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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES MATTHEW ERHART, an individual,

Plaintiff,

v.

BoFI HOLDING, INC., an entity d/b/a BOFI FEDERAL BANK and BANK OF THE INTERNET,

Defendant.

Case No. 15-cv-2287-BAS-NLS
consolidated with
15-cv-2353-BAS-NLS

ORDER ON JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE NO. 5

[ECF No. 88]

BoFI FEDERAL BANK, a federal savings bank

Plaintiff,

v.

CHARLES MATTHEW ERHART, an individual,

Defendant.

1 Before the Court is the parties’ Joint Motion for Determination of Discovery
2 Dispute No. 5, wherein Defendant BofI Holding Inc. (“BofI”) requests the Court to
3 order Plaintiff Charles Matthew Erhart (“Erhart”) to sit for a mental examination.
4 ECF No. 88. For the reasons set forth below, the Court **DENIES WITHOUT**
5 **PREJUDICE** the motion.

6 **I. Background**

7 Erhart and BofI are involved in two separate consolidated actions. Erhart
8 brings this action, alleging whistleblower retaliation action against BofI for
9 violations of the Sarbanes–Oxley Act of 2002, the Dodd–Frank Wall Street Reform
10 and Consumer Protection Act, and California state law. ECF No. 32. Erhart alleges
11 that during the course of his employment with BofI as an internal auditor, he found
12 and reported several violations to his superiors and eventually to the appropriate
13 government agencies as a whistleblower. *Id.* at ¶¶ 9-46, 54-60. He alleges that in
14 return, his superiors attempted to silence him by threatening him, giving him
15 negative performance reviews, and eventually terminating him. Even after
16 termination, Erhart alleges that BofI has continued to defame him, preventing him
17 from obtaining subsequent employment. Erhart alleges that as a result, he has
18 suffered a loss in earnings and benefits, and physical and emotional distress. In the
19 consolidated case, BofI brings a countersuit against Erhart, alleging that he stole and
20 disseminated BofI’s confidential information and documents, causing damage to its
21 reputation and stock price. *See generally BofI Federal Bank v. Erhart*, Case No.
22 15cv02353-BAS (NLS), ECF No. 12.

23 Relevant to this dispute, Erhart’s first amended complaint included a cause of
24 action for intentional infliction of emotional distress. ECF No. 32 at ¶¶135-138.
25 The Court later dismissed this cause of action from the complaint. ECF No. 44 at
26 28-31. Regardless, the complaint still includes allegations that Plaintiff suffered
27 emotional distress arising from the events alleged therein. *See* ECF No. 32 at ¶¶ 75,
28 81, 94, 123, 156.

1 On August 10, 2018, BofI requested that Plaintiff stipulate to a mental
2 examination or alternatively, sought to meet and confer on the matter. ECF No. 88-
3 1 at 5. On August 12, 2018, BofI served Plaintiff with an Amended Notice of
4 Mental Examination, seeking to set the examination for September 5, 2018. ECF
5 No. 88-7. The notice stated that Plaintiff would be examined by Dr. Marc Cohen to
6 “assess[] the facts supporting those portions of Plaintiff’s complaint and damages
7 related to his alleged mental conditions, as well as psychiatric conditions that may
8 serve as a basis for BofI’s defense against Plaintiff’s claims for damages.” *Id.* The
9 notice also stated that the examination would consist of a “standard psychiatric
10 examination” of Plaintiff, using “accepted diagnostic instruments, tests,
11 manipulations, and techniques” and last no more than 8 hours with lunch and breaks
12 as needed. *Id.* On August 28, 2018, Plaintiff informed BofI that he would not
13 submit to the examination. ECF No. 88-1 at 5. 6.

14 The parties subsequently attempted to negotiate a stipulation. Plaintiff agreed
15 to stipulate to the following if BofI would not pursue the mental examination: (1)
16 BofI did not cause Erhart to suffer any emotional, mental, or physical distress
17 beyond mere garden variety distress; (2) Erhart shall not be entitled to recover
18 damages arising out of his emotional, mental or physical distress beyond damages
19 for garden variety distress; and (3) Erhart agreed “not to designate in expert
20 disclosures or call at trial an expert concerning Erhart’s emotional, mental, or
21 physical distress, including but not limited to any treating physician, medical expert,
22 or consultant.” ECF No. 88-1 at 7. However, Erhart would not agree to stipulate
23 that he “is not suffering from, and does not seek damages from BofI for any
24 continuing and/or future emotional, mental, or physical distress.” *Id.*; ECF No. 88-9
25 at ¶ 3. Separately, Plaintiff offered to stipulate that he would not call any doctors at
26 trial if BofI would agree not to depose any doctors or call any doctors as witnesses
27 at trial and to withdraw its request for a mental examination, but BofI declined.
28

1 ECF No. 88-9 at ¶ 14. Thus, no stipulations were ever entered into and the parties
2 bring the present dispute to the Court.

