

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 Orders of the United States district court  
For the District of Idaho  
(No. 1:17-cv-00151-BLW)

---

**DEFENDANTS-APPELLANTS' JOINT REPLY BRIEF**

Lawrence G. Wasden  
Attorney General State of Idaho  
Brady J. Hall  
Special Deputy Attorney General  
P.O. Box 6756  
Boise, ID 83707  
(208) 336-6900  
[brady@melawfirm.net](mailto:brady@melawfirm.net)  
*Attorneys for Defendants-Appellants  
Idaho Department of Corrections, Henry  
Atencio, Jeff Zmuda, Howard Keith Yordy,  
Richard Craig, and Rona Siegert*

Dylan Eaton  
J. Kevin West  
Bryce Jensen  
Parsons Behle & Latimer  
800 West Main Street  
Suite 1300  
Boise, ID 83702  
(208) 562-4900  
[Deaton@parsonsbehle.com](mailto:Deaton@parsonsbehle.com)  
[KWest@parsonsbehle.com](mailto:KWest@parsonsbehle.com)  
[BJensen@parsonsbehle.com](mailto:BJensen@parsonsbehle.com)  
*Attorney for Defendants-  
Appellants Corizon, Inc., Scott  
Eliason, Murray Young, and  
Catherine Whinnery*

January 2, 2020

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**SUMMARY OF ARGUMENT** .....1

**ARGUMENT**.....3

**I. The Doctrine of Equitable Vacatur Requires this Court to Vacate the  
District Court’s Order Granting Renewed Preliminary  
Injunctive Relief**.....3

**II. Plaintiff’s Request for Sanctions is Not Properly Before this Court  
Procedurally and Should Not Be Entertained Further**.....15

**CONCLUSION**.....19

## TABLE OF AUTHORITIES

<i>A&amp;M Records, Inc., v. Napster</i> 284 F.3d 1091 (9 <sup>th</sup> Cir 2002).....	13
<i>Al Najjar v. Ashcroft</i> , 273 F.3d 1330 (11th Cir. 2001).....	10
<i>Cal. Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.)</i> , 98 F.3d 1147 (9th Cir.1996) .....	15
<i>George v. City of Morro Bay</i> , 322 F.3d 586 (9th Cir.2003).....	15
<i>Higgins v. Vortex Fishing Sys., Inc.</i> , 379 F.3d 701 (9th Cir.2004) .....	15
<i>Lindquist v. Idaho State Bd. Of Correction</i> , 776 F.2d 851 (9 <sup>th</sup> Cir 1985).....	13
<i>Miranda v. Southern Pacific Transportation Co.</i> , 710 F.2d 516 (9th Cir.1983).....	16
<i>Mujica v. AirScan Inc.</i> , 771 F.3d 580 (9 <sup>th</sup> Cir. 2014) .....	18
<i>Roadway Exp., Inc. v. Piper</i> , 447 U.S. 752, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980).....	16
<i>U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship</i> , 513 U.S. 18, 115 S. Ct. 386, 389– 90, (1994).....	4, 5
<i>United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft</i> , 239 U.S. 466, 36 S. Ct. 212, 217, (1916).....	5
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36, 71 S.Ct. 104, (1950) .....	4, 5, 11
<i>United States v. Sec'y, Fla. Dep't of Corr.</i> , 778 F.3d 1223 (11th Cir. 2015)... passim	
<i>Walling v. James V. Reuter, Co., Inc.</i> , 321 U.S. 671, 64 S.Ct. 826, 829 (1944).....	4
<i>Williams v. Alioto</i> , 549 F.2d 136 (9th Cir. 1977).....	6, 7

*Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980).....6

**Statutes**

Fed. R.App. P. 38.....18

## SUMMARY OF ARGUMENT

On December 13, 2018, the district court entered its *Findings of Fact, Conclusions of Law, and Order* (Dkt. No. 149), granting Ms. Edmo’s Motion for Preliminary Injunction. In practice, this order purported to grant Ms. Edmo the permanent, final relief she sought: a gender affirming surgery, although it seemed to do so under the auspices of preliminary injunctive relief—it was not clear to the parties whether the district court had, in fact, granted preliminary or permanent injunctive relief. (Dkt. No 149, p.45). On appeal from that order, this Court indicated that the December 13, 2018 order was unclear on this point and, on May 30, 2019, partially remanded to the district court to clarify whether “as part of [the district court’s] ruling on [Ms.] Edmo’s motion for preliminary injunction, the district court also granted permanent injunctive relief.” (*Edmo v. Corizon, Inc., et al.*, Case: 19-35017 (hereinafter “*Edmo I*”), DktEntry: 90, p. 3-4).<sup>1</sup> In addition, the district court was asked to clarify whether it had renewed any preliminary injunctive relief prior to March 4, 2019, when the original preliminary injunction expired under the plain language of the PLRA. *Id.*

---

<sup>1</sup> It must be noted that Ms. Edmo, in her brief in *Edmo I*, understood that the district court only entered a preliminary injunction and did not convert the hearing to a final trial on the merits. (*Edmo I*, DktEntry: 32-1, pp. 39-40 (“**Finally, the District Court did not ‘convert[] the preliminary injunction hearing to a final trial on the merits,’ as Defendants contend. The District Court’s order is clear that it is an order for preliminary injunctive relief.**”) (citations omitted) (emphasis added)

On May 31, 2019, the district court issued an Order (Dkt. No. 196) asserting that, on December 13, 2018, it had granted both preliminary and permanent injunctive relief and that it was also renewing the preliminary injunction. (ER 08-09). To the best of Defendants’ understanding, the Order purported to create a new preliminary injunction that was identical in substance to the existing permanent injunction. Given the awkward procedural posture of the district court’s May 31, 2019 Order, Defendants did not want to waive any issues as to any new preliminary injunction. Out of an abundance of caution, Defendants filed this appeal from the renewed preliminary injunction on June 28, 2019. (*Edmo v. Corizon, Inc., et al.*, Case: 19-35552 (hereinafter “*Edmo II*”). (ER 01-03). This Court subsequently ordered Defendants to show cause as to the propriety of the appeal and Defendants did so. (*Edmo II*, DktEntry: 9-10). This Court discharged the order to show cause and issued a briefing schedule. (*Id.*, DktEntry: 11).

Defendants and Plaintiff now agree that the renewed preliminary injunction is no longer in existence—it merged with the permanent injunctive relief ordered by the Court. And, as Defendants explained in their *Response to Show Cause Order*, the renewed preliminary injunction also expired under the plain language of the PLRA. (*Edmo II*, DktEntry: 10, p. 9) It is undisputed that Defendants’ appeal of the preliminary injunction’s underlying merits is now moot. However, the district court’s order granting preliminary injunctive relief remains on the record as

valid and “conclusively established.” It has potential precedential value and may be relied upon in future litigation. Because the preliminary injunction no longer exists and the appeal is moot, Defendants are procedurally unable to “clear” the record of a district court order that all parties agree is invalid. It must now be vacated under the doctrine of equitable vacatur.

## **ARGUMENT**

### **I. The Doctrine of Equitable Vacatur Requires this Court to Vacate the District Court’s Order Granting Renewed Preliminary Injunctive Relief.**

It would be proper for this Court to vacate the district court’s June 30, 2019 Order to the extent it purports to grant preliminary injunctive relief. Plaintiff now agrees with Defendants that the preliminary injunction has merged with the identical permanent injunctive relief, rendering Defendants’ appeal of the preliminary injunction moot. In this situation, the doctrine of equitable vacatur (which Plaintiff failed to address in her answering brief) compels this Court to dismiss this appeal and vacate the district court’s Order to the extent it grants a preliminary injunction. While Plaintiff contends that this Court lacks jurisdiction and/or authority to vacate the district court’s order because the appeal is moot, the United States Supreme Court has clearly stated otherwise:

...[R]eason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been

determined that the requirements of Article III no longer are (or indeed never were) met. That proposition is contradicted whenever an appellate court holds that a district court lacked Article III jurisdiction in the first instance, vacates the decision, and remands with directions to dismiss.

