UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO, Plaintiff, v. IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO; JEFF ZMUDA; HOWARD KEITH YORDY; CORIZON, INC.; SCOTT ELIASON; MURRAY YOUNG; RICHARD CRAIG; RONA SIEGERT; CATHERINE WHINNERY; AND DOES 1-15, Defendants.	Case No. 1:17-CV-00151-BLW **ORDER**

INTRODUCTION

This order is responsive to two filings presently before the Court. The first, Plaintiff's motion for reconsideration of the Court's November 8, 2019 order for evidentiary submissions and a hearing regarding gender confirmation surgical technique and presurgical requirements. (Dkt. 249.) The second, Defendants' objection to the November 8, 2019 order. (Dkt. 250.)

BACKGOUND

The Court includes limited background here as the history pertinent to the present motion and objection has recently been stated in full within the Court's orders of October 24, 2019, and November 8, 2019. (Dkt. 255; Dkt. 244.) As detailed therein, on October 10, 2019, the United States Court of Appeals for the Ninth Circuit partially lifted the stay of the Court's December 2018 Order and injunction to allow for Plaintiff to "receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." As such, this Court acted within the bounds of the limited jurisdiction conferred by the Ninth Circuit to ensure Plaintiff receives necessary treatments.

Namely, on October 24, 2019, the Court issued a Presurgical Order requiring Defendants to take steps to ensure three remaining presurgical requirements were met—the only treatment-based requirement being laser hair removal in the area of the surgical site. Defendants filed an interlocutory appeal of the order and also filed a motion, before this Court, to stay the order pending appeal.

The Court, in its discretion, denied the stay. However, because the Court found at least some merit in Defendants' contention that there may be more than one type of gender confirmation surgery that would cure the ongoing violation of Plaintiff's Eighth Amendment rights, it set the issue for briefing and oral argument. It is this order that Plaintiff asks the Court to reconsider, and to which Defendants

object. The Court will briefly set forth the parties' arguments below.

1. Plaintiff's Motion for Reconsideration

Plaintiff makes five arguments in support of her request for the Court to reconsider its November 8, 2019 order: (1) that the Court enjoined Defendants to provide Plaintiff with vaginoplasty as treatment for her gender dysphoria in its December 2018 Order; (2) that both the Court and Defendants have previously recognized the surgical technique for vaginoplasty is appropriately determined by the surgeon in consultation with the patient; (3) that Defendants have engaged in a strategy of delay by attempting to litigate against their own surgeon's recommendations, which is evidence of further deliberate indifference to Plaintiff's serious medical need; (4) that Defendants have waived their arguments regarding surgical technique and presurgical requirements; and (5) that the November 8, 2019 Order jeopardizes Plaintiff's receipt of medically appropriate care. (*See* Dkt. 249.)

2. Defendants' Objection

Defendants object to the Court's November 8, 2019 Order on the following bases: (1) that the Court does not have jurisdiction to proceed with further briefing and an evidentiary hearing regarding which surgery or which presurgical treatments are medically necessary;[1] (2) that Defendants did not ask for "an

[1] Defendants assert the Court was divested of its jurisdiction because Defendants appealed the Presurgical Order subject to Defendants' motion to stay (citing Federal Rule of Civil Procedure 62(c); and *Nat. Res. Def. Council, Inc.*

evidentiary hearing at this point and are not trying to re-litigate issues;" (3) that the evidentiary hearing and briefing schedule is unfair and unduly prejudicial to Defendants because they have to file an opening brief in the appeal to the Ninth Circuit soon; and (4) that the Court impermissibly shifted the burden of proof onto Defendants by demanding Defendants establish an element of Plaintiff's case regarding medical necessity. (*See* Dkt. 250.)

DISCUSSION

For the reasons stated below, the Court will not vacate the hearing set for November 21, 2019, will not revise the briefing schedule for that hearing, and will deny Plaintiff's motion for reconsideration. However, given Defendants' appeal of the Presurgical Order, it is necessary for the Court to revisit the issue of whether it retains jurisdiction to require the briefing and hold the hearing.

Defendants styled their appeal of the interlocutory Presurgical Order, filed October 31, 2019, as a "joint preliminary injunction" appeal. (Dkt. 227.) On November 7, 2019, the Ninth Circuit issued a scheduling order, which defines the appeal as a "preliminary injunction appeal."[2] (Dkt. 240.) The briefing schedule set by the Ninth Circuit is as follows: Opening brief due no later that November 29,

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v. Sw. Marine Inc., 242 F.3d 1163, 1166-67 (9th Cir. 2001)). Plaintiffs also challenge the Court's jurisdiction to further substantively adjudicate the issues in the Presurgical Order, based on Defendants' appeal of that order. (Dkt. 241 at 7 (Plaintiff argues the Presurgical Order was not immediately appealable, but until the Ninth Circuit dismisses the appeal, the Court does not have jurisdiction.)

[2] Rule 3-3 governs appeals from a trial court of interlocutory orders that modify, grant, or refuse to modify a preliminary injunction. *See* Circuit Rule 3-3, Preliminary Injunction Appeals.

2019; answering brief due December 27, 2019, or 28 days after service of opening brief; and an optional reply due 21 days after service of the opening brief—with the furthest date possible being January 17, 2019. *Id.* at 1. Provided the foregoing, it is clear the appeal has been accepted by the Ninth Circuit.

