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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

D.H., by and through his mother, Janice Hennessy-Waller, and John Doe, by his guardian and next friend, Susan Doe, on behalf of themselves and all others similarly situated, Plaintiff, vs. Jami Snyder, Director of the Arizona Health Care Cost Containment System, in her official capacity, Defendant.	No. 4:20-cv-00335-TUC-SHR **PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL DOCUMENTS AND TESTIMONY** ***ORAL ARGUMENT REQUESTED***

TABLE OF CONTENTS

I. INTRODUCTION

Four things stand out in Defendant's opposition to Plaintiff's motion to compel. ***First***, Defendant has failed to respond to and therefore concedes Plaintiff's arguments that: (i) she must disclose all relevant meetings with the Governor's office; (ii) she cannot assert attorney work product over notes, communications, and documents related to those meetings; (iii) she cannot assert executive privilege based on any analogue to the presidential communications privilege; (iv) Plaintiff's and the public's interest in reviewing the materials overcomes any qualified deliberative process privilege; and (v) the common interest privilege cannot apply to communications with the Governor's office because it was not asserted during Dr. Salek's deposition and it requires that both parties with the common interest be lawyers or be represented by lawyers. Defendant also failed to respond to Plaintiff's specific challenges to logistical emails/meeting invitations regarding discussions with the Governor's office (Entry #s 66 & 74) and the "cost/risk analysis" identified on the Late Log[1] (Entry #75); thus, Defendant concedes that those documents should be produced as well.

Second, the record here belies Defendant's claim that discovery was limited to January 1, 2016 to the present. The scope of the applicable interrogatories and requests for production contained no such limitation, and Defendant's responses reflect that she understood those requests were not time limited. Nor does the letter attached to Defendant's opposition show that discovery was limited by agreement, including as to search terms. Nor could any such restrictions be appropriate given that the discovery relates to the creation and continued enforcement of the Challenged Exclusion. Nor did Defendant actually restrict her search in the manner she suggests, as she admits that she looked for responsive information dating from 1982 to the present. *E.g.*, Opp. at 4.

Third, Defendant has offered no additional specificity to support her assertion of privilege for any of the entries challenged on Defendant's privilege log. As Plaintiff noted in his motion,

[1] Capitalized terms are defined in Plaintiff's motion. Exhibits 1-14 & A-G refer to exhibits filed with Plaintiff's motion and Defendant's opposition. Exhibits 15 & 16 are attached hereto.

the descriptions in the Late Log are too vague to properly assert privilege given the black letter law that the mere presence of an attorney on a document or communication is insufficient to bestow the protection of the attorney-client privilege. Defendant offers no affidavits to support her blanket claims of privilege. She does not differentiate between legal and policy/business advice in any discussions involving attorneys. And Defendant even fails to identify many of the counsel supposedly involved in the "privileged" communication.

Fourth, Defendant tries to downplay the importance of the discovery sought, asserting that "gender reassignment surgery is not safe and effective or medically necessary as a treatment for gender dysphoria in minors." Opp. at 4. Contrary to Defendant's argument, that is not what Dr. Salek testified. Instead, Dr. Salek testified that AHCCCS *never* evaluated whether the Challenged Exclusion is consistent with peer-reviewed scientific and medical research demonstrating that male chest reconstruction surgery is safe, effective, and essential treatment for gender dysphoria; nor has AHCCCS determined whether such care can ever be medically necessary. Ex. 15, Dep. Tr. Dr. Sara Salek, at 20:6-13, 21:9-14 (Nov. 12, 2021). That AHCCCS has not considered these factors is critical. As the Ninth Circuit concluded on appeal in this case, federal sex discrimination laws—specifically, Section 1557 and the Equal Protection Clause—protect individuals from discrimination based on their transgender status. *Doe v. Snyder*, 28 F. 4th 103, 113-15 (9th Cir. 2022) (citing *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019)). Thus, consistent with the Ninth Circuit's opinion, if AHCCCS is applying a different standard to surgeries provided to transgender patients than to other medical treatments, that disparate treatment discriminates based on sex. The discovery requests at issue go directly to whether Defendant can prove her asserted defense.

Plaintiff's motion should be granted. The Court should order Defendant to produce the challenged documents and overrule Defendant's objections to the questions posed to Dr. Salek.

II. ARGUMENT

A. Defendant failed to respond to multiple of Plaintiff's arguments, thus waiving opposition to those arguments.

A party that does not respond to an argument posed in an opening brief waives the uncontested issue in most circumstances. *Medrano v. Carrington Foreclosure Servs. LLC*, No. CV-19-04988-PHX-DWL, 2019 WL 6219337, at *6 (D. Ariz. Nov. 21, 2019) (citing *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011); *Carrington Mortg. Servs., LLC v. Ticor Title of Nevada, Inc.*, No. 220CV00699JCMNJK, 2020 WL 3958251, at *3 (D. Nev. July 8, 2020) (citing *Stichting* and granting an uncontested argument in the motion to compel).

Defendant failed to respond or address any of the following arguments from Plaintiff's motion:

- Defendant should be required to disclose all relevant meetings with the Governor's office; to date, Defendant still has not done so. *See* Mot. at 8.
- None of the meetings or communications with the Governor's office are protected by the attorney work product doctrine. *See* Mot. at 10.
- The common interest privilege does not apply to the meetings and communications with the Governor's office because (1) Defendant did not assert it during Dr. Salek's deposition, and (2) a "prerequisite" to the privilege is that "representatives with whom its lawyers were communicating were themselves lawyers or represented by lawyers at the time of the communication." Mot. at 11 (citing *Flowers-Carter v. Braun Corp.*, No. CV-18-03836-PHX-DWL, 2020 WL 2319935, at *13 (D. Ariz. May 11, 2020)). Indeed, Defendant acknowledges that the privilege may exist "between attorneys of separate individuals or organizations," Opp. at 12, yet identifies no attorney from the Governor's office.

