. As such, the Court finds good cause for the psychological examination.

4 Further, there is no dispute over Dr. Neiman-Kimel's credentials to conduct the IME for
5 Defendant. Rather, Plaintiffs' opposition is focused on shielding the child from further trauma
6 after all that she has been through. While the Court is mindful and empathetic to Plaintiffs'
7 position, the Court finds that appropriate parameters can be placed on the IME to address these
8 concerns and ensure that the minor child (who is now 14 years old) is protected as much as
9 possible. Although the opposition resorts to rather inflammatory language to argue their point,
10 the Court finds it appropriate to issue a note of caution. The IME is of a minor child and likely
11 will discuss sensitive information. The utmost professionalism and care shall be extended to the
12 minor child and the highest level of civility shall be utilized amongst counsel for both sides
13 during the IME process.

14 As for the parameters of the IME, the Court agrees that a two day format may be used for
15 the testing. This is not two full 8 hour days, but rather, the two day format is to make it easier on
16 the minor child. The totality of the IME shall be completed between six to eight hours, which is a
17 standard timeframe for the proposed testing. The list of testing shall be provided to Plaintiffs'
18 counsel – which is outlined in Defendant's Motion (ECF No. 35, p. 13, Ins. 9-20). The Court is
19 aware of Plaintiffs' objection that Defendant must explain each of the proposed tests and their
20 relevance, but finds that not convincing. It is clear from the nature of the tests that they are
21 designed to obtain data on the minor child's mental state. The Court has sufficient information to
22 find good cause to permit all of the tests to proceed.

23 Counsel for the parties shall meet and confer and find a mutually agreeable date and time
24 for the examination to be conducted within the next 60 days. No observer shall be present for the
25 testing, but the parents shall be permitted to remain on site and confer with their daughter on
26 breaks as needed. Also, the IME shall not be recorded for counsel to review. The Court has not
27 been presented with sufficient evidence that any recording is necessary under these specific
28 circumstances. The parties involved are professionals and the Court finds that an observer or a

1 recording would be more likely to disrupt the examination rather than protect from an
2 unscrupulous examination.

3 No stipulation shall be put on Dr. Neiman-Kimel's opinion as the parties have an
4 opportunity to dispute expert reports during the motions in limine stage of the litigation. Further,
5 production of the report and raw data shall be made in accordance with the discovery plan and
6 scheduling order deadlines for expert and rebuttal expert disclosures. Finally, to the extent that
7 Plaintiffs seek to take Dr. Neiman-Kimel's deposition, they may conduct it via remote means if
8 they wish to avoid the costs and burden of travelling.

9 As for Defendant's Motion to Seal (ECF No. 36), the Court finds that Defendant has met
10 the standard to seal with respect to Dr. Roitman's expert report. Although the fact that the
11 information was disclosed as confidential under the Protective Order is not alone sufficient, it is
12 the type of confidential health information that may be protected by the Ninth Circuit's directives
13 in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006) and *Center for Auto*
14 *Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016). The Court finds that
15 protecting confidential health information is a compelling reason to seal Exhibit E-2. *See, e.g.,*
16 *Youtoo Techs., Inc. v. Twitter, Inc.*, 2017 WL 3396496 at *2 (D. Nev. Aug. 7, 2017). Therefore,
17 the Court will grant Defendant's Motion to Seal (ECF No. 98).

18 **III. CONCLUSION**

19 **IT IS THEREFORE ORDERED** that Defendant's Motion to Compel an Independent
20 Psychological Examination (ECF No. 35) is **granted**.

21 **IT IS FURTHER ORDERED** that Defendant's Motion for Leave to File Exhibit Under
22 Seal (ECF No. 36) is **granted**.

23 DATED: April 26, 2021.

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26 DANIEL J. ALBRECHTS
27 UNITED STATES MAGISTRATE JUDGE
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