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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 RESPONSE TO DEFENDANTS' JOINT MOTION TO STAY

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

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INTRODUCTION

Ms. Edmo filed this lawsuit *pro se* on April 6, 2017, seeking relief from Defendants' ongoing violations of her rights and damages for the harm they have caused. ECF No. 1. She has diligently pursued her case, both as a *pro se* plaintiff and with the assistance of counsel. Ms. Edmo moved for expedited injunctive relief as to her desperate need for gender confirmation surgery pursuant to three of her legal claims, and this Court enjoined Defendants to provide this surgery, finding Ms. Edmo had successfully proven her Eighth Amendment claim. The Ninth Circuit affirmed this Court's order. Now, while Defendants seek further appellate review of this Court's order—which they have made clear will include petitioning the Supreme Court for certiorari—they also seek to stay further litigation of Plaintiff's remaining case.

Contrary to Defendants' argument, this Court squarely retains jurisdiction over the claims for which Plaintiff did not move for expedited relief. The relevant legal standard for evaluating Defendants' motion for a stay requires the Court to weigh the competing interests which will be affected and maintain an even balance. *Landis v. N. Am. Co.* 299 U.S. 248, 254-55 (1936); *Lockyer v. Mirant Corp.*, 293 F.3d 1098, 1109 (9th Cir. 2005). While Plaintiff agrees that judicial economy militates in favor of a partial stay, a complete stay would unduly prejudice Plaintiff and disadvantage her ongoing claims because it would impede her ability to access key evidence, including party and witness testimony. In order to "maintain an even balance," this Court should enter a partial stay that permits Plaintiff targeted discovery, including ongoing access to her custody and medical records, the depositions of five key individuals whose testimony is likely to become increasingly confused and inaccurate during a stay, and preservation of relevant documentary and electronic evidence.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff moved for expedited injunctive relief on three of her claims: her Eighth Amendment claim, her Fourteenth Amendment claim for discrimination based on sex, and her Affordable Care Act ("ACA") claim for discrimination based on sex (claims 1, 2, and 5 in the Third Amended Complaint, ECF No. 172). This Court entered an order granting injunctive relief

as to Plaintiff's Eighth Amendment claim and denying it as to her Fourteenth Amendment claim for discrimination based on sex and her ACA claim. ECF No 149. Defendants subsequently appealed that order.

While Defendants' appeal was pending, the parties proceeded with discovery regarding remaining claims and issues that were not part of the expedited discovery related to Plaintiff's injunctive relief motion. *See* ECF No. 171 (setting fact discovery cut-off of August 15, 2019). Plaintiff noticed depositions, including individual Defendants and percipient witnesses, for dates in June through August 2019. Declaration of Lori Rifkin in Support of Plaintiff's Response to Defendants' Joint Motion to Stay ("Rifkin Decl."), filed concurrently, at ¶ 2. Defendants refused to produce those individuals for deposition and instead proposed a stay pending the Ninth Circuit's decision on their interlocutory appeal. *Id.* at ¶ 3. Plaintiff stipulated to that stay, given that the Court and parties anticipated that the appellate decision was imminent, and this Court entered a stay on July 19, 2019. ECF Nos. 207 & 208. This Court lifted that stay on August 23, 2019, following the Ninth Circuit's decision. ECF No. 210. Defendants now seek a stay of all remaining proceedings in this Court pending exhaustion and resolution of further interlocutory appellate review. Defendants have petitioned the Ninth Circuit to rehear their appeal en banc, and the Governor of Idaho has publicly stated numerous times that he intends to petition the Supreme Court for certiorari review of this Court's Order. Therefore a stay pending completion of all interlocutory appellate review could conceivably last at least through the summer of 2021.

Plaintiff filed this case on April 6, 2017. ECF No. 1. Facts relevant to Plaintiff's claims date back as far as 2012, when she entered IDOC and was diagnosed with gender dysphoria. Postponing depositions two more years is likely to substantially decrease the clarity and accuracy of deponents' memories. This is especially true for those individual Defendants and witnesses who are no longer working within the IDOC system—including two former IDOC officials who have moved to other states' corrections systems and whose memories of the practices and procedures they were involved in with respect to Ms. Edmo and IDOC will likely become confused with practices and procedures of their current systems. The delay is also likely to

affect several individual Defendants who have retired from their IDOC or Corizon positions and whose memories will inevitably fade as their time out of those positions increases.

