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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

**DEFENDANTS' JOINT MOTION
TO STAY**

Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery, by and through their counsel of record, Parsons Behle & Latimer, and the Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert, by and through their counsel of record, Moore Elia Kraft & Hall, LLP, hereby move this Court, based on the authority and arguments cited in the accompanying memorandum filed herewith, to issue an order staying the litigation (including all discovery) before the district court on all of Plaintiff's claims in this case.

This Motion is supported by a Memorandum and Declaration in support filed contemporaneously herewith.

DATED this 2nd day of March, 2020.

PARSONS BEHLE & LATIMER

By: /s/ Dylan A. Eaton

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

DATED this 2nd day of March, 2020.

MOORE ELIA KRAFT & HALL, LLP

By: /s/ Brady J. Hall

Brady J. Hall
Counsel for Defendants Idaho Department of
Correction, Henry Atencio, Jeff Zmuda, Howard
Keith Yordy, Richard Craig, and Rona Siegert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of March, 2020, 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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NO. 1:17-cv-151-BLW

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' JOINT MOTION TO
STAY**

COME NOW, Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery, by and through their counsel of record, Parsons Behle & Latimer, and the Idaho

Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert, by and through their counsel of record, Moore Elia Kraft & Hall, LLP (collectively referred to as “Defendants”), hereby file this Memorandum in Support of their Motion to Stay.

I. INTRODUCTION¹

The Court should exercise its discretion and stay this litigation pending the resolution of Defendants’ forthcoming appeal to the Supreme Court. Ms. Edmo will not suffer any harm if the Court issues a stay because the Court has already adjudicated Ms. Edmo’s claims for injunctive relief. Moreover, a stay will further judicial economy because the resolution of the issues on appeal will simplify and clarify the remaining litigation in this Court. Thus, this Court should follow its inclination at the February 21, 2020 status conference in this case to “grant a request for stay.” Decl. of D. Eaton in Support Defendants’ Joint Motion to Stay (“Eaton Decl.”), Ex. A at 13:22–23.

Per the Court’s request, the parties did meet and confer on February 27, 2020 to discuss if they could agree to stay the underlying litigation pending disposition by the Supreme Court of Defendants’ forthcoming petition for certiorari.² Eaton Decl. ¶ 4. While the parties appear to agree that most of the underlying litigation should be stayed, they did not come to an agreement because Ms. Edmo’s counsel will not agree to stay the depositions of five individual defendants. *Id.* ¶ 5. Yet, there is **no** evidence or basis that the reasons contemplated by the court for allowing very limited depositions while the remainder of the discovery and litigation is stayed – age of the

¹ Defendants previously filed a motion to stay the litigation in this matter for two reasons: 1) the court lacked jurisdiction based on Defendants’ pending appeal in the Ninth Circuit, and 2) a stay would promote judicial economy. Dkt. 214-1 at 2–9. This Court now has jurisdiction because the Ninth Circuit issued the mandate. However, if the Supreme Court grants the Petition for Certiorari, Defendants reserve the right to argue that the Court lacks jurisdiction over the issues inextricably intertwined with the issues raised in the petition.

² By Defendants’ calculation, the Petition for Certiorari is due May 11, 2020.

witness or concern the witness is leaving the country and inability to be deposed at a later time – are present. See *Id.*, Ex. A, 13:22 - 14:7. Thus, because there is no urgent need to depose these individuals, the Court should stay the litigation.

II. BACKGROUND AND PROCEDURAL POSTURE

This case is in a unique and complex procedural posture. In the operative complaint, Ms. Edmo listed six claims for relief: 1) failure to provide necessary medical treatment under the Eighth Amendment; 2) discrimination based on sex in violation of the Fourteenth Amendment; 3) discrimination based on diagnosis of gender dysphoria in violation of the Fourteenth Amendment; 4) discrimination based on diagnosis of gender dysphoria in violation of the Americans with Disabilities Act (“ADA”); 5) discrimination based on sex in violation of the Affordable Care Act (“ACA”); and 6) negligence under Idaho state law. (Third Amended Complaint, Dkt. 172 at 14-22). Each of these claims is primarily based on Ms. Edmo’s allegation that Defendants have failed to provide medically-necessary treatment for her gender dysphoria. (*Id.* ¶¶ 61, 70, 83-84, 91, 99, and 102).

Ms. Edmo filed a Motion for Preliminary Injunction, arguing that she was likely to succeed on her Eighth Amendment claim, her Fourteenth Amendment claim based on sex discrimination, and her ACA claim. (Dkt. 62 at 10-16). Asserting that Defendants failed to provide appropriate medical treatment for Ms. Edmo’s gender dysphoria (“GD”), Ms. Edmo requested that the Court enter an injunction ordering Defendants to provide necessary medical treatment for her GD, including gender confirmation surgery (“GCS”) and access to gender-appropriate items. (*Id.* at 20).

