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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

15
16 VANESSA BRYANT,
17
18 Plaintiff,
19
20 v.
21 COUNTY OF LOS ANGELES, et al.,
22
23 Defendants.

CASE NO. 2:20-cv-09582-JFW-E
DISCOVERY MATTER
NOTICE OF MOTION AND JOINT
STIPULATION REGARDING
DEFENDANT COUNTY OF LOS
ANGELES' MOTION TO COMPEL
INDEPENDENT MEDICAL
EXAMINATIONS OF PLAINTIFFS

Assigned to Hon. John F. Walter and
Magistrate Judge Charles F. Eick

Hearing Date: November 5, 2021
Time: 9:30 a.m.
Place: Courtroom 750

Discovery Cutoff: November 29, 2021
Pretrial Conference: February 4, 2022
Trial: February 22, 2022

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1 **TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 Please take notice that on November 5, 2021 at 9:30 a.m., or as soon
4 thereafter as this matter may be heard in Courtroom 750 of the above-captioned
5 Court, located at 255 East Temple Street, Los Angeles, California 90012, Defendant
6 County of Los Angeles (the “County”) will and hereby does move pursuant to
7 Federal Rule of Civil Procedure 35 for an order compelling Plaintiffs Vanessa
8 Bryant; Matthew Mauser; P.M., T.M., and I.M.; Christopher L. Chester; R.C. and
9 H.C.; and John James Altobelli and Alexis Altobelli (collectively, “Plaintiffs”) to
10 appear for independent medical examinations (“IMEs”) conducted by Marc A.
11 Cohen, M.D. (for Plaintiffs age 17 and up) and Christopher R. Thompson, M.D (for
12 the child/adolescent Plaintiffs P.M., T.M. and I.M.).

13 Pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 37-2, the
14 County respectfully submits the following Joint Stipulation Regarding Motion to
15 Compel Independent Medical Examinations of Plaintiffs. Plaintiffs have put their
16 mental condition in controversy by asserting claims for ongoing, severe emotional
17 distress, anxiety and depression. IMEs are not only relevant, but necessary for the
18 County to mount its defense to these claims and to evaluate the existence, extent and
19 nature of Plaintiffs’ alleged emotional injuries.

20 This Motion is based upon this Notice of Motion, the Joint Stipulation, the
21 Declaration of Casey B. Sypek and exhibits thereto, the Declaration of Marc A.
22 Cohen, M.D. and exhibits thereto, the Declaration of Christopher R. Thompson,
23 M.D. and exhibits thereto, and any other papers or argument of counsel that may be
24 filed or submitted in connection with this Motion.

25 In accordance with Local Rule 37-1, the County met and conferred with
26 Plaintiffs in good faith before filing this Motion. (*See* Declaration of Casey B.
27 Sypek ¶¶ 16-20 & Exs. O-R.)
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DATED: October 15, 2021

MILLER BARONDESS, LLP

By: 

CASEY B. SYPEK
Attorneys for Defendants
COUNTY OF LOS ANGELES, LOS
ANGELES COUNTY FIRE
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JOINT STIPULATION

I. INTRODUCTION

A. The County’s Position

Plaintiffs are suing Defendant County of Los Angeles (the “County”) for tens of millions of dollars based solely on their claimed “severe emotional distress.” Despite putting their mental condition front and center in this case, Plaintiffs refuse to submit to independent medical examinations (“IMEs”). The County brings this motion to compel IMEs of the Plaintiffs, which are necessary to evaluate the existence, extent and nature of Plaintiffs’ alleged emotional injuries. Plaintiffs cannot claim that they are suffering from ongoing depression, anxiety and severe emotional distress and then balk at having to support their claims.

Plaintiffs’ claims arise from the investigation of a tragic helicopter crash that took the lives of nine individuals. Plaintiffs, the surviving family members of the crash victims, assert claims for violation of the Fourteenth Amendment, negligence, invasion of privacy and intentional infliction of emotional distress. The basis for these claims is that Defendants showed accident site photos to other government personnel and to a bartender. None of the photos were sent to anyone outside the County. Plaintiffs allege that, as a result of this conduct by Defendants, they have suffered and continue to suffer severe emotional distress, depression, anxiety, constant fear and continuous agony. Plaintiffs claim that, because of Defendants’ conduct, it is “impossible for [them] to have any peace of mind ever again.” (Declaration of Casey B. Sypek (“Sypek Decl.”) Ex. Y at 8:12-13.) Plaintiffs’ only and entire damages claims are for these mental and emotional injuries.

Defendants’ position is that, while Plaintiffs have undoubtedly suffered severe distress and trauma from the crash and resulting loss of their loved ones, their distress was not caused by Defendants or any accident site photos that were never publicly disseminated. IMEs are not only necessary to evaluate the nature and extent of Plaintiffs’ alleged injuries, they are critical to the County’s defense.

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1 Accordingly, Defendants asked Plaintiffs to stipulate to IMEs with properly
2 trained, board-certified forensic psychiatrists. (Sypek Decl. ¶ 16.) After weeks of
3 stalling and evading, Plaintiffs refused to submit to IMEs, necessitating this motion.
4 (*Id.* ¶¶ 16-20.)

5 The United States Supreme Court has held that a plaintiff who alleges mental
6 injury places his or her mental condition in controversy and provides a defendant
7 with good cause for an IME to determine the existence and extent of that injury.
8 *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964). Plaintiffs’ claimed mental and
9 emotional injuries are all over their complaints, discovery responses and briefing
10 submitted to this Court. On top of that, Plaintiff Bryant has designated a lineup of
11 celebrity witnesses to come into court and corroborate her claims of severe
12 emotional distress. (Sypek Decl. Ex. N at 6-9.) Plaintiffs are not entitled to a one-
13 sided recitation of their injuries at trial. IMEs are not only warranted, they are
14 critical to a fair trial.

15 Plaintiffs’ refusal to stipulate to IMEs is not in good faith and warrants
16 sanctions. The County respectfully requests that this Court order Plaintiffs to
17 submit to IMEs and pay the County’s fees and costs incurred in filing this motion.
18 Alternatively, the Court should issue an order precluding Plaintiffs from presenting
19 evidence of their mental and emotional injuries at trial.

20 **B. Plaintiffs’ Position**

21 Unable to defend the indefensible conduct of its employees who took and
22 shared horrific photographs of Plaintiffs’ deceased loved ones, and with just a few
23 weeks remaining before fact discovery closes, the County has resorted to scorched-
24 earth discovery tactics designed to bully Plaintiffs into abandoning their pursuit of
25 accountability. After seeking intrusive discovery into everything from Plaintiffs’
26 privileged therapist records and middle school report cards (Bryant Decl. ¶¶ 2–3),
27 the County now seeks to compel the victims of its employees’ misconduct—
28

1 including four teenagers, a 10-year-old child, and a 5-year-old kindergartener—to
2 undergo involuntary psychiatric examinations.