*U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21, 115 S. Ct. 386, 389–90, (1994). To that end, if an appeal becomes moot while awaiting review, an appellate court should not consider its merits, but may make such disposition of the whole case as justice “may require,” such as by vacating underlying district orders, including orders purporting to grant preliminary injunctive relief. *Id.* at 21-22 (citing *Walling v. James V. Reuter, Co., Inc.*, 321 U.S. 671, 677, 64 S.Ct. 826, 829 (1944)) (See also, *United States v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1229 (11th Cir. 2015) (hereinafter “*FDOC*”).

Indeed, it is well-settled that appellate courts should vacate district court directives whose review is “prevented through happenstance”—that is to say, where a controversy presented for review has “become moot due to circumstances un-attributable to any conduct of the parties.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, (1950). In fact, appellate courts’ “broad authority” is “commonly utilized to prevent a lower court’s action, unreviewable because of mootness, from spawning any legal consequences.” *Munsingwear*, 340 U.S. at 41(emphasis added). The concern is that a right, question, or fact previously put in issue and directly determined by a court of competent jurisdiction cannot be

disputed in a subsequent suit between the same parties—it must be taken as conclusively established, so long as the district court’s action in the first suit remains unmodified. *Id.* at 38. There is no such thing as an “inactive” or “null” district court order.

In light of the potential prejudice to litigants’ rights, application of equitable vacatur is not discretionary:

...the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the [appellant], there is no power to review it upon the merits, but that it should be reversed and the case be remanded to the court below with directions to dismiss...

*United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 466, 478, 36 S. Ct. 212, 217, (1916). Thus, when an issue in a case becomes moot on appeal, the court not only must dismiss as to the mooted issue, but also vacate the portion of the district court's order that addresses it. *Id.* The policy of vacating the underlying district court order is “premised on the equitable principle that “a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25. This practice “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40.

As applicable here, when an intervening event renders the appeal of a *preliminary injunction* moot, it is proper to dismiss the appeal and also to vacate the preliminary injunction granted by the lower court. *FDOC*, 778 F.3d at 1229-30. *See also, Williams v. Alioto*, 549 F.2d 136 (9th Cir. 1977) (“*Williams I*”). This is true because an order granting preliminary injunctive relief requires a finding by the district court that the party seeking relief “prevailed on the merits of at least some of their claims.” *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980) (“*Williams II*”). When an appeal of such an order becomes moot, the appellant no longer has any ability to “clear” the district court’s findings regarding the merits of the underlying case—this is why the appellate court must vacate the underlying injunction as well as dismiss the appeal. Otherwise, the order granting preliminary injunctive relief remains “conclusively established” for the purposes of future litigation.

The 9<sup>th</sup> Circuit adheres to this principle. In the *Williams v. Alioto* series of cases, the plaintiffs sought preliminary injunctive relief challenging the so-called “Operation Zebra” guidelines the San Francisco Police Department had issued in response to a series of unsolved murders in 1977. *Williams I*, 549 F.2d at 138-41. These guidelines authorized police officers to stop any individuals who “fit the description” of the suspects, and Plaintiffs brought a class action suit alleging various constitutional violations. *Id.* The district court granted a preliminary

injunction that enjoined police officers from detaining individuals merely because they fit the profile of the “‘Zebra’ killer.” *Id.* at 139-140. The San Francisco Police Department appealed the preliminary injunction, but apprehended and convicted the “Zebra killers” during the pendency of the appeal. *Id.* at 141. This Court recognized that the apprehension and convictions rendered the appeal of the preliminary injunction moot and, thus, it had no ability to consider the merits of the constitutional issues raised by the parties. *Id.* at 145. Accordingly, it dismissed the appeal and vacated the district court’s order granting plaintiffs a preliminary injunction. *Id.* Any argument that this Court lacks the authority to do the same in this matter is without merit.