Eventually, the Court partially granted and partially denied Ms. Edmo’s request for an injunction. (Dkt. 149 at 45). The Court held that Defendants had not provided Ms. Edmo with necessary medical treatment, in violation of the Eighth Amendment. (*Id.* at 41). Consequently, the

Court ordered Defendants “to provide Plaintiff with adequate medical care, including gender confirmation surgery.”(*Id.* at 45). However, the Court denied Ms. Edmo’s request for an injunction based on her Fourteenth Amendment and ACA claims. (*Id.* at 44-45). In addition, the Court denied as moot Ms. Edmo’s request related to accessing gender-appropriate items. (*Id.* at 45). While Ms. Edmo’s motion was pending, the Idaho Department of Correction had implemented a new gender dysphoria policy, which unrelatedly mooted the relief Ms. Edmo had requested from the Court. (*Id.*). Defendants appealed the Court’s Order, and the Ninth Circuit stayed the injunction. Meanwhile, believing that the Court had entered only a preliminary injunction and that the Court’s findings did not have any preclusive effect, the parties continued to litigate Ms. Edmo’s claims.

On appeal, a three-judge panel of the Ninth Circuit affirmed in part and vacated in part the injunction. The panel held that the Court did not err in determining that Ms. Edmo was not provided necessary medical treatment and that Ms. Edmo had succeed on the merits of her Eighth Amendment claim against Dr. Eliason. *Edmo v. Corizon, Inc.*, No. 19-35017, 2019 WL 3978329, at *20-30 (9th Cir. Aug. 23, 2019). However, the panel concluded that Ms. Edmo had “not established the liability” of Defendants Yordy, Siegert, Dr. Young, Dr. Craig, and Dr. Whinnery. *Id.* at 32. In addition, the court remanded with instructions to exclude Corizon from the injunction. *Id.* According to the panel, the Court had properly converted the hearing to a final trial on the merits of Ms. Edmo’s claims for injunctive relief, and Defendants “waived [their] right to a jury trial with respect to issues common to Edmo’s request for an injunction ordering GCS and her legal claims” by failing to object. *Id.* at 35.

Defendants filed a Petition for Rehearing En Banc. *Edmo v. Corizon, Inc.*, Nos. 19-35017 and 19-35019, Dkt. 99. Defendants contend that converting the hearing to a final trial on the merits violated their rights to a jury trial and that the Court failed to provide the requisite clear and

unambiguous notice. *Id.* at 3-12. In addition, Defendants argue that the treatment they provided to Ms. Edmo was medically acceptable. *Id.* at 12-19.

While that petition was pending, Defendants filed a motion to stay the litigation in this Court. Dkt. 214. Defendants argued that a stay was appropriate for two reasons: 1) the court lacked jurisdiction based on Defendants’ pending appeal in the Ninth Circuit, and 2) a stay would promote judicial economy. Dkt. 214-1 at 2–9. The Ninth Circuit subsequently denied the petition for rehearing en banc, Dkt. 263, and issued the mandate, returning jurisdiction to this Court, Dkt. 266.³ As a result, this Court dismissed Defendants’ motion to stay as moot. Dkt. 264 at 2. However, Defendants intend to file a petition for writ of certiorari with the Supreme Court. Thus, Defendants renew their motion to stay because staying this litigation will promote judicial economy.

III. ARGUMENT

The Court should issue a stay of this case pending resolution of Defendants’ appeal to the Supreme Court. Staying this litigation will not cause any harm to Ms. Edmo and will promote judicial economy.

A. The Court Should Exercise Its Discretion and Issue a Stay.

“A district court has discretionary power to stay proceedings in its own court.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). In deciding whether to stay litigation pending appeal, the district court must weigh “the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and

³ If the Supreme Court grants the petition for certiorari, Defendants contend this court would lack jurisdiction over the issues inextricably intertwined with the issues raised in the petition. Defendants reserve the right to raise that argument in a subsequent motion if the Supreme Court grants the petition.

questions of law which could be expected to result from a stay.”⁴ *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). In this case, Ms. Edmo will not suffer any harm if the Court issues a stay and a stay would promote the orderly course of justice. Thus, the Court should grant a stay.

Ms. Edmo will not be harmed by a stay. When a plaintiff seeks only damages, “[d]elay of [plaintiff]’s suit would result, at worst, in a delay in [plaintiff]’s monetary recovery, with possible (though by no means certain) loss of prejudgment interest.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005). In contrast, if a plaintiff “seeks injunctive relief against ongoing and future harm,” then the plaintiff will suffer damage from a stay. *Id.* at 1112. Here, a stay would not delay any injunctive relief. The Court has already granted Ms. Edmo injunctive relief by ordering Defendants to provide Ms. Edmo with gender confirmation surgery and Defendants are in the process of carrying out the Court’s order. In addition, the Court found that Ms. Edmo’s other claims for injunctive relief were effectively moot because IDOC’s new gender dysphoria policy provided Ms. Edmo the relief she was seeking. Consequently, the only harm Ms. Edmo might possibly suffer is a delay in any monetary recovery. That type of harm is not sufficient to defeat a request for a stay. *Id.*

Importantly, a stay will promote the orderly course of justice. A stay will promote the orderly course of justice if it will simplify “issues, proof, and questions of law.” *CMAX*, 300 F.2d at 268. “Considerations of judicial economy are highly relevant in determining whether the orderly course of justice weighs in favor of a stay.” *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2016 WL 9021536, at *2 (N.D. Cal. Mar. 22, 2016) (quotation marks and alteration omitted). In particular, a stay is appropriate if the court would be “forced to address the . . . claims in

