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INTRODUCTION

Defendants respectfully submit this response to the Court's April 18, 2022, Memorandum and Order (Doc. 238) ("Mem. & Order") ordering the Bureau of Prisons ("BOP") and six Department of Justice ("DOJ") attorneys to show cause why BOP should not be held in contempt and why sanctions should not be imposed. Defendants acknowledge the frustration the Court must have felt when it learned that Ms. Iglesias's April 7, 2022, consult with Surgeon One did not include a discussion of or referral for vaginoplasty, the gender-confirming procedure that Ms. Iglesias most desires; and when it became aware, perhaps for the first time, that Surgeon One does not perform vaginoplasties. Defendants and their DOJ attorneys can appreciate the disappointment Ms. Iglesias must have felt as well. Defendants and their counsel, too, were surprised and disappointed at the outcome of the April 7 consult and share the Court's frustration. *See* Declaration of Dr. Alix McLearn (July 1, 2022) ¶ 68 (filed herewith); Declaration of Brian M. Boynton (June 30, 2022) ¶ 11 (filed herewith) Declaration of Alexander K. Haas (June 30, 2022) ¶¶ 3, 10 (filed herewith).

Defendants acknowledge, too, that their failure to more prominently highlight the fact that Surgeon One refers patients to other providers for vaginoplasties gave rise to expectations about the April 7 consult that ultimately were not met and contributed to the frustration that the Court, Ms. Iglesias, and Defendants all felt afterward. Defendants and their counsel deeply regret the confusion and distress their actions have caused, and the doubts their actions have planted about the good faith of Defendants' intentions to provide Ms. Iglesias the health care she requires. *See* McLearn July 1 Decl. ¶¶ 7-9, 38, 48, 86; Boynton June 30 Decl. ¶¶ 8, 11; Haas June 30 Decl. ¶¶ 3, 5, 8, 10, 12.

Defendants are just as deeply gratified that this frustration and disappointment did not keep the parties from coming together to create a new path forward, in the form of the Court's Stipulated Order, that will lead Ms. Iglesias to the treatment she seeks. Under the Stipulated Order, she will receive a vaginoplasty from the Chicago-based surgeon, Surgeon Two, identified by her counsel,

(assuming Surgeon Two accepts Ms. Iglesias as a patient), and breast augmentation and facial feminization—surgeries that she also desires—from Surgeon One. The first of two facial-feminization procedures with Surgeon One has already been scheduled, and the parties are awaiting a date for an in-person consult with Surgeon Two. *See* McLearn July 1 Decl. ¶¶ 10-13. Defendants are encouraged at the progress made in obtaining the care Ms. Iglesias needs.

Under the Court’s Memorandum and Order, what remains for the Court to examine now is whether the record supports a finding of contempt or the imposition of sanctions. For the reasons set forth below and in the attached declarations, we respectfully submit that it does not.

The Court’s Memorandum and Order first directs BOP to show cause why it should not be held in contempt for violating the Court’s December 27, 2021, preliminary injunction (Doc. 177), on the grounds that BOP’s Transgender Executive Council (“TEC”) did not evaluate Ms. Iglesias’s request for gender-confirmation surgery (“GCS”) as ordered, but instead delayed making a decision. As we explain below, the TEC evaluated Ms. Iglesias’s request and issued a favorable decision consistent with its assigned role under BOP policy, the limits of its authority, and the limits of its expertise. That decision provided the authorization that permitted BOP to refer Ms. Iglesias to Surgeon One, and otherwise to begin arrangements for gender-confirming procedures. Defendants understand now that the Court intended BOP to proceed differently and that Defendants could have better described the process at issue. Defendants regret that they did not provide greater clarity and that the TEC’s approach raised significant concerns for the Court. But we respectfully submit that BOP did not intend to violate the Court’s preliminary injunction and, in our view, acted in compliance with its terms.

The Memorandum and Order next directs BOP to show cause why it should not be sanctioned under the Court’s inherent power, or Federal Rule of Civil Procedure 11(c), for (i) reporting that its medical-services contractor had located what the contractor considered to be an “appropriate surgeon” for Ms. Iglesias (Surgeon One), without first conducting a formal analysis of Surgeon One’s capabilities;

(ii) failing to clearly represent in Defendants' status reports that Surgeon One does not perform vaginoplasties, while continuing to state Ms. Iglesias was scheduled to consult with Surgeon One about gender-confirmation surgery; and (iii) keeping Ms. Iglesias's April 7 appointment with Surgeon One despite Defendants' awareness that Surgeon One refers patients seeking vaginoplasties to other providers. As we explain below, BOP informed the Court of its contractor's reported location of an appropriate surgeon in reasonable, good-faith reliance on the contractor's decades-long history of ably providing for the health-care needs of persons in BOP custody, and on additional information about Surgeon One's qualifications posted on the website of the highly reputable medical institution with which Surgeon One is affiliated. Additionally, BOP—even after receiving confirmation on March 3, 2022 (and immediately disclosing) that Surgeon One refers patients out for vaginoplasties—described the April 7 appointment with Surgeon One as a GCS consult, and kept the appointment, in the reasonable, good-faith belief that Surgeon One could consult with Ms. Iglesias about a range of GCS procedures, including vaginoplasty, and help arrange for another surgeon to perform a vaginoplasty for her. In addition, keeping the appointment would not (and did not) interfere with BOP's ongoing searches for other vaginoplastic surgeons to treat Ms. Iglesias.

Finally, the Memorandum and Order directs six Department of Justice attorneys who have worked on this case in different capacities and at different times to show cause why they should not be sanctioned under the Court's inherent power, or Rule 11, for representing in Defendants' status reports that Ms. Iglesias would meet with Surgeon One on April 7 for a GCS consult, when at least some of them also had known since March 3 that Surgeon One refers patients to other providers for vaginoplasties. As explained below, while we very much regret that the matter was not handled differently, none of the DOJ lawyers engaged in misconduct. We respectfully submit that, the DOJ trial attorneys responsible for the filings at issue relied reasonably and in good faith on an expectation (like BOP's) that Surgeon One would consult with Ms. Iglesias about vaginoplasty and help her secure the

services of another surgeon to perform the procedure for her, and an expectation that Surgeon One could perform other GCS procedures that Ms. Iglesias desires, including the facial feminization and breast augmentation procedures which are now moving forward.

For all of these reasons, discussed in greater detail below, Defendants respectfully submit that sanctions against BOP and its DOJ counsel are unwarranted, and the orders to show cause in the Court's Memorandum and Order should be discharged.

BACKGROUND¹

I. BOP'S RESPONSE TO THE COURT'S PRELIMINARY INJUNCTION

The Court's December 27, 2021, preliminary injunction, ECF No. 177, ordered BOP to "have the TEC meet and evaluate [Ms.] Iglesias's request for GCS by **Monday, January 24, 2022.**" *Id.* at 1. The Court also ordered BOP to schedule a court reporter to attend the TEC meeting and provide a transcript. *Id.* If the TEC were to recommend Ms. Iglesias for GCS, the Court ordered BOP to "[f]ile a notice to the Court within two days of the recommendation," to "[r]efer [Ms.] Iglesias to the BOP medical director immediately," and, if the medical director found Ms. Iglesias suitable for GCS, to submit a treatment plan to the Court within two days, and file status reports every seven days thereafter. *Id.* at 1-2. If the TEC did not recommend Ms. Iglesias for GCS, the Court ordered BOP to "[f]ile a notice with the Court explaining all the reasons for the TEC's decision within seven days" and provide the Court with a transcript of the meeting. *Id.* at 3.²

¹ The discussion herein focuses solely on issues raised by the Court in its Memorandum and Order. Defendants have previously provided background on the case generally, at ECF Nos. 99 (Resp. to Mot for Preliminary Injunction); 129 (Mot. to Dismiss); 191, 199, and 214 (Responses to Order to Show Cause).

² On January 14, 2022, Defendants filed a partial motion for reconsideration seeking relief from one aspect of the injunction—the requirement that a court reporter be retained and be present to provide a transcript of the meeting. ECF No. 178. In their motion, Defendants argued that the requirement to transcribe and disclose internal agency deliberations and decisionmaking violated the deliberative-process privilege, the Prison Litigation Reform Act, and separation-of-powers

The TEC met as directed on January 24, 2022, and considered Ms. Iglesias’s request for surgery. ECF No. 206 at 21:12-21:17; 23:9-23:10; McLearen Jan. 31 Decl. ¶ 5 (ECF No. 183-1). The TEC had previously met and deliberated on Ms. Iglesias’s request for GCS in October 2021, at which time Ms. Iglesias had resided in a BOP female facility (Federal Medical Center (“FMC”) Carswell) for only six months. For that and other reasons, the TEC decided that it would reconsider her request in approximately six months’ time, after her transfer to the Residential Reentry Center (“RRC”) in Miami. McLearen June 30 Decl. ¶ 20. However, in January 2022 the TEC’s decision was to “recommend that [Ms.] Iglesias be referred to a surgeon for consultation for GCS approximately one month after she is placed in a Residential Reentry Center, . . . assuming she does not engage in behavior that would prevent her from continued placement in a female facility and assuming further that no other reasons develop that would make gender confirmation surgery inappropriate for [Ms.] Iglesias.” McLearen Jan. 31 Decl. ¶ 6 (ECF No. 183-1).

The January 2022 decision differed from the decision reached in October 2021 because, whereas the TEC previously decided only to reconsider Ms. Iglesias’s request in the future, the January 2022 decision was to approve Ms. Iglesias for referral after her transfer to the RRC, so long as she could remain in a female facility and no other contraindications arose. McLearen July 1 Decl. ¶ 22. The TEC’s January 2022 decision was based on three factors: (1) complying with BOP’s general policy requiring that a transgender individual have “about a year” of social adjustment living in a gender-conforming facility prior to gender confirmation surgery, ECF No. 206 at 25:7-25:11; (2) ensuring “continuity of care” by making it possible for Ms. Iglesias to complete the entire GCS process with a single team of providers near the Miami RRC, rather than beginning the process with one set of providers while still incarcerated at FMC Carswell, and then switching providers mid-

principles. *Id.* This Court granted Defendants’ motion on January 19, 2022, and modified its preliminary injunction to remove the court reporter requirement. ECF No. 181.

stream after transferring to the RRC, *id.* at 23:22-24:15; and (3) expediting Ms. Iglesias’s receipt of care by avoiding the potentially time-consuming requirement of referring her first for an initial medical evaluation by the BOP medical director before she could consult with a specialist surgeon, a step not required for inmates residing in BOP RRCs.

The TEC believed the action it took in January 2022 complied with the Court’s December 27 injunction to evaluate Ms. Iglesias’s request for gender-confirmation surgery. *Id.* at 23:4-23:8, 26:4-26:6. The objective of the TEC’s decision was to provide the “best care” that BOP could for Ms. Iglesias, and in no way by a desire to delay her receipt of care. *Id.* at 26:18-26:25; 103:22-104:8; 133:24-134:2. Defendants notified the Court of the TEC’s January 2022 decision in a Notice of Compliance with Preliminary Injunction filed Court on January 31, 2022. ECF No. 183.

II. THIS COURT’S FEBRUARY 10, 2022, SHOW CAUSE ORDER AND DEFENDANTS’ RESPONSE

On February 10, 2022, this Court issued a Show Cause Order directing Defendants by February 14, 2022, to explain in writing why sanctions should not be imposed for ignoring the Court’s December 27, 2021, injunction, and delaying action on Ms. Iglesias’s request for GCS, by not referring her immediately to the medical director. ECF No. 187 at 5.

Defendants filed their initial response to the Court’s Show Cause Order on February 14, 2022, ECF No. 191. They explained that BOP complied with the Court’s preliminary injunction when the TEC issued its January 2022 decision approving Ms. Iglesias’s request, and set forth the reasons why it recommended that she be referred to a surgeon approximately one month following her arrival at the Miami RRC, barring contraindications. *Id.* at 11-12. Defendants also noted that BOP was continuing to work diligently to fulfill Ms. Iglesias’s request for GCS, *id.* at 27-28, and advised the Court that

BOP has notified its [medical-services] contractor of Plaintiff’s pending transfer and has been informed that the contractor has located an appropriate surgeon. The surgeon has been contacted and given preliminary patient information, and Dr.

McLearen will provide a further update to the Court on any progress made at or before the February 22, hearing.

Id. at 28 (citations omitted). These statements were supported by a declaration provided by Dr. Alix McLearen, Acting Assistant Director of BOP with oversight of BOP's Reentry Services Division, in which she stated that "to avoid delay in this case, BOP[] has notified the contractor of Iglesias's pending transfer and has been informed they have located an appropriate surgeon," i.e., Surgeon One. McLearen Feb. 14 Decl. ¶ 20(ECF No. 191-2).

On February 18, 2022, Defendants provided the Court with a supplemental declaration from Dr. McLearen, in which she provided more information about Surgeon One, stating that "BOP has been informed by the contractor that it has located a surgeon to potentially perform [Ms.] Iglesias's . . . GCS (assuming the surgeon agrees to accept [Ms.] Iglesias as a patient)." McLearen Feb. 18 Supp. Decl. ¶ 2 (ECF No. 197-1). Dr. McLearen further noted that (a) the surgeon is a member of the World Professional Association for Transgender Health (WPATH), *id.* ¶ 4; (b) BOP had sent the surgeon the past two years of Ms. Iglesias's medical records and would work with its contractor to provide the surgeon with any further information the surgeon requested, *id.* ¶ 5; and (c) BOP had advised its contractor that the referral to the surgeon should include comprehensive services, including hair removal at the surgical site, *id.* ¶ 6.

When the contractor first identified Surgeon One, Dr. McLearen looked over Surgeon One's qualifications (solely for her own information, not as part of a formal review) on the website of the medical institution where Surgeon One practices, which stated that Surgeon One [REDACTED]

[REDACTED] McLearen July 1 Decl. ¶ 57. (Defendants have no reason to believe that Surgeon One, on the webpage or otherwise, has misrepresented their qualifications to perform gender-

confirmation surgery. *Id.* ¶ 81.³) During the same time period BOP was also working with its contractor to obtain more information about Surgeon One, the surgeon’s availability, and requirements for a consult. *Id.* ¶ 53. In connection with these efforts, BOP’s contractor passed along what seemed to BOP to be conflicting information about the GCS procedures that Surgeon One performs. *Id.* ¶ 54. On February 11, in response to a BOP e-mail asking how many “bottom surgeries” Surgeon One had performed, the contractor answered “2-3 month.” *Id.* 53 On February 14, the contractor forwarded BOP an e-mail from Surgeon One in which Surgeon One wrote “[w]e do not offer vaginoplasty yet.” *Id.*⁴

At this early stage of the contractor’s outreach to Surgeon One, Dr. McLearen had concerns about releasing too much information regarding Surgeon One, fearing that doing so could lead to accusations that BOP was sole-sourcing a contract in violation of federal procurement laws. *Id.* ¶ 83. Her concerns were based in her own limited understanding of complex federal procurement rules, and a recent episode in another transgender inmate’s case. *Id.* Correspondence had been sent to that inmate’s counsel discussing a surgeon with whom a BOP official had spoken directly (not through a contractor) about treating the plaintiff inmate. *Id.* The letter raised alarm within BOP about an appearance of illegally sole-sourcing a contract, with potentially severe legal consequences, and triggered stern admonitions from BOP procurement experts to avoid statements in litigation

³ On page 24 of its Memorandum and Order the Court lists six questions that it directs “Defendants and Dr. McLearen” to answer. ECF No. 238 at 24. The information above responds to the Court’s third question—“[d]id [Surgeon One] misrepresent the ability to perform vaginoplasties before the show cause hearing in any additional way besides the website as discussed in Doc. 237?” *See* McLearen July 1 Decl. ¶ 81.

⁴ On page 24 of the Memorandum and Order the Court’s fourth question asks “[w]as the first time Dr. McLearen or Defendants learned [that Surgeon One does not personally perform vaginoplasties] on March 3, 2022?” The February 14 e-mail forwarded by the contractor was the first piece of information specifically indicating that Surgeon One does not perform vaginoplasty. *See* McLearen July 1 Decl. ¶ 53.

that “got out ahead” of the contracting process. *Id.* Anxious, therefore, not to release information about Surgeon One that could result in a violation, or perceived violation, of procurement requirements—but not wishing, either, to conceal uncertainty about the procedures Surgeon One performs—Dr. McLearen informed DOJ counsel (during a discussion in preparation for the February 22, 2022, show-cause hearing) that BOP had received conflicting communications creating uncertainty about the bottom surgeries that Surgeon One performs and refers out. *Id.* ¶ 84.

So far as memory serves, Dr. McLearen did not inform DOJ counsel that BOP had received information specifically indicating that Surgeon One does not perform vaginoplasties. Declaration of Joshua M. Kolsky (June 29, 2022) ¶ 7 (filed herewith); Declaration of John Robinson (June 29, 2022) ¶¶ 10, 13 (filed herewith); Declaration of Daniel Schwei (June 30, 2022) ¶¶ 22-24 (filed herewith). Dr. McLearen did not appreciate at the time the importance that information might hold for the Court, Ms. Iglesias, or DOJ counsel because she did not believe the conflicting information, at that early stage, was a reason not to find out what treatment Surgeon One could offer Ms. Iglesias, and believed the most important objective at the time was to arrange a consultation for Ms. Iglesias with a GCS surgeon who could discuss the range of GCS procedures available, and allow her to make informed decisions about the medically necessary and appropriate procedures she wished to undergo. McLearen July 1 Decl. ¶ 85. Dr. McLearen anticipated that even if Surgeon One did not personally perform vaginoplasties, Surgeon One would be able to refer Ms. Iglesias to another surgeon who could. *See id.* Dr. McLearen now recognizes that she could have more clearly made the information BOP had received available to DOJ counsel and the Court, and now fully understands why the failure to do so would be of concern to the Court. *Id.*

For their part, the DOJ trial attorneys named in the Court’s Memorandum and Order who were working on this case at the time have vague recollections that during the week of February 14-18, 2022, “Dr. McLearen suggest[ed] . . . that BOP was working to confirm that the surgeon

performs bottom surgery,” Robinson June 30 Decl. ¶ 10; that “one or more BOP officials discussed at a high-level their knowledge of Surgeon One’s qualifications,” Kolsky June 30 Decl. ¶ 5; that BOP conveyed “some uncertainty regarding the exact procedures Surgeon 1 would personally perform” due to the limited amount of information it had received about Surgeon One from its contractor, Schwei June 30 Decl. ¶ 24, and that they received a written comment from agency counsel along the same lines, Kolsky June 30 Decl. ¶ 6; J. Robinson June 30 Decl. ¶ 10; Schwei June 30 Decl. ¶ 24. At no point prior to March 3 do these attorneys recall receiving information specifically indicating that Surgeon One does not perform vaginoplasties. Kolsky June 30 Decl. ¶ 5; Robinson June 30 Decl. ¶¶ 12-13; Schwei June 30 Decl. ¶ 22.

Pursuant to the February 10 Show Cause Order, the Court held a hearing on February 22, 2022. During this hearing, Ms. Iglesias’s counsel, referring to Dr. McLearen’s February 14 declaration, asked Dr. McLearen “[w]hat constitutes an appropriate surgeon for gender-affirming surgery?” Dr. McLearen responded, “[i]n that context I was speaking to we have asked for somebody that does certain things and *the contractor has identified somebody appropriate to that.*” ECF No. 206 at 74:20-75:1 (emphasis added). In response to the question whether she was asserting that Surgeon One was “appropriately qualified to be performing the surgery,” Dr. McLearen responded “I am representing that *the contractor has identified somebody that they said is appropriate to perform the surgery.*” *Id.* 75:2-75:5 (emphasis added). Dr. McLearen then added that “I have not done some kind of analysis. I looked at the basic facts out of my own desire to know, and this person appears to do [GCS] and have credentials.” *Id.* 75:10-75:12. *See also* McLearen July 1 Decl. ¶¶ 79-80.⁵ The Court

⁵ The information in this paragraph is responsive to the first and second questions on page 24 of the Court’s Memorandum and Order, which ask “[w]as Dr. McLearen relying on the first surgeon’s website” and “on BOP’s contractor” as the bases for stating in her February 14 declaration that BOP “has been informed that the contractor has located an appropriate surgeon.” Dr. McLearen also addresses these questions in her declaration filed herewith. McLearen July 1 Decl. ¶¶ 79-80.

took the matter under advisement, and ordered Defendants to provide weekly status reports on their efforts to arrange for Ms. Iglesias's surgery. *Id.* 178:13-178:24.

BOP had confidence in the contractor's judgment that it had located an appropriate surgeon for Ms. Iglesias, and so informed the Court of this progress, for several reasons. The contractor has six years' experience and expertise in locating appropriate medical providers for individuals in BOP RRCs, and 22 years' experience acquiring contract medical services (when needed) at secure BOP facilities, and has built a reputation within BOP for reliability and competence. McLearen July 1 Decl. ¶ 55. Surgeon One also has impressive professional credentials and qualifications, as indicated on Surgeon One's webpage, and practices at a large, well resourced, and highly regarded medical institution that BOP believed could provide access to a network of affiliated surgeons and an array of medical services. *Id.* ¶¶ 56-57. Furthermore, notwithstanding the conflicting information BOP had received about the procedures that Surgeon One performs, BOP viewed a consultation with a knowledgeable GCS surgeon as an "essential first step" for Ms. Iglesias that would allow a surgeon to evaluate her needs, explain the various GCS options available to her, and allow her for the first time to make informed decisions about the procedures she wished to undergo. *Id.* ¶¶ 58-60. Surgeon One was at the very least an appropriate choice with whom to begin this process, because even if Surgeon One did not personally perform all the procedures Ms. Iglesias desired, given Surgeon One's affiliation BOP expected that Surgeon One could enlist the aid of other GCS specialists who do. *Id.* ¶ 60. BOP also believed that a direct exchange of information between Ms. Iglesias and Surgeon One would be the most effective way to resolve the conflicting information BOP had received about the procedures Surgeon One could and could not perform. *Id.* ¶ 61.

On February 25, 2022, Defendants filed the first of their weekly status reports, as ordered by the Court at the February 22, 2022 Show Cause Hearing. ECF No. 204. That status report was supported by a declaration from Dr. McLearen describing recent developments in BOP's and its

contractor's efforts to locate a surgeon for Ms. Iglesias. ECF No. 204-1. Dr. McLearen noted that while BOP and its contractor were trying to arrange a consultation with Surgeon One as early as possible, and that BOP had also request that its contractor to continue searching for other surgeons who may be able to perform Ms. Iglesias's GCS. McLearen Feb. 25 Decl. ¶ 7 (ECF No. 204-1).

III. DEFENDANTS' MARCH 4 STATUS REPORT AND SUBSEQUENT REPORTS

Defendants' next status report was due to the Court on March 4, 2022. Before filing that report, BOP determined that Jenna Epplin, National Policy and Program Coordinator (Transgender Inmates) for the Women and Special Populations Branch, would now provide declarations in support of these status reports. Declaration of Jenna Epplin (June 29, 2022) ¶¶ 1, 5 (filed herewith); McLearen July 1 Decl. ¶ 89.⁶ In preparing her March 4 declaration, Ms. Epplin reviewed a number of filings from this litigation, and contacted a number of BOP personnel to gather information on the latest developments in Ms. Iglesias's case. Epplin June 29 Decl. ¶¶ 6, 7. Among other things reported in her March 4, 2022 declaration, Ms. Epplin learned in the course of this information-

⁶ The fifth question on page 24 of the Court's Memorandum and Order asks "[w]hy has Dr. McLearen stopped providing declarations? (Notably, after Dr. McLearen made her declaration in Defendants' first status report, Jenna Epplin has been providing declarations to Defendants' status reports)" ECF No. 238 at 24. Dr. McLearen had previously provided a number of declarations at decisive points in the litigation, but asked Ms. Epplin to take on responsibility for BOP's weekly status report declarations because: (a) Dr. McLearen was concerned that preparing the weekly declarations, which did not depend on her personal knowledge, would detract from her ability to meet her numerous time-consuming responsibilities as Acting Assistant BOP Director in charge of the Reentry Services Division, McLearen July 1 Decl. ¶¶ 91-92; and (b) Ms. Epplin was a logical choice, given that her duties as National Policy Coordinator for Transgender Inmates involves extensive gathering and coordination of information regarding transgender inmates, Epplin June 29 Decl. ¶¶ 1, 5; McLearen July 1 Decl. ¶ 92. The decision that Ms. Epplin would submit declarations for the weekly status reports was in no way motivated by concern over the truth or accuracy of any declaration or testimony previously provided by Dr. McLearen. McLearen July 1 Decl. ¶¶ 87-90. Ms. Epplin previously was not involved in the day-to-day decisions regarding Ms. Iglesias's medical care, though she was generally familiar with Ms. Iglesias's case from her role on the TEC. Epplin June 29 Decl. ¶ 3. For reasons that Dr. McLearen explains, BOP's declarations in support of the parties' joint status reports, required under paragraph 9 of the Court's Stipulated Order (Doc. 267), will be submitted by Gregg Fearday. McLearen July 1 Decl. ¶ 90.

gathering: (1) on March 1, that BOP's contractor had made an appointment for Ms. Iglesias to consult with Surgeon One on April 7, 2022, *id.*; and (2) on March 3, that BOP's contractor had confirmed that "Surgeon 1 refers patients out to other providers for vaginoplasty and that the contractor would find out who those providers are," *id.* This information was provided to DOJ counsel, and ultimately included in the final declaration Ms. Epplin filed with the Court on the following day. *See* Epplin Mar. 4 Decl. (Mar. 4, 2022) ¶¶ 5, 6 (ECF No. 212-1).

The preparation and filing of Ms. Epplin's March 4 declaration was also the first occasion on which any of the DOJ trial attorneys working on the case recalls receiving specific information from BOP indicating that Surgeon One does not personally perform vaginoplasty. *See* Kolsky June 29 Decl. ¶¶ 4-5; Robinson June 29 Decl. ¶¶ 12-13; Schwei June 30 Decl. ¶¶ 31-32. Thus within one day of receiving confirmation that Surgeon One does not perform vaginoplasties, and instead refers patients seeking that procedure to other providers, BOP had disclosed it to counsel, and Defendants had disclosed it to Plaintiff and the Court in the form of Ms. Epplin's declaration.

Plaintiff's counsel directly referred to the information that Surgeon One refers patients out for vaginoplasty in a response to Defendants' March 4 status report, filed on March 9. After quoting from Ms. Epplin's declaration, counsel advised that

Ms. Iglesias seeks clarification whether Surgeon 1 – the surgeon with whom Ms. Iglesias has a consultation scheduled for April 7, 2022 – is capable of performing vaginoplasty and would perform the procedure for Ms. Iglesias if contracted as the surgeon, or whether this is a typographical error meant to refer to a different procedure.

ECF No. 219 at 4. During this early-March time period, counsel for the parties also exchanged a number of e-mail communications regarding the many logistical issues involved in arranging for Ms. Iglesias's medical care. Robinson June 29 Decl. ¶ 23. In one such communication, Ms. Iglesias's counsel requested much of the same information regarding Surgeon One referenced in her March 9 filing. *See* ECF No. 234-3, Ex. A, at 2. On March 14, Defendants' counsel recommended that Ms.

Iglesias obtain the information sought directly from Surgeon One during the initial consultation, *see id.* at 1, in response to which Ms. Iglesias’s counsel asked either that Defendants’ counsel provide the information requested, or that they “withdraw your prohibition” on their contacting Surgeon One directly, ECF No. 234-3, Ex. B, at 2. Defendants’ counsel responded on March 16 that although they had previously requested that Ms. Iglesias’s counsel voluntarily refrain from contacting Surgeon One, “we are not prohibiting you from doing so.” *Id.* at 1; Robinson June 29 Decl. ¶ 23; Schwei June 30 Decl. ¶ 41-42. DOJ counsel believed this exchange, which clarified that Ms. Iglesias’s counsel were free to contact Surgeon One, had essentially resolved the various requests for information Ms. Iglesias’s counsel raised in the March 9 response, and contemporaneous e-mail requests to Defendants’ counsel. *See* Schwei June 30 Decl. ¶ 43.

Following the March 4 status report, Defendants filed four more regular weekly status reports (and one sealed supplement) between March 11 and April 1. None of these reports restated the fact that Surgeon One referred patients to other providers for vaginoplasty, because Defendants had already disclosed that information, and the focus of the weekly status reports was on providing new information and updates on BOP’s efforts to obtain GCS for Ms. Iglesias. Epplin June 29 Decl. ¶ 10; Kolsky June 29 Decl. ¶ 9; Robinson June 30 Decl. ¶ 22. Each of those status reports characterized Ms. Iglesias’s forthcoming appointment with Surgeon One in identical terms, as “a consultation for gender-confirmation surgery on April 7, 2022.” ECF No. 220 at 1; ECF No. 227 at 1; ECF No. 229 at 1; ECF No. 231 at 1.

Even knowing by then that Surgeon One does not personally perform vaginoplasties, both BOP and DOJ trial counsel believed it was fair to characterize the subject of the anticipated April 7 consultation as “gender-confirmation surgery.” Both BOP and DOJ understood that the term “gender-confirmation surgery” as used and defined in the relevant literature such as the WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People,

Version 7 at 57 (2012) (“WPATH Standards of Care”), includes a variety of different surgical procedures, including top, bottom, and facial surgeries. McLearen July 1 Decl. ¶¶ 68-69; Kolsky June 29 Decl. ¶ 10; Robinson June 29 Decl. ¶ 21. Defendants, and counsel for Defendants, believed that because Surgeon One could perform at least some of these surgical procedures, including breast augmentation, and facial feminization, in which Ms. Iglesias had expressed interest, it was therefore appropriate to characterize the consultation as on regarding “gender-confirmation surgery.”

McLearen July 1 Decl. ¶ 71; Kolsky June 29 Decl. ¶ 10; Robinson June 29 Decl. ¶¶ 16, 21. (Indeed, Surgeon One’s notes of the consultation [REDACTED]

[REDACTED] ECF No. 249-1, and, validating Defendants’ expectations, Surgeon One accepted Ms. Iglesias as a patient for breast augmentation and facial feminization, and the first of two facial-feminization surgeries is currently scheduled for August 23, 2022. McLearen July 1 Decl. ¶ 11.)

In addition, both BOP and DOJ trial counsel also believed that even if Surgeon One would not personally perform Ms. Iglesias’s requested vaginoplasty, Surgeon One could discuss the procedure with Ms. Iglesias and coordinate her care with another provider who could perform it. Epplin June 29 Decl. ¶ 13; McLearen July 1 Decl. ¶¶ 68, 71; Schwei June 30 Decl. ¶ 36. Therefore, even understanding Ms. Iglesias’s desire for a vaginoplasty, Defendants and their DOJ trial counsel still believed it was fair to describe the upcoming April 7 appointment as a consultation “for gender-confirmation surgery,” given their belief that vaginoplasty would be discussed and that the consultation could lead to a direct referral to another provider who could personally perform the procedure.

IV. MS. IGLESIAS’S APRIL 7, 2022 CONSULTATION WITH SURGEON ONE

Ms. Iglesias attended her consultation with Surgeon One on April 7, 2022, as scheduled. ECF No. 233 at 1. BOP believed that this consultation would be an important step in providing Ms. Iglesias with the medical care she had requested, for several reasons. Even though Surgeon One

does not perform vaginoplasty, Surgeon One is a GCS expert, and BOP therefore believed Surgeon One could knowledgeably provide Ms. Iglesias with information regarding the full range of gender-confirming surgical procedures. Epplin June 29 Decl. ¶ 13; McLearn July 1 Decl. ¶ 74. Furthermore, BOP believed that because that Surgeon One is associated with a large health-care institution, even though Surgeon One does not personally perform vaginoplasty, Surgeon One could help arrange for Ms. Iglesias to receive a vaginoplasty from another surgeon who performs that procedure. Epplin June 29 Decl. ¶ 13; McLearn July 1 Decl. ¶ 71. Notwithstanding these expectations, BOP instructed its contractor to continue to search for other surgeons near the Miami RRC who could provide Ms. Iglesias a vaginoplasty. McLearn July 1 Decl. ¶ 73. The April 7 consult did not interfere with BOP's continued search efforts.

Even knowing that Surgeon One does not perform vaginoplasties, DOJ counsel agreed that it made sense to keep Ms. Iglesias's April 7 appointment with Surgeon One, (i) because meeting with Surgeon One presented an opportunity for Ms. Iglesias to discuss gender-confirmation surgery with an expert who could advise her on the specific procedures available to her, and answer her questions about them, Kolsky June 29 Decl. ¶ 11, Robinson June 29 Decl. ¶ 15, Schwei June 30 Decl. ¶ 34.c, (ii) because they anticipated that Surgeon One could provide a direct referral for Ms. Iglesias to a surgeon who does perform vaginoplasties, Kolsky June 29 Decl. ¶ 11; Robinson June 29 Decl. ¶¶ 14-15; Schwei June 30 Decl. ¶¶ 34.a, 34.b, 34.f., and (iii) because DOJ counsel also understood that BOP's efforts to locate a local surgeon who performs vaginoplasties was continuing regardless of the appointment with Surgeon One. Kolsky June 29 Decl. ¶ 11; Robinson June 29 Decl. ¶ 17.

The day following the consult, April 8, 2022, BOP received (via its contractor) a message from Surgeon One indicating that Surgeon One and Ms. Iglesias had discussed options for breast augmentation and facial feminization during the consultation. *Id.* According to Surgeon One's record of the visit, [REDACTED]

[REDACTED]

[REDACTED] ECF No. 249-1 at 1. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 3. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 4. [REDACTED]

[REDACTED]

[REDACTED] According to a declaration Ms. Iglesias filed on April 8, [REDACTED]

[REDACTED] Iglesias Apr. 11 Decl. ¶ 4

(ECF No. 234-2), and [REDACTED], *id.* ¶ 5. Following the consultation,

Surgeon One provided BOP’s contractor a list of four area surgeons who perform vaginoplasty, and BOP instructed its contractor to contact three of the four doctors (the fourth had already been contacted and declined to accept Ms. Iglesias as a patient). ECF No. 233 at 1-2.

“BOP was surprised and disappointed . . . to hear that Surgeon One did not consult with [Ms. Iglesias] about vaginoplasty on April 7 . . . [BOP was] also disappointed that Surgeon One did not offer to contact other surgeons to arrange vaginoplasty for Ms. Iglesias, but instead simply provided a list of other GCS surgeons” who perform the procedure. McLearen July 1 Decl. ¶ 68. DOJ counsel shared this reaction of surprise and concern that the consultation did not include a substantive discussion of the vaginoplasty procedure.⁷ *See* Schwei June 30 Decl. ¶ 7

⁷ April 8, 2022 was the first time that Brian Boynton, Principal Deputy Assistant Attorney General for the Civil Division, one of the six DOJ attorneys named in the Court’s April 18 Memorandum and Order, became aware that Surgeon One does not perform vaginoplasties. Boynton June 30 Decl. ¶ 9.

V. THIS COURT'S APRIL 18, 2022 SHOW CAUSE ORDER

On April 18, 2022, this Court issued its Memorandum and Order directing BOP and six named DOJ attorneys who worked at various times and in various capacities on this case to show cause why sanctions should not be imposed on them. ECF No. 238. First, BOP is directed to show cause why it should not be held in contempt for violating the Court's December 27, 2021, preliminary injunction, on the grounds: (1) that the TEC "failed to evaluate [Ms.] Iglesias's request for GCS on January 24, 2022[,]" *id.* at 9-10; (2) that the TEC improperly delayed rather than make a decision regarding Ms. Iglesias's request for GCS, *id.* at 10-11; and (3) that the TEC did not make reasonable and diligent efforts to comply with the Court's injunction, *id.* at 12-13.

Second, BOP is directed to show cause why it should be sanctioned under the Court's inherent power, and Federal Rule of Civil Procedure 11, for: (1) representations that BOP's contractor had identified what it considered to be an "appropriate surgeon" to perform GCS for Ms. Iglesias, even though BOP did not itself conduct a "formal analysis" of Surgeon One's qualifications, *id.* at 23-24; (2) failing to "clearly represent[]" in its status reports that Surgeon One does not personally perform vaginoplasties, while continuing to state in those reports that Ms. Iglesias was scheduled to consult with Surgeon One about gender-confirmation surgery, *id.* at 25-28; and (3) keeping Ms. Iglesias's April 7 appointment with Surgeon One even after Defendants were aware that Surgeon One does not personally perform vaginoplasties, *id.* at 25-29.