3 Adding insult to injury, the County is making this demand while
4 simultaneously refusing to make two of its key witnesses (Sheriff Villanueva and
5 Fire Chief Osby) available for a routine deposition. Apparently, in the County’s
6 estimation, top officials should be shielded from providing any testimony, but the
7 victims should not only withstand the emotional toll of a full-day deposition, but
8 also submit to an *eight-hour* involuntary psychiatric examination (Cohen Decl. ¶ 6)
9 simply because they had the audacity to demand accountability for Defendants’
10 disrespect of the dead and callous intrusion upon their private grief.

11 One hopes that the County’s eleventh-hour intimidation tactic is not
12 supported by the Board of Supervisors—Hilda Solis, Holly Mitchell, Sheila Kuehl,
13 Janice Hahn, and Kathryn Barger—who have often clashed with the Sheriff over his
14 many abuses.¹ (*See* Bryant Decl. ¶ 10.) But whatever the Board’s position, the
15 County’s position is not supported by the law.

16 For one, the County’s request is too little, too late. The County has indicated
17 that it intends to use its proposed examining psychiatrists as expert witnesses. (*See*
18 Bryant Decl. ¶ 4, Ex. C.) Under the Court’s scheduling order, the County was
19 obligated to exchange the psychiatrists’ Rule 35 reports by no later than October 4.
20 (*See id.* ¶¶ 7–8.) But the County chose to sit on its hands until a mere eighteen days

21 _____
22 ¹ *See, e.g.,* Ryan Carter, *LA County Formally Outlines Ways Supervisors Could*
23 *Remove Sheriff*, Los Angeles Daily News, Jan. 26, 2021,
24 [https://www.dailynews.com/2021/01/26/la-county-formally-outlines-ways-](https://www.dailynews.com/2021/01/26/la-county-formally-outlines-ways-supervisors-could-remove-sheriff/)
25 [supervisors-could-remove-sheriff/](https://www.dailynews.com/2021/01/26/la-county-formally-outlines-ways-supervisors-could-remove-sheriff/); Robert Garrova, *What Does the Public Battle*
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28 [max-social-media](https://laist.com/news/sheriff-villanueva-budget-la-malinche-mad-max-social-media); Maya Lau, *L.A. County Supervisors Admonish Alex Villanueva*
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2019, [https://www.latimes.com/local/lanow/la-me-losangeles-supervisors-sheriff-](https://www.latimes.com/local/lanow/la-me-losangeles-supervisors-sheriff-villanueva-20190129-story.html)
[villanueva-20190129-story.html](https://www.latimes.com/local/lanow/la-me-losangeles-supervisors-sheriff-villanueva-20190129-story.html).

1 before the court-ordered expert deadline to even approach Plaintiffs about the issue.
 2 The expert deadline has now passed, and the November 29 close of fact discovery is
 3 fast approaching. The County has not even tried to defend its delay. The County
 4 cannot use this discovery motion as a back door to amend the scheduling order. Nor
 5 can the IME process be fairly completed in the few weeks that remain. After the
 6 examinations themselves, reports would have to be exchanged, Plaintiffs would
 7 have to designate rebuttal experts, and both sides' experts would have to be
 8 deposed. "The Federal Rules and the Court's scheduling order are designed to
 9 prevent a last-minute scramble of the type that would be necessary under these
 10 circumstances." *Granados v. GEO Grp., Inc.*, 2020 WL 6694346, at *2 (C.D. Cal.
 11 Oct. 15, 2020). The County should not be able to profit from creating a compressed
 12 timeline for an entire swath of expert discovery.

13 Setting aside that the time has passed for IMEs, the County's motion also fails
 14 on the merits because Plaintiffs seek damages for the emotional distress that should
 15 reasonably be expected after Defendants' mistreatment of Plaintiffs' loved ones'
 16 remains came to light. Plaintiffs have not asserted any specific mental or psychiatric
 17 disorder and have no intent of relying upon any treating therapists or medical
 18 evidence. Nor have Plaintiffs advanced any expert testimony about their emotional
 19 distress. It does not take an expert—and it certainly does not take an involuntary
 20 eight-hour psychiatric examination—for a jury to assess the nature and extent of the
 21 emotional distress caused by Defendants' misconduct. The Sheriff himself has
 22 explained that taking photos of the dead "harms people [who] suffered a tragedy
 23 already."² Plaintiffs' disgust, distress, and fears are the feelings that any reasonable
 24 person would experience if the public officials entrusted to protect the dignity of
 25 their deceased family members snapped graphic photos of their loved ones' remains,
 26

27 ² [https://www.facebook.com/watch/live/?v=875675446231021&ref=watch](https://www.facebook.com/watch/live/?v=875675446231021&ref=watch_permalink)
 28 [permalink](https://www.facebook.com/watch/live/?v=875675446231021&ref=watch_permalink).

1 used the photos for cocktail-hour entertainment, and failed to contain and secure the
 2 photos. The requested mental examinations are unwarranted because Plaintiffs are
 3 claiming emotional distress that any reasonable person victimized by Defendants’
 4 misconduct would experience. *See, e.g., Tennison v. City & Cnty. of San Francisco*,
 5 2005 WL 8160037, at *4 (N.D. Cal. July 5, 2005) (denying Rule 35 motion where
 6 plaintiffs did not claim distress “other than that ‘normally associated’” with the
 7 wrongful imprisonment at issue (citation omitted)). The County’s motion should be
 8 denied.

9 **II. ARGUMENT**

10 **A. The County’s Position**

11 **1. Legal Standard**

12 Federal Rule of Civil Procedure 35(a) provides, in relevant part:

13 The court where the action is pending may order a party whose mental
 14 or physical condition . . . is in controversy to submit to a physical or
 15 mental examination by a suitably licensed or certified examiner. . . .
 16 The order: (A) may be made only on motion for good cause and on
 17 notice to all parties and the person to be examined; and (B) must
 18 specify the time, place, manner, conditions, and scope of the
 19 examination, as well as the person or persons who will perform it.

20 The purpose of Rule 35 is “to ‘level the playing field’ between parties in
 21 cases in which a party’s physical or mental condition is in issue. ‘[G]ranting a
 22 request for a psychiatric examination pursuant to Rule 35 is to preserve [] the equal
 23 footing of the parties to evaluate the plaintiff’s mental state” *Ragge v.*
 24 *MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D. Cal. 1995) (alterations in
 25 original) citation omitted). “Only if no additional relevant information could be
 26 gained by an examination of [plaintiff] should the motion for a psychiatric
 27 examination be denied.” *Id.* (alteration in original) (citation omitted).

28 Thus, under Rule 35, a defendant is entitled to conduct a mental examination
 of a plaintiff if it demonstrates that: (1) the plaintiff has placed his or her mental

1 condition in controversy; and (2) good cause exists for the examination.
 2 *Schlagenhauf*, 379 U.S. at 119; *Turner v. Imperial Stores*, 161 F.R.D. 89, 92 (S.D.
 3 Cal. 1995).