- Defendant cannot assert any analogue to the presidential communications privilege because federal courts do not recognize that privilege, and even if they did, she lacks standing to assert the privilege. Mot. at 12.
- The deliberative process privilege is a qualified privilege, and here, Plaintiff's need for—and the public interest in reviewing—the information overcomes any conceivable privilege. Mot. at 13.
- Defendant cannot maintain privilege over *logistical* emails and meeting invitations scheduling discussions with the Governor's office. Mot. at 16 (Entry #s 66 & 74).
- Defendant cannot maintain privilege over the "cost/risk analysis" identified in Defendant's deposition (and related communications) because the analysis concerns financial risk or exposure—*not* legal risk or exposure. Mot. at 16-17 (Entry #75).

Because Defendant failed to oppose any of these arguments, the Court should compel disclosure of documents and testimony related to meetings with the Governor's office and should compel production of the documents identified at Entry #s 66, 74, & 75.

B. Defendant improperly attempts to retroactively impose limits to the discovery at issue that were never agreed upon.

Defendant's opposition spends considerable effort to persuade the Court that the documents and communications at issue fell outside of "agreed" upon limits to discovery. Mot. at 5-8. This argument is a red herring, and it fails.

On January 19, 2021, Defendant responded to Plaintiff's First Set of Interrogatories. These responses were inaccurate and, importantly for this motion, the relevant responses were not limited in time. For example, Interrogatory No. 17 asked:

> Identify and describe any instance in which You or AHCCCS formally or informally considered amending or eliminating the Challenged Exclusion. For each instance of consideration, identify the date or approximate date of consideration; the offices or employees under Your or AHCCCS' supervision involved in such consideration and their role(s); the nature of the considered changes; and what (if any) actions were taken by You or AHCCCS.

In response, Defendant answered (emphasis added):

> Defendant objects to this interrogatory because it includes multiple discrete subparts that appear calculated to avoid the limitations imposed by Fed. R. Civ. Pro. 33(a)(1). The request also includes an impermissibly broad period of time. Because the Challenged Exclusion was created in 1982, Defendant also objects to this interrogatory to the extent it seeks information that is not currently available or known to AHCCCS.
>
> Based on the information currently available, ***Defendant has not had occasion, prior to initiation of this lawsuit, to consider amending or eliminating the Challenged Exclusion***.

That response was false. As Plaintiff learned during Dr. Salek's deposition, Defendant failed to disclose multiple relevant meetings and communications between various AHCCCS personnel and the Governor's office. Contrary to Defendant's arguments, the response was also not limited in time from January 1, 2016 to the present. Even if it were, her response to Interrogatory No. 17 was *still* false because multiple relevant communications or meetings occurred in 2017 that still, to this day, have not been disclosed by Defendant. Mot. at 7-8.[2]

Similar deficiencies impact Defendant's written responses to Interrogatory Nos. 15 & 16 and Request for Production Nos. 6, 11, & 41. For example, Request for Production No. 6 seeks production of "All communications relating to the development and promulgation of the Challenged Exclusion." Ex. 3. Request for Production No. 11 seeks production of "All communications relating to the implementation, enforcement, and/or any consideration of elimination or amendment of the Challenged Exclusion." *Id.* And Request for Production No. 41 seeks production of "All documents Defendant relied upon, referenced in or identified in answering Plaintiffs' interrogatories." *Id.* None of Defendant's written responses purport to impose any time restriction or limitation on search terms.

In addition to these written responses (which are not limited by time or search terms), Defendant argues that discovery was limited by agreement. Again, not true. First, Defendant herself admits that she has looked for responsive information dating from 1982. Opp. at 4. Second, while Defendant objected to specific discovery requests and agreed to search for specific categories of ESI from the last six years using certain search terms, discovery as a whole was

[2] For efficiency in his LRCIV 37.1 Statement, Plaintiff challenged Dr. Salek's testimony rather than Interrogatories 15-17.

never so limited. In fact, the letter attached to Defendant's brief (Ex. D) actually undermines her claim. The letter purports to limit certain discovery and ESI searches to January 1, 2016 to the present, but *not* the relevant requests. For example, for Interrogatories 15-17, the letter stated:

> Jakenna Lebsock will contact several individuals within AHCCCS [including Defendant and Dr. Salek] to inquire into whether they have information responsive to Interrogatories 15-17 (meetings in which the Challenged Exclusion or gender dysphoria treatments/services were discussed, documents or other information AHCCCS has considered or reviewed relating to the Challenged Exclusion, and instances where AHCCCS considered amending or eliminating the Challenged Exclusion).

Ex. D, at p. 5. No time restriction or search terms applied to this search. Conceding the point, Defendant later amended her responses to Interrogatories 15 & 17 to cite Dr. Salek's testimony, which included information that was outside the date range Defendant now seeks to impose on her discovery obligations.

Finally, Defendant is obligated to reasonably investigate and respond to the allegations, to engage in good faith discovery, and to reasonably search for and produce relevant documents. *See also* Fed. R. Civ. P. 26(g) (requiring counsel to sign discovery responses certifying that after reasonable inquiry the response "is complete and correct as of the time it is made."). The communications at issue in Defendant's motion should have been identified upon a reasonable investigation into the issues.[3] These communications and documents come directly from Defendant's and Dr. Salek's files. To remedy this problem, the Court should compel production.