In the interest of trying to reach a stipulated proposal to submit to the Court, Plaintiff's counsel met and conferred with Defendants' counsel and offered to stipulate to a stay[1] with three specific carve-outs to protect Plaintiff from the prejudice that would otherwise result: 1) Defendants must provide Plaintiff with ongoing (at least bi-monthly) production of her updated medical and custody records so that Plaintiff and her counsel have adequate information to determine if Plaintiff becomes subject to additional risk of serious harm such that a continued stay of proceedings would be inappropriate; 2) Plaintiff may take the depositions of five persons (four individual Defendants and one percipient witness who is a former official capacity Defendant) whose testimony is crucial to her case but whose memories are likely to significantly fade or become confused while Defendants seek en banc and Supreme Court review of this Court's injunction[2]; 3) Defendants confirm that they are preserving all documentary evidence, including electronic evidence, relevant to this case during the pendency of any stay regardless of any internal retention policies that would otherwise result in deletion or destruction of this evidence after specified periods of time.[3] Rifkin Decl. at ¶ 4.

IDOC and Corizon Defendants agreed to Plaintiff's first and third requests (ongoing

[1] Plaintiff does not agree to a stay of any kind regarding this Court's ability to enforce its December 2018 injunctive relief Order requiring Defendants to provide Ms. Edmo with all necessary medical care to effectuate gender confirmation surgery. Rather, Plaintiff would agree to these stay terms related only to claims this Court has not yet adjudicated.

[2] By identifying these five depositions to proceed at this time as a carve-out to any potential stay, Plaintiff does not waive her right to additional depositions pursuant to the operative Discovery Plan, ECF No. 159 at 5, or to petitioning the Court for additional depositions during any stay should she learn f other key witnesses who may become unavailable or whose testimony may otherwise need to be preserved.

[3] The current discovery plan filed in this case references Defendants' routine document retention practices for electronically stored information, which do not maintain emails longer than two years. ECF No. 159 at 1-2. While Defendants are obligated to preserve all relevant evidence while this case in pending, given the reference to these retention policies in the discovery plan, Plaintiff seeks an order to ensure preservation of evidence during the extended nature of this litigation.

production of records and preservation of evidence) but will not agree to Plaintiff conducting any of the requested depositions. Rifkin Decl. at ¶ 5. Therefore, Plaintiff opposes Defendants' motion for stay to the extent that it would completely bar her from timely conducting these depositions, and requests that this Court grant a partial stay that incorporates Plaintiff's requested carve-outs, including the five specified depositions. Plaintiff must have access to these limited depositions in order to preserve evidence and avoid prejudice to Plaintiff's ongoing case.

ARGUMENT

I. This Court Has Ongoing Jurisdiction Over the Claims on which Plaintiff Did Not Move for Expedited Relief

This Court continues to have jurisdiction over those claims on which Plaintiff did not move for expedited relief: Plaintiff's Fourteenth Amendment claim of discrimination based on diagnosis against all Defendants except IDOC; Plaintiff's Americans with Disabilities Act ("ADA")/Rehabilitation Act claim of discrimination based on disability against IDOC and Corizon; and Plaintiff's state law negligence claim against IDOC official capacity Defendants, Defendant Yordy in his individual capacity, and Corizon (claims 3, 4, and 6 in the Third Amended Complaint, ECF No. 172).

Defendants argument that this Court lacks jurisdiction over these remaining claims applies the wrong legal standard. The "inextricably intertwined" standard upon which they rely relates to an *appellate court's* jurisdiction to review additional matters on interlocutory appeal under 28 U.S.C. § 1292(a)(1) beyond an order granting or refusing to grant an injunction. *See Paige v. State of Cal.*, 102 F.3d 1035, 1039-40 (9th Cir. 1996) (construing "inextricably intertwined" standard as evaluating whether effective review of order on appeal requires review of other orders). The issue before this Court, however, is whether a district court is automatically divested of jurisdiction of not-yet adjudicated claims pending resolution of an interlocutory appeal. The only case Defendants cite for the "inextricably intertwined" standard, *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F. 2d 676, 680 (9th Cir. 1990), addressed whether the court of appeals, considering an interlocutory appeal of an injunction,

could also consider a district court's rulings on summary judgment, affirmative defenses, and declaratory relief. Here, this Court has made no rulings with respect to Plaintiff's other claims beyond denying Defendants' motion to dismiss—an order that was never appealed. Defendants fail to cite any legal authority, nor is there such authority, for their broad assertion that their interlocutory appeal automatically divests this court of jurisdiction over the entirety of the case. Rather, *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001), cited by Defendants elsewhere in their brief, establishes the relevant legal standard: "[T]he filing of a notice of interlocutory appeal divests the district court of jurisdiction *over the particular issues* involved in that appeal" (emphasis added). Indeed, *TransWorld Airlines* specifically recognized that a district court could retain jurisdiction over remaining claims and to determine damages, even though it had entered a permanent injunction for which appeal was pending. 913 F.3d at 680. Thus, it is clear that this Court retains jurisdiction for all claims other than those properly subject to the interlocutory appeal.[4]

