

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JIONNI CONFORTI,

Plaintiff,

v.

ST. JOSEPH'S HEALTHCARE SYSTEM,
INC.; ST. JOSEPH'S HOSPITAL AND
MEDICAL CENTER D/B/A ST. JOSEPH'S
REGIONAL MEDICAL CENTER; and
FATHER MARTIN D. ROONEY,

Defendants.

Case No. 2:17-cv-00050 (CCC/CLW)

Motion Day: March 16, 2020

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION
OF THE COURT'S OPINION AND ORDER DENYING DEFENDANTS' MOTION TO
COMPEL MENTAL EXAMINATION OF PLAINTIFF**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
BACKGROUND	2
LEGAL STANDARD.....	3
ARGUMENT	4
I. THE MOTION MUST BE DENIED BECAUSE DEFENDANTS FAIL TO CHALLENGE THE LACK OF “GOOD CAUSE.”.....	4
II. THE COURT’S ORDER ON DEFENDANTS’ RULE 35 MOTION IS CONSISTENT WITH ITS PRIOR RULING ON PLAINTIFF’S MOTION TO QUASH.....	6
III. DEFENDANTS DO NOT IDENTIFY ANY “NEW” EVIDENCE OR MISTAKE OF LAW TO WARRANT RECONSIDERATION.	8
1. Defendants Consented To The Briefing Schedule On The Rule 35 Motion.	8
2. The Deposition Testimony Is Not “New” Evidence.	9
3. Defendants Identify No Factual Or Legal Error On The Court’s Resolution Of The “In Controversy” Requirement.....	11
IV. DEFENDANTS FAILED TO ESTABLISH DR. REEVES’S QUALIFICATIONS UNDER RULE 35.	13
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>Ballas v. Tedesco</i> , 41 F. Supp. 2d 531 (D.N.J. 1999).....	6
<i>Benham v. Rice</i> , 2007 WL 8042488 (D.D.C. Sept. 14, 2007).....	7
<i>Bowers v. Nat’l Collegiate Athletic Ass’n</i> , 130 F. Supp. 2d 610 (D.N.J. 2001).....	3
<i>Cabeza v. Fed. Home Loan Mortg. Corp.</i> , 2015 WL 4388339 (D.N.J. July 14, 2015).....	8
<i>Evans v. Catholic Relief Servs.</i> , 2020 WL 468336 (D.N.J. Jan. 29, 2020).....	1, 3, 5
<i>Galletta v. Velez</i> , 2014 WL 631891 (D.N.J. Feb. 18, 2014).....	9
<i>Gilgallon v. Bd. of Chosen Freeholders for Cty. of Hudson</i> , 2005 WL 6962099 (D.N.J. Mar. 29, 2005).....	10
<i>Estate of Harrison v. Trump Plaza Hotel & Casino</i> , 2015 WL 3754996 (D.N.J. June 16, 2015).....	4
<i>Kuminka v. Atlantic Cnty. N.J.</i> , 551 F. App’x 27 (3d Cir. 2014).....	7
<i>Max’s Seafood Café v. Quinteros</i> , 176 F.3d 669, 677 (3d Cir. 1999).....	4
<i>Montana v. Cty. of Cape May Bd. of Freeholders</i> , 2013 WL 5724486 (D.N.J. Oct. 18, 2013).....	6, 11
<i>Pine Belt Auto., Inc. v. Royal Indem. Co.</i> , 2009 WL 424384 (D.N.J. Feb. 19, 2009).....	9
<i>Red Roof Franchising LLC, Inc. v. AA Hosp. Northshore, LLC</i> , 937 F. Supp. 2d 537 (D.N.J. 2013)f.....	4, 8, 9
<i>Resorts Int’l, Inc. v. Greate Bay Hotel & Casino, Inc.</i> , 830 F. Supp. 826 (D.N.J. 1992).....	3
<i>Robinson v. HD Supply, Inc.</i> , 2013 WL 3815987 (E.D. Cal. July 19, 2013).....	5
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964).....	5, 7, 11
<i>Sleep Tight Diagnostic Ctr., LLC v. Aetna Inc.</i> , 2020 WL 967819 (D.N.J. Feb. 27, 2020).....	1, 4

Tucker v. (HP) Hewlett Packard, Inc.,
2019 WL 2743781 (D.N.J. Apr. 30, 2019) 11

Rules and Regulations

L.Civ. R. 7.1(i) 3
Fed. R. Civ. P. 26 1, 6, 7
Fed. R. Civ. P. 35 *passim*
Fed. R. Evid. 702 14

Plaintiff Jionni Conforti respectfully submits this Opposition to Defendants' Motion for Reconsideration (Dkts. 119-120) of the Court's Opinion and Order (Dkt. 116) (the "Order") denying Defendants' Motion to Compel a Mental Examination (Dkt. 96) (the "Rule 35 Motion").