C. Defendant waived privilege by failing to timely assert it.

Defendant's attempt to justify her failure to timely assert privilege also falls flat. The timeline of events could not be clearer:

[3] Moreover, Defendant's claim that the search terms did not identify these documents is remarkable given that the search terms not only included the terms proposed by Plaintiff, but also included the terms originally proposed by Defendant herself, including "gender dysphoria," "gender change," and "gender reassignment." Ex. 16, at 8 (Letter from Plaintiff to Defendant Re: Follow-Up to Meet-and-Confer (Feb. 2, 2021)). The subject of the emails in question, dated August 6, 2020, are "Healthcare Coverage" and "Administrative Code." *See* Mot. at 8; Ex. 11, at 6. If these documents—directly from Director Snyder's emails—were not identified by the search terms proposed by Defendant, then Defendant failed to propose reasonable search terms.

- January 2021: Defendant served her written discovery responses. The materials at issue in this motion to compel should have been disclosed in January 2021. Most of the materials are years old and should have been easily located on a reasonable search. Defendant should have asserted privilege in January 2021. But she did not.
- March 2021: Two and a half months later, Defendant served her Initial Log and never indicated that she intended to supplement the log. Mot. at 6.
- November 2021: At Dr. Salek's deposition, Defendant disclosed and asserted privilege for the first time over meetings and communications with the Governor's office. *Id.*
- December 2021: Defendant served a Revised Log, which was still deficient and offered no specificity as to the reasons why she asserted privilege. *Id.*
- January 2022: After repeated requests from Plaintiff that Defendant serve a privilege log that complies with the Rules, Defendant served the Late Log, asserting privilege over meetings and communications with the Governor's office and dozens of other entries that Plaintiff had never seen before. *Id.*

Disregarding this timeline and her duty to timely assert privilege, Defendant asks the Court to connect her obligation to assert privilege to her ongoing supplementation of *initial disclosures* under Rule 26. Opp. at 6, 8. Under Defendant's (novel) rationale, a party would never have to timely assert privilege so long as that party continued to supplement its initial disclosures. That cannot be correct, and unsurprisingly, Defendant cites no cases to support her position. Instead, directly on point is the holding in *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1147 (9th Cir. 2005): withholding materials without proper notice "is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." *See* Mot. at 6-7.[4] Under this standard, Defendant waived privilege over the materials at issue. The Court should compel disclosure.

[4] Defendant also inappropriately injects alleged privilege issues with respect to Plaintiff's treating physicians and professionals. Opp. at 9. These privilege assertions were timely raised within weeks of productions from *third-party subpoena respondents*, in stark contrast to

D. Defendant fails to show that any privilege attaches to meetings and communications with the Governor's office.

As discussed above, discovery related to meetings with the Governor's office should be compelled due to waiver and the many other arguments which Defendant failed to oppose. *Supra* § II.A. But beyond these issues, this requested discovery should still be disclosed because Defendant's assertions of privilege are incorrect.

Defendant appears to rest her assertion of privilege over the content of the meetings with the Governor's office on two arguments. First, Defendant asserts the "deliberative process privilege." Defendant does not dispute that, to invoke the deliberative process privilege, a document must be both predecisional and deliberative in nature. Mot. at 13; *FTC. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Defendant offers no evidence to meet either prong of this test. Instead, Defendant parrots the legal standard and then claims that the documents and communications at issue implicate "AHCCCS's overall treatment of Section 1557" with no detail and no explanation as to why this fact, if true, would allow Defendant to invoke the deliberate process privilege (it does not). Opp. at 13. Further, the deliberative process privilege only applies to *predecisional* communications, yet Defendant offers no evidence to reconciles how this privilege could apply to communications in both 2015 and 2017—both of which are at issue in this motion—plus Dr. Salek's independent evaluation of the Challenged Exclusion since 2017. *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8199308, at *2 (D. Ariz. July 21, 2016) ("Post-decisional information is not covered by the deliberative process privilege.").

Second, Defendant asserts the common interest privilege. Defendant argues that the communications at issue (Entry #s 28-32) "reflect coordinated efforts between AHCCCS and the Governor's office to provide a unified, legally sound response to high-profile public inquiries with the potential to spark legal liability." Opp. at 13. Yet Defendant provides no evidence or affidavits to support this assertion. There is nothing in the record to suggest that these

Defendant's failure to timely assert her privileges over a year ago. These issues are also irrelevant to the Court's determination of Plaintiff's motion to compel.

communications involved *legal* matters rather than policy or political issues. (And, there is no evidence that lawyers were representing both parties.) Thus, this argument fails, too.

E. Dr. Salek should be required to answer—on the record—questions regarding her independent evaluation of the Challenged Exclusion.

Plaintiff's motion also seeks to compel answers to certain questions posed to Dr. Salek regarding her independent evaluation of whether the Challenged Exclusion should be changed. Mot. at 14. Defendant argues that the questions posed "sought information regarding the content of [the meeting with the Governor's office]." Opp. at 13. That is not true. Plaintiff specifically asked Dr. Salek to "put the meeting aside" and answer in her capacity as "chief medical officer of AHCCCS." Mot. at 14. Defendant also argues that Dr. Salek testified she "has not had reason to consider the rule outside of that meeting." Opp. at 14. Defendant fails to include any citation in support of that argument—because Dr. Salek never so testified. Plaintiff is entitled to explore this issue directly with Dr. Salek. Finally, Defendant argues that it is "impossible to disentangle Dr. Salek's opinions from the meeting with counsel." Opp. at 14. Again, Plaintiff is entitled to explore this issue directly with Dr. Salek. If Dr. Salek wants to admit, on the record, that she is not capable of having an opinion independent of advice of counsel, as a medical doctor and as the Chief Medical Officer of AHCCCS, about whether the Challenged Exclusion is appropriate, then Plaintiff—and the public—are entitled to that admission.