II. The Balance of Interests Weighs Against a Complete Stay

A district court has discretion to stay proceedings based on its exercise of judgment, "which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. These competing interests include "the possible damage which may result from granting a stay, the hardship or inequity a party may suffer [if the case is allowed] to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer*, 398 F.3d at 1110. Courts also generally consider whether granting a stay would "'cause undue prejudice or present a clear tactical disadvantage to the non-moving party.'" *ASCII Corp. v. STD Entm't USA, Inc.*, 844 F. Supp. 1378, 1380 (N.D. Cal. 1994) (quoting *GPAC, Inc. v. D.W.W. Enterprises, Inc.*, 144

[4] Even were the "inextricably intertwined" standard for appellate review somehow applicable to the question of this Court's jurisdiction, it does not support a stay here. Defendants' argument that there are factual commonalities between the claims, without more, is insufficient to meet this standard. *See, e.g., Apple, Inc. v. Samsung Elecs. Co.*, No. 12-CV-00630-LHK, 2014 WL 6687122 at *6 (N.D. Cal. Nov. 25, 2014) (mere factual overlap between issues does not demonstrate that those issues are "inextricably bound" to each other).

F.R.D. 60, 63 (D.N.J. 1992); *In re Am. Apparel, Inc. S'holder Derivative Litig.*, No. CV 10-06576 MMM RCX, 2012 WL 9506072, at *43 (C.D. Cal. July 31, 2012).

The burden is on the movant to show that a stay is appropriate. *See Clinton v. Jones*, 520 U.S. 708 (1997). "If there is even a fair possibility that the stay for which the moving party prays will work damage to someone else, the moving party must make out a clear case of hardship or inequity in being required to go forward. Furthermore, being required to defend a suit, without more, does not constitute a clear case of hardship or inequity." *Broadcom Corp. v. Sony Corp.* No. SACV161052 JVSJCGX, 2017 WL 7833636, at *3 (C.D. Cal. Feb. 13, 2017) (internal quotations and alteration omitted) (quoting *Landis*, 299 U.S. at 255 and *Lockyer*, 398 F.3d at 1112). "If a stay is especially long or its term is indefinite, the Court 'require[s] a greater showing to justify it.'" *Blackeagle v. United States*, No. 3:16-CV-00245-BLW, 2017 WL 442774, at *3 (D. Idaho Feb. 1, 2017) (quoting *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000)).

Here, Plaintiff does not dispute that there are some overlapping factual issues between the claims on appeal and the remaining claims such that resolution of the appeal is likely to simplify questions of fact and law, reduce discovery disputes, and allow for a single jury trial on all remaining claims. However, a complete stay of all remaining discovery, including depositions of individual Defendants and key witnesses, would significantly "increase the danger of prejudice [to Plaintiff] resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Clinton*, 520 U.S. at 707-08. Therefore, Plaintiff requests that this Court enter only a partial stay so that Plaintiff may obtain specified discovery necessary to avoid undue prejudice and tactical disadvantage. *See id.; CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir. 1962) (observing that district court may permit further discovery proceedings during a stay if there is a concern with evidence preservation *Greer v. Dick's Sporting Goods, Inc.*, No. 215-CV-01063 KJM-CKD, 2018 WL 372753, at *3 (E.D. Cal. Jan. 10, 2018) ("[P]laintiff argues 'the longer this case is stayed, the harder evidence becomes to collect as witnesses' memories fade and documents disappear or get destroyed.' . . . Plaintiff's concern

that class members' memories may fade is well taken, particularly in light of the open-ended nature of DSG's proposed stay and the need for discovery that 'depend[s] on the memories of class member[s].'"); *S.E.C. v. Alexander*, No. 10-CV-04535-LHK, 2010 WL 5388000, at *4 (N.D. Cal. Dec. 22, 2010) ("The Court agrees that the delay associated with a stay may affect the availability of witnesses and documents or the quality of testimony. . . . if there are specific witnesses whose poor health, fading memories, or other circumstances justify more immediate discovery, the Court can avoid prejudice to Plaintiff by permitting discovery from these witnesses on a case-by-case basis."); *ASCII Corp.*, 844 F. Supp. at 1380 (courts generally consider whether a stay would cause undue prejudice or present a tactical disadvantage as well as the stage in the litigation and whether discovery is completed).

