

J. Kevin West, ISB #3337
Email: KWest@parsonsbehle.com
Dylan A. Eaton, ISB #7686
Email: DEaton@parsonsbehle.com
Parsons, Behle & Latimer
800 W. Main Street, Suite 1300
Boise, Idaho 83702
Telephone: (208) 562-4900
Facsimile: (208) 562-4901

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

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

Defendants.

CIVIL ACTION FILE

NO. 1:17-cv-151-BLW

**MEMORANDUM IN SUPPORT OF
MOTION FOR RULE 35
EXAMINATION**

Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery (“Corizon Defendants”), by and through their counsel of record, Parsons Behle & Latimer, hereby submit this Memorandum in Support of Motion for Rule 35 Examination.

I. INTRODUCTION

Corizon Defendants bring this emergency motion because they seek under Rule 35 an Order allowing their expert psychiatrist, Keelin Garvey, M.D., to conduct a clinical interview of Plaintiff this Friday, August 10, 2018. Dr. Garvey already has flights from the Boston area to Boise so that she can conduct this interview and arrangements have already been made with IDOC for this interview to take place. Further, she has very limited time to conduct this interview between now and Defendants' expert disclosure deadline on August 31, 2018. Through the meet and confer process, Plaintiff's counsel has been a moving target on their position regarding this clinical interview. Plaintiff's counsel initially outright objected to this clinical interview. Now, it appears Plaintiff's counsel would agree to it, but only if Dr. Garvey agrees to limit her expert opinions prior to conducting this clinical interview. This is not contemplated by Rule 35 and is improper. Defendants should not have to negotiate the scope of their expert's testimony in order to get a clinical interview for the expert. The proposed "time, place, manner, conditions, and scope of the examination" by Dr. Garvey are reasonable and consistent with the clinical interview allowed by this Court for IDOC's expert. IDOC's expert is a licensed clinical expert and Corizon Defendant's expert is a psychiatrist. So, Defendants' experts are in different disciplines and should be allowed to conduct their own interviews within the scope of their different professions just as Plaintiff's separate expert psychologist and psychiatrist have done. In summary, Corizon Defendants respectfully ask the Court to issue an expedited order allowing Dr. Garvey's clinical interview to proceed on August 10, 2018.

II. PERTINENT FACTS

1. Plaintiff has clearly put forth her mental and physical condition in controversy in this case by bringing a lawsuit challenging, among other things, the care and treatment for her

Gender Dysphoria and suing psychiatrist and medical doctors, among others. (See Plaintiff's Second Amended Complaint.)

2. On June 1, 2018, Plaintiff filed a Motion for Preliminary Injunction that was supported by declarations from an expert psychologist, Dr. Ettner, and separately an expert psychiatrist, Dr. Gorton. They each conducted their own separate interviews of Plaintiff to assist with rendering their opinions. (See Dr. Gorton's Declaration, Dkt. 62-1, pp. 55-66 and Dr. Ettner's Declaration, Dkt, 62-1, p. 5-8 discussing their interviews with Plaintiff.) Additionally, Dr. Gorton conducted a physical examination of Plaintiff. (Dr. Gorton Decl., Dkt. 62-1, p. 7-8.)

3. After much discussion between IDOC's counsel and Plaintiff's counsel, a stipulation was entered allowing IDOC's expert clinician to perform a clinical examination of Plaintiff. (Dkt. 79) The Court subsequently issued an order allowing this examination to go forward. (Dkt. 84)

4. On July 27, 2018, counsel for Corizon Defendants emailed Plaintiff's counsel and indicated that Corizon Defendants' expert psychiatrist wanted to conduct a clinical interview as well and also indicated that the expert did not want a representative to be present for the interview because the mere presence of a party representative can influence or affect the interview process so that it is not as objective as possible. (Declaration of Dylan A. Eaton in Support of Corizon Defendants' Motion for Rule 35 Examination (hereinafter "Eaton Decl."), Exhibit A.)