"Because the attorney-client privilege is in derogation of the [t]ruth-finding process and must be strictly construed, the privilege should attach only where extending its protection would foster more forthright and complete communication between the attorney and her client about the client's legal dilemma." *Miller v. York Risk Servs. Grp.*, No. CV-13-01419-PHX-JWS, 2014 WL 11514550, at *2 (D. Ariz. July 22, 2014) (internal citation omitted). Here, Defendant fails to meet that standard with respect to the questions outlined in Plaintiff's motion. Mot. at 14. Dr. Salek should be compelled to answer them under oath, as well as follow-ups to those questions.

F. Defendant offers no additional details to justify her assertion of privilege on what appear to be routine media, policy, and business issues.

Finally, Defendant fails to meaningfully respond to the other entries challenged on the Late Log. Instead, Defendant simply repeats the legal standard, noting "communications are privileged when they are made to or by a lawyer for the purpose of securing or giving legal advice, are made in confidence, and are treated as confidential." Opp. at 10. Defendant then argues that the challenged entries "deal with the typical interactions between agency employees and their in-house counsel on routine legal matters" or "describe communications between AHCCCS counsel and AHCCCS employees regarding public inquiries into AHCCCS coverage – inquiries that required a response with input from AHCCCS legal counsel to ensure AHCCCS does not incur legal liability through its public statements." *Id.*

The problem is that Defendant fails to carry her burden to show with specificity that each challenged document is actually privileged. Defendant lumps the documents together and offers conclusory arguments with no supporting affidavits. Defendant has not even identified the "attorney" supposedly at issue in many of the entries. Plaintiff specifically asserted these deficiencies in his motion, which Defendant failed to rebut. Mot. at 15-16 (citing *United States v. Town of Colorado City*, No. 3:12-CV-8123-HRH, 2014 WL 5431222, at *3 (D. Ariz. Oct. 27, 2014) (noting "the mere presence of an attorney does not render" privilege). *See also Murray v. Mayo Clinic*, No. CV-14-01314-PHX-SPL, 2016 WL 10646315, at *3 (D. Ariz. July 20, 2016) ("Simply 'cc-ing' an attorney on an email is not sufficient to invoke the privilege" and "[r]outine business dealings are not protected under attorney-client privilege, and labeling a communication as privileged does not automatically protect it.").

Defendant also cites *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 13649412 (D. Ariz. Apr. 2, 2015) (cited at Opp. 10-11), but that case is inapposite. There, a specially appearing non-party served document requests on defendants, and in response to defendants' privilege assertion, the non-party did "not challenge that the communications with [outside counsel] were for a purpose other than giving/obtaining legal counsel on behalf of Defendants." *Id.* at *3. Here, by contrast, Plaintiff *does* challenge that the communications at issue were "for a purpose other than giving/obtaining legal counsel." Moreover, *Melendres* noted that the "purpose

of maintaining confidentiality is defeated when privileged communications are disseminated to a third party," *id.* at *4, and therefore defendants could "not claim attorney-client privilege over any responsive document circulated" beyond those persons necessary to receive the privilege communication, *id.* at *5. Applied here, there is no evidence that sharing legal advice with the Governor's *policy* advisor was necessary to obtain *legal* advice on matters that might have been privileged as to AHCCCS. And if legal and policy issues were both discussed, Plaintiff is at least entitled to discovery on those policy discussions. A blanket claim of privilege is inappropriate.

For these reasons, therefore, the Court should compel production of each of the challenged entries identified in Exhibit 13 to Plaintiff's motion.

III. CONCLUSION

For the reasons discussed above and in Plaintiff's opening brief, Plaintiff respectfully requests that the Court grant Plaintiff's motion to compel. As also noted in Plaintiff's opening brief and in this reply, Plaintiff respectfully requests oral argument on the motion to compel.

Dated April 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2022, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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EXHIBIT 15

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

D.H., by and through his mother, Janice Hennessey-Waller; and John Doe, by his guardian and next friend, Susan Doe, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Jami Snyder, Director of the Arizona Health Care Cost Containment System, in her official capacity,

Defendant.

No. 4:20-cv-335-SHR

Certified Transcript

(Pages 1-201)

VIDEO-RECORDED VIDEOCONFERENCE DEPOSITION OF
DR. SARA SALEK

November 12, 2021

PURSUANT TO WRITTEN NOTICE and the appropriate rules of civil procedure, the video-recorded videoconference deposition of Dr. Sara Salek, called for examination by the Plaintiffs, was taken remotely commencing at 9:08 a.m. on November 12, 2021, before Jennifer Bajwa Melius, Verbatim Stenographic Reporter and Registered Professional Reporter.

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Syed Hassan, Videographer
Kasey Rogg, Esq., AHCCCS
Silvia Elena Beckman, King & Spalding LLP

standards of care for treating transgender individuals diagnosed with gender dysphoria?

MR. BARTON: Objection.

A. We have not evaluated the current exclusion through our established process. 09:29:55AM

Q. (By Mr. Chinsky) Is the challenged exclusion consistent with peer-reviewed scientific and medical research demonstrating that top surgery is a safe, effective, and essential treatment for gender dysphoria? 09:30:23AM

MR. BARTON: Objection.