4 Although there is a constitutional right to privacy, that right is “conditional
 5 rather than absolute” and “is waived when a plaintiff raises before the court issues
 6 concerning her mental and emotional condition and seeks damages for mental and
 7 emotional injuries.” *Enwere v. Terman Assocs., L.P.*, No. C 07-1239 JF (PVT),
 8 2008 WL 5146617, at *2 (N.D. Cal. Dec. 4, 2008). Rule 35 is to be “construed
 9 liberally to allow the examination.” *Tan v. City & County of San Francisco*, No. C
 10 08-01564 MEJ, 2009 WL 594238, at *2 (N.D. Cal. Mar. 4, 2009). For the reasons
 11 set forth below, the County is entitled to IMEs of each of the Plaintiffs.

12 **2. Plaintiffs Have Put Their Mental State in Controversy**

13 Plaintiffs’ entire lawsuit is based on their severe emotional distress and
 14 ongoing fear, anxiety and depression. Their mental state is front and center in this
 15 case. A plaintiff puts his or her mental state in controversy if one or more of the
 16 following factors are present: (1) a cause of action for intentional or negligent
 17 infliction of emotional distress; (2) an allegation of a specific mental or psychiatric
 18 injury or disorder; (3) a claim of unusually severe emotional distress; or (4) plaintiff
 19 concedes that his mental condition is “in controversy” within the meaning of
 20 Rule 35(a). *Turner*, 161 F.R.D. at 95. All of the *Turner* factors are present here.

21 Plaintiffs’ only and entire damages claims are for emotional distress. (Sypek
 22 Decl. Ex. A ¶¶ 86, 92, 98, 105, 113; Ex. B ¶¶ 28, 36, 47, 56; Ex. C ¶¶ 31, 40, 52,
 23 69; Ex. D ¶¶ 29, 38, 50, 58, 67.) Plaintiffs allege that Defendants’ conduct has
 24 caused them “severe emotional distress” and “constant fear.” (*Id.* Ex. A ¶ 9; Ex. B
 25 ¶ 12; Ex. C ¶ 9; Ex. D ¶ 9.)

26 Plaintiffs also allege that Defendants’ conduct has caused them to suffer from
 27 anxiety and depression—specific, diagnosable psychiatric disorders. (Sypek Decl.
 28 Ex. A ¶ 73; Ex. B ¶ 12; Ex. C ¶ 9; Ex. D ¶ 9.) These allegations place Plaintiffs’

1 mental condition in controversy. *See Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508,
 2 514 (C.D. Cal. 2019) (seeking damages for ongoing severe emotional distress and
 3 depression puts extent and existence of mental injuries plainly “in controversy”);
 4 *Gavin v. Hilton Worldwide, Inc.*, 291 F.R.D. 161, 164 (N.D. Cal. 2013) (finding
 5 mental condition in controversy where plaintiff alleged she suffers from chronic
 6 depression).

7 Plaintiffs’ interrogatory responses echo the allegations about their severe
 8 emotional distress, ongoing anxiety, depression and other mental injuries. (Sypek
 9 Decl. Ex. I at 19:9-21:16; Ex. J at 9:1-7; Ex. L at 12:18-27; Ex. M at 16:1-25:1.)

10 Moreover, Mauser and Altobelli have each asserted causes of action for
 11 intentional infliction of emotional distress. (Sypek Decl. Exs. C & D.) This, too, is
 12 sufficient to find their mental state in controversy for purposes of Rule 35. *See*
 13 *Vinson v. Superior Court*, 43 Cal. 3d 833, 839 (1987) (“[A] party who chooses to
 14 allege that he has mental and emotional difficulties can hardly deny his mental state
 15 is in controversy.”); *Gavin*, 291 F.R.D. at 164-65 (finding mental condition in
 16 controversy where complaint included claim for IIED).

17 According to Plaintiffs, “Defendants’ actions have made it impossible for
 18 Plaintiffs to have any peace of mind ever again.” (Sypek Decl. Ex. Y at 8:12-13.)
 19 Bryant also alleges that Defendants’ conduct “compounded the trauma” of losing
 20 her husband and daughter. (*Id.* Ex. A ¶ 9.) She further claims that, as a result of
 21 Defendants’ conduct, “she lives in fear” and is “reluctant to use social media to
 22 interact directly with people.” (*Id.* Ex I at 21:14-16.) These are not “garden
 23 variety” emotional distress damages; they are allegations of severe emotional trauma
 24 impacting Plaintiffs’ everyday lives, placing their mental condition squarely in
 25 controversy. *See Richard Martin Franco, Jr. v. City of West Covina*, No. 5:18-cv-
 26 02587-JGB (SHKx), 2020 WL 2495140, at *5 (C.D. Cal. Jan. 17, 2020) (allegations
 27 of anxiety, mental anguish, irritability, moodiness, depression, social withdrawal,
 28 and tearfulness put mental state in controversy); *Alexis v. Rogers*, No. 15cv691-

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1 CAB (BLM), 2017 WL 1073404, at *3 (S.D. Cal. Mar. 21, 2017) (ordering IME
2 where plaintiff alleged ongoing “humiliation, embarrassment, emotional distress,
3 and mental anguish” and described her emotional distress as “severe”).

4 Bryant has also designated seven celebrity witnesses to corroborate her claims
5 of emotional distress. (Sypek Decl. Ex. N at 6-9.) She cannot reasonably deny that
6 her mental condition is in controversy.

7 The *Turner* factors are well established here.

8 **3. There Is Good Cause to Conduct Plaintiffs’ Examinations**

9 Plaintiffs are claiming severe and ongoing emotional distress, anxiety and
10 depression; and they are seeking tens of millions of dollars to compensate them for
11 their alleged mental and emotional injuries. IMEs are essential to evaluate the
12 existence, extent and cause of Plaintiffs’ alleged harm. There is good cause to order
13 IMEs of each of the Plaintiffs.

14 Courts consider many factors in determining whether there is “[g]ood cause”
15 under Rule 35, including but not limited to: (1) whether the plaintiff claims ongoing
16 emotional distress; (2) whether the desired materials are relevant; and (3) the
17 possibility of obtaining the desired information by other means. *Franco v. Bos. Sci.*
18 *Corp.*, No. 05-CV-1774 RS, 2006 WL 3065580, at *1 (N.D. Cal. Oct. 27, 2006).
19 All of these factors weigh in favor of compelling Plaintiffs to submit to IMEs.

20 **First**, Plaintiffs all claim their emotional and mental injuries are “ongoing,”
21 “constant” and “continuous.” (Sypek Decl. Ex. A ¶¶ 86, 92, 98, 105, 113; Ex. B
22 ¶¶ 28, 36, 47, 56; Ex. C ¶¶ 31, 40, 52, 69; Ex. D ¶¶ 29, 38, 50, 58, 67; Ex. I at 19:9-
23 21:16; Ex. J at 9:1-7; Ex. L at 12:18-27; Ex. M at 16:1-25:1.) For example, Bryant’s
24 interrogatory responses, verified under oath, state: “As a result [of Defendants’
25 conduct], Plaintiff *continues to suffer emotional distress and mental anguish*. The
26 thought of government personnel betraying the public and Plaintiff’s trust and using
27 these intensely private images for personal entertainment has already inflicted, *and*
28

1 *will continue to inflict pain and suffering on Plaintiff.”* (*Id.* Ex. I at 20:17-21
2 (emphasis added).)

