Case No. 19-35552

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants
and
CORIZON, INC., et al.,
Defendants-Appellants

On Appeal from Order of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

DEFENDANTS-APPELLANTS' RESPONSE TO SHOW CAUSE ORDER

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INTRODUCTION

Defendants-Appellants Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig and Rona Siegert (the "IDOC Defendants"), and Defendants-Appellants Corizon, Inc., Scott Eliason, Murray Young, and Catherine Whinnery (the "Corizon Defendants") (hereinafter collectively "Defendants-Appellants"), hereby submit this response to this Court's September 11, 2019 Order (Dkt.Entry: 9) requesting Defendants-Appellants to "show cause as to why this appeal should not be dismissed as moot" in light of the August 23, 2019 opinion in *Edmo v. Corizon, Inc*., No. 19-35017 and 19-35019 (hereinafter "*Edmo I*").[1] For the reasons set forth below, Defendants-Appellants respectfully submit that the opinion in *Edmo I* did not moot all of the issues in the instant appeal, Case No: 19-35552 (hereinafter "*Edmo II*"), because the Court can still give Defendants-Appellants Scott Eliason, Henry Atencio, Jeff Zmuda and Keith Yordy effective relief in the event that it decides the issues in this appeal on the merits in their favor.

[1] The Order (Dkt.Entry: 9) does not reference Ninth Circuit Rule 3-6(b), *Summary Disposition of Civil Appeals*. Accordingly, Defendants-Appellants understand they are not being asked to address the text of that rule or applicable standard for dismissal. *See, e.g., U.S. v. Hooton*, 693 F.2d 857 (1982). To the extent the Court intends to dismiss the appeal pursuant to Rule 3-6(b), Defendants-Appellants request an opportunity to be heard as to why dismissal is not appropriate. *Id*. at 858 ("Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief.")

PROCEDURAL BACKGROUND

On December 13, 2018, the district court granted Plaintiff-Appellee Adree Edmo's *Motion for Preliminary Injunction* ordering each of the Defendants-Appellants to "provide Plaintiff with adequate medical care, including gender confirmation surgery." (*Edmo I*, ER045) Plaintiff had not requested a permanent injunction and the district court's Order did not state that permanent injunctive relief was afforded. (*Id*., ER045) Nor did the district court's Order state that the injunctive relief ordered met the needs-narrowness-intrusiveness findings required by the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(2). (ER001-045)

The IDOC Defendants and Corizon Defendants each filed timely notices of appeal and the appeals were consolidated. (*Edmo I*, Dkt.Entry: 8) On March 6, 2019, Defendants-Appellants filed their *Joint Opening Brief*. (*Id*., Dkt.Entry: 11) Edmo filed an *Answering Brief* on April 3, 2019. (*Id*., Dkt.Entry: 32) On that same day, Defendants-Appellants filed a *Joint Urgent Motion to Vacate District Court's Order* asserting that the preliminary injunction the district court ordered had automatically expired pursuant to the PLRA and that the appeal was moot. (*Id*., Dkt.Entry: 31) The Court advised the parties it would hear the merits of Defendants-Appellants' motion to vacate at oral argument. (*Id.*, Dkt.Entry: 37, p. 2)

On May 16, 2019, *Edmo I* was argued and submitted to Circuit Judges M. Margaret McKeown, Ronald M. Gould, and Robert S. Lasnik[2] (hereinafter collectively referred to as the "Panel").

On May 30, 2019, the Panel issued an Order directing a limited remand to the district court to "clarify" whether it had renewed the preliminary injunction after entering the same in its December 13, 2018 Order; whether the district court also granted permanent injunctive relief to Edmo in that Order; and whether the district court concluded in the Order whether Edmo had actually succeeded on the merits of the Eighth Amendment claim for permanent injunctive relief. (*Edmo I*, Dkt.Entry: 90) The Panel also stated that the "district court has authority under this limited remand to consider whether to reissue the injunction." (*Id*., p. 3) The Panel's Order did not request the district court to develop the factual record further or make any new factual findings.

On May 31, 2019, the district court entered an Order in response to the limited remand, which was made a part of the record in *Edmo I*. (Dkt.Entry: 91) In that Order, the district court made additional factual findings and confusingly stated that it had already entered a permanent injunction, but was also renewing the preliminary injunction. (*Id*. at p. 8) The district court also stated that it "clarifies that it concluded, and expressly incorporated into its final decision, that Plaintiff

[2] The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, was sitting by designation.

succeeded on the merits of her Eighth Amendment claim for permanent injunctive relief." (*Id*. at p. 9) Finally, the district court asserted that its "original injunction complied with the Prison Litigation Reform Act's requirement that the Court consider and make factual findings regarding the scope of the injunction." (*Id*. at p. 6)

The Panel did not request or otherwise invite supplemental briefing or argument from the parties as to the propriety or implications of the district court's Order on limited remand. Instead, on August 23, 2019, the Panel (citing to the district court's Order on limited remand) entered its Opinion affirming the district court's issuance of a preliminary and permanent injunction against Defendants-Appellants Eliason (in his individual capacity) and Atencio, Yordy, and Zmuda (in their official capacities). *Edmo I*, * 40, 76-77.

On June 28, 2019, Defendants-Appellants filed a joint notice of appeal to obtain appellate review of the factual and legal findings made in the district court's Order on limited remand. This joint notice of appeal was docketed on July 1, 2019, and Defendants-Appellants were instructed that a "[b]riefing schedule will be set by future court order." (*Edmo II*, Dkt. 1-1) On July 26, 2019, Defendants-Appellants sought clarification from this Court as to whether they will have an opportunity to brief the "new legal issues that Defendants did not have the opportunity to brief or argue in the first appeal and that the Defendants and Court

would benefit from some additional briefing." (*Edmo II*, Dkt. Entry: 7) On August 2, 2019, this Court provided clarification stating that "[t]he court has not established a briefing schedule for this appeal, and there are currently no briefing deadlines." (*Edmo II*, Dkt.Entry: 8).