A. We have not evaluated this current service through our standard review process.

Q. (By Mr. Chinsky) Do you have a view as to whether the exclusion is consistent with scientific and medical research -- current? 09:30:35AM

A. We have not reviewed this current service through our standard review process.

Q. So I understand AHCCCS hasn't done that, but my question is a little bit different. You know, do you, as a medical director sitting here today, have a view as to whether this challenged exclusion is consistent with current scientific and medical research? 09:30:56AM

MR. BARTON: Objection. Vague. 09:31:11AM

A. To clarify, you know, in regards to my current role as the chief medical officer for the Arizona Medicaid program, that in that capacity we would still need to go through our established process to review gender-reassignment surgery as referred to in the rule in regard to, you know, my -- that is my current role that I am serving in the capacity of, Arizona, you know, chief medical officer. 09:31:28AM

Q. (By Mr. Chinsky) Can gender-affirming surgical care ever be medically necessary to treat gender dysphoria? 09:32:03AM

A. As I've referenced, that we haven't yet reviewed the rule through our established process to make that determination.

Q. Do you, as a child and adolescent psychiatrist, have a view on that? 09:32:24AM

MR. BARTON: Objection.

A. As far as my own personal view as a physician and, as you mentioned, a child and adolescent psychiatrist, that there is, you know, a lot of, you know, national and international discussion on this issue. There is a lot of debate, and partly just scientific debate on what is the most effective intervention or interventions in regards to treating childhood as well as adolescence gender 09:32:42AM 09:33:04AM

I, Jennifer Bajwa Melius, do hereby declare:

That, prior to being examined, the witness named in the foregoing deposition was by me duly sworn pursuant to Section 30(f)(1) of the Federal Rules of Civil Procedure and the deposition is a true record of the testimony given by the witness.

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to text under my direction.

_____ That the witness was requested to review the transcript and make any changes to the transcript as a result of that review pursuant to Section 30(e) of the Federal Rules of Civil Procedure.

_____ Signature is Waived

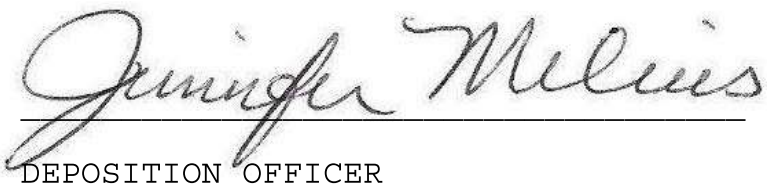
_____ The changes made by the witness are appended to the transcript.

__X__ No request was made that the transcript be reviewed pursuant to Section 30(e) of the Federal Rules of Civil Procedure.

I further declare that I have no interest in the event or the action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Witness my hand this 16th day of November, 2021.



DEPOSITION OFFICER

EXHIBIT 16

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February 2, 2021

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Re: *D.H. et al. v. Snyder*, Case No. 4:20-cv-00335-SHR

Dear Counsel,

We write to follow up on our January 13 meet-and-confer and to raise certain issues with Defendant's written discovery responses and process for the collection of ESI. At the outset, we appreciate that Defendant appears to understand her obligation to conduct reasonable, good faith searches of documents and ESI. However, after reviewing Defendant's Answers to Plaintiffs' First Set of Interrogatories and after considering your explanation of the processes by which Defendant is searching for and producing ESI, we have identified several deficiencies that must be remediated by Defendant.

First, we have reviewed Defendant's Answer to Plaintiffs' First Set of Interrogatories ("Interrogatories") and identified several deficiencies. We outline these deficiencies below in the hope that Defendant will voluntarily provide the requested answers without the necessity of involving the Court to compel the answers.

- Interrogatory 3: Plaintiffs requested a description of the process Arizona Medicaid uses to determine if a particular service is medically necessary to treat a certain condition.

- **Defendant responded**: "Requests for prior authorization of a service are reviewed by 1) personnel at the AHCCCS health plans for persons enrolled with those plans, and 2) by AHCCCS personnel within the Office of the Chief Medical Officer for those AHCCCS-eligible persons not enrolled in a health plan. The standards to be applied to determine medical necessity include information as to the standard of care, the nature of the service requested, the history and condition of the recipient, and legal requirements, including those found in A.A.C. R-22-101.B (defining 'medical necessity'), A.A.C. R9-22-202.B; A.A.C. R9-22-204.A; A.A.C. R9-22-205.B, and the AHCCCS Medical Policy manual at Chapters 310-B, 310-V, and 430."

- **Defendant's response is not complete**. Plaintiffs requested a **"description of the process"** used to determine the medical necessity of services. Specifically, Plaintiffs asked for references to all documents that may be used by AHCCCS personnel when determining if a service is medically necessary. Defendants have provided a vague and incomplete answer that AHCCCS personnel review prior authorizations and they use broad standards to review prior authorizations. A complete response to the interrogatory should describe each step that AHCCCS personnel take to evaluate if a service is medically necessary, including when specific standards will be considered and how those standards are applied. Any and all documentation the AHCCCS personnel use in both evaluating and recording a decision on medical necessity should be included in this interrogatory response.

- Interrogatory 4: Plaintiffs requested a description of the process by which the documents identified in Interrogatory 3 were originally drafted and how these documents are updated.

  - **Defendant responded**: "Defendant has no knowledge or information with which to answer how documents in prior administrations were originally drafted or updated. Generally, the process for administrative rulemaking is as prescribed in A.R.S. 41-1021 et seq. and AHCCCS policies are updated on an as-needed basis by the AHCCCS Policy Committee."

  - **Defendant's Response is not complete or adequate**. As a preliminary matter, Plaintiffs' request refers to documents used by AHCCCS personnel to review and evaluate whether a service is medically necessary (documents requested in Interrogatory 3). Defendant's current response to Interrogatory 3 fails to identify any such documents; therefore, Defendant's response to Interrogatory 4 is similarly incomplete and will need to be updated in conjunction with the response to Interrogatory 3.