Finally, the six named DOJ attorneys are directed to show cause why they should not be sanctioned under the Court's inherent power, and Rule 11, for the representations in Defendants' status reports that the purpose of Ms. Iglesias's April 7 consultation with Surgeon One would be to discuss gender-confirmation surgery, even though it was known that Surgeon One does not perform vaginoplasties, *id.* at 29-30.

**VI. THE PARTIES' SETTLEMENT EFFORTS AND STIPULATED ORDER
RESOLVING MS. IGLESIAS'S CLAIMS**

On May 27, 2022, the Parties filed a joint motion reporting to the Court that the Parties had reached an agreement to resolve Ms. Iglesias's claims, and submitting a proposed Stipulated Order governing the steps the parties will take next to arrange for Ms. Iglesias's GCS. ECF No. 267. On May 31, 2022, the Court granted the Parties' joint motion, and entered the Stipulated Order. ECF No. 269. Stipulated Order provides, among other things, that:

1. Defendants will continue to schedule regular appointments for Ms. Iglesias for laser hair removal;
2. Defendants will schedule appointments for Ms. Iglesias with Surgeon One for facial feminization and breast augmentation;
3. Defendants will schedule an appointment for Ms. Iglesias for vaginoplasty with the Chicago-based surgeon identified by Ms. Iglesias's counsel;
4. Defendants will pay for the costs of the surgical procedures identified above, including pre-surgical care and post-surgical care and recovery, and any related necessary medical care, if such surgeries or care occur while Ms. Iglesias is still in BOP custody;
5. If any of the surgical procedures identified above, including pre-surgical care, post-surgical care and recovery, and any related necessary medical care, cannot be completed prior to Ms. Iglesias's release from BOP custody, then BOP will deposit funds into an escrow or trust account to cover costs of such care;
6. BOP will also deposit into an escrow account an amount to cover any unexpected medical or associated out-of-pocket costs;
7. BOP will pay Plaintiffs' counsel an agreed-upon amount in attorneys' fees and costs;
8. The Parties will file regular status reports with the Court on significant developments on the surgeries;
9. The case will be stayed until January 3, 2023;
10. Within fourteen days after BOP makes the required payment(s), Ms. Iglesias will file a stipulation of dismissal with prejudice.

ECF No. 267-1.

VII. BOP'S CONTINUING EFFORTS TO PROVIDE MS. IGLESIAS WITH THE HEALTH CARE SHE SEEKS

Since the Court entered the Stipulated Order, Defendants have continued to work diligently to provide Ms. Iglesias with the gender-confirmation procedures she is seeking, and have made significant progress in doing so. Ms. Iglesias continues to make progress toward obtaining facial feminization and breast augmentation surgery with Surgeon One. On May 31, 2022, Ms. Iglesias underwent a required CT scan in preparation for facial surgery. Fearday June 10 Decl. ¶ 5 (ECF No. 274-1). Ms. Iglesias had a telehealth appointment with Surgeon One on June 16, 2022, and Surgeon One has now scheduled the first surgical procedure for August 23, 2022. McLearen July 1 Decl. ¶ 11. BOP has also asked its contractor to move ahead with scheduling the second surgery with Surgeon One. Fearday June 10 Decl. ¶ 5 (ECF No. 274-1).

BOP has also continued to work to schedule a vaginoplasty procedure with the Chicago-based surgeon identified by Plaintiff's counsel ("Surgeon Two"). Ms. Iglesias had a telehealth consultation with Surgeon Two on May 5, 2022. ECF No. 256-1 at 1. On May 26, 2022, Surgeon Two's staff informed BOP that additional administrative tasks need to be completed before Surgeon Two could have an in-person consultation with Ms. Iglesias. McLearen July 1 Decl. ¶ 12. BOP has also continued to work to provide Ms. Iglesias with both facial hair removal and surgical-site hair removal in anticipation of vaginoplasty. *Id.* ¶ 13. Ms. Iglesias had a second dermatology appointment for laser hair removal at the surgical site and for facial hair removal on June 6, 2022, and her next appointment is currently scheduled for July 11, 2022. Fearday June 10 Decl. ¶ 7 (ECF No. 274-1).

Even though it is unusual for someone holding such a senior management position as Dr. McLearen now occupies to be integrally involved in managing the care of a single inmate, ECF No. 206 at 59:5-59:12; nevertheless, because Ms. Iglesias is "likely the first individual to receive gender-confirming surgery under BOP's care," she "is a special case," and Dr. McLearen will still maintain

personal oversight of Ms. Iglesias’s case to ensure that she receives appropriate care under the terms of the Stipulated Order,⁸ McLearn July 1 Decl. ¶ 91.

Throughout this time, Defendants have been operating in good faith with Ms. Iglesias, her counsel, and the Court, and no one involved with this case from either BOP or DOJ ever sought to mislead the Court, Ms. Iglesias, or her counsel about BOP’s efforts to provide for her health-care needs. *See Id.* ¶ 77 (“The objective of of all of BOP’s efforts was to obtain all medically necessary treatment for Ms. Iglesias, including vaginoplasty, and BOP did not seek at any time to mislead the Court about its intentions, or its efforts.”); Robinson June 29 Decl. ¶ 26 (“I do not believe that I or any of my colleagues in this matter have engaged in misconduct, attempted to mislead the Court, or taken any action to inappropriately delay Ms. Iglesias’ receipt of health care she requires.”); Kolsky June 29 Decl. ¶ 13 (“I believe that everyone at DOJ involved in this case has acted in good faith and endeavored to represent our client’s legitimate interests within the bounds of our ethical and professional responsibility obligations.”); Schwei June 30 Decl. ¶ 4 (“I believe I have acted ethically, professionally, and reasonably at all times in this case – and I believe the same of my DOJ colleagues.”) Haas June 30 Decl. ¶ 6 (“I do not believe that any of these DOJ attorneys sought to intentionally withhold or conceal information for the purpose of deceiving the Court, Plaintiff, or her counsel.”); Boynton June 30 Decl. ¶ 8 (“I do not believe anyone on the team intended to mislead the Court or Ms. Iglesias...”).

Nevertheless, BOP and DOJ personnel who have been involved with this case deeply regret the miscommunications that have led this Court to question their candor. *See* McLearn July 1 Decl. ¶ 9 (“I have spent my career working to ensure access to quality services for all inmates in BOP

⁸ The information above responds to the Court’s sixth question in the Memorandum and Order—“[i]s Dr. McLearn still the one personally involved in seeing GCS through?” ECF No. 238 at 24. *See* McLearn July 1 Decl. ¶ 91.

custody and regret any statements or actions by BOP that may have led the Court, or Ms. Iglesias, to feel that they have been misled, and regret the frustration caused as a result.”); Epplin June 29 Decl. ¶ 14 (“I am sorry that the Court has expressed concern with BOP’s representations in this case but can assure the Court that I did not intend to withhold any information from the Court or Ms. Iglesias.”); Kolsky June 29 Decl. ¶ 13 (“I regret that statements made and actions taken on BOP’s behalf in this matter have caused the Court to question Defendants’ candor, the candor of Defendants’ counsel, or BOP’s intentions to provide Ms. Iglesias with the medical care she requires.”); Robinson June 29 Decl. ¶ 26 (“While I am glad that we have been able to reach a resolution with Ms. Iglesias that guarantees her the care she needs, I am very sorry that we continued to cause the Court concern notwithstanding our best efforts to represent the Government’s interests ethically and professionally in this difficult and important matter.”); Schwei June 30 Decl. ¶ 4 (“I acknowledge that there have been mistakes and miscommunications during the case. I do not believe that any of those mistakes or miscommunications were intentional or deliberate. Nonetheless, I wish to apologize for any negative impact that those mistakes and miscommunications have had on the Court and on Ms. Iglesias.”); Haas June 30 Decl. ¶ 5 (“On behalf of the Federal Programs Branch, I want to personally apologize to the Court, Plaintiff, and her counsel for any confusion or distress caused by Defendants’ representations in this case.”); Boynton June 30 Decl. ¶ 8 (“On behalf of the Department of Justice, I apologize to the Court and to Ms. Iglesias and her counsel for any confusion caused by Defendants’ failure to more clearly and prominently highlight and explain what Defendants learned regarding the procedures Surgeon 1 personally performed and those that Surgeon 1 referred to others as part of a patient’s treatment plan.”).

While Defendants acknowledge the difficulties, delays, and frustrations that have seemed, at times, to beset the parties’ efforts to provide Ms. Iglesias the care she needs, for the reasons

discussed below we respectfully submit that the conduct of Defendants and their counsel, described herein, does not warrant the imposition of sanctions.

ARGUMENT

I. CIVIL CONTEMPT SANCTIONS AGAINST BOP ARE UNWARRANTED.

The Court's Memorandum and Order cites three potential reasons for concluding that BOP did not comply with the December 27 injunction: (i) that the TEC "failed to evaluate [Ms.] Iglesias's request for GCS on January 24, 2022[,]" Mem. & Order at 9, ECF No. 238; (ii) that on January 24 the TEC improperly delayed rather than make a decision regarding Ms. Iglesias's request for GCS, *id.* at 10-11; and (iii) that the TEC did not make reasonable and diligent efforts to timely comply with the Court's injunction, *id.* at 12-13.

Defendants regret that the Court has these concerns and that there appears to have been some misunderstanding about what was intended. As explained below, however, Defendants respectfully submit that BOP complied with the December 27, 2021 injunction, because the TEC (i) evaluated Ms. Iglesias's request for gender-confirming surgery in light of the circumstances presented in January 2022, and the limits of its authority and expertise; (ii) without further delay, issued a favorable decision that authorized the preparations now underway for Ms. Iglesias's surgery, without further action required of the TEC; and (iii) issued its decision and notified the Court within the deadlines set by the Court's injunction, as soon as it was practical under the circumstances to do so. And even if BOP did not comply with the December 27 injunction, principles of abatement of civil contempt, the lack of provable losses due to BOP's actions, and principles of sovereign immunity, preclude coercive or compensatory contempt sanctions.

A. Legal Standards for Civil Contempt

A finding of civil contempt may be sustained against a party only if the following elements are established by clear and convincing evidence: (1) the order in question "sets forth an

unambiguous command;” (2) the party violated that command; (3) the “violation was significant, meaning it did not substantially comply with the Order;” and (4) the party “failed to take steps to reasonabl[y] and diligently comply with the Order.” *Prima Tek II, L.L.C. v. Klerk’s Plastic Indus. B.V.*, 525 F.3d 533, 542 (7th Cir. 2008) (citing *Goluba v. School Dist. of Ripon*, 45 F.3d 1035, 1037 (7th Cir. 1995)); see also *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 751 (7th Cir. 2007), *cert. denied* 552 U.S. 1231 (2008) (“In order to prevail on a contempt petition, the complaining party must demonstrate by clear and convincing evidence that the respondent has violated the express and unequivocal command of a *court order*.” (quoting *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993))).

Civil contempt sanctions “must relate to one of [] two purposes:” “compelling compliance with a court order” or “compensating the complainant for losses caused by contemptuous actions.” *Autotech*, 499 F.3d at 752 (quoting *Tranzact Tech., Inc. v. 1Source Worldsite*, 406 F.3d 851, 856 (7th Cir. 2005)). Evidence in the record must support contempt sanctions directed to either purpose. *Id.*

As to the first purpose—coercing compliance—“the court must consider the ‘character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.’” *Id.* (quoting *S. Suburban Housing Ctr. v. Berry*, 186 F.3d 851, 854 (7th Cir. 1999)). Moreover, coercive sanctions may stand only if the “contemnor is afforded an opportunity to purge,” that is, to “avoid the penalty, or some part of it, by complying with the order.” *FTC v. Trudeau*, 579 F.3d 754, 770 (7th Cir. 2009) (quoting *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994)).

Compensatory sanctions for civil contempt must be supported by evidence of the “provable losses sustained by the non-breaching party as a result of the violation of the order.” *Prima Tek*, 525 F.3d at 543. Such evidence is “crucial to ensuring that the award is not greater than necessary[.]” *Trudeau*, 579 F.3d at 770 (vacating monetary sanction where district court did not “explain how it

arrived at the specific amount of the sanction imposed” and failed to “outlin[e] the methodology the court used to crunch those numbers and arrive at what it believed to be the appropriate amount”).

As discussed below, contempt sanctions are neither warranted here nor available under the circumstances of this case.

B. The TEC Evaluated Ms. Iglesias’s Request for GCS and Issued a Recommendation that Authorized BOP to Refer Her for Surgery.

The Court’s December 27 injunction first directed the TEC to meet on or before January 24, 2022, “to evaluate [Ms.] Iglesias’s request for GCS[.]” Dec. 27 Prelim. Inj. at 1, ECF No. 177. The TEC did so. *See* Feb. 22 Tr. at 23:4-17, ECF No. 206; McLearen Feb. 14 Decl. (ECF No. 191-2) ¶¶ 12-16; McLearen Jan. 31 Decl. ¶¶ 4-13 (ECF No. 183-1). Prior to January 2022 the TEC had not recommended Ms. Iglesias for gender-confirming surgery because, among other reasons, she had not yet resided for twelve months in a gender-confirming (i.e., female) facility, as BOP policy (adapted from WPATH standards of care) generally required. McLearen July 1 Decl. ¶ 19; *see also* Feb. 22 Tr. at 21-22; McLearen Jan. 31 Decl. ¶ 8 (ECF No. 183-1); Tr. of Motion Hr’g (Nov. 22, 2021) at 136:18-24 (“Nov. 22 Tr.”) (ECF No. 175); Alison Leukefeld Apr. 20, 2021 Decl. ¶¶ 11-12 (ECF No. 99-2). That is why the TEC did not recommend Ms. Iglesias for gender-confirmation surgery when it considered her request in October 2021, and instead decided that it would reconsider her request for surgery following placement and at least one month’s successful adjustment at the Miami RRC. McLearen July 1 Decl. ¶ 20; *see* Feb. 22 Tr. at 25.

When, as instructed by the Court, the TEC reconsidered Ms. Iglesias’s request for surgery in January 2022, it took into account the facts and circumstances at that time—including Ms. Iglesias’s impending transfer to the RRC, the importance of maintaining continuity in her care throughout the GCS process, and the logistical expedience of referring Ms. Iglesias directly to a surgeon following her transfer to the RRC, rather than referring her (while still located at FMC Carswell), to the BOP medical director. McLearen July 1 Decl. ¶¶ 34-36; *see also* Feb. 22 Tr. at 23-26; McLearen Feb. 14

Decl. ¶¶ 14-20 (ECF No. 191-2); McLearen Jan. 31 Decl. ¶¶ 10-12 (ECF No. 183-1). Based on these factors, the TEC reached a different conclusion than before. Instead of deferring her request for future consideration, as it had done in October 2021, the TEC decided in January 2022 to approve Ms. Iglesias's request and recommended that she be referred for surgical consideration approximately one month after arrival at the Miami RRC, so long as her adjustment was adequate to show that she could maintain her placement there. McLearen July 1 Decl. ¶ 21; *see also* Feb. 22 Tr. at 23, 25-26; McLearen Jan. 31 Decl. ¶¶ 4, 6, 9, 13 (ECF No. 183-1).

The difference in outcome between the TEC's October 2021 and January 2022 meetings is a meaningful one. In October 2021 the TEC decided to reconsider Ms. Iglesias's request in April 2022. Accordingly, the TEC would have had to meet again in April 2022, re-evaluate her request, and issue a recommendation in favor of surgery, before she could be referred for a consultation. McLearen July 1 Decl. ¶ 22; *see* Transgender Offender Manual, § 9 at 9 (Jan. 13, 2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf> (last visited July 1, 2022). In January 2022, the TEC approved Ms. Iglesias for referral to a surgeon as long as she experienced no significant adjustment problems. Accordingly, no further evaluation or decision-making by the TEC was required for her referral to a surgeon and (if medically indicated) surgery to proceed. McLearen July 1 Decl. ¶ 22. And the tangible effects of that decision can now be seen in the record of recent events. Ms. Iglesias has now had two consultations with two surgeons for various types of surgery, the first on April 7, 2022, with Surgeon One to discuss facial feminization and breast augmentation, and the second on May 5, 2022, a telehealth consult with Surgeon Two to discuss vaginoplasty. *See id.* ¶ 23. BOP was authorized to proceed with these consultations and related appointments in preparation for Ms. Iglesias's surgeries—all without any further involvement by the TEC—because the TEC considered and gave approval to Ms. Iglesias's request for surgery in January 2022. *Id.*

Thus the TEC complied with the Court's instruction to "evaluate" Ms. Iglesias's request for surgery at its January 2022 meeting.

The Court's Memorandum and Order suggests that the TEC did not in fact evaluate Ms. Iglesias's request for GCS in January 2022 because it recommended only that she be referred to a surgeon for consultation, and left it up to the surgeon to decide what procedures are medically necessary and appropriate for her, instead of deciding that on its own. Mem. & Order at 9-10. But as Dr. McLearn explains, the TEC is neither authorized nor qualified to make medical judgments of that kind, and the TEC would lack authority, in any event, to enforce them on outside surgeons retained to perform GCS on BOP inmates.

The TEC is constituted under authority of the Transgender Offender Manual, § 3(a)(5), at 4, as BOP's "official decision-making body on all issues affecting [BOP's] transgender population[.]" with authority "to offer advice and guidance on unique measures related to treatment and management needs of transgender inmates[.]" *See also* Leukefeld Apr. 20, 2021 Decl. ¶ 4 (ECF No. 99-2). Regarding inmate requests for GCS, the TEC is authorized to "determine that all milestones and individual goals for surgical *consideration* have been met," Transgender Offender Manual § 9, at 9 (emphasis added), not to decide what surgical procedures are medically necessary and appropriate for individual inmates. Instead, if the TEC determines that an inmate has met the foregoing pre-requisites, then the Manual instructs that the inmate be referred to the BOP Medical Director for medical evaluation, or (in the case of RRC residents) to the Reentry Services Division for referral to a surgeon. *Id.* § 3(a)(2) at 4, § 9 at 9, § 16, at 12-13; *see also* McLearn July 1 Decl. ¶¶ 25-26.⁹ In short, under the Transgender Offender Manual the TEC is authorized only to

⁹ This is precisely the type of decision the TEC made in October 2021, when for the first time it approved another inmate's request for GCS: it made a referral to the Medical Director for surgical consideration. McLearn July 1 Decl. ¶ 25; Feb. 22 Tr. at 64:3-6.

recommend that an inmate seeking GCS be referred to an appropriate medical professional for surgical consultation, based on the TEC's assessment that the inmate has achieved certain milestones and met certain requirements. The TEC does not have authority to decide as a medical matter that an inmate should undergo GCS. *Id.* ¶ 27.

In addition to a lack of authority, the TEC also lacks the necessary expertise to make such judgments. The TEC's membership is stipulated by the Transgender Offender Manual, the terms of which ensure that the TEC is composed of BOP staff with diverse specialties, but ordinarily it does not include treating physicians or surgeons, as was the case in January 2022. McLearen July 1 Decl. ¶ 28; Transgender Offender Manual, § 3(a)(5), at 4; Leukefeld Apr. 20, 2021 Decl. ¶ 4 (ECF No. 99-2); Nov. 22 Tr. at 130:6-22, 151:3-8, 158:21-159:19. None of the individuals serving on the TEC at that time was a physician or surgeon, and none had medical expertise in GCS. Moreover, neither the TEC nor any other BOP authority can dictate to outside surgeons on whom BOP must depend to perform GCS, which patients to accept, or what procedures to perform in individual cases. McLearen July 1 Decl. ¶ 29; *see* McLearen Feb. 18 Supp. Decl. ¶¶ 4, 10 (ECF No. 197-1); Feb. 22 Tr. 89:20-23, 112:13-20. The TEC therefore could not have decided that it was medically appropriate for Ms. Iglesias to undergo GCS, or specific gender-confirming surgical procedures, or to direct any medical professional within or outside BOP to perform GCS on her. McLearen July 1 Decl. ¶ 29.

Given the limits of the TEC's authority and expertise, the TEC reasonably concluded that the Court's direction to "evaluate [Ms.] Iglesias's request for GCS[.]" Dec. 27 Prelim. Inj. at 1, required it to make the type of decision for which it was created—to decide whether Ms. Iglesias should be recommended for referral to a qualified surgeon for a consultation. McLearen July 1 Decl. ¶ 24. That is what the TEC did, as a result of which Ms. Iglesias has had consultations with two GCS surgeons, preparations have begun in anticipation of her receiving medically necessary gender-affirming surgery, and one surgical procedure is now scheduled, without the need for further

decisionmaking by the TEC. *Id.* ¶ 23. We respectfully submit that nothing in the Court’s instruction to the TEC to “evaluate [Ms.] Iglesias’s request for GCS[.]” Dec. 27 Prelim. Inj. at 1, “sets forth an unambiguous command[.]” *Prima Tek*, 525 F.3d at 542, to make medical judgments about what manner of treatment she should receive, in lieu of trained and experienced GCS surgeons. Even if that was the Court’s intention, in light of the injunction’s terms the TEC cannot be faulted for failing to grasp that meaning, thus precluding a finding of contempt.

C. The TEC Did Not Postpone Its Decision.

The Court’s Memorandum and Order next suggests that BOP violated the December 27 injunction on the ground that in January 2022 the TEC did not make, but delayed, a decision on Ms. Iglesias’s request for surgery, by recommending that she “be referred to a surgeon for consultation for GCS approximately one month after” her placement in an RRC, “assuming she does not engage in behavior that would prevent her from continued placement in a female facility and assuming further that no other reasons develop that would make gender confirmation surgery inappropriate for [her].” Mem. & Order at 4, 10-11 (quoting McLearen Jan. 31 Decl. ¶ 6 (ECF No. 183-1)). As Dr. McLearen explains, the TEC in fact made a decision that approved Ms. Iglesias’s request, a decision that has made it possible since then for her to consult with two surgeons, and to attend further appointments in preparation for gender-confirming procedures, and to schedule the first of her surgeries, all without further authorization by the TEC required. McLearen July 1 Decl. ¶ 30.¹⁰

¹⁰ For reasons discussed in earlier filings, Defendants respectfully submit that the Court’s December 27 injunction does not “set[] forth an unambiguous command[.]” *Prima Tek*, 525 F.3d at 542, either to make an immediate and unconditional recommendation in support of Ms. Iglesias’s request for surgery, or to deny it outright, and that the caveated decision the TEC in fact made complied with the injunction’s terms. *See* Feb. 14 Resp. to Show Cause Order at 10-13 (ECF No. 191); Mar. 4 Supp. Resp. to Show Cause Order at 9-13 (ECF No. 214). We incorporate those arguments by reference here, although we recognize that the Court has expressed views to the contrary. Mem. & Order at 4-5, 8-13. For present purposes, however, the salient point is that the TEC made a decision in January 2022, pursuant to which preparations for Ms. Iglesias’s gender-confirmation surgery, including vaginoplasty, are now under way.

The Court's Memorandum and Order emphasizes that the unambiguous purpose of the December 27 preliminary injunction was to avoid delay in the TEC's decision regarding Ms. Iglesias's request. Mem. & Order at 11. As Drs. McLearen and Leukefeld testified, however, the TEC did not make its January 2022 decision for the purpose of delaying Ms. Iglesias's surgery. Rather, as set forth in prior declarations and testimony, the TEC's January 2022 decision was based on (i) BOP's policy that GCS is generally considered for persons in BOP custody "only after one year of clear conduct and compliance with mental health, medical, and programming services at [a] gender affirming facility[,]" Transgender Offender Manual, § 9 at 9; *see also* McLearen Jan. 31 Decl. ¶¶ 6-7 (ECF No. 183-1); (ii) continuity of care—that it was more prudent for the welfare of the patient, Ms. Iglesias, to begin and complete the entire course of procedures involved in GCS with a single team of physicians and mental-health care professionals in one location, rather than to begin the process with one set of providers (while Ms. Iglesias still remained in FMC Carswell) and complete it with another set of providers (following her transfer to the Miami RRC), Feb. 22 Tr. 23:18-24:15; McLearen Feb. 14 Decl. ¶¶ 16, 18 (ECF No. 191-2); McLearen Jan. 31 Decl. ¶ 10 (ECF No. 183-1); and (iii) that referring Ms. Iglesias for a surgical consult after her transfer from FMC Carswell to the Miami RRC meant that she could be referred directly to a surgeon (or surgeons) for consultation without having to undergo the potentially time-consuming step of referring her first to the BOP Medical Director for an initial medical evaluation before being referred to a GSC surgeon, *see* McLearen Jan. 31 Decl. ¶ 11 (ECF No. 183-1). *See also* McLearen July 1 Decl. ¶¶ 34-36.

None of these considerations was taken into account for purposes of delay. To the contrary, the TEC expected that referring Ms. Iglesias for surgery after her relocation to the Miami RRC might accelerate her treatment by eliminating the intervening step of a medical evaluation by the BOP Medical Director. And to expedite the process further, the TEC decided that only one month of adjustment at the RRC would be necessary before a surgical referral could be made, even though

that meant Ms. Iglesias would not spend the full twelve months in a gender-conforming facility that the Transgender Offender Manual generally requires before a referral is made. McLearen July 1 Decl. ¶ 37. Defendants regret that their statements and actions have raised doubts with the Court about BOP's sincere intent to provide Ms. Iglesias with needed medical care, and to do so without unnecessary delay. *See id.* ¶ 38. But Defendants respectfully submit that the TEC did not violate the Court's December 27 injunction by failing to issue a decision on Ms. Iglesias's request in January 2022.

D. The TEC Acted Diligently to Comply with the December 27 Injunction.

A citation for contempt requires an additional finding that the party "failed to take steps to reasonable[ly] and diligently comply with the Order." *Prima Tek*, 525 F.3d at 542. Defendants respectfully submit that no such finding can be made on this record.

The Court's Memorandum and Order first points to the fact that the TEC did not meet to consider and act on Ms. Iglesias's request for surgery until January 24, 2022, the deadline established by the Court's December 27, 2021 injunction. Mem. & Order at 12. But so long as BOP acted within the time allowed by the Court's order itself, no additional diligence was required. And as Dr. McLearen explains, the pendency of Defendants' Expedited Motion for Partial Reconsideration of the Court's Preliminary Injunction Order (ECF No. 178), seeking relief from the injunction's requirement that the TEC's meeting be transcribed, made it impractical for the TEC to meet before January 24. *See* McLearen July 1 Decl. ¶¶ 40-42.

The Memorandum and Order also points to the fact that, instead of reporting the TEC's decision in two days (by January 26, 2022), as required under the injunction if it approved Ms. Iglesias's request, Defendants reported the TEC's decision in seven days (on January 31) as required if the TEC did not recommend Ms. Iglesias for GCS. Mem. & Order at 13. But that decision does not reflect a lack of diligence. As Defendants have previously explained, they followed the latter set

of reporting requirements out of concern that following the first set might mislead the Court, by suggesting that the TEC had made a recommendation that Ms. Iglesias be referred *immediately* for surgery, when, as explained above, it recommended that she be referred to a surgeon within one month after her March 2022 transfer to the Miami RRC. *See* Notice of Compliance at 2 (ECF No. 183); Feb. 14 Resp. to Show Cause Order at 5 (ECF No. 191)

Moreover, as Dr. McLearen explains, neither the TEC's decision to meet on January 24, nor the decision to report the TEC's recommendation on January 31, was intended to delay, or in fact delayed, BOP's arrangements for Ms. Iglesias's surgery. McLearen July 1 Decl. ¶¶ 42-45; *see also* McLearen Feb. 14 Decl. ¶ 20 (ECF No. 191-2). In fact, BOP asked its contractor to begin the process of identifying a surgeon for a potential GSC consultation for Ms. Iglesias on January 14, 2022, 10 days before the TEC's meeting and decision. McLearen July 1 Decl. ¶ 45; *see also* Declaration of William Robinson (Mar. 2, 2022) ¶ 19 (ECF No. 210-1). No lack of diligence on BOP's part can be found here.

E. Civil Contempt Sanctions Would be Improper in the Current Posture of this Case.

As discussed above, a court may impose civil contempt sanctions on a litigant either to compel compliance with a court order, or to compensate an opposing party for injuries incurred because of the failure to comply with the court's order. *See supra* at Section I.A. But principles underlying the doctrine of abatement of civil contempt teach that coercive sanctions to compel compliance with an interlocutory order, such as a preliminary injunction, are improper once the parties' dispute been resolved, as here, by settlement. Awards of compensatory financial sanctions must be based on evidence of provable losses, evidence that is lacking here, and such awards are also foreclosed under the abatement doctrine by the comprehensive settlement of a case. In any event, sovereign immunity would preclude a monetary award of compensatory contempt sanctions against an agency of the Federal Government.

1. Coercive contempt sanctions are inappropriate because the settlement and the Stipulated Order have eliminated any conceivable need to compel compliance with the December 27 injunction.

Under the “general rule” of abatement of civil contempt, a civil contempt order that is coercive in nature “is mooted when the proceeding out of which it arises terminates.” *Obr ex rel. NLRB v. Latino Exp., Inc.*, 776 F.3d 469, 479-80 (7th Cir. 2015) (citing, *inter alia*, *United States v. Slaughter*, 900 F.2d 1119, 1125-26 (7th Cir. 1990)). As the Court of Appeals explained in *Slaughter*, a coercive contempt sanction imposed for “purposes tied to the pendency of [a] proceeding” “would be invalid” if entered after the proceeding had come to a close. 900 F.2d at 1126.

This principle of abatement dates back at least to *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418 (1911), in which the Supreme Court held that a civil contempt proceeding for violation of an injunction “necessarily ended” once “the main cause of which [the civil contempt proceeding] [was] a part” was settled by the parties. *Id.* at 452. The settlement, the Court explained, made it “both unnecessary and improper to make any decree in [the] contempt proceeding[.]” *Id.* at 451. This concept “of civil contempt abatement . . . has been described by court after court[.]” *Obr*, 776 F.3d at 480, in a variety of contexts.¹¹ The sole exception to the rule is that abatement “does not occur . . . when the need or purpose for [a] coercive contempt order survives the underlying proceeding.” *Slaughter*, 900 F.2d at 1125; *see Petroleos Mexicanos*, 826 F.2d at 400-01.

Although this case will not formally be terminated until, pursuant to the parties’ Settlement Agreement, Ms. Iglesias files a Rule 41 stipulation of dismissal, *see* ECF No. 267-2, we submit that principles of abatement still apply here. The parties’ settlement agreement disposes of “all claims,

¹¹ In addition to *Gompers*, *see, e.g., Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 400 (5th Cir. 1987); *Backo v. Local 281, United Bhd. of Carpenters & Joiners of Am.*, 438 F.2d 176, 182 (2d Cir. 1970), *cert. denied* 404 U.S. 858 (1971); *DeParcq v. U.S. Dist. Ct. of S.D. Iowa*, 235 F.2d 692, 700 (8th Cir. 1956); *Harris v. Texas & Pac. Ry. Co.*, 196 F.2d 88, 90 (7th Cir. 1952). *See also Yates v. United States*, 355 U.S. 66, 72 (1957); *cf. Shillitani v. United States*, 384 U.S. 364, 372 (1966).

issues, complaint, and actions that have been or could have been asserted by [Ms. Iglesias] against Defendants” in this action, Settlement Agreement (ECF No. 267-2) at 1; *id.* ¶ 3 at 4 (releasing all claims, causes of action, or requests for relief that have been or could have been asserted). The Stipulated Order (ECF No. 269), entered in accordance with the parties’ agreement as consideration for Plaintiff’s release of her claims, Settlement Agreement ¶ 1(a), now establishes a framework under which BOP will provide gender-confirmation surgery to Ms. Iglesias, including vaginoplasty, facial feminization, and breast augmentation, whether it occurs prior to or following her release from BOP custody. *See* Stipulated Order ¶¶ 3-5, 7, 8. The settlement and Stipulated Order thus make it unnecessary, and therefore, we submit improper to impose sanctions for the purpose of compelling compliance with the December 27 injunction. *Gompers*, 221 U.S. at 451-52.

The exception to the general rule, that “abatement does not occur when the need or purpose for [a] contempt order survives the underlying proceeding[.]” *Slaughter*, 900 F.2d at 1125, does not apply in this instance. This Court issued its December 27 preliminary injunction to provide “assurance that [Ms.] Iglesias w[ould] not fall victim to any further delays” in her receipt of GCS. Dec. 27 Prelim. Inj. at 1-2; Mem. & Order at 59 (ECF No. 176). By concurrence of the parties and the Court, the Stipulated Order now meets that need by guaranteeing that Ms. Iglesias will receive GCS, at no cost to her, regardless of whether the surgery occurs prior to her release from BOP custody, or afterward. Contempt sanctions intended to compel the TEC to meet again and “evaluate” Ms. Iglesias’s request for GCS, or to compel the TEC to issue a new “decision” on her request, would serve no useful purpose under the framework of the Court’s Stipulated Order. There is no need for the TEC to perform either of those acts to ensure that Ms. Iglesias receives GCS. Because there is no longer any such need to achieve the objectives of the December 27 injunction, issuing a contempt order to compel the performance of those acts is also no longer necessary, and would be improper. *See Gompers*, 221 U.S. at 451.

2. A compensatory sanction is also unavailable because the parties have settled, there is no evidence of a need for further compensation, and such relief would be precluded by sovereign immunity.

The Court’s Memorandum and Order correctly observes that as a general matter a court may impose contempt sanctions on a party not only to coerce obedience to the court’s orders, but also to “compensate the [opposing party] for losses.” Mem. & Order at 8 (quoting *Teledyne Techs., Inc. v. Shekar*, 739 F. App’x 347, 351 (7th Cir. 2018)). Like coercive sanctions, however, compensatory contempt sanctions are unavailable under the circumstances of this case, for at least three reasons.

First, because the parties reached a settlement, Ms. Iglesias no longer has any claim for compensation, and compensatory sanctions are thus unavailable. Although termination of the underlying action generally does not moot a civil contempt proceeding that is compensatory in nature, *see Obr*, 776 F.3d at 479-80; *Petroleos Mexicanos*, 826 F.2d at 400, in situations where the case is terminated by a comprehensive settlement between the parties of all claims raised in the case, a complainant relinquishes all claims to compensation for losses they may have suffered due to an opponent’s alleged violation of a court order. *See Gompers*, 221 U.S. at 451-52; *see also Backo*, 438 F.2d at 182 & n.3. Thus, as held *Gompers*, once the parties reach a settlement of all claims, the plaintiff is not entitled to any further compensation, including monetary compensation for alleged contempts. 221 U.S. at 451-52; *see id.* at 444 (noting that the sanction sought in *Gompers* was “remedial relief” for the complainant, “measured . . . by the pecuniary injury caused by the act of disobedience”). Here, too, although the case has not yet been formally dismissed, the parties’ comprehensive settlement of all claims brought or that could have been brought in this case eliminates any potential justification there otherwise might be to issue financial sanctions as compensation for hypothetical losses flowing from a failure to comply with the December 27 preliminary injunction.

Second, compensatory financial sanctions cannot be awarded here because they are not supported by evidence of any compensable injury suffered by Ms. Iglesias a result of the alleged

violation of the Court's preliminary injunction. The Court's Memorandum and Order does not point to any evidence in the record of an injury to Ms. Iglesias that would form a basis for such sanctions (nor are Defendants aware of any). Compensatory sanctions are permissible only if supported by that kind of evidence. *See Prima Tek*, 525 F.3d at 543 (sanctions must be supported by evidence of the "provable losses sustained by the non-breaching party as a result of the violation of the order").

Third, sovereign immunity precludes an award of compensatory contempt sanctions against the Government. Principles of sovereign immunity bar awards of monetary sanctions against the Government (including attorney's fees) except insofar as a waiver of that immunity has been unequivocally expressed in statutory text. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). And that is equally so where monetary sanctions for contempt are concerned.