3 Chester similarly contends that the anxieties caused by Defendants “will
4 accompany [him] the rest of [his] life.” (Sypek Decl. Ex. M at 24:27-28.) Plaintiffs
5 also argued in recent briefing to this Court that they suffer “constant fear and
6 anxiety that [they] may one day confront the appalling photos on the internet.” (*Id.*
7 Ex. Y at 8:9-12.)

8 Because Plaintiffs allege ongoing emotional injuries, there is good cause to
9 conduct their IMEs. *Enwere*, 2008 WL 5146617, at *4 (finding good cause for IME
10 where plaintiff claimed ongoing emotional and mental injuries); *Ragge*, 165 F.R.D.
11 at 609 (plaintiff’s allegation that her emotional distress is ongoing was sufficient to
12 establish good cause); *Gabriel v. Johanns*, No. CIV S-07-0300 LKK EFB, 2007 WL
13 4170635, at *2 (E.D. Cal. Nov. 19, 2007) (ordering IME when plaintiff alleged
14 anticipated future emotional distress); *Ayat v. Societe Air France*, No. C 06-1574
15 JSW (JL), 2007 WL 1120358, at *4 (N.D. Cal. Apr. 16, 2007) (there was good
16 cause for IME where plaintiff alleged he “suffered and continues to suffer from
17 depression”).

18 ***Second***, mental examinations of Plaintiffs are relevant and necessary to
19 evaluate the extent and cause of Plaintiffs’ emotional distress and to ascertain any
20 preexisting conditions. A central tenet of the County’s defense is that Plaintiffs’
21 severe emotional and mental injuries were not caused by any conduct of Defendants,
22 but rather by the tragic helicopter crash and resulting deaths of their loved ones.
23 Plaintiffs cannot be suffering distress from accident site photos that they have never
24 seen and that were never publicly disseminated.

25 Indeed, Plaintiffs’ own allegations conflate their alleged emotional injuries
26 with the trauma of losing their loved ones. (Sypek Decl. Ex. A at ¶ 9 (alleging that
27 Defendants’ conduct “compounded the trauma of losing Kobe and Gianna”); Ex. C
28 at ¶ 9 (“As if the tragically premature loss of their mother and wife was not enough .

1 . . . [Plaintiffs] now suffer severe emotional distress”); Ex. D at ¶ 9 (“As if the
 2 tragically premature loss of their sister, mother and father were not enough . . .
 3 [Plaintiffs] now suffer severe emotional distress”); Ex. B at ¶ 12 (“Already
 4 devastated by the loss of wife, mother, daughter and sister, the Chester Plaintiffs
 5 suffered severe emotional distress”).)

6 Accordingly, IMEs of Plaintiffs are critical to the County’s defense and are
 7 necessary to explore the root of Plaintiffs’ suffering. *See Gabriel*, 2007 WL
 8 4170635, at *2 (IME was warranted in part to determine whether other factors may
 9 have attributed to or exacerbated plaintiff’s emotional injuries); *Camacho v.*
 10 *McCarthy*, No. EDCV 15-2043-JGB (KKx), 2020 WL 2510544, at *6 (C.D. Cal.
 11 Mar. 30, 2020) (finding good cause for IME where “there is a critical question
 12 regarding what portion of Plaintiff’s depression is attributable to Defendant’s alleged
 13 wrongful conduct and what portion is attributable to Plaintiff’s other life
 14 circumstances”).

15 Moreover, all of Plaintiffs’ claims for monetary damages relate to their
 16 alleged emotional distress. These are not “garden variety” claims where emotional
 17 distress damages are sought only as an adjunct to other claims. The County is
 18 therefore entitled to IMEs. *See Franco*, 2006 WL 3065580, at *1-2 (ordering IME
 19 where all or most of claims related to emotional distress); *Brill v. Napolitano*,
 20 No. CV 09-0421-PSG(RCx), 2010 WL 11509081, at *1-2 (C.D. Cal. Apr. 26, 2010)
 21 (ordering IME where plaintiff claimed ongoing “severe mental and emotional
 22 distress” and depression in complaint and discovery responses).

23 ***Third***, there is no other means by which the County can obtain the
 24 information it needs to mount its defense to Plaintiffs’ claims of severe emotional
 25 distress. During the parties’ meet-and-confer, Plaintiffs contended that Defendants
 26 can adequately defend against Plaintiffs’ emotional distress claims through cross-
 27 examination of Plaintiffs and their witnesses. (Sypek Decl. ¶ 20.) Wrong.
 28 Plaintiffs are seeking tens of millions of dollars for their alleged emotional injuries,

1 which are ongoing and severe. The County needs a forensic psychiatric assessment
 2 of the existence, extent and causes of Plaintiffs' emotional distress, trauma, anxiety
 3 and depression, conducted by a professional with the relevant expertise.
 4 Defendants' attorneys are not trained forensic psychiatrists; nor are they qualified to
 5 diagnose or evaluate the severity of mental disorders such as anxiety and depression.
 6 IMEs are necessary for the County to evaluate the nature and extent of Plaintiffs'
 7 claimed harm. *See Elmansoury v. City of Garden Grove*, No. SA CV 17-01269-
 8 DOC (DFMx), 2019 WL 2871159, at *2 (C.D. Cal. Mar. 26, 2019) (granting motion
 9 to compel IME where plaintiff claimed ongoing emotional distress, and rejecting
 10 plaintiff's argument that defendants' access to medical records and plaintiff's
 11 deposition was sufficient).

12 During the parties' meet-and-confer, Plaintiffs refused to answer whether they
 13 were receiving treatment for their emotional distress. (Sypek Decl. ¶ 20.) To the
 14 extent they are receiving such treatment, IMEs are even more critical.³

15 **4. The IMEs The County Seeks Are Reasonable**

16 The County has selected Marc Cohen, M.D. to conduct the examinations of
 17 Plaintiffs age 17 and up (Vanessa Bryant, Christopher Chester, R.C. and H.C., John
 18 James Altobelli, Alexis Altobelli and Matthew Mauser). Dr. Cohen is a board
 19 certified, licensed forensic psychiatrist with excellent credentials and significant
 20

21 ³ On September 14, 2021, the County served document requests and interrogatories
 22 on Plaintiffs regarding treatment Plaintiffs have received for their alleged emotional
 23 distress and corresponding medical and treatment records. (Sypek Decl. Exs. E-H.)
 24 Plaintiffs' responses are due on October 14, 2021. (*Id.*) Regardless of whether
 25 Plaintiffs provide documents and information in response to these requests, there
 26 will be good cause for IMEs. If Plaintiffs provide substantive responses, IMEs will
 27 be necessary to independently assess the diagnoses and conclusions therein. If
 28 Plaintiffs object and refuse to respond, then Defendants will have no other evidence
 to rebut Plaintiffs' testimony about their mental condition. When it comes to
 Plaintiffs' emotional distress claims for significant damages, Defendants should not
 have to take Plaintiffs' word for it.