Similar to the instant case, in *FDOC*, the district court entered preliminary injunctive relief under the PLRA on December 6, 2013, requiring the Florida Department of Corrections to provide kosher-appropriate diets to certain prisoners. *FDOC*, 778 F.3d at 1225-6. On appeal, the 11<sup>th</sup> Circuit determined that the district court had failed to renew the preliminary injunction within 90 days, and thus, under the plain language of the PLRA, the injunction had “passed on to injunction heaven” on March 6, 2014. *Id.* at 1229. Like here, the filing of that appeal took place prior to the expiration of the 90 day deadline, but that did not “toll” the deadline. *Id.* The 11<sup>th</sup> Circuit held that, “when an issue becomes moot on appeal, we not only dismiss as to the mooted issue, but also vacate the portion of the

district court's order that addresses it," citing the reasoning set forth above. *Id* at 1229-30. Thus, because the appeal was rendered moot, it vacated the district court's order to the extent that it granted preliminary injunction.

In this case, the district court's May 31, 2019 Order should be vacated to the extent it grants any preliminary injunctive relief, which the Order so indicates. By that Order, the district court attempted to grant "preliminary mandatory relief" while simultaneously asserting that it had already granted the same relief in the form of "permanent injunctive relief" five months prior, on December 13, 2018. Obviously, this cannot be, and the district court erred: as of May 31, 2019, all preliminary injunctive relief had merged into the "permanent injunctive relief" purportedly granted on December 13, 2018, and no further preliminary injunctive relief could possibly have issued. This stands to reason because the district court has taken the position that its December 13, 2018 Order issued permanent injunctive relief after holding a final trial on the merits of the case <sup>2</sup>, a procedural posture in which further "preliminary injunctive relief" has no possible application. (ER 07).

Indeed, all parties agree that the "preliminary mandatory relief" contained in the May 31, 2019, Order has been superseded and is moot, and that this appeal

---

<sup>2</sup> Defendants vigorously dispute that any such final trial on the merits occurred, and this issue is the subject of an ongoing appeal before this Court in *Edmo I*, Case: 19-35017.

should be dismissed. (*Edmo II*, DktEntry: 15-1, p. 7). In other words, Plaintiff agrees with Defendants' position that the May 31, 2019 renewed preliminary injunction is now moot. However, Plaintiff either misunderstands or obfuscates the important distinction between (1) the preliminary injunction at issue and (2) the district court's May 31, 2019 Order, which currently remains on the record as a valid finding of law and fact. Defendants do not primarily seek an order that the preliminary injunction is invalid based on its underlying merits. Such an argument was only made in the alternative. Rather, Defendants seek to have this Court vacate a portion of the District Court's May 31, 2019 Order that all parties agree should be without effect—there is no preliminary injunction—yet which no party now has the ability to challenge the merits directly on appeal.

Plaintiff appears to suggest that the district court's Order granting preliminary injunctive relief was somehow automatically rendered "void" or "null" when the preliminary injunction merged with the permanent injunction. To that end, Plaintiff contends that "Defendants can cite no case law that would explain why vacating an inactive order is necessary or would have legal effect." (*Edmo II*, DktEntry 15-1, p. 30). Defendants did, in fact, cite case law in explanation of that very point (see, e.g., *Edmo II*, DktEntry: 12, p. 13-14), and note, further, that Plaintiff's argument invents the concept of an "inactive" order. There is no such thing. There is no legal mechanism by which court orders are automatically

rendered “inactive” or without effect—district court orders “must be taken as conclusively established[] so long as the district court’s action...remains unmodified.” *Munsingwear* 340 U.S. at 38. This is precisely the reason that an appellate court must vacate district court orders that become moot while on appeal, and is precisely the reason that Defendants pursued this appeal. (*See, e.g., Edmo II*, DktEntry: 10, p. 9)

