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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO (a/k/a MASON 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.

Case No.: 1:17-cv-00151-BLW

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER FOR EVIDENTIARY SUBMISSION AND HEARING RE: SURGICAL TECHNIQUE AND PRESURGICSAL TREATMENTS AND REQUEST FOR EXPEDITED CONSIDERATION UNDER LOCAL RULE 6.1

Complaint Filed:	April 6, 2017
Discovery Cut-Off:	None Set
Motion Cut-Off:	None Set
Trial Date:	None Set

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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Adree Edmo, through her counsel of record, hereby moves the Court for reconsideration of its November 8, 2019 order for evidentiary submission and hearing regarding surgical technique and presurgical treatments, Dkt. 244.

This motion is based on this Notice of Motion and Motion, the memorandum of points and authorities filed herewith, and all pleadings and files on record in this action, as well as any oral argument and evidence that may be presented at any hearing on this motion.

Pursuant to Local Rule 6.1, Plaintiff requests that this Court consider this motion on an expedited basis. There is good cause to support such expedited consideration because the Court's November 8, 2019 order requires briefing, submission of evidence, and an evidentiary hearing beginning on November 15, 2019 and completed by November 21, 2019.

Dated: November 12, 2019

Respectfully Submitted,

FERGUSON DURHAM
HADSELL STORMER RENICK & DAI LLP
NATIONAL CENTER FOR LESBIAN RIGHTS
RIFKIN LAW OFFICE

By: /s/ *Lori Rifkin*
Lori Rifkin
Attorneys for Plaintiffs

INTRODUCTION

Plaintiff moves this Court to reconsider its order for evidentiary submissions and a hearing regarding the surgical technique and presurgical requirements for Plaintiff's vaginoplasty. First, surgical technique is a medical decision appropriately made by the treating surgeon based on what he determines to be the most medically appropriate approach for Plaintiff. The fact that the surgery is a vaginoplasty rather than, for instance, a knee reconstruction, does not except it from this basic premise. Second, the treating surgeon is Defendant's hand-selected contractor, and this Court should not permit Defendants to litigate their own contractor's determination of surgical technique. Defendants' rejection of the surgeon's recommendations itself constitutes continued deliberate indifference to Ms. Edmo's serious medical needs. Third, Defendants have waived any opportunity to dispute the specific surgical technique and presurgical treatments determined necessary by their selected surgeon, including by electing to appeal this Court's October 24, 2019 Presurgical Order rather than move for clarification or reconsideration, as this Court directed them to do. Indeed, by choosing to appeal that Order, Defendants have divested this Court of jurisdiction to further substantively adjudicate the issues implicated by its Presurgical Order.[1] Finally, the procedure and schedule that the Court has set forth will substantially prejudice Plaintiff's litigation of her case and thus jeopardize her receipt of medically appropriate care.

For all of these reasons, allowing Defendants to propose "alternative means of remedying their established violation" of Ms. Edmo's rights and holding an evidentiary hearing about surgical techniques contravenes is improper. To the extent that the Court has questions for Dr. Stiller about his surgical and presurgical requirements, this Court should follow the course of action it described in both the March 21, 2019 and April 9, 2019 status conferences to enforce its injunction: "[I]f I were not stayed . . . I would plan to be very aggressively involved in getting with Dr. Stiller…I do think there needs to be some direct communication with Dr. Stiller and a communication back to

[1] Plaintiff's position is that this Court's Presurgical Order is not appealable. Until the Ninth Circuit dismisses the appeal, however, Defendants' filing of the notice of appeal divested jurisdiction from this Court.

the court so I have directly from his view rather than having it interpreted and translated by the parties. . . . And if I were not stayed by the Circuit, that's precisely what I would do, is to come up, after consulting with the parties, with a process by which we can get Dr. Stiller involved in this discussion." Dkt. 183 at 25:8-26:5; *see also id.* at 32:19-33:8; Dkt. 199 at 20:1-5. Consistent with the Court's prior plan, the Court could request Defendants' selected surgeon, Dr. Stiller, to appear at a status conference (at least telephonically) to answer the Court's questions directly. This procedure is within the Court's jurisdiction to continue to enforce its Presurgical Order, even while Defendants' appeal of that Order is pending.

RELEVANT PROCEDURAL BACKGROUND

On December 13, 2018, following a three-day trial and review of extensive documentary evidence and testimony, this Court enjoined Defendants to "take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order." Dkt. 149 at 45. This order set June 13, 2019 as the surgery deadline. For more than three months, from December 13, 2018 through March 20, 2019, when the Ninth Circuit issued a stay, this Court's injunction was in full effect. Case No. 1935017, Dkt. 19. Plaintiff detailed Defendants' failure to comply with the Court's injunction in her March 19, 2019 status report, including that Defendants failed to contact a potential surgeon for more than two months after the Court issued its order, and "failed to request specific information about the pre-surgical timeline and steps that must be completed (such as pre-surgery electrolysis) until mid-March 2019—three months after this Court's order." Dkt. 180 at 2-8. On March 29, 2019, the Ninth Circuit modified the stay to exempt the April 12, 2019 presurgical appointment. Case No. 1935017, Dkt. 30; Dkt. 228-2 at 9- (Exh. A). On August 23, 2019, the Ninth Circuit affirmed this Court's injunctive relief order and held that, "[t]he order, read in context, requires defendants to provide GCS, as well as 'adequate medical care' that is 'reasonably necessary' to accomplish that end." *Edmo v. Corizon, Inc.* 935 F.3d 757, 800 (9th Cir. 2019). The Ninth Circuit provided that its "stay of the district court's December 13, 2018 order shall automatically terminate upon issuance of the mandate." *Id.* at 803. Because Defendants petitioned for rehearing en banc and

that petition is still pending, the mandate has not yet issued. On October 10, 2019, the Ninth Circuit partially lifted the stay "so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." Case No. 1935017, Dkt. 104. It has now been more than one month since the partial lifting of the stay and Ms. Edmo has not received any presurgical treatments.