5. On July 31, 2018 at 11:00 a.m., IDOC's expert clinician, Dr. Andrade, started his clinical interview of Plaintiff pursuant to the stipulation and court order of the parties. (See Dkt. 84)

6. On July 31, 2018 at 12:26 p.m. (about 1½ hours after Dr. Andrade's clinical exam had started), Plaintiff's counsel emailed Corizon Defendants' counsel and objected to a second

IME of Plaintiff. Among other things, Plaintiff's counsel suggested (after IDOC's expert had conducted its interview of Plaintiff) that the Corizon Defendants and IDOC Defendants should have conduct one joint IME. (Eaton Decl., Exhibit B.)

7. On July 31, 2018 at 5:19 p.m., Corizon Defendants' counsel emailed Plaintiff's counsel and asked to meet and confer regarding their expert conducting a clinical interview under Rule 35. Among other things, Corizon Defendants' counsel indicated that they were not required to coordinate with IDOC's counsel as they are a separate party, that Corizon Defendants' expert psychiatrist is in a different discipline from IDOC's expert clinician and would, in part, be opining on different areas, that the different professionals would not want to conduct a join interview just as Plaintiff's expert psychologist and psychiatrist did not conduct a joint interview, and pointed out that even if coordination of the IME was a possibility, such was precluded by Plaintiff's counsel not responding to Corizon Defendants' email until after IDOC's IME was underway and almost complete. (Eaton Decl., Exhibit B.)

8. In the afternoon of August 1, 2018, a meet and confer conference via telephone occurred with counsel for all parties to discuss Corizon Defendants' request for its expert psychiatrist to conduct an IME of Plaintiff and Plaintiff's counsel's objections. Plaintiff's counsel clarified they were not outright objecting to a second IME by Corizon Defendants' expert, but in the same breath also asserted that a second IME by a co-defendant is contrary to the law. Plaintiff's counsel also insisted that Corizon Defendants' expert could not ask the same or similar questions to that of IDOC's expert and could only opine on areas separate from IDOC's expert. Corizon Defendants' counsel responded that they are separate defendants represented by separate counsel and entitled to their own expert with a separate IME and allowed to opine about similar and separate issues. Corizon Defendants' counsel also indicated that their expert is a psychiatrist with

medical education, training and experience and would be focused on an IME and ultimately offering opinions within the scope of her profession, which is distinct from IDOC's expert. Counsel for both Defendants pointed out that Plaintiff's counsel had separate psychologist and psychiatrist experts who performed separate interviews, and who had separate opinions, but also other opinions that overlapped. Counsel for Plaintiff initially stated that they were not familiar with Plaintiff's experts' declarations, but then acknowledged there was overlap of opinions between their experts after consulting with another attorney more familiar with their experts' declarations. The parties concluded that Corizon Defendants' counsel would submit a proposed stipulation and draft order for an IME by Corizon Defendants' expert and then Plaintiff's counsel would respond as to whether they would so stipulate by the end of that week. (Eaton Decl., ¶ 5.)

9. On August 2, 2018, Corizon Defendants' counsel emailed a draft stipulation for a Rule 35 Examination and proposed order to Plaintiff's counsel. The proposed stipulation was similar to the stipulation entered between IDOC Defendants and Plaintiff's counsel for IDOC's expert clinician in that, consistent with F.R.C.P. 35 it specified the "time, place, manner, conditions, and scope of the examination, as well as the person ...who will perform it." As with the stipulation with IDOC's counsel, it outlined the general areas of inquiry and indicated that the scope would be within Dr. Garvey's profession as a psychiatrist and noted areas covered would be geared toward whether the medical care was appropriate, standard of medical care, and other areas within her profession. As with the IDOC stipulation, it limited the interview to 3 hours and, even though it is not stated as allowed under Ruel 35, agreed that Plaintiff could have a party representative present and that the interview would be recorded. (Eaton Decl., Exhibit C.)