PRELIMINARY STATEMENT

A motion for reconsideration is an "extraordinary remedy" that "is not warranted simply because a party disagrees with a decision" or as a "vehicle for rearguing matters that were or could have been raised prior to the Court's ruling." *Evans v. Catholic Relief Servs.*, 2020 WL 468336, at *1 (D.N.J. Jan. 29, 2020). Yet that is exactly what Defendants' motion forwards here: It merely "regurgitate[s] the same failed arguments which this Court has considered and rejected in the prior decision," without directing the Court to any intervening change in controlling law, any evidence unavailable to Defendants, or otherwise showing how the Court's decision presents a "manifest injustice." *Sleep Tight Diagnostic Ctr., LLC v. Aetna Inc.*, 2020 WL 967819, at *2-3 (D.N.J. Feb. 27, 2020) (Wolfson, C.J.). And while Defendants try to squeeze old arguments under new headings, none comes close to justifying reconsideration.

On January 22, 2020, after months of extensive argument on Defendants' Rule 35 Motion, this Court correctly found (Order at 8) that "Defendants have not sustained their burden" of showing that the "extraordinary remedy of a Rule 35 examination is necessary here." Specifically, the Court determined that: (1) none of the five *Turner* factors for the "in controversy" requirement were met, as Mr. Conforti does not seek damages for "severe" or "ongoing mental distress," does not plan to offer expert testimony on damages, and does not assert any claim for relief beyond that of a typical victim of discrimination (*id.* at 4); and (2) in any event, Defendants' motion "lack[ed]" the requisite "good cause" to force Mr. Conforti to undergo an invasive mental examination "[i]n light of the comprehensive discovery available to Defendants" already on Mr. Conforti's discrimination claims (*id.* at 5-6).

Defendants' motion for reconsideration offers no basis for the Court to second guess its careful Order. *First*, it fails to even mention (let alone contest) the Court's conclusion that Defendants did not establish good cause, which *alone* compels denial of the motion. *Second*, the Order in no way "contradicts" this Court's earlier rulings. *Third*, Defendants identify no new evidence or manifest errors that would now show Mr. Conforti placed his mental condition "in controversy." *Finally*, and in any event, Defendants fail to show that Dr. Reeves is "suitably" qualified to conduct such an invasive, wide-ranging mental examination demanded here.

Frankly, the question is not even close. The Court should (again) reject Defendants' rehashed arguments, and deny Defendant's motion for reconsideration.

BACKGROUND

This action was filed in January 2017 (Dkt. 1), after Defendants discriminated against Mr. Conforti in June 2015 by denying him access to medical care because of his sex, nonconformity with sex stereotypes, and transgender status.¹ Two years later, after repeated discovery delays and on the eve of the close of fact discovery (*see* Dkt. 69-1 at 5-6), Defendants belatedly served six deposition subpoenas on Mr. Conforti's medical providers. Mr. Conforti filed a motion to quash in February 2019 (Dkt. 69) ("Motion to Quash"). Thereafter, in July 2019, the parties conferred and agreed to a proposed amended discovery schedule, in which Defendants consented to filing their Rule 35 Motion by July 22, 2019, and only disagreed as to whether expert reports should be filed prior to resolving the Motion to Quash. *See* Dkt. 93 at 1-2.

The parties completed briefing on Defendants' Rule 35 Motion in August 2019 (*see* Dkt. 101). On August 15, 2019, the Court issued its Order on Mr. Conforti's Motion to Quash, (Dkt.

¹ Mr. Conforti further relies on and incorporates herein the facts set forth previously in Mr. Conforti's Opposition to Defendants' Rule 35 Motion. Dkt. 100 at 3-4.

104). Relevant here, the Court ruled on the Motion to Quash that under the liberal Rule 26 “relevance” standard, the Court would “permit the depositions” of Dr. Ian Tang, Dr. Joseph Vitale, and Ms. Rissy Batista, in light of their “reasonable temporal scope” to “Defendants’ alleged wrongdoing and in its immediate aftermath.” *Id.* at 4. By contrast, the Court quashed the subpoenas to Mary Vitale, Dr. Charles Haddad, and Dr. Vincent Fitzgerald, as well as Defendants’ request for medical records after July 2018 because even under Rule 26, “any connection” between Mr. Conforti’s mental health treatment occurring “upwards of three years after the alleged act of discrimination” was “highly attenuated” to his “emotional distress damages.” *Id.* at 10.