The "power to punish [a party] for contempts" is a manifestation of a Federal court's inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). And it is firmly established as a general matter, of course, that a court's inherent authority includes the power to assess attorneys' fees or other monetary fines against either parties or their attorneys. *Chambers*, 501 U.S. at 49–50. *Accord Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980). But because "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed *in statutory text*," *Lane v. Pena*, 518 U.S. 187, 192 (1996) (emphasis added), a court's inherent power to sanction abuses of the judicial process does not authorize the imposition of monetary sanctions against the United States or its agencies. *See United States v. Horn*, 29 F.3d 754, 764-67 (1st Cir. 1994) ("Congress, not the courts, is the government's authorized representative for purposes of waiving sovereign immunity"); *see also In re North*, 62 F.3d 1434, 1436 (D.C. Cir. 1994) ("The right to recover attorneys' fees from the United States depends on whether Congress has waived sovereign immunity."); *Resolution Trust Corp. v. Miramon*, 935 F. Supp. 838, 841 (E.D. La. 1996) ("[o]nly Congress has the power to waive a federal

agency's sovereign immunity"); *United States v. Waksberg*, 881 F. Supp. 36, 41 (D.D.C.1995) ("Sovereign immunity can only be curtailed pursuant to the exercise of legislative[,] not judicial[,] power."), *vacated on other grounds*, 112 F.3d 1225 (D.C. Cir. 1997). *Cf. Ismie Mut. Ins. Co. v. HHS*, 2007 WL 9815957, at *6 (N.D. Ill. Mar. 22, 2007) (referring to "the bedrock principle that only Congress can waive the federal government's sovereign immunity by means of an explicit pronouncement"); *Metro. Sanitary Dist. of Greater Chicago v. U.S. Dep't of Navy*, 722 F. Supp. 1565, 1568 (N.D. Ill. 1989) ("Only an Act of Congress can validly waive the sovereign immunity of the United States.").¹²

In accord with these principles, courts have held that compensatory contempt sanctions may not be awarded against the Government absent a congressional waiver of sovereign immunity. *Yancheng Baolong Biochem. Prods. Co., Ltd. v. United States*, 406 F.3d 1377, 1382-83 (Fed. Cir. 2005); *Coleman v. Espy*, 986 F.2d 1184, 1189-92 (8th Cir. 1993). In this case, too, sovereign immunity bars a compensatory sanction against BOP as an exercise of the Court's inherent contempt power.¹³

For all of the foregoing reasons, no finding of contempt against BOP for violation of the December 27 preliminary injunction is warranted, and in the current posture of this case, no sanction for contempt is available.

¹² The contempt statute, 18 U.S.C. § 401, does not provide the necessary authorization. Notwithstanding the powers the statute confers on the courts, courts have held that the contempt statute does not qualify as a waiver of sovereign immunity, because it contains no explicit, unequivocal language allowing the government to be sued. *Horn*, 29 F.3d at 763; *Waksberg*, 881 F. Supp. at 40.

¹³ The Court's Memorandum and Order cites *In re Kessler*, 100 F.3d 1015, 1017 (D.C. Cir. 1996) for the proposition that contempt orders against Executive Branch officials do not offend the separation of powers. Mem. & Order at 8. In *Kessler* the Commissioner of the Food and Drug Administration petitioned for a writ of mandamus vacating a district court order that authorized his deposition. 100 F.3d at 1015. The D.C. Circuit denied the petition, holding that ordinarily a litigant dissatisfied with a discovery order must disobey the order, stand in contempt, and appeal from the contempt order, *id.* at 1016, and that separation-of-powers principles did not require otherwise simply because the Commissioner was an official of the Executive Branch, *id.* at 1017. Nothing in *Kessler* suggests, however, that a court may impose a *monetary* sanction against an Executive Branch agency as a remedy for contempt.

II. BOP'S GOOD-FAITH EFFORTS TO OBTAIN GENDER-CONFIRMATION SURGERY FOR MS. IGLESIAS, AND TO INFORM THE COURT OF ITS PROGRESS, DO NOT MERIT THE IMPOSITION OF SANCTIONS.

The Court's Memorandum and Order next directs BOP to show cause why it should not be sanctioned under the Court's inherent power, or Rule 11(c), based on (i) representations that BOP's contractor had identified what it considered to be an "appropriate surgeon" (Surgeon One) to perform gender-confirming surgery for Ms. Iglesias, notwithstanding that BOP had not conducted a "formal analysis" of Surgeon One's qualifications, Mem. & Order at 23-24; (ii) statements in a number of Defendants' weekly status reports that Ms. Iglesias had been referred to Surgeon One for GCS, even though Defendants were aware that Surgeon One does not personally perform vaginoplasties, *id.* at 24-28; and (iii) BOP's decision to keep Ms. Iglesias's April 7 appointment for a consult with Surgeon One even after learning that Surgeon One refers patients out for vaginoplasty, *id.* at 28-29.

Since the TEC's decision approving Ms. Iglesias's request for surgery and recommending that she be referred for a GCS consult, BOP has worked to secure the services of a surgeon who could either perform the medically necessary and appropriate procedures that Ms. Iglesias desires, or, as needed, refer her directly to other qualified surgeons capable of performing them. McLearen July 1 Decl. ¶¶ 13, 62. Defendants have endeavored in their weekly status reports to inform the Court of their progress, and at times, lack of progress, in achieving that goal. Epplin June 29 Decl. ¶¶ 10, 11. Defendants regret that their earlier efforts to arrange gender-affirming surgery for Ms. Iglesias, including a vaginoplasty, and to keep the Court apprised of their efforts, have given the Court reason to question the sincerity of BOP's efforts, and the candor of its representations to the Court. McLearen July 1 Decl. ¶¶ 9, 38, 48, 85.

As discussed below, however, at no time did BOP act in bad faith, or with a design to obstruct these proceedings, but in the good-faith, reasonable belief that its actions, including pursuit

of the referral to Surgeon One, were calculated to achieve the common objective of GCS surgery for Ms. Iglesias, including a vaginoplasty. BOP's representations that its medical-services contractor considered Surgeon One an appropriate choice to whom Ms. Iglesias could be referred, and that she was scheduled to meet with Surgeon One on April 7 for a "GCS consult," were also made in good faith and factually warranted based on the information available to BOP at the time. Defendants respectfully submit, therefore, that sanctions are not justified under either the Court's inherent power or Rule 11.

A. Legal Standards Applicable to Inherent-Power and Rule 11 Sanctions

"A district court has inherent power to sanction a party who has willfully abused the judicial process or otherwise conducted litigation in bad faith," *Secrease v. W. & S. Life Ins. Co.*, 800 F.3d 397, 401 (7th Cir. 2015) (citation omitted). "Because of their very potency," however, a court's inherent powers "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44; *see also United States v. Johnson*, 327 F.3d 554, 562 (7th Cir. 2003); *Black v. Brown*, 2019 WL 3325840, at *1 (S.D. Ill. Mar. 25, 2019). Chief among these restraints is the requirement that the subject of the sanction acted with "willful disobedience or bad faith." *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003) (holding that "[t]he district judge's finding of no willfulness . . . preclude[d] any sanction . . . under the inherent powers of the court"), *overruled on other grounds by Ramirez v. T & H Lemont, Inc.*, 845 F.3d 772 (7th Cir. 2016); *see also Fuary v. City of Chicago*, 900 F.3d 450, 463 (7th Cir. 2018) (to impose sanctions under its inherent authority a court "must first make a finding of bad faith, designed to obstruct the judicial process, or a violation of a court order") (citation omitted); *Schmude v. Sheahan*, 420 F.3d 645, 649–50 (7th Cir. 2005); *Johnson*, 327 F.3d at 562–63; *Morisch v. United States*, 2009 WL 6506656, at *1 (S.D. Ill. June 16, 2009) (inherent-power sanctions "should not be imposed unless there is willful disobedience, bad faith, or fraud"). A court has "no authority" under its inherent powers to issue sanctions for "mere negligence," *Maynard*, 332 F.3d at 471, or "clumsy lawyering[.]"

Furery, 900 F.3d at 464. *Cf. Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 449 (7th Cir. 1993) (“Although MCS’ factual error was admittedly a serious one, and one with which the district court was understandably perturbed, the error was inadvertent and therefore not sanctionable.”).

Rule 11(b) provides that by presenting a pleading, written motion, or other paper to the court, an attorney certifies to the best of their knowledge, information, and belief, based on reasonable inquiry, (i) that “it is not being presented for any improper purpose,” including, *inter alia*, “unnecessary delay,” and (ii) that “the claims, defenses, and other legal contentions” therein, as well as the “the factual contentions” and “denials of factual contentions” are warranted. Fed. R. Civ. P. 11(b)(1)-(4). “[A]fter notice and a reasonable opportunity to respond . . . the court may impose an appropriate sanction on any attorney . . . or party” for a violation of Rule 11(b). *Id.* § 11(c)(1); *see Bentz v. Maue*, 2020 WL 1938883, at *1 (S.D. Ill. Apr. 22, 2020) (“A court may impose [Rule 11] sanctions on a party for making arguments or filing claims that are frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose.” (quoting *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998)); *Yonaka v. UPS, Inc.*, 2006 WL 8455949, at *1 (S.D. Ill. Dec. 20, 2006).

“Rule 11 sanctions ‘are to be imposed sparingly,’” however. *Peoples Nat’l Bank, N.A. v. Am. Coal Co.*, 2012 WL 1606014, at *3 (S.D. Ill. May 8, 2012) (quoting *Hartmax Corp. v. Abboud*, 326 F.3d 862, 867 (7th Cir. 2003)). The “mere absence of legal precedent . . . or the failure to prevail on the merits of a particular legal contention . . . cannot justify a finding of frivolousness,” which “connote[s] that the legal contention . . . is utterly implausible and lacks any arguable basis[.]” *Ogden v. Dyco*, 2010 WL 11685292, at *2 (S.D. Ill. Mar. 22, 2010) (citation omitted); *see also Nemskey v. Int’l Union of Operating Eng’rs, Loc. 399*, 2008 WL 4853626, at *10 (S.D. Ill. Nov. 4, 2008), *aff’d* 574 F.3d 859 (7th Cir. 2009). Likewise, “factual statements” that are “subject to interpretation that could render them accurate or [as] presenting a genuine issue of fact” do not warrant sanctions under Rule 11(c). *White v. Dep’t of Justice*, 2018 WL 488719, at *7 (S.D. Ill. Jan. 19, 2018).

For the reasons discussed below, sanctions against BOP under the Court’s inherent power, or Rule 11, are unwarranted.

B. BOP Reasonably and Truthfully Informed the Court That Its Contractor Reported Locating an “Appropriate Surgeon.”

The Court first directs BOP to show cause why it should not be sanctioned for “report[ing]” in its February 14 response to the Court’s February 10 show-cause order (ECF No. 191), and in Dr. McLearen’s supporting declaration (ECF No. 191-2) “that an appropriate surgeon [for Ms. Iglesias] was located[.]” even though at that time Dr. McLearen had “neither performed a formal analysis of [Surgeon One’s] qualifications nor knew how many past gender-affirming bottom surgeries [Surgeon One] [had] performed[.]” Mem. & Order at 23-24. As discussed below, BOP respectfully submits that the representation made about Surgeon One in its February 14 response, and in Dr. McLearen’s declaration, was warranted and made in good faith—to inform the Court, not to mislead it—and does not merit sanctions.

BOP’s February 14 response and Dr. McLearen’s declaration reported only that BOP “ha[d] been informed” by its medical-services contractor “that the contractor ha[d] located an appropriate surgeon.” McLearen Feb. 14 Decl. ¶ 20 (ECF No. 191-2); ECF No. 191 at 3, 28. BOP did not state that Dr. McLearen or anyone else at the agency had made an independent determination that Surgeon One was in fact an appropriate choice to perform GCS, or any particular GCS procedure, for Ms. Iglesias. As of February 14, neither Dr. McLearen nor BOP had conducted a formal analysis of Surgeon One’s qualifications to provide medically necessary and appropriate treatment that Ms. Iglesias required. McLearen July 1 Decl. ¶¶ 49, 51. No such formal analysis would or could occur until Ms. Iglesias consulted with Surgeon One; Surgeon One agreed to accept Ms. Iglesias as a patient; Surgeon One and Ms. Iglesias together worked out an overall treatment plan; and BOP’s contractor submitted a formal service proposal for examination by BOP subject-matter experts. *Id.* ¶¶ 51-52. Because none of these steps had occurred by February 14, neither Dr. McLearen nor

BOP was in a position to say that they had concluded Surgeon One was an “appropriate” choice to treat Ms. Iglesias. Instead, to apprise the Court of BOP’s progress, they informed the Court of what they knew at the time—that the contractor had identified a surgeon that the contractor believed could meet the request for medical services that that BOP had communicated to it. *Id.* ¶ 52.

In hindsight, BOP recognizes that in its eagerness to make the Court aware of its progress, *see id.* ¶¶ 62, 87, it may not have made it sufficiently clear that the contractor’s identification of what it believed to be a suitable surgeon for Ms. Iglesias was just the beginning, not the culmination, of the process of identifying a surgeon (or surgeons) to provide Ms. Iglesias with the medical treatment she requires. It was nevertheless reasonable, we respectfully submit, to inform the Court of what the contractor had reported.

First, BOP’s medical-services contractor has been the agency’s exclusive contractor for the acquisition of health-care services at all BOP halfway houses nationwide for the past six years, and for contract medical services (when needed) at BOP secure facilities for 22 years. It has developed a reputation within BOP of reliability and competence in meeting the diverse health-care requirements of BOP’s inmate population. BOP had no reason to believe that the contractor would jeopardize its relationship with BOP and its reputation in the marketplace, or compromise its professional standards, by advising BOP that it had identified a surgeon who could meet a patient’s health-care needs without a basis for saying so. McLearn July 1 Decl. ¶ 55; *see also* Kolsky June 29 Decl. ¶ 12; Robinson June 29 Decl. ¶ 5; Schwei June 30 Decl. ¶ 26.c.

Second, the contractor pointed out that, in contrast to an individual practitioner, Surgeon One is affiliated with a large and highly regarded medical institution, suggesting that even if there were certain GCS procedures that Surgeon One did not personally perform, Surgeon One could still provide access to a whole network of providers and an array of medical resources to provide Ms.

Iglesias the full range of treatment she required. McLearen July 1 Decl. ¶ 56; *see also* Robinson June 29 Decl. ¶¶ 5, 8; Schwei June 30 Decl. ¶¶ 6, 25.

Third, when the contractor identified Surgeon One to BOP, Dr. McLearen reviewed Surgeon One's professional and educational background as posted on the website of the medical institution with which Surgeon One is associated. McLearen July 1 Decl. ¶ 57. Among other things, the website states: (i) that Surgeon One's [REDACTED]

[REDACTED];

(ii) that [REDACTED]

[REDACTED]; (iii) that [REDACTED]

[REDACTED]; (iv) that [REDACTED]

[REDACTED]; and (v) that [REDACTED]

[REDACTED]. *See id.* ¶¶ 57, 81. This description of

Surgeon One's qualifications [REDACTED]

[REDACTED], posted on the website of the reputable medical institution where Surgeon One practices,

gave further confidence in what the contractor had reported about Surgeon One. *Id.* ¶ 80; *see also*

Kolsky June 29 Decl. ¶¶ 3, 5; Robinson June 29 Decl. ¶ 6; Schwei June 30 Decl. ¶ 26.d.

Fourth, perhaps foremost in BOP's consideration was the imperative of arranging a consultation for Ms. Iglesias with a qualified GCS surgeon as the essential first step in deciding on any course of treatment for her. Although Ms. Iglesias had clearly expressed her desire for certain GCS procedures, including vaginoplasty, it was necessary for her informed decisionmaking to consult with a GCS expert who could evaluate her individual needs and desires, explain the range of treatment options available to her, and review the pros and cons of each. Once such a consultation occurred and the surgeon and Ms. Iglesias together decided on an appropriate course of treatment, BOP could then arrange and pay for the medically necessary and appropriate procedures involved.

McLearen July 1 Decl. ¶ 58. Based on what BOP had been told about Surgeon One’s qualifications by a trusted source—its contractor—and had learned from Surgeon One’s webpage, Surgeon One appeared at the very least to be an appropriate choice with whom to begin this consultation process. Even if Surgeon One did not perform vaginoplasties, given the surgeon’s affiliation with a large, extremely well-resourced medical institution, and BOP’s prior experience with inmates who required treatment by inter-disciplinary teams of doctors, *see supra* at 16, BOP reasonably expected that Surgeon One could nevertheless enlist the aid—that is, refer Ms. Iglesias to— a GCS specialist who could perform that procedure for her. McLearen July 1 Decl. ¶¶ 56, 60; *see also* Kolsky June 29 Decl. ¶ 11; Robinson June 29 Decl. ¶¶ 5, 8; Schwei June 30 Decl. ¶¶ 6, 25.

As explained above, it has come to light in Defendants’ preparation of this response, that between February 11 and 14, 2022, BOP received conflicting messages from its contractor about the procedures Surgeon One does and does not perform. On February 11 BOP received an e-mail from the contractor stating that Surgeon One performs two to three “bottom” surgeries each month, and on February 14 an e-mail forwarded by the contractor from Surgeon One stating, “We do not offer vaginoplasty yet.” McLearen July 1 Decl. ¶ 53. BOP did not clearly communicate that information to DOJ counsel, however, out of concern on Dr. McLearen’s part that releasing too much information about Surgeon One at that early stage of the contractor’s outreach could result in accusations of sole-sourcing a contract in violation of federal procurement laws. *Id.* ¶ 83. The discovery of these facts raises two issues, which we address in turn.

First, notwithstanding the conflicting information BOP had received about Surgeon One’s capabilities, it was still reasonable of BOP to inform the Court that its contractor had reported finding an appropriate surgeon for Ms. Iglesias. As already discussed, the contractor had an approximately 22-year track record of reliability when it came to locating appropriate providers to meet the health-care requirements of persons in BOP custody. McLearen July 1 Decl. ¶ 55.

Surgeon One's webpage, indicating that Surgeon One's [REDACTED]

[REDACTED]

supported a belief that Surgeon One could perform at least a number of GCS procedures that would be beneficial to Ms. Iglesias and of interest to her. *Id.* ¶ 57. Surgeon One's institutional affiliation, as reported by the contractor, and confirmed by the webpage, gave rise to a reasonable expectation that Surgeon One could assist Ms. Iglesias in arranging for other surgeons, perhaps colleagues at Surgeon One's place of work, to perform any medically necessary and appropriate GCS procedures for Ms. Iglesias that Surgeon One could not. *Id.* ¶ 56. And, importantly, BOP only meant to report to the Court the progress it had made to date in locating a suitable surgeon for Ms. Iglesias, not to suggest that the search had reached its end. *See id.* ¶ 62.

Even if, in hindsight, BOP could have more effectively communicated that latter point, BOP's representation that its contractor had reported locating an appropriate surgeon for Ms. Iglesias was factually warranted, and it was made without purpose to mislead the Court about the procedures Surgeon One performs, or the type of care that BOP intends Ms. Iglesias to receive. *Id.* And in the end, although it is now known that Surgeon One does not perform vaginoplasties, the contractor's identification of Surgeon One nevertheless represented genuine progress in obtaining care for Ms. Iglesias, as Surgeon One has agreed to perform (and scheduled) procedures—breast augmentation, and facial feminization—that Ms. Iglesias desires, that will be beneficial for her gender dysphoria, and that she is entitled to under the Court's Stipulated Order. Even if the Court were to conclude that BOP should have handled this matter differently, Defendants respectfully submit that BOP's representations about the appropriateness of Surgeon One provide no basis for imposing sanctions.

Second, although the failure in mid-February to clearly inform DOJ counsel about specific information indicating that Surgeon One does not perform vaginoplasty was ill-conceived and

regrettable, it is not sanctionable. Dr. McLearen explains that her concern about releasing too many details regarding Surgeon One was based on her own limited understanding of federal procurement laws, *id.* ¶¶ 83-84 (about which she has previously testified, *see* Feb. 22 Tr. 29:10-12, 94:1-2, 94:11-12), and a recent episode in another inmate's case. In that case, correspondence sent to the inmate's counsel about a potential GCS surgeon to treat the inmate raised alarm in BOP about an appearance of illegally sole-sourcing a contract, with potentially severe legal consequences. McLearen July 1 Decl. ¶ 83. That episode, combined with Dr. McLearen's limited grasp of federal procurement requirements, made her extremely anxious about statements or actions that could raise procurement-law issues in this case. *Id.* ¶ 84.

Therefore, she attempted to convey the uncertainty about Surgeon One's capabilities in a way that she believed was less likely to result in a violation, or perceived violation, of procurement requirements. *Id.* To that end, during a discussion with DOJ counsel in preparation for the February 22 show-cause hearing, she recalls informing them that BOP had received conflicting communications from the contractor that had created uncertainty about the bottom surgeries that Surgeon One performs personally, and those that Surgeon One refers out. *Id.* For their part, the DOJ trial attorneys on the case at that time have some recollection of being told about a degree of uncertainty concerning Surgeon One's capabilities, Robinson June 29 Decl. ¶ 10; Schwei June 30 Decl. ¶ 24, but not of BOP receiving specific information at that time indicating that Surgeon One does not, in fact, perform vaginoplasties, Kolsky June 29 Decl. ¶ 5; Robinson June 29 Decl. ¶¶ 12-13; Schwei June 30 Decl. ¶ 22.

At the time, Dr. McLearen genuinely did not appreciate the importance this information might hold for the Court, Ms. Iglesias, or DOJ counsel, because at the time (for the reasons discussed above) she did not consider uncertainty about the procedures that Surgeon One would perform or refer out to be a reason, at least at that early stage, not to consider Surgeon One for Ms.

Iglesias. *Id.* In her mind, the critical first step in securing GCS for Ms. Iglesias remained arranging a one-on-one consultation with a GCS expert, during which Ms. Iglesias and the surgeon could make mutually informed decisions about a medically appropriate treatment plan. *Id.* From Dr. McLearn's perspective, the conflicting communications that BOP had received about Surgeon One only heightened the need for a consult. Because communications with Surgeon One had to be routed back and forth through BOP's contractor, attempts to obtain detailed information about Surgeon One had turned into a frustrating game of telephone, in which BOP often received bits and pieces of information that it could not readily verify or follow up on. *Id.* ¶ 61. BOP concluded that the only way to ensure a complete exchange of information allowing Surgeon One to make judgments about what surgical services were appropriate for Ms. Iglesias, and Ms. Iglesias to make informed decisions about which of the available procedures she wished to undergo, was for the two of them to meet face-to-face and develop, if practicable, a mutually agreed-upon and appropriate plan of treatment that Surgeon One alone, or in collaboration with other GCS specialists, could execute. *Id.*

Dr. McLearn now recognizes that she should have more clearly conveyed the information BOP had received in mid-February about Surgeon One's capabilities to DOJ counsel. *Id.* ¶ 85. She understands the Court's concerns, and wishes to assure the Court that she did not act with any intention to mislead the Court about Surgeon One's capabilities, or BOP's intentions to obtain all the medically necessary and appropriate care for Ms. Iglesias that she requires, including a vaginoplasty. *Id.* (Indeed, just over two weeks later, when BOP received confirmation from its contractor on March 3 that Surgeon One refers patients out for vaginoplasties, BOP immediately disclosed that information.) She regrets any actions that have led the Court to question otherwise. *Id.* ¶ 86. But because she acted without any intention to mislead the Court, to deprive it of information that she recognized as being material, or otherwise to obstruct the judicial process, the

elements of willfulness and bad faith are absent here, and her actions, though ill-considered, do not rise to the level of sanctionable misconduct. *Maynard*, 332 F.3d at 470 (absence of willfulness precludes inherent power sanctions); *Fuery*, 900 F.3d at 463 (inherent power sanctions require finding of bad faith).

C. It Was Not Sanctionable of BOP to Describe the Intended Purpose of the April 7 Appointment With Surgeon One as a GCS Consult, or Keep the Appointment.

The Court next orders BOP to show cause why it should not be sanctioned on two additional grounds. First, the Court directs BOP to explain why it did not “clearly represent[]” in its status reports before April 8, 2022, that Surgeon One does not personally perform vaginoplasties, even though BOP’s contractor confirmed on March 3, 2022, that Surgeon One refers patients out for vaginoplasty, and even though BOP continued to represent in its status reports filed from March 4 through April 1 that it had scheduled Ms. Iglesias to consult with Surgeon One about gender-confirmation surgery. Mem. & Order at 25-28. Second, the Court directs BOP to explain why it continued to pursue the April 7 consultation with Surgeon One when it knew by March 3 that Surgeon One does not perform vaginoplasties. *Id.* at 28-29. For the reasons set forth below BOP respectfully submits that it did not engage in sanctionable misconduct.

First, and again, respectfully, BOP did not wait until April 8 to report that Surgeon One refers patients out for vaginoplasty. BOP’s contractor confirmed that fact for the first time on March 3, 2022, McLearen July 1 Decl. ¶ 64; Epplin June 29 Decl. ¶ 8, and BOP reported “that Surgeon 1 refers patients to other providers for vaginoplasty” the next day, in paragraph 6 of the March 4, 2022, Declaration of Jenna Epplin (ECF No. 212-1), filed as an exhibit to Defendants’ March 4 status report (ECF No. 212). McLearen July 1 Decl. ¶ 64; Epplin June 29 Decl. ¶¶ 8, 9. No effort was made to conceal this information. *See also* Robinson June 29 Decl. ¶ 12; Kolsky June 29 Decl. ¶ 4; Schwei June 30 Decl. ¶¶ 31-32. Nor did the information escape the notice of Ms. Iglesias’s counsel. Plaintiff’s counsel specifically inquired about Ms. Epplin’s representation that

“Surgeon 1 refers patients out to other providers for vaginoplasty” in their March 9 response to Defendants’ March 4 status report, Pl.’s Resp. to Defs.’ March 4, 2022, Status Report (ECF No. 219) at 4.

BOP did not again state in its declarations until April 8, 2022, that Surgeon One refers patients out for vaginoplasty, and so nothing further was said about it in Defendants’ status reports, because there was no new information to report on that subject until after the April 7 consult. Epplin June 29 Decl. ¶ 10; Robinson June 29 Decl. ¶ 22; Kolsky June 29 Decl. ¶ 11. We respectfully submit that the failure to repeat a fact of which Ms. Iglesias’s counsel had already received actual notice does not constitute a material omission or misrepresentation of fact for which a party may be sanctioned, whether under a Court’s inherent power, or Rule 11.

We also submit that it was not sanctionable of BOP to pursue the April 7 consult with Surgeon One, or to continue to describe the forthcoming appointment as a consultation about gender-confirmation surgery, even though it had been confirmed on March 3 that Surgeon One refers out for vaginoplasty. For several reasons BOP reasonably believed at the time that Ms. Iglesias had an appointment with Surgeon One on April 7 to consult about GCS. McLearn July 1 Decl. ¶ 68.

First, as discussed above, when the contractor informed BOP that it had identified a well-credentialed GCS surgeon affiliated with a large, well-resourced and highly respected medical institution, BOP believed that Surgeon One could provide Ms. Iglesias direct access to a team of providers who also practice there, ensuring that Ms. Iglesias received the entire range of gender-confirming surgeries she requires, including vaginoplasty, whether performed by Surgeon One, or other GCS specialists with whom she is affiliated. *Id.* ¶ 65. As discussed, prior to the appointment, BOP’s contractor had confirmed that Surgeon One could refer out for vaginoplasty. It was thus reasonable to presume that a consultation with Surgeon One could encompass vaginoplasty.

Second, the term gender-confirmation surgery encompasses a wide variety of procedures in addition to vaginoplasty. The American Society of Plastic Surgeons (“ASPS”) defines gender-confirmation surgery to include several categories of transfeminine and transmasculine top, bottom, and facial surgeries. ASPS, Gender Affirmation Surgeries, <https://www.plasticsurgery.org/reconstructive-procedures/gender-affirmation-surgeries> (last visited June 30, 2022). Consistent with the views of the ASPS, the WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7 at 57 (2012) (“WPATH Standards of Care”), observes that an entire range of surgical procedures is available for male-to-female patients with gender dysphoria, including “[g]enital surgery: penectomy, orchiectomy, vaginoplasty, clitoroplasty, vulvoplasty[.]” but also “[b]reast/chest surgery: augmentation mammoplasty (implants/lipofilling),” and “non-genital, non-breast surgical interventions[.]” such as “facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid-cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures.” Based on that understanding, BOP believed, as discussed above, that the April 7 consult would provide Ms. Iglesias with an opportunity to meet with a GCS specialist to discuss the entire array of GCS procedures potentially available to her, including vaginoplasty; and then make informed decisions about the medically appropriate procedures she desires, regardless of whether Surgeon One would perform them personally, or refer them out to other providers. McLearn July 1 Decl. ¶ 67.

Third, BOP did not pursue the April 7 appointment with Surgeon One to the exclusion of other efforts to obtain a vaginoplasty for Ms. Iglesias. Notwithstanding the scheduled April 7 consult, BOP continued its already ongoing search for other surgeons in Miami, and the surrounding region, who might treat Ms. Iglesias. *Id.* ¶ 73. It also considered the option of reaching out to the Chicago-based surgeon, Surgeon Two, recommended by Ms. Iglesias’s counsel. *Id.* ¶ 74. Keeping the April 7 appointment did not interfere with these efforts. *Id.* ¶ 76. And even if BOP

had not anticipated that the April 7 appointment would include consultation about vaginoplasty, so long as BOP continued to search for other surgeons who might perform a vaginoplasty for Ms. Iglesias, it still would have made sense in the meantime to work with Surgeon One to arrange for other GCS procedures, such as breast augmentation and facial feminization, that Ms. Iglesias desired and could benefit from. *Id.* On the other hand, canceling the April 7 consult could only have set back efforts to provide Ms. Iglesias with the full range of GCS procedures she requires. *Id.* Notably, although Ms. Iglesias's counsel had inquired specifically about the reference to Surgeon One referring out for vaginoplasty, her counsel did not request that the appointment with Surgeon One be canceled.

We recognize that the Court's December 27 preliminary-injunction opinion explains that by "GCS" the Court meant "gender reassignment surgery or surgeries altering one's reproductive organs." *See* Mem. & Order at 25 (quoting ECF No. 176 at 1 n.1). And while the clinical definition of GCS as understood by professional organizations such as WPATH and ASPS is not limited to surgery involving the genital organs, the Court naturally expected that Ms. Iglesias would be referred for a vaginoplasty consult, as she had requested. At no time, however, did BOP contemplate that Ms. Iglesias would not be referred for vaginoplasty, or would not receive vaginoplasty if it was medically indicated. McLearen July 1 Decl. ¶ 69. That is why, when Surgeon One did not directly arrange for Ms. Iglesias to consult with a vaginoplastic surgeon (contrary to BOP's expectations), BOP then continued to search for an available surgeon for Ms. Iglesias, by contacting (or re-contacting) surgeons on the list Surgeon One provided, expanding its contractor's search from Miami to the surrounding Florida area, and ultimately arranging for Ms. Iglesias to consult with the Chicago-based surgeon identified by her attorneys. *Id.*

BOP was surprised and disappointed to hear that Surgeon One did not consult with Ms. Iglesias about vaginoplasty on April 7, and did not offer to contact other surgeons to arrange a

vaginoplasty for her. *Id.* ¶ 68. We appreciate that Ms. Iglesias must have been disappointed as well. *Id.* Nevertheless, prior to the April 7 consult BOP believed, for the reasons explained above, that Ms. Iglesias’s appointment with Surgeon One was appropriately considered a GCS consult. *Id.* And because Ms. Iglesias in fact consulted with Surgeon One about procedures—facial feminization and breast augmentation—that Ms. Iglesias desires as part of her gender transformation, that will be beneficial for treating her gender dysphoria, and that Surgeon One is now preparing to perform, BOP still believes it is accurate to refer to that appointment as a GCS consult. *Id.* Under these circumstances, we respectfully submit that it was neither intentionally misleading nor factually unwarranted of BOP to represent that Ms. Iglesias was scheduled to consult with Surgeon One about gender-confirmation surgery, nor was it an abuse of the judicial process to keep the April 7 appointment. Sanctions, therefore, are not justified.

III. THE REPRESENTATIONS OF DOJ COUNSEL WERE TRUTHFUL, MADE IN GOOD FAITH, AND ARE NOT SANCTIONABLE.

Lastly, the Court’s Memorandum and Order instructs six Department of Justice attorneys representing BOP in this matter to show cause why they should not be sanctioned under the Court’s inherent power, or Rule 11, for representations made in Defendants’ status reports (and one sealed supplement) filed between February 25 and April 1, 2022 (ECF Nos. 204, 212, 220, 221, 227, 229, and 231). Mem. & Order at 29-31. Specifically, the Court directs the named DOJ Attorneys to explain why Defendants’ status reports continued to state that Ms. Iglesias would consult with Surgeon One on April 7 about gender-confirmation surgery, when it was known by March 3 that Surgeon One refers out for vaginoplasty. *Id.* at 30.

The DOJ attorneys working on this matter since the Court issued its December 27 preliminary injunction have sought to do all they could in their role as counsel to ensure that prompt arrangements are made for Ms. Iglesias’s surgery, including most recently engagement with her counsel to reach a mutually agreeable settlement that charts a new course for ensuring that she either

receives the care she requires while still in BOP custody, or receives it afterward at no cost to her. Boynton June 30 Decl. ¶¶ 6, 10; Kolsky June 29 Decl. ¶ 13; Robinson June 29 Decl. ¶ 25; Schwei June 30 Decl. ¶¶ 56, 57. They have not sought to hide information or to mislead the Court, or Ms. Iglesias, about BOP's efforts to locate a qualified surgeon, or surgeons, to perform the medically necessary gender-confirmation surgeries, including vaginoplasty, that Ms. Iglesias desires. They regret that their statements and actions on Defendants' behalf have raised doubt in the Court's mind about the Government's candor in this matter, and BOP's intentions to provide Ms. Iglesias with the care she requires—notwithstanding their best efforts to represent Defendants in accordance with the high standards of ethics and professionalism to which all Government attorneys are called. Boynton June 30 Decl. ¶ 8; Kolsky June 29 Decl. ¶ 13; Robinson June 29 Decl. ¶ 26; Schwei June 30 Decl. ¶¶ 4, 56.

For the reasons explained below, however, the DOJ attorneys involved to one degree or another with the preparation and submission of the status reports cited in the Court's Memorandum and Order all reasonably believed, like BOP, that Ms. Iglesias's April 7 appointment with Surgeon One was meant to be a consultation about gender-confirmation surgery, including vaginoplasty. Their representations to that effect in Defendants' status reports were factually warranted, and were made in good faith without purpose to obstruct these proceedings or delay Ms. Iglesias's receipt of care. Sanctions are therefore unwarranted.

As a threshold matter, we observe that not all six of the DOJ attorneys named in the Court's Memorandum and Order stand in the same shoes insofar as Defendants' status reports are concerned. Mr. Feldon and Mr. Gardner had no involvement in the preparation or submission of those reports, and little to no involvement in the efforts described therein to arrange for Ms. Iglesias's surgery. Declaration of Gary Feldon (June 29, 2022) ¶ 4 (filed herewith); Declaration of Joshua E. Gardner (June 30, 2022) ¶ 3 (filed herewith). During the relevant period, specifically,

from February 25 to May 23, 2022, Mr. Feldon was out of the office on parental leave and did not participate in the handling of this case. Feldon June 29 Decl. ¶ 4. Similarly, since October 27, 2021, Mr. Gardner has been on detail from the Federal Programs Branch (the office responsible for the Government's defense of this case) to the Department of Justice Office of Legislative Affairs. Gardner June 30 Decl. ¶ 3.¹⁴ Thus, in addition to the fact that the statements made in Defendants' status reports are not themselves sanctionable, neither Mr. Feldon nor Mr. Gardner is subject to sanction under the Court's inherent power, Rule 11, or otherwise, because neither was responsible for the contents or submission of those reports.

Similarly, Mr. Schwei, who was assigned to this case to handle issues related to the Court's February 10 Order to Show Cause, Schwei June 30 Decl. ¶ 13, did not sign or file any of the status reports cited in the Court's Memorandum and Order, nor does his name appear in the signature blocks, *id.* ¶¶ 14, 17, although he remained generally aware of what was occurring in the case during the relevant period and reviewed all (or nearly all) of Defendants' filings during that period, *id.* ¶¶ 37-38. In addition to the fact that the representations made in Defendants' status reports were factually warranted and not made for any improper purpose, Mr. Schwei is not subject to sanction under Rule 11 because he did not "present[,] . . . whether by signing, filing, submitting, or later advocating," any of the reports in question. Fed. R. Civ. P. 11(b).

We also observe, as a threshold matter, that Mr. Boynton, the Principal Deputy Attorney General for the Civil Division, did not personally become aware of the fact that Surgeon One does not perform vaginoplasty until April 8, 2022. On the morning of April 8 he received an e-mail from the DOJ litigation team passing along information about a conversation with Ms. Iglesias's counsel,

¹⁴ Although neither Mr. Feldon nor Mr. Gardner formally withdrew from representation of Defendants when their absences began, that was in accord with Federal Programs Branch policy, which anticipates that attorneys on extended leaves or details will resume working on the cases to which they were previously assigned upon their return. Haas June 30 Decl. ¶ 14.

in which they expressed their disappointment that her April 7 consultation with Surgeon One did not include a discussion of that procedure. Boynton June 30 Decl. ¶ 9. Accordingly, in addition to all the other reasons why the statements made in Defendants' status reports about the April 7 consult are not sanctionable, Mr. Boynton cannot be sanctioned on the ground that he approved the submission of those reports with knowledge that Surgeon One refers out for vaginoplasty, for in fact he lacked such knowledge at the time.