ARGUMENT

I. This Court Enjoined Defendants to Provide Ms. Edmo Vaginoplasty as Treatment for Gender Dysphoria.

As an initial matter, there can be no legitimate dispute that vaginoplasty is the gender confirmation surgery at issue in Plaintiff's motion and this Court's and the Ninth Circuit's orders. Most obviously, the surgery criteria referenced by this Court, the Ninth Circuit, and every medical expert and witness who testified are the World Professional Association of Transgender Healthcare Standards of Care ("WPATH SOC") criteria specifically for vaginoplasty for male-to-female patients. Tr. Exh. 15[2] at 60 (listing six "criteria for metoidioplasty or phalloplasty in FtM patients and for vaginoplasty in MtF patients"); Dkt. 149 at 9, ¶ 14 (citing six WPATH SOC criteria); 935 F.3d at 771 (citing six WPATH SOC criteria); Dkt. 138 at 420-421 (Defendant Eliason's testimony regarding his assessment of Ms. Edmo for a "vaginoplasty"); Dkt. 139 at 639-41 (Defense expert Dr. Andrade's testimony regarding his assessment of Ms. Edmo under the WPATH standards for vaginoplasty); Dkt. 139 at 528-530; (Defense expert Dr. Garvey's testimony regarding application of the WPATH SOC criteria for vaginoplasty to Ms. Edmo); Dkt. 137 at 73-76 (Plaintiff expert Dr. Ettner's testimony regarding the WPATH criteria for vaginoplasty and application to Ms. Edmo); Dkt. 138 at 247-248; 252-254 (Plaintiff's expert Dr. Gorton's testimony regarding the WPATH SOC criteria for vaginoplasty and his assessment of Ms. Edmo).

The sixth criterion—"12 continuous months of living in a gender role that is congruent with their gender identity"—applies *only* to vaginoplasty, not any of the lesser surgeries for male-

[2] The WPATH SOC was submitted as Exhibit 15 in the October 2018 trial in this case and is referenced as "Tr. Exh. 15" in this brief.

to-female patients, and is the criterion Defendants and their experts focused extensively on in contending that Ms. Edmo does not qualify for gender confirmation surgery. Tr. Exh. 15 at 60; *see* 935 F.3d at 789 ("For example, both Dr. Garvey and Dr. Andrade expressed the view that Edmo does not meet the sixth WPATH criterion . . . They pointed out that Edmo has not presented as female outside of prison and urged that she needs real-life experiences in the community before undergoing GCS. These opinions run head-on into the WPATH Standards of Care."). This Court and the Ninth Circuit both analyzed the application of the sixth criterion to Ms. Edmo as part of their respective decisions ordering Defendants to provide gender confirmation surgery. Dkt. 149 at 28, ¶ 64; 935 F.3d at 789-90. This Court's order and the Ninth Circuit's affirmation of the order requiring Defendants to provide gender confirmation surgery in the form of vaginoplasty to Ms. Edmo are the law of the case and must not be re-litigated. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (law of the case "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues'").

Defendants and their attorneys consistently and repeatedly demonstrated their knowledge that this Court's order requires vaginoplasty surgery. *See generally* Dkt. 235 at 15-16. (setting forth detailed citations to Defendants' references to vaginoplasty). On March 19, 2019, Defendants filed a status report regarding compliance with the injunction in which they literally highlighted the WPATH standards related to vaginoplasty in male-to-female patients. They also attached a declaration from Corizon's Idaho Regional Vice President of Operations, Aaron Hofer, attesting to his understanding that the relevant surgery was vaginoplasty, which was the "focus of [his] arrangements." Dkt. 179-1 at 2, ¶ 5. Mr. Hofer attested to his understanding of Dr. Stiller's experience performing vaginoplasties and set forth Dr. Stiller's requirements for gender confirmation surgery, including "laser treatment and/or electrolysis for lower region (a.k.a., the genital region)." *Id.* at 4, ¶¶ 14-15. Mr. Hofer also detailed his understanding from Dr. Stiller's assistant, Ms. Bergmann, that, during the initial presurgical consultation, Dr. Stiller would determine "if hair removal on the genitals by laser or electrolysis is necessary. According to Ms. Bergmann, if the electrolysis is needed, the process can take (on the low end) 6 to 8 months and

(on the high end) up to 1 year. Ms. Bergmann indicated that most patients need hair removal." *Id.* at 6, ¶ 19. Mr. Hofer further explained his understanding from Dr. Stiller's assistant that:

> [T]here are 3 options for a vaginoplasty. First, is the 'zero depth' option that is usually reserved for older patients or patients who are not sexually active. The vaginal cavity that is created with this option is minimal to non-existent. The second vaginoplasty option, which is the most common, is a penal inversion. Dr. Stiller would attempt to get a vaginal cavity with this option with a depth of about 5 to 6 inches. The final vaginoplasty option is called a 'colo-vaginoplasty' and involves 2 surgeries and utilizes part of the colon to form the vaginal cavity. This option allows for the most depth of the vaginal cavity, which can be 7 to 8 inches. The second of the colo-vaginoplasty surgeries usually occurs several months (about 6 months) after the first surgery.