  - Further, Defendant is charged with providing the information **available** to her, which includes the records that are **available** to her and the information known by her agents, even if that information is not currently in her possession. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010). If she lacks the necessary information to make a full, fair, and specific answer to the interrogatory, she must set forth, in detail, the efforts undertaken to obtain the information. *Pellerin v. Wagner*, No. 2:14-cv-02318, 2016 WL 950792, *3 (D. Ariz. Mar. 14, 2016).

- Interrogatory Nos. 5-6:
    - Interrogatory 5: Plaintiffs requested information about all persons involved in the drafting, promulgation, and implementation of the Challenged Exclusions.
    - Interrogatory No. 6: Plaintiffs requested a description of the process by which the Challenged Exclusion was originally drafted, promulgated, and implemented.
    - **Defendant Responded**: "Defendant has been unable to locate or identify any document or person with knowledge or information responsive to this interrogatory."
    - **Defendant's responses are not adequate**. Defendant is charged with providing the information **available** to her, which includes the records that are **available** to her and the information known by her agents, even if that information is not currently in her possession. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010). If she lacks the necessary information to make a full, fair, and specific answer to the interrogatory, she must set forth, in detail, the efforts undertaken to obtain the information. *Pellerin v. Wagner*, No. 2:14-cv-02318, 2016 WL 950792, at *3 (D. Ariz. Mar. 14, 2016).
- Interrogatory No. 7: Plaintiffs requested the identification of all documents, including, but not limited to, provider guides and manuals, provider bulletins, plan bulletins, clinical coverage policies, and claims processing manuals related to the medical procedures, treatments, and services covered by Arizona Medicaid to treat gender dysphoria.
    - **Defendant Responded**: "See A.A.C. R9-22-205 and the AHCCCS Medical Policy Manual at Chapter 430."
    - **Defendant did not answer the question**. She points to the Challenged Exclusion and the Medical Policy Manual referencing Early and Periodic Screening, Diagnostic, and Treatment Services. Neither of these documents reference treatments and services related to gender dysphoria. As there are clearly services covered by AHCCCS to treat gender dysphoria [*see* Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction Dkt. 18, at 3], Defendant needs to update this response with the appropriate references.
- Interrogatory Nos. 8–10:
    - Interrogatory No. 8: Plaintiffs requested an identification of all medical procedures, treatments, and services (including all applicable and related procedure or treatment codes) that are excluded from coverage under Arizona Medicaid when requested or intended for the treatment of gender dysphoria.
    - Interrogatory No. 9: Plaintiffs asked whether any of the medical procedures, treatments, and services identified in response to Interrogatory No. 8 are covered by

Arizona Medicaid when medically necessary to treat a condition other than gender dysphoria.

- Interrogatory No. 10: Plaintiffs requested an identification of all types of breast- or chest-related surgery covered by Arizona Medicaid.

- **Defendant Responded**: Defendant objects to this interrogatory because it seeks irrelevant information that is not proportionate to the needs of this case. This case is specifically limited to male chest reconstruction surgery as a remedy for gender dysphoria in persons under the age of 21. The procedures identified in this interrogatory (Interrogatory No. 8) are completely irrelevant to the medical procedure at issue in this lawsuit. Defendant also objects to this interrogatory because it includes multiple discrete subparts that appear calculated to avoid the limitations imposed by Fed. R. Civ. P. 33(a)(1).

- **Defendant's response is inadequate**. Rule 33(a)(2) provides that "an interrogatory may relate to any matter that may be inquired into under Rule 26(b)." Rule 26(b) permits discovery of any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.

- Here, Plaintiffs allege that enforcement of the Challenged Exclusion denies them essential medical services and discriminates against them because they are transgender and seek transition-related surgeries. [Complaint Dkt. 1 ¶¶ 15–16, 36–40, 65–66, 119–26; Plaintiffs' Motion for Preliminary Injunction Dkt. 3, at 10–13.]

- Defendant denies these allegations and asserts that the exclusion is not discriminatory, the "reassignment" surgeries are not essential, and AHCCCS provides minors all required services to treat gender dysphoria. [Answer Dkt. 17 ¶¶ 15–16, 36–40, 65–66, 119–26; Affirmative Defenses Dkt. 17 E, G; Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction Dkt. 18, at 3, 5–7, 12, 14–18.]

- Plaintiffs also allege that AHCCCS is violating the Medicaid Act's comparability requirement by withholding services from transgender people while providing the same services to those who need them to treat a condition other than gender dysphoria. [Complaint Dkt. 1 ¶¶ 117–18; Plaintiffs' Motion for a Preliminary Injunction Dkt. 3, at 9–10] Defendant denies these allegations. [Answer Dkt. 17 ¶¶ 64, 117–18; Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction Dkt. 18, at 14.]

- Interrogatories 8–10 are directly relevant to Plaintiffs' Medicaid Act, § 1557, and Equal Protection claims and to Defendant's arguments and defenses, and Plaintiffs are entitled to discovery regarding the metes and bounds of the services provided by AHCCCS but excluded by the Challenged Exclusion.

- Further, there are no discrete subparts in Interrogatory Nos. 8–10, as the examples of potentially excluded services are "logically or factually subsumed within and

necessarily related to the primary question." *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006).

- Interrogatory No. 11: Plaintiffs requested the identification of all persons involved in implementing and/or enforcing the Challenged Exclusion from January 1, 2010 to present, including each person's role(s).