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1 experience in conducting IMEs, as set forth in his declaration and attached CV.
2 (Declaration Marc A. Cohen, M.D. (“Cohen Decl.”) ¶ 2 & Ex.1.)

3 The County has selected Christopher Thompson, M.D. to conduct the
4 examinations of the child and adolescent Plaintiffs—P.M. (age 13), T.M. (age 10)
5 and I.M. (age 5). Dr. Thompson is a board certified, licensed forensic psychiatrist
6 with top-notch training and significant experience in conducting forensic psychiatric
7 examinations of children and adolescents. (Declaration of Christopher J.
8 Thompson, M.D. (“Thompson Decl.”) ¶ 2 & Ex. 1.)

9 The County’s proposed examinations of Plaintiffs are properly limited in
10 scope and duration, which will allow a fair assessment of Plaintiffs’ alleged
11 damages—specifically, Plaintiffs’ past and present psychological condition. (Cohen
12 Decl. ¶¶ 12-13; Thompson Decl. ¶ 14.) The examinations will evaluate the extent
13 and nature of Plaintiffs’ alleged emotional distress or other mental injuries, as well
14 as whether Plaintiffs have experienced any environmental or psychological factors
15 that contribute to their distress. (Cohen Decl. ¶ 10; Thompson Decl. ¶ 7.)

16 The tests Dr. Cohen and Dr. Thompson seek to use, as outlined in their
17 declarations, are widely accepted, non-invasive, and designed to evaluate the nature
18 and scope of the emotional damages Plaintiffs are alleging Defendants caused them.
19 (Cohen Decl. ¶ 12; Thompson Decl. ¶ 4.)

20 The County is sensitive to the horrific trauma Plaintiffs have suffered and
21 continue to suffer from the loss of their loved ones, particularly with respect to the
22 young children and adolescents. For that reason, even though the young children
23 and adolescents are named Plaintiffs, the County has not noticed their depositions
24 and instead selected Dr. Thompson (who has specialized forensic psychiatric
25 training with children and adolescents) to conduct their examinations. (Thompson
26 Decl. ¶ 5.)

27 All of the proposed examinations of Plaintiffs will be conducted in a private,
28 one-on-one, non-confrontational setting at Dr. Cohen’s office (in Beverly Hills) and

1 Dr. Thompson's office (in Westwood). (Cohen Decl. ¶ 11; Thompson Decl. ¶ 11.)
 2 They will be audio and video recorded, with copies of all recordings to be provided
 3 to counsel on both sides. (Cohen Decl. ¶ 15; Thompson Decl. ¶ 12.) The proposed
 4 examinations are safe, reasonable and minimally burdensome.

5 **5. The Court Should Award Sanctions**

6 Plaintiffs have clearly placed their mental condition in controversy. They are
 7 claiming ongoing, severe emotional and mental injuries (including anxiety and
 8 depression); and they are seeking significant damages to compensate them for these
 9 alleged harms. Moreover, Plaintiffs have stalled and evaded the County's requests
 10 for IMEs, creating an unnecessary time crunch as the parties approach the close of
 11 fact and expert discovery. (Sypek Decl. ¶¶ 16-20.) Plaintiffs' unreasonable refusal
 12 to submit to IMEs and failure to comply with their discovery obligations is grounds
 13 for sanctions. Accordingly, the Court should award the County its attorneys' fees
 14 and costs in bringing this Motion. *See Land v. Denny's, Inc.*, 133 F.3d 927 (9th Cir.
 15 1997) (district courts have broad discretion under Rule 37 to impose sanctions,
 16 including attorneys' fees, for failure to comply with discovery obligations); *M & F*
 17 *Fishing, Inc. v. Certain Underwriters at Lloyds*, No. 06CV0934-DMS (BLM), 2007
 18 WL 9706573, at *3 (S.D. Cal. Apr. 13, 2007) (same); *Smith v. Diamond Offshore*
 19 *Co.*, No. 07-3954, 2009 WL 1107717, at *4 (E.D. La. Apr. 22, 2009) (awarding
 20 attorneys' fees and costs of bringing motion to compel where plaintiff opposed
 21 Rule 35 exam that was necessary to determine the existence and extent of plaintiff's
 22 alleged injuries).

23 **B. Plaintiffs' Position**

24 **1. The County's Motion Is Untimely**

25 Eighteen days before the parties were due to exchange expert reports on
 26 October 4 (Bryant Decl. ¶ 7), the County's counsel asked Plaintiffs to undergo
 27 psychiatric examinations (Sypek Decl. Ex. O). This was the first time that the
 28 County mentioned that it intended to pursue such examinations. (Bryant Decl. ¶ 9.)

1 The cursory request was bereft of any specifics about the contemplated exams. (*See*
 2 *Sypek Decl. Ex. O.*) The County made no affirmative showing that each Plaintiff’s
 3 mental condition is genuinely in controversy, or that good cause exists for such
 4 intrusive, emotionally taxing discovery. (*See id.*) Nor did counsel’s email explain
 5 why the County had waited nearly a year to raise the issue, or how such discovery
 6 could be completed before the expert discovery deadline. (*See id.*) During the
 7 parties’ subsequent Rule 37 videoconference, the County’s counsel had no answer to
 8 these basic questions or any explanation for how the belated request would give
 9 Plaintiffs sufficient time to depose the County’s proposed psychiatrists, much less
 10 retain experts to prepare rebuttal reports. (Bryant Decl. ¶ 11.)

11 Still lacking any justification for their delay, and with just a few weeks
 12 remaining in the discovery period, the County now seeks an order requiring
 13 Plaintiffs to submit to forced psychiatric examinations *after* the expert report
 14 deadline has already lapsed. (*See Bryant Decl. ¶ 7.*) As another Court in this
 15 District has held, this suffices to deny the County’s motion. *Granados v. GEO Grp.,*
 16 *Inc.*, 2020 WL 6694346, at *2 (C.D. Cal. Oct. 15, 2020) (denying motion for
 17 independent psychiatric examination as untimely where defendants first raised the
 18 issue just over two weeks before the expert disclosure deadline). “[G]ranting
 19 Defendants’ request at this stage of the proceedings would sow chaos with the
 20 Court’s scheduling order and the trial date.” *Id.*

21 “[M]any district courts in California have concluded that Rule 35 medical
 22 examinations are subject to the expert deadlines.” *Id.* at *1 (collecting cases).
 23 Permitting an IME after the deadline for expert reports would be unfair where, as
 24 here, the examination is requested for the inherently adversarial purpose of
 25 providing expert testimony at trial. *See, e.g., Diaz v. Con-Way Truckload, Inc.*, 279
 26 F.R.D. 412, 419 (S.D. Tex. 2012). This is especially true when the request “comes
 27 at the close of discovery” and the defendant “seeks an opinion regarding the cause”
 28

1 of the plaintiff's injuries. *Perez v. Viens*, 2011 WL 855673, at *3 (D. Neb. Mar. 8,
2 2011).