Id. at 6, ¶ 21.[3] Mr. Hofer attested that he asked Dr. Stiller's assistant "how it is determined which vaginoplasty option is selected. I was told that it is based partly on Dr. Stiller's assessment of the patient's anatomy and based partly on the patient's preference." *Id.* at 7, ¶ 22.

In light of this overwhelming record, Defendants' recent claim that they are "confused" as to what surgery is at issue,[4] asserted for the first time after the Ninth Circuit exempted presurgical care from the stay, is a bald attempt to delay Ms. Edmo's care and impermissibly re-litigate issues that have already been decided as the law of the case. *See Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1153-54 (E.D. Cal. 2001) ("The law of the case doctrine requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the matter . . . All of the defendants' contentions were previously argued and rejected when the court issued the first and second preliminary injunction."). The only issue properly before this Court is enforcement of its order for vaginoplasty, within the bounds of its jurisdiction while the stay of the injunction remains partially in effect.

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[3] Dr. Stiller's treatment note from his consultation with Ms. Edmo reflects that he did not discuss the "zero depth" option with her. *See* Dkt. 228-2 at 9-12 (Exh. A). Ms. Edmo does not fit the demographic for this surgery and, as Plaintiff noted in her opposition to the stay motion, this surgical option is not a "vaginoplasty."

[4] Defendants' counsel even went so far as to claim that the gender confirmation surgery ordered in this case might refer to "facial feminization surgery or voice surgery." *See* Attachment A (10/17/19 Status Conf. Transcript) at 18:16-22. Because the transcript of the October 17, 2019 status conference has not yet been filed on the docket by the Court, Plaintiff attaches it hereto as Attachment A.

II. As Defendants and this Court Have Recognized, Surgical Technique for Vaginoplasty Is Appropriately Determined by the Surgeon in Consultation with the Patient, Not through an Evidentiary Hearing

As has been well-established in this case, the medical standard of care for gender confirmation surgery is set forth in the WPATH Standards of Care (WPATH SOC), Version 7. Dkt 149 at 6, ¶¶ 5-6; 935 F.3d at 769-770. The WPATH SOC make clear that it is the role of a qualified[5] surgeon, together with his patient, to determine the appropriate surgical technique for gender confirmation surgery, including vaginoplasty:

> During [the preoperative surgical] consultation, the procedure and postoperative course should be extensively discussed with the patient. Surgeons are responsible for discussing all of the following with patients seeking surgical treatments for gender dysphoria:
>
> - The different surgical techniques available…
> - The advantages and disadvantages of each technique…
> - The inherent risks and possible complications of the various techniques; surgeons should inform patients of their own complication rates with each procedure.
>
> These discussions are the core of the informed consent process, which is both an ethical and legal requirement for any surgical procedure.

Tr. Exh. 15 at 56-57; *see also id.* at 62 ("Ideally, surgeons should be knowledgeable about more than one surgical technique for genital reconstruction so that they, in consultation with patients, can choose the ideal technique for each individual. Alternatively, if a surgeon is skilled in a single technique and this procedure is either not suitable for or desired by a patient, the surgeon should inform the patient about other procedures and offer referral to another appropriately skilled surgeon.").

Notably, both the Court *and Defendants* have acknowledged that the precise details of Ms. Edmo's surgical treatment must now be determined by Dr. Stiller in accordance with the SOC.

[5] The WPATH SOC states that "[p]hysicians who perform surgical treatments for gender dysphoria should be urologists, gynecologists, plastic surgeons, or general surgeons, and board-certified as such by the relevant national and/or regional associations. Surgeons should have specialized competence in genital reconstructive techniques as indicated by documented supervised training with a more experienced surgeon." Tr Exh. 15 at 62.

See, e.g., Dkt. 183 at 6:5-9 (Statement of IDOC Counsel that, "[w]e can't dictate to this surgeon how he is going to perform this surgery or when he is going to perform it. The WPATH is very clear that, ultimately, the ethical and legal responsibility to provide the surgery rests with him, and he has got to feel very comfortable with it."). Similarly, this Court repeatedly recognized that the medical decisions about the requirements for Ms. Edmo's surgery are now appropriately in the hands of the surgeon—whom Defendants hand-picked—and his patient, just as they would be in the case of a hysterectomy, a knee repair surgery, or any other surgery to treat a serious medical condition.[6] *See, e.g.,* Dkt. 199 at 16:4-14 ("We're at a point now of medical decision. And that decision should be driven by medical needs and medical knowledge and not the advocacy of one side or the other . . . The questions of fairness I don't think typically enters into a medical decision as to the propriety of a certain type of treatment. It's either indicated or it's not."); *id*. at 18:21-24 ("I think medical treatment is not an issue of—is not where this issue should be retried. That really is a medical decision which I think the treating physician needs to determine."). The fact that the surgery at issue is a vaginoplasty to treat gender dysphoria does not change this analysis. *See, e.g.,* Attachment A at 14:25-16:9 (recognizing that Plaintiff need not separately litigate each aspect of presurgical treatment to establish that it is independently required by the Eighth Amendment).