⁴ “The likelihood of success on the merits [on appeal] is not an independent factor.” *Kuang v. United States Dep’t of Def.*, No. 18-CV-03698-JST, 2019 WL 1597495, at *6 (N.D. Cal. Apr. 15, 2019).

piecemeal fashion [because it] may have to wait until the issue on appeal is resolved before deciding the final relief, if any.” *Manriquez v. DeVos*, No. 17-CV-07210-SK, 2018 WL 5316174, at *3 (N.D. Cal. Aug. 30, 2018). Further, a stay is appropriate if the “discovery issues that remain might be different if the Court addresses the case as a whole rather than only addressing in part.” *Id.* Consequently, a stay is appropriate when “an interlocutory appeal contains issues that may dispose of the case or significantly reshape the merits” even if the appeal does not involve all of the plaintiff’s claims. *Kuang v. United States Dep’t of Def.*, No. 18-CV-03698-JST, 2019 WL 1597495, at *6 (N.D. Cal. Apr. 15, 2019).

These factors all apply in favor of granting a stay in this case. The ultimate resolution of Defendants’ appeal will determine whether the Court properly converted the hearing to a trial on the merits and, consequently, which of Ms. Edmo’s claims remain to be adjudicated. Thus, a stay will allow the court to avoid addressing Ms. Edmo’s claims in a piecemeal fashion. In addition, because it is uncertain which of Ms. Edmo’s claims are still left to be adjudicated, the scope of permissible discovery is also uncertain. Moreover, the ultimate resolution of Defendants’ appeal will also significantly reshape the merits of Ms. Edmo’s claims because the appeal involves issues that are common to all of Ms. Edmo’s claims, primarily the propriety of her treatment.

Ms. Edmo seems to agree that the Court should grant a stay but requests that the Court create a carveout to allow Ms. Edmo to take the depositions of five specific individuals. As the Court noted in the February 21, 2020 status conference, the Court should stay any depositions unless a party wishing to take a deposition can show the witnesses may not be available in the future “because of their age” or “their intention to leave the country or to otherwise – become very difficult to subpoena and depose at another time.” Eaton Decl., Ex. A at 13:22–14:11. There is no indication or basis that any of these issues are present. Rather, Ms. Edmo has only expressed

general concerns that the memory of these witnesses may fade. But general concerns about the possibility of fading memory should not dissuade the Court from granting a temporary stay.

Other courts have granted stays under similar circumstances. “Given that the potential risk of lost evidence is the sole purported harm from a stay, this factor weighs only slightly against a stay.” *Arris Enterprises LLC v. Sony Corp.*, No. 17-CV-02669-BLF, 2017 WL 3283937, at *3 (N.D. Cal. Aug. 1, 2017).

Any determination from the [the Supreme Court], one way or the other, will go far in streamlining the case. If the [Supreme Court] overturns this Court’s ruling, the landscape of this case will be altered dramatically and the ruling will significantly modify the course of this litigation. If the [Supreme Court] upholds the injunction, that too will streamline the case as the ‘central issues’ will have been largely resolved in [Plaintiff]’s favor and against the defendants When the Court weighs these considerations against **potential** loss of memory or evidence -- the **only** prejudice raised by [Plaintiff] -- a stay is warranted.

Herbalife Int’l of Am. Inc. v. Ford, No. CV072529GAFFMOX, 2008 WL 11491587, at *2 (C.D. Cal. Mar. 12, 2008) (emphasis in original). The Court should similarly grant a stay in this case.

Additionally, Ms. Edmo has waived the right to assert an argument that she needs to depose the remaining individual defendants at this time. Ms. Edmo had a full and complete opportunity to depose these individuals – all of whom are named Defendants – in the summer of 2018 when this Court allowed approximately four months of discovery leading up to the hearing on Ms. Edmo’s request for injunctive relief. Ms. Edmo made no attempt then to take these individual Defendants’ depositions. Pushing forward with litigation without receiving the final word regarding Defendants’ appeal to the U.S. Supreme Court will unnecessarily increase litigation costs for the parties, and waste judicial resources. It will also create confusion, potential multiple depositions of the same witness, and be unfair because it would allow one party to conduct discovery while the other cannot. In addition, a stay will not harm Ms. Edmo. Thus, the Court should grant a stay of the underlying litigation and related discovery in this case on all of Plaintiff’s claims.

IV. CONCLUSION

The Court should exercise its discretion and grant Defendants' Motion to Stay the underlying litigation and discovery in its entirety in this case pending disposition by the U.S. Supreme Court on Defendants' forthcoming Petition for Writ of Certiorari. A stay will promote judicial economy, avoid confusion, and will not harm Ms. Edmo.

DATED this 2nd day of March, 2020.

PARSONS BEHLE & LATIMER

By: /s/ Dylan A. Eaton

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

DATED this 2nd day of March, 2020.

MOORE ELIA KRAFT & HALL, LLP

By: /s/ Brady J. Hall

Brady J. Hall
Counsel for Defendants Idaho Department of
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Defendants.