Defendants deposed Dr. Tang, Dr. Vitale, and Ms. Batista in September 2019. Oral argument on the Rule 35 Motion was held on December 3, 2019 (Dkt. 115), and, at Defendants’ request, the deposition transcripts of Dr. Tang and Ms. Batista (and Dr. Vitale) *were submitted to the Court for consideration on the Rule 35 Motion* the next day. *See* Exhibit 1 attached hereto (Defendants’ Dec. 4, 2019 cover letter transmitting transcripts to the Court). On January 22, 2020, the Court issued the instant Order denying Defendants’ Rule 35 Motion. Dkt. 116.

LEGAL STANDARD

A party may seek reconsideration of an order by filing a motion “setting forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked.” L. Civ. R. 7.1(i); *see Bowers v. Nat’l Collegiate Athletic Ass’n*, 130 F. Supp. 2d 610, 612 (D.N.J. 2001) (“The word ‘overlooked’ is the operative term in the Rule.”); *Evans*, 2020 WL 568336, at *1 (“‘Overlooked’ refers only to facts and legal arguments that might reasonably have resulted in a different conclusion had they been considered.” (quotations omitted)).

In this District, “reconsideration is an extremely limited procedural vehicle,” *Resorts Int’l, Inc. v. Greate Bay Hotel & Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992), and “is improper when it is used to ask the Court to rethink what it had already thought through—rightly or

wrongly,” *Red Roof Franchising LLC, Inc. v. AA Hosp. Northshore, LLC*, 937 F. Supp. 2d 537, 547 (D.N.J. 2013). To prevail on a motion for reconsideration, Defendants must show at least one of the following grounds: “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [made its initial decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). “The standard for reconsideration is high, and such motions are granted only sparingly.” *Red Roof Franchising*, 937 F. Supp. 2d at 544. “In other words, a motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple.” *Sleep Tight Diagnostic Ctr.*, 2020 WL 967819, at *2 (quotations omitted).

ARGUMENT

In their motion for reconsideration, Defendants identify no “new evidence not available when the [C]ourt” denied their Rule 35 Motion, nor any “clear error of law or fact” in the Order, nor any other basis to warrant reconsideration. *Max’s Seafood Café*, 176 F.3d at 677. Because the motion does nothing more than express “disagreement with the Court’s initial decision,” it is “not appropriate” for reconsideration and should be summarily denied. *Estate of Harrison v. Trump Plaza Hotel & Casino*, 2015 WL 3754996, at *1 (D.N.J. June 16, 2015).

I. THE MOTION MUST BE DENIED BECAUSE DEFENDANTS FAIL TO CHALLENGE THE LACK OF “GOOD CAUSE.”

As an initial matter, Defendants’ motion can be denied for one simple reason: They do not challenge the Court’s finding that they failed to establish “good cause” to warrant a Rule 35 mental examination. In the Order, the Court ruled (at 5) that “[e]ven if Plaintiff had placed his depression, anxiety, or gender dysphoria in controversy here, Defendants’ Rule 35 application *still* fails for lack of good cause.” (emphasis added). Defendants offer no arguments—new or old—contesting this finding. Because this was an independent ground for denying Defendants’ Rule 35 Motion,

this alone justifies denial of reconsideration. *See Evans*, 2020 WL 568336, at *1 (movant must direct Court to “facts and legal arguments that might reasonably have resulted in a different conclusion had they been considered”). Defendants mention “good cause” only once (Defs.’ Br. 8), in a case citation where Defendants address whether Mr. Conforti placed any injury “in controversy,” offering no mention (let alone argument) of how good cause is now satisfied.

The reason for Defendants’ silence on “good cause” is self-evident: While they attempt to rely on “new” testimony obtained after briefing (but *before* oral argument) as support for their (erroneous) position that Mr. Conforti’s mental status was placed “in controversy,” that same purportedly “new” evidence supports that they can obtain sufficient information “through other discovery methods,” *i.e.* that good cause does not exist. Order at 6. At their request, Defendants were granted three additional depositions on Mr. Conforti’s standard compensatory damages request on top of the “comprehensive discovery [already] available to Defendants” (*id.*), which underscores that there is “no good cause” to also compel a Rule 35 examination of Mr. Conforti’s current mental health status. *See, e.g., Robinson v. HD Supply, Inc.*, 2013 WL 3815987, at *6 (E.D. Cal. July 19, 2013) (denying a Rule 35 examination when defendants’ “asserted bases for good cause are unpersuasive,” even if the emotional distress was “in controversy”).

Even if Defendants’ motion can be construed as somehow implicitly challenging the Court’s “lack of good cause” finding, it still fails. At most, Defendants argue that “the desired materials are relevant,” but the Supreme Court (and this Court) rejected such a rationale as a sufficient basis for “good cause” under Rule 35. *See Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) (“good cause” requires a “greater showing of need” than Rule 26’s relevancy requirement); Order at 5 (“*Schlagenhauf* makes clear that relevance is an insufficient basis for a finding of good cause.”). The good cause requirement is “not a mere formality,” *id.*, but should “act as a shield

against unnecessarily subjecting a plaintiff to a mental examination on just general allegations of emotional distress, or using it as a means to harass the plaintiff.” *Montana v. Cty. of Cape May Bd. of Freeholders*, 2013 WL 5724486, at *2 (D.N.J. Oct. 18, 2013). Nowhere in the motion do Defendants explain how the Court can now find good cause.² The Court need go no further.