Forcing Plaintiff to litigate every presurgical issue would be an absurd result. It would vitiate the ability of federal courts to order and enforce injunctive medical relief for prisoners and in the context of this case, it would render meaningless the Ninth Circuit's order exempting presurgical care from the stay. Indeed, other district courts in the Ninth Circuit ordering similar types of injunctive medical relief have ordered corrections officials to schedule a prisoner patient to see an outside specialist and "authorize, perform, and/or facilitate any treatment [the specialist] recommends as necessary" to treat the relevant condition. *Rhea v. Wash. Dep't of Corr.*, 2010 WL 3720215 at *4 (W.D. Wash. Sept. 17, 2010); *see, e.g., Mason v. Ryan*, 2018 WL 2119398, at *6

[6] For example, a hysterectomy may be performed in a manner that removes the uterus and does or does not include removal of the cervix, fallopian tubes and/or ovaries; a reconstruction of the anterior cruciate ligament in the knee may be performed using a tissue from a cadaver or a patient's own patellar or hamstring tendon.

(D. Ariz. May 8, 2018) ("Therefore, the Court will order Defendants to schedule Plaintiff to see Dr. Page on an immediate basis, so that Dr. Page can assess Plaintiff's condition and current medications . . . Defendants will also be ordered to provide the treatment and medication prescribed by Dr. Page."). This Court's Presurgical Order is consistent with these cases and the relevant standards of care—it adopted Defendants' hand-selected surgeon's presurgical requirements virtually verbatim and set reasonable deadlines related to that care. *See Mason,* 2018 WL 2119398, at *5 ("Adhering to the specialist's treatment recommendations is the most narrowly drawn relief necessary to correct the harm identified by Plaintiff.").

In light of the above, holding an evidentiary hearing regarding the appropriate surgical technique for Ms. Edmo's vaginoplasty usurps Dr. Stiller's medical decision-making role, and would impermissibly intrude on Ms. Edmo's medical privacy to an intolerable degree. Indeed, Defendants' unconstitutional refusal to provide necessary and adequate medical care to Ms. Edmo has already forced her to largely forfeit her medical privacy in order to litigate this case. Defendants' continued refusal to provide constitutionally required care—even in the face of the Ninth Circuit's per curiam finding of their deliberate indifference and the appellate court's specific entreaty to Defendants to move forward with providing Ms. Edmo treatment, 935 F.3d at 803—is their chosen litigation strategy. While Defendants are free to litigate this case as they see fit, they should not be permitted to subject Ms. Edmo to the unconscionable intrusion and indignity of a public evidentiary hearing regarding the depth and appearance of her vagina and her medical needs regarding sexual sensation. *See* Tr. Exh. 15 at 63 ("Sexual sensation is an important objective in vaginoplasty, along with creation of a functional vagina and acceptable cosmesis.").

In sum, this Court should reconsider its decision permitting briefing on the substantive issue of surgical technique and presurgical requirements and scheduling a hearing. If the Court requires any additional information beyond the information Dr. Stiller articulated in his declaration, the Court should proceed in a manner consistent with the approach it set forth in prior status conferences: the Court should request Dr. Stiller participate, at least telephonically, in a status conference so that the Court can hear directly from him. Moreover, to the extent Dr. Stiller

has not yet made a final determination regarding which vaginoplasty technique is appropriate for Ms. Edmo and requires additional information from Ms. Edmo, this does not provide justification for Defendants to further stall and litigate. Rather, Defendants must schedule an immediate follow-up appointment between Ms. Edmo and Dr. Stiller for this purpose. *See* Case No. 1935017, Dkt. 104 (partially lifting stay so that Plaintiff may receive all presurgical treatments and related appointments or consultations necessary for surgery). This Court must not permit Defendants to employ the tactic of sitting on their hands and refusing to provide necessary treatment to Ms. Edmo by virtue of refusing to confirm the surgery technique and presurgical procedures Dr. Stiller has selected.

III. Defendants' Delay and Attempt to Litigate Against Their Own Chosen Surgeon's Recommendations Evidence Further Deliberate Indifference to Ms. Edmo's Serious Medical Need and This Court Should Not Permit It

Defendants' decision to litigate against *their own chosen contractor* is untethered to any medical rationale and is instead an attempt to avoid compliance with the injunction and the Ninth Circuit's order partially lifting the stay. This tactic, as well as Defendants' overall delay, constitutes further deliberate indifference, and this Court should not countenance it.

During any time period when this Court's injunction is not stayed, Defendants must comply promptly with the order, even pending appeal. *Maness v. Meyers*, 419 U.S. 449, 458 (1975). "The rule in *Maness* that parties must comply whether or not they believe a court's order is incorrect and must do so during any period that they may be contesting its validity is applicable to public and private parties alike. Specifically the rule is applicable to [the] Governor [ ], as well as the lowliest citizen." *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1054 (E.D. Cal. 2013) (three-judge panel of the district court); *see also GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 386 (1980) ("[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order."). As both this Court and the Ninth Circuit have already held, Defendants will not suffer any legally cognizable injury as a result of providing presurgical care to Ms. Edmo,

including hair removal. *See* Case No. 19-35017, Dkt. 104; Dkt. 244 at 11 ("The Ninth Circuit determined that Defendants had failed to carry their burden to show that irreparable harm is probable if the presurgical treatments are completed—including hair removal. That is the law of the case.").

