

The Honorable Ronald B. Leighton
Trial: July 26, 2010

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

STORMANS, INCORPORATED, et al.,

Plaintiffs,

v.

MARY SELECKY, Secretary of the
Washington State Department of Health,
et al.,

Defendants,

and

JUDITH BILLINGS, et al.

Defendant-Intervenors.

NO. C07-5374 RBL

PLAINTIFFS AND STATE
DEFENDANTS'
STIPULATION AND ORDER

COMES NOW Plaintiffs Stormans, Inc., Rhonda Mesler, and Margo Thelen, by and through their attorneys, Steven T. O'Ban and Kristen K. Waggoner of Ellis, Li, McKinstry, and State Defendants Mary Selecky, et al., by and through their attorneys, Joyce A. Roper and Rene D. Tomisser, Assistant Attorneys General, and enter into the following:

PLAINTIFFS' AND STATE DEFENDANTS'
STIPULATION AND AGREED ORDER (NO. C07-
5374 RBL) - 1

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1 STIPULATION

2 1.1 Plaintiffs brought this action alleging that the Board of Pharmacy's rules, Wash.
3 Admin. Code §246-863-095 and Wash. Admin. Code §246-869-010, violate their constitutional
4 rights, including the free exercise of religion and substantive due process protections under the
5 First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964.

6 1.2 Plaintiffs, pharmacists and a pharmacy owner, have a conscientious objection to
7 stocking and dispensing Plan B, the morning after pill. When a customer has requested Plan B,
8 Plaintiffs have referred the customer to a nearby provider and, upon the patient's request, called
9 the provider to ensure the product is in stock ("facilitated referral"). Prior to the adoption of the
10 rules, Plaintiffs' facilitated referrals did not violate Washington law.

11 1.3 The Board of Pharmacy claims that it interprets the current rules to prohibit
12 Plaintiffs from refusing to deliver lawful medications and referring patients to a nearby
13 pharmacy for any reason, including conscientious objections, other than the reasons provided
14 by WAC 246-869-010 .

15 1.4 On June 29, 2010, the Board of Pharmacy commenced rule-making to amend its
16 rules to allow a facilitated referral. Specifically, the Board intends to adopt a rule allowing
17 facilitated referrals for all pharmacies and pharmacists out of stock or unable or unwilling to
18 stock, or timely deliver or dispense lawfully prescribed medications on site to their patients for
19 any reason, including for conscientious reasons. A copy of the Board of Pharmacy meeting
20 minutes is attached as Exhibit A.

21 1.5 As Board members indicated in their comments at the June 29th meeting, referral
22 is a time-honored pharmacy practice, it continues to occur for many reasons, and is often the
23 most effective means to meet the patient's request when the pharmacy or pharmacist is unable

1 or unwilling to provide the requested medication or when the pharmacy is out of stock of
2 medication. Board members also explained that anticipated changes in the pharmaceutical
3 industry will effect the practice of pharmacy in ways that permitting flexibility with facilitated
4 referrals will improve the delivery of health care in Washington, including when a drug is not
5 cost-effective to order, the drug requires monitoring or follow-up by the pharmacist, and other
6 reasons.

7 The Board believes that pharmacies and pharmacists should retain the ability to engage
8 in facilitated referrals; that facilitated referrals are often in the best interest of patients,
9 pharmacies, and pharmacists; that facilitated referrals do not pose a threat to timely access to
10 lawfully prescribed medications and that facilitated referrals help assure timely access to
11 lawfully prescribed medications. Such lawfully prescribed medications would include Plan B.

12 1.6 The State Defendants' rule-making processes require public hearings and
13 comments and these processes generally take at least six months for the Board to adopt rule
14 amendments. The State Defendants agree to use their best efforts to complete the rules within
15 eight months.

16 1.7 The rule-making processes under Wash. Rev. Code 34.05 do not allow the
17 parties to stipulate to specific language of the rules in advance of the first public hearing. Nor
18 do the parties stipulate what rule language would sufficiently accommodate Plaintiffs'
19 conscientious objections to stocking and dispensing Plan B.

20 1.8 Upon entry of the following Order, Plaintiffs and State Defendants agree to a
21 stay of the trial in this matter to allow the Board time to complete its rule processes to allow for
22 facilitated referrals. State Defendants agree they will not object to this Court lifting the stay
23 upon Plaintiffs' request nor object to Plaintiffs' request for this Court to set trial on an

1 expedited basis if Plaintiffs reasonably believe at any time during the rule-making process that
2 the proposed rules do not allow them to engage in a facilitated referral instead of stocking or
3 dispensing Plan B.

4 State Defendants will not object to the Plaintiffs' amending their Complaint upon
5 information and belief that acts or omissions of the State Defendants, from the date of this stay
6 and during the rulemaking process, supports a new claim. State Defendants reserve the right to
7 raise any defenses to a new claim other than a defense that the claim is untimely or is barred
8 because the pleadings were closed under the Court's current schedule.