II. THE COURT’S ORDER ON DEFENDANTS’ RULE 35 MOTION IS CONSISTENT WITH ITS PRIOR RULING ON PLAINTIFF’S MOTION TO QUASH.

Even if the Court were to proceed to the arguments Defendants present in their motion, it should still be denied, as Defendants rely on the same evidence and arguments that the Court already considered and rejected. Defendants argue (Defs.’ Br. 5-8) the Order is “contradicted” by the Court’s prior ruling on Mr. Conforti’s Rule 26 Motion to Quash regarding “garden variety” damages. Defendants are wrong.

First, contrary to Defendants’ representations (Defs.’ Br. 7), the Court did *not* previously hold that “Conforti’s emotional condition is not garden variety.” Rather, in ruling on the Motion to Quash, the Court only found that, under the more liberal Rule 26 discovery standard, Defendants were entitled to depose Ms. Batista to “explor[e] other contributing factors to Conforti’s emotional distress,” “whether ‘garden variety’ or otherwise.” (Dkt. 104 at 8). Indeed, the Court reached the *opposite* conclusion on Dr. Fitzgerald (*id.* at 9-10), finding that “any connection to Plaintiff’s emotional distress damages” and Fitzgerald’s treatments “more than two years after St. Joseph’s denial of the hysterectomy” was too “highly attenuated.” The Court’s Motion to Quash ruling turned on *temporal proximity and relevance* to the acts of discrimination in June 2015, and did *not* find that Mr. Conforti alleged something beyond “garden variety.”

² Having failed to challenge this independent ground in their opening brief, Defendants have waived advancing any such argument on reconsideration. *See Ballas v. Tedesco*, 41 F. Supp. 2d 531, 533 n.2 (D.N.J. 1999) (“A moving party may not raise new issues and present new factual materials in a reply brief that it should have raised in its initial brief.”).

Second, in any event, the Order explicitly addressed and rejected this very argument, finding that the “same logic” permitting Defendants to depose three non-parties under Rule 26 “does not extend to Rule 35 examinations, which are subject to a separate and more exacting standard than other forms of discovery.” Order at 4; *see also Kuminka v. Atlantic Cnty. N.J.*, 551 F. App’x 27, 29 (3d Cir. 2014) (“mere conclusory allegations of the pleadings” and “mere relevance to the case” do not satisfy Rule 35). Defendants point to no clear error of law or fact warranting a different outcome, and again fail to offer any persuasive reasoning why the “standard language concerning the emotional distress damages typically sought in discrimination cases” in the Complaint places Mr. Conforti’s mental condition “in controversy,” let alone justifying an invasive mental exam.³ Order at 4. In fact, Defendants previously differentiated between the “broader” Rule 26 standard and the more exacting standard under Rule 35, arguing that the Court should reject “Plaintiff’s attempt to graft the [Rule 35] standard” into Rule 26. Dkt. 73 at 10 & n.1; *see also* Dkt. 115 (“12/03 Hr’g Tr.”) 31:12-16 (Defendants “agree it’s a higher standard” under Rule 35). Having already conceded a heightened standard applies to Rule 35, Defendants cannot now reverse course and argue that a Rule 26 discovery decision is dispositive here.

Third, while Defendants note (Defs.’ Br. 8) the Court’s recognition that a Rule 35 examination could be warranted for plaintiffs seeking damages for “ongoing mental distress” that

³ Nor do Defendants respond to Mr. Conforti’s serious concern that compelling Rule 35 mental examinations to be conducted on victims of discrimination simply for seeking “standard” emotional distress damages “typically sought in discrimination cases” (Order at 4) would have a significant chilling effect on civil rights litigants and would be contrary to public policy. *See* Dkt. 100 at 22-23; *see also Benham v. Rice*, 2007 WL 8042488, at *2 (D.D.C. Sept. 14, 2007) (concluding that the “[e]xtraordinarily intrusive” Rule 35 orders “would have an unwarranted chilling effect” on victims of discrimination if subjected to a mental examination “anytime they sought redress for such perceived discrimination”). “The plain language of Rule 35 precludes such an untoward result.” *Schlagenhauf*, 379 U.S. at 121-22 (cautioning that if Rule 35 examinations were permitted in any personal injury negligence action, it “would mean that such examinations could be ordered routinely in automobile accident cases”).

is “more severe than general emotional distress” (Order at 4), they identify no new factual basis or legal authority suggesting the Court should now conclude that Mr. Conforti does in fact seek such damages for “severe” and “ongoing” emotional distress (and to be clear, he does not). *See Cabeza v. Fed. Home Loan Mortg. Corp.*, 2015 WL 4388339, at *2 (D.N.J. July 14, 2015) (rejecting reconsideration motion based on “a mere difference of opinion with the Court’s decision”). Moreover, Defendants never argued in the first instance that Mr. Conforti’s emotional distress was alleged to be “unusually severe” (Dkt. 100 at 13). *See Red Roof Franchising*, 937 F. Supp. 2d at 543 (motion for reconsideration is not “an opportunity for a litigant to raise new arguments or present evidence that could have been raised prior to the initial judgment”).