This Court's Presurgery Order was appropriate and authorized by the Ninth Circuit's decision partially lifting the stay, and by Federal Rule of Civil Procedure 62(c), which "authorizes a district court to continue supervising compliance with [an] injunction," *A & M Records v. Napster, Inc.* 284 F.3d 1091, 1096 (9th Cir. 2002). The Order was also necessary in light of Defendants' prior history of failing to adequately comply with the injunction. *See* Dkt. 183 at 3:24-5:7; *id.* at 10:24-11:11; *Hutto v. Finney*, 437 U.S. 678, 687 (1978) (district court has broad equitable powers to seek to bring an ongoing violation to an immediate halt and to insure against the risk of inadequate compliance); *Toussaint v. McCarthy*, 801 F.3d 1080, 1087 (9th Cir. 1986) ("A defendant's history of noncompliance with prior court orders is a relevant factor in determining the necessary scope of an effective remedy.").[7]

[7] Notably, this is not the first time these Defendants have attempted to avoid providing a prisoner court-ordered treatment for gender dysphoria. In 2007, in *Gammett v. Idaho State Board of Corrections (I)*, this Court enjoined Defendants to provide a transgender plaintiff "appropriate female hormone therapy and psychotherapy to address Plaintiff's gender identity." 2007 WL 2186896 at *17-18 (D. Idaho July 27, 2007). Defendants notified the Court that they could not implement the terms of the injunction—even though Plaintiff's counsel had identified two local Boise providers qualified and willing to provide the treatment. *Gammett v. Idaho State Board of Corrections (II)*, 2007 WL 2684850 at *4-5 (D. Idaho Sept. 7, 2007). Consequently, the Court issued a more specific order for provision of treatment to the plaintiff, finding, "[t]he treatment plan is necessary because Defendants were given the opportunity to provide treatment for Plaintiff and have notified the Court that they cannot provide treatment." *Id.* at *5. The Court's second order explicitly authorized the physician providing hormones to "exercise her independent medical judgment to…fashion an individualized treatment plan for Plaintiff." *Id.*

Similarly, Defendant Corizon has utilized similar claims of "confusion" to avoid compliance with court-ordered injunctive medical relief to prisoners in other states *See, e.g., Mason v. Ryan,*, 2019 WL 1382468, at *23 (D. Ariz. Mar. 27, 2019) ("The record shows that Mason did not see Dr. Page or Dr. Waldrip again until after the Court ordered Corizon to schedule him with the specialists. Dr. Waldrip recommended surgery, but the consult request for the surgery was denied and an alternative treatment plan was recommended by an unknown, non-treating "Dr. Stacy" for the reason that the Court's Order only indicated that Mason must see the orthopedic

Defendants delayed complying with the Court's injunction for months before selecting Dr. Stiller to provide vaginoplasty to Ms. Edmo. *See* Dkt. 183 at 3:24:5-7; Dkt. 180. Defendants knew Dr. Stiller would assess surgical options at the presurgical consultation, but delayed scheduling the consultation until April 2019. *See, e.g.,* Dkt. 180 at 49-50 (3/17/19 Eaton email). When Plaintiff moved for modification of the stay to ensure that the April presurgical appointment went forward, Plaintiff based that motion on Dr. Stiller's need to determine what surgical technique and presurgical treatments are appropriate for Ms. Edmo. Case No. 19-35017, Dkt. 22 at 6 ("The pre-surgical appointment consists only of the surgeon's examination and interview of Ms. Edmo so that he can gather information necessary to determine the surgical approach appropriate for Ms. Edmo, what procedures or treatments she will require before surgery, and how long those procedures and treatments are expected to take. Maintaining this appointment is essential to preserving Ms. Edmo's right to timely and necessary medical treatment while Defendants' appeal is pending and to ensure there is not a dangerous delay in provision of such medical care if the District Court's preliminary injunction is affirmed by this Court."); *accord* Dkt. 179-1 (Hofer Decl.) at 6, ¶ 19 – 7, ¶ 22. The Ninth Circuit granted Plaintiff's motion. Case No. 19-35017, Dkt. 30.

Following the Ninth Circuit's affirmation of this Court's injunction, Plaintiff moved for a partial lifting of the stay so that Ms. Edmo could receive the presurgical requirements Dr. Stiller determined were necessary following the presurgical consultation. *See* Case No. 19-35017, Dkt. No. 101-1 at 12-13 ("Partial lifting of the March 20, 2019 stay is necessary to minimize ongoing and future serious and irreparable harm to Ms. Edmo. Such relief will ensure that Ms. Edmo receives presurgical treatments that Defendants' selected surgeon has determined are medically

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specialist, and it did not require Corizon to proceed with any recommended surgical options. This insistence to comply only with the technical requirements of the Court's Order and disregard the specialist's recommendation reflects a callous indifference to Mason's serious medical need and is probative of deliberate indifference.") (internal citations omitted); *Mason v. Ryan*, No. CV178098PCTDGCMHB, 2019 WL 1797199, at *7 n.4 (D. Ariz. Apr. 24, 2019) ("Corizon claims that it attempted to schedule the follow-up appointment, but Dr. Waldrip's office was unable to accommodate. But this claim is entirely unsupported") (internal citations omitted).

necessary prerequisites for gender confirmation surgery."). Consistent with its prior modification, the Ninth Circuit granted that motion. Case No. 19-35017, Dkt. 104.

The purpose of both exemptions to the stay was to ensure that Defendants may not—through continued delay tactics—effectively deny Ms. Edmo the necessary medical treatment to which this Court and the Ninth Circuit have held she is constitutionally entitled. Defendants themselves admitted in their briefing to the Ninth Circuit opposing Plaintiff's motion to partially lift the stay that they understood that if the Ninth Circuit did lift the stay to allow presurgical treatment to move forward, they would have to provide hair removal treatment: "[I]f this Court enters an order effectively requiring Defendants to provide substantive and irreversible GCS treatments (i.e. electrolysis), the Court will diminish Defendants' right to appeal the foregoing serious legal questions to the extent that any treatment is provided." Case No. 19-35017, Dkt. 103-1 at 9. The Ninth Circuit considered Defendants' argument, and, nevertheless, granted the partial lifting of the stay. This is the law of the case.