Regardless, however, of the degree to which particular individuals among the six DOJ attorneys named in the Court's Memorandum and Order were involved in the preparation and submission of Defendants' status reports, the representation that Ms. Iglesias was scheduled to meet with Surgeon One for a GCS consult was made on the basis of a reasonable, good-faith belief that the consultation would include a discussion of vaginoplasty, among other procedures, notwithstanding the confirmation received on March 3 that Surgeon One refers patients to other providers for that procedure. Counsel's belief was based on a number of facts and reasonable expectations flowing therefrom.

Like BOP, the DOJ trial attorneys working on this matter first learned for a fact that Surgeon One does not perform vaginoplasties, but refers patients out for that procedure, on or about March 3, 2022, after BOP forwarded a draft of Ms. Epplin's March 3, 2022 declaration. Kolsky June 29 Decl. ¶ 4; Robinson June 29 Decl. ¶¶ 12-13; Schwei June 30 Decl. ¶¶ 31-32. During the week of February 14-18, 2022, BOP and the DOJ trial attorneys were in frequent communication to prepare for the February 22 show-cause hearing (the focus of which was the TEC's compliance with the Court's December 27 injunction, rather than BOP's search for a surgeon). *See* Schwei June 30 Decl. ¶ 22. The attorneys vaguely recall BOP at some point bringing up Surgeon One's qualifications, at a high level of generality, *see* Kolsky June 29 Decl. ¶ 5, and mentioning that BOP still needed to resolve some uncertainty concerning the procedures that

Surgeon One performs, *see* Robinson June 29 Decl. ¶ 10; Schwei June 30 Decl. ¶ 24, as well as a written comment from agency counsel along the same lines, Robinson June 29 Decl. ¶ 10; *see* Kolsky June 29 Decl. ¶ 6. Only recently were the attorneys made aware of the February 14 e-mail, forwarded from the contractor to BOP, in which Surgeon One states “We do not offer vaginoplasty yet.” None of them recalls receiving information in mid-February, in any form, specifically indicating that Surgeon One does not perform vaginoplasty. Kolsky June 29 Decl. ¶ 7; Robinson June 29 Decl. ¶ 13; Schwei June 30 Decl. ¶¶ 8, 52.

Nevertheless, even upon learning on March 3 that Surgeon One refers patients out for vaginoplasty, the trial attorneys continued to represent that Ms. Iglesias was scheduled on April 7 to consult with Surgeon One about gender-confirmation surgery because, like BOP, *see supra* at 45, they reasonably believed that statement, in good faith, to be true. Their belief, like BOP’s, was based on a variety of facts and information available to them. First, even knowing that Surgeon One referred patients out for vaginoplasties, the DOJ trial attorneys reasonably anticipated that to mean that Surgeon One would nevertheless discuss the procedure with Ms. Iglesias and let her ask questions about it, and thereafter refer her directly to another provider, perhaps a colleague at the institution where Surgeon One practices, who could perform the procedure for her. Robinson June 29 Decl. ¶ 14; Schwei June 30 Decl. ¶¶ 33, 34. Based in part on Surgeon One’s institutional affiliation, their own personal experience, and other factors, they anticipated this to be a seamless process akin to arrangements made by a primary care physician to have a patient seen by a specialist. Kolsky June 29 Decl. ¶ 11; Robinson June 29 Decl. ¶ 14; Schwei June 30 Decl. ¶¶ 32-33.

Second, they did not understand the term gender-confirmation surgery in the same sense as the Court defined it for purposes of its December 27 preliminary injunction opinion, *see* Mem. & Order at 1 n.1, that is, to mean just a single surgical procedure, or to be limited to surgery involving the genital organs. Kolsky June 29 Decl. ¶ 10; Robinson June 29 Decl. ¶ 21. Rather, they

understood it, with reference to the WPATH Standards of Care, as a menu of top, bottom, and facial surgeries available to treat gender dysphoria and/or to acquire physical characteristics matching an individual's gender identity. Kolsky June 29 Decl. ¶ 10; Robinson June 29 Decl. ¶ 19. They had reason to believe, based on the judgment of BOP's contractor, and Surgeon One's webpage, *see* Kolsky June 29 Decl. ¶ 3; Robinson June 29 Decl. ¶ 6, that Surgeon One performed a number of these procedures, including GCS procedures such as breast augmentation and facial feminization in which Ms. Iglesias had expressed interest, even if Surgeon one did not personally perform vaginoplasty, *see* Kolsky June 29 Decl. ¶ 10; Robinson June 29 Decl. ¶ 22.

Third, although Surgeon One did not in fact discuss vaginoplasty with Ms. Iglesias, the surgeon's record of the April 7 consult (ECF No. 249-1) supports the reasonableness of referring to their meeting as a GCS consult. [REDACTED]

[REDACTED] ECF No. 249-1 at 1. [REDACTED]

[REDACTED] *Id.* at 3, 5. The depth of Ms. Iglesias's interest in breast augmentation and facial feminization is expressed most compellingly, of course, by the Court's Stipulated Order, which entitles her to receive these treatments from Surgeon One, and affirms both the value of keeping the April 7 appointment with Surgeon One, *see* Kolsky June 29 Decl. ¶¶ 10, 11; Robinson June 29 Decl. ¶ 19, and the reasonableness of referring to that appointment as a GCS consult.

We acknowledge that Defendants' status reports could have more clearly and prominently highlighted the information that Surgeon One refers patients to other providers for vaginoplasty, and regret that they did not. *See* Boynton June 30 Decl. ¶ 8; Robinson June 29 Decl. ¶ 18. But there was no attempt to hide that information, *see id.*, and for the reasons explained above, the DOJ attorneys responsible for preparing and filing those reports acted reasonably, notwithstanding that

information, in referring to the April 7 appointment as a GCS consult. They did so, moreover, in good faith and without intent to mislead. Their actions do not call for punishment in the form of sanctions.¹⁵

IV. DEFENDANTS WOULD APPRECIATE THE OPPORTUNITY TO ADDRESS ANY REMAINING CONCERNS THE COURT MAY HAVE.

Defendants are grateful for the opportunity to address the Court's concerns, and to explain why sanctions are not warranted or necessary here. In preparing this response, Defendants and the individual BOP personnel and DOJ attorneys who have provided declarations have endeavored to provide this Court with a comprehensive account of the events in question. Defendants respectfully submit that, based on the existing record, this Court should conclude its sanctions inquiry as to both BOP and the individual DOJ attorneys.

If the Court continues to have concerns about the conduct of this case, however, Defendants respectfully request an opportunity to further address those concerns. Defendants are not certain as to the precise form of potential sanctions under consideration. Additionally, although Defendants have attempted to comprehensively address the Court's concerns, given the breadth of conduct discussed in the Court's April 18 Memorandum and Order, Defendants would request a further opportunity to address any remaining concerns if the Court believes they have been inadequately addressed by this response. As the record here reflects, this case was litigated as a collective effort by numerous individuals at both DOJ and BOP. *See, e.g.*, Feldon June 29 Decl. ¶ 4; Kolsky June 29 Decl. ¶¶ 1, 6; Robinson June 29 Decl. ¶ 4; Schwei June 30 Decl. ¶¶ 5, 37.

¹⁵ The Memorandum and Order notes that "Defendants were ordered to explain how *J.M. by & through Lewis v. Crittendon*, NO. 1:18-CV-568-AT, 2018 WL 7080041, at *1 (N.D. Ga. Apr. 10, 2018) and the additional cases relied upon were applicable. (ECF No. 198, p. 23). Counsel shall confirm where this explanation can be found." Mem. & Order at 29 n.11. *J.M.* and other cases were discussed by Defendants at page 19, footnote 6, in Defendant's Response to the Court's February 21, 2022, Notice and Order (ECF No. 199 at 19 n.6).

Accordingly, the United States would have serious concerns about the issuance of sanctions against any individual attorney, penalizing them for conduct that is more accurately attributable to the collective action of numerous individuals and/or entities. Before the Court enters any sanctions against individual DOJ attorneys, therefore, the United States would respectfully request the opportunity to address any remaining concerns the Court may have.

Again, Defendants appreciate the opportunity to submit this response, and hope that the detailed explanations provided herewith demonstrate that, although there were miscommunications in this case, those miscommunications were unintentional and not deserving of any sanctions. Defendants very much appreciate the Court's time and attention devoted to this important matter.

CONCLUSION

For the reasons discussed above, Defendants respectfully submit that the Court's orders to show cause contained in its April 18 Memorandum and Order should be discharged, and that no sanctions, for contempt or otherwise, should issue against BOP or its counsel.

Dated: July 1, 2022

STEVEN D. WEINHOEFT
United States Attorney

LAURA J. JONES
Assistant United States Attorney

Respectfully submitted,

BRIAN D. NETTER
Deputy Assistant Attorney General

/s/ James J. Gilligan
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Counsel for Defendants

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-NJR

DECLARATION OF BRIAN M. BOYNTON

I, Brian M. Boynton, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I make this declaration based on personal knowledge and in response to the Court's April 18, 2022 Memorandum and Order, Dkt. No. 238.

2. I currently serve as the Principal Deputy Assistant Attorney General for the Civil Division of the United States Department of Justice. I joined the Department of Justice in this position on January 20, 2021. I previously served at the Department of Justice from late 2014 through January 19, 2017, first as a Deputy Assistant Attorney General in the Office of Legal Counsel and then as a Counselor to Attorney General Loretta E. Lynch.

3. As the head of the Civil Division, I oversee approximately 1,100 attorneys in six different branches: the Appellate Staff, the Commercial Litigation Branch, the Consumer Protection Branch, the Federal Programs Branch, the Office of Immigration Litigation, and the Torts Branch. I am ultimately responsible for both running the Division and overseeing the legal positions taken by the Division. The Civil Division represents the United States, its departments and agencies, Members of Congress, Cabinet Officers, and other federal officers and employees in civil litigation. The

Division handles tens of thousands of lawsuits each year and is responsible for numerous court filings on any given day. Each day, I participate in multiple meetings and calls on a wide range of topics and review filings for many different cases. As a result, I am unable to review most of the filings made by the Division, can devote only a limited amount of time to the filings I do review, and generally am not made aware of every detail in each individual case.

4. I did not have any involvement in the preparation, drafting, or submission of any of the filings at issue in the Court's February 10, 2022 Show Cause Order. *See* Dkt. 187 (citing Dkt. Nos. 100, 129, 130, 147, 157, 161, 178, 183). I reviewed those filings for the first time after the Court issued its February 10 Show Cause Order.

5. Following issuance of the February 10 Show Cause Order, I attended the February 22, 2022 Show Cause Hearing. At the hearing, I explained that the Department of Justice took the Court's concerns very seriously and deeply regretted that our handling of the case had raised these concerns. I indicated that I would speak with the Director of the Bureau of Prisons (BOP) and BOP's General Counsel about the case and that I would personally monitor BOP's progress toward arranging gender-confirmation surgery (GCS) for Ms. Iglesias. I also indicated that I would review Defendants' future filings in the case.

6. Since the February 22 hearing, I have monitored this case and sought to ensure that BOP would promptly make arrangements for Ms. Iglesias's surgery. Immediately following the February 22 hearing, I spoke with BOP Acting General Counsel James Wills about the case. Similarly, I spoke with BOP Director Michael Carvajal about the case on March 2, 2022. I have also reviewed every filing in this case since the February 22, 2022 hearing up through the recent settlement of the case. Most recently, I was actively engaged in the discussions that led to the settlement in this case. I participated in numerous calls with Ms. Iglesias's counsel and in numerous calls with BOP leadership, and I helped the parties reach a mutually agreeable settlement and path forward.

7. On April 18, 2022, the Court issued a Memorandum and Order (Dkt. 238) directing six Department of Justice attorneys, including me, to show cause why we should not be sanctioned. In addition to noting the conduct at issue in the Court's February 10, 2022 Show Cause Order, the Court's April 18, 2022 Order focuses on statements in Defendants' filings regarding a particular surgeon with whom Plaintiff had a consultation on April 7, 2022. Specifically, the Court observed: "Now for seven weeks, DOJ attorneys have represented that the BOP has scheduled an appointment with a surgeon for a consultation for GCS—despite the fact that BOP was 'advised that Surgeon 1 refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers are.'" Dkt. 238 at 29-30. The Court ordered: "[T]he DOJ attorneys shall address their continued representations in Docs. 204, 212, 220, 221, 227, 229, and 231. It was not until the seventh status report that DOJ attorneys clearly represented that the first surgeon merely 'refers patients out to other providers for vaginoplasty.' (Doc. 233)." Dkt. 238 at 30.

8. On behalf of the Department of Justice, I apologize to the Court and to Ms. Iglesias and her counsel for any confusion caused by Defendants' failure to more clearly and prominently highlight and explain what Defendants learned regarding the procedures Surgeon 1 personally performed and those that Surgeon 1 referred to others as part of a patient's treatment plan. I do not believe anyone on the team intended to mislead the Court or Ms. Iglesias. Nonetheless, given the way the April 7 consultation unfolded, I recognize why the Court and Ms. Iglesias have expressed concerns—and I again express my regret.

9. I personally was not aware that Surgeon 1 does not perform vaginoplasties, or even that there was any question about whether Surgeon 1 performs vaginoplasties, until the morning of April 8, 2022—the day after Ms. Iglesias's April 7, 2022 consultation appointment and the day we submitted our seventh status report indicating that "Surgeon 1 refers patients out to other providers for vaginoplasty." Dkt. 233 at 1. On the morning of April 8, 2022, I became aware that Surgeon 1

does not personally perform vaginoplasties when I received an email from our DOJ team passing along information about a conversation with Ms. Iglesias's counsel in which her counsel expressed their disappointment about Ms. Iglesias's April 7, 2022 consultation appointment. I had received and reviewed a draft of the Epplin Declaration filed March 4, 2022, which states that "BOP was also advised that Surgeon 1 refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers are." Dkt. No. 212-1, ¶ 6. But I have no recollection of reading or focusing on that particular sentence. I regret that I did not notice the sentence indicating that Surgeon 1 refers patients out for the vaginoplasty procedure.

10. After learning of this fact on April 8 and following the Court's April 18, 2022 Order, I had multiple conversations with BOP's Acting General Counsel and with the Acting Assistant Director of the BOP's Reentry Services Division and worked closely with our team to try, once again, to chart a new course in this case. I was also in contact with Ms. Iglesias's counsel to express our strong desire to provide Ms. Iglesias with the care she needs and to work with them cooperatively to pursue that goal. As noted above, I was closely involved in the settlement discussions with Ms. Iglesias's counsel, including participating in multiple settlement calls and helping the parties reach a mutually agreeable settlement and a path forward for Ms. Iglesias to receive the care she needs. BOP has never before provided gender-confirmation surgery to an inmate in its custody. Providing that care to Ms. Iglesias will be an important milestone.

11. I understand the Court's frustrations and those of Ms. Iglesias and her counsel. Although I respectfully submit that there is no basis to impose sanctions, I deeply regret that there were delays and failures of communication in this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 30, 2022 in Washington, District of Columbia.

/s/ Brian M. Boynton
Brian M. Boynton
Principal Deputy Assistant Attorney General
Civil Division
United States Department of Justice

18, 2022 (Doc. 227-2), March 25, 2022 (Doc. 229-1), April 1, 2022 (Doc. 231-1), April 8, 2022 (Doc. 233-1), April 15, 2022 (Doc. 237-1), and April 22, 2022 (Doc. 249-2). I also provided a declaration on May 17, 2022 (Doc. 263-2) in support of the parties' joint motion to modify the Court's April 26, 2022 preliminary injunction. I am providing this declaration in response to the Court's April 18, 2022 Memorandum and Order (Doc. 238), and in support of Defendants' response to that order. Specifically, I address statements in my prior declarations regarding Ms. Iglesias's April 7, 2022 consultation with the surgeon identified in my declarations as "Surgeon 1."

3. Before I began providing declarations in this matter, I did not have knowledge of the day-to-day decisions regarding Ms. Iglesias's medical care. I became aware of Ms. Iglesias's request for gender-confirmation surgery around April 2021 in connection with a TEC meeting that month, but aside from my role on the TEC, I was not involved in the details of coordinating Ms. Iglesias's care in connection with this matter. I was aware of the Court's December 27, 2021 preliminary injunction and attended the January 24, 2022 TEC meeting. Before I started providing declarations, the TEC members who provided declarations to my knowledge were two of my supervisors, Dr. Alix McLearn, the Acting Assistant Director of BOP for the Reentry Services Division, and Dr. Alison Leukefeld, Acting Deputy Assistant Director for the Reentry Services Division.

4. At some point in February 2022, I became aware that the Court had ordered BOP to show cause why sanctions should not be imposed in connection with BOP's response to the Court's December 27, 2021 preliminary injunction. I understand that Dr. McLearn and Dr. Leukefeld provided declarations in response to the Court's show-cause order and also attended a show-cause hearing on February 22, 2022 but I did not attend the hearing.

5. Shortly after the show-cause hearing, on February 28, 2022, Dr. McLearn advised me that the Court had ordered BOP to file weekly updates every Friday regarding BOP's progress in scheduling a consultation with a surgeon for gender-confirmation surgery for Ms. Iglesias and any

other items relating to Ms. Iglesias's care. Dr. McLearen explained that she had previously provided declarations in connection with BOP's updates to the Court and assigned me the task of providing the declarations going forward. I knew that Dr. McLearen, as the head of the entire Reentry Services Division, had significant administrative responsibilities. I also was not aware of any reason why Dr. McLearen needed to be the one providing weekly declarations. I understood the declarations would be based on information gathered from multiple BOP personnel who were directly involved with coordinating Ms. Iglesias's care. Given that my job responsibilities involve extensive gathering and compiling of information from multiple sources on transgender inmate issues, I found it acceptable for me to provide the declarations going forward so that Dr. McLearen could focus on her administrative responsibilities.

6. In preparation for providing the weekly declarations in this litigation, I reviewed a number of filings in this litigation to better familiarize myself with the factual and legal issues presented by the case. These materials included prior declarations from BOP witnesses, the Court's preliminary injunction decision, and the Court's February 10, 2022 show-cause order. I reviewed these materials and discussed recent developments in the case with agency counsel.

7. I submitted my first declaration in this case on March 4, 2022. *See* Doc. 212-1. In connection with preparing that declaration, I emailed and called others at BOP to gather the latest developments relating to Ms. Iglesias's care. Through these communications, I learned that on March 1, 2022, BOP was advised by its contractor that Surgeon 1 had scheduled an appointment for a consultation with Ms. Iglesias on April 7, 2022. I relayed this information in my declaration that was filed with the Court. *See* Doc. 212-1 ¶ 5.

8. I also learned through these communications that on March 3, 2022, in response to a question about hair removal, BOP was advised by its contractor that Ms. Iglesias "must be seen for evaluation before anything else is ordered." The contractor stated that once the surgeon has

determined that Ms. Iglesias “meets the clinical criteria and has accepted her then the rest can be entered.” The contractor also stated that Surgeon 1 refers patients out to other providers for vaginoplasty and that the contractor would find out who those providers are. I also relayed this information in my declaration that was filed with the Court. *Id.* ¶ 6.

9. Before I learned on March 3 that Surgeon 1 refers patients to other providers regarding vaginoplasty, I did not know that Surgeon 1 does not perform vaginoplasties. Looking back through my emails in preparing this declaration, on February 14, 2022, I was forwarded an email thread from Dr. Alison Leukefeld asking if I could arrange for Ms. Iglesias’s medical records to be provided to NaphCare. Further down on the email thread forwarded to me was an internal email that was not originally sent to me which contained a statement purportedly provided by Surgeon 1 that “We do not offer vaginoplasty yet.” I did not read that portion of the email thread at the time because it was not directly relevant to the request for medical records, and I do not recall having any awareness that Surgeon 1 did not provide vaginoplasty until March 3. Once I learned the information, I included it in my declaration that was filed with the Court on March 4.

10. I continued to provide weekly declarations in connection with BOP’s updates to the Court regarding BOP’s progress in securing a surgeon and other issues related to Ms. Iglesias’s care through April 22, 2022. For each of those declarations, I followed the same process of emailing and calling others at BOP to gather information that I then relayed in the declarations. For example, I provided a declaration on March 11, 2022, that included an update on BOP’s efforts to secure a surgeon and identify a dermatologist who performs permanent hair removal at the surgical site. Doc. 220-1. On March 18, I provided a declaration that included an update that BOP was evaluating whether it might be feasible to have the surgery performed in Chicago should Surgeon 1 not agree to accept Ms. Iglesias as a patient. Doc. 227-2. I also provided an update on BOP’s efforts to secure two letters of referral from qualified mental health providers. *Id.* I provided similar updates on March

25 (Doc. 229-1) and April 1 (Doc. 231). I did not include again in these declarations that Surgeon 1 refers patients to other providers for vaginoplasty because I had already included that information in my March 4 declaration, and there was no new information to report on that issue until Ms. Iglesias attended the consultation with Surgeon 1 on April 7.

11. For every declaration that I signed, I took my obligations seriously and reviewed the declaration carefully. I made efforts to obtain all relevant information and reported any information that I learned that seemed relevant to BOP's efforts to secure a surgeon and Ms. Iglesias's care. I worked closely with agency counsel to confirm that the contents of the declarations were accurate and that we were fulfilling our obligations to the Court.

12. I am aware that the Court has questioned BOP's decision to keep the appointment with Surgeon 1 even after it learned that Surgeon 1 refers patients to other providers for vaginoplasty. I was not involved in the decision to schedule the appointment with Surgeon 1 or to keep the appointment with Surgeon 1 after we learned that they refer patients to other providers for vaginoplasty. However, I discussed with others at BOP why they believed that it was appropriate to proceed with the consultation with Surgeon 1, and I summarized those reasons in my April 15, 2022 declaration. *See* Doc. 237-1 ¶¶ 14–15.

13. As I explained in that declaration, my understanding from speaking with others at BOP was that BOP believed that even if Surgeon 1 may not be able to perform all aspects of gender-confirmation surgery, the surgeon could coordinate Ms. Iglesias's care and refer her to other providers as needed. *Id.* ¶ 14. BOP believed that proceeding with the consultation would help to secure a surgeon to perform the vaginoplasty, as BOP's contractor had advised that Surgeon 1 had indicated that they refer patients to other providers for that procedure. *Id.* BOP also believed that it was appropriate to proceed with Surgeon 1 to provide Ms. Iglesias an opportunity to discuss the totality of procedures involved in gender-confirmation surgery and for Surgeon 1 to accept Ms. Iglesias as a

patient for whichever procedures they could perform. *Id.* ¶ 15. I understand that Surgeon 1 discussed options for breast augmentation and facial feminization with Ms. Iglesias, determined that they would be helpful in treating Ms. Iglesias's gender dysphoria, and that BOP has agreed to provide these surgeries to Ms. Iglesias. *Id.* I understand that Dr. McLearn is addressing these issues in more detail in her declaration in response to the Court's April 18, 2022 show-cause order.

14. As noted above, I take my obligations to the Court seriously. I understand that the Court has expressed concern with BOP's representations in this case but can assure the Court that I did not knowingly withhold any information from the Court or Ms. Iglesias. Rather, I always tried to relay all relevant information that was provided to me as completely and accurately as possible.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 29th day of June, 2022.

JENNA EPPLIN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (a.k.a.,)	
CRISTIAN NOEL IGLESIAS),)	
)	
Plaintiff,)	
)	
vs.)	Case No. 19-cv-00415-NJR
)	
IAN CONNORS, ET AL.,)	
)	
Defendants.)	

FOURTH DECLARATION OF GARY FELDON

I, Gary Feldon, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am a Trial Attorney with the Federal Programs Branch of the Department of Justice, a career civil service role. I represent Defendants in the above-captioned litigation. I make this declaration based on my personal knowledge of the facts stated herein.

2. This is my fourth declaration in the above-captioned matter, following declarations dated February 14, February 18, and March 4, 2022.

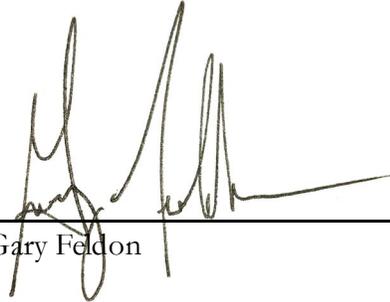
3. Pursuant to the Court’s April 18 Memorandum and Order, Dkt. No. 238, its minute order, Dkt. No. 243, and April 26 Preliminary Injunction, Dkt. No. 252, I am required to appear at a hearing in East St. Louis, Illinois, at a date and time to be determined, and show cause why I should not be sanctioned for representations, made in seven status reports filed by Defendants, Dkt. Nos. 204, 212, 220, 221, 227, 229, and 231, that BOP had scheduled a surgical consultation for Plaintiff to discuss gender-confirmation surgery, despite the fact that BOP had been advised that the surgeon in question refers patients out to other providers for vaginoplasty. Dkt. No. 238 at 29-30.

4. I have had no involvement in the preparation or submission of the seven status reports identified in the Court’s Memorandum and Order and only minimal awareness of or involvement in the efforts made by BOP and its contractor described in those reports to locate a surgeon to perform gender-confirmation surgery (GCS) for Plaintiff. I was on a three-month full-time parental leave to care for my infant son from February 25, only three days after the February 22 show cause hearing, until May 23, 2022. I was a participant in a few group discussions relating generally to BOP’s efforts to identify a GCS surgeon for Plaintiff prior to beginning my leave the following week. Those conversations all presumed that the doctor discussed during the Court’s February 22, 2022 show cause hearing was a possible candidate to perform a vaginoplasty for Plaintiff. Had anyone suggested in any way during those conversations that the doctor would be unwilling or unable to perform vaginoplasty, I would have advised that we inform Plaintiff and the Court and then pursue alternative surgeons. Since beginning my parental leave on February 25, I have had no involvement in the above-captioned case, including any efforts to locate a surgeon or to report to

the Court on that topic, except discussions on responding to the Court's most recent show cause order, Dkt. No. 238.

5. Consistent with Federal Programs Branch practice, I did not temporarily withdraw from the case during my leave. However, I was not a signatory to any of the filings addressed in the Court's most recent show cause order. Dkt. No. 238.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of June 2022.



Gary Feldon

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICOLE IGLESIAS (a.k.a.
CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, ET AL.,

Defendants.

19-CV-00415-NJR

SUPPLEMENTAL DECLARATION OF JOSHUA E. GARDNER

I, Joshua E. Gardner, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am currently employed by the Department of Justice (DOJ), Office of Legislative Affairs, where I have been detailed since October 27, 2021. My permanent position is with the Federal Programs Branch, Civil Division, DOJ, as a Special Counsel, a Senior Level career civil-service position. I have worked at DOJ since February 2004, and have worked in the Federal Programs Branch since 2008. Previously I worked at the law firm of Shearman & Sterling, and before that I served as a law clerk for a Justice on the Florida Supreme Court. During my time at DOJ, I have been responsible for personally litigating and managing numerous cases, often involving complex issues of federal constitutional and administrative law. My direct supervisors are three Federal Programs Branch Directors, each of whom is also a career civil servant. As part of my job responsibilities, since 2016 I have worked on behalf of DOJ on the Advisory Committee for Civil Rules. In this role, I work with numerous federal district court and appellate court judges, law professors, and practitioners, to

consider potential amendments to the Federal Rules of Civil Procedure. In addition to my work at DOJ, I have been an adjunct professor at The George Washington University Law School since 2005, where I have taught at various times Legal Research & Writing, Government Lawyering and Pretrial Advocacy. A substantial portion of my teaching involves instruction on legal ethics and professional responsibility. I graduated from The George Washington University Law School in 2000 with high honors. I have received numerous awards for my work at DOJ, including awards recognizing my integrity as a litigator.

2. I make this declaration based on personal knowledge and in response to the Court's April 18, 2022, Memorandum and Order, Dkt. No. 238, in which the Court has ordered certain Department of Justice attorneys who have worked on this case to show cause why sanctions should not be imposed for particular representations contained in status reports submitted by Defendants at docket entries 204, 212, 220, 221, 227, 229, and 231 (collectively, "Status Reports"). Dkt. No. 238 at 30.

3. Because I have been on detail to the Office of Legislative Affairs since October 27, 2021, I have had no involvement in the preparation, drafting, or review of the Status Reports, in any of the representations contained in those Status Reports, or in BOP's efforts described in the Status Reports to arrange gender-confirming surgery for Plaintiff Iglesias. I have no recollection of anyone from the Federal Bureau of Prisons or the Department of Justice telling me at any time before March 3, 2022, that the surgeon it identified did not perform vaginoplasties, and given that I was on detail during this time, it is highly unlikely that I had any awareness of this fact before the filing of the March 3, 2022 status report. Even then, I cannot say with any degree of certainty that I read the March 3, 2022 status report at the time it was filed, although I have reviewed the status report since it was filed. I am not a signatory on any of the Status Reports.

Alexandria, Virginia
June 30, 2022

/s/ Joshua E. Gardner
Joshua E. Gardner
Special Counsel
United States Department of Justice

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICOLE IGLESIAS (a.k.a.
CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, ET AL.,

Defendants.

19-CV-00415-NJR

SUPPLEMENTAL DECLARATION OF ALEXANDER K. HAAS

I, Alexander K. Haas, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am a Director in the Federal Programs Branch, Civil Division, of the United States Department of Justice, a position in the Career Senior Executive Service of the United States Government. I have served in this position since August 2019. As outlined in my initial declaration, Dkt. No. 191-3, I have spent the majority of my career as a civil servant as an attorney for the United States in various capacities. I make this declaration based on personal knowledge, and am submitting it on behalf of the Federal Government in the above-captioned matter in response to the Court's April 18, 2022 Memorandum and Order, Dkt. 238.

2. The role of the Federal Programs Branch is principally to defend civil actions filed against the Government in federal district courts throughout the United States. The Branch is made up of approximately 110 attorneys, all of whom are career professionals. The Branch handles significant cases nationwide in which parties challenge the lawfulness of Federal Government

programs, policies, and decisions of virtually every agency of the Executive Branch as well as the constitutionality of Federal statutes; the cases handled by the Branch encompass a wide range of subject matters and address many different areas of the law. The Branch handles, and I supervise, significant defensive civil litigation concerning the Department of Justice and therefore the Federal Bureau of Prisons (BOP). As a result, I have been the Director supervising this litigation since the Branch began working on it.

3. I am familiar with the course of this litigation and am aware that the Court issued a preliminary injunction in late December 2021. I also am aware that on February 10, 2022, the Court issued an Order to Show Cause in the above-captioned case and expressed concerns about the Government's compliance with that preliminary injunction and the conduct of the Government's litigation. I attended the February 22, 2022 Show Cause Hearing. Like the other Department of Justice attorneys representing BOP in this case, I take this Court's concerns over the handling of this case very seriously and I regret that our handling of this case has led to these concerns and led to so much frustration for the Court, Plaintiff, and her counsel.

4. Since the February 22 hearing, I have continued to monitor this case closely and participated in numerous meetings and calls regarding this case to ensure BOP was making progress to provide Plaintiff with any and all necessary medical treatment, including surgery, to treat Plaintiff's gender dysphoria. I am aware that the Court issued a Memorandum and Order on April 18, 2022, Dkt. 238 requiring, among other things that: (1) Defendants show cause why BOP should not be held in contempt for violating the Court's December 27, 2021, preliminary injunction order (Doc. 177); and (2) BOP and six DOJ attorneys address representations made in

a series of status reports (Docs. 204, 212, 220, 221, 227, 229, and 231) about a surgeon with whom BOP, through its contractor, had scheduled a consultation on April 7, 2022 for Plaintiff.

5. On behalf of the Federal Programs Branch, I want to personally apologize to the Court, Plaintiff, and her counsel for any confusion or distress caused by Defendants' representations in this case. From the inception of this case up to the present day, I have observed a team of dedicated public servants who worked tirelessly to defend their client's interests while complying with their ethical obligations and this Court's Orders. Among other things, I have observed the care with which the team has sought to address the Court's concerns, including to provide the Court and Plaintiff with timely and accurate information available to them about the progress BOP made to provide Plaintiff with any and all necessary medical care. Notwithstanding these efforts, I recognize and understand why the Court and Plaintiff have expressed their concerns, for which I wish to express my profound regret.

6. Based on everything that I have seen, I do not believe that any of the DOJ attorneys identified in the Court's April 18, 2022, Memorandum and Order intentionally misled the Court, Plaintiff, or her counsel. Similarly, based on everything that I have seen, I do not believe that any of these DOJ attorneys sought to intentionally withhold or conceal information for the purpose of deceiving the Court, Plaintiff, or her counsel. I believe that each of these DOJ attorneys acted ethically, within the bounds of their professional duties, and reasonably at all times in this case.

7. Moreover, at no time as the events at issue here unfolded did any of the attorneys working on this case raise a concern with me that there was any intention to mislead the Court or Plaintiff, or to withhold information that the Defendants ought to disclose. Given my experience

as Director overseeing litigation handled by the Branch, and consistent with my expectations of the trial attorneys in the Branch, including those working on this case, it is inconceivable to me that there could have been an intention to mislead the Court or Plaintiff, or to withhold information that should be disclosed, without any of the career professionals working on this matter bringing it to my attention.

8. With the benefit of hindsight and more complete information, I now recognize, as do the DOJ attorneys, that Defendants' status reports identified in the Court's April 18, 2022, Memorandum and Order gave rise to expectations on the Court's part regarding Ms. Iglesias's April 7 consultation with Surgeon One that were not met. I believe that miscommunication arose in part from the failure—the highly regrettable failure—to give greater prominence in Defendants' March 4, 2022, filing to the fact that Surgeon One refers patients to other providers for vaginoplasty. I believe the miscommunication also stemmed from the different meaning that the term 'gender-confirmation surgery' held for the Court on the one hand, and for the DOJ attorneys (and BOP) on the other.

9. Based on everything that I have seen, I also believe that the misunderstanding to which these filings inadvertently gave rise stemmed in large part from an attenuated chain of communications. My understanding is that medical care provided to individuals residing in BOP Residential Reentry Centers is provided not by agency personnel but through a federal contractor that identifies independent medical care providers and arranges for treatment. This arrangement adds extra links to the usual communication chain between DOJ and its client agencies—namely, the federal contractor and the independent medical provider. The DOJ attorneys lacked visibility

into the communications exchanged back and forth across these additional links, because they could not communicate directly with either the federal contractor or the independent medical provider with whom the contractor communicated.

10. I believe this lack of visibility contributed to the DOJ attorneys' (and BOP's) own set of expectations, which ultimately were also unmet, about the nature of the consultation that would occur on April 7, about whether Surgeon One would discuss the vaginoplasty procedure sought by Plaintiff, and whether Surgeon One would act as a point of access to other providers who could perform that procedure for her. I am convinced that these expectations are reflected in the manner in which Defendants' status reports described the anticipated April 7 consult. And I am equally confident that if the DOJ attorneys had possessed more complete and ready access to information, the status reports identified in the Court's April 18, 2022, Memorandum and Order would have been drafted differently, and that more complete information about what to expect from the April 7 consult would have been conveyed to the Court and Plaintiff. While it is regrettable and understandably frustrating to the Court, Plaintiff, and her counsel, that Defendants' status reports were unable to paint a more complete picture of what the April 7 consult would entail, I know that it is also deeply frustrating to the DOJ attorneys identified in the Court's April 18, 2022 Memorandum and Order, as well as to BOP.

11. As a Federal Programs Branch Director, it is my experience that DOJ and Branch attorneys, consistent with their responsibilities as career civil servants, seek to accurately present to the courts the position of the United States in litigation, the facts in a case as they know it at any given time, and the applicable law with respect to matters the Branch handles. Consistent with this

experience, from the moment the Branch first became involved in this case, I have witnessed a team of dedicated DOJ attorneys who worked days, nights, and weekends to comply with their professional and ethical obligations and to diligently provide the Court, Plaintiff, and Plaintiff's counsel with timely and accurate information. I also have witnessed a client agency, BOP, work persistently and diligently through a series of legal and practical problems to provide first-of-its-kind medical care with which they lacked expertise to a person in the care of the Residential Reentry Services Branch, Ms. Iglesias. And it is exasperating—to the DOJ attorneys identified in the Court's April 18, 2022, Order, to BOP, and to myself—that despite the entire team's genuine, good-faith efforts, more complete information regarding the April 7 consultation and/or the ability of Surgeon 1, or Surgeon 1's team, to provide the vaginoplasty procedure was not conveyed to the Court, Plaintiff, and her counsel.