3 Here, the County has expressly disclosed both of its proposed examiners as
4 testifying experts. (Bryant Decl. ¶ 4, Ex. C.) And the County's motion confirms
5 that its sole purpose in seeking IMEs is to support its overall defense and obtain an
6 opinion on causation. *See Minnard v. Rotech Healthcare Inc.*, 2008 WL 150502, at
7 *2 (E.D. Cal. Jan. 15, 2008) (expert deadlines apply where IME is requested "to
8 support defendant's overall position"); *Diaz*, 279 F.R.D. at 419 (same). This is
9 quintessential expert discovery. *Lopez v. City of Imperial*, 2014 WL 232271, at *3
10 (S.D. Cal. Jan. 21, 2014) ("If the IME examiner will offer opinions and conclusions
11 regarding the objective facts derived from an examination, the IME and the report
12 produced by the IME examiner is expert discovery, not fact discovery.")⁴

13 Judge Walter set an October 4 deadline for expert reports. (Bryant Decl.
14 ¶¶ 7–8.) That deadline has come and gone. The County did not even try to seek
15 relief from the deadline. By failing to address the timeliness of its requests for
16 involuntary medical examinations in response to Plaintiffs' questions during the
17 meet-and-confer process or in its opening motion, the County has waived any
18 argument to the contrary. *See Mavrix Photographs LLC v. Intergroup Vista, LLC*,
19 2015 WL 12832043, at *2 (C.D. Cal. June 2, 2015).

20 Moreover, the County could not justify its lack of diligence even if it had tried
21 to do so.⁵ No new information has come to light that could have prompted the
22

23 ⁴ *See also, e.g., Nguyen v. Regents of the Univ. of California*, 2018 WL 6112617, at
24 *5 n.3 (C.D. Cal. July 26, 2018) (same).

25 ⁵ Instead of providing any explanation, County tries to blame *Plaintiffs* for its own
26 months-long delay in seeking these examinations. The County even suggests
27 Plaintiffs should be sanctioned for taking a mere seven days to consider this difficult
28 and sensitive issue after the County first sent information about its proposed
examining psychiatrists. *See supra* at 20. Plaintiffs, of course, had no say in the
County's decision to raise IMEs at the close of fact discovery. This "time crunch" is

1 County’s request. It has known since the outset of this case that Plaintiffs claim
 2 emotional distress damages. There is no legitimate reason the County could not
 3 have sought IMEs earlier in the discovery period, when there would have been time
 4 for Plaintiffs to cross-examine the County’s psychiatrists and designate rebuttal
 5 experts. By instead waiting until the close of discovery, the County seeks not to
 6 level the playing field but to gain an unfair advantage. The compressed discovery
 7 period the County seeks for the IME process would effectively squeeze the Plaintiffs
 8 out of an opportunity to conduct essential follow-on discovery. In short, the County
 9 wants to be able to present expert testimony on a topic while depriving Plaintiffs of
 10 a fair opportunity to do the same. The Federal Rules and the Court’s scheduling
 11 order do not permit such a result. *See Granados*, 2020 WL 6694346, at *2.

12 The County’s motion should be denied as untimely.

13 **2. The County Has Not Carried Its Burden To Justify Such**
 14 **Intrusive Discovery**

15 **(a) Legal Standard**

16 The Supreme Court has emphasized that Rule 35 “requires discriminating
 17 application by the trial judge.” *Schlagenhauf v. Holder*, 379 U.S. 104, 243 (1964).
 18 Rule 35(a)’s “in controversy” and “good cause” requirements are not satisfied by
 19 “mere conclusory allegations” nor by “mere relevance to the case.” *Id.* at 242.
 20 Rather, they “require an affirmative showing by the movant that each condition as to
 21 which the examination is sought is really and genuinely in controversy and that
 22 good cause exists for ordering each particular examination.” *Id.* at 243–44. “The
 23 ability of the movant to obtain the desired information by other means is also
 24 relevant.” *Id.* Courts “will not issue a mental examination order to satisfy idle
 25 curiosity, or manipulative desires, of a party.” *Rund v. Charter Comm, Inc.*, 2007
 26 WL 312037, at *3 (E.D. Cal. Jan. 30, 2007).

27 _____
 28 entirely of the County’s making.

1 A complaint that merely claims damages for emotional distress does not place
 2 a party’s mental condition “in controversy” within the meaning of Rule 35(a). *See,*
 3 *e.g., Turner v. Imperial Stores*, 161 F.R.D. 89, 98 (S.D. Cal. 1995). More is
 4 required. *See, e.g., Montez v. Stericycle, Inc.*, 2013 WL 2150025, at *4 (E.D. Cal.
 5 May 16, 2013) (“Rule 35 was not meant to be applied in so broad a fashion as to
 6 allow courts to order a mental examination whenever a plaintiff claimed emotional
 7 distress. . . [C]ourts evaluating a Rule 35 motion should not order mental
 8 examinations unless the case involves other factors surpassing a generic claim of
 9 emotional distress.”).

10 In evaluating the “in controversy” requirement, courts distinguish between (a)
 11 specific allegations of psychiatric disorders or mental injuries (e.g., post-traumatic
 12 stress disorder, suicidal ideation, clinical depression), which are sufficient to place a
 13 plaintiff’s mental state in controversy, and (b) general allegations of anxiety, stress,
 14 trauma, humiliation, mental anguish, and emotional distress, which are not. *See,*
 15 *e.g., Turner*, 161 F.R.D. at 98; *Pringle v. Wheeler*, 2021 WL 1907824, at *4 (N.D.
 16 Cal. Apr. 16, 2021). Where a plaintiff’s emotional suffering involves only the
 17 distress “naturally flowing” from a defendant’s misconduct—the feelings that
 18 anyone in the plaintiff’s shoes would experience—an IME is unwarranted. *See*
 19 *Pringle*, 2021 WL 1907824, at *3; *see also Houghton v. M&F Fishing, Inc.*, 198
 20 F.R.D. 666, 669 (S.D. Cal. 2011) (emotional distress “normally associated with or
 21 attendant to” an injury does not place mental condition in controversy); *Smith v.*
 22 *Equinox Holdings, Inc.*, 2015 WL 628361, at *4 (N.D. Cal. Feb. 12, 2015) (invasive
 23 discovery into mental health cannot overcome right to privacy where a plaintiff
 24 alleges “only the emotional distress that an ordinary person would likely experience
 25 in similar circumstances”). In such circumstances, “[t]here is no need to conduct a
 26 mental examination . . . for the very reason that such distress is normal and
 27 understandable by the lay factfinder.” *Rund*, 2007 WL 312037, at *2.
 28