Defendants' continued foot-dragging in the face of this Court's and the Ninth Circuit's specific orders requiring them to provide Ms. Edmo desperately-needed treatment constitutes further deliberate indifference in three ways. First, intentionally delaying medically necessary care is itself deliberate indifference. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104-05 (holding that deliberate indifference is manifested by prison officials who intentionally deny or delay access to medical care, or intentionally interfere with treatment once prescribed); *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) ("Deliberate indifference 'may appear when prison officials deny, delay, or intentionally interfere with medical treatment.'") (quoting *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988)). The Ninth Circuit's specific grant of access to Dr. Stiller for a presurgical appointment is rendered meaningless if Defendants refuse to follow through on the presurgical treatments and preparation Dr. Stiller determined are required. *Cf. Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) ("Access to the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems. The medical staff . . . must be able to treat medical problems or refer prisoners to others who can.").

Second, Defendants' reliance on the opinions of unqualified and non-specialist providers over those of their own chosen specialist also constitutes deliberate indifference. *See, e.g., Snow v. McDaniel*, 681 F.3d 978, 986-88 (9th Cir. 2012) (comparing recommendations by physicians hired to consult and examine patient with non-treating physicians who were not board-certified or specialists in the relevant discipline) (overruled, in part, on other grounds by *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014)); *see also id.* at 986 ("We are specifically concerned with the URP's repeated denials of bilateral THA surgery, which had been recommended by Snow's treating physician. . . . But instead of approving the needed hip surgery when Snow's treating physician and a specialist considered the request an 'emergency'…the URP repeatedly refused to authorize the procedure. The URP gave no medical reason for the denials.."); *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (holding that where there is a need for specialized expertise, refusing to engage or follow specialist's recommendations permits an inference of deliberate indifference) *Wakefield v. Thompson*, 177 F.3d 1160, 1165 (9th Cir. 1999) ("Following *Estelle*, we have held that a prison official acts with deliberate indifference when he ignores the instructions of the prisoner's treating physician or surgeon."). Defendants have offered no basis for disputing their chosen surgeon's use of the vaginoplasty technique he attested is "[t]he most commonly performed vaginoplasty surgery, and the one performed on the vast majority of patients both in this country and worldwide," Dkt. 224-1 at Exh. 1, ¶ 4, other than complaining that Ms. Edmo should not get to choose her preferred option. Defendants themselves selected Dr. Stiller to provide the surgery to Ms. Edmo and represented that they believe him qualified to do so. *See, e.g.,* Dkt. 92-2 at 14:9-15; Dkt. 179-1 at 4, ¶ 14. Yet, rather than following their chosen specialist's recommendation, Defendants submitted a declaration from one of Corizon's non-specialist physicians questioning whether Dr. Stiller's requirements are necessary. Dkt. 228-2. Defendants further assert, without a shred of legal support, that "in the absence of evidence that only one type of vaginoplasty is medically acceptable, that decision must be left up to the medical discretion of Ms. Edmo's prison *mental health* providers." Dkt. 228-1 at 8 (emphasis added).

Third, Defendants' determinations about medical treatment based on administrative policy

and litigation strategy rather than the medical needs of a patient constitutes deliberate indifference. *See Hamilton v. Endell*, 981 F.3d 1062, 1067 (9th Cir. 1992) (overruled, in part, on other grounds) (recognizing deliberate indifference where prison officials deliberately ignored a physician's instructions for reasons unrelated to the medical needs of the prisoner); *Colwell*, at 1069 (finding evidence of deliberate indifference where "[t]he record in this case indicates that the NDOC similarly ignored the recommendations of treating specialists and instead relied on the opinions of non-specialist and non-treating medical officials who made decisions based on an administrative policy"). Tellingly, Defendants have never actually taken a position regarding which surgical technique they believe should be employed. Even their most recent assertion that their "prison *mental health* providers" should determine the appropriate *surgical* technique for vaginoplasty, Dkt. 228-1, is void of any such purported opinion. This is because it benefits Defendants' *litigation* strategy to assert no real position. By questioning the penile inversion technique, Defendants avoid the presurgical requirement of genital hair removal. And if they can delay hair removal long enough, there will be insufficient time before Ms. Edmo's July 2021 release date to provide this option. By failing to urge the alternate, colo-vaginoplasty technique, Defendants preserve the argument, closer to Ms. Edmo's release date, that this option is also untenable since it requires two separate surgeries.

This Court must not permit Defendants to thwart its injunction through these additional acts of deliberate indifference to Ms. Edmo's serious medical needs.

IV. Defendants Have Waived Their Arguments Regarding Surgical Technique and Presurgical Requirements

As stated above, the surgical technique and presurgical requirements must be left to Dr. Stiller, Defendants' chosen specialist. Even if this were not the law, however, Defendants have repeatedly waived these issues.

Parties are not permitted to "lay in wait" regarding procedural or legal issues in the district court, raising them for the first time at the appellate level. *See, e.g., Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) ("'[A]n issue will generally be deemed waived on appeal if the

argument was not raised sufficiently for the trial court to rule on it.'") (quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010)). This rule is "essential" so that parties have the opportunity to present evidence and legal arguments before the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) ("This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal."). Further, this principle affords the district court the opportunity to fully consider the issues before it and correct any errors. *See, e.g., In re Mercury*, 618 F.3d at 992. The appellate court "will only excuse a failure to comply with th[e waiver] rule when necessary to avoid a manifest injustice." *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)).