    - **Defendant Responded**: "Defendant objects to the overbreadth of the time period encompassed by this interrogatory. Over the ten-year period encompassed by this interrogatory there have been many people who implemented the rules and regulations applicable to the Challenged Exclusion. Those persons come and go in the usual course of change in jobs and administrations. For these reasons, Defendant cannot identify all those persons by name. Without waiving her objections, Defendant states that the persons who would 'implement' or 'enforce' the Challenged Exclusion include personnel in the AHCCCS health plans who approve or deny requests for gender reassignment surgery for members of those health plans, and at the AHCCCS Administration level, AHCCCS's Chief Medical Officer and his or her staff."

    - **Defendant's response is incomplete.** Plaintiffs requested **the name and role** of each person who oversaw the implementation and enforcement of the Challenged Exclusion. But Defendants have only identified the generic roles that oversee the Challenged Exclusion enforcement. For this response to be complete, Plaintiffs require the specific name and title of all individuals who directed the enforcement and implementation of the Challenged Exclusion.

    - Plaintiffs clarify that the question is seeking the individuals who oversaw the implementation and enforcement of the challenged exclusion, not those involved in lower level review of requests for gender reassignment surgeries. This clarification should relieve Defendant of the alleged burden in providing a complete and accurate response to Interrogatory No. 11.

- Interrogatory Nos. 12–14:

    - Interrogatory No. 12: Plaintiffs requested an identification of every denial of coverage or prior authorization for coverage for any medical treatment, service, or procedure based on the Challenged Exclusion from January 1, 2010 to present.

    - Interrogatory No. 13: Plaintiffs requested the age at the time of denial and dates of enrollment in Arizona Medicaid for each individual identified in Interrogatory No. 12.

    - Interrogatory No. 14: Plaintiffs requested the identity of all internal appeals, formal or informal requests for reconsideration, or judicial challenges to denial of coverage or prior authorization for coverage, for any medical treatment, service, or procedure based on the Challenged Exclusion from January 1, 2010 made to Defendant, AHCCCS, or any third-party managed care organization.

- **Defendant Responded**: Defendant objects to this interrogatory because it seeks irrelevant information that is not proportionate to the needs of this case. This case is specifically limited to male chest reconstruction surgery as a remedy for gender dysphoria in persons under the age of 21. This interrogatory seeks information related to any instance of denial under the Challenged Exclusion and thus includes denials that are completely irrelevant to the medical procedure at issue in this lawsuit. Defendant also objects to this interrogatory because it includes multiple discrete subparts that appear calculated to avoid the limitations imposed by Fed. R. Civ. Pro. 33(a)(a). This request also includes an impermissibly broad period of time. Without waiving her objections, Defendant is continuing to search the records available since January 1, 2016 and will supplement this response once that search is complete. (In Interrogatory Nos. 13 and 14 Defendant states "See Response to Interrogatory No. 12.")

- **Defendant's responses are inadequate.** As discussed above, the extent of AHCCCS's denial of services required by transgender individuals is relevant to Plaintiffs' discrimination claims. [Complaint Dkt. 1 ¶¶ 15–16, 36–40, 65–66, 119–26; Plaintiffs' Motion for Preliminary Injunction Dkt. 3, at 10–13]

- Further, the extent to which the Challenged Exclusion denials have been challenged in formal and informal proceedings is also relevant to Plaintiffs' claims that these excluded services are medically necessary and that the Challenged Exclusion is discriminatory.

- This information is also relevant to Plaintiffs' Class Allegations and the assertion that transgender individuals are deterred from seeking prior authorization for transition-related surgeries [Complaint Dkt. 1 ¶¶ 67, 105–14], which Defendant denies [Answer Dkt. 17 ¶ 67].

- Additionally, the age of the individual at the time of denial is relevant to Plaintiffs' claim that the Challenged Exclusion violates the Medicaid Act's EPSDT requirements [Complaint Dkt.1 ¶¶ 48–55, 115–16; Plaintiffs' Motion for Preliminary Injunction Dkt. 3, at 8–9], which Defendant denies [Answer Dkt 17 ¶¶ 55, 115–16; Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction Dkt. 18, at 12–14].

- Plaintiffs recognize that Defendant is attempting to locate this information. Defendant should provide a complete response by **February 12, 2021**. Plaintiffs, however, maintain that the searches should extend to records available to AHCCCS from January 1, 2010, not limited to those after January 1, 2016. If Defendant becomes aware that the quantity of Challenged Exclusion denials and appeals or challenges to those denials from January 1, 2010 to the present is so numerous as to be unduly burdensome, then Plaintiffs agree to confer with Defendants and come to a mutually agreeable solution regarding the scope of Interrogatory Nos. 12, 13, and 14.

- Interrogatory No. 15: Plaintiffs requested an identification of all public or non-public meetings involving Defendant or AHCCCS in which the Challenged Exclusion and/or Arizona Medicaid coverage for medical or surgical treatments or services to treat gender dysphoria was discussed.

    - **Defendant Responded:** "Defendant is not aware of any public meeting discussing the Challenged Exclusion or any or non-public meeting that is not protected by the attorney-client privilege."

    - **Defendant's answer is inadequate**. Defendant is charged with providing the information **available** to her, which includes the records that are **available** to her and the information known by her agents, even if that information is not currently in her possession. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010). If she lacks the necessary information to make a full, fair, and specific answer to the interrogatory, she must set forth, in detail, the efforts undertaken to obtain the information. *Pellerin v. Wagner*, No. 2:14-cv-02318, 2016 WL 950792, *3 (D. Ariz. Mar. 14, 2016).

- Interrogatory No. 16: Plaintiffs requested an identification of all research, studies, data, reports, publications, testimony or other documents relating to the Challenged Exclusion that Defendant or AHCCCS considered, reviewed, or relied on since the Challenged Exclusion's adoption.