CIVIL ACTION FILE

NO. 1:17-cv-151-BLW

**DECLARATION OF DYLAN A. EATON
IN SUPPORT OF DEFENDANTS'
JOINT MOTION TO STAY**

I, Dylan A. Eaton, declare as follows:

1. I am more than eighteen years of age and I am legally competent to make this declaration. I have personal knowledge of the facts set forth herein, and can testify as to the truth of the statements contained herein if called upon as a witness at the trial of this action.

2. I am duly licensed to practice law in the State of Idaho and before this Court. I am an attorney of record for Defendants Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery in the above-referenced action.

3. Attached as **Exhibit A** hereto is a true and correct copy of the transcript of the Court's February 21, 2020 status conference.

4. Defendants' counsel and counsel for Ms. Edmo met and conferred on February 27, 2020 to discuss the possibility of agreeing to stay the litigation in this Court pending final resolution of Defendants' forthcoming petition for writ of certiorari to the Supreme Court.

5. The parties could not agree to stay the litigation because Ms. Edmo's counsel would not agree to stay the depositions of five individual defendants.

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

DATED this 2nd day of March, 2020.

/s/ Dylan A. Eaton

Dylan A. Eaton

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By: /s/ Brady J. Hall
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P R O C E E D I N G S

February 21, 2020

(Telephonic status conference.)

THE COURT: Counsel, this is Judge Winmill. I'm assuming since I heard a lot of beeps that we have everyone on the line, but just to be sure, let me do a roll call.

Who do we have on for plaintiffs?

MS. RIFKIN: Lori Rifkin, Your Honor.

MS. WHELAN: Amy Whelan --

MR. DURHAM: Craig Durham here, Your Honor.

THE COURT: I'm sorry. Who was that? Was it Ms. Whelan?

MS. WHELAN: Yep. This is Amy Whelan on for plaintiff as well.

THE COURT: Okay. And who else for the plaintiff?

MR. DURHAM: Craig Durham, Your Honor, and Deborah Ferguson.

THE COURT: All right. Anyone else?

MS. RIFKIN: Lori Rifkin, Your Honor.

THE COURT: Yeah. Ms. Rifkin, I heard you.

Anyone else for the plaintiffs?

MS. RIFKIN: That's all we're expecting.

THE COURT: All right. For the defendants, Mr. Hall?

MR. HALL: Yes, Your Honor.

THE COURT: You're on.

1 And for Corizon, Mr. Eaton?

2 MR. EATON: Yes, Your Honor.

3 THE COURT: Anyone else?

4 MR. HALL: Not for IDOC.

5 MR. EATON: Not for Corizon.

6 THE COURT: All right. Counsel, I would note also,
7 Ms. Gearhart, the court deputy is also on by phone. She is home
8 ill today, but wanted to be available in case some dates came up
9 so she is listening in.

10 And then I think there was at least one or two people
11 from the public or press who wanted to participate, and our
12 policy is to give dial-in numbers for anyone who wants to listen
13 in to any proceedings to kind of give meaning to our commitment
14 to open courts.

15 But I just want counsel to be mindful of that, that
16 there are others on the phone as well.

17 Counsel, this is the status conference set to discuss
18 the case management given the Ninth Circuit's resolution of the
19 appeal of my decision from December of last year in this matter.
20 I would note, just to make sure everyone is up to speed, that
21 two days ago, the Ninth Circuit took two steps: One is to issue
22 the mandate and, second, to deny the defendants' request for a
23 further stay of the judgment pending their proceedings to seek a
24 writ of certiorari from the Supreme Court.

25 So from my point of view, that means the ball is

1 literally back in my court, and we need to proceed on all
2 fronts.

3 Now, I'm mindful that the defendants have given some
4 indication of their intent to seek a writ of certiorari from the
5 Supreme Court, and I'm assuming that as part of that they have
6 also -- have sought a stay of the Court's judgment.

7 Perhaps, Mr. Hall or Mr. Eaton, you can enlighten me
8 as to what the status is of that.

9 MR. HALL: Your Honor, this is Brady Hall. At this
10 point, the status is that the state and defendants are preparing
11 a petition for certiorari for the U.S. Supreme Court. No stay
12 (inaudible) has been signed (inaudible) at this point and --
13 (inaudible.)

14 (Court reporter requests clarification.)

15 THE COURT: Just a second.

16 Mr. Hall, could you -- we are not hearing you very
17 well. Could you -- are you on a cell phone?

18 MR. HALL: I am, Your Honor.

19 Can you hear me better now?

20 THE COURT: A little better. Keep the speaker on the
21 phone right close, if you would, because you were cutting out.

22 MR. HALL: No problem, Your Honor.

23 I'll just reiterate that the defendants are planning
24 to file a petition with the Supreme Court for review. No stay
25 has been filed at this point, but that is under consideration.

1 THE COURT: All right. And, Mr. Eaton, do you concur?

2 MR. EATON: I do, Your Honor.

3 THE COURT: All right. Well, Counsel, what I would
4 like to do is get an update on the -- where we are on some of
5 the orders that have been issued. First would be regarding the
6 presurgical hair removal that the Court ordered on October 24th.
7 If I could get a report very briefly on that, whether those
8 treatments are underway and are proceeding as intended.