A. Plaintiff Is Entitled to Discovery Related to Her Claims Under the Fourteenth Amendment (Discrimination Based on Diagnosis), the ADA, and Idaho State Law

In evaluating the competing interests relevant to the stay analysis, it is crucial to recognize that Plaintiff's three legal claims over which this Court continues to have jurisdiction will ultimately move forward in the litigation regardless of the outcome of the interlocutory appeal. Thus, Plaintiff has a right to pursue discovery related to these claims and Defendants have no legitimate basis for contesting Plaintiff's need to preserve evidence related to these claims.

Indeed, contrary to Defendants' assertions, Plaintiff's Fourteenth Amendment claim of discrimination based on diagnosis and her ADA claim of discrimination based on disability are not identical to her Eighth Amendment claim of cruel and unusual punishment. Plaintiff's discrimination claims allege that Defendants have subjected, and continue to subject her, to differential treatment because of her diagnosis of gender dysphoria, including creating unique procedures for making determinations about provision of medical treatment that apply only to individuals with gender dysphoria, denying her services and benefits because of her gender dysphoria, and disciplining and punishing her because of her gender dysphoria. *See* ECF No.

172 at ¶¶ 81-82, 91, 102-103. Further, these ongoing claims are for both damages and non-surgery injunctive relief, and Plaintiff is entitled to conduct discovery related to these claims.[5]

Accordingly, the outcome of any further interlocutory appellate review of this Court's December 23, 2018 Order will not affect Plaintiff's ability to proceed on her remaining claims. In their petition for rehearing en banc, Defendants argued that the October 2018 proceedings were not a final trial on the merits and this Court's order was a preliminary injunction; or, alternatively, to the extent this Court held a final trial on the merits and issued a permanent injunction, this was improper. Were the Ninth Circuit to rehear the case en banc (or the Supreme Court to grant review) on the bases urged by Defendants, there are generally four possible outcomes: 1) the appellate court could follow the same course as the three-judge panel and affirm this Court's findings on the merits and entry of a permanent injunction on Plaintiff's Eighth Amendment claim; 2) the appellate court could determine that it was improper for this Court to hold a final trial on the merits and enter a permanent injunction, but affirm this Court's entry of a preliminary injunction; 3) the appellate court could determine that it was improper for this Court to hold a final trial on the merits and enter a permanent injunction, and reverse this Court's entry of a preliminary injunction; 4) the appellate court could find that that this Court properly held a final trial on the merits, but reverse this Court's entry of a permanent injunction.

In the first scenario, Plaintiff would proceed towards a jury trial on her Eighth

[5] Defendants falsely assert that this 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." ECF No. 214-1 at 8. This Court made no such finding of fact or law. Rather, because IDOC adopted a new gender dysphoria policy on the eve of trial, Plaintiff did not pursue those aspects of her motion for expedited injunctive relief that would *potentially* be addressed by the new IDOC policy *if fully and appropriately implemented*. Plaintiff did not waive her ability to seek injunctive relief, for example, concerning her access to appropriate clothing and commissary items, or concerning Defendants' discipline and punishment of her for expressing her gender identity, if such relief is necessary after the putative adoption of Defendants' new policy. *See* ECF No. 149 at 45 (stating that the Court "will not address that relief at this time. This is without prejudice to the plaintiff's right to raise the issue in the future, should IDOC revoke the new policy or if the implementation of the policy results in ongoing violations.").

Amendment claim for damages against Corizon and Eliason as well as her claims for damages and any remaining non-surgical injunctive relief against IDOC, Corizon, and individual IDOC and Corizon Defendants that were not a part of her motion for expedited relief: Plaintiff's Fourteenth Amendment claim of discrimination based on diagnosis, her ADA/Rehabilitation Act claim of discrimination based on disability, and her state law negligence claim. In both the second and third scenarios, Plaintiff would proceed towards a jury trial on all of her claims for injunctive relief and damages against all Defendants, including her Eighth Amendment claim. In the fourth scenario, Plaintiff would proceed towards a jury trial on the three claims that were not a part of her motion for expedited relief, which are against IDOC, Corizon, and individual Defendants. Thus, regardless of the outcome of the appeal, Plaintiff is entitled to proceed with discovery on her Fourteenth Amendment claim for discrimination based on diagnosis, her ADA claim, and her state law negligence claim. Therefore, a complete stay is unwarranted and should not be entered in this case.