12. Based on everything that I have seen, I see no basis to impose sanctions on any DOJ attorney personally or on BOP. I again wish to personally apologize, and profess my profound regret, to the Court, Plaintiff, and her counsel for any confusion or distress caused by Defendants' representations in this case. Further, I have asked the Branch's training committee to consider including this matter as a case study in future trainings for the entire Branch, so that current and future Branch attorneys can benefit and learn from this unfortunate experience.

13. It is my privilege as a Director in the Federal Programs Branch to represent the United States of America. And it is my privilege in this position to work with outstanding attorneys who execute their duties as counsel for the United States with skill and utmost professionalism. That is true with respect to the each of the attorneys assigned to this case, and whom I have known through

personal observation and interaction over time to have conducted themselves consistent with the highest standards of ethics and professionalism with respect to their litigation matters, including the above-captioned civil action.

14. Finally, I would like to explain one matter of Branch practice as it pertains to attorneys who temporarily are on extended leave from the Branch. These extended leave situations typically occur in connection with either parental leave or a temporary detail to another part of the Federal Government and often last between three and twelve months. During the leave period, those on extended leave are Branch employees but the Branch does not expect them, absent special arrangements, to perform the Branch's work until the leave period ends. Because our cases continue to be litigated during these extended leave periods, the Branch assigns other attorneys to personally handle the case should a need arise. Starting in February 2020, I have handled case assignments for the Branch and have been responsible for identifying attorneys to litigate cases for the temporary period that another attorney is out on extended leave. When an extended leave situation terminates, my expectation is that the attorney who had been on leave will resume working on their cases unless I agree, after discussing the matter with the attorney and reviewer, otherwise. Because it is assumed that attorneys on extended leave will resume litigating the cases that are temporarily being litigated by a colleague, in my experience, attorneys beginning an extended leave arrangement do not usually formally withdraw from cases for the leave period. I explain this general practice because two attorneys identified in the Court's April 18, 2022 Memorandum and Order, Joshua Gardner and Gary Feldon, were on extended leave during the period when the status reports identified in that Order were filed. My understanding and

recollection is that neither Mr. Gardner nor Mr. Feldon were involved in preparing these status reports identified in that Order, which would be consistent with the Branch's general practice and my expectations of those in an extended leave situation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2022, in the City of Kensington in the State of Maryland.

Alexander K. Haas
Director, Federal Programs Branch
United States Department of Justice

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-RJN

THIRD DECLARATION OF JOSHUA M. KOLSKY

I, Joshua M. Kolsky, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am a Trial Attorney employed as a career civil servant by the Department of Justice, Civil Division, Federal Programs Branch. I am one of the attorneys representing the Defendants in this litigation. I make this declaration based on my personal knowledge of the facts stated herein.

2. I am submitting this declaration to address various questions and concerns raised in the Court's Memorandum and Order issued on April 18, 2022. In particular, this Court ordered certain DOJ attorneys, including myself, to address representations made in seven status reports filed by Defendants, Docs. 204, 212, 220, 221, 227, 229, and 231, that the Federal Bureau of Prisons ("BOP") had scheduled a consultation for Plaintiff Cristina Iglesias to discuss gender-confirmation surgery, when it knew by that time that the surgeon with whom she had the appointment ("Surgeon One") refers patients to other providers for vaginoplasty. Doc. 238 at 29-30.

3. I learned the identity of Surgeon One on or about February 15, 2022. At that time, I had limited information about Surgeon One. As a litigation counsel for Defendants, I generally deferred to the judgment of BOP and its contractor about the suitability of Surgeon One to treat Ms. Iglesias's gender dysphoria. Nevertheless, on February 15, 2022, I reviewed Surgeon One's website and a news article about Surgeon One, both of which indicated that Surgeon One had impressive academic and medical credentials and experience performing gender affirming procedures. At the time, I did not know, or even suspect, that Surgeon One would not be able to personally perform the surgery Ms. Iglesias was primarily seeking.

4. I first learned that Surgeon One refers patients out to other providers for vaginoplasty on March 3, 2022 when I reviewed the declaration of Jenna Epplin. That declaration contained the following statement: "BOP was also advised that Surgeon 1 refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers are." Doc. 212-1 ¶ 6. The following day, March 4, 2022, I filed the Epplin Declaration as an exhibit to Defendants' March 4 Status Report (Doc. 212).

5. I do not recall receiving any information or communications prior to March 3, 2022, whether in writing or orally, suggesting that Surgeon One does not perform vaginoplasty. As noted, I reviewed Surgeon One's website in February 2022 but that website does not suggest that Surgeon One does not perform vaginoplasty (and instead describes Surgeon One's clinical interest in [REDACTED]). I recall generally that, in February 2022, one or more BOP officials discussed at a high-level their knowledge of Surgeon One's qualifications – which was limited at that time – but I do not recall any statement or suggestion in those discussions that Surgeon One does not perform vaginoplasty. I do not recall any statement from any BOP official expressing uncertainty about which procedures Surgeon One would perform, but I did not participate in every conversation with BOP officials.

6. After the Court issued the April 18 Memorandum and Order, I reviewed my files for any pre-March 3 references to the question of whether Surgeon One performs vaginoplasty. I located an email, dated February 18, 2022, on which I was copied. An attachment to that email included a comment from BOP suggesting there was some unspecified lack of clarity concerning Surgeon One and the vaginoplasty procedure. I had not reviewed that attachment until I searched my files in April 2022. I was on an airplane at the time the email was sent, and the email pertained to a document with which I had only minimal involvement. In any event, the attachment indicated only a lack of clarity—it did not state that Surgeon One did not perform vaginoplasty.

7. I am aware that the April 15, 2022 Declaration of Jenna Epplin stated in part, “BOP had previously received information from its contractor suggesting that Surgeon 1 may not currently offer vaginoplasty[.]” 4/15/2022 Epplin Decl. ¶ 13. While working to prepare that declaration and the associated status report, BOP indicated that, in February 2022, it received information through its contractor indicating that Surgeon One performed two to three bottom surgeries per month but did not offer vaginoplasty yet. I do not recall BOP sharing that information about Surgeon One with me at the time it was received in February 2022. Had I known of that information in February 2022, I am certain I and/or my DOJ colleagues would have promptly shared it with the Court and Plaintiff’s counsel.

8. As noted above, I filed the March 4, 2022 Epplin Declaration as an exhibit to Defendants’ March 4 Status Report (Doc. 212). The March 4 Status Report, which summarized the Epplin Declaration, did not itself state that Surgeon One refers patients to other providers for vaginoplasty. In deciding on the contents of the Status Report, neither I nor, to my knowledge, my colleagues, intended to mislead the Court or Ms. Iglesias regarding Surgeon One’s capabilities. Otherwise, we would not have specifically disclosed in the March 4 Epplin declaration that Surgeon One refers patients to other providers for vaginoplasties.

9. Defendants' later status reports also did not state that Surgeon One refers patients to other providers for vaginoplasty. That is because the content of those status reports was based on the declarations submitted with them, which primarily described new information received or developments that had occurred during the preceding week.

10. The Court's Memorandum & Order also raises concerns with the fact that "DOJ attorneys have represented that the BOP has scheduled an appointment with a surgeon for a consultation for GCS—despite the fact that BOP was 'advised that Surgeon 1 refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers are.'" Mem. & Or. at 29-30. My understanding of the term "gender confirmation surgery" is that it does not refer to one particular medical procedure, but rather is a broad term used to describe a variety of surgical procedures used to treat gender dysphoria. My understanding is based in part on the WPATH Standards of Care, which describe many different surgical procedures for the treatment of gender dysphoria in transgender women, including "breast/chest surgery: augmentation mammoplasty (implants/lipofilling)," "[g]enital surgery: penectomy, orchiectomy, vaginoplasty, clitoroplasty, vulvoplasty," and "nongenital, nonbreast surgical interventions," such as "facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid-cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures." My understanding is that Surgeon One personally performs some of these procedures, including breast augmentation and facial feminization surgery (both of which Ms. Iglesias has elected to pursue to treat her gender dysphoria). There are indications, including on Surgeon One's website, that Surgeon One may perform [REDACTED]. Therefore, I believe it was accurate to describe Ms. Iglesias's appointment with Surgeon One as a consultation for gender confirmation surgery. I recognize that the Court defined "gender confirmation surgery" for purposes of its December 27, 2022, preliminary injunction decision to

mean surgery or surgeries altering one's genital organs. (Doc. 176 at 1 n.1.) The term "gender confirmation surgery" in Defendants' status reports was used in the clinical sense, as in the WPATH Standards of Care. Any difference between the definition in the Court's December 27 opinion and the clinical definition did not occur to me at the time.

11. For multiple reasons, I believe it was appropriate for BOP to go forward with Ms. Iglesias's April 7 consultation notwithstanding the fact that Surgeon One refers patients to other providers for vaginoplasty. First, the consultation was an opportunity for Ms. Iglesias to discuss various surgical procedures that Surgeon One does personally perform (including facial feminization and breast augmentation), procedures that Ms. Iglesias desires and can help treat her gender dysphoria. I am aware that the medical record from Ms. Iglesias's April 7 consultation with Surgeon One notes that although Ms. Iglesias's [REDACTED]

[REDACTED] Second, BOP's contractor had reported that Surgeon One refers patients to other providers for vaginoplasty. In my personal experience, a referral from one doctor to another usually involves the doctor identifying a specific provider and coordinating with that provider so that there is a seamless transition of care. Prior to the April 7 consultation, I expected that Surgeon One would offer a similar process and would directly refer Ms. Iglesias to another surgeon for vaginoplasty, potentially another physician at Surgeon One's practice. I did not know that Surgeon One would not directly refer Ms. Iglesias to another surgeon and coordinate care with that other surgeon until April 7, when I learned that at the consultation Surgeon One instead provided a list of vaginoplastic surgeons for BOP or Ms. Iglesias to contact. However, I believe it was reasonable for BOP to expect that Surgeon One could help facilitate vaginoplasty by another surgeon. Third, at the time of the appointment with Surgeon One, BOP was actively continuing to search for other surgeons in the Miami area who would be acceptable to Ms. Iglesias and willing to schedule a

consultation with Ms. Iglesias for a vaginoplasty procedure. Thus, moving forward with the April 7 consultation even after it was discovered that Surgeon One does not personally perform vaginoplasties did not delay or prevent the identification or consultation with any other Miami-area surgeon for a vaginoplasty, had BOP been able to locate one who would accept Ms. Iglesias as a patient.

12. The Court's Memorandum and Order also notes that Defendants' Response to the Court's February 10, 2022 Order to Show Cause cites to the Declaration of Dr. Alix M. McLearn and states that "BOP has notified its contractor of Iglesias's pending transfer, and has been informed that the contractor has located an appropriate surgeon." Mem. & Order at 6. My understanding is that the term "appropriate surgeon" is a reference to BOP's contractor's initial assessment of Surgeon One. I am not personally aware of the information that BOP's contractor used to make that assessment. My understanding is that BOP generally relies on the knowledge and experience of its contractor to locate appropriate healthcare providers. I have not had any direct communication with BOP's contractor about this or any other matter.

13. Over the past several months, I have worked hard alongside my DOJ colleagues to assist BOP's efforts to identify and retain a surgeon or surgeons for Ms. Iglesias, and to accurately report BOP's progress to the Court, and Ms. Iglesias. Although we have faced challenges and setbacks in pursuit of a surgeon or surgeons for Ms. Iglesias, I believe that everyone at DOJ involved in this case has acted in good faith and endeavored to represent our client's legitimate interests within the bounds of our ethical and professional responsibility obligations. I regret that statements made and actions taken on BOP's behalf in this matter have caused the Court to question Defendants' candor, the candor of Defendants' counsel, or BOP's intentions to provide Ms. Iglesias with the medical care she requires. I am pleased that the parties were able to negotiate

a mutually-acceptable settlement of this action, which I expect will lead to Ms. Iglesias receiving multiple forms of gender confirmation surgery to treat her gender dysphoria.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of June 2022 in Chevy Chase, Maryland.

JOSHUA KOLSKY Digitally signed by JOSHUA
KOLSKY
Date: 2022.06.29 17:09:02 -04'00'

Joshua M. Kolsky

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

<p>CRISTINA NICOLE IGLESIAS (a.k.a., CRISTIAN NOEL IGLESIAS),</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>IAN CONNORS, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p>	<p>No. 19-cv-00415-NJR</p>
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DECLARATION OF DR. ALIX M. McLEAREN

I, Dr. Alix M. McLearen, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am currently employed by the Federal Bureau of Prisons (“BOP”) as Acting Assistant Director of BOP for the Reentry Services Division. I have held my current position since December of 2021, and have been the Senior Deputy Assistant Director since May of 2020. I have been employed by BOP since 2003.

2. I am familiar with the Court’s April 18, 2022, Memorandum and Order (Doc. 238) (“Mem. & Order”) requiring, in part, (i) that Defendants show cause why BOP should not be held in contempt for violating the Court’s December 27, 2021, preliminary injunction order (Doc. 177) (“Dec. 27 Prelim. Inj.”); and (ii) that BOP show cause why it should not be sanctioned for representing that Surgeon One¹ is an “appropriate surgeon” to perform gender-confirmation surgery (“GCS”) for Plaintiff Cristina Iglesias. I submit this declaration in support of Defendants’ response to the Court’s Memorandum and Order. The statements made herein are based on my

¹ Surgeon One’s name, and a link to information regarding Surgeon One’s professional background, were submitted to the Court under seal on February 23, 2022 (Doc. 201).

personal knowledge and on information provided to me in connection with my duties and responsibilities as Acting Assistant Director for the Reentry Services Division.

3. This declaration includes four principal sections. In the first section I provide an update on the progress being made to arrange for Ms. Iglesias's gender-confirmation surgery, including vaginoplasty to be performed by the Chicago-based surgeon originally identified by Ms. Iglesias's attorneys, and facial-feminization and breast-augmentation surgery to be performed by Surgeon One, in accordance with the parties' settlement and the Court's Stipulated Order (Doc. 269).

4. In the second section, I explain that in response to the Court's December 27 injunction, BOP's Transgender Executive Council ("TEC") evaluated Ms. Iglesias's request for GCS, and on January 24, 2022, issued a decision which allowed BOP to act on her request without the need for further decision-making by or authorization from the TEC.

5. In the third section, I explain why BOP reported to the Court that its medical-services contractor had located a surgeon (Surgeon One) whom the contractor considered appropriate to treat Ms. Iglesias, even though BOP was not yet able to confirm that conclusion independently. I also explain in section three why BOP's status reports referred to Ms. Iglesias's April 7, 2022, appointment with Surgeon One as a "GCS" consult, and why BOP kept that appointment—even though Surgeon One does not personally perform vaginoplasties. In short, BOP believed it would be (and still believes it was) a GCS consult (i) because it expected that Surgeon One could help arrange for, that is, refer Ms. Iglesias to, another provider (or providers) to perform a vaginoplasty, (ii) because of other GCS procedures that Surgeon One potentially could perform (and currently plans to perform) for Ms. Iglesias, and (iii) because BOP could (and did) keep the appointment while still continuing its search for other providers who could potentially perform vaginoplasty for her.

6. In the final section I respond to the list of questions posed by the Court on page 24 of its Memorandum and Order.

7. Before turning to these subjects, however, I wish to say that I appreciate the Court's frustration with the time it has taken to arrange for Ms. Iglesias's surgery following the TEC's decision. I share that frustration. Acting under my supervision, the Reentry Services Division has been steadfastly working to make arrangements for Ms. Iglesias's surgery as quickly as could be done. Unlike routine medical care provided to inmates for which a host of providers is available, this is a first-of-its-kind situation presenting a novel set of procedures for the Reentry Services Division specifically and agency as a whole to coordinate. We have had to overcome numerous hurdles in doing so, such as legal constraints on BOP's ability to procure outside medical services (including the need to work through BOP's medical-services contractor), and BOP's lack of authority and control over outside medical providers, who decide for themselves whether to accept Ms. Iglesias as a patient, and, if so, when they will treat her and what procedures they believe it medically necessary and appropriate to perform. As discussed in more detail *see infra* Paragraph 74, multiple medical providers contacted by BOP's contractor have declined to schedule consultations with Ms. Iglesias. In addition, we have had to remain mindful of correctional and rehabilitative considerations, such as Ms. Iglesias's preparation for reentry to society after spending most of her adult life in BOP custody.

8. Because of these limitations and constraints on BOP's ability to act in a matter of this kind, and the absence an existing roadmap to obtain these services, I can understand that the process of arranging for Ms. Iglesias's care may have appeared at times to be stop-and-go. But under my direction the Reentry Services Division has been working daily to overcome the obstacles we have encountered in order to provide Ms. Iglesias the care she requires. I remain committed to doing what I can as Acting Assistant Director to see to it that she receives that care. It has never

been my intention, nor BOP's, that she receive anything less, or that her care be delayed. BOP has put an extraordinary amount of time, effort, and resources into ensuring Ms. Iglesias receives proper treatment.

9. I wish specifically to emphasize that BOP has never sought to mislead the Court, or Ms. Iglesias, into believing that BOP was arranging for her to receive a particular kind of gender-confirmation procedure, specifically vaginoplasty, when in fact it was not. The agency recognizes the myriad treatment and surgical approaches for transgender individuals. As early as January, we were beginning to explore options for surgeons and have related internal discussions to ensure we consulted an expert while adhering to applicable rules. Once consultation for surgery was approved, it has been BOP's intention that Ms. Iglesias receive any and all medically necessary and appropriate GCS procedures, as determined by a surgeon, to treat her gender dysphoria. BOP's actions have been consistently directed toward that goal. I have spent my career working to ensure access to quality services for all inmates in BOP custody and regret any statements or actions by BOP that may have led the Court, or Ms. Iglesias, to feel that they have been misled, and regret the frustration caused as a result.

I. STATUS OF MS. IGLESIAS'S GENDER-CONFIRMATION SURGERY

10. In this section I report on recent progress made to arrange for Ms. Iglesias's gender-confirmation surgery in accordance with the parties' settlement and the Court's Stipulated Order, Doc. 269.

11. At all times since Ms. Iglesias has been housed in an RRC, BOP has sought to provide Ms. Iglesias medical treatment in a manner that would also allow her reentry needs to be met. Since the Court issued the Stipulated Order, BOP has been working to schedule facial-feminization and breast-augmentation surgeries with Surgeon One. On May 24, 2022, Surgeon One's office initially advised that they are waiting for surgical information from Surgeon One before they will provide a

surgery date, and that the surgeries would be scheduled for July or later.² On May 31, 2022, Ms. Iglesias underwent a computerized topography scan in preparation for her facial surgery. On June 16, 2022, Ms. Iglesias had a telehealth appointment with Surgeon One. Surgeon One has now scheduled the first procedure for August 23, 2022.³

12. Second, BOP has been working to schedule vaginoplasty with the Chicago-based surgeon identified as Surgeon Two in the Stipulated Order. As discussed previously, Ms. Iglesias underwent a telehealth consultation with Surgeon Two on May 5, 2022. Doc. 256-1 at 1. On May 26, 2022, a representative from Surgeon Two's medical office informed BOP's contractor that there is additional work that Surgeon Two's staff needs to complete before they can arrange an in-person consultation with Ms. Iglesias. Specifically, the staff needs to work on contractual and other logistical issues. The representative stated that she would be in touch with BOP's contractor once she has full approval to move forward. The representative also stated that she had asked her finance leaders to work on pricing so that that could be forwarded to BOP's contractor. BOP's contractor has continued to follow up weekly, and was advised on June 28, 2022, that there was no further update, the decision is still being worked on, and that the representative from Surgeon Two's office hoped to have an answer in the next few weeks.

13. Third, BOP worked diligently to locate a provider and obtain medical orders in furtherance of permanent hair removal for Ms. Iglesias. BOP is continuing to schedule permanent-

² As previously reported, Surgeon One indicated that she performs facial feminization in two stages. Breast augmentation can occur during either one of those stages. The two stages are spaced apart by one month. (Doc. 256-1 at 3.)

³ Last week BOP was advised that Surgeon One had a cancellation and could potentially see Ms. Iglesias sooner (the week of June 27). However, Ms. Iglesias unfortunately had a recent emergency room visit related to gallstones or a gallbladder issue. When Surgeon One's office was informed of this, they advised that the earlier appointment could not take place, but kept the August 23, 2022, appointment in place.

hair-removal appointments for Ms. Iglesias both for facial hair removal and surgical site hair removal in anticipation of vaginoplasty. Ms. Iglesias had such an appointment on June 6, and her next appointment is currently scheduled for July 11, 2022.

II. THE TEC'S RESPONSE TO THE COURT'S DECEMBER 27 INJUNCTION

14. In this section I explain that in response to the Court's December 27 injunction, the TEC evaluated Ms. Iglesias's request for GCS and that its resulting January 2022 decision provided the necessary TEC approval for her to undergo such GCS procedures as physicians to whom she would be referred (subject to review by BOP staff), determined to be necessary and appropriate.

15. The Court's injunction required the TEC, first, "to meet to evaluate [Ms.] Iglesias's request for GCS by Monday, January 24, 2022[.]" second, if the TEC recommended Ms. Iglesias for surgery, then to "[f]ile a notice to the Court within two days of the recommendation" and to "[r]efer [Ms.] Iglesias to the BOP's medical director immediately"; or third, if the TEC recommended against surgery for Ms. Iglesias, then in that event to "[f]ile a notice with the Court explaining all the reasons for the TEC's decision within seven days." Dec. 27 Prelim. Inj. at 1-3.

16. The Court's Memorandum and Order states three reasons why it appears to the Court that BOP may not have complied with its December 27 injunction: first, that the TEC "failed to evaluate [Ms.] Iglesias's request for GCS on January 24, 2022[.]" Mem. & Order at 9; second, that on January 24 the TEC improperly delayed rather than make a decision regarding Ms. Iglesias's request for GCS, *id.* at 10-11; and third that the TEC did not make reasonable and diligent efforts to timely comply with the Court's injunction, *id.* at 12-13.

17. As I testified in my February 14, 2022, declaration, and at the February 22, 2022, show-cause hearing, BOP and the members of the TEC (including myself) took with utmost seriousness their obligation to comply with the Court's December 27 injunction, and believed that the decision reached by the TEC at its January 2022 meeting, and the actions taken thereafter by BOP to notify

the Court of the TEC's decision satisfied the Court's requirements. After having made our best efforts to comply with the injunction, I respectfully continue to believe that to be true, and explain why that is so below.

A. The TEC's Evaluation of Ms. Iglesias's Request for Gender-Confirming Surgery.

18. The Court's December 27 injunction first directed the TEC to meet on or before January 24, 2022, "to evaluate [Ms.] Iglesias's request for GCS[.]" Dec. 27 Prelim. Inj. at 1. The TEC did so, as I stated in my January 31 and February 14, 2022, declarations and testified at the February 22 show-cause hearing.

19. As explained in prior testimony given by me and Dr. Alison Leukefeld, prior to January 2022 the TEC had not recommended Ms. Iglesias for gender-confirming surgery because she had not yet resided for twelve months in a female facility, and accordingly not shown adequate social adjustment, during the critical period of social adjustment meant to ensure that a transgender inmate can co-exist successfully and securely with peers of his or her own gender before undergoing gender-confirming surgery that cannot be reversed. As the Court is aware, it is BOP policy that persons in the agency's custody generally should be considered for GCS "only after one year of clear conduct and compliance with mental health, medical, and programming services at [a] gender-affirming [BOP] facility." Transgender Offender Manual, Program Statement 5200.18, § 9 at 9 (Jan. 13, 2022) (attachment 1 to McLearen Decl. (Doc. 183-1)). Though the written policy was not formally finalized until this year, BOP has followed it in practice since 2016.

20. That is the reason why the TEC did not recommend Ms. Iglesias for gender-confirmation surgery when it considered her request in October 2021. At that time she had resided in a BOP female facility (FMC Carswell) for less than six months (since May 2021). During that time her social adjustment was a work in progress. In addition, she was already scheduled for transfer to BOP's Residential Reentry Center ("RRC") in Miami, Florida (where she would also reside with

women) in March 2022, in anticipation of her December 2022 release from BOP custody. The TEC therefore decided that it would reconsider her request for surgery following placement and successful adjustment at the RRC of at least one month, approximately 11-12 months following her May 2021 transfer to the female facility at Carswell.

21. When at the Court's instruction the TEC reconsidered Ms. Iglesias's request for surgery in January 2022, it took into account the facts and circumstances as they existed at that time, and reached a different decision than in October 2021, as I testified at the February 22 hearing. A number of factors that the TEC took into account in January 2022 were not present in October 2021. These included Ms. Iglesias's imminent transfer to the Miami RRC, the importance of maintaining continuity in her care throughout the GCS process, and the logistical expedience of referring Ms. Iglesias directly to a surgeon following her transfer to the RRC, rather than referring her, while still located at FMC Carswell, to the BOP medical director. After taking these additional factors into account, instead of holding over Ms. Iglesias's request for further consideration, as it had done in October 2021, the TEC decided in January 2022 that she would be referred for surgical consideration approximately one month after arrival at the Miami RRC, so long as her adjustment was adequate to show that she could maintain her placement there. *See* Feb. 22 Tr. at 23, 25-26; McLearen Decl. (Doc. 191-2) ¶¶ 4, 6, 9, 13.

22. The difference between the TEC's October 2021 and January 2022 decisions is not just semantic. Under the October 2021 decision to re-evaluate Ms. Iglesias in April 2022, the TEC would have had to meet again to consider Ms. Iglesias's request for surgery, and a new decision (a favorable decision) would have been required, before she could be referred for a surgical consultation. *See* Transgender Offender Manual, § 9 at 9. In contrast, under the January 2022 decision, no further evaluation or decision by the TEC was required for her initial referral or (barring the unforeseen) for medically necessary and appropriate GCS surgeries to proceed. In fact,

if sufficiently serious contra-indications had arisen by April 2022 necessitating that surgery not go forward (such as an inability to maintain placement at the RRC), the TEC would have had to meet again to reconsider Ms. Iglesias's case, and rescind its prior decision authorizing her referral.

23. The difference between the TEC's October 2021 and January 2022 decisions is also illustrated by events as they have unfolded. Ms. Iglesias has now had two consultations with two surgeons for gender-confirming surgery. She had an initial consultation with Surgeon One on April 7, 2022, to discuss a range of available gender-confirmation surgeries, including specifically a series of facial-feminization and breast-augmentation surgeries, and received a CT-scan on May 31, 2022, in preparation for the first of two facial-feminization procedures. Ms. Iglesias is scheduled to receive the first such procedure on August 23, 2022. Ms. Iglesias also had an initial tele-health consult with Surgeon Two on May 5, 2022, to discuss vaginoplasty, and we anticipate that Surgeon Two's staff will schedule an in-person consult once they have completed work related to contractual and logistical issues. Because of the consideration the TEC gave to Ms. Iglesias's request in January 2022, and the decision it reached, no further evaluation or decision-making by the TEC was necessary for BOP to authorize these consults, or (barring the unforeseen) any medically necessary and appropriate surgical procedures to follow.

24. I understand that the Court nevertheless believes that the TEC did not evaluate Ms. Iglesias's request for GCS because in January 2022 it recommended only that she be referred for consultation with a surgeon, leaving it to the surgeon to decide what procedures are medically necessary and appropriate for her. Mem. & Order at 9-10. As I discuss below, however, in January 2022, after evaluating Ms. Iglesias's request for GCS, the TEC made the only type of decision it is authorized, and qualified, to make, and the only type of decision it has ever made when presented with a transgender inmate's request for GCS. The TEC's evaluation did not itself include a decision

or direction, as a medical matter, that Ms. Iglesias should receive gender-confirming surgery as that is not the TEC's function, nor is it a decision the TEC is equipped to make.

25. The TEC is constituted under authority of the Transgender Offender Manual, § 3(a)(5), at 4, as BOP's "official decision-making body on all issues affecting [BOP's] transgender population," with authority "to offer advice and guidance on unique measures related to treatment and management needs of transgender inmates[.]" With regard, specifically, to requests by transgender inmates for GCS, the TEC is the body authorized to "determine that all milestones and individual goals for surgical consideration have been met." *Id.* § 9, at 9. If the TEC makes such a determination, then in the case of an inmate housed in a secure BOP facility, the request "is referred to the [BOP] Medical Director for medical consideration," and it is then the Medical Director who "determine[s] if the surgery is medically appropriate for referral to a gender affirming surgeon." *Id.* (Section 3(a)(2) of the Transgender Offender Manual, at 4, correspondingly provides that the BOP Medical Director "receives referrals from the TEC and determines whether gender affirming surgery requests will be referred to a surgeon.") This is precisely the type of decision the TEC made in October 2021, when for the first time it approved another inmate's request for GCS: it made a referral to the Medical Director for surgical "consideration." Transgender Offender Manual § 9 at 9. It did not purport to decide or direct, as a clinical matter, that it was medically necessary and appropriate to perform gender-confirming surgery on that inmate. That determination was the responsibility of the BOP Medical Director and the provider(s) to whom the Director might refer that inmate.

26. Similarly, "treatment decisions for inmates in community custody," that is, for inmates located in RRCs, "are made by the Residential Reentry Management Branch" of the Reentry Services Division, under my direction, "in consultation with the TEC." Transgender Offender Manual § 16, at 13. Consistent with this allocation of authority for inmates in a community setting, the TEC

recommended in January 2022 that the Residential Reentry Management Branch refer Ms. Iglesias to an outside surgeon to determine the medical necessity of treating her with GCS (absent contra-indications) in approximately mid-April 2022, instead of referring her to the Medical Director.

27. In short, while it is true that a BOP inmate cannot obtain GCS without the TEC's approval, under the authority conferred on the TEC by the Transgender Offender Manual, the TEC can only recommend to the Medical Director, or, as done here for Ms. Iglesias, to the Residential Reentry Management Branch, that an inmate seeking GCS be referred to an appropriate medical professional for surgical consultation, based on the TEC's assessment that the inmate has achieved certain milestones in their transition, and met certain requirements, such as twelve months' residence in a gender-confirming facility. The TEC does not now have, and has never had, authority to decide as a medical matter that an inmate should undergo any surgical procedure of any kind.

28. In addition to a lack of authority to make medical decisions regarding transgender inmates' treatment, the TEC also does not include treating physicians (other than a psychiatrist) or surgeons. The Transgender Offender Manual directs that the TEC consist of senior-level staff from (1) the Women and Special Populations Branch, and the Psychology Services Branch, of the Reentry Services Division; (2) the Designation and Sentence Computation Center (DSCC), within the Correctional Programs Division; and (3) the Health Services Division. Transgender Offender Manual, § 3(a)(5) at 4. As a result, the TEC is composed of staff with diverse specialty areas, commensurate with the wide variety of issues the TEC must be prepared to address concerning BOP's transgender population, but the TEC as currently constituted does not include treating physicians (other than the psychiatrist) or surgeons, and that was true in January 2022. In January 2022, when the TEC last considered Ms. Iglesias's request for GCS, the TEC's members included two psychologists, one psychiatrist, a pharmacist, and BOP designations (facility placement) experts.

See id.; Nov. 22 Tr. at 130:6-22, 151:3-8, 158:21-159:19. None of the individuals serving on the TEC at that time (other than the psychiatrist) was a physician or surgeon.

29. Moreover, because BOP does not at this time employ surgeons on its medical staff who are capable of performing GCS, and must contract with outside surgeons to arrange GCS for its transgender inmates, neither the TEC nor anyone else at BOP can direct a surgeon to perform GCS on a particular patient, or decide for that surgeon which specific procedures to perform. Any surgeon to whom BOP might refer an inmate would exercise independent discretion to accept that individual as a patient or not, and independent medical judgment in deciding what surgical procedures to perform. BOP does not control such decisions. Under no set of circumstances, therefore, could the TEC have purported to decide that it was medically appropriate for Ms. Iglesias to undergo GCS, or specific gender-confirming surgical procedures, or to direct any medical professional within or outside BOP to perform particular GCS procedures on her. Given the limits of the TEC's authority and expertise, the most it can do when it considers an inmate's request for GCS is to recommend that the inmate be referred to a qualified surgeon for a consultation, if appropriate. And that is what the TEC recommended in Ms. Iglesias's case in January 2022.

30. Given the TEC's assigned role, when we received the Court's December 27 injunction directing the TEC to evaluate Ms. Iglesias's request for GCS by January 24, 2022, we understood the Court to require the TEC to consider and make a recommendation regarding her request in the same manner as it would any other such request. Based on that understanding, the TEC evaluated Ms. Iglesias's request in light of the facts and circumstances presented at that time, and made a recommendation that has allowed her to consult with two surgeons and begin preparations for medically necessary gender-confirming procedures. In so doing, we believed we had done what the Court required of us. If I had understood the Court's December 27 injunction to require the TEC

to exercise authority it does not possess, or to reach medical judgments that it is not qualified to make, I would have sought clarification through counsel.

B. The TEC's Arrival at a Decision Regarding Ms. Iglesias's Request

31. The Court's Memorandum and Order next states that in January 2022 the TEC did not make, but delayed, a decision regarding Ms. Iglesias's request for GCS, because it recommended that she "be referred to a surgeon for consultation for GCS approximately one month after" her placement in an RRC, "assuming she does not engage in behavior that would prevent her from continued placement in a female facility and assuming further that no other reasons develop that would make gender confirmation surgery inappropriate for [her]." Mem. & Order at 10-11; *see* McLearen Decl. (Doc. 183-1) ¶ 6. For reasons already explained above, in January 2022 the TEC in fact made a decision in favor of Ms. Iglesias's request, a decision that has made it possible since then for her to consult with two GCS surgeons, and to schedule further appointments with them in anticipation of and preparation for gender-confirming procedures.

32. As discussed above, in October 2021 the TEC decided only that it would reconsider Ms. Iglesias's request following her transfer to the RRC, thus necessitating a further meeting and decision by the TEC before her surgery could be authorized. But in January 2022 the TEC, as noted, recommended that Ms. Iglesias be referred for surgery one month following her transfer to the RRC absent certain contra-indications. That decision provided the necessary authorization to refer Ms. Iglesias to two separate surgeons to consult about and begin preparations for various GCS procedures, including vaginoplasty, without any further action needed by the TEC. Accordingly, the TEC's action in January 2022 was a decision on Ms. Iglesias's request, under which her referral for surgery was authorized and preparations in anticipation of her surgery are now being made, and, as noted above, her first facial-feminization procedure is scheduled for August 23.

33. The Court's Memorandum and Order emphasizes that the unambiguous purpose of the December 27 preliminary injunction was to avoid delay in the TEC's decision regarding Ms. Iglesias's request. Mem. & Order at 11. As both Dr. Leukefeld and I have previously testified, the TEC did not make its January 2022 decision with any purpose to delay Ms. Iglesias's surgery.

34. In prior declarations and testimony I have previously explained the reasons for the TEC's decision to refer Ms. Iglesias for gender-confirming surgery one month following her placement at the Miami RRC. First was the BOP policy that GCS is generally considered for persons in BOP custody "only after one year of clear conduct and compliance with mental health, medical, and programming services at [a] gender affirming facility." Transgender Offender Manual, § 9 at 9; *see also* McLearen Decl. (Doc. 183-1) ¶¶ 6-7. The twelve-month requirement serves crucial correctional objectives by allowing BOP to evaluate whether an inmate can be housed safely in a gender-confirming facility prior to conducting irreversible gender-confirming surgery. *Id.* ¶ 8. This requirement was particularly important in Ms. Iglesias's case, given her prior difficulties in adjusting to living with female peers in a correctional setting. *See id.* ¶ 12.

35. The second consideration was continuity of care—that it was more prudent for the welfare of the patient, Ms. Iglesias, to begin and complete the entire course of procedures involved in GCS, including pre-operative preparations, post-operative care, and psycho-social counseling, with a single team of physicians and mental-health care professionals, rather than begin the process with one set of providers (while she still remained in FMC Carswell, in Fort Worth) and complete it with another set of providers following her transfer to the Miami RRC. Feb. 22 Tr. 23:18-24:15; McLearen Decl. (Doc. 191-2) ¶¶ 16, 18; McLearen Decl. (Doc. 183-1) ¶ 10.