9 MR. EATON: Your Honor, this is Dylan Eaton for
10 Corizon. I can update you on that.

11 THE COURT: All right.

12 MR. EATON: As for the laser hair removal treatments,
13 Ms. Edmo, it's my understanding, has now had three of those. I
14 understand there are going -- this is three of six appointments,
15 and they are generally about six weeks apart. So they did start
16 regularly soon after our hearings and the orders, applicable
17 orders last year. So as I have indicated, they have been going
18 every, about, six months, and Ms. Edmo completed three of six.
19 The most recent one, I believe, was on February 18th.

20 And then I know Your Honor wanted a letter provided
21 from the treatment provider to Dr. Stiller, and Dr. Alviso who
22 provides the hormone treatment did prepare a letter and it was
23 sent to Dr. Stiller. I don't have the date of that in front of
24 me, but it was timely and before the deadline for the Court's
25 order. I think that was provided in December. And I have -- as

1 far as I know, it's received and there is no follow-up from
2 Dr. Stiller on that, and a copy was provided to plaintiff's
3 counsel and IDOC's counsel, and I have heard no objections to
4 that. So we have been proceeding as ordered.

5 THE COURT: All right. Ms. Rifkin, I assume you have
6 no concern based upon Mr. Eaton's report?

7 MS. RIFKIN: Not with the presurgical treatment
8 requirements, Your Honor.

9 THE COURT: And the referral letter?

10 MS. RIFKIN: Yes. We don't have a concern. Counsel
11 provided it to us in advance of sending it to Dr. Stiller.

12 THE COURT: All right. The other issue -- well, there
13 are two more issues. One is the Ninth Circuit -- and this may
14 have been just yesterday -- remanded the issue of fees on appeal
15 to the Court, to me, to review and decide. Perhaps -- I don't
16 know if there is a motion for fees that's pending that I'm to
17 take up or whether that still needs to be filed. In any event,
18 I do think that needs to be scheduled for briefing and
19 submission to the Court.

20 Ms. Rifkin, can you report on whether a petition for
21 fees was already filed with the circuit, and then I'm just to
22 pick up on that or do you still need to file such a petition?

23 MS. RIFKIN: Yes, Your Honor.

24 No petition has been filed. We did move the
25 Ninth Circuit to transfer the fees, and we have -- we anticipate

1 either filing by proposed stipulation or by motion a proposal
2 that this court address fees when the case is resolved, and so
3 putting off the need for a petition, and we are meeting and
4 conferring with defendants about that. We have already started
5 meeting and conferring so we anticipate filing either a proposed
6 joint stipulation or a motion within the week.

7 THE COURT: All right. Then I'll just wait. There is
8 nothing for me to do until something is before me on that issue.
9 If you're proposing to put off that issue until the close of the
10 entire case, I'm fine with that as well. But I'll just wait
11 further word from counsel as to whether or not I need to take
12 some action on that.

13 The final issue I have is to discuss discovery and
14 case management. So at this point, there are still, you know --
15 all the claims in terms of damages are still to be addressed.
16 For example, the -- even the Eighth Amendment claim, although
17 the court has ruled on that in terms of injunctive relief, I
18 think the parties are entitled to a jury determination on
19 liability, but there is the Fourteenth Amendment claims for
20 equal protection and the ADA, or Americans with Disabilities Act
21 claim, the Affordable Care Act claim, state law negligence
22 claim, and request for punitive damages all remain outstanding.

23 So what I would note is that the parties in September
24 filed a joint proposed update to the discovery plan. It
25 basically was tied to a date certain and then played off from

1 that, and then we sent out an order on February 11th laying out
2 how those dates might now apply and wanting counsel to be
3 prepared to discuss that at this status conference.

4 Basically, fact discovery would be concluded by
5 June 11th of this year, plaintiff's expert disclosure by
6 July 11th, defendants' expert disclosure by August 25th, and a
7 rebuttal expert disclosure by both parties on September 15th,
8 and then discovery of the experts would continue until October
9 15th, and there would be a dispositive motion deadline of
10 November 15th of this year.

11 Counsel, I want to hear from you now as to whether or
12 not those are realistic deadlines. We intend to issue an order
13 just implementing those deadlines so unless counsel points out
14 some specific problem.

15 So starting with the plaintiffs, do you have any issue
16 with those proposed dates?

17 MS. RIFKIN: Yes, Your Honor. Thank you.

18 We do. We do not think that those dates are feasible
19 given defendants' representation, including their motion to stay
20 before the Ninth Circuit that they are filing a petition for
21 certiorari. Their deadline for filing that petition is May
22 11th. We sought additional information about the timing of that
23 petition and also a motion to stay in the Supreme Court and have
24 not received that information.

25 We are concerned that the schedule, as the Court laid

1 it out, which was what the parties agreed back in September,
2 would prejudice plaintiff's ability to litigate the case while
3 also litigating petition for cert and stay in the Supreme Court.
4 So we are -- remain concerned about those dates.