ANALYSIS

"A case is moot on appeal if no live controversy remains at the time the court of appeals hears the case." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal*., 488 F.3d 1065, 1068 (9th Cir. 2007) (Citations omitted). "The test for whether such controversy exists is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor." *Id*. (citing and quoting from *In re Burell*, 415 F.3d 994, 998 (9th Cir. 2005) and *Garcia v. Lawn*, 805 F.3d 1400, 1402 (9th Cir. 1986)) (Citations omitted).

In *NASD Dispute Resolution, Inc.*, the plaintiffs-appellants agreed the case was moot because both the Ninth Circuit and the California Supreme Court had concluded separately in cases decided pending the appeal that federal securities law did preempt California standards. 488 F.3d at 1068. That was exactly the legal relief the plaintiffs-appellants sought from the Ninth Circuit in the subsequent appeal. The Ninth Circuit deemed the appeal moot finding "[w]e cannot give the

appellants any further relief because [the other two cases] have already provided the relief sought by them in this case." *Id*.

Unlike in *NASD Dispute Resolution, Inc.*, the Court in this appeal can afford Defendants-Appellants Eliason, Atencio, Yordy, and Zmuda the relief they request if they prevail on the merits of this appeal. As a preliminary matter, the mandate in *Edmo I* has not issued nor has appellate review of the Panel's rulings been exhausted. *See, e.g.*, Federal Rule of Appellate Procedure 41. *See also, Petition for Rehearing En Banc*, filed in *Edmo I* (Dkt. Entry: 99). Accordingly, dismissing this appeal on the grounds that the non-final decision in *Edmo I* mooted the appeal in this case is premature.

Additionally, while these Defendants-Appellants have not yet been able to file an opening brief (Dkt.Entry: 8), there are issues unique to this appeal for which Defendants-Appellants were not permitted to raise or brief in *Edmo I*. Defendants-Appellants question the scope and propriety of the limited remand, which merely sought "clarification" as to the intent of the district court's order as opposed to requesting the district court to conduct limited fact finding instructive on an issue on appeal. *Compare with, e.g., Mirchandani v. U.S.*, 836 F.3d 1223, 1225 (9th Cir. 1988) (permitting a limited remand so the district court could address a post-judgment motion and make new factual findings); *Friery v. L.A. Unified Sch. Dist*., 448 F.3d 1146, 1150 (9th Cir. 2006) (limited remand directing district court to

develop factual record regarding whether teacher had standing to bring claim) and *Ciarpaglini v. Norwood*, 817 F.3d 541, 543 (7th Cir. 2016) (remand for limited fact-finding proceedings aimed at permitting both sides to develop a record on question of mootness).

Likewise, issues exist as to whether the district court impermissibly exceeded the scope of the limited remand by, for example, making new findings that its prior order complied with the PLRA's need-narrowness-intrusiveness requirements and by simultaneously entering both a permanent and preliminary injunction. Arguably, any findings made in excess of the scope of the limited remand are void as having been done without jurisdiction. *See, e.g.*, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curium) (recognizing that once a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed).

Issues also exist with regard to whether the district court erroneously renewed the expired preliminary injunction without first affording Defendants-Appellants the opportunity to be heard and/or issued the renewal without making any findings that preliminary injunctive relief was still warranted as of May 31, 2019. In *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001), the Ninth Circuit recognized that the PLRA imposes a burden on plaintiffs to continue to prove that preliminary relief is still warranted when successive preliminary

injunctions are issued. *Id*. at 936 ("If anything, [18 U.S.C. § 3626(a)(2)] simply imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted.")[3]

Finally, since the district court entered a new preliminary injunction on May 31, 2019, ninety days have passed without the district court having made the preliminary relief final.[4] While the district court also now contends it validly entered a permanent injunction (which remains an issue on appeal in *Edmo I*), it is clear that a preliminary injunction automatically expires if it is not made final within the requisite 90-day period. *Mayweathers*, 258 F.3d at 936 (citing 18 U.S.C. § 3626(a)(2)). Accordingly, this Court can and should enter relief to Defendants-Appellants in this appeal that includes, but is not limited to, a vacatur of the district court's May 31, 2019 preliminary injunction. *See, e.g., U.S. v. Secretary, Florida Dept. of Corrections*, 778 F.3d 1223, 1228-29 (11th Cir. 2015) (citing *Mayweathers*, 258 F.3d at 936 (9th Cir. 2001)).

[3] Importantly, unlike with *Edmo I* and *Edmo II*, the Ninth Circuit in *Mayweathers* consolidated the two separate appeals filed after the district court entered the first and second preliminary injunctions. 258 F.3d at 934.

[4] The 90-day period to finalize the May 31, 2019 preliminary injunction expired on August 29, 2019.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that this Court not dismiss this appeal as moot. In light of ongoing appellate review, *Edmo I* is not yet a final decision establishing the law of the case. Moreover, additional issues exist in this appeal that were not permitted to be raised in *Edmo I*, and upon which this court can separately grant relief to Defendants-Appellants Eliason, Atencio, Yordy, and Zmuda.

This 25th day of September, 2019.

/s/ Dylan A. Eaton
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/s/ Brady J. Hall
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS-APPELLANTS' RESPONSE TO SHOW CAUSE ORDER by electronic filing on the date stated below to:

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