36. The final consideration that informed the TEC's January 2022 decision was that referring Ms. Iglesias for a surgical consult after her transfer from FMC Carswell to the Miami RRC meant that she could be referred directly to a surgeon (or surgeons) for consultation without having

to undergo the potentially time-consuming step of referring her first to the BOP Medical Director for a medical evaluation of her request. *See* McLearen Decl. (Doc. 183-1) ¶ 11. The members of the TEC anticipated, therefore, that making the referral after Ms. Iglesias's transfer to the RRC would allow for a more streamlined process that might expedite her surgery. *Id.*; *see* Feb. 22 Tr. 24:16-25:6, 67:23-68:6; McLearen Decl. (Doc. 191-2) ¶ 17.

37. None of the considerations that informed the TEC's January 2022 recommendation was in any way intended to delay Ms. Iglesias's care. To the contrary, the expectation was that referring her for surgery after her relocation to the Miami RRC might accelerate her treatment by eliminating the intermediate step of referral to the BOP Medical Director. And further to that end, the TEC decided that only one month of adjustment at the RRC would be necessary before a surgical referral could be made, even though that meant Ms. Iglesias would spend only eleven months in a gender-confirming facility before the referral was made, not twelve, as is generally required by the Transgender Offender Manual.⁴

38. Dr. Leukefeld and I have repeatedly sought in prior declarations and testimony to assure the Court that the TEC has never made a decision concerning Ms. Iglesias because it wanted to delay her receipt of appropriate physical or mental-health care. We sought only to provide her with the most appropriate care that BOP, as an agency, is capable of offering, while still taking procurement laws and correctional considerations, including Ms. Iglesias's adjustment back into society, into account. I regret any misunderstandings in this matter that have left the Court with doubts about the sincerity of BOP's intentions. This is especially true as BOP has put an extraordinary amount of time, effort, and resources into ensuring Ms. Iglesias receives proper

⁴ Ultimately, Ms. Iglesias spent just over 10 months in female facilities before being seen for GCS consultation. She arrived at FMC Carswell on May 25, 2021, and was seen by Surgeon One on April 7, 2022.

treatment. But I wish to assure the Court again that the TEC acted with no intent to delay Ms. Iglesias's receipt of needed care when it made its January 2022 decision.

C. BOP's Efforts to Comply With the Court's December 27 Injunction

39. The Court's Memorandum and Order next states that BOP did not act reasonably and diligently to comply with the Court's December 27 preliminary injunction, because the TEC did not meet to evaluate Ms. Iglesias's request for gender-confirming surgery until the January 24, 2022, deadline. Mem. & Order at 12. Although the TEC did not meet as directed until the last day allowed under the Court's order, I believe that the TEC acted responsibly to evaluate Ms. Iglesias's request as the Court had directed.

40. We were surprised, however, at the order to have a court reporter attend and transcribe the TEC's meeting. As I explained in my January 14, 2022, declaration in support Defendants' Expedited Motion for Partial Reconsideration of the Court's Preliminary Injunction Order (Doc. 178), when BOP staff seek the TEC's input on the needs of individual transgender inmates, such as health care, psychological care, housing assignments, and others, the TEC depends on full and open discussion and collaboration among its members in formulating the best possible recommendations. An expectation that members' thoughts, opinions, and recommendations expressed during a TEC meeting would be transcribed and publicly disclosed could deter TEC members from sharing their frank observations, analyses, and recommendations, and compromise the TEC's ability to develop thoroughly considered and soundly based recommendations. *See* McLearen Decl. (Doc. 178-1) ¶¶ 6-11.

41. These concerns led to a period of time during which BOP conferred with its DOJ counsel about the court-reporter requirement and what steps, if any, could be taken to have it lifted. These deliberations culminated in the preparation and filing of Defendants' motion for reconsideration on January 14, 2022. As the Court is aware, the motion asked that BOP be relieved

of the requirement in the December 27 injunction to schedule a certified court reporter to be present at the TEC's meeting, and provide a transcript of the meeting to the Court. It was not feasible to schedule the TEC meeting before the Court ruled on the motion, because until the Court ruled we would have no way of knowing whether we had to conduct the meeting in the presence of a court reporter or not.

42. In the end, the Court granted Defendants' motion for reconsideration, and lifted the injunction's court-reporter requirement, on Wednesday, January 19, 2022. As a result, only two business days passed thereafter before the TEC met, on Monday, January 24, 2022, and issued its decision concerning Ms. Iglesias's request. By the time the Court lifted the injunction's court-reporter requirement, it would have been impractical to reschedule the TEC meeting for an earlier date.

43. The Memorandum and Order also expresses concern that BOP delayed the TEC's decision by not reporting it to the Court within two days (by January 26, 2022), as required under the December 27 injunction if the TEC recommended Ms. Iglesias for GCS, and instead reporting the decision to the Court in seven days (on January 31) as directed under by the injunction if the TEC did not recommend Ms. Iglesias for GCS.

44. The decision to report the TEC's recommendation to the Court on January 31 rather than January 26 was not motivated by any purpose of delay. I was not personally involved in the decision, as it was largely made by DOJ and agency counsel. I have been advised that DOJ counsel concluded (as they have explained in their own prior declarations) that the TEC's recommendation did not constitute an unequivocal recommendation for immediate surgery, as contemplated by the injunction's first set of reporting requirements, and therefore that following the first set of requirements could have been misleading by suggesting that the TEC had made an unequivocal and/or immediate recommendation. I also have been advised that DOJ counsel decided that the

more forthcoming approach would be to follow the injunction's second set of instructions, which required BOP "to explain[] all the reasons for the TEC's decision," Doc. 177 at 3, even though the TEC had not recommended against GCS for Ms. Iglesias.

45. Not only were the decisions to meet on January 24 and to report to the Court on January 31 not motivated by considerations of delay, they did not, in fact, lead to any delay in the arrangements for Ms. Iglesias's surgery. As I explained in my February 14 declaration, BOP had already begun by then to develop a plan to provide Ms. Iglesias with GCS, and (through its medical-services contractor) had already contacted the surgeon (Surgeon One) who is now preparing to perform the facial-feminization and breast-augmentation surgeries desired by Ms. Iglesias. McLearen Decl. (Doc. 191-2) ¶ 20. Indeed, BOP first asked its contractor if it could identify a surgeon for a potential GCS consultation in the Miami area on January 14, 2022, ten days before TEC's meeting. *See* Decl. of William Robinson (Doc. 210-1) ¶ 19. The decisions to schedule the TEC's meeting on January 24 and to report the TEC's recommendation to the Court on January 31, rather than January 26, had no impact on and did not delay the process of identifying surgeons through BOP's contractor, and the commencement of other efforts to provide Ms. Iglesias necessary medical care.

* * *

46. To summarize, the TEC (i) evaluated Ms. Iglesias's request for gender-confirming surgery in light of the circumstances presented in January 2022, and the limits of its authority and expertise; (ii) without further delay, issued a favorable decision that authorized the preparations now underway for her GCS, without further action required of the TEC; and (iii) issued its decision and notified the Court within the deadlines set by the Court's injunction, as soon as it was practical under the circumstances to do so.

III. BOP'S REPRESENTATIONS AND ACTIONS REGARDING SURGEON ONE

47. The Court's Memorandum and Order next states that the Court is considering imposing sanctions against BOP based on: (i) representations that BOP's contractor had identified what it considered to be an "appropriate surgeon" (Surgeon One) to perform gender-confirming surgery for Ms. Iglesias, notwithstanding that BOP had not conducted a "formal analysis" of Surgeon One's qualifications; (ii) statements in a number of Defendants' weekly status reports that Ms. Iglesias had been referred to Surgeon One for GCS, even though Defendants were aware that Surgeon One does not personally perform vaginoplasties; and (iii) Defendants' decision to keep Ms. Iglesias's April 7 appointment for a consult with Surgeon One even after learning that Surgeon One refers patients out for vaginoplasty. Mem. & Order at 23-29.

48. I address each of these concerns below, but first wish to reiterate that neither I nor BOP has sought to mislead the Court, or Ms. Iglesias, concerning BOP's efforts to provide her with needed medical care. BOP staff, including myself, have had to arrange for a type of care that BOP has never provided before while navigating complicated contractual law and policy and meeting our obligations in fast-paced and complicated litigation. I do regret any misunderstandings that have resulted. It has always been my and BOP's intention to provide Ms. Iglesias with the treatment she requires for her gender dysphoria, including but not necessarily limited to vaginoplasty, as determined via consultations with those who have the expertise to decide on appropriate procedures, and notwithstanding the difficulties presented by procurement requirements, the limited number of available providers, and the novelty (at least to BOP) of the GCS process. Neither I nor BOP has ever sought to deceive the Court about its intentions, or misrepresent its efforts, regarding Ms. Iglesias's care.

A. Representations That Surgeon One Is an “Appropriate” Choice To Treat Ms. Iglesias

49. The Court first questions why “Defendants reported” on February 14, 2022, in Defendants’ Response to the Court’s February 10, 2022 Order to Show Cause (Doc. 191), and why I attested in my February 14 declaration (Doc. 191-2), “that an appropriate surgeon [for Ms. Iglesias] was located,” even though at that time I had “neither performed a formal analysis of [Surgeon One’s] qualifications nor knew how many past gender affirming bottom surgeries [Surgeon One] [had] performed[.]” Mem. & Order at 23-24.

50. Respectfully, I must observe that Defendants’ February 14 response to the Court’s February 10 show-cause order did not report for a fact that “an appropriate surgeon was located.” Defendants stated that BOP “had[d] been informed,” by its medical-services contractor “that the contractor ha[d] located an appropriate surgeon.” That statement was based on my February 14 declaration, in which I conveyed that BOP “ha[d] notified the contractor of [Ms.] Iglesias’s [then] pending transfer [to the Miami RRC] and ha[d] been informed they ha[d] located an appropriate surgeon.”

51. I did not presume to say that I or anyone else at BOP had made an independent determination that Surgeon One is in fact an appropriate choice to provide any particular procedure or service to treat Ms. Iglesias’s gender dysphoria. I did not do so precisely because, as the Court’s Memorandum and Order observes and as I testified, I had conducted no formal analysis of my own of Surgeon One’s qualifications, nor, not being a physician, would I consider myself qualified to make such an assessment. Instead, as I explained at the February 22 hearing, BOP has long provided health-care services for individuals residing in BOP RRCs, such as Ms. Iglesias, through a third-party contractor that provides or procures services for correctional systems. Under the terms of the contract, when an RRC resident requests or requires treatment, a service request is submitted to the contractor, which then identifies a provider they believe is appropriate for the presenting

problem. In Ms. Iglesias's case, involving a request for specialized care requiring the contractor to seek an out-of-network provider, it was expected that the contractor, upon identifying a provider it considered appropriate and who agreed (after consultation) to treat the patient, would submit a detailed service proposal for evaluation by BOP subject-matter experts (likely BOP medical experts, and the TEC), who would analyze it for consistency with best practices and industry standards of care, and vet any service providers identified.

52. However, when I submitted my declaration in support of Defendants' response to the February 10 show-cause order, none of these steps had yet occurred. Ms. Iglesias had not yet consulted with Surgeon One; Surgeon One had not yet agreed to accept Ms. Iglesias as a patient; Surgeon One and Ms. Iglesias had not yet worked out an overall treatment plan; and the contractor had not yet submitted a formal service proposal for examination by BOP's subject-matter experts. That being the case, neither I nor BOP was in a position to say, and so did not say, that Defendants had concluded that Surgeon One was "appropriate" for Ms. Iglesias. Rather, what I intended to convey was the contractor had located a surgeon in response to BOP's inquiry. To apprise the Court of our progress to that point, we informed the Court of what we knew at the time—that BOP's contractor had identified a surgeon that BOP understood the contractor believed was appropriate to meet the request for medical services that that we had communicated to it.

53. Moreover in mid-February the contractor, in response to various inquiries we had made about Surgeon One, the surgeon's availability, and requirements for a consult, sent us e-mails with conflicting information about the procedures that Surgeon One personally performs. To assess Surgeon One's qualifications to treat Ms. Iglesias we had asked the contractor to find out various pieces of information, including how many bottom surgeries Surgeon had performed, to which the contractor responded on February 11 "2-3 month." Several days later, on February 14, the

contractor passed along to us a further response from Surgeon One stating “We do not offer vaginoplasty yet.”

54. Although in mid-February BOP had not independently verified Surgeon One’s qualifications to treat Ms. Iglesias and had received conflicting information about the procedures Surgeon One personally performs, I believed then and continue to believe now that it was reasonable to inform the Court that BOP’s contractor had identified a surgeon that it considered an appropriate choice to meet with Ms. Iglesias, evaluate her request for surgery, and then recommend a range of medically necessary and appropriate procedures that Surgeon One either could perform personally or refer out to other surgeons. I believe this to be the case for a number of reasons.

55. First, BOP’s medical-services contractor has contracted with the agency for the acquisition of health-care services for inmates housed at BOP RRCs since 2016. BOP has worked with the same contractor in regard to acquisition of contract medical services, when needed, at all BOP correctional facilities and penitentiaries, for approximately twenty-two years. Over the course of this contractual relationship the contractor has developed a reputation within BOP of reliability and competence in meeting the diverse health-care requirements of BOP’s inmate population nationwide. To my knowledge, it has earned the respect and confidence of the BOP health-care specialists and management officials who are ultimately responsible for ensuring that the health-care needs of individuals in BOP custody are met. I do not believe that the contractor would jeopardize its relationship with BOP, place its reputation in the marketplace at risk, or compromise its professionalism, by advising BOP that it had identified a surgeon who could meet a patient’s health-care needs without a basis for saying so.

56. Second, the contractor did not simply identify Surgeon One as a potential provider, it enthusiastically recommended Surgeon One as a choice for Ms. Iglesias. The contractor pointed out that Surgeon One is affiliated with a large and highly regarded medical institution, which

presumably could provide access to an entire network of providers and a comprehensive array of medical resources to aid in Ms. Iglesias's treatment. Because of Surgeon One's institutional affiliation, it appeared that Surgeon One likely could act as a gateway for Ms. Iglesias to access a range of medical services that an individual practitioner might not be able to offer. It was, and is, my understanding that this type of referral is a typical practice among medical providers whose patients require treatment by an inter-disciplinary team of physicians. Even if there were certain GCS procedures that Surgeon One did not personally perform, those of us working at BOP to arrange for Ms. Iglesias's surgery were excited that the contractor had located what appeared to be such an encouraging option.

57. Third, when the contractor identified Surgeon One to us, I reviewed (for my own knowledge, not as any sort of formal review) Surgeon One's professional and educational background as posted on the website of the medical institution with which Surgeon One is associated. There it is stated that Surgeon One's

[REDACTED]

[REDACTED] This description of Surgeon One's professional qualifications as a GCS surgeon, posted on the website of the reputable medical institution where Surgeon One practices, including references to Surgeon One's interest in gender-confirming surgery on the pelvic

and genital regions, gave me further confidence in what the contractor had reported about Surgeon One.

58. Perhaps uppermost in my mind, however, was the fact that arranging a consultation for Ms. Iglesias with a qualified GCS surgeon was the essential first step in obtaining the medical treatment she required. Although Ms. Iglesias had made requests over the years for various types of gender-confirming surgery, including breast augmentation, facial feminization, penectomy, orchiectomy, and vaginoplasty, as a lay patient she simply was not in a position, any more than we on the TEC were, to make medical judgments about which of the wide range of available GCS procedures would be necessary and appropriate for her. Treatment is individualized to the unique clinical needs of a patient and medical providers are procured based on their medical specialty and skill level. It is not uncommon to have a medical provider refer the patient to another medical provider with a different skill set when the patient's needs are evolving or change during the course of treatment. Several consultations with providers of differing specialties may, in some cases, be necessary until there is a final plan. And even then, plans are continuously adjusted or adapted as clinically indicated. Therefore, it was essential that she consult with a medical professional with expertise in various types of gender-confirming surgery, who could evaluate her individual needs and desires, explain the range of treatment options available to a patient such as herself, review the pros and cons of each, and allow her then to make an informed decision about the specific procedures she wished to undergo. Once the surgeon and Ms. Iglesias together decided on an appropriate course of treatment, BOP would then be prepared to arrange and pay for the medically necessary and appropriate procedures involved.

59. BOP's thinking on this issue was informed by its experience over many years with inmates seeking treatment for complex medical conditions, such as, to take one illustrative example, those inmates who, having contracted breast cancer, requested mastectomies. Although these

inmates, upon learning of their diagnoses, initially desired mastectomies to treat their illness, mastectomy is not medically necessary in all cases of breast cancer. Depending on the individual, the size and nature of the tumor, and other factors such as metastasization, breast cancer can be treated by non-surgical means, such as radiation therapy, chemotherapy, hormonal therapy, and so on. Even where surgical intervention is required, lumpectomy presents a less radical alternative to mastectomy. In cases where BOP inmates have requested mastectomies, BOP has referred them to breast cancer specialists to consult about the range of treatment options available to them, help them make informed decisions about treatment plans appropriate to their clinical need, and arrange to secure the services of any additional specialists from various disciplines who might be needed to carry out the procedures included in that plan. Accordingly, there have been times when inmates who believed at the outset that they want or needed mastectomies instead opted for less drastic means of treating their conditions once they were fully informed of the options available to them. Those inmates who decided to get mastectomies still benefited from the opportunity to make informed decisions before undergoing such potentially life-changing surgery.

60. Because GCS, like the treatment of diseases such as breast cancer, involves multiple treatment options involving inter-disciplinary teams of providers, we considered it just as essential for Ms. Iglesias that she consult with a GCS surgeon qualified to inform her about the procedures that are medically necessary and appropriate for someone in her circumstances, counsel her about the advantages and disadvantages of the options available to her, and arrange for the involvement of additional medical specialists needed to perform any appropriate procedures that Ms. Iglesias might decide to undergo, including vaginoplasty. (Because BOP has never before provided an individual in its custody with GCS, we were learning information about these procedures through developments in Ms. Iglesias's case. So the need for expert medical opinion(s) was particularly acute here.) Based on what we had been told about Surgeon One's qualifications by BOP's contractor,

and learned from Surgeon One's webpage, Surgeon One was at the very least an appropriate surgeon with whom to begin this consultation process, notwithstanding the conflicting information we had received about whether Surgeon One personally performed vaginoplasty. Even if Surgeon One did not perform vaginoplasties yet, given the surgeon's affiliation with a large, extremely well-resourced medical institution, and our prior experience with inmates who required treatment by inter-disciplinary teams of doctors, we expected that Surgeon One could nevertheless enlist the aid—that is, refer Ms. Iglesias to—a GCS specialist who could perform that procedure for her.

61. In point of fact, in mid-February we had concluded that a face-to-face consult between Ms. Iglesias and the surgeon was the only effective way to resolve the conflicting pieces of information we had received about Surgeon One via our contractor. Procurement requirements dictated that all communications with Surgeon One be routed through our contractor, and all communications with our contractor had to be passed through BOP's Contracting Officer's Representative. As a result, attempting to obtain detailed information about Surgeon One turned into a frustrating game of telephone, in which communications with Surgeon One had to be passed from me or my staff (or DOJ counsel) to the contracting officer, to the contractor, to the surgeon, and then back, often leaving us with bits and snippets of information we could not readily verify or follow up on. The only way, we concluded, to guarantee a complete exchange of the information necessary for Surgeon One to make judgments about what services Surgeon One could provide (or arrange) for Ms. Iglesias, for Ms. Iglesias to make informed decisions about which of the available procedures she wished to undergo, and for BOP, finally, to reach a conclusion about Surgeon One's suitability to treat Ms. Iglesias, was for the two of them to meet face-to-face and find out if they could arrive at a mutually agreed-upon and appropriate plan of treatment that Surgeon One alone, or in collaboration with other GCS specialists, could bring to fruition.

62. I can appreciate the Court's concern that Defendants conveyed the contractor's view about Surgeon One's suitability when, as is now known, Surgeon One does not perform vaginoplasties. I assure the Court, though, that it was not BOP's intention, or mine, to mislead the Court about the gender-confirming procedures Surgeon One performs, or to mislead the Court about BOP's intention to refer Ms. Iglesias to another surgeon, or surgeons, for any medically necessary and appropriate procedures that Surgeon One does not perform. We understood the Court's deep concern that Ms. Iglesias receive GCS as soon as possible, and wished to apprise the Court of progress BOP had made in obtaining treatment for her. Although we now know for a fact that Surgeon One does not perform but refers out for vaginoplasties, and was not, as hoped, able to directly refer⁵ Ms. Iglesias to another surgeon to perform a vaginoplasty, in the end identifying Surgeon One represented genuine progress in obtaining needed care for Ms. Iglesias, as Surgeon One has agreed to perform certain GCS procedures that Ms. Iglesias desires, procedures that Surgeon One agrees will be helpful in treating Ms. Iglesias's gender dysphoria, and that are now being scheduled. And it should be noted that even after scheduling the consultation with Surgeon One, BOP continued to search for other surgeons, first in the Miami area, then more broadly in the surrounding Florida region, and finally reaching out to the Chicago-based surgeon identified by Ms. Iglesias's attorneys.

B. BOP Understood That Ms. Iglesias's Consult With Surgeon One Would Include Vaginoplasty.

63. The Court's Memorandum and Order next asks why Defendants continued to report that BOP had scheduled an appointment for Ms. Iglesias to consult with Surgeon One about

⁵ It should be noted that two of the surgeons that Surgeon One referred to appeared to be candidates for providing Ms. Iglesias vaginoplasty, but when BOP inquired one told BOP to ask again in approximately 35 days; and one advised they were not taking new vaginoplasty patients until approximately August.

“gender-confirmation surgery,” even after BOP reported on March 4, 2022, that Surgeon One does not personally perform vaginoplasty and instead refers patients to other providers for that procedure. Mem. & Order at 25-28. The Court also inquires why BOP did not state in its weekly reports until April 8, 2022, after Ms. Iglesias’s initial consult with Surgeon One, that Surgeon One refers patients out for vaginoplasty rather than performing that procedure.

64. Respectfully, BOP did not wait until April 8 to report that Surgeon One does not perform vaginoplasty. BOP first reported to the Court (and Ms. Iglesias) on March 4, 2022, “that Surgeon One refers patients to other providers for vaginoplasty and that the contractor would find out who those providers are.” That information, which was confirmed in a communication from the contractor on March 3, 2022, was contained in paragraph 6 of the March 4, 2022, Declaration of Jenna Epplin (Doc. 212-1), which was filed as an exhibit to Defendants’ Status Report (Doc. 212) also filed on that day. As noted above, although BOP had previously received conflicting information from its contractor about the procedures that Surgeon One personally performs, as soon as BOP received confirmation that Surgeon One personally would not provide vaginoplasty to Ms. Iglesias, but instead would refer her to other GCS specialists for that procedure, we informed the Court and Ms. Iglesias the following day.

65. Upon confirming that Surgeon One refers out for vaginoplasty, BOP continued to report that Ms. Iglesias had an appointment with Surgeon One to consult about GCS. It did so because BOP believes it was correct, and is still correct, to characterize the consultation as being about GCS. First, as the American Society of Plastic Surgeons (“ASPS”) has noted, GCS is typically “performed by a multispecialty team” of plastic surgeons. ASPS, Gender Affirmation Surgeries, <https://www.plasticsurgery.org/reconstructive-procedures/gender-affirmation-surgeries>. When the contractor informed BOP that it had identified a well-credentialed GCS surgeon associated with a large, well-resourced and highly respected medical institution, BOP believed that Surgeon One could

fill the role of assembling a team of providers, as needed, to ensure that Ms. Iglesias received the entire range of gender-confirming surgeries she needs, as would ordinarily occur with any complex, multi-part surgical procedures.

66. Second, and consistent with the views of the ASPS, the WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7 at 57 (2012) (“WPATH Standards of Care”), observes that an entire range of surgical procedures is available for male-to-female patients with gender dysphoria, such as Ms. Iglesias, including “[g]enital surgery: penectomy, orchiectomy, vaginoplasty, clitoroplasty, vulvoplasty,” “breast/chest surgery: augmentation mammoplasty (implants/ lipofilling),” and “nongenital, nonbreast surgical interventions,” such as “facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid-cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures.”

67. Based on these understandings, BOP believed that Ms. Iglesias’s scheduled appointment with Surgeon One was properly described in its status reports as a consult for GCS, for several reasons. First, as described above, even if Surgeon One could not personally perform all of the procedures Ms. Iglesias required, BOP believed Surgeon One could consult with Ms. Iglesias about the full range of surgical treatments available to her, including vaginoplasty; answer her questions about them, so that Ms. Iglesias could make informed decisions about which procedures to undergo; and develop a treatment plan including procedures that Surgeon One could perform (as Surgeon One now anticipates doing) as well as procedures, such as vaginoplasty, that other surgeons might perform. Second, because of Surgeon One’s institutional affiliation, BOP believed that Surgeon One could help refer Ms. Iglesias to, and help secure, another surgeon, or surgeons, to perform her vaginoplasty.

68. BOP was surprised, and disappointed—as I know Ms. Iglesias must have been—to hear that Surgeon One did not consult with her about vaginoplasty on April 7, in addition to facial feminization and breast augmentation. We were also disappointed that Surgeon One did not offer to contact other surgeons to arrange vaginoplasty for Ms. Iglesias, but instead simply provided a list of other GCS surgeons that she (or BOP’s contractor) might contact to obtain a vaginoplasty. Nevertheless, prior to the April 7 consult, BOP believed, for the reasons I have explained above, that Ms. Iglesias’s appointment with Surgeon One was appropriately considered a GCS consult. And because Ms. Iglesias in fact consulted with Surgeon One about procedures—facial feminization and breast augmentation—that Surgeon One is now preparing to perform for Ms. Iglesias as part of her gender transformation, BOP still believes it is accurate to refer to that appointment as a GCS consult.

69. The Court’s Memorandum and Order indicates its expectation that Ms. Iglesias would be referred for a vaginoplasty consult, pointing to the December 27 preliminary-injunction opinion where the Court explains that by “GCS” it meant “gender reassignment surgery or surgeries altering one’s reproductive organs.” Mem. & Order at 25. Although the clinical definition of GCS as understood by professional organizations including WPATH and ASPS is not limited to surgery involving the genital organs, WPATH Standards of Care at 57; <https://www.plasticsurgery.org/reconstructive-procedures/gender-affirmation-surgeries> (listing categories of transfeminine and transmasculine top, bottom, and facial surgeries), I assure the Court that at no time did BOP contemplate that Ms. Iglesias would not be referred for vaginoplasty, or would not receive that treatment if determined to be medically indicated. That is why, when Surgeon One provided BOP a list of other surgeons for Ms. Iglesias to consult with, BOP then continued to search for an available vaginoplastic surgeon for Ms. Iglesias, by (i) contacting (or re-contacting, in at least one case) Miami surgeons on the list Surgeon One gave to Ms. Iglesias, (ii) directing its contractor to expand its

search to the surrounding Florida area (within a 50-mile radius from the RRC where Ms. Iglesias resides), and (iii) arranging for Ms. Iglesias to consult with [and to be treated by] the Chicago-based surgeon identified by Ms. Iglesias's attorneys.

70. As noted, the Court also asks why BOP continued to pursue the April 7 consultation with Surgeon One when the agency "knew [Surgeon One] would only provide [Ms.] Iglesias with breast augmentation and facial feminization[.]" Mem. & Order at 28. As I explain below, it made sense to keep the April 7 appointment with Surgeon One, for at least three reasons.

71. First, as discussed, BOP believed it appropriate to proceed with Surgeon One because even if Surgeon One referred patients out for vaginoplasty, BOP anticipated that the April 7 consult would provide Ms. Iglesias with an opportunity to meet with a GCS specialist; to discuss and learn more about the entire array of GCS procedures potentially available to her; and then make informed decisions about the procedures she desires, regardless of whether Surgeon One performs personally or refers them out to other providers. As a result of the April 7 consult, Surgeon One has accepted Ms. Iglesias as a patient to perform certain procedures that Ms. Iglesias desires, and that apparently would be beneficial for her gender dysphoria, and we anticipate that Surgeon One will schedule further appointments with Ms. Iglesias in preparation for those procedures.

72. Second, for the reasons discussed, BOP believed that its contractor had identified Surgeon One as a provider who could coordinate Ms. Iglesias's care with other GCS surgeons and refer her directly to them as needed to ensure she received the medically necessary and appropriate treatment to meet her needs.

73. Third, BOP did not schedule and keep the April 7 appointment with Surgeon One to the exclusion of other efforts to locate a vaginoplastic surgeon for Ms. Iglesias. Even after the April 7 consult was scheduled, BOP continued its already ongoing search for other surgeons who might treat Ms. Iglesias. Through its contractor, BOP contacted three other Miami GCS surgeons

prior to the April consult, but the first two declined to accept Ms. Iglesias as a patient, and Ms. Iglesias declined to see the third, because (as I understand it) of a prior public controversy involving that provider. BOP then expanded its search to include the surrounding Florida region, although without success. Following the April 7 consult, BOP also reached out to three of the four surgeons on the list provided by Surgeon One. (BOP had already contacted the fourth surgeon previously, who declined to accept her as a patient.) BOP was advised that two of those three surgeons would not schedule an appointment for vaginoplasty at that time. The third surgeon's office initially set an appointment for an April 11 tele-health consult, but soon thereafter canceled it, explaining that they would not be scheduling vaginoplasties before the fall 2022.

74. Even before the April 7 consult, BOP also considered reaching out to the Chicago-based surgeon, Surgeon Two, recommended by Ms. Iglesias's counsel. However, sending Ms. Iglesias to Chicago for her surgery raised (and still raises) serious concerns about her successful reentry into society after her release. I was also informed by BOP contracting experts that referring Ms. Iglesias to a surgeon who had been identified by her counsel rather than BOP's medical-services contractor raised procurement issues, too, but I have been advised that those issues have been resolved through the parties' settlement and the Court's Stipulated Order. The main purpose of BOP residential reentry centers, such as the Miami RRC where Ms. Iglesias now resides, is to help inmates nearing the ends of their sentences learn life skills necessary for independent living, develop vocational skills, find employment, secure housing, and (re)build ties with their communities, so they can successfully reintegrate into that community. To do so RRCs offer an array of services such as skills training, employment counseling, job placement, mental-health services, and opportunities to nurture relationships with family and friends, all within a safe, structured, and supportive environment. This period of adjustment is especially critical for longtime inmates such as Ms. Iglesias, who has spent the bulk of her adult life in prison. And critical to the success of the reentry

process is continuity, without which an inmate may not adequately develop the skills, maintain the steady employment, or successfully nurture the relationships needed, to thrive in the community once released from the prison system.

75. BOP was therefore concerned (and remains concerned) that spending four-to-eight weeks in Chicago for surgery, pre-surgical procedures, and post-surgical recovery, would mean interrupting Ms. Iglesias's weekly mental-health counseling in Miami, could place her current employment at risk, impair her development of local social connections, and as a result reduce the chances of her successful return to society after her release. Nevertheless, once it became clear to us that there were no immediately available options for Ms. Iglesias to receive vaginoplasty in Florida, BOP requested that its contractor arrange a tele-health consult with Surgeon Two, which occurred on May 5, 2022, and we are now awaiting word from Surgeon Two's office as to when an in-person consultation for vaginoplasty can be scheduled.

76. Even if BOP had not expected the April 7 appointment with Surgeon One to include consultation about vaginoplasty, so long as BOP continued to make efforts to locate other potential surgeons who might perform vaginoplasty for Ms. Iglesias, it still would have made sense in the meantime to continue working with Surgeon One, to obtain other appropriate services that Surgeon One could offer. Keeping the appointment for the April 7 consult did not interfere with BOP's other search efforts. And canceling the April 7 consult could only have set back, not advanced, BOP's efforts to provide Ms. Iglesias with the full range of GCS procedures she needs. The benefits of keeping the April 7 appointment are now apparent, as Surgeon One has accepted Ms. Iglesias for facial feminization and breast augmentation surgery—procedures that are medically indicated and that Ms. Iglesias desires—and is making preparations in anticipation of conducting those procedures for Ms. Iglesias beginning on August 23, 2022, assuming there are no contraindications (such as Ms. Iglesias's potential gallbladder issue) at that time.

* * *

77. To summarize, BOP reported that it had been informed by its medical-services contractor that the contractor had located an appropriate surgeon to whom to refer Ms. Iglesias (i) because we wanted to apprise the Court of progress the agency had made in arranging for her treatment; (ii) because we believed it was reasonable to rely on the word of BOP's contractor, given its long record of professionalism and competence as a third-party provider of health-care services; (iii) because of additional information available to us about Surgeon One's qualifications; and (iv) because Surgeon One appeared qualified for the essential first step of consulting with Ms. Iglesias to make mutually informed decisions about the procedures she would undergo, and either to perform those procedures personally or arrange for other GCS specialists to do so. Similarly, we described Ms. Iglesias's April 7 appointment with Surgeon One as a consultation for gender-confirmation surgery, and decided to keep that appointment even after learning that Surgeon One does not perform vaginoplasties, because (i) we believed that Surgeon One could consult with Ms. Iglesias about a range of medically indicated GCS procedures available to her, including vaginoplasty; (ii) we expected that Surgeon One could offer to perform at least some of those procedures personally (as Surgeon One is now preparing to do), and make the necessary arrangements for other surgeons to perform any needed procedures, such as vaginoplasty, that Surgeon One does not perform; and (iii) keeping the April 7 appointment did not interfere with BOP's ongoing searches for other vaginoplastic surgeons to treat Ms. Iglesias, and nothing would be gained by canceling it. The objective of all of BOP's efforts was to obtain all medically necessary treatment for Ms. Iglesias, including vaginoplasty, and BOP did not seek at any time to mislead the Court about its intentions, or its efforts.

IV. THE COURT'S QUESTIONS ON PAGE 24 OF ITS MEMORANDUM AND ORDER

78. In this final section I address the list of questions posed by the Court on page 24 of its Memorandum and Order.

79. The first two questions ask, respectively, whether I was “relying on BOP’s contractor,” and/or on Surgeon One’s website, when I reported in my February 14 declaration (Doc. 183-1) that BOP’s contractor had located what it considered an “appropriate surgeon” to treat Ms. Iglesias. As discussed in paragraphs ____, above, the answer to both questions is yes. Again, to be precise, I did not state in my February 14 declaration that BOP itself had determined at that time that Surgeon One was an “appropriate” choice to treat Ms. Iglesias. In reliance on what we were told by the contractor, I stated only that the contractor had identified a surgeon whom it considered appropriate to meet the need for medical services that BOP had conveyed. I was careful to state only the view of the contractor, because BOP had not yet had the opportunity at that early stage to confirm the contractor’s conclusion independently.

80. As also explained above, and as I noted when I testified at the February 22, 2022, hearing, I reviewed Surgeon One’s qualifications as stated on the website of the medical institution where Surgeon One practices, which, together with the contractor’s long history of reliable performance for BOP, gave me sufficient confidence in the contractor’s conclusion regarding Surgeon One’s suitability to report it to the Court.

81. The third question on page 24 of the Memorandum and Order asks whether Surgeon One “misrepresented [their] ability to perform vaginoplasties . . . in any additional way beside the website[.]” I do not have reason to believe that Surgeon One has misrepresented their ability to perform vaginoplasties in any way, and, respectfully, I have no reason to believe that Surgeon One’s abilities are misrepresented on the website. The website states that Surgeon One’s [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] I do not view any of those statements as misrepresentative of Surgeon One’s abilities simply because Surgeon One refers patients out for vaginoplasty. As discussed, the term “gender-confirmation surgery” as understood clinically by WPATH and ASPS refers to a wide variety of gender-confirming procedures, including a number of genital surgeries other than vaginoplasty, such as penectomy, orchiectomy, clitoroplasty, and vulvoplasty. The fact that Surgeon One does not perform one of these procedures did not mean that Surgeon One is incapable of performing other so-called “bottom” surgeries, or that it is inaccurate to refer to Surgeon One as a GCS surgeon.

82. The Court’s fourth question on page 24 of the Memorandum and Order appears to ask whether March 3, 2022, was the first time that I or Defendants learned that Surgeon One does not perform vaginoplasties. As I discuss in paragraphs ____, above, March 3, 2022, was in fact the first time that we received confirmation from BOP’s contractor that Surgeon One refers out for vaginoplasty. But as I also discussed in paragraphs ____, above, between February 11 and 14, 2022, BOP received conflicting information from its contractor about the procedures Surgeon One does and does not perform—first, on February 11, an e-mail stating that Surgeon One performs 2-3 bottom surgeries a month, and second, on February 14, an e-mail stating “We do not offer vaginoplasty yet.”

