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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity; JEFF ZMUDA, in his official capacity; AL RAMIREZ, in his official capacity; HOWARD KEITH YORDY, in his official and individual capacities; CORIZON, INC.; SCOTT ELIASON; MURRAY YOUNG; RICHARD CRAIG; RONA SIEGERT; CATHERINE WHINNERY; AND DOES 1-15;

Defendants.

CIVIL ACTION FILE

NO. 1:17-cv-151-BLW

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO STRIKE
PORTIONS OF DECLARATION OF
APRIL DAWSON, M.D.**

COME NOW Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery, by and through their counsel of record, Parsons Behle & Latimer, and the Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Al Ramirez, Richard Craig, and Rona Siegert, by and through their counsel of record, Moore Elia Kraft & Hall, LLP, by and through their counsel of record, Parsons Behle & Latimer, and hereby submits Defendants' Response to Plaintiff's Motion to Strike Portions of Declaration of April Dawson, M.D. (the "Motion to Strike").

I. INTRODUCTION

On October 10, 2019, the Ninth Circuit issued an order partially lifting the stay of an injunction issued by this Court that required Defendants to provide Plaintiff Adree Edmo ("Ms. Edmo") with gender confirmation surgery ("GCS"). (ECF No. 220). The Ninth Circuit partially lifted the stay so that Ms. Edmo "may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." (*Id.* at 2). Based on a unilateral filing by Ms. Edmo, the Court ordered Defendants to provide 1) laser hair removal or electrolysis, 2) a GCS referral letter from a treating physician, and 3) payment approval for the surgery (the "Modified Injunction"). (*See* ECF Nos. 224 and 225). Defendants appealed that Order and filed a Motion to Stay Pending Appeal, generally arguing that the Court did not have jurisdiction to issue such an order and also because the Court failed to give Defendants an opportunity to respond to Ms. Edmo's filing upon which its Order was based. (ECF No. 228).

In support of their Motion to Stay, Defendants submitted the Declaration of Dr. April Dawson. (ECF No. 228-2). Dr. Dawson's declaration demonstrates that Defendants were unduly prejudiced when the Court issued the Order without allowing Defendants an opportunity to respond to Ms. Edmo's filing. Further, Dr. Dawson's declaration showed that Defendants have a

likelihood of success¹ on appeal since, among other things, the Court's order requiring pre-surgical treatment, including hair removal, is not narrowly tailored under the PLRA. Ms. Edmo apparently has not selected the specific surgery she wants and hair removal is not required for one of those surgeries. Additionally, there has not been the necessary findings by the Court that the hair removal, which after all the treatments are complete is permanent, is medical necessary. Moreover, 8th Amendment analysis does not allow a inmate to choose the care they want.

Ms. Edmo does not refute the merits and contents of Dr. Dawson's declaration; rather, Plaintiff tries to assert unsupported evidentiary arguments. **Plaintiff's attempt to strike Dr. Dawson's declaration is a telling attempt to sanitize the record of evidence that would further establishing that Edmo failed to present sufficient evidence at the October 2018 hearing as to what specific procedures and surgeries, if any, is medically necessary.**

The Court should deny Ms. Edmo's Motion to Strike. First, the rule against hearsay does not apply under the circumstances. Second, the statements are not hearsay. Third, some of the statements fall within a recognized exception to the rule against hearsay. Thus, Court should deny the Motion to Strike.

II. ARGUMENT

The rule against hearsay does not apply to Defendants' Motion to Stay. Like a motion for preliminary injunction, the urgency of a motion to stay "makes it difficult to obtain affidavits from persons who would be competent to testify at trial." *See Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *see also Nken v. Holder*, 556 U.S. 418, 428 (2009) (noting that "[a] stay pending appeal certainly has some functional overlap with an injunction, particularly a

¹ Or could have made a clear showing or been successful on the merits depending on the standard applicable to the Court's Order.

preliminary one”). Under such circumstances “a district court may rely on otherwise inadmissible evidence, including hearsay evidence.” *McGiboney v. Corizon*, No. 1:18-CV-00529-DCN, 2019 WL 3048339, at *5 (D. Idaho July 11, 2019) (quotation marks and citation omitted); *see also Flynt Distrib. Co.*, 734 F.2d at 1394 (A court may consider inadmissible evidence “when to do so serves the purpose of preventing irreparable harm before trial.”). Here, Defendants quickly moved for a motion to stay the Court’s Order. Based on the urgency of the Motion to Stay, the Court should consider Dr. Dawson’s affidavit even if it contains some hearsay.