1 On top of the “in controversy requirement,” the moving party must also
 2 establish “good cause” for an involuntary mental examination. To make this “good
 3 cause” showing, the movant must identify facts justifying the discovery. *Pringle*,
 4 2021 WL 1907824, at *5. Relevant factors include “the possibility of obtaining
 5 desired information by other means, whether plaintiff plans to prove her claim
 6 through testimony of expert witnesses, whether the desired materials are relevant,
 7 and whether plaintiff is claiming ongoing emotional distress.” *Id.*

8 Even when the “good cause” and “in controversy” requirements of Rule 35
 9 are met, the requested examination must also be “proportional to the needs of the
 10 case,” *Hung Nguyen v. Regents of the Univ. of Cal.*, 2018 WL 6112617, at *3 (C.D.
 11 Cal. July 26, 2018), and it remains “within the court’s discretion whether to order an
 12 examination,” *Hernandez v. Simpson*, 2014 WL 4090513, at *3 (C.D. Cal. Aug. 18,
 13 2014), taking into account the right of the party to be examined to avoid
 14 unnecessary invasions of privacy, *see Montez*, 2013 WL 2150025, at *2.

15 (b) **The County Has Not Satisfied Rule 35’s “Good Cause”**
 16 **and “In Controversy” Requirements**

17 The County’s motion fundamentally misunderstands and misapplies four of
 18 the five *Turner* factors that courts use to evaluate whether a plaintiff’s mental state
 19 is “in controversy” for purposes of Rule 35(a). The County’s motion also omits one
 20 of the factors altogether, without explanation. *Compare supra* at 13 *with Turner*,
 21 161 F.R.D. at 95:

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

27 By omitting one factor and misapplying the others, the County falsely asserts “[a]ll
 28 of the *Turner* factors are present here.” *Supra* at 13. The opposite is true.

1 *First*, the Plaintiffs have not alleged a “specific mental or psychiatric injury or
 2 disorder.” *Turner*, 161 F.R.D. at 95. The County falsely claims Plaintiffs have
 3 alleged “specific, diagnosable psychiatric disorders” by misleadingly citing snippets
 4 of the Plaintiffs’ complaints that use the generic terms “anxiety” and “depression.”
 5 *See supra* at 13 (citing, e.g., Sypek Decl. Ex. A ¶ 73 (“Mrs. Bryant’s anxiety [that
 6 the photos could go viral] has been reinforced by widespread discussion of the
 7 photos online.”). None of the cited snippets actually alleges clinical depression or
 8 an anxiety disorder. *See, e.g. Pringle*, 2021 WL 1907824, at *4 (contrasting
 9 “general claims like anxiety,” which do not put mental condition in controversy,
 10 with “more specific mental injuries such as post-traumatic stress disorder,
 11 depression, insomnia, and suicidal ideation”). Instead, Plaintiffs allege the distress
 12 and anxiety that naturally “arises in the normal course of human events when a
 13 person suffers [the] indignities and deprivation of rights” that occurred here.
 14 *Turner*, 161 F.R.D. at 92; *see also, e.g., Tennison*, 2005 WL 8160037, at *4;
 15 *Hernandez*, 2014 WL 4090513, at *3 (“Only where a plaintiff refers to specific
 16 mental and psychiatric injuries is she affirmatively placing into controversy a mental
 17 condition.”).

18 *Second*, Plaintiffs have not alleged “unusually severe emotional distress.”
 19 *Turner*, 161 F.R.D. at 95. Crucially, to determine whether the alleged emotional
 20 distress is “*unusually severe*,” the alleged distress must be “measured not in absolute
 21 terms,” but “in relative terms – *i.e.*, relative to the specific circumstances
 22 confronting the person.” *Tennison*, 2005 WL 8160037, at *4 (emphasis added). An
 23 IME is reserved for those situations where the “response (the emotional distress) to
 24 the circumstances is so unusual and unexpected such that the fact finder’s ability to
 25 understand the distress stretches beyond a lay person’s understanding or knowledge”
 26 and “specialized knowledge of an expert is warranted.” *Id.* Defendants cannot
 27 subject Plaintiffs to involuntary psychiatric examinations simply because their
 28 misconduct was inherently abhorrent and severely upsetting. Likewise, courts have

1 consistently held that a large damages claim is insufficient to justify an IME.
2 *Nguuyen*, 2018 WL 6112617, at *4 (collecting cases).

3 *Third*, Plaintiffs have not offered any expert testimony to support their
4 emotional distress claims. *Turner*, 161 F.R.D. at 95. Plaintiffs have confirmed that
5 they have no intention of relying upon expert testimony absent a court-ordered IME
6 (Bryant Decl. ¶ 11), which should obviate any need for an IME. *Hernandez*, 2014
7 WL 4090513, at *4 (denying motion for IME where plaintiff had not offered expert
8 testimony, and, “[i]n fact, one of the reasons plaintiff assert[ed] as to why a mental
9 examination here would prejudice her is that she would be obliged to designate a
10 rebuttal expert”).

11 *Fourth*, Mrs. Bryant has not brought a standalone cause of action for either
12 intentional or negligent infliction of emotional distress. (*See* Sypek Decl. Ex. A.)
13 Neither have the Chester Plaintiffs. (*See id.* Ex. B.) The existence of such causes of
14 action in the Mauser and Altobelli complaints do not tip the balance for the Bryant
15 and Chester cases—the Court must conduct the “in controversy” analysis on a
16 plaintiff-by-plaintiff basis. *See Schlagenhauf*, 379 U.S. at 243–44. Regardless, the
17 County cites no case—and Plaintiffs are aware of none—where a cause of action for
18 intentional infliction of emotional distress, standing alone, was sufficient to justify
19 an IME under Rule 35(a). Each of the County’s cases involved an additional factor
20 not present here. *See, e.g., supra* at 14 (citing *Gavin*, 291 F.R.D. at 164–65
21 (plaintiff alleged defendant’s conduct caused her to be hospitalized and to attempt
22 suicide)), 14–15 (citing *Alexis*, 2017 WL 1073404, at *3 (plaintiff did not oppose
23 the motion, conceded mental condition was “in controversy,” and intended to use an
24 expert to prove damages)).

25 *Fifth*, and finally, the County baldly asserts that Plaintiffs have conceded that
26 their mental condition is “in controversy” within the meaning of Rule 35(a). That is
27 untrue, and the County cites no such concession. Instead, the County merely notes
28 that Mrs. Bryant has disclosed various fact witnesses with knowledge of her

1 emotional distress. That fact does not establish that her mental condition is “in
2 controversy” for purposes of Rule 35(a).