3 **II. Legal Standards**

4 Federal Rule of Civil Procedure 35 governs mental examinations and
5 authorizes the court to “order a party whose mental or physical condition . . . is in
6 controversy to submit to a physical or mental examination by a suitably licensed or
7 certified examiner.” Fed. R. Civ. P. 35(a)(1). The order may be made “only on
8 motion for good cause and on notice to all parties and the person to be examined”
9 and “must specify the time, place, manner, conditions, and scope of the
10 examination, as well as the person or persons who will perform it.” Fed. R. Civ. P.
11 35(a)(2).

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

1 Although FRCP 35 “is to be construed liberally in favor of granting
2 discovery,” “garden-variety” emotional distress is insufficient to put Plaintiff’s
3 mental state in controversy. *Turner*, 161 F.R.D. at 96; *see also Schlagenhauf*, 379
4 U.S. at 118. “One district court has characterized garden-variety claims for
5 emotional distress as ‘claims of generalized insult, hurt feelings, and lingering
6 resentment’ that ‘do not involve a significant disruption of the plaintiff’s work life
7 and rarely involve more than a temporary disruption of the claimant’s personal
8 life.’” *Ortiz v. Potter*, 2010 WL 796960, at *3 (E.D. Cal. Mar. 5, 2010)
9 (quoting *Javeed v. Covenant Medical Center Inc.*, 218 F.R.D. 178, 179 (N.D. Iowa,
10 Apr. 3, 2001)). Another district court distinguished a garden-variety claim of
11 emotional distress from “a claim of psychic injury or psychiatric disorder.”
12 *Houghton v. M & F Fishing, Inc.*, 198 F.R.D. 666, 668 (S.D. Cal. Jan. 10, 2001)
13 (quoting *Sabree v. United Broth. of Carpenters & Joinders of America, Local No.*
14 *33*, 126 F.R.D. 422, 426 (D. Mass. June 8, 1989)).

15 “Regardless of whether the ‘good cause’ requirement is met, it is within the
16 Court’s discretion to determine whether to order an examination.” *Nguyen v.*
17 *Qualcomm Inc.*, CIV. 09-1925-MMA WVG, 2013 WL 3353840, at *4 (S.D. Cal.
18 July 3, 2013).

19 **III. Discussion**

20 BoFI argues that, even though the Court previously found that Erhart’s claims
21 of emotional distress are garden variety now that the intentional infliction of
22 emotional distress claim has been dismissed, several factors support permitting a
23 mental examination. Recently on September 27, 2018 in response to an
24 interrogatory regarding Plaintiff’s “basis for any and all general damages” sought,
25 Plaintiff answered:

26 Plaintiff seeks all general damages allowable by law on his claims,
27 including without limitation for all emotional harm, physical pain,
28 mental suffering, loss of enjoyment of life, anxiety, humiliation,

1 emotional distress, embarrassment, injury to reputation, he has suffered
2 or will suffer as a result of Defendants’ conduct.

3 ECF No. 88-8 at 8. In addition, in his initial disclosures, Plaintiff disclosed Drs.
4 Marc Reiner and Robert LaVigne, both “[p]sychiatrist[s] that Mr. Erhart met with
5 on multiple occasions relating to his emotional distress.” ECF No. 88-5 at 29, 32.
6 Plaintiff has also identified Dr. Calvin Wong as someone who has provided him
7 with medical treatment. ECF No. 88-6 at 11-12. Furthermore, Plaintiff has
8 produced medical records, which indicate that Erhart suffered from “anxiety from
9 work, dizziness,” and seeing dark spots. ECF No. 88-1 at 4.

10 Erhart counters that his claims are garden-variety claims that do not warrant
11 an intrusive mental examination. ECF NO. 88-1 at 15-16. Erhart argues that he
12 only disclosed treating doctors in his initial disclosures for the sake of transparency
13 and to meet his discovery obligations. *Id.* at 16. He points out that he has offered to
14 stipulate to not calling treating doctors but it was BofI who rejected the stipulation.
15 *Id.* Erhart also contends that he has no current treatment regarding his mental state
16 so there is no need to examine him now. *Id.* at 18.

17 First, the Court considers whether Plaintiff has put his mental state
18 sufficiently “in controversy.” The parties do not dispute that the first, second, and
19 fifth *Turner* factors do not apply here—there is no intentional infliction of emotional
20 distress claim remaining, Plaintiff has not alleged a specific mental injury, and
21 Plaintiff does not concede that his mental state is “in controversy.” Thus, the only
22 factors for the Court to consider are the third and fourth *Turner* factors.

23 As for *Turner* factor three—if there is a claim of unusually severe emotional
24 distress—the Court finds that this factor is a close call. The allegations in the
25 complaint related to Plaintiff’s mental distress and Plaintiff’s recent interrogatory
26 response are vague and non-specific. However, Plaintiff did close at least two
27 doctors in his initial disclosures who he claims treated him for “emotional distress.”
28 Furthermore, Plaintiff refused to stipulate to not claiming any damages for

1 “continuing and/or future emotional, mental, or physical distress.” Both of these are
2 suggestive that Plaintiff’s emotional distress—though vaguely alleged—may be
3 more severe than a more typical case, where the distress caused is more limited in
4 temporal scope to event at issue and does not cause significant disruption to
5 Plaintiff’s personal or professional life. Regardless, on balance, the Court does not
6 find that this factor standing alone would be sufficient to warrant a mental
7 examination.