5 THE COURT: What are you proposing?

6 MS. RIFKIN: Well, it's hard to know, Your Honor, what
7 to propose given that we're not sure. We don't have information
8 -- additional information of what the timing is. We did
9 discuss, you know, I think as both parties briefed to the Court
10 regarding defendants' joint motion to stay the litigation. We
11 had offered to stipulate with defendants as to staying the
12 underlying litigation with the ability -- with the carve-out for
13 plaintiffs to be able to take the depositions of the defendants
14 and relevant percipient witnesses who have left the IDOC or
15 Corizon system, and we reiterated to the defendants that we are
16 still open to that stipulation. We are still offering that
17 stipulation. The Court has denied their motion to stay, but in
18 effort to preserve the evidence while appreciating that the
19 parties are going to be litigating in the Supreme Court, at
20 least the petition, that was our proposal.

21 So we don't have -- didn't get into trying to figure
22 out exactly amending the dates that Your Honor put out in the
23 order.

24 THE COURT: Well, Ms. Rifkin, are you suggesting that
25 the Court stay further proceedings here until perhaps some date

1 after May 11th because of the time counsel will be spending on
2 the writ -- the cert petition, but that you be allowed to
3 designate certain witnesses, fact witnesses that need to be
4 deposed, because either -- well, for whatever reason? Is that
5 roughly what you're suggesting?

6 MS. RIFKIN: Yes. We would be amenable to that,
7 Your Honor. We think just given our attempts last summer
8 to -- we noticed the depositions for discovery and the attempts
9 to try and schedule them when other -- when defendants were
10 proceeding with the appeals. You know, we are trying to be
11 realistic. We don't want to constantly come back to Your Honor
12 to ask for extensions because we haven't been able to find dates
13 that the parties agree to.

14 THE COURT: Mr. Hall or Mr. Eaton, your thoughts?

15 MR. HALL: Your Honor, this is Brady Hall. I'll take
16 a shot at that.

17 The parties did meet and confer yesterday, and I would
18 say it was a pretty positive, realistic discussion. And we
19 discussed that it makes sense that further discussions about a
20 potential stipulation staying the litigation in the district
21 court pending preparation of briefing, including a response
22 brief, Your Honor, which is going to put us into June of this
23 year. From the state's position, it makes little sense for
24 either party to spend time on litigation and discovery efforts
25 while preparing fairly substantial briefing on substantial

1 issues in the Supreme Court. It's going to take a lot of time
2 in the spring and into the early summer, while at the same time
3 resolution of this case before the Supreme Court, whether cert
4 position is granted or not, is going to have a drastic effect on
5 the current plans in this case.

6 So I would propose, on behalf of my client, that the
7 Court afford the parties another week, seven days, to continue
8 to meet and confer and discuss this option of having a
9 stipulation to further stay proceedings. If we cannot reach a
10 stipulation, then I think I anticipate one or more parties would
11 be filing a motion for stay.

12 That would be my recommendation, Your Honor, and
13 request.

14 THE COURT: All right. Mr. Eaton?

15 MS. RIFKIN: Your Honor --

16 THE COURT: Oh, yes. Ms. Rifkin.

17 MS. RIFKIN: Yeah. I mean, I just want to clarify
18 that we separately want to, after this discussion, raise with
19 Your Honor the issue of the injunction for surgery that is now
20 in effect, and so I just want to be very clear for the record
21 that our proposed stipulation to stay the underlying proceedings
22 in the district court does not include effectuating the
23 injunction for surgery that is now in effect, so that would be
24 separate.

25 THE COURT: All right. And I assume, Mr. Hall, that's

1 what you were talking about, is only proceeding with discovery
2 on the damage claims?

3 MR. HALL: That is all the parties have discussed to
4 date, Your Honor.

5 THE COURT: All right. Now, Mr. Eaton, do you agree
6 with Mr. Hall's assessment?

7 MR. EATON: I do. And just to briefly reiterate, I
8 think the efforts to prepare for Supreme Court briefing and also
9 what the Supreme Court may or may not rule will affect the scope
10 of discovery, and the parties are a bit in the air on that right
11 now so -- but, yes, I do concur with Mr. Hall's statements.

12 THE COURT: All right. Well, I'm inclined to do what
13 Mr. Hall just suggested, which basically is give counsel a week
14 to try to hammer out a stipulation on a proposed stay regarding
15 discovery on the underlying damage claims; but obviously, the
16 injunctive relief and the Court's order that Ms. Edmo be
17 provided the gender confirmation surgery would not be affected
18 by that. I anticipate that if either party is -- well, if the
19 parties are unable to reach an agreement, that one party or the
20 other will file a motion for stay, and the Court will then
21 address it in a hearing.

22 I can tell that you right now, perhaps to save you the
23 effort, my inclination would be to grant a request for stay but
24 also to allow limited -- and I do mean limited -- depositions of
25 critical witnesses whose availability may be in question in the

1 future, but I don't know who that might be or what the
2 circumstances would be. But I don't think it should be a very
3 long list, but there may be individuals -- either because of
4 their age or perhaps your understanding of their intention to
5 leave the country or to otherwise -- become very difficult to
6 subpoena and depose at a later point in time, that those
7 depositions need to be taken just to preserve the record.