83. These communications from the contractor in short snippets of information (rather than complete detail) and appeared somewhat conflicting to me. However, I had concerns that releasing too much information about the surgeon at that early stage of the contractor’s outreach to Surgeon One could result in accusations of sole-sourcing a contract in violation of the competitive-bidding requirements of the Competition in Contracting Act, and the Federal Acquisition Regulation. As I testified at the February 22 hearing, I am not a lawyer, and have at best only a basic

understanding of federal procurement requirements, which can be extraordinarily complex. But in late 2021, in another case involving a transgender inmate's request for GCS, Defendants, through counsel, sent correspondence to the inmate's counsel discussing a surgeon with whom a BOP official had spoken directly (without going through a contractor) about treating the plaintiff inmate. The letter caused alarm within BOP that it might create an appearance of illegally sole-sourcing a contract to perform surgery on that inmate, with potentially severe legal consequences for the officials involved. We were sternly advised by BOP procurement experts to avoid making statements in that case, and in this litigation, that "got out ahead" of the actual contracting process.

84. The legal concerns that the release of information in a letter from Defendants' counsel in the other transgender inmate's case had given rise to, combined with my own limited understanding of federal procurement laws, made me extremely anxious about making any statement or taking any action in this case that could lead to accusations that we were not following proper procurement procedures. I was very concerned that releasing detailed information about Surgeon One at so early a stage in the procurement process—before Surgeon One had even agreed to see Ms. Iglesias for an initial consultation—might violate, or appear to violate, federal procurement requirements. Not being a procurement expert, I did not know whether or not it would actually be unlawful to do so, but I was deeply worried that it might be. At the same time, I had no desire to conceal the uncertainty about the procedures Surgeon One performed; I only wanted to convey it in a way that was less likely (at least in my mind) to result in a violation, or perceived violation, of procurement requirements. With that objective in mind, several days after receiving the conflicting communications about Surgeon One, during a discussion with DOJ counsel in preparation for the February 22 show-cause hearing, I informed them that we had received conflicting communications from the contractor that had created uncertainty about the bottom surgeries that Surgeon One performs personally, and those that Surgeon One refers out.

85. At the time I genuinely did not appreciate the importance this piecemeal and sometimes confusing and potentially conflicting information might hold for the Court, Ms. Iglesias, or our DOJ counsel, because, as I explained above, uncertainty about which procedures Surgeon One performed or referred out was not a reason in my mind to reject Surgeon One at that early stage of BOP's effort to locate a surgeon, or surgeons, to treat Ms. Iglesias. In mid-February the most critical step in securing GCS of any type for Ms. Iglesias, was to arrange a one-on-one consultation with a GCS expert, during which Ms. Iglesias and the surgeon could make mutually informed decisions about a medically appropriate treatment plan, regardless of whether Surgeon One, or another provider, would perform her vaginoplasty. I tried my best to balance what I perceived to be the pertinence of the conflicting and incomplete information about Surgeon One with my concerns about federal contracting requirements. In hindsight, I realize that I could have more clearly made the information we had received about Surgeon One's capabilities available to our DOJ counsel and the Court, and I now fully understand the Court's concerns. I was also doing my best to maintain a surgical option for this patient. I am not a lawyer but was doing my abject best to manage this patient's care to the best of my abilities while trying to follow contractual law, policy requirements, and comply with requirements of the court.

86. I again wish to assure the Court, however, that I did not act with any intention to deceive. I had no intention of misleading the Court, or Ms. Iglesias, into believing that BOP was referring Ms. Iglesias for a vaginoplasty consultation when in fact it was not. Neither I nor BOP was engaged in any such ruse. In fact, just a short time after the February 22, 2022 hearing—seven business days—BOP asked its contractor to clarify whether Surgeon One refers out for vaginoplasty. When the contractor confirmed this fact, BOP promptly included it in Ms. Epplin's March 4, 2022 declaration. Our intention then, as now, was that Ms. Iglesias receive any medically

necessary and appropriate GCS procedure that she requires, and desires, including vaginoplasty, and I regret that our actions have led the Court to question otherwise.

87. The Court's fifth question asks why I stopped submitting declarations in support of Defendants' weekly status reports following the first of those reports, filed on February 25, 2022 (Doc. 204). As the Court is aware, beginning with the second of those reports, filed on March 4, 2022 (Doc. 212), BOP's supporting declarations have been submitted by Jenna Epplin, the National Policy and Program Coordinator (Transgender Inmates) for the Women and Special Populations Branch within the Reentry Services Division. I asked Ms. Epplin to take on this responsibility for several reasons, but, as I explain below, not because of any concern about the truth or accuracy of any declarations I had previously submitted, or testimony that I had previously given.

88. As noted above, I serve as Acting Assistant BOP Director in charge of the Reentry Services Division. The Division's mission is to prepare inmates for reentry into society by providing them opportunities for skills development, employment, and re-establishment of social connections, thereby reducing recidivism and improving public safety. As Acting Assistant Director, and a member of BOP's senior management team, I oversee approximately 85 programs, including numerous vocational programs and other activities designed to facilitate the successful transition of incarcerated men and women at 122 facilities into their communities upon release. I am responsible for administering an approximately \$1 billion annual budget, the supervision of over 200 BOP employees, and indirect oversight of thousands of contractor employees at more than 120 RRCs nationwide. Notwithstanding the breadth of my duties and responsibilities as Acting Assistant Director, I decided personally to submit declarations on BOP's behalf as the need arose at decisive moments in the case, such as on January 31, and again February 14, when the Court's December 27 injunction, and later its February 11 show-cause order, required Defendants to explain the reasons for the TEC's decision on Ms. Iglesias's request for surgery. I did so to demonstrate, by virtue of

the senior position that I hold, the level of BOP's commitment to providing Ms. Iglesias the medical treatment she needs.

89. However, after submitting the February 25 declaration in support of Defendants' first weekly status report, I determined that I could not reconcile devoting the time and attention required to prepare weekly declarations with my obligation to attend to the many other duties and responsibilities of my position. In addition, the declarations for Defendants' weekly status reports were not likely to be based on my personal knowledge, but information conveyed between the contractor and BOP personnel in the Residential Reentry Management Branch regarding efforts to arrange for Ms. Iglesias's GCS. I concluded for these reasons that it would make more sense to assign this task to the individual at BOP with daily responsibilities for managing the transgender population, and fewer pressing demands on her time, to execute the declarations for Defendants' weekly status reports (although I have continued to review drafts of the declarations before their submission). Ms. Epplin was the logical choice because, as National Policy Coordinator for the Women's and Special Populations Branch, she has overall responsibility for monitoring and providing guidance within the agency on all issues concerning BOP's transgender population, and ensuring that the needs of BOP's transgender inmates are met. She organizes and records TEC meetings, provides consultation on transgender matters to wardens and clinical staff, and engages regularly with stakeholders about transgender persons in BOP's custody.

90. Under paragraph 9 of the Court's Stipulated Order, in lieu of Defendants' weekly status reports the parties are now required to file joint status reports, every four weeks, updating the Court on significant developments related to Ms. Iglesias's surgeries. Mr. Gregg Fearday, Health Systems Specialist for the Residential Reentry Branch of the Reentry Services Division, submitted BOP's declaration in support of the parties' June 10, 2022, report (Docs. 274, 274-1), and will continue to do so for the additional reports to be filed. Mr. Fearday was assigned this responsibility instead of

Ms. Epplin because under the Stipulated Order the parties' status reports going forward seem most likely to involve updates on Ms. Iglesias's medical appointments. Tracking this information falls directly within the scope of Mr. Fearday's position.

91. Finally, the Court asks whether I remain personally involved in BOP's efforts to secure gender-confirmation surgery for Ms. Iglesias. The answer is yes. I did testify at the February 22 hearing that as Acting Assistant Director for Reentry Services I am not personally responsible for managing the day-to-day care of individual BOP inmates. That is the responsibility of the BOP clinical and contract staff assigned at individual BOP correctional facilities and RRCs. But Ms. Iglesias is a special case—likely the first individual to receive gender-confirming surgery under BOP's care. Therefore I have maintained, and will continue to maintain, oversight of the process by which BOP arranges for her care, to ensure that she receives the medical treatment she requires from qualified providers, and so that BOP continues to develop its understanding of the GCS process for the benefit of other BOP inmates who may require similar care in the future.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this ___1st___ day of July , 2022.

ALIX MCLEAREN Digitally signed by ALIX MCLEAREN
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DR. ALIX M. McLEAREN

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-NJR

DECLARATION OF JOHN ROBINSON

I, John Robinson, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a trial attorney in the Federal Programs Branch, an office within the Civil Division of the United States Department of Justice. I joined the Department of Justice in 2020. From 2016 to 2020, I was a Senior Associate at the Washington, D.C. office of Arnold & Porter. Earlier in my career, I clerked for the Hon. Joan B. Gottschall of the United States District Court for the Northern District of Illinois and the Hon. Rosemary S. Pooler of the United States Court of Appeals for the Second Circuit. I graduated from the University of Michigan Law School in 2012 and Yale University in 2009.

2. I previously provided declarations in this matter on February 14, 2022 (Doc. 191-6) and March 4, 2022 (Doc. 214-4). I am providing this declaration in response to the Court's April 18, 2022 Memorandum and Order (the "April 18 Order") (Doc. 238), and in support of Defendants' response to that order. Specifically, I address (i) Defendants' representations regarding efforts by the Federal Bureau of Prisons ("BOP") to secure a surgeon to provide gender-confirmation surgery for Plaintiff Cristina Iglesias, as set forth in seven of Defendants' Status Reports (Docs. 204, 212, 220, 221, 227, 229, and 231); (ii) my understanding as to why BOP continued to proceed with a consultation

with the surgeon referred to in those reports as “Surgeon 1” even after BOP learned that the surgeon refers patients to other providers for vaginoplasty; and (iii) other matters of concern to the Court raised in the April 18 Order.

3. Defendants first described BOP’s efforts to secure a surgeon in their February 14, 2022, response to the Court’s February 10, 2022, show-cause order (Doc. 187), where they stated that “BOP has notified its contractor of Iglesias’s pending transfer, and has been informed that the contractor has located an appropriate surgeon.” Doc. 191 at 3.¹ I believed that this statement was true for two main reasons.

4. First, the statement in Defendants’ February 14 filing was supported by a declaration from Dr. Alix McLearen that BOP had been informed by its medical-services contractor that “they [*i.e.*, the contractor] have located an appropriate surgeon.” McLearen Decl. ¶ 20 (Doc. 191-2). I did not participate in any communications between BOP and its contractor. However, I had no reason to believe that this statement was untrue. As a government attorney, I frequently must rely on declarations from agency witnesses when making factual representations to the Court. While I often discuss the contents of a declaration with agency counsel to ensure that I understand the factual assertions, I would generally presume that those assertions are true unless I had some reason to believe otherwise.

5. Second, I had no reason to doubt that BOP’s contractor would be capable of finding an “appropriate” surgeon for the gender-confirmation surgery sought by Ms. Iglesias. I never directly interacted with the contractor, but based on my conversations with BOP, I understood that the contractor had considerable experience in locating providers for individuals in BOP custody, including out-of-network providers for specialized treatment. I also understood that BOP had provided the

¹ Although I was not a signatory to Defendants’ February 14 response, I was substantially involved in preparing the response and stand behind the Government’s representations in that document.

contractor with Ms. Iglesias's medical records, which indicated that she was seeking gender-confirmation surgery. I understood that BOP was relying on the contractor's expertise to use those records to find a surgeon who was appropriate for Ms. Iglesias. Accordingly, at the time of Defendants' February 14 filing, I had no reason to question the statement that BOP's contractor had located what the contractor considered to be "an appropriate surgeon." However, as noted, I did not have firsthand knowledge of BOP's communications with the contractor or even know the surgeon's identity at the time of Defendants' February 14 filing.

6. The day after Defendants' February 14 filing, I learned the identity of the surgeon for the first time in connection with preparing for the upcoming February 22 show-cause hearing. Upon learning the surgeon's identity, I looked up their background and areas of expertise on the website of the medical institution with which they are affiliated. The information there further suggested to me that the surgeon was appropriate for Ms. Iglesias. Among other things, the website noted that the surgeon specializes in "[REDACTED]," listed as an area of their expertise "[REDACTED] [REDACTED] stated that the surgeon is [REDACTED] [REDACTED]," and described the surgeon's "[REDACTED] [REDACTED]" in the region. However, I was still ultimately relying on BOP, which I understood at that early stage to be relying on an initial assessment made by its contractor, as to whether the surgeon was, in fact, appropriate.

7. On February 18, 2022, Defendants filed a supplemental declaration from Dr. Alix McLearn, which further apprised the Court of developments regarding BOP's efforts to arrange gender-confirmation surgery for Plaintiff. Doc. 197-1. The declaration again stated that BOP had "been informed by [its] contractor that [the contractor] has located a surgeon to potentially perform Iglesias's gender-confirming surgery" *Id.* ¶ 2. The declaration noted that BOP had "sent the surgeon (via its contractor) the past two years of Iglesias's medical records to review" and was

“continu[ing] to work with [the] contractor to ascertain what additional information, if any, the surgeon requires in order to decide whether to accept Iglesias as a patient.” *Id.* ¶ 5. Again, I was relying on BOP (which I understood to be relying on its contractor) as to whether the surgeon was able to potentially perform gender-confirmation surgery for Ms. Iglesias in the event that the surgeon accepted Ms. Iglesias as a patient.

8. At the show-cause hearing on February 22, 2022, I conducted the direct examination of Dr. Alix McLearen. As part of the examination, I asked Dr. McLearen what steps BOP had taken to prepare for Ms. Iglesias’s referral to a surgeon. She explained that BOP had “provided medical records, about two years['] worth of patient history” to BOP’s contractor and “asked that a surgeon be secured.” 2/22/22 Hr’g Tr. 28:7–9. She further explained that BOP “[does’n]t reach out to the surgeon directly,” and instead relies on a contractor that is “like a medical referral service that . . . has almost a network of providers” and that the contractor was “attempting to secure [a] surgeon.” *Id.* at 29:8–22. Dr. McLearen also confirmed that the surgeon had Ms. Iglesias’s medical records and that BOP was waiting to hear whether the surgeon would accept Ms. Iglesias as a patient. *Id.*

9. On cross-examination, Dr. McLearen was asked whether she was personally representing that the surgeon was “appropriately qualified to be performing the surgery.” *Id.* at 75:2–5. Dr. McLearen clarified that she was not herself representing that the surgeon was appropriately qualified but instead was “representing that the contractor has identified somebody that they said is appropriate to perform the surgery.” *Id.* Counsel also asked whether BOP had “undertaken any analysis of whether th[e] surgeon is an appropriate surgeon.” *Id.* at 75:6–12. Dr. McLearen responded that she had not done any formal analysis but had “looked at the basic facts out of [her] own desire to know” and thought that the surgeon “appears to do this work and have credentials.” *Id.* She explained that she understood the surgeon “ha[s] a medical degree, . . . perform[s] these surgeries, and [is] WPATH-certified,” but acknowledged that she did not know “how many past gender-

affirming bottom surgeries” the surgeon had performed. *Id.* at 75:23–25; 76:1–3. As explained in the first declaration of William Robinson, BOP expected that its subject-matter experts would formally vet the surgeon after the initial consultation, once BOP had a service proposal form its contractor. *See* Decl. of W. Robinson ¶ 21 (Doc. 210-1).

10. I had no reason to believe that any statements in Dr. McLearen’s declarations or any part of Dr. McLearen’s testimony at the February 22 show-cause hearing was false or misleading. As noted above, I was relying on BOP and, in turn, BOP’s contractor, to determine whether the surgeon was an appropriate provider for Ms. Iglesias. I do not recall learning any information in preparing for the show-cause hearing that caused me to question whether the surgeon was an appropriate provider. I believe that the surgeon’s qualifications came up briefly during one meeting with BOP in advance of the show-cause hearing, and I believe Dr. McLearen stated during that meeting (as she stated at the show-cause hearing) that she had looked up the surgeon’s credentials on their website and that the surgeon appeared to be qualified but that she had not done any formal analysis of the appropriateness of the surgeon. I vaguely recall Dr. McLearen suggesting at this time that BOP was working to confirm that the surgeon performs bottom surgery. But I do not recall receiving any information that the surgeon did not perform vaginoplasty and referred patients out to other providers for vaginoplasty. In reviewing my emails from this time period, I now see that agency counsel made a comment in one document regarding a lack of clarity as to whether the surgeon performs vaginoplasty, but I do not recall reading this comment at the time.

11. Shortly after the February 22 show-cause hearing, the Court directed Defendants to file weekly status updates on contacts with the surgeon, the surgeon’s response, and any other developments relating to Ms. Iglesias’s care. Defendants filed their first such status report and accompanying declaration on February 25, 2022. Docs. 204, 204-1. In that status report, Defendants stated:

Through the attached Declaration of Dr. Alix McLearen, BOP reports that on February 24, 2022, BOP's contractor forwarded to BOP a message from the surgeon that the contractor had previously contacted about potentially providing gender confirmation surgery to Plaintiff. McLearen Decl. ¶ 5. A summary of that message is contained in the McLearen Declaration. *See id.* In short, the surgeon has not yet made a decision about whether she would accept Ms. Iglesias as a patient for surgery, but the surgeon appears to be open to potentially accepting Ms. Iglesias as a patient if certain requirements are satisfied. *See id.* The surgeon indicated that the surgery could feasibly be completed by December 2022. *Id.*

Doc. 204 at 1. Again, I believed that these statements were true and had ample factual support. Specifically, they were supported by a sworn declaration by Dr. McLearen, and I had no reason to believe that the representations in the declaration were untrue. The declaration noted, among other things, that “[t]he surgeon further indicated that if Ms. Iglesias only wants ‘bottom surgery,’ that could feasibly all be accomplished in the given time frame (i.e. by December 2022).” Doc. 204-1 ¶ 5. These communications from the surgeon seemed consistent to me with the contractor’s judgment that the surgeon was an appropriate provider for Ms. Iglesias. On March 2, 2022, I learned that the surgeon had scheduled an appointment for a consultation with Ms. Iglesias, which also suggested to me that the surgeon believed they were an appropriate provider.

12. On March 3, 2022, I received a draft declaration from BOP stating that, in response to a question about hair removal, BOP had been advised by BOP’s contractor that “the patient must be seen for evaluation before anything else is ordered.” *See* Doc. 212-1 ¶ 6. The declaration also stated that in connection with this same inquiry, BOP was advised that the surgeon “refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers were.” *Id.*

13. To the best of my recollection, this was the first time that I learned that the surgeon does not perform vaginoplasty. As discussed above, I vaguely recall one prior conversation in which Dr. McLearen suggested that BOP was working to confirm that the surgeon performs vaginoplasty, but I do not recall having any prior knowledge that the surgeon in fact referred patients out to other

providers for vaginoplasty. While I am now aware that on February 14, 2022, Surgeon 1 sent an email to BOP's contractor that they do not perform vaginoplasty, I was not made aware of its contents at that time and had not seen it until recently, when it was sent to me in connection with preparing Defendants' response to the Court's April 18 Order. As noted above, in addition to the fact that the contractor apparently considered the surgeon to be appropriate, I was reassured at that time by the fact that the surgeon, who had Ms. Iglesias's medical records, had continued to engage with BOP and scheduled a consultation with Ms. Iglesias. This further suggested to me that the surgeon believed that it would be appropriate for Ms. Iglesias to meet with them for a consultation.

14. When I learned on March 3, 2022, that the surgeon refers patients out to other providers for vaginoplasty, I do not recall viewing this as a significant setback or reason for BOP to cancel the appointment with the surgeon. In my mind, the statement that the surgeon "refers patients out to other providers" suggested that the surgeon could refer Ms. Iglesias directly, either to another member of the team at the medical institution where the surgeon practices, or to an outside provider. I had in mind the situation where, for example, a primary care physician refers a patient to a specialist, such as a cardiologist. In my experience, such a referral is usually a seamless process that involves the primary care physician arranging for the patient to see a specific specialist. I did not understand the statement to suggest that the surgeon would provide Ms. Iglesias with a list of names, and that after the consultation BOP and its contractor would be responsible for directly contacting the surgeons on the list to find out if they would accept Ms. Iglesias as a patient.

15. I also thought that BOP's intention to proceed with the April 7 consultation with the surgeon made sense because I expected that the surgeon could discuss gender-confirmation surgery with Ms. Iglesias generally and answer any questions that she may have. I expected that the surgeon could coordinate Ms. Iglesias's care and, as noted, arrange for her to see another surgeon for vaginoplasty. I also thought that it was reasonable for BOP to proceed with the surgeon because the

surgeon had scheduled the consultation with Ms. Iglesias, which, as noted, suggested to me that the surgeon believed a consultation was an appropriate next step.

16. In addition, while I understood that Ms. Iglesias has been primarily focused on obtaining vaginoplasty, I did not understand this to be the only procedure she was requesting. I knew, for example, that gender-confirmation surgery often involved both “top” and “bottom” surgeries, and I am aware from separate litigation that BOP has agreed to provide both top and bottom surgeries to at least one other individual in BOP custody. I also understand that Ms. Iglesias herself requested that BOP provide top surgery in 2019. The consultation with the surgeon provided Ms. Iglesias an opportunity to discuss these other procedures so that she could decide whether she wished to request them in connection with her request for gender-confirmation surgery.

17. At the same time, I knew that BOP was continuing its efforts to identify other potential surgeons who might perform gender-confirmation surgery for Ms. Iglesias, including vaginoplasty. For example, I learned on March 4, 2022, that BOP had been informed by its contractor that the contractor had found and scheduled an appointment for a consultation on March 23 with a second surgeon. Around this same time, I was aware that BOP’s contractor was continuing to look for appropriate surgeons in and around Miami. I also knew that BOP was evaluating whether it would be feasible to have the surgery performed in Chicago by the surgeon that Ms. Iglesias’s counsel had identified. Under these circumstances, it seemed reasonable to me for BOP to proceed with the appointment with the original Miami-based surgeon, even if they referred patients to other providers for vaginoplasty, while it was continuing to pursue other options.

18. On March 4, 2022, Defendants filed their second status report and accompanying BOP declaration. *See* Docs. 212, 212-1. The status report referred to the attached declaration and noted that the surgeon had scheduled an appointment for a consultation with Plaintiff for April 7, 2022 and that BOP planned to move forward with the appointment. Doc. 212. The declaration stated

that BOP had been advised that the surgeon “refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers are.” Doc. 212-1 ¶ 6. I regret that we did not also include this statement in the status report itself, which summarized the contents of the declaration. But there was no attempt to hide this information from Plaintiff or the Court. To the contrary, we disclosed it in a public filing the day after learning the information.

19. As the April 18 Order observes, our weekly status reports continued to refer to the appointment with the surgeon as a consultation for “gender confirmation surgery.” *See, e.g.*, Doc. 220. The Court’s April 18 Order questions why Defendants continued to use that term after Defendants knew the surgeon refers patients to other providers for vaginoplasty. I believed the use of this term was appropriate because I understood that the consultation *was* for gender confirmation surgery—a term that I understood to refer not only to vaginoplasty but to any of the multiple procedures that a transgender individual might undergo to obtain the physical characteristics that match their gender identity. *See, e.g.*, Defs.’ 4/15/2022 Status Report at 5, Doc. 237 (citing WPATH Standards of Care). Indeed, the surgeon’s record of the consultation with Ms. Iglesias also states [REDACTED]

[REDACTED] *See* Doc. 249-1 at 1 [REDACTED]
The record notes that Ms. Iglesias was [REDACTED] and that while [REDACTED]

[REDACTED] *Id.* at 1, 3. Under these circumstances, I do not think that it was inappropriate to refer to the consultation with the surgeon as a consultation for “gender confirmation surgery.” Indeed, I understand that after the April 7 consultation with the surgeon, Ms. Iglesias expressed an interest to BOP again in pursuing breast augmentation and facial feminization to help treat her gender dysphoria, as recommended by the surgeon. I understand that BOP is moving forward with coordinating with the surgeon to provide these procedures for Ms. Iglesias.

20. The Court's April 18 Order also questions why Defendants did not report that the surgeon refers patients to other providers for vaginoplasty in these subsequent status reports. As noted, we reported this information in Ms. Epplin's March 4 declaration. We did not report it again in future status reports because the information had already been disclosed, and we did not learn any new information until shortly after the April 7 appointment, when the surgeon again indicated that they would refer out for vaginoplasty and provided a list of potential providers.

21. In the April 18 Order, the Court notes that its preliminary-injunction opinion stated that "[f]or the purposes of this order, GCS refers to gender reassignment surgery or surgeries altering one's reproductive organs," Doc. 238 at 2 n.1, 25 (citing Doc. 176 at 1 n.1), and appears to suggest that it was inappropriate for BOP to proceed with a surgeon who referred patients to other providers for vaginoplasty. But I did not understand the term "gender-confirmation surgery" to mean vaginoplasty only. Rather, as noted, I understood that the term can refer both to surgeries that alter one's reproductive organs (such as vaginoplasty) and also to surgeries (such as facial feminization and breast augmentation) that do not alter one's reproductive organs.

22. In addition, while I understood that Ms. Iglesias has been primarily focused on obtaining vaginoplasty, I did not understand this to be the only procedure she was requesting. I knew, for example, that gender-confirmation surgery often involved both "top" and "bottom" surgeries, and, as noted above, I am aware from separate litigation that BOP has agreed to provide both top and bottom surgeries to at least one other individual in BOP custody. I also understand that Ms. Iglesias herself requested that BOP provide top surgery in 2019 and that, after the April 7 consultation with the surgeon, she expressed an interest to BOP again in pursuing breast augmentation and facial feminization to help treat her gender dysphoria, as recommended by the surgeon. I understand that BOP is moving forward with these procedures. Thus, for all these reasons, I believe that it was

appropriate to refer to the appointment with the surgeon as a consultation for gender confirmation surgery.

23. In addition to filing weekly status reports with the Court, my colleagues and I were also in regular contact with Ms. Iglesias's counsel about her care and BOP's search for a surgeon. On March 8, 2022, Ms. Iglesias's counsel requested more information on the criteria that BOP and its contractor were using to identify and evaluate surgeons for Ms. Iglesias. My colleagues and I conferred with BOP on counsel's request and responded with the information that was available to BOP at the time. I explained that the contractor had identified two surgeons after researching area providers and reaching out to board-certified surgeons and transgender-care clinics. I also provided the curriculum vitae of one of the surgeons and noted that information about the other surgeon's education, training, and patient satisfaction was available from their website. I did not explain again that the first of the two surgeons had informed BOP's contractor that they refer patients out for vaginoplasty because we had recently disclosed this information in our March 4 filing. In response to a follow-up email from Ms. Iglesias's counsel, I also made clear that we were not prohibiting Ms. Iglesias's counsel from contacting any of the surgeons that BOP had identified. We explained that we had designated the surgeon's name as confidential under the protective order to prevent it from appearing on the public docket, but that the protective order did not prohibit Plaintiff's counsel from contacting the surgeon.

24. On April 7, 2022, after the consultation with the surgeon, we had a call with Ms. Iglesias's counsel in which they expressed their concern and surprise that the surgeon advised Ms. Iglesias during the consultation that they do not perform vaginoplasties. I asked if Ms. Iglesias's counsel knew whether a referral for vaginoplasty was discussed during the consultation, as it was my understanding that the surgeon referred patients to other providers for vaginoplasty, as BOP had previously reported. They indicated that they did not believe such a referral was discussed. I asked if Ms. Iglesias's counsel had made an effort to contact the surgeon in advance of the appointment, and

they indicated that they had attempted to contact the surgeon but had been unable to get answers to their questions. I explained that BOP would need to review the medical record from the appointment before determining appropriate next steps but that my hope and expectation was that the surgeon would work with another provider either on their team or outside of their practice to coordinate Ms. Iglesias's care, so as to ensure that she received vaginoplasty before her release date in December 2022, which the surgeon had previously suggested was feasible.

25. Since the April 7 consultation, my DOJ and BOP colleagues and I have worked to ensure that Ms. Iglesias receives the surgery that she seeks as expeditiously as possible. In recent weeks, the parties have worked together to resolve this matter through a settlement agreement and stipulated order that ensure Ms. Iglesias will either receive the medical care she requires while she is in BOP custody or, if after her release from BOP custody, will receive the care she needs at no cost to her. I am very pleased that the parties were able to reach this mutually beneficial resolution.

26. At the same time, I continue to regret that the Court remains concerned with the Government's actions and representations in this case. As noted in my prior declarations, I consider it a great honor to represent the United States, and believe that honor places a corresponding obligation on Government attorneys to hold themselves to the highest standards of ethics, professionalism, and candor to the courts. As stated in my prior declarations, I do not believe that I or any of my colleagues in this matter have engaged in misconduct, attempted to mislead the Court, or taken any action to inappropriately delay Ms. Iglesias's receipt of health care she requires. While I am glad that we have been able to reach a resolution with Ms. Iglesias that guarantees her the care she needs, I am very sorry that we continued to cause the Court concern notwithstanding our best efforts to represent the Government's interests ethically and professionally in this difficult and important matter.



JOHN ROBINSON

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-NJR

Declaration of Daniel Schwei

I, Daniel Schwei, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am employed by the U.S. Department of Justice (DOJ) in the Civil Division's Federal Programs Branch. I currently serve as a Special Counsel, which is a Senior Level career civil-service position.

2. Since graduating from law school, I have spent my entire legal career in public service. I first clerked for a judge on the United States Court of Appeals for the Sixth Circuit, and then joined the Federal Programs Branch in October 2010 through the Attorney General's Honors Program. I have remained at the Federal Programs Branch since October 2010, except for a temporary seven-month detail in 2020 to the Federal Bureau of Investigation's Office of General Counsel.

3. As a career public servant who has served in the Federal Programs Branch across multiple Administrations, I consider it an honor and privilege to represent the United States. I take seriously the Department of Justice's ethos that our responsibility is not to obtain courtroom victories, but rather to pursue justice on behalf of the United States as a whole. For similar reasons,

I take seriously my duties as an attorney to act ethically, to comply with the rules of professional responsibility, to fulfill my duty of candor to opposing counsel and to the Court, and to comply with all court orders.

4. Because of the importance I place on acting ethically and professionally, I deeply regret that this case has caused the Court to doubt the Department of Justice's actions and candor. I believe I have acted ethically, professionally, and reasonably at all times in this case – and I believe the same of my DOJ colleagues. Based on my involvement in this case, I do not believe there is any basis to impose personal sanctions on any Department of Justice attorney. However, I acknowledge that there have been mistakes and miscommunications during the case. I do not believe that any of those mistakes or miscommunications were intentional or deliberate. Nonetheless, I wish to apologize for any negative impact that those mistakes and miscommunications have had on the Court and on Ms. Iglesias.

I. Summary of My Actions and Understanding Regarding Surgeon 1

5. I have consistently endeavored in this case to provide the Court (and Plaintiff) with accurate, timely, and complete information to the best of my ability based on the information that has been provided to me. I have been reliant on others to provide me with information concerning Ms. Iglesias's care and Surgeon 1, because I have not had any direct contact with any of Ms. Iglesias's potential medical providers (including Surgeon 1), nor have I had any direct contact with BOP's contractor responsible for arranging Ms. Iglesias's medical care. Instead, I have been required to rely on communications relayed to me indirectly, frequently with multiple layers in between (*e.g.*, Surgeon 1 communicating with the contractor, which in turn communicates with BOP, which then communicates with DOJ).

6. Prior to April 7, 2022, my understanding was that Surgeon 1 either personally performed vaginoplasties or at least evaluated and helped coordinate patients' requests for

vaginoplasties (and as of March 3-4, 2022, I believed the latter to be true). In particular, I believed that even if Surgeon 1 did not personally perform vaginoplasties, the initial consultation with Surgeon 1 would still involve discussion of the vaginoplasty procedure and would meaningfully advance arrangements for that procedure, because I believed Surgeon 1 was part of a broader team of doctors that provided comprehensive care for individuals seeking gender-affirming surgical procedures, and that Surgeon 1 was an “entry point” for an individual interested in obtaining care from that broader team. Thus, to the extent Surgeon 1 did not personally perform vaginoplasties, my understanding and expectation was that Surgeon 1 would provide a direct, seamless referral to a colleague who could perform the vaginoplasty for Ms. Iglesias.

7. Based on that understanding, I was surprised and concerned to learn on April 7, 2022, that Ms. Iglesias’s consultation with Surgeon 1 did not include any meaningful discussion of the vaginoplasty procedure. That was inconsistent with my understanding of the purpose of that consultation—*i.e.*, as being primarily in pursuit of a vaginoplasty.

8. In June 2022, in the course of the Government preparing its response to this Court’s most recent Order to Show Cause, Doc. 238, I learned for the first time that, on February 14, 2022, BOP received information from Surgeon 1 indicating “[w]e do not offer vaginoplasty yet.” That information was not provided to me at any point in time prior to June 2022. I also am not aware of any of my DOJ colleagues receiving that information until approximately the same timeframe.

9. Had I been aware of this information, I would have taken steps to ensure that this information was timely disclosed to the Court (and to Plaintiff), and would have advised BOP differently regarding their overall plan for Ms. Iglesias’s care. Unfortunately, I was simply unaware of this information during the relevant points in time. Instead, I believed the April 7 consultation would be a meaningful step towards obtaining a vaginoplasty and acted accordingly.

I believe my actions and understandings were reasonable, based on the information available to me at the time, although I very much regret that my understanding was mistaken and that the confusion surrounding the April 7 consultation was not avoided.

10. In the sections that follow, I discuss my actions and understandings in more detail, including at different moments in time.

II. Background on My Involvement in the Case

11. I first became aware of this case on February 10, 2022, after the Court issued its first Order to Show Cause regarding injunction compliance and certain representations made by attorneys in this case. *See* Doc. 187. Given that the Court's Order specifically named attorneys who had been working on this case as potential subjects of sanctions, *id.* at 6, my colleague James Gilligan and I were assigned to represent the United States' interests in connection with responding to the Court's Order to Show Cause. Mr. Gilligan had previously planned travel that made it difficult for him to attend the February 22, 2022 show cause hearing, so it was decided that I would be assigned to handle the February 22 hearing.

12. I entered my appearance in this case on February 14, 2022. Doc. 190. Later that night, I filed Defendants' Response to the Court's Order to Show Cause, which was accompanied by eight declarations. Doc. 191. On February 18, I filed a Notice along with a supplemental declaration from an attorney, Doc. 196, as well as a Notice and supplemental declaration from Dr. McLearen, Doc. 197. Following this Court's Notice and Order entered on February 21, 2022, Doc. 198, I also signed Defendants' Response to that Notice and Order, Doc. 199.

13. I attended the show cause hearing on February 22, 2022, during which I noted that I was assigned to "handl[e] issues related to the Court's Order to Show Cause." Tr. at 7. Following the February 22 hearing, the Court provided Defendants an opportunity to supplement their Response to the February 21 Notice and Order. *See* Doc. 200. On February 28 I filed a consent

motion for a 48-hour extension of the deadline for that filing, *see* Doc. 207, and on March 4 I filed Defendants' Supplemental Response to the Court's February 21, 2022 Notice and Order, Doc. 214. That supplemental response was a legal brief approximately 25 pages long, and was accompanied by four additional declarations and excerpts from a deposition transcript. *See id.*

14. Aside from the filings discussed above, I have not filed any other documents in this case. To my knowledge, my name has not appeared on the signature block for any other filings in this case. My communications with Plaintiff's counsel have also generally been limited to issues involving contempt and/or sanctions.¹

III. My Connection to the Filings Cited in the Court's Order to Show Cause

15. I have read the Court's Memorandum and Order dated April 18, 2022 (Doc. 238). In that Order, the Court directs that "DOJ attorneys are hereby ORDERED to SHOW CAUSE in writing on or before April 28, 2022, why sanctions should not be imposed." *Id.* at 30. I am one of the DOJ attorneys specifically ordered to appear and show cause why sanctions should not be imposed. *Id.* at 31.

16. The Court's Memorandum and Order notes that "[t]he Court and DOJ attorneys have spent a significant amount of time addressing the following events," and then lists seven specific events. *Id.* at 29. As discussed above, I was not involved in any of those seven events. Instead, my role was to represent the United States' interests in connection with the Court's first Order to Show Cause and February 21 Notice and Order surrounding those seven events.