3 Tellingly, the County cites no authority for the proposition that the disclosure
4 of *fact* witnesses justifies an involuntary *expert* examination. To the contrary, the
5 numerous fact witnesses only confirm that information about Mrs. Bryant’s
6 emotional distress is readily available through other means. *See, e.g., Nguyen*, 2018
7 WL 6112617, at *4 (fact that defendants “have been able to depose Plaintiff and
8 those familiar with this mental state, including family members and friends”
9 weighed against allowing an intrusive IME); *Hernandez*, 2014 WL 4090513, at *5
10 (“[I]nformation on plaintiff’s emotional distress appears to be readily obtainable
11 through other means—namely the deposition of the[] disclosed individuals [on
12 plaintiff’s initial disclosures].”).

13 Because the County cannot establish any of the *Turner* factors, that should
14 end the inquiry. *See, e.g., Turner*, 161 F.R.D. at n. 5 (not reaching “good cause”
15 analysis where defendants failed to establish the “in controversy” requirement). But
16 the County’s motion independently fails for lack of “good cause” and
17 proportionality. The County falls far short of the specific factual showing needed to
18 establish good cause. “Good cause” does not exist simply because Defendants’
19 misconduct has an ongoing emotional impact. The County does not—and cannot—
20 link Plaintiffs’ ongoing distress to any alleged psychological disorder or “unusually
21 severe” reaction that would justify an IME. *See, e.g., Nguyen*, 2018 WL 6112617,
22 at *4 (plaintiff’s claim of ongoing emotional distress did not supply good cause for
23 IME where plaintiff did “not allege any specific psychiatric injury or disorder that
24 an IME could explore”); *Houghton*, 198 F.R.D. at 669 (denying IME where
25 “plaintiff expressly stipulated that he [was] *not* claiming any present psychological
26 disorder”). Plaintiffs’ fear that they may one day confront the photos of their
27 deceased family members needs no expert explication. Nor is there anything
28 “unusual” or beyond the jury’s ken about the ongoing impact of Defendants’

1 desecration of Plaintiffs’ memories of their loved ones. An IME would do nothing
 2 to elucidate this ongoing distress or make it easier for a jury to understand.
 3 Accordingly, “Defendants’ need for expert testimony (in addition to cross-
 4 examination and presentation of non-expert evidence) is not compelling,” and “there
 5 is no good cause for a psychological or mental examination.” *Tennison*, 2005 WL
 6 8160037, at *4.

7 That emotional distress is Plaintiffs’ primary damages claim does not
 8 constitute good cause for an intrusive, emotionally-demanding examination. In the
 9 cases relied upon by the County on this point, IMEs were ordered not because of the
 10 primacy of the emotional distress damages, but because one of the plaintiffs
 11 intended to present his treating psychiatrist as a witness (which Plaintiffs have
 12 specifically disclaimed doing here),⁶ and because the other asserted a host of
 13 specific mental and emotional injuries, some of which even manifested as physical
 14 injuries.⁷

15 Finally, the County can obtain information about Plaintiffs’ emotional distress
 16 through other, less intrusive means—in particular, via the Plaintiff and fact-witness
 17 depositions that have taken place and are scheduled for the coming weeks. *See, e.g.,*
 18 *Pringle* 2021 WL 1907824, at *5 (fact that defendant could “ask relevant questions
 19 regarding [plaintiff’s] emotional distress” at deposition weighed against finding
 20 good cause for IME). The County insists that it nonetheless “needs a forensic
 21 psychiatric assessment” but fails to explain why this would be true. Instead, it
 22 simply makes improper appeals again to monetary sums supposedly at stake, and
 23

24 ⁶ *See supra* at 17 (citing *Franco*, 2006 WL 3065580, at *2 (“If [plaintiff] intends to
 25 present her treating psychiatrist as the primary witness supporting her damages
 26 claims, she has put her mental state in controversy.”)).

27 ⁷ *See id.* (citing *Brill*, 2010 WL 11509081, at *2 (listing string of ailments plaintiff
 28 asserted she suffered as a result of incidents alleged in complaint, including teeth
 grinding, insomnia, digestive disturbances, among others)).

1 inapposite cases involving plaintiffs who were relying on testifying psychiatrists or
 2 alleged psychological diagnoses. *See supra* at 18 (citing *Elmansoury*, 2019 WL
 3 2871159, at *2 (“The treating psychiatrist’s diagnosis—echoed by Plaintiff—leaves
 4 the Court with little question that Plaintiff is alleging a ‘specific mental or
 5 psychiatric injury or disorder.’”).

6 Rule 35 “is animated by the need for expert testimony” and concerns about
 7 fairness. There is no need for Rule 35 to fill any expert gap where, as here, there is
 8 no imbalanced playing field because Plaintiffs have stipulated that they will not
 9 present any expert or psychiatric testimony to support their distress claim, they do
 10 not intend to rely upon any medical evidence, and they have not alleged any specific
 11 mental or psychiatric disorder. *See Tennison*, 2005 WL 8160037, at *4.

12 **III. CONCLUSION**

13 **A. The County’s Position**

14 For the foregoing reasons, the County respectfully requests that the Court
 15 compel Plaintiffs Bryant, Chester, Altobelli and Matthew Mauser to submit to IMEs
 16 by Marc Cohen, M.D.; and that it compel Plaintiffs P.M., T.M. and I.M. (the minor
 17 Mauser Plaintiffs) to submit to IMEs by Christopher Thompson, M.D. Furthermore,
 18 the County respectfully requests an award of sanctions against Plaintiffs for the
 19 County’s attorneys’ fees and costs incurred in bringing this Motion. In the
 20 alternative, Plaintiffs should be precluded from presenting evidence of their
 21 emotional and mental injuries at trial.

22 **B. Plaintiffs’ Position**


23 The County’s motion should be denied in full. It comes months too late, none
 24 of the *Turner* factors apply, and there is no “good cause” for compelling Plaintiffs to
 25 submit to intrusive psychiatric examinations. After forcing Plaintiffs to fight tooth
 26 and nail to obtain even the most basic discovery in this case—like a deposition of
 27 Sheriff Villanueva and the production of critical documents—the County now asks
 28 the Court to sanction Plaintiffs for objecting to their untimely, unnecessary demand

1 that they submit to intrusive, emotionally taxing psychiatric examinations.
2 Plaintiffs’ refusal to accept the County’s unilateral re-writing of the expert discovery
3 schedule, and their unwillingness to let the County intrude further into their private
4 affairs, is not “unreasonable.” *See supra* 20. Rather, it is self-defense. The
5 County’s alternative, unsupported request that Plaintiffs be precluded from
6 testifying about their emotional distress should likewise be rejected out of hand.

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DATED: October 15, 2021

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ATTESTATION CLAUSE

I, Casey B. Sypek, am the ECF User whose ID and password are being used to file this **MOTION AND JOINT STIPULATION REGARDING THE COUNTY’S MOTION TO COMPEL INDEPENDENT MEDICAL EXAMINATIONS OF PLAINTIFFS**. In compliance with L.R. 5-4.3.4, I hereby attest that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing’s content and have authorized the filing.

DATED: October 15, 2021

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