8 However, the above factor coupled with *Turner* factor four may be sufficient
9 to place Plaintiff’s mental status “in controversy.” The fourth factor focuses on
10 whether Plaintiff would offer expert testimony as to his mental distress. Plaintiff
11 has disclosed several doctors he claims treated him for emotional distress and has
12 produced medical records reflecting treatment. Treating physicians are typically
13 considered experts, who would give testimony under Federal Rule of Evidence 702.
14 *See, e.g., Langermann v. Prop. & Cas. Ins. Co. of Hartford*, No. 2:14-CV-00982-
15 RCJ, 2015 WL 4724512, at *4 (D. Nev. Aug. 10, 2015) (stating that “[t]reating
16 physicians are clearly experts” even though they are also percipient witnesses and
17 need to be disclosed as such if they are to testify to any “medical opinion”); *see also*
18 *Carrillo v. B & J Andrews Enterprises, LLC*, No. 2:11-CV-01450-RCJ, 2013 WL
19 394207, at *4 (D. Nev. Jan. 29, 2013) (“Treating physicians or other health care
20 professionals are primary examples of those who must be identified under Rule
21 26(a)(2)(A) and provide disclosures pursuant to Rule 26(a)(2)(C).”). Thus, even
22 though the time for expert disclosures has not yet passed,¹ planned testimony of
23 treating physicians even prior to expert disclosure can be indicative that expert
24 testimony will be presented regarding emotional distress. *See Ortiz v. Potter*, No.
25 2:08-CV-01326 LKKKJN, 2010 WL 796960, at *4 (E.D. Cal. Mar. 5, 2010).

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27
28 ¹ The current deadline is set for November 5, 2018. ECF No. 81.

1 The complication in this case with this factor is that it is not entirely clear to
 2 the Court what Plaintiff is willing to stipulate to at this juncture. It is true that the
 3 parties discussed certain stipulations regarding Plaintiff agreeing to not put on
 4 testimony of treating physicians/experts in exchange for Defendant not pursuing the
 5 mental examination, but these stipulations were never entered into and therefore, not
 6 binding on either party. Thus, while Plaintiff states in the joint motion that he
 7 “agreed” to so stipulate, it is unclear to the Court whether Plaintiff is saying he
 8 “agreed” to in the past with relation to the parties’ negotiations over stipulations that
 9 were never entered into or whether he is affirmatively representing to the Court now
 10 that he will definitively not call any treating physicians or other experts as to
 11 emotional distress.² If it is the latter, the Court would agree that this factor would
 12 not warrant a mental examination either.

13 Accordingly, at this juncture, the Court will **DENY** Boff’s request
 14 **WITHOUT PREJUDICE** to renewing the request should more evidence come to
 15 light that Plaintiff will put on testimony and/or evidence from his doctors or other
 16 experts regarding any diagnosis or treatment for emotional distress.³ For example, if
 17 Plaintiff designates any of the treating physicians as experts at the expert disclosure
 18 stage, this may be indicative of his intent to put on such evidence. At that point, the
 19 Court may find that a mental examination may be appropriate and could be
 20 conducted during the expert discovery period.⁴ *See, Luque-Villanueva v. County of*

22 ² For example, as another point of confusion, Plaintiff includes as a title to a
 23 subsection in his motion that he “is not calling his doctors as witnesses,” but in the
 24 subsection, he states that he is “not introducing any evidence from a *present* treating
 25 doctor.” ECF No. 88-1 at 16, 18 (emphasis added).

26 ³ In addition, the Court expects that parties can work issues like this out without
 27 court intervention and encourages the parties to work towards a resolution on this
 28 issue should any further complications arise.

⁴ Because the Court does not find that Plaintiff’s mental status is “in controversy” at
 this time, the Court does not need to reach the issue of whether there is “good

1 *San Diego*, 16CV2945-GPC (NLS), 2018 WL 2149366, at *2 (S.D. Cal. May 10,
2 2018) (permitting IME during expert discovery period).

3 **IV. Conclusion**

4 At this phase of litigation, the Court will exercise its discretion to **DENY**
5 **WITHOUT PREJUDICE** Bofl’s request for Plaintiff to submit to a mental
6 examination, subject to renewal at a later time if appropriate.

7 **IT IS SO ORDERED.**

8 Dated: October 12, 2018

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10 Hon. Nita L. Stormes
11 United States Magistrate Judge
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28 cause” to permit the examination. *See Robertson v. City of San Diego*, No. 13CV1460 W JLB, 2014 WL 6810726, at *3 (S.D. Cal. Dec. 2, 2014).