¹ I was the primary attorney who handled discussions with Plaintiff's counsel in connection with negotiating a briefing schedule on their motion for a modified preliminary injunction. *Cf.* Doc. 213 at 1 n.1 (noting an agreed-upon briefing schedule). That was principally because, when Plaintiff's counsel first sought to meet-and-confer regarding their forthcoming motion, they initially planned to style it as a motion for sanctions against Defendants. I have frequently been copied on e-mails between Defendants' counsel and Plaintiff's counsel, but my own communications with Plaintiff's counsel have generally been limited to the topics of contempt and/or sanctions issues.

17. The Court's April 18 Memorandum and Order also directs:

DOJ attorneys are hereby ORDERED to SHOW CAUSE in writing on or before April 28, 2022, why sanctions should not be imposed. Specifically, the DOJ attorneys shall address their continued representations in Docs. 204, 212, 220, 221, 227, 229, and 231.

Doc. 238 at 30. I have reviewed each of the seven docket entries cited in the Court's Memorandum and Order, and confirmed that I did not submit any of those filings, nor does my name appear on the signature block for any of those filings.

18. I understand that, in general, the Court is concerned with Defendants' representations regarding Surgeon 1, given that Surgeon 1 does not personally perform vaginoplasties. I therefore address below my understanding at the relevant points in time with respect to Surgeon 1 and Plaintiff's request for a vaginoplasty.

IV. My Awareness of Surgeon 1 Not Personally Performing Vaginoplasties

19. As described above (in paragraphs 5-9), prior to Ms. Iglesias's initial consultation with Surgeon 1 on April 7, 2022, my understanding was that Surgeon 1 either performed vaginoplasties or at least helped coordinate patients' requests for vaginoplasties through direct, seamless referrals to other surgeons who could perform vaginoplasties (and my understanding was the latter as of March 3-4, 2022). Based on what I know now, my understanding regarding Surgeon 1 was incorrect. I genuinely regret that I had a misimpression of the facts. As discussed further below, however, I believe my understanding was at least reasonable, and therefore does not provide a basis for sanctions.

A. Time Period Surrounding February 22 Order to Show Cause Hearing

20. It is difficult for me to recall exactly what I knew about Surgeon 1 and when. As noted above, I first learned about this case and was assigned to it on February 10, 2022. I immediately needed to familiarize myself with the history of this case, assist in preparing a written

response to the Order to Show Cause (due four days later on February 14, 2022), and begin preparing for the hearing on February 22, 2022, during which two BOP officials would be called as witnesses. Thus, this time period was extremely intense and fast-moving, which makes it difficult to recall precise understandings at different moments in time.

21. My recollection is that sometime shortly after I was assigned to the case, likely on Friday, February 11, 2022, I first learned BOP had identified, through its contractor, a potential surgeon located in Florida (Surgeon 1). Dr. McLearn addressed the identification of this surgeon in her February 14 declaration, *see* Doc. 191-2 ¶ 20, and also in her supplemental declaration filed on February 18, 2022. *See* Doc. 197-1 ¶¶ 2-9. I believe I first learned the specific identity of Surgeon 1 on or about February 15, 2022.

22. During the week of February 14-18, 2022, my DOJ colleagues and I communicated frequently with BOP, both in writing and orally, regarding the filings mentioned in the prior paragraph as well as in preparation for the show cause hearing scheduled for February 22, 2022. At no point during this timeframe was I informed that BOP had received a communication from Surgeon 1 indicating that they do not offer vaginoplasty yet.

23. To the contrary, my understanding during this timeframe was that Surgeon 1 likely personally performed vaginoplasties. That procedure was the primary focus of the litigation at that time, and I believed, based on communications with BOP during the week of February 14-18, that BOP's efforts to locate a surgeon were specifically intended to address Ms. Iglesias's request for a vaginoplasty.

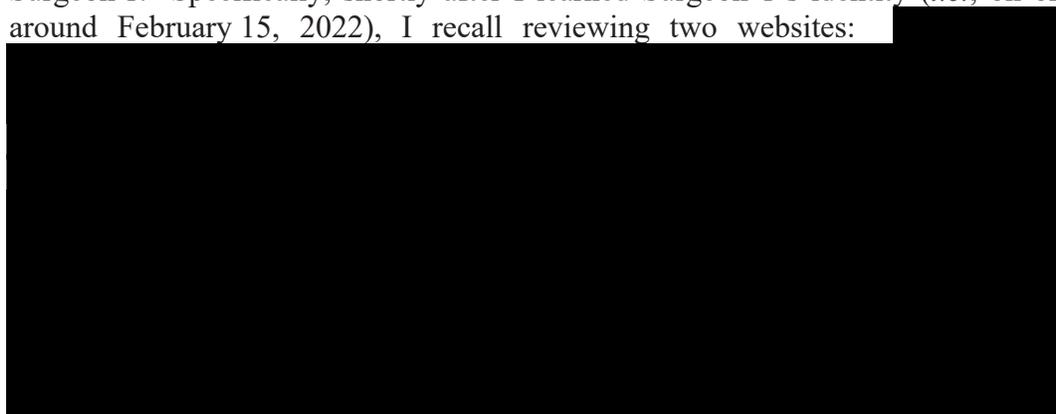
24. During this same timeframe, I understood from BOP that there was some uncertainty regarding the exact procedures Surgeon 1 would personally perform. (That is why, in the prior paragraph, I said that I believed Surgeon 1 "likely" personally performed vaginoplasties,

because I understood there to be some uncertainty on the question.) I recall Dr. McLearn mentioning this uncertainty during at least one conversation during the week of February 14-18 (in advance of the February 22 hearing), and I also received a written communication from BOP on February 18 noting the uncertainty. At the time, I understood this uncertainty to stem from the fact that BOP, through its contractor, had only received a limited amount of information about Surgeon 1 and Surgeon 1's qualifications, and BOP, through its contractor, was still in the process of trying to gain more such information. I also understood it to be very early in the overall process of arranging for Ms. Iglesias to become a potential patient of Surgeon 1. For all of these reasons, I understood BOP to be reluctant to state definitively that Surgeon 1 could personally perform *all* aspects of Ms. Iglesias's requested treatments. I do not recall anyone from BOP communicating that Surgeon 1 does not perform vaginoplasty, or that BOP had received any specific information to that effect.

25. Regardless, my understanding was that, even if Surgeon 1 did not personally perform certain aspects of Ms. Iglesias's requested treatment, Surgeon 1 operated as part of a broader team of professionals that provided comprehensive care for individuals seeking gender-affirming surgical procedures, and that BOP viewed Surgeon 1 as the "entry point" for an individual interested in obtaining care from that broader team of doctors. Thus, I understood that, to the extent Surgeon 1 did not personally perform vaginoplasties (and assuming Surgeon 1 accepted Ms. Iglesias as a patient), then Surgeon 1 would directly, seamlessly refer Ms. Iglesias to another doctor on Surgeon 1's team to perform the vaginoplasty. For that reason, I believed that pursuing treatment from Surgeon 1 would still be in pursuit of a vaginoplasty, notwithstanding the uncertainty as to whether Surgeon 1 would personally perform that procedure.

26. As noted, this understanding was based on information provided to me by BOP in connection with the two filings submitted on February 14 and 18, as well as during the course of our preparations for the February 22 hearing. Additionally, my understanding was based on and consistent with, among other things:

- a. Dr. McLearen's February 14 declaration, in which Dr. McLearen reported that BOP's medical-services contractor stated that "they have located an appropriate surgeon," Doc. 191-2 ¶ 20;
- b. Dr. McLearen's February 18 declaration, describing how "BOP has been informed by the contractor that it has located a surgeon to potentially perform Iglesias's gender-confirming surgery," Doc. 197-1 ¶ 2;
- c. Throughout this time, my understanding was that BOP's medical-services contractor was principally responsible for locating an appropriate medical provider (at least in the first instance, subject to BOP subject-matter experts later confirming the provider's qualifications). *See, e.g.*, Robinson Decl. (Doc. 210-1) ¶¶ 17-18. My understanding was that the contractor knew what procedures Ms. Iglesias was seeking (including, as relevant here, a vaginoplasty), and was familiar with locating appropriate medical providers and arranging for appropriate medical care. Thus, my understanding and expectation was that the contractor would identify surgeons capable of performing Ms. Iglesias's requested vaginoplasty, or at least surgeons who would be able to meaningfully coordinate Ms. Iglesias's request for a vaginoplasty. In my mind, the contractor was in the best position to evaluate (at least in the first instance) whether it had located an "appropriate surgeon" for Ms. Iglesias's requested vaginoplasty, consistent with its responsibilities under the contract. Once I learned that BOP was "informed [by the contractor] they have located an appropriate surgeon," Doc. 191-2 ¶ 20, I therefore believed it made sense for BOP to report that information to the Court, and I believed that information to be accurate based on my understanding of the contractor's role.
- d. My understanding was also consistent with informal research I performed regarding Surgeon 1. Specifically, shortly after I learned Surgeon 1's identity (*i.e.*, on or around February 15, 2022), I recall reviewing two websites:



These materials were consistent with my understanding that Surgeon 1 practiced as part of a broader team, and that the initial consultation with Surgeon 1 would help provide access to the full suite of providers, regardless of what procedures Surgeon 1 could personally perform.

- e. I am not an expert in transgender health care or the surgical procedures necessary for a vaginoplasty, and during this timeframe, I did not know whether a vaginoplasty constituted only a single procedure. Specifically, I thought that, in order to obtain a vaginoplasty, it might first be necessary to undergo other procedures (beyond just permanent hair removal) – for example, I thought that the testicles and/or penis might need to be removed prior to receiving the vaginoplasty itself. I was aware that removal of the testicles (orchiectomy) and penis (penectomy) were potential surgical interventions based on my review of the WPATH Standards of Care, but it was not clear to me whether these procedures were performed as part of a vaginoplasty, or were independent procedures that needed to be performed prior to a vaginoplasty. Thus, BOP’s reluctance to state definitively that Surgeon 1 would personally perform every aspect of Ms. Iglesias’s requested treatment made sense to me, because it seemed possible to me that there could be multiple steps towards achieving the vaginoplasty, requiring a team of multiple surgeons, and Surgeon 1 might participate in some of those procedures even if Surgeon 1 did not perform the vaginoplasty itself.

27. At the February 22 hearing, I believed and understood Dr. McLearen’s testimony to be consistent with my understanding about Surgeon 1 and Surgeon 1’s ability either to personally perform the vaginoplasty or seamlessly refer Ms. Iglesias to another doctor on Surgeon 1’s team who could perform the vaginoplasty. For example, Dr. McLearen stated that “the contractor has identified somebody that they said is appropriate to perform the surgery,” Feb. 22 Tr. at 75, and testified several times that BOP’s goal was to obtain comprehensive care from the team of providers affiliated with Surgeon 1. *See, e.g., id.* at 49 (“[W]e have explained we want this to be comprehensive. The first step would be actually meeting with this surgeon to understand what their team is willing to do, but that we would want everything to be included, and I have been informed that the contractor understands that.”); *see also id.* at 33, 100-01, 102.

28. That testimony (and other information received in this timeframe) informed and was consistent with my understanding – *i.e.*, that the appointment with Surgeon 1 was for the purpose of gaining access to the “team of surgeons” affiliated with Surgeon 1. I understood that

Surgeon 1 was simply “the identified surgeon” to “get in front of” in order to unlock access to the full “team of surgeons,” Feb. 22 Tr. at 101, and that team would include a surgeon who could perform vaginoplasty (even if that person was not Surgeon 1).²

29. Following the February 22 hearing, Defendants submitted their first weekly status report on February 25. *See* Doc. 204. In a declaration attached to that status report, Dr. McLearn reported that Surgeon 1 noted that two letters of support would be required “for any type of ‘bottom surgery,’” and that “if Ms. Iglesias only wants ‘bottom surgery’, that could feasibly all be accomplished in the given time frame (i.e. by December 2022).” Doc. 204-1 ¶ 5. I interpreted those statements as essentially confirming my understanding—that Surgeon 1 would either personally perform Ms. Iglesias’s vaginoplasty, or meaningfully coordinate Ms. Iglesias’s vaginoplasty—because I did not think Surgeon 1 would offer those opinions regarding vaginoplasty if Surgeon 1 did not intend to have at least some role in performing or arranging that procedure.

30. As noted above, at no point prior to April 7 was I informed that neither Surgeon 1 nor any member of Surgeon 1’s team was able to perform Ms. Iglesias’s vaginoplasty. Thus, I did not believe that there was any misrepresentation, inaccuracy, or other material omission made in any of the above-described testimony or filings submitted to the Court regarding Surgeon 1. Had

² Because I believed Surgeon 1 to be part of a broader team of providers, I understood that the consultation with Surgeon 1 might include discussion of other potential procedures in addition to vaginoplasty (*e.g.*, “top” procedures like breast augmentation and facial feminization). *Cf.* Feb. 22 Tr. at 62 (“The surgeon will be a recommender of what needs to come next. . . . So, while I am aware of what is likely to be needed, every case is different and I am giving that deference to the surgeon.”); *id.* at 102 (“[W]e are going to send you to a surgeon who’s an expert and they are going to decide what exactly is needed and how much and how long and work with their team.”). Nonetheless, my understanding at this time—and at every point prior to April 7—was that the initial consultation with Surgeon 1 would primarily be in pursuit of a vaginoplasty, since that was the procedure that was the focus of the litigation at the time.

I been aware of any such misrepresentations, inaccuracies, or material omissions, I would have taken steps to ensure that any errors were corrected and that the Court (and Ms. Iglesias) were given accurate information regarding Surgeon 1.

B. March 4 Status Report and Declaration

31. I do not recall with certainty when exactly I first learned that Surgeon 1 in fact does not personally perform vaginoplasties, but I am confident that it was sometime on March 3 or 4, 2022, in connection with my review of the Epplin declaration (or a draft of the Epplin declaration) that was filed at Doc. 212-1 as an attachment to Defendants' March 4 status report. Specifically, that declaration states: "BOP was also advised that Surgeon 1 refers patients out to other providers for vaginoplasty and was advised the contractor would find out who those providers are." Doc. 212-1 ¶ 6.

32. I cannot recall whether I read that sentence on March 3 or March 4 because, at that time, I was centrally focused on preparing Defendants' supplemental response to the Court's February 21 Notice and Order, which was also due on March 4, 2022. As noted above, that filing was directly related to my role in this case (representing the United States' interests in connection with potential contempt and/or sanctions issues), and that was a significant, time-consuming filing for my colleagues and me to prepare: the brief itself was 25 pages long, and the brief relied on four declarations (comprising over 30 pages), plus several pages of deposition testimony excerpts. *See* Docs. 214 through 214-6. I worked multiple late nights to prepare that filing, and that filing was my overriding focus at that time. Thus, my recollection of when I learned other facts during that timeframe is somewhat hazy.

33. Following my review of the March 4 Epplin declaration, my understanding regarding Surgeon 1's role evolved somewhat because at that point I understood that Surgeon 1 did not, in fact, personally perform vaginoplasties. Regardless, my overall understanding

continued to be that Surgeon 1 operated as part of a team of doctors, and Surgeon 1 was the “entry point” for that broader team of doctors who provided many different types of specialized medical care for transgender patients. Thus, even though Surgeon 1 did not personally perform vaginoplasties, my understanding was that an appointment with Surgeon 1 for an initial consultation was still a significant step towards obtaining a vaginoplasty for Ms. Iglesias – because the consultation with Surgeon 1 would essentially “unlock” access to other providers on Surgeon 1’s team, including a provider on the team who would perform a vaginoplasty. I believed that, if Surgeon 1 accepted Ms. Iglesias as a patient, the “referral” for a vaginoplasty would be direct and seamless – because the referral would be to another provider already affiliated with Surgeon 1 and Surgeon 1’s team.

34. Based on what I know now, the understanding described in the prior paragraph was incorrect. Based on the information available to me at the time, however, I believed then (and continue to believe now) that this understanding of Surgeon 1’s role made sense, for a variety of reasons:

- a. First, as noted above in paragraph 25, my initial understanding from the time period surrounding the February 22 show cause hearing was that Surgeon 1 operated as part of a broader team of doctors, and that BOP was seeking comprehensive care from that broader team, including with respect to a vaginoplasty for Ms. Iglesias. All of those same reasons (discussed above) continued to support my understanding regarding Surgeon 1 during this time period.
- b. Second, even when BOP’s contractor reported on March 3rd that Surgeon 1 did not personally perform vaginoplasties, I understood the contractor to still state that Ms. Iglesias should be “seen for evaluation” by Surgeon 1, at which point Surgeon 1 could advise on hair removal procedures necessary for a vaginoplasty – and assuming Surgeon 1 accepted Ms. Iglesias as a patient, “then the rest [of the procedures necessary for a vaginoplasty] can be entered”:

On March 3, 2022, in response to a question about hair removal, BOP was advised by BOP’s contractor that ‘the patient must be seen for evaluation before anything else is ordered.’ Specifically, once Surgeon 1 has determined that Ms. Iglesias ‘meets the clinical criteria and has accepted her then the rest can be entered.’

Mar. 4 Epplin Decl. (Doc. 212-1) ¶ 6. In other words, even while the contractor was reporting that Surgeon 1 did not perform vaginoplasties, I understood the contractor to also be saying that the necessary procedures for Ms. Iglesias’s vaginoplasty could be ordered after the consultation with Surgeon 1 if Surgeon 1 accepted Ms. Iglesias as a patient. *See also id.* ¶ 10 (“[T]he contractor indicated they would reach out to see who Surgeon 1 uses for hair removal [at the surgical site], for the sake of finding such a service consistent with Surgeon 1’s practice.”). I understood these statements to mean that the appointment with Surgeon 1 was still in pursuit of a vaginoplasty (potentially among other procedures), and that Ms. Iglesias’s vaginoplasty could be performed by Surgeon 1’s broader practice, even if Surgeon 1 would not personally perform the procedure.

Indeed, even after March 4, the consultation with Surgeon 1 continued to be linked with hair removal “at the surgical site.” *See, e.g.*, Apr. 1 Epplin Decl. (Doc. 231-1) ¶ 8 (“As Surgeon 1 has not yet accepted Ms. Iglesias as a patient, I have been advised BOP needs to provide Surgeon 1 adequate time after the April 7, 2022, consultation in which to make that determination and to provide a physician’s order that documents the medical necessity of hair removal at the surgical site[.]”). Because “hair removal at the surgical site” is relevant only in the context of the vaginoplasty procedure, I understood these statements to mean that BOP expected the consultation with Surgeon 1 to be in pursuit of a vaginoplasty (potentially among other procedures).

- c. Third, my understanding was further supported by other events after March 4, when I understood BOP’s position to be that the best way for Ms. Iglesias to obtain more information about vaginoplasty techniques, results, etc., would be for Ms. Iglesias to raise those questions with Surgeon 1 at the initial consultation. In my mind, BOP’s view that Ms. Iglesias should raise these issues at the consultation with Surgeon 1 re-affirmed to me, at least implicitly, that Surgeon 1 was expected to discuss vaginoplasties at the initial consultation with Ms. Iglesias in anticipation of potentially arranging a vaginoplasty for her, even if Surgeon 1 did not personally perform the procedure.
- d. Fourth, on a number of occasions throughout this time period, my DOJ colleagues and I discussed with BOP the issue of whether BOP should pursue a vaginoplasty from the Chicago-based surgeon identified by Plaintiff’s counsel. *See, e.g.*, Mar. 18 Epplin Decl. (Doc. 227-2) ¶ 6; Mar. 25 Epplin Decl. (Doc. 229-1) ¶ 9; Apr. 1 Epplin Decl. (Doc. 231-1) ¶ 6. Throughout these discussions, BOP’s position was that Surgeon 1 was preferable to the Chicago-based surgeon, because Surgeon 1 had been identified by the medical-services contractor and was located in Miami near Ms. Iglesias’s community placement. *Cf.* Mar. 18 Epplin Decl. (Doc. 227-2) ¶ 6 (stating that BOP was willing to consider “whether it might be feasible to have the surgery performed in Chicago *should Surgeon 1 not agree to accept Ms. Iglesias as a patient*” (emphasis added)). By preferring Surgeon 1 over the Chicago-based surgeon, I understood that to mean that BOP believed Surgeon 1 and the Chicago-based surgeon were both capable of providing vaginoplasties (or at least meaningfully arranging for that procedure through direct referrals).

- e. Fifth, throughout this same time period (both before and after March 4), my DOJ colleagues and I discussed with BOP the issue of obtaining two letters from mental health practitioners in support of Ms. Iglesias’s surgery. *See, e.g.*, Feb. 25 McLearen Decl. (Doc. 204-1) ¶¶ 5-6; Mar. 11 Epplin Decl. (Doc. 220-1) ¶ 9; Mar. 18 Epplin Decl. (Doc. 227-2) ¶ 10; Mar. 25 Epplin Decl. (Doc. 229-1) ¶ 7; Apr. 1 Epplin Decl. (Doc. 231-1) ¶ 10; Apr. 8 Epplin Decl. (Doc. 233-1) ¶ 8. I understood, based on my involvement in this case and my review of the WPATH Standards of Care, that two letters of support were required specifically for Ms. Iglesias’s requested vaginoplasty (her “bottom surgery”), but not for any potential “top” procedures (which required only one letter of support). Thus, I understood BOP’s preparation of two letters of support—specifically in advance of the April 7 initial consultation with Surgeon 1, *see* Doc. 220-1 ¶ 9—to be consistent with my understanding that the scheduled consultation with Surgeon 1 was in anticipation of a vaginoplasty (among other potential procedures).
- f. Sixth and finally, my understanding throughout this time – that an appointment with Surgeon 1 would help “unlock” access to other providers affiliated with Surgeon 1 – was informed by my own personal experiences obtaining specialized health care services. I have experienced situations where, once the patient is at an appointment with a specialist, the specialist is able to “refer” patients to their colleagues (providing other types of specialized care) and that referral is completely seamless and virtually automatic – sometimes as simple as walking down the hallway to the other specialist’s office. My own personal experiences with these direct, seamless referrals have been in the same type of environment in which Surgeon 1 practices [REDACTED]. For all of the reasons discussed above, my understanding was that the “referral” discussed in the March 4 Epplin declaration would be a direct, seamless linking with a surgeon who performs vaginoplasty – such that the initial consultation on April 7 would still be a significant, meaningful step towards Ms. Iglesias receiving a vaginoplasty.

35. In short, I knew based on the March 4 Epplin declaration that Surgeon 1 did not personally perform vaginoplasties, but I nonetheless still believed that the April 7 consultation with Surgeon 1 would be in pursuit of a vaginoplasty and would be a significant step towards obtaining that procedure. Based on the above, I believe my understanding was at least reasonable.

36. The Court’s April 18 Order to Show Cause questions why “DOJ attorneys have represented that the BOP has scheduled an appointment with a surgeon for a consultation for GCS—despite the fact that BOP was ‘advised that Surgeon 1 refers patients out to other providers for vaginoplasty[.]’” Doc. 238 at 29-30. As discussed above, I did not think there was any inaccuracy in describing the April 7 appointment as a “consultation for GCS,” given that my

understanding at the time was that the April 7 consultation would still involve meaningful discussion of the vaginoplasty procedure, and would be a significant step towards obtaining a vaginoplasty for Ms. Iglesias (albeit from one of Surgeon 1's colleagues). For the same reason, I believed it made sense to continue with the April 7 appointment even after I was informed that Surgeon 1 did not personally perform vaginoplasties – because I believed the April 7 appointment would unlock, and was necessary to unlock, access to Surgeon 1's colleagues who *could* perform the vaginoplasty procedure.

C. The Period Between the March 4 Status Report and the April 7 Consultation

37. After the March 4 filing and prior to the initial consultation with Surgeon 1 on April 7, 2022, my understanding about Surgeon 1's role remained the same as described above, for the reasons laid out above. Specifically, even though Surgeon 1 did not personally perform vaginoplasties, I still expected Surgeon 1 to discuss the topic at the initial consultation with Ms. Iglesias and then, if Surgeon 1 accepted Ms. Iglesias as a patient, Surgeon 1 would seamlessly refer Ms. Iglesias to a doctor affiliated with Surgeon 1 who did perform vaginoplasties.

38. After March 4, 2022, my involvement in this case decreased substantially. Partly that was because I had responsibilities arising in other cases, which I had not been able to focus on during the period of intense activity in this case (*i.e.*, between when I was assigned on February 10 and the supplemental sanctions filing that I submitted on March 4). Additionally, after submitting the supplemental sanctions filing on March 4, Doc. 214, there were no longer any upcoming contempt and/or sanctions-related filings. Thus, although I remained generally aware of what was occurring in the case, I did not draft or submit any filings after March 4.

39. Nonetheless, I believe I reviewed all (or nearly all) of Defendants' filings submitted during this time period (*i.e.*, between March 4 and April 7). Because of my understanding set forth above regarding Surgeon 1's role in arranging a vaginoplasty for Ms. Iglesias, I did not think that

any of the filings submitted during this time period were false or misleading. If I had believed there were any inaccuracies or other ethical problems associated with any of Defendants' filings I reviewed, I would have immediately taken action to ensure that the inaccuracies and problems were corrected.

40. I am aware that, on March 9, Plaintiff submitted a response to Defendants' March 4 status report and the March 4 Epplin declaration, in which Plaintiff's counsel raised questions about the statement in the Epplin declaration that Surgeon 1 does not perform vaginoplasties. *See* Doc. 219 at 4 ("Ms. Iglesias seeks clarification whether Surgeon 1—the surgeon with whom Ms. Iglesias has a consultation scheduled for April 7, 2022—is capable of performing vaginoplasty and would perform the procedure for Ms. Iglesias if contracted as the surgeon, or whether this is a typographical error meant to refer to a different procedure.").

41. I understood that, through this statement, Plaintiff's counsel were seeking information about Surgeon 1's qualifications to perform vaginoplasty. During this same timeframe, however, Plaintiff's counsel were engaged in ongoing e-mail correspondence with Defendants' counsel about that same subject. *See generally* Doc. 234-3. And many of the same topics that Plaintiff's counsel addressed in their March 9 filing were also addressed in the parties' e-mail correspondence. *Compare, e.g.*, Doc. 219 at 3 ("Ms. Iglesias asks if these are also criteria for her prospective surgeons, and what other criteria Defendants are utilizing."), *with* Doc. 234-3, Exh. A, at 2 (Plaintiff's counsel inquiring on March 8 about "what criteria BOP and [the contractor] are using to identify and evaluate surgeons for Ms. Iglesias"); *and compare* Doc. 219 at 3-4 (listing nine bullet points of information Plaintiff's counsel seek), *with* Doc. 234-3, Exh. A, at 2 (requesting information on essentially the same nine topics). Thus, I understood Plaintiff's

counsel's inquiry about Surgeon 1 in the March 9 filing to be encompassed within the general exchange of information that was ongoing via e-mail during this timeframe.

42. Moreover, I understood Plaintiff's counsel's requests for information (including the requests made in their March 9 filing) to be resolved through mutual agreement of the parties approximately one week later. Specifically, after Defendants' counsel recommended on March 14 that the requested information be sought during the initial consultations, *see* Doc. 234-3, Exh. A, at 1, Plaintiff's counsel responded on March 15:

Regarding our requests for additional information, we are in a little bit of a bind. You are saying that much of the information will need to come from the surgeons themselves, but you have asked us not to contact [Surgeon 1] and [Surgeon 4]. . . . Accordingly, we reiterate our request for the information outlined in my previous email, or, in the alternative, ask that you withdraw your prohibition on Plaintiff's counsel contacting the surgeons so that we may seek the information directly.

Doc. 234-3, Exh. B, at 2. Defendants' counsel then responded on March 16, stating that "[w]e previously requested that you not contact [Surgeon 1] because of our concerns," but "we are not prohibiting you from doing so." Doc. 234-3, Exh. B, at 1.

43. Although I received these exchanges, I did not view myself as being directly involved in them, given my role on this case (discussed above). Regardless, I am not aware of anyone at DOJ who, through these exchanges, was attempting to conceal any information pertaining to Surgeon 1 or Surgeon 1's ability to perform a vaginoplasty. Rather, I genuinely believed that we had resolved Plaintiff's counsel's requests for information pertaining to Surgeon 1 by confirming that Plaintiff's counsel were not prohibited from contacting Surgeon 1 directly, which was one of the options that Plaintiff's counsel suggested in their March 15 e-mail. *See* Doc. 234-3, Exh. B, at 2. Far from constituting any effort to conceal the facts regarding Surgeon 1, therefore, I recall being pleased that the parties were able to work cooperatively to resolve the information-sharing issue without needing to place the dispute in front of the Court, and I also

recall thinking that everything was still on track for Ms. Iglesias to have an initial consultation with Surgeon 1 on April 7 regarding her desire for a vaginoplasty.

44. Had I known beforehand that the initial consultation with Surgeon 1 would not involve any discussion of the vaginoplasty procedure, I would unquestionably have taken steps to ensure that this fact was disclosed to the Court and to Plaintiff's counsel. I believe the same is true of my DOJ colleagues assigned to this case. At that time, however, my understanding was that the April 7 initial consultation would involve discussion of the vaginoplasty procedure, and would be a meaningful step towards Ms. Iglesias obtaining that procedure, as discussed above.

D. The April 7 Consultation with Surgeon 1

45. I do not have first-hand knowledge of what happened at Ms. Iglesias's April 7 consultation with Surgeon 1. As noted above, throughout my participation in this case, I have not had any direct contact with any of Ms. Iglesias's potential medical providers, including Surgeon 1, nor have I had any direct contact with BOP's contractor. Instead, I have relied on communications relayed to me indirectly, frequently with multiple layers in between.

46. I have reviewed the medical record from Ms. Iglesias's April 7 consultation with Surgeon 1, which generally reflects that Ms. Iglesias was evaluated for breast augmentation and facial feminization. *See* Doc. 249-1. The record also states that Surgeon 1 [REDACTED] [REDACTED] *Id.* at 4. My understanding is that, following the April 7 appointment, Surgeon 1 "provided a list of four doctors in Florida who provide vaginoplasty." Apr. 8 Epplin Decl. (Doc. 233-1) ¶ 5.

47. I have also reviewed Ms. Iglesias's declaration regarding the appointment, stating that [REDACTED]

[REDACTED] Doc. 234-2, ¶¶ 4, 5, 8.

48. Ms. Iglesias's description of the April 7 consultation [REDACTED] [REDACTED] is fundamentally inconsistent with my prior understanding and expectation of what was going to happen at the April 7 consultation. When I first learned that the April 7 consultation did not involve any meaningful discussion of the vaginoplasty procedure, I was surprised and concerned, given my prior understanding described above. [REDACTED]

[REDACTED] See Doc. 234-2 ¶ 10.

49. Although I too was surprised by what happened on April 7, I would nonetheless like to apologize to the Court for this situation. I recognize how much time and attention the Court has devoted to this matter, and how this type of confusion on critical aspects of Ms. Iglesias's medical care only compounds the Court's difficulties, and its frustration. Moreover, as discussed at the February 22 hearing, my goal in this matter was to assure the Court of everyone's good faith, and to allow the parties and the Court to focus on the important merits issues in the case rather than on potential sanctions or contempt proceedings. I was unable to achieve this goal, which I very much regret.

E. Time Period After April 7 Consultation

50. Following the April 7 consultation, my colleagues and I immediately recognized the importance of arranging a consultation for Ms. Iglesias with a surgeon who could perform a vaginoplasty. We worked with BOP in an effort to make that happen as quickly as possible. See, e.g., Doc. 233-1 ¶¶ 5-6; Doc. 237-1 ¶¶ 5-8.

51. Additionally, following the April 7 consultation, Defendants submitted additional filings on April 8 and April 15. *See* Docs. 233, 237. As relevant here, the April 15 filing stated that “when BOP received a communication from its contractor on March 3 indicating that [Surgeon 1] refers patients for vaginoplasty, it disclosed this fact to the Court in a sworn declaration the next day.” Doc. 237 at 3 (citing Mar. 4 Epplin Decl, Doc. 212-1, ¶ 6).

52. At the time of the April 8 and April 15 filings, I genuinely believed that the first time BOP learned that Surgeon 1 did not perform vaginoplasties was on March 3. At the time of those filings, I was unaware of the February 14 communication (discussed above in paragraph 8) in which Surgeon 1 stated that “[w]e do not offer vaginoplasty yet.” Accordingly, at the time of those filings, I was not aware of any inaccuracy or omission in them—and had I been aware of any inaccuracy or omission at the time, I would have taken steps to ensure that it was corrected.

V. Although Unfortunate, The April 7 Consultation Does Not Provide a Basis for Attorney Sanctions

53. Notwithstanding the unfortunate circumstances surrounding the April 7 consultation and its lack of meaningful discussion of the vaginoplasty procedure, I do not believe that sanctions against me personally (or any of my DOJ colleagues) are warranted or necessary.

54. I am not aware of anyone at DOJ who expected the April 7 consultation to unfold the way it did, with no meaningful discussion or evaluation with respect to the vaginoplasty procedure. Instead, I expected the April 7 consultation to involve substantive discussion of the vaginoplasty procedure and to be a meaningful step towards Ms. Iglesias receiving a vaginoplasty, and I believe the same is true of my DOJ colleagues who have worked on this case.

55. Had I known what would happen at the April 7 consultation, I would have taken steps to ensure that Plaintiff’s counsel and the Court were likewise aware of those facts. Similarly, had I known about the February 14 communication to BOP indicating that Surgeon 1 and

Surgeon 1's colleagues "do not offer vaginoplasty yet," I would have taken steps to ensure that fact was disclosed to the Court and to Plaintiff's counsel, and would have advised BOP differently regarding their overall plan for Ms. Iglesias's care.

56. I recognize now that my understanding of what would happen at the April 7 consultation was incorrect, as was my understanding regarding Surgeon 1's ability to provide a direct, seamless referral to a colleague who could perform a vaginoplasty. Nonetheless, at all times, I believe that my DOJ colleagues and I acted reasonably based on the information available to us at the time. We advised BOP about the importance of providing accurate, complete, timely information to the Court; we communicated with BOP about this case almost every day (and frequently multiple times each day); we asked follow-up questions when information provided to us was unclear; and we attempted to partner with BOP as much as possible to ensure that Ms. Iglesias's medical care remained on-track. In short, I believe we did everything that attorneys are expected to do in terms of advising our client and making reasonable factual inquiries supporting the accuracy of our representations to the Court. Although I believe I acted at least reasonably based on the information available to me, I still very much regret that the April 7 consultation unfolded the way it did, and that the Court and Plaintiff were not provided complete information concerning Surgeon 1 in a timely fashion.

57. Because I have personally been named in the Court's April 18 Order to Show Cause as being subject to potential sanctions, *see* Doc. 238 at 31, I am no longer in a position to represent the United States' interests in connection with contempt and/or sanctions issues in this case. Nonetheless, I still remain committed to fulfilling the goal I set at the outset of my involvement in this case—*i.e.*, allowing the parties and this Court to focus on Ms. Iglesias's medical care, rather than contempt or sanctions issues. For that reason, my colleagues and I have worked extremely

hard to ensure that Defendants are addressing Ms. Iglesias’s medical needs in a productive manner. I believe that the settlement agreement recently reached by all parties, Doc. 267, is the culmination of our efforts, and is itself strong evidence of our and Defendants’ collective good faith in this matter. I am particularly pleased that, in addition to a vaginoplasty, the settlement agreement also contemplates Ms. Iglesias receiving facial feminization and breast augmentation from Surgeon 1 – which I hope will now allow the April 7 consultation to be viewed as a successful part of Ms. Iglesias’s overall medical care, rather than an obstacle to such care.

58. Through this declaration, I have attempted to provide the Court with a thorough, detailed explanation of my conduct at the relevant moments in time. I hope that this declaration demonstrates my good faith and reasonableness in this case. To the extent the Court has any remaining concerns regarding my conduct, however, I would appreciate the opportunity to further address those concerns. In particular, I have drafted this declaration under certain constraints, including my professional duties to protect client confidences and other privileged information, as well as the fact that I have not been a first-hand witness to many of the key communications or events surrounding the April 7 consultation.

59. As noted at the outset of this declaration, I take very seriously my duties as an attorney to act ethically, to comply with the rules of professional responsibility, to fulfill my duty of candor to opposing counsel and to the Court, and to comply with all court orders. I am committed to fulfilling those duties in this case, and I believe I have acted reasonably and consistent with those duties throughout this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on June 30, 2022.

DANIEL SCHWEI Digitally signed by DANIEL SCHWEI
Date: 2022.06.30 20:54:14 -04'00'

Daniel Schwei