During the period following issuance of the injunction, this Court repeatedly directed Defendants to identify any barriers they foresaw related to surgery or presurgical care. *See, e.g.,* Dkt. 201 at 14:24-15:7 ("The Court: Well, that's why I'm asking you to work cooperatively and make—kind of put your cards on the table and see where we are so that we're not just churning, just talking a lot with nothing actually being done to resolve whatever disputes there may be between the parties. Mr. Eaton, are you on board with that? Mr. Eaton: Yeah. I understand, Your Honor. Yes. The Court: Okay. And Mr. Hall? Mr. Hall: Yes, Your Honor. Sounds like a good plan."). Defendants never argued to the Court that it was inappropriate for their selected surgeon to determine the appropriate vaginoplasty technique and necessary presurgical procedures for Ms. Edmo.[8] In fact, they maintained they could not dictate such medical requirements to Dr. Stiller.

[8] Nor, as the Ninth Circuit noted, did Defendants raise this issue in their opening appellate brief. 935 F.3d at 800 n.3. However, even if Defendants had timely objected that the exact surgical technique and presurgical treatment of hair removal were not established during the trial or in this Court's injunction, such argument would have failed. Until Ms. Edmo was actually referred to a qualified surgeon and had the presurgical consult, such information could not have been determined. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) ("Although Rosati lacks

Nor did Defendants move for clarification or modification of this Court's December 13, 2018 injunctive relief order to request more specific direction regarding the gender confirmation surgery required, the surgical technique required, or presurgical requirements. Instead, Defendants focused on re-hashing their contention that Ms. Edmo is not entitled *to surgery at all*, and refused for months to effectuate even the most basic planning steps for surgery. For example, even though Defendants' counsel knew prior to their March 19, 2019 status report that "most patients need the hair removal for surgery," that there are multiple surgical techniques for vaginoplasty, and that Dr. Stiller, together with the patient, "determines which option is appropriate after his medical examination of the patient," and stated that they were "considering options, which may include a motion for modification," Defendants never contested these issues in their March 19, 2019 status report. *Compare* Dkt. 180 at 49-50 (3/17/19 Eaton email) to Dkt. 179 (Defs.' March 19, 2019 Joint Status Rpt.). Rather, Defendants identified that the "most notable" potential complication "that may create barriers to having the surgery performed before June" was the WPATH and Dr. Stiller's requirement of referral letters from Ms. Edmo's treating physician and two mental health providers. Dkt. 179 at 3. Again, Defendants insisted that the WPATH Standards "do not equate to the standard of care for diagnosis and treatment of inmates or persons [sic] diagnosed with gender dysphoria," and that "[b]ecause Ms. Edmo's medical and mental health providers do not believe that Ms. Edmo meets the criteria for surgery…Defendants are unable to provide those referral letters." *Id.*; *see also* Dkt. 201 at 7:5-8:23. Defendants did not raise objections to Dr. Stiller choosing the surgical technique, nor did they file a motion for modification of the injunction, as their counsel stated they contemplated. *See* Dkt. 180 at 5-6, ¶ 10.

Defendants again waived any ability to litigate surgical technique and presurgical

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a medical opinion recommending SRS, she plausibly alleges that this is because the state has failed to provide her access to a physician competent to evaluate her."); *De'lonta v. Johnson*, 708 F.3d 520, 527 n.4 (4th Cir. 2013) ("Appellees and the district court take pains to point out that, absent a doctor's recommendation, De'lonta cannot show a demonstrable need for sex reassignment surgery. However, we struggle to discern how De'lonta could have possibly satisfied that condition when, as she alleges, Appellees have never allowed her to be evaluated by a GID specialist in the first place.").

procedures when they elected to immediately appeal this Court's Presurgical Order rather than follow the Court's direction to move for clarification or reconsideration. After the Ninth Circuit's partial lifting of the stay, this Court held a status conference on October 17, 2019 to begin effectuating the Ninth Circuit's order and its injunction with respect to presurgical procedures. During this conference, Defendants repeatedly insisted that the Court issue an order clarifying what presurgical steps Defendants must complete, claiming, as described *supra*, new "confusion" directly belied by all of their prior conduct. Attachment A at 10:2-11:16; 13:1-17. The Court agreed to issue such an order and requested that Plaintiff provide a submission setting forth Dr. Stiller's presurgical requirements. *Id.* at 13:18-14:2. The Court specifically told Defendants that if they were still "confused" after it issued an order implementing Dr. Stiller's requirements, Defendants could move for clarification or modification. *Id.* at 12:23-24 ("The Court: [T]hat's not really before the Court unless you file a motion for clarification or modification."); *id.* at 17:2-5 ("The Court: [I]f you want clarification, you can get it. But I don't see any reason why there needs to be any delay while you're requesting that."); *id.* at 20:22-21:4 ("[A]s I have indicated, Mr. Hall and Mr. Eaton are absolutely free to either file a motion for clarification or—or upon my receipt of the information from Dr. Stiller, after I enter an order, you can file a motion challenging that, if you wish."). Defendants did not at any time object to this procedure as set forth by the Court. *See, e.g., id.* at 19:2-15 ("Mr. Hall: I've heard the Court, and I've heard the Court is not going to consider this any further absent a motion or some clarification."). After the Court issued its Presurgical Order, Defendants appealed it, thereby forgoing further motion practice regarding the Presurgical Order in this Court.[9] Defendants' failure to object to the Court's clearly articulated procedure until their motion for a stay pending appeal forfeited their ability to litigate the issues set forth in this Court's November 8, 2019 Order. *Cf.* 935 F.3d at 801 (citing with approval *Reilly*