Plaintiff also misconstrues this Court’s appellate authority by suggesting this Court has no jurisdiction or authority to vacate the district court’s Order because such an action would constitute an impermissible advisory opinion. Plaintiff’s argument on this point is misguided in light of *Munsingwear* and its progeny. It is a well-settled and uncontroversial principle that, when an appeal becomes moot while awaiting review, the appellate court may not consider its merits, but may dispose of the case “as justice may require.” The United States Supreme Court has made clear that “justice requires” the vacatur of court orders whose appellate review has been made impossible through no fault of the parties. This Court has clear jurisdiction to dismiss the appeal as to the mooted issue, but also vacate the portion of the district court’s Order that addresses it. *See e.g., Al Najjar v. Ashcroft*, 273 F.3d 1330, 1340 (11th Cir. 2001).

Applying the principles set forth by the Supreme Court, this Court should exercise the above-described authority as “justice requires” by vacating the district

court's May 31, 2019 order insofar as it attempts to grant preliminary injunctive relief. That Order is a finding, on the record, that Plaintiff "prevailed on the merits of at least some of her claims." 625 F.2d. 845. That Order has potential precedential value in ongoing and future litigation, especially if the permanent injunction is reversed and vacated upon further appeal. However, Defendants are prevented from appealing the merits of the preliminary injunction in that Order because the injunction has been rendered moot "due to circumstances unattributable to any conduct of the parties." *Munsingwear, Inc.*, 340 U.S. at 39. Those happenstantial circumstances were the district court's apparent issuance of identical permanent relief in December 2018, which had the effect of merging any existing preliminary injunctive relief, and the district court's failure to finalize or renew the preliminary injunction within 90 days of May 31, 2019.

Based on the procedurally novel position of "simultaneous preliminary and permanent injunctive relief," Defendants are now at risk of suffering the future effects of a court order, the merits of which they have no meaningful way to appeal or further contest. An order of vacatur in this case is in line with 9<sup>th</sup> Circuit precedent for vacating preliminary injunctions that are rendered moot while on appeal. This would also be consistent with the outcome in *FDOC*, a case that presents substantially the same question and procedural posture wherein a preliminary injunction, issued under the PLRA, expired.

Under the Plain Language of the PLRA, the preliminary injunction has expired<sup>3</sup> and, for the same reasons set forth above, this Court should enter an order vacating the district court’s May 31, 2019 Order to the extent it purports to grant preliminary injunctive relief. Plaintiff makes two arguments against this proposition, the first of which is that the injunction did not expire because it merged into the permanent injunction. Thus, Plaintiff essentially takes the position that Defendants cannot show that the preliminary injunction expired because another of Defendants’ arguments in favor of vacatur—that the injunction merged—is dispositive. In response, Defendants note that this particular argument is immaterial to the outcome of the appeal. It makes no difference whether the preliminary injunction has merged or expired: the preliminary injunction must still be vacated because it “is no more”; it has ceased to be—it is an “ex-injunction”.

Next, Plaintiff argues that the 90-day expiration deadline contained in the PLRA was “tolled” when Defendants appealed the district court’s May 31, 2019 Order. This proposition is utterly without support. Nonetheless, Plaintiff states, on Page 19 of her response brief:

[T]his Court should not reach questions of law about preliminary injunctions under the PLRA, or whether an appeal tolls the PLRA’s expiration provision.... *See e.g.*

---

<sup>3</sup> For a more detailed discussion, please see *Defendants’ Joint Opening Brief, (Edmo II, DktEntry: 12)*, p.7-9.

*Lindquist v. Idaho State Bd. Of Correction*, 776 F.2d 851  
(9<sup>th</sup> Cir 1985).