However, Dr. Dawson’s declaration is not hearsay because many of the statements are not necessarily being used to prove the truth of the matters asserted in the declaration. A statement is hearsay only when it is “offer[ed] in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Dr. Dawson’s declaration is not being used to prove the truth of the matter asserted in the declaration. Rather, Defendants are using Dr. Dawson’s declaration to demonstrate the kinds of evidence they would have presented in response to Ms. Edmo’s filing.

Dr. Dawson’s statement regarding Boise Electrolysis refusal to treat Ms. Edmo is not hearsay. Dr. Dawson is the Idaho Regional Medical Director for Corizon and needs to know if offsite providers have refused care because she is involved in the offsite referral and approval process. Thus, Dr. Dawson has personal knowledge regarding whether Boise Electrolysis would agree to treat Ms. Edmo and it is an appropriate statement based on her job duties.

The other challenged statements from Dr. Dawson’s declaration fall within recognized exceptions to the rule against hearsay. A statement cannot be excluded as hearsay if it “is made for—and reasonably pertinent to—medical diagnosis or treatment; and . . . describes medical history; past or present symptoms or sensations; their inception; or their general cause.” Fed. R. Evid. 803(4). Plaintiff claims that Dr. Dawson’s statement regarding Ms. Edmo intent and desires

regarding which surgery she wants is inadmissible hearsay. However, such statements falls under this Fed. R. Evid. 803(4) exception. Moreover, such statements by Ms. Edmo are found in Dr. Stiller's consult note from April 2019 where he states: "pt unsure if she desires a penile inversion with scrotal grafts or colovaginoplasty." (Dawson Decl, Exhibit A.) This subjective representation of a patient's desires and comments is commonly found in medical records, such as in consult notes by an offsite provider, and commonly utilized by the treating medical doctors at the prison (or elsewhere) to assist with providing treatment and care to patients, such as Ms. Edmo. Further, the offsite consult note by Dr. Stiller is a business record as it is found in Ms. Edmo's chart at the prison. (Dawson Decl., paragraph # 8.) As such, even if the rules of evidence applied, the consult note and representations by Dr. Stiller about Edmo's comments and desires are admissible and fall within hearsay exceptions.

In addition, even if the rules of evidence applied, the statements made by Dr. Stiller to Dr. Dawson, including regarding the different surgical procedure options, whether hair removal is indicated for the various surgeries, the hair removal process and if the hair removal procedure when complete is permanent, if Plaintiff needs to be removed from hormones prior to surgery and potential risks, also fall within the Rule 803(4) exception. Dr. Dawson is Corizon's Regional Medical Director and is involved in coordinating Ms. Edmo's treatment with Dr. Stiller. Dr. Dawson's conversation with Dr. Stiller is related to Ms. Edmo's treatment as ordered by the Court. Thus, Dr. Stiller's statements, as reflected in Dr. Dawson's declaration, fall within a recognized exceptions to the rule against hearsay.

Additionally, Plaintiff's fail to recognize that Dr. Dawson is a qualified medical doctor in her own right. Although she is not a GCS surgeon, she has the ability to make such determination,

such as whether the hair removal process is permanent, based on her own education, training and experience.

Also, the statements made by Dr. Alviso related to Ms. Edmo's treatment should not be excluded as hearsay under Rule 803(4), even if the rules of evidence apply.

III. CONCLUSION

The Court should deny the Motion to Strike. The rule against hearsay does not apply to Defendants urgent Motion to Stay. Further, some of the statements in Dr. Dawson's declaration are not necessarily being used to prove the truth of the matter asserted. Finally, Dr. Dawson's statements fall within recognized exceptions to the rule against hearsay.

DATED this 6th day of November, 2019.

PARSONS BEHLE & LATIMER

By: /s/ Dylan A. Eaton

Dylan A. Eaton
Counsel for Defendants Corizon Inc.,
Scott Eliason, Murray Young, and
Catherine Whinnery

DATED this 6th day of November, 2019.

MOORE ELIA KRAFT & HALL, LLP

By: /s/ Brady J. Hall

Brady J. Hall
Counsel for Defendants Idaho Department of
Correction, Henry Atencio, Jeff Zmuda, Howard
Keith Yordy, Al Ramirez, Richard Craig, and
Rona Siegert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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