III. DEFENDANTS DO NOT IDENTIFY ANY “NEW” EVIDENCE OR MISTAKE OF LAW TO WARRANT RECONSIDERATION.

Defendants offer a list of gripes (Defs.’ Br. 9-11) about purported “new” information learned before “briefing closed” on the Rule 35 Motion. None of these warrant reconsideration.

1. Defendants Consented To The Briefing Schedule On The Rule 35 Motion.

Defendants begin by blaming the Court (Defs.’ Br. 9-10) for purportedly denying them the opportunity to rely on the transcripts of the medical providers’ depositions in support of their Rule 35 Motion, arguing that “the Court still ordered Defendants to file the motion to compel on July 22, 2019” after they allegedly “expressed concern” that the depositions would not be complete by then. Defendants are mistaken, and their faulty recollection does not justify reconsideration.

Defendants cannot blame the Court for a proposed briefing schedule that was *negotiated and agreed to by Defendants*. *See* Dkts. 93, 95. Regardless of any “concern” expressed at oral argument on the Motion to Quash in June 2019, Defendants subsequently conferred with Mr. Conforti and consented to filing their Rule 35 Motion by July 22, 2019, and only “expressed concern” on the timing of expert reports in relation to the medical providers’ depositions. *See* Dkt.

93 at 1-2 (joint proposed amended discovery schedule noting that “Defendants have agreed to file their Rule 35 motion by July 22”). The Court merely so-ordered the parties’ proposed briefing schedule. Dkt. 95 at 1-2. And regardless, if those depositions were so critical to the Rule 35 Motion, Defendants had ample opportunity to request leave to file supplemental briefing after those depositions were completed in September 2019. They did not. Defendants cannot now complain about a briefing schedule they agreed to seven months earlier, based on evidence they obtained months prior to oral argument.⁴ *Cf. Galletta v. Velez*, 2014 WL 631891, at *2 (D.N.J. Feb. 18, 2014) (“a motion for reconsideration is not a vehicle for a party to raise arguments that were effectively waived by being omitted from that party’s original briefs”).

2. The Deposition Testimony Is Not “New” Evidence.

At any rate, Defendants’ claim that the deposition testimony is “new” evidence (Defs.’ Br. 9-11) is belied by the fact that Defendants *already relied on and submitted those transcripts to the Court*. See, e.g., 12/03 Hr’g Tr. 7:1-2 (“[T]his is a good time [to] go into the two doctors that were deposed”); *id.* at 7:5-8:7 (discussing deposition testimony). A reconsideration motion cannot be based on preexisting evidence newly packaged to the Court; rather, Defendants must show that the “new” evidence “was unavailable or unknown *at the time of the original hearing*,” not “after briefing closed” (Defs.’ Br. 9). *Red Roof Franchising*, 937 F. Supp. 2d at 547 n.7 (emphasis added); see also *Pine Belt Auto., Inc. v. Royal Indem. Co.*, 2009 WL 424384, at *3 (D.N.J. Feb. 19, 2009) (refusing to consider evidence “submitted to the Court prior to its decision,” as the party did not show it was “new” evidence that “was unavailable or not known at the time of the original

⁴ Moreover, Mr. Conforti identified both Dr. Tang and Ms. Batista in his Initial Disclosures, dated April 14, 2017, yet Defendants waited over two years until the close of discovery in January 2019 to issue their subpoenas. Any supposed prejudice from the subsequent briefing schedules on Defendants’ belated discovery requests were caused by Defendants’ own substantial, repeated delays in seeking any deposition testimony from Mr. Conforti or his providers.

hearing”). There is no dispute that, prior to January 2020, Defendants were aware of the three depositions they themselves took in September 2019.

Moreover, just one day after oral argument, Defendants submitted complete copies of the entire transcripts to the Court. *See* 12/03 Hr’g Tr. 9:6-9 (offer to “submit the deposition transcripts from Tang and Batista”); *see also* Ex. 1. The Order expressly noted (at 6) how “[t]hese deposition transcripts were submitted to the Court for in camera review in connection with [the Rule 35] Motion.” To now characterize such evidence as “new,” let alone “overlooked,” is confounding.