8 With that exception, I think putting this matter off
9 until, say, June or the first of July with regard to discovery
10 and getting this case on track for a damages trial is probably
11 appropriate.

12 So unless there is some objection, I think what I will
13 do is just direct counsel to either file a stipulated stay
14 within ten days or absent that to file a motion for stay, and I
15 will then take it up and in all likelihood grant that, but then
16 resolve any unresolved disputes regarding what, if any,
17 depositions or discovery should be allowed during the pendency
18 of the stay. So that's, I think, where we are going.

19 Ms. Rifkin, are you satisfied with that?

20 MS. RIFKIN: Yes, Your Honor. I would like to, before
21 the conference ends, address the issue of the surgery, but what
22 you just laid out --

23 THE COURT: We will circle back to that.

24 MS. RIFKIN: -- we don't object to. Thank you.

25 THE COURT: Mr. Hall, are you satisfied with that?

1 MR. HALL: Yes, Your Honor. We will need to confer
2 with my clients in that respect.

3 THE COURT: All right. Mr. Eaton?

4 MR. EATON: Yes, Your Honor.

5 THE COURT: Do you have any discomfort with what I
6 have proposed?

7 MR. EATON: No, I do not.

8 THE COURT: All right. Then that's what we'll do with
9 regard to the scheduling order. We will not enter anything, but
10 give counsel one week to try to reach an agreement or absent
11 that, file a motion -- actually, ten days to file a motion for
12 the Court to take up.

13 Now, Ms. Rifkin, let's come back to the issue of
14 surgery.

15 MS. RIFKIN: Yes, Your Honor. Thank you.

16 As Mr. Eaton reported, Ms. Edmo has had three of the
17 presurgical treatments and will need, according to the -- what
18 they have told us, three more treatments which puts her roughly
19 finishing the presurgical treatment, I think, mid-June, which
20 would make her ready for surgery. And as has previously been in
21 evidence before Your Honor, defendants have selected Dr. Stiller
22 who has a very busy schedule, and so we are conferring with
23 defendants to reserve a surgery date immediately and update the
24 Court with the date they have reserved and their plans to
25 provide Ms. Edmo surgery and postsurgical care as soon as she is

1 ready, and we believe that defendants should file a status
2 update with the Court next week with their plans.

3 THE COURT: All right. Mr. Eaton or Mr. Hall. As I
4 understand what Ms. Rifkin is saying is that until the Supreme
5 Court stays the proceedings, we are to proceed with the surgery
6 as scheduled. Now, of course, if the Supreme Court grants a
7 stay, then everything changes, but until that happens, I agree
8 that we should proceed and probably even select a date for the
9 surgery at this time, understanding that all of that may come to
10 a screeching halt if the Supreme Court grants a stay.

11 Mr. Hall or Mr. Eaton, any objection to that?

12 MR. HALL: Your Honor, this is Brady Hall. I'll
13 address that first. This is the first we are hearing of that,
14 and what I would request is provide the parties an opportunity,
15 again another seven to ten days, to meet and confer on these
16 issues, see what we can agree upon so as to not make it
17 necessary at this time to involve the Court on those issues. I
18 would like to have conversations with my client, we have
19 codefense counsel, and plaintiff's about these issues before
20 there is a request of the Court to take action.

21 THE COURT: And Mr. Eaton?

22 MR. EATON: Your Honor, I would agree with that, as
23 well, and I would indicate that I read Your Honor's order
24 to -- for the status conference today to be addressing the
25 proposed litigation scheduling deadlines. So while I'm happy to

1 continue to talk with plaintiff's counsel and IDOC counsel and
2 the Court about this, I don't know that today is the day for
3 that. And additionally, and related to that, I would be
4 stretching to remember the exact requirements and those types of
5 things. For instance, in addition to the laser hair removal
6 treatment that is ordered to be completed, I believe there is
7 evidence before the Court that Ms. Edmo needs to be off hormones
8 for three weeks before the surgery so I would like an
9 opportunity to look back at those things to be more prepared to
10 have this discussion.

11 THE COURT: All right. Well, thank you, Mr. Eaton.

12 Obviously, when we set this hearing, we didn't know
13 that the mandate would be issued or that the Ninth Circuit would
14 deny the motion for further stay, and that's why the issues are
15 coming up even though they weren't listed as an item in the
16 order setting this conference. But I do think it needs to be
17 addressed, but I do think that Mr. Hall's suggestion of letting
18 the parties try to work this out over the next seven to ten days
19 is appropriate. Similar to my comments about the stay of
20 discovery on the underlying damage claims, I would simply
21 indicate that unless and until the Supreme Court stays my order,
22 I intend that, with all due speed, we'll proceed forward to have
23 the surgery as scheduled, but that, of course, is not just a
24 matter of scheduling the surgery but also making sure that all
25 of the presurgical matters are addressed.

1 So in that light, I think there is some value to
2 having the parties discuss this and see if you can reach an
3 agreement, and submit a joint plan for the surgery with the
4 Court in the same ten-day time frame. If you are unable to do
5 so, then I'll probably schedule an immediate status conference
6 or hearing to resolve the issue, but I'm giving counsel fair
7 warning that my view is that the surgery needs to be scheduled
8 as quickly as possible, and barring a stay from the Supreme
9 Court, that's what's going to occur.