B. Targeted Discovery and a Retention Order is Necessary as Part of any Stay Order to Prevent Harm and Prejudice to Plaintiff's Case

The legal standard regarding a stay requires this Court to consider whether such a stay would prejudice Plaintiff's ability to litigate her case. If there is "even a fair possibility" that the stay will damage Plaintiff, Defendants must "make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. Plaintiff has identified three key areas of discovery which, if not carved out from a stay that could last another two years, present risk of harm to Plaintiff and prejudice her ability to litigate her case.

First, since this Court's entry of a stay on July 19, 2019, Defendants have stopped providing Plaintiff and her counsel with updates to her custody and medical records, which they are obligated to provide as part of supplemental discovery. This prevents Plaintiff and her counsel from accurately assessing the scope of Defendants' ongoing violations of her rights and the scope of the harm and suffering Defendants continue to inflict on her, including whether additional motions for expedited relief are necessary. Defendants have not demonstrated any

hardship or inequity in being required to produce these records in accordance with their discovery obligations.

Second, although Plaintiff conducted several depositions as part of the expedited discovery process related to her motion for injunctive relief, she has not deposed other key individual Defendants and witnesses (as well as Fed. R. Civ. P. 30(b)(6) witnesses). While discovery was open earlier this year, Plaintiff formally noticed nine depositions, and was in the process of scheduling additional depositions with Defendants. None of these depositions occurred because Defendants refused to produce the deponents, and, subsequently, the parties and Court agreed to stay discovery pending the then-imminent decision from the Ninth Circuit. Rifkin Decl. ¶¶ 2-3. Of the depositions Plaintiff intends to take, there are five for which additional delay would substantially risk prejudicing Plaintiff's ability to litigate her case. Four of these depositions are of the individual Defendants whom Plaintiff has not yet deposed: Defendants Craig, Siegert, Whinnery, and Young. Plaintiff has alleged that each of these four individuals were personally involved in violating her rights, and so their testimony is particularly important to her claims. *See* ECF No. 172 at ¶¶ 19-22. Already, three of these four individuals no longer work within the IDOC system. According to Defendants' counsel, Craig retired in February 2017, Whinnery retired in February 2015, and Young moved from IDOC to the New Mexico corrections system. Rifkin Decl. at ¶ 6. Additionally, Zmuda, who, as the Deputy Director of IDOC, was an official capacity Defendant who oversaw implementation of health care services and treatment, and is therefore a key witness, has moved from IDOC to the Kansas correctional system. *See* ECF No. 172 at ¶ 16; Rifkin Decl. at ¶ 6. For the corrections officials who have moved to different corrections systems, and whose testimony about IDOC-specific practices and events is crucial to Ms. Edmo's case, it is highly likely that their memories will become more confused between corrections systems over time. *See Greer*, 2018 WL 372753, at *3 ("Plaintiff's concern class members' memories may fade is well taken, particularly in light of the open-ended nature of DSG's proposed stay and the need for discovery that depends on the memories of class members as to lengths of time spent undergoing security check." (internal

quotations and alterations omitted)); *S.E.C.*, 2010 WL 5388000, at *4 ("The Court agrees that the delay associated with a stay may affect the availability of witnesses and documents or the quality of testimony. . . . Fading memories are a particularly concern in this case, as the SEC alleges that fraudulent statements were made as early as 2006 and were made orally, without any written record."). For the individual Defendants who have retired from the system, it is also highly likely that their memories of policies, procedures, practices, and events will fade more quickly as their time in retirement increases. *See id.* The additional individual Defendant not yet deposed is Whinnery, and, given the frequency of movement out of the IDOC system, substantial delay of her deposition is likely to raise the same issues. Moreover, as the only individual Defendant still working within the IDOC system, her testimony is particularly important to capture now, while she is still within the system and has knowledge of current practices that the other parties do not have. Defendants cannot demonstrate any hardship or inequity resulting from having this limited number of depositions go forward, especially given that Ms. Edmo has claims against these individuals (or in Zmuda's case, for which he is a key witness) that will proceed regardless of the outcome of any further appellate review. *See Lockyer*, 398 F.3d at 1112 (holding that being required to defend a suit does not constitute hardship or inequity).