9 1.9. During the stay, this Court's March 6, 2009, Stipulation and Order Granting
10 Defendants' and Defendant-Intervenors' Joint Motion for Stay of Proceedings Pending
11 Decision by the Ninth Circuit Court of Appeals remains in effect.

12 1.10 If Plaintiffs' claims are tried, the parties agree not to refer to, use, or rely on
13 alleged incidents involving the refusal to stock, deliver, or dispense lawfully prescribed drugs
14 or devices, or complaints of such incidents, or alleged problems with timely access to drugs or
15 devices that occur after the stay.

16 1.11 State Defendants agree to maintain current contact information of all witnesses
17 under the Board's control that have been identified as witnesses in Plaintiffs' case-in-chief.

18 ORDER

19 2.1 This Court has jurisdiction over the parties and the subject matter of this lawsuit.

20 2.2 This case was filed by Plaintiffs nearly three years ago. The Court is very
21 familiar with the factual allegations and legal contentions of the parties and the relief sought by
22 Plaintiffs.

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PLAINTIFFS' AND STATE DEFENDANTS'
STIPULATION AND AGREED ORDER (NO. C07-
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1 2.3 Plaintiffs brought this action alleging that the Board of Pharmacy's rules, Wash.
2 Admin. Code §246-863-095 and Wash. Admin. Code §246-869-010, violate their constitutional
3 rights, including the free exercise of religion and substantive due process protections under the
4 First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964.

5 2.4 Plaintiffs, pharmacists and a pharmacy owner, have a conscientious objection to
6 stocking and dispensing Plan B, the morning after pill. When a customer has requested Plan B,
7 Plaintiffs have referred the customer to a nearby provider and, upon the patient's request, called
8 the provider to ensure the product is in stock ("facilitated referral"). Prior to the adoption of the
9 rules, Plaintiffs' facilitated referrals did not violate Washington law.

10 2.5 The Board of Pharmacy claims that it interprets the current rules to prohibit
11 Plaintiffs from refusing to deliver lawful medications and referring patients to a nearby
12 pharmacy, for any reason, including conscientious objections, other than the reasons provided
13 by WAC 246-869-010 .

14 2.6 Throughout this proceeding, Plaintiffs have requested that this Court grant an
15 injunction against State Defendants in order to permit Plaintiffs to continue engaging in
16 facilitated referrals for patients requesting Plan B.

17 2.7 This Court denied the summary judgment motions of the State Defendants and
18 Intervenors on June 15, 2010. Trial is set to begin July 26, 2010.

19 2.8 On June 29, 2010, the Board of Pharmacy commenced rule-making to amend its
20 rules to allow a facilitated referral. Specifically, the Board intends to adopt a rule allowing
21 facilitated referrals for all pharmacies and pharmacists out of stock or unable or unwilling to
22 stock or timely deliver or dispense lawfully prescribed medications on site to their patients for
23 any reason, including for conscientious reasons.

1 2.9 The State Defendants' rule-making processes require public hearings and
2 comments. The parties have not stipulated to any specific rules language. The State Defendants
3 have assured this Court they will use their best efforts to conclude the rule-making process
4 within eight months.

5 2.10 Therefore, the trial in this case shall be and hereby is STAYED to allow the
6 Board time to complete its rule-making processes to allow for facilitated referrals. This Court
7 will lift the stay and set trial on an expedited basis upon Plaintiffs' request at any point in the
8 future if Plaintiffs reasonably believe at any time during the rule-making process that the
9 proposed rules do not allow them to engage in a facilitated referral instead of stocking or
10 dispensing Plan B.

11 2.11 During the stay, this Court's March 6, 2009, Stipulation and Order Granting
12 Defendants' and Defendant-Intervenors' Joint Motion for Stay of Proceedings Pending
13 Decision by the Ninth Circuit Court of Appeals remains in effect.

14 2.12 If this case later proceeds to trial, the parties may not refer to, use, or rely on
15 alleged incidents involving the refusal to stock, deliver, or dispense lawfully prescribed drugs
16 or devices, or complaints of such incidents, or alleged problems with timely access to drugs or
17 devices that may arise after entry of this Order.

18 2.13 State Defendants must maintain current contact information of all witnesses
19 under the Board's control that have been identified as witnesses in Plaintiffs' case-in-chief.

20 DONE IN OPEN COURT this _____ day of _____, 2010.

21
22 RONALD B. LEIGHTON
23 UNITED STATES DISTRICT JUDGE

1 AGREED TO BY:

2 ELLIS, LI & MCKINSTRY PLLC

ROBERT M. MCKENNA
Attorney General

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PLAINTIFFS' AND STATE DEFENDANTS'
STIPULATION AND AGREED ORDER (NO. C07-
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