In any event, Defendants rely on the purportedly “new” evidence to “simply rehash the same arguments that were presented to and rejected by the Court.” *Gilgallon v. Bd. of Chosen Freeholders for Cty. of Hudson*, 2005 WL 6962099, at *1 (D.N.J. Mar. 29, 2005). For example, Defendants claim (Defs.’ Br. 9-10) that Dr. Tang’s and Ms. Batista’s testimony gave them “insight” into how Mr. Conforti was diagnosed with gender dysphoria, and this “change in circumstances” warrants a Rule 35 examination. But immediately after this point, Defendants concede (*id.* 10) that the Order already considered and rejected Defendants’ “novel” argument attacking Mr. Conforti’s undisputed diagnosis for the first time since June 2015. Order at 7-8.⁵

⁵ This exact issue was already briefed by the parties. *See* Dkt. 97 at 1-2 (Defendants arguing that Mr. Conforti’s gender dysphoria diagnosis and “mental health [is] the sole basis for his seeking the hysterectomy”); Dkt. 100 at 15-16 & n.4 (Mr. Conforti arguing that “Defendants have never asserted a defense that Mr. Conforti was denied a hysterectomy because he did not, in fact, have gender dysphoria”); Dkt. 101 at 8, 11 (Defendants arguing on reply that “[d]iscovery into Plaintiff’s gender dysphoria disorder post-surgery is clearly relevant”). Likewise, Defendants’ contention (Defs.’ Br. 2) that the deposition testimony “revealed ... that their diagnosis of Conforti’s gender dysphoria was based almost entirely on Conforti’s belief that he has gender dysphoria” was raised at oral argument. *See* 12/03 Hr’g Tr. 7:22-24 (Defendants’ counsel arguing that Dr. Tang and Ms. Batista’s diagnoses were based “largely in part on what Mr. Conforti told them,” consistent with “the test under the DSM”).

3. **Defendants Identify No Factual Or Legal Error On The Court's Resolution Of The "In Controversy" Requirement.**

Even if the September 2019 depositions of Dr. Tang or Ms. Batista constituted “new” evidence (they do not), Defendants fail to show how they now satisfy the “in controversy” requirement of Rule 35, as none of that testimony shows that the Court erred by finding that “Plaintiff has not placed his depression and anxiety ‘in controversy’” to justify a Rule 35 examination. Order at 4. Defendants instead resort to “us[ing] this motion as a way of reciting, at length, evidence previously available to [them] and restating arguments previously considered by this Court.” *Tucker v. (HP) Hewlett Packard, Inc.*, 2019 WL 2743781, at *1 (D.N.J. Apr. 30, 2019). “[S]uch efforts are wholly unavailing.” *Id.*

First, as Mr. Conforti argued in his prior opposition (Dkt. 100 at 6-18), and as the Court correctly found, Mr. Conforti seeks compensation for the general, non-clinical emotional distress typically felt “after experiencing alleged harassment.” *Montana*, 2013 WL 5724486, at *4; see Order at 4 (Complaint alleges “standard language concerning the emotional distress damages typically sought in discrimination cases”). Defendants’ arguments (Defs.’ Br. 8) that Mr. Conforti “suffered anxiety and depression long before June 2015” and that Dr. Tang’s and Ms. Batista’s deposition testimony “offer further proof” of Mr. Conforti’s “complex” mental health history were already raised by Defendants, and neither was sufficient (then or now) to show that Mr. Conforti placed his current mental condition “in controversy.” The same applies to Defendants’ cited cases (*id.* 7-8), which also were raised previously and do not demonstrate any error of law by the Court.⁶

⁶ *Montana*, for example, simply acknowledged that alleging “severe” or “specific injuries” that were “**caused by defendants’ actions**” (neither of which are the case here) can place a plaintiff’s mental state “in controversy,” but “general allegations” of “stress and anger after experiencing alleged harassment” were insufficient to meet that heightened standard. 2013 WL 5724486, at *4 (emphasis added); see also *Schlagenhauf*, 379 U.S. at 118 (concluding that while a “plaintiff in a negligence action who asserts mental or physical injury” in the pleadings may satisfy the “in

Here, Mr. Conforti has *not* alleged he suffered any specific or severe psychological injuries caused by Defendants' actions. *See* Dkt. 100 at 8 & n.2 (collecting cases where severe emotional distress was found). He does *not* bring a claim for intentional or negligent infliction of emotional distress, and he has indicated he does *not* intend to offer expert testimony to support his claim for damages based on the standard emotional distress he suffered as a result of Defendants' actions. And it is patently insufficient under Rule 35's "in controversy" requirement that Mr. Conforti was *previously* diagnosed with gender dysphoria or other health conditions, as he neither seeks damages for his gender dysphoria nor alleges that it was caused or exacerbated by Defendants.