Third, the open-ended stay proposed by Defendants, which could last another two years, risks the destruction of this evidence pursuant to Defendants' internal retention policies. Given Defendants' inclusion of these retention policies in the operative discovery plan, ECF No. 159 at 1-2, Plaintiff seeks an order requiring Defendants to continue to preserve all evidence moving forward, regardless of any such retention policies.

CONCLUSION

For all of the reasons stated above, the balance of interests weighs against a complete stay of proceedings. While Plaintiff does not oppose a stay in its entirety, such stay must moderate the substantial risk of prejudice to Plaintiff that would otherwise result. Therefore, Plaintiff requests that this Court enter a partial stay that makes the following provisions relevant to discovery: 1) Defendants must produce Plaintiff's updated custody and medical records on an

ongoing and at least bi-monthly basis; 2) Plaintiff may depose Defendants Craig, Siegert, Whinnery, and Young, as well as former official capacity Defendant Zmuda, with these depositions to be completed no later than March 2020; 3) Defendants must preserve all potentially relevant documentary evidence, including electronic evidence, regardless of any internal retention policies.

Dated: October 21, 2019

Respectfully Submitted,
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By: /s/ *Lori Rifkin*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 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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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

DECLARATION OF LORI RIFKIN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' JOINT MOTION TO STAY

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

DECLARATION OF LORI RIFKIN

I, Lori Rifkin, hereby declare and state:

1. I am an attorney licensed to practice law in the state of California and am admitted *pro hac vice* before this Court, and am counsel of record for Plaintiff in this action. The information contained herein is based on my personal knowledge, or upon review of files and documents generated or received and regularly maintained by my office in connection with this case. If called upon, I could testify in a court of law to the accuracy of the matters set forth herein.

2. Earlier in 2019, while Defendants' appeal was pending, the parties proceeded with discovery regarding remaining claims and issues that were not part of the expedited discovery related to Plaintiff's injunctive relief motion. Plaintiff formally noticed nine depositions, including of individual Defendants, percipient witnesses, and 30(b)(6) witnesses for dates in June through August 2019, and was in the process of scheduling additional depositions with Defendants.

3. Just prior to the first scheduled set of depositions in June 2019, Defendants notified Plaintiff that they would not produce those individuals for deposition. Defendants proposed a stay of discovery pending the Ninth Circuit's decision on their interlocutory appeal. After discovery conferences with the Court's clerk and further meeting and conferring with Defendants, Plaintiff stipulated to that stay, given that the Court and parties anticipated that the appellate decision was imminent.

4. After Defendants filed the instant Motion to Stay, in the interest of trying to reach a stipulated proposal to submit to the Court, Plaintiff's counsel reached out to schedule a time to meet and confer with Defendants' counsel. Counsel met and conferred by phone on Tuesday, October 15, 2019, and Plaintiff's counsel offered to stipulate to a stay with three specific carve-outs to protect Plaintiff from the prejudice that would otherwise result: 1) Defendants must provide Plaintiff with ongoing (at least bi-monthly) production of her updated medical and custody records so that Plaintiff and her counsel have adequate information to determine if

Plaintiff becomes subject to additional risk of serious harm such that a continued stay of proceedings would be inappropriate; 2) Plaintiff may take the depositions of five persons (four individual Defendants and one percipient witness who is a former official capacity Defendant) whose testimony is crucial to her case but whose memories are likely to significantly fade or become confused while Defendants seek en banc and Supreme Court review of this Court's injunction; 3) Defendants confirm that they are preserving all documentary evidence, including electronic evidence, relevant to this case during the pendency of any stay regardless of any internal retention policies that would otherwise result in deletion or destruction of this evidence after specified periods of time.

5. On Saturday, October 19, 2019, IDOC and Corizon Defendants notified Plaintiff's counsel that they would agree to Plaintiff's first and third conditions for a stay (ongoing production of records and preservation of evidence) but will not agree to Plaintiff conducting any of the requested depositions.

6. Defendants' counsel has informed me that Defendant Craig retired in February 2017, Defendant Whinnery retired in February 2015, Defendant Young moved from IDOC to the New Mexico corrections system, and former IDOC Deputy Director Zmuda, who was an official capacity Defendant, has moved from IDOC to the Kansas correctional system.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on October 21, 2019 in Oakland, California.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 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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/s/ *Lori Rifkin*
Lori Rifkin