    - **Defendant Responded:** "Defendant objects to this interrogatory because it includes multiple discrete subparts that appear calculated to avoid the limitations imposed by Fed. R. Civ. Pro. 33(a)(1). The request also includes an impermissibly broad period of time. Because the Challenged Exclusion was created in 1982, Defendant also objects to this interrogatory to the extent it seeks information that is not currently available or known to AHCCCS. Without waving her objections, Defendants has had no occasion since January 1, 2016 to review research, studies, or other documents relating to the Challenged Exclusion prior to initiation of Plaintiffs' lawsuit."

    - **Defendant's response is inadequate**. Defendant must answer the question that is asked. Defendant's response that she "has had no occasion since January 1, 2016 to review research, studies, or other documents related to the Challenged Exclusion" is impermissibly vague and unduly narrow. Interrogatories should not be read in "an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request." Fed. R. Civ. P. 37(a)(3), advisory committee notes to the 1993 amendments.

    - Defendant is required to provide **all material that is available** to her, regardless of whether that material is in her possession. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010). If she lacks the necessary information to make a full, fair, and specific answer to the interrogatory, she must set forth, in detail, the efforts undertaken to obtain the information. *Pellerin v. Wagner*, No. 2:14-cv-02318, 2016 WL 950792, *3 (D. Ariz. Mar. 14, 2016).

- Further, the question does not contain discrete subparts but examples that are "logically or factually subsumed within and necessarily related to the primary question." *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612 614 (N.D. Cal. 2006).

- Interrogatory No. 17: Plaintiffs requested the identification and description of any instance in which Defendant or AHCCCS formally or informally considered amending or eliminating the Challenged Exclusion.

  - **Defendant Responded**: "Defendant objects to this interrogatory because it includes multiple discrete subparts that appear calculated to avoid the limitations imposed by Fed. R. Civ. Pro. 33(a)(1). The request also includes an impermissibly broad period of time. Because the Challenged Exclusion was created in 1982, Defendant also objects to this interrogatory to the extent it seeks information that is not currently available or known to AHCCCS. Based on the information currently available, Defendant has not had occasion prior to initiation of this lawsuit, to consider amending or eliminating the Challenged Exclusion."

  - **Defendant's response is inadequate**. Defendant must answer the question that is asked. Defendant's response that she "has not had occasion prior to initiation of this lawsuit, to consider amending or eliminating the Challenged Exclusion" is impermissibly vague and non-responsive. Defendant is obligated to respond with candor and specificity, and she has not. *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 323 (C.D. Cal. 2004).

  - Defendant is required to provide all material that is available to her, regardless of whether that material is in her possession. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010). If she lacks the necessary information to make a full, fair, and specific answer to the interrogatory, she must set forth, in detail, the efforts undertaken to obtain the information. *Pellerin v. Wagner*, No. 2:14-cv-02318, 2016 WL 950792, *3 (D. Ariz. Mar. 14, 2016).

  - Further, the question does not contain discrete subparts but examples that are "logically or factually subsumed within and necessarily related to the primary question." *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612 614 (N.D. Cal. 2006).

Second, we understand that you have searched for ESI using a date range of January 1, 2016, to the present, using the terms "gender dysphoria," "gender change," and "gender reassignment." During our meet-and-confer, you indicated that Defendant searched AHCCCS's own ESI in this manner, with a focus on custodians within the director's office, the legal department, the chief medical officer, and the compliance department. You further indicated that, because Defendant has the contractual right to obtain documents from each of its participating health plans, Defendant directed these plans to search through their ESI in a similar manner.

Defendant subsequently produced documents on January 19, 2021 (SNYDER.000001-303). We have reviewed this production, and we observe that this production contains just ***two*** emails, both of which were sent by Defendant's counsel in connection with Defendant's

retention of a proposed expert witness for this litigation (SNYDER.000001 & 000138). Based on this production, the date range and terms utilized for searching have yielded essentially no responsive documents and no ESI. Therefore, we request that Defendant removes the time limiter on its searches, and uses the following additional search terms to search for and collect relevant ESI:

- Sex change
- Transgender
- Transsexual
- Gender Identity Disorder
- Chest reconstruction
- Surgery /10 (sex or gender or transgender)
- Mastectomy

The addition of these terms is essential to a responsive ESI search to account for the terms typically used in discussing treatment for gender dysphoria and the historical context in which documents and data may have been created. For example, although the term "sex change" is out-of-date today, we note that the Challenged Exclusion initially excluded coverage for "sex change operations" prior to a 2002 amendment which changed the language to "gender reassignment surgeries." Therefore, historical documents regarding the origin of the Challenged Exclusion are far more likely to use the term "sex change" as opposed to "gender reassignment."

If, as a result of the expanded date range and additional search terms, Defendant finds that the resulting hits are so numerous that they would be unduly burdensome to review, please let us know, and we will endeavor to find a mutually agreeable process for reviewing these searches or, if appropriate, to further narrow the documents.

Third, we understand that you have identified certain custodians from which you are conducting email searches which, as mentioned, focus on the director's office, the legal department, the chief medical officer, and the compliance department. In addition to these custodial searches, please confirm that you will also undertake a search of non-custodial documents and ESI, such as network folders and shared files. By way of example, AHCCCS may utilize one or more electronic folders accessible by multiple individuals, or AHCCCS may maintain historical paper files in a file room or shared office space. These documents and ESI would fall outside of any particular custodian's data, but Defendant is still obligated to conduct reasonable searches through these types of documents and to produce any responsive documents located upon those searches.

As you know, time is of the essence in this case. Please confirm that Defendant will comply with the requests in this letter by February 12, 2021. We would be happy to discuss and

clarify our requests as needed, so please let us know if you would like to set up a further meet-and-confer.

Sincerely,

Brent P. Ray
Partner

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