Second, Defendants attempt to sidestep the "in controversy" requirement by claiming (Defs.' Br. 10) that the "medical necessity" of the underlying medical care sought by a victim of discrimination must be established by a plaintiff to have "standing" to raise a discrimination claim. Defendants raised this during oral argument, which the Court considered and rejected. *See* 12/03 Hr'g Tr. 23:14-18 (Defendants asserting that "medical necessity" is a "threshold issue in this case as to whether or not there is discrimination ... they basically would have no standing if there was no medical necessity"); Order at 6. Defendants cite no intervening change in controlling law to support their extreme proposition that a hospital can discriminatorily refuse access to medical care first and investigate the medical necessity of that care over four years later.⁷

controversy" requirement, it was not satisfied when plaintiff's "condition was sought to be placed in issue by other parties").

⁷ If anything, Defendants seek a chance to explore *whether* there *could have been* a purportedly non-discriminatory reason to deny Mr. Conforti care based on the sufficiency of the underlying medical diagnosis—a defense Defendants never raised and conceded is not applicable here. *See* 12/03 Hr'g Tr. 10:1-8 (conceding that "obviously, we didn't examine [Mr. Conforti] to that degree at St. Joseph's ... St. Joseph's couldn't do it because of the ERDs, and I know that's a separate issue that we don't need to get into.").

Third, even assuming this argument was properly raised now on reconsideration (it is not), Defendants are wrong as a matter of law that Mr. Conforti has to establish that the hysterectomy was “medically necessary” for a discriminatory denial of access to that care to be actionable. It is undisputed that Defendants never based their denial on a qualified doctor’s fact-driven conclusion that a hysterectomy was not medically necessary for Mr. Conforti. Rather, the only reason for the denial provided by Defendants—either contemporaneously or advanced by counsel years later—was Defendants’ *knowledge or perception* that Mr. Conforti is transgender and suffers from gender dysphoria. And their only defense to Mr. Conforti’s claims has been that they cannot be held liable for such conduct, even though it is a violation of federal and state law. Mr. Conforti does not need to prove he is in fact transgender and was suffering from gender dysphoria in June 2015—though he is and was—to have standing to assert his discrimination claims. *See* Dkt. 100 at 15-16 & n.4 (collecting authority under the ACA and the NJLAD). Defendants conceded this point at oral argument as well. 12/03 Hr’g Tr. 24:3-7 (Defendants “don’t dispute that” a “perception” that someone is in a “protected category ... could be actionable discrimination”).

IV. DEFENDANTS FAILED TO ESTABLISH DR. REEVES’S QUALIFICATIONS UNDER RULE 35.

Finally, Defendants again mischaracterize (Defs.’ Br. 11) the proceedings by claiming that the Court “*sua sponte*” questioned Dr. Reeve’s qualifications on evaluating a gender dysphoria diagnosis in error. But Mr. Conforti *did* challenge Dr. Reeve’s credentials. 12/03 Hr’g Tr. 20:22-21:2 (arguing that Defendants provided “very little to no information about who the medical examiner is and whether that person has any experience at all with transgender patients, let alone diagnosing gender dysphoria”). And regardless, it was Defendants’ burden to meet the requirements of their own Rule 35 motion, including by: (1) showing that the mental examination will be conducted by “a *suitably* licensed or certified examiner”; and (2) “specify[ing]

the ... person or persons who will perform it.” Fed. R. Civ. P. 35(a)(1), (2)(B) (emphasis added); *see also id.*, advisory committee’s note (1991 amend.) (noting that the “new requirement” that the examiner be “suitably licensed” is “intended to encourage the exercise of [a court’s] discretion” and “expressly authorize[s]” courts “to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination”). Defendants made no effort (either now or on the original Rule 35 Motion) to show that Dr. Reeves was “suitably” licensed in the context of this litigation to conduct a re-investigation of an over six-year-old gender dysphoria diagnosis. Indeed, Defendants omit the “suitably” licensed language from their motion entirely. (Defs.’ Br. 12). Moreover, Defendants offer no explanation as to why Dr. Reeves’ curriculum vitae and declaration (Dkt. 121)—improperly offered now for the first time in this motion—could not have been submitted to the Court prior to deciding the Rule 35 Motion.

Defendants’ assertion (Defs.’ Br. 12) that Dr. Reeves’ qualifications can only be challenged *after* the invasive examination is conducted has no basis in Rule 35 either and flies in the face of logic. While that may be true for typical expert testimony under Federal Rule of Evidence 702, that is not the applicable standard for the more exacting standard under Rule 35 to directly examine Mr. Conforti’s present mental state. Whether Dr. Reeves is qualified to serve as an expert witness is not the issue; rather, the Court properly considered whether Defendants made the requisite showings to satisfy Rule 35, including that the examiner chosen was “suitably licensed or certified.” Fed. R. Civ. P. 35(a)(1); *see also* 12/03 Hr’g Tr. 20:22-21:2 (arguing that the issue of proper medical treatments for gender dysphoria could “be dealt with through expert testimony separately and apart from an intrusive, invasive, and rare independent medical examination”).