10. On August 3, 2018, Plaintiff's counsel responded to the proposed stipulation and order for Corizon Defendants' expert's IME stating, in relevant part "We will agree to your expert

conducting a recorded Rule 35 exam of our client, so long as the exam is limited to the areas necessary for your expert's medical opinions, which you stated are: the medical standards of care and whether Ms. Edmo's treatment meets those standards, as well as the appropriate medical treatment and care for Ms. Edmo, including whether sex reassignment surgery is medically necessary. We do understand that certain areas may overlap during the clinical interview but the ultimate **medical opinions are limited to the above areas**. Please modify your proposed stipulation accordingly. We are happy to discuss this further." (emphasis added) (Eaton Decl., Exhibit D.)

11. Later in the day on August 3, 2018, Corizon Defendants' counsel responded by asking Plaintiff's counsel, "You state 'please modify your proposed stipulation accordingly.' What specifically do you have an issue with and suggest needs to be modified in my proposed stip?" Additionally, Corizon Defendants' counsel responded by stating,

"I note that we are not 'limiting' our expert opinions as your email below suggests and to require such is improper. Further, we are not even required to disclose the areas of our expert's opinions at this time. Our expert will offer opinions within the scope of her profession and qualifications just as Plaintiff's expert Dr. Gorton has purported to do. Rule 35 only requires we disclose the scope of the clinical interview, not disclose or limit areas of expert opinions. The proposed stip is completely within the scope of our expert's profession and reasonable. And, we offered that you may have a representative present for the interview even though Rule 35 does not state that is allowed. Please advise by tomorrow if we have an agreement or not. If you have any reasonable proposed language for me to consider regarding the "time, place, manner, conditions, and scope of the examination" as contemplated under Rule 35, let me know by tomorrow as well. Otherwise, I will file a motion on Monday ..."

(Eaton Decl., Exhibit D.)

12. On August 5, 2018, Plaintiff's counsel again attempted to limit Dr. Garvey's clinical interview and responded that they "propose that the stipulation state that the scope of your

expert's examination is limited to issues involving medical standards of care and the appropriate medical treatment and care for Ms. Edmo...." (Eaton Decl., Exhibit E.)

13. Corizon Defendants' expert psychiatrist, Dr. Garvey, currently has reserved flights from the Boston area to Boise to conduct the clinical interview of Plaintiff on August 10, 2018. Due to her personal and professional schedule and Defendants' expert disclosure deadline of August 31, 2018, she needs to conduct the interview of Plaintiff on August 10, 2018. Arrangements for this clinical interview to occur on August 10, 2018 have already been made with IDOC. (Eaton Decl., ¶ 9.)

III. LAW AND ANALYSIS

Under Fed.R.Civ.P. 35(a)(1), "(t)he court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control." Pursuant to subsection (a)(2) of Rule 35, "The order may be made only on motion for good cause and on notice to all parties and the person to be examined; and must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it."

As with other rules of discovery, Rule 35 should be construed liberally in favor of an examination, but the Court must "balance the right of the party to be examined to avoid personal invasion against the moving party's right to a fair trial."

All of the prerequisites are met to allow Dr. Garvey to conduct a clinical interview of Plaintiff on August 10, 2018.

First, Plaintiff's mental and physical health are in controversy in this case thus allowing for an IME. Indeed, Plaintiff has raised the issue of treatment and care for Gender Dysphoria and sued mental health and medical professionals related to these claims. (See Plaintiff's Second Amended Complaint.) Plaintiff does not challenge that this is at issue and, notably, has disclosed her own experts who conducted separate clinical interviews and physical examinations in order to render their own opinions.

Second, Dr. Garvey is an appropriate and suitable examiner. She is a licensed psychiatrist and has experience, among other things, in assessing and treating patients with Gender Dysphoria, including patients incarcerated in prisons. Plaintiff has not challenged that Dr. Garvey is appropriate to conduct a clinical interview of Plaintiff.