10 Ms. Rifkin, are you content with that resolution?

11 MS. RIFKIN: Yes, Your Honor, in terms of the ten
12 days. You know, I -- this is not the first time that the
13 Court's order has been in effect, and, as we repeatedly pointed
14 out, that leaving it to the parties to talk about has not
15 resulted in actual action by defendants. And, in fact, this
16 information has continually been supplied, until they were
17 required to report, to provide status updates to the Court under
18 oath. And so in terms of getting the information, defendants
19 often cite security concerns and other problems in terms of
20 providing us with any information.

21 We don't think there is anything for the Court to
22 decide here. The status report update is so that defendants are
23 accountable to the Court and plaintiffs for making the necessary
24 plans, which Dr. Stiller has already told them what they are.
25 So there is no issue to be decided by the Court or asking the

1 Court to intervene as requiring the defendants to report on
2 their progress in compliance with the injunction that is now in
3 effect. So we are happy to continue and meet and confer, but we
4 are not asking for further intervention by the Court. We are
5 asking for defendants to be required to apprise the Court and
6 plaintiffs about their compliance with the existing order.

7 THE COURT: Well, I don't have a problem with that
8 either. I mean, I think the point is that there is some value
9 in your meeting and conferring to make sure that there is
10 agreement about what remains to be done in terms of presurgical
11 treatment. And so I think that in ten days, then I either need
12 to have a stipulation from the parties or, absent that, a report
13 from the defendants as to the schedule that they anticipate
14 following to comply with the Court's order. And then if
15 plaintiff is dissatisfied with what is submitted, they can file
16 an objection, and we'll have an expedited hearing on that
17 objection.

18 MS. RIFKIN: Thank you, Your Honor.

19 THE COURT: All right. So I think that's where we're
20 at. I'll give counsel a chance to continue discussing this and
21 see if you can agree on a stipulation. If not, then the
22 defendants are to submit a status report which includes a
23 timetable for the defendants to comply with the Court's order
24 that the surgery be scheduled and undertaken.

25 Mr. Hall or Mr. Eaton, do you have any questions about

1 that?

2 MR. HALL: No, Your Honor. This is Brady Hall. No
3 issues. No issues with the Court's plan.

4 Just for purposes of preserving the record, I will
5 register an objection to Ms. Rifkin's characterization of
6 defendants' conduct and willingness and ability to meet with the
7 Court's orders, notwithstanding. Your Honor, I like this plan.
8 This will give us an opportunity to meet and confer and see
9 where we're at. Thank you.

10 THE COURT: All right. Mr. Eaton.

11 MR. EATON: This is Dylan Eaton. I agree with
12 Mr. Hall in all respects, including the objection.

13 THE COURT: All right. Well, the characterization of
14 counsel's conduct is -- you know, it isn't going to effect any
15 decision I'm making here. I don't know -- I understand why
16 defense counsel may object, but it's simply her
17 characterization, and I'll make my own decision as to whether I
18 think counsel is acting in good faith or not.

19 At this point, I think we are on schedule. Things are
20 proceeding the way they should be, and I don't see any actions
21 on the part of the defendants at this point that would give rise
22 to any concern that there is a conscious attempt to avoid
23 compliance with the Court order. So I have no reason to think
24 that at this point. I have made comments in the past where I
25 did have some concerns, but I think those have been addressed

1 and resolved, and we now are in a position where I think it's
2 just a matter of getting the surgery scheduled and doing it in a
3 way that is in keeping with the Court's order.

4 All right. That's all I have, but let me ask, is
5 there anything else from the plaintiff's to discuss?

6 MS. RIFKIN: No, Your Honor, I don't believe so.
7 Thank you.

8 THE COURT: Mr. Hall, on behalf of the Idaho
9 Department of Corrections?

10 MR. HALL: No, Your Honor. Thank you.

11 THE COURT: And Mr. Eaton, on behalf of Corizon?

12 MR. EATON: No, Your Honor. Thank you.

13 THE COURT: All right. Then, Counsel, I'll expect you
14 to meet and confer to try to resolve a stay of the underlying
15 discovery -- or the discovery on the underlying claims and also
16 on a schedule for Ms. Edmo's surgery, and barring an agreement,
17 then counsel will notify the Court of this, and the defendants
18 will provide the Court with its proposed schedule for compliance
19 with the Court's order. We'll issue a short -- perhaps just a
20 minute entry order or a very short written decision just
21 outlining those dates and deadlines.

22 All right. If there is nothing else, thank you,
23 Counsel.

24 MS. RIFKIN: Thank you, Your Honor.

25 MR. EATON: Thank you.

MR. HALL: Thank you.

(Proceedings concluded at 12:05 p.m.)

REPORTER'S CERTIFICATE

I, TAMARA I. HOHENLEITNER, CSR, RPR, CRR, certify that
the foregoing is a correct transcript of proceedings in the
above-entitled matter.

/s/ Tamara I. Hohenleitner

02/26/2020

TAMARA I. HOHENLEITNER, CSR, RPR, CRR

Date