Even assuming *arguendo* that Defendants could offer this evidence now and take a second bite at the Rule 35 apple, they still fail. Dr. Reeves’ declaration (Dkt. 121) shows that he has no specific expertise with gender dysphoria beyond the general “field of psychiatry” and “participat[ing] in a statewide lecture” on gender dysphoria once in 2014. *Id.* ¶ 4. Dr. Reeves appears to concede as much, as he only plans to take a “history of Plaintiff’s alleged gender dysphoria” (*id.* ¶ 6)—information which Defendants (and consequently, Dr. Reeves) already have and does not necessitate an invasive Rule 35 examination. Nor do Defendants make any showing that Dr. Reeves is suitably licensed to exam Mr. Conforti on other (irrelevant) topics such as “the effectiveness” of the hysterectomy Mr. Conforti received. *Id.* In short, neither the Declaration nor Dr. Reeves’ curriculum vitae show clear error in the Court’s finding that Defendants failed to prove that Dr. Reeves is suitably qualified to conduct a Rule 35 examination of Mr. Conforti.

CONCLUSION

Defendants’ motion for reconsideration should be denied.

DATED: March 2, 2020

Respectfully submitted,

By: *s/ Jaclyn M. Palmerson*

Jaclyn M. Palmerson (N.J. Bar No. 209452016)

Jane M. Byrne (*pro hac vice*)

Todd Anten (*pro hac vice*)

Thomas L. Barnes (*pro hac vice*)

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

51 Madison Avenue, 22nd Floor

New York, New York 10010-1601

t: (212) 849-7000

Omar Gonzalez-Pagan (*pro hac vice*)

Carl S. Charles (*pro hac vice*)

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

120 Wall Street, 19th Floor

New York, New York 10005

t: (212) 809-8585

Attorneys for Plaintiff Jionni Conforti

CERTIFICATE OF SERVICE

I, Jaclyn M. Palmerson, hereby certify that, on March 2, 2020, I served true and correct copies of Plaintiff's Opposition to Defendants' Motion for Reconsideration on the following counsel of record by ECF:

Christopher Sawyer Mayer, Esq.
Thomas F. Doherty, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 622-4444
Email: cmayer@mccarter.com
Email: tdoherty@mccarter.com

/s/ Jaclyn M. Palmerson
Jaclyn M. Palmerson

EXHIBIT 1



Katerina R. Mantell
Associate
T. 212-609-6818
F. 212-645-1596
kmantell@mccarter.com

McCarter & English, LLP
Worldwide Plaza
825 Eighth Avenue
31st Floor
New York, NY 10019-7475
www.mccarter.com

December 4, 2019

VIA E-MAIL (CLW Orders@njd.uscourts.gov)

The Honorable Cathy L. Waldor
United States Magistrate Judge
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Room 4040, Courtroom 4c
Newark, New Jersey 07101

Re: Conforti v. St. Joseph's Healthcare System, Inc., et al.,
Case No. 2:17-cv-00050 (CCC/CLW)

Dear Judge Waldor:

This firm represents Defendants St. Joseph's Health, Inc., St. Joseph's University Medical Center, Inc., and Father Martin D. Rooney in the above-referenced matter. Pursuant to Your Honor's request at oral argument held on December 3, 2019, enclosed please the following documents:

- Full transcript of the Oral Deposition Testimony of Rissy Batista;
- Condensed transcript of the Oral Deposition Testimony of Rissy Batista;
- Full transcript of the Oral Deposition Testimony of Ian Tang, M.D.;
- Condensed transcript of the Oral Deposition Testimony of Ian Tang, M.D.;
- Full transcript of the Oral Deposition Testimony of Joseph Vitale, M.D.; and
- Condensed transcript of the Oral Deposition Testimony of Joseph Vitale, M.D.

Although Dr. Vitale's deposition transcript was not expressly discussed at oral argument, we have enclosed this transcript should Your Honor wish to review it.

These transcripts have been designated as "Confidential - Attorneys' Eyes Only" subject to the parties' protective order.

We thank the Court for its consideration of this matter.

Respectfully Submitted,

A handwritten signature in black ink that reads "Katerina R. Mantell".

Katerina R. Mantell

Enclosures

cc: Tom Barnes, Esq. (via email)
Omar Gonzalez-Pagan, Esq. (via email)
Christopher S. Mayer, Esq. (via email)
Thomas F. Doherty, Esq. (via email)