Third, the proposed clinical interview by Dr. Garvey is reasonable as to "time, place, manner, conditions, and scope of the examination." In fact, the proposed clinical interview has similar scope and conditions as was in the clinical interview approved and ordered by this Court for the IME performed by Dr. Andrade, including a three-hour limitation on the interview that will occur at the prison and allowing a non-attorney representative to be present (but not interfere) with the interview, and allowing the interview to be audio recorded. The proposed scope of the interview is indeed well within the scope of a reasonable interview by a psychiatrist in that it will generally cover the following areas:

- History of Present Illness
- Past Psychiatric History
- Past Medical History
- Social and Developmental/Trauma History and current social relationships/support
- Gender Identity History
- Sexual and Relationship History
- Employment History
- Family History
- Substance Abuse History

- Criminal/Legal History
- Current/Past Prison Functioning including but not limited to: disciplinary reports, program involvement, employment
- Discussion of hopes/expectations for GD treatment
- Mental Status Examination

The scope of this interview is consistent with the clinical interview allowed by Dr. Andrade, IDOC's expert clinician.

Fourth, a second IME by a co-defendant is allowed. Through the meet and confer process, it appears that Plaintiff's counsel may have walked back their initial outright objection to a second clinical interview of Plaintiff. Nevertheless, a second clinical interview is not precluded and is allowed. *E.g. Peters v. Nelson*, 153 F.R.D. 635, 639 (N.D. Iowa 1994)(holding that rule 35 language "does not limit the number of examinations" and allowing tests by two specialists – a psychiatrist and a neuropsychologist); *Continental Cas. Co. v. U.S.*, 2004 WL 2216528, * 3 (N.D. Cal. 2004)(allowing an orthopedic exam and a neurologic exam and holding that if a complex injury is at issue, then it is appropriate to seek opinions from several medical specialists.) In this case, Plaintiff's expert psychologist and psychiatrist each performed their own separate interviews and have rendered their own separate opinions which overlap in some areas and do not in others. Therefore, Plaintiff is in no position to challenge separate clinical interviews by IDOC's expert clinician and Corizon Defendants' expert psychiatrist because Plaintiff's experts did the same thing.

Corizon Defendants do not admit they need to have an expert in a different discipline who will offer different opinions to justify a second IME. Corizon Defendants are a separate party represented by separate counsel and, therefore, entitled to their own experts who should be allowed their own IMEs, if needed, even if they are going to opine on similar issues.

Nevertheless, there are differences between IDOC's and Corizon Defendants' experts. IDOC's expert Dr. Andrade is a clinical expert, license independent clinical social worker, and current director of clinical operations. Whereas, Corizon Defendants' expert is a psychiatrist who has education, training and experience in psychiatry and has an M.D. Hence, while some of the questioning in the Rule 35 clinical interview will overlap (just as Plaintiff's counsel admits their two experts opinions overlap in some regard), Dr. Garvey's clinical interview will largely be geared toward psychiatric and medical care and treatment (i.e., the scope of her profession), which likely would not be addressed by Dr. Andrade. Hence, there is definitely a need for these two experts to perform their own separate clinical interviews as they are in different professions and focused on different areas.

The crux of what appears to be the primary issue between Plaintiff's counsel and Corizon Defendants' counsel is Plaintiff's counsel's improper attempt to require that Dr. Garvey's expert opinions be limited as a condition to allowing the IME. Indeed, Plaintiff's August 3, 2018 email to Corizon Defendants' counsel said they would agree to the IME if Dr. Garvey's "opinions are limited" to area of standard of medical care. (Eaton Decl., Exhibit D.) There is nothing in Rule 35 that requires an expert to disclose, let alone, limit her opinions before an IME. (Defendants are not required to disclose expert opinions in this case until August 31, 2018.) Rule 35 simply requires disclosure of the expert and the "time, place, manner, conditions, and scope of the examination." Fed.R.Civ.P. 35(a)(2)(B). Corizon Defendants' counsel has made all of these requisite disclosures, which are reasonable and similar to Dr. Andrade's clinical interview that was approved by the Court. Further, while Dr. Garvey has concerns about allowing Plaintiff to have a representative present for her clinical interview because it could interfere with the objectivity of the interview, she has agreed to go along with the same process as was allowed with Dr. Andrade

and allow Plaintiff to have a paralegal representative present. It simply makes no sense that an expert has to limit her opinions before they have had an opportunity to conduct the examination and review the discovery that would be needed before offering such opinions.