[9] Defendants did not, as this Court states in its November 8, 2019 Order, do "exactly what" the Court acknowledged that they could do, which was "file a motion raising argument to challenge the presurgical requirements." Dkt. 244 at 12. Rather, Defendants appealed the Court's Presurgical Order, and moved for a stay pending appeal. In so doing, Defendants also ignored the Ninth Circuit's specific direction that "[t]o the extent there are issues arising from a surgical evaluation, the State can raise those issues with the district court." 935 F.3d at 800.

v. United States, 863 F.2d 149, 160 (1st Cir. 1988) ("When a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected must act expeditiously to call the error to the judge's attention, or to cure the defect, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles.")).

While Defendants' appeal arguably divested this Court of jurisdiction to substantively reconsider its Presurgical Order or further adjudicate the presurgical requirements,[10] it is clear that this Court retains authority to enforce its existing Presurgical Order. The Court should do so.

V. The Litigation Procedure Ordered by the Court Jeopardizes Plaintiff's Receipt of Medically Appropriate Care

This Court should also reconsider its November 8, 2019 Order because the briefing and hearing process set forth in that Order will severely prejudice Plaintiff by delaying and threatening her access to treatment this Court and the Ninth Circuit have already determined to be urgently necessary and life-saving. If this Court re-opens the evidentiary record to allow Defendants to litigate against their own, self-selected specialist, Ms. Edmo will be in the untenable position of having to find and retain experts to rebut Defendants' improper evidence while also having to prepare for an evidentiary hearing the day after her response is due.

Unlike Defendants, Plaintiff does not employ doctors or have access to taxpayer or for-

[10] Plaintiff expects the Ninth Circuit to dismiss Defendants' appeal of this Court's Presurgical Order for lack of jurisdiction because the Order is not appealable and because the Ninth Circuit has already determined that Defendants waived any argument that this Court failed to specify the type of gender confirmation surgery in its injunction. 935 F.3d at 800 n. 23. However, until that occurs, Defendants' filing of their notice of appeal divests this Court of jurisdiction to further substantively adjudicate the issues involved in the appeal. *See City of L.A. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) ("[T]he filing of a notice of interlocutory appeal divests the district court of jurisdiction over the particular issues involved in that appeal."); *see also A & M Records, Inc. v. Napster, Inc.* 284 F.3d 1091, 1099 (9th Cir. 2002) (while a preliminary injunction is pending on appeal, the district court "lacks jurisdiction to modify the injunction in such manner as to 'finally adjudicate substantial rights directly involved in the appeal.'"); *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1190 (9th Cir. 2000) (voiding lower court order that "amounted to a final adjudication of the substantial rights directly involved in the appeal" because court lacked jurisdiction during pendency of appeal).

profit corporation money to hire experts for an evidentiary hearing at a moment's notice. Where Defendants may call upon their employees to file declarations buttressing Defendants' litigation positions (despite those employees having literally no qualifications to do so), Plaintiff must rebut those assertions—however unsupported or dubious they may be. Because Plaintiff is not a medical provider, she must rely on the availability of outside experts to provide such evidence and testimony. It simply is not feasible for Plaintiff to retain qualified experts to provide declarations and testify in the space of five days, in response to whatever new obfuscations of gender confirmation surgery, the WPATH Standards of Care, and/or surgical techniques and requirements Defendants will manufacture.

The stakes could not be higher for Ms. Edmo in terms of ensuring that she will receive gender confirmation surgery that is medically appropriate for her in accordance with the determinations of a qualified surgeon. Defendants, on the other hand, have little at stake in continuing to delay provision of treatment as long as they can, even if they ultimately lose every motion and appeal. Indeed, it is hardly in doubt that, in order to further delay provision of actual care to Ms. Edmo, Defendants are certain to appeal any further orders the Court makes to enforce the injunction as a result of the scheduled evidentiary hearing.

Defendants also will not be harmed whether or not they provide presurgical care to Ms. Edmo. Ms. Edmo, on the other hand, continues to suffer each day that necessary treatment is delayed. In light of this overwhelmingly lopsided balance of hardships, this Court should move forward with effectuating its Presurgical Order that Defendants satisfy Dr. Stiller's presurgical requirements, including providing hair removal treatments to Ms. Edmo. *Cf. McNearney v. Wash. Dep't of Corr.*, 2012 WL 354267 at *43 (W.D. Wash. June 15, 2012) ("Defendants argue that Plaintiff's request is premature in that it circumvents their ability to defend themselves against the allegations of her complaint and that granting temporary relief would insert this Court as 'decision-maker for her medical care.' . . . The physician who examined Ms. McNearney was engaged by the DOC specifically to evaluate her condition. In light of his findings and the findings of at least one other orthopedic specialist that Ms. McNearney is suffering and will continue to suffer

unnecessary pain, the undersigned finds that the balance of hardships is greater for Ms. McNearney if the injunction were not granted.").

CONCLUSION

For the reasons stated above, Plaintiff moves that this Court reconsider its November 8, 2019 Order for evidentiary submissions and a hearing regarding the surgical technique and presurgical requirements for Plaintiff's vaginoplasty. Plaintiff requests that this Court instead immediately enforce its existing Presurgery Order, or, in the alternative, schedule a status conference including Dr. Stiller so that the Court can clarify any of his medical determinations for Ms. Edmo as needed.

Dated: November 12, 2019

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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