As each party notes, when a notice of appeal is filed, jurisdiction over the matters appealed normally transfers from the district court to the appeals court. *See Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985). However, as stated in the Court's November 8, 2019 Order, an exception exists under Federal Rule of Civil Procedure 62(c).[3] (*See* Dkt. 244 at 8-9.) The rule permits a district court to retain jurisdiction to "suspend, modify, restore, or grant an injunction during the pendency of the appeal… as it considers proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c); *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001). Although a district court retains jurisdiction during the pendency of an appeal "to act to preserve the status quo" the rule "does not restore jurisdiction to the district court to adjudicate anew the merits of the case." *Id.* (quoting *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d

[3] From Advisory Committee Notes on Rules – 2018 Amendment:

> The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

Fed. R. Civ. P. 62(c)(Advisory Committee's Note to 2018 amendment).

1163, 1166 (9th Cir. 2001)). In effect, in exercising such jurisdiction, a district court may not "materially alter the status of the case on appeal." *Id.*

In this instance, the Court has not materially altered the status of the case on appeal by ordering briefing on the issue of whether surgical techniques other than penile vaginoplasty will confirm Plaintiff's gender as a female. *See Mayweathers* at 935. This issue, as argued and raised by Defendants, may ultimately delay the provision of medically necessary gender confirmation surgery to Plaintiff upon full lifting of the stay by the Ninth Circuit.

To preserve the status quo, it is necessary to determine whether there is any basis in Defendants' assertion that there are other surgical techniques that will provide the medically necessary gender confirmation treatment Plaintiff needs to cure her ongoing gender dysphoria. This necessity is wrought from the Ninth Circuit's order partially lifting the stay because the Court must know if there is merit in the contention that Plaintiff need not undergo the presurgical treatment of laser hair removal. However, as further indicated below, the Court would like to hear in full Plaintiff's arguments that Defendants have waived this issue, and that the record establishes vaginoplasty is the only surgical technique that will be gender confirming in Plaintiff's case,

To this end, the status quo at the time of the appeal includes findings that, by denying Plaintiff medically necessary gender confirmation surgery, Plaintiff

suffers ongoing serious risk of harm, i.e. "if she is not provided with gender confirmation surgery in the very near future" there is a "significant risk" she "will make a third attempt at self-castration." (Dkt. 196.) These findings were set forth in the Court's order of May 31, 2019, which clarified issues for the Ninth Circuit and reissued the injunction. *Id.* These same findings were affirmed by the Ninth Circuit within its August 23, 2019 order. (Dkt. 209.) These findings have not been reversed or modified during the pendency of Defendants' appeal of the full injunction, or during Defendants' recent appeal of this Court's interlocutory Presurgical Order.

Moreover, this case is in an unusual posture. The Court's October 24, 2019 Order was issued in direct response to the Ninth Circuit's order of October 10, 2019, partially lifting the stay of the Court's December 2018 Order and injunction to allow Plaintiff to "receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." In that light, the Court questions whether the appeal of the October 24, 2019 Order can fairly be characterized by the Defendants or should be treated by the Ninth Circuit as a "joint preliminary injunction" appeal. Rather, it appears to be a garden-variety interlocutory appeal of a non-final order. If that is the case, the Court retains jurisdiction to proceed with the resolution of the limited issues covered by the October 10, 2019 order partially lifting the stay. *See* 28 U.S.C. § 1292(a)(1); *See*

Dannenberg v. Software Toolworks, 16 F.3d 1073, 1074 (9th Cir. 1994).

Finally, the Defendants are not without a remedy. The Court believes, for the reasons stated above, that it has jurisdiction to conduct the proceedings outlined in its October 24, 2019 Order. The Defendants are free to seek a stay of that order by the Ninth Circuit. (*See* Fed. R. App. P. 8, Stay or Injunction Pending Appeal.) If the Court has mischaracterized its jurisdiction, the Ninth Circuit will undoubtedly so indicate. In seeking such a stay, the Defendants will be required by rule to provide reasons for the court to grant such relief. The Court notes this procedure to again highlight the fact that Defendants had a full and fair opportunity to argue that the Ninth Circuit should not have partially lifted the stay to allow Plaintiff to receive all presurgical treatments necessary to gender confirmation surgery. To argue a stay of the Court's order effectuating the Ninth Circuit's action, the Defendants necessarily will re-assert arguments made there, and subsequently re-made here. For these reasons, the Court finds Defendants' contention that they are not attempting to "re-litigate issues" unpersuasive.

In sum, the Court finds it necessary and prudent to hold the expedited hearing on the discrete issue of whether a gender confirmation surgery technique other than penile vaginoplasty would cure the ongoing violation of Plaintiff's Eighth Amendment right to medically necessary treatment. Notably, the Court has not ordered, and does not envision conducting, a full evidentiary hearing. Instead,

it has instructed the parties to file briefing, affidavits, or other evidentiary materials "they wish to submit." In this regard, the arguments raised by Plaintiff in her motion for reconsideration directly relate to the subject of the hearing. Provided this and the foregoing, the Court will deny the motion for reconsideration.

IT IS SO ORDERED.

DATED: November 14, 2019

B. Lynn Winmill
U.S. District Court Judge