Plaintiff's counsel's email on August 5, 2018 now proposes "the scope of your expert's examination is limited to issues involving medical standards of care and the appropriate medical treatment and care for Ms. Edmo." This really is just a backdoor way of still trying to limit Dr. Garvey's opinions by precluding what she can explore and what questions she can ask at the outset. Dr. Garvey's opinions and the clinical interview should not be limited as long as it is generally within the scope of her profession and related to Plaintiff's claims, the defenses thereto, and Plaintiff's experts' opinions. *See Gavin v. Hilton Worldwide Inc.*, 291 F.R.D. 161, 165-67 (N.D. Cal. 2013)(allowing the examiner to proceed on a contested line of questioning since the court would not "micro-manage the examination and expected the examiner to "act professionally"); *Franco v. Boston Scientific Corp.*, 2006 WL 3065580, *2, 2006 U.S. Dist. LEXIS 81425, *5 (N.D.Cal. Oct. 27, 2006) (declining to exclude "historical matters" from IME because defendant was entitled to explore what effects were attributable to termination, and what effects were due to "long history of depression and psychological problems"); *see also Letcher v. Rapid City Regional Hosp., Inc.*, 2010 WL 1930113, **6-7, 2010 U.S. Dist. LEXIS 46959, **15-18 (D.S.D. May 12, 2010) ("The court notes that the entire reason for the IME is to assess whether (plaintiff) really does suffer from a mental condition, whether that condition constitutes a disability if it does exist, and whether defendants caused (plaintiff) severe emotional distress by their actions. (Plaintiff's) complaint places her mental condition in controversy, as she concedes, and therefore, the court will not limit (the examiner's) exploration of the very issues she herself has placed before the court"). While Dr. Garvey will likely explore topics related to psychiatric medical standard of

care, she should not be limited to that line of questioning. She should be allowed to explore any issues within her qualifications, including as a psychiatrist and correctional psychiatric expert, and should be allowed to interview Plaintiff in a manner that would relate to any of Plaintiff's claims in this case, any of the defenses, and any of Plaintiff's experts' opinions. Further, she should not be precluded from offer rebuttal or impeachment testimony. Plaintiff's proposal seems to do just that and is unduly limiting on Dr. Garvey's assessment of this case.

Additionally, Dr. Garvey's clinical interview will be recorded and also observed by a representative for Plaintiff. Therefore, if Plaintiff's counsel takes issue with the clinical interview or Dr. Garvey's opinions, Plaintiff will have an opportunity to challenge such at a later date. There is no basis to do so at this point as the Rule 35 clinical exam is getting scheduled.

For this matter, the court just needs to be comfortable that the examiner is suitable and that there are reasonable conditions and scope of the examination. Such is the case here, especially since the conditions and the scope proposed for Dr. Garvey's clinical interview are very similar to the court's order previously entered as to IDOC's expert's clinical interview.

IV. CONCLUSION

In summary, Corizon Defendants ask that the Court issue an order allowing their expert psychiatrist to conduct a clinical interview under Rule 35 on August 10, 2018 as stated in the proposed order (Eaton Decl., Exhibit F.)

DATED this 6th day of August, 2018.

PARSONS BEHLE & LATIMER

By: /s/ Dylan A. Eaton

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Craig H. Durham
Deborah A. Ferguson
FERGUSON DURHAM, PLLC
chd@fergusondurham.com
daf@fergusondurham.com
(Counsel for Plaintiff)

Amy Whelan
Julie Wilensky
National Center for Lesbian Rights
awhelan@nclrights.org
jwilensky@nclrights.org
(Counsel for Plaintiff)

Brady J. Hall
MOORE ELIA KRAFT & HALL, LLP
brady@melawfirm.net
(Counsel for Defendants Kevin Kempf,
Richard Craig, Rona Siegert, and Howard
Keith Yordy)

Lori E. Rifkin
Dan Stormer
Shaleen Shanbhag
HADSELL STORMER & RENICK, LLP
lrifkin@hadsellstormer.com
dstormer@hadsellstormer.com
sshanbhag@hadsellstormer.com
(Counsel for Plaintiff)

By: /s/ Dylan A. Eaton
Dylan A. Eaton