(*Edmo II*, DktEntry: 15-1, p. 25). Plaintiff's assertion and proffered case law are overreaching and misleading. The decision in *Lindquist* does not contain the word "toll" or otherwise address expiration limits for preliminary injunctions. *Id.* In fact, that case did not involve a preliminary injunction at all. *Id.* In that case, among other things, prisoners in Idaho claimed that a prison's law library was constitutionally inadequate because it was too small. They sought a permanent injunction that would force the prison to move the library to a larger location. The prison moved the library into a larger space. This Court determined that the issue of the law library's size was, therefore, moot, and that it need not consider the merits of those claims. This marginally relevant case demonstrates only that an appeals court should not consider the underlying merits of claims that become moot on appeal. It does not stand for the proposition that that "this Court should not reach questions of law about preliminary injunctions under the PLRA, or whether an appeal tolls the PLRA's expiration provision..." as Plaintiff represented.

For additional support of her theory that the PLRA's statutorily-defined preliminary injunction expiration deadline provision might be "tolled" by an appeal, Plaintiff cites *A&M Records, Inc., v. Napster* 284 F.3d 1091 (9<sup>th</sup> Cir 2002), a case which does not involve the PLRA and is, therefore, irrelevant to Plaintiff's

contention. Likewise, none of the other cases cited by Plaintiff actually involved preliminary injunctions under the PLRA. Defendants are not aware of any case law supporting Plaintiff's novel "tolling" concept.

To the contrary, in *FDOC* the district court entered a preliminary injunction on December 6, 2013 that was appealed in January, 2014. The appeal in that case did not "toll" the expiration deadline, and the 11th Circuit subsequently determined that the injunction expired on March 6, 2014, during the course of the appeal. Likewise, in this case, the district court purported to grant injunctive relief on December 13, 2018, which Defendants appealed on January 9, well within the 90 day deadline under the PLRA. Subsequently, this Court's May 30, 2019 Order asked the district court to clarify whether it had renewed the injunction "on March 4, 2019—nine days before a preliminary injunction would have expired under the PLRA." (*Edmo I*, DktEntry: 90. p. 3). Thus, it is the law of this case that the filing of an appeal does not toll the PLRA's 90 day limit—otherwise the injunction could not have expired on March 4, 2019. Plaintiff's "tolling" theory is inapposite here because it is non-existent.

Accepting Plaintiff's argument on this point would require this Court to forge new legal ground directly in contravention of the PLRA's plain language. Assuming that the preliminary injunction had not already merged with the permanent injunction by May 31, 2019—which it had—the preliminary injunction

has now expired under the PLRA and the district court's Order should be vacated for that reason also.

**II. Plaintiff's Request for Sanctions is Not Properly Before this Court Procedurally and Should Not Be Entertained Further.**

Plaintiff's Answering Brief requests sanctions for bringing a frivolous appeal under Rule 38 of the Federal Rules of Appellate Procedure and also seeks an award of sanctions pursuant to the Court's "inherent power." Plaintiff has not properly brought the issue of sanctions before this Court and is not, therefore, entitled to sanctions for any reason.

An award of sanctions for bringing a frivolous appeal under Rule 38 "may be made only 'after a separately filed motion or notice from the court and reasonable opportunity to respond. *George v. City of Morro Bay*, 322 F.3d 586, 591–92 (9th Cir.2003) (quoting Fed. R.App. P. 38). A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. *Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 709 (9th Cir.2004) (stating that "[a] request [for an award of fees] made in an appellate brief does not satisfy Rule 38,' and thus the motion [should be] denied without prejudice.") (quoting *Cal. Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1154 (9th Cir.1996)). Plaintiff has not made a motion for sanctions and the Court has not otherwise provided notice that it will make a ruling on the issue of sanctions or

provide Defendants any opportunity to respond. Plaintiff is not entitled to sanctions under Rule 38.

Likewise, prior to imposing sanctions according to its “inherent authority” the Court must provide Defendants “fair notice and an opportunity for a hearing on the record.” *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980). *See also Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 522–23 (9th Cir.1983)). This is because procedural due process requires notice and a hearing before any governmental deprivation of a significant property interest. *Id.* at 522. Here, Defendants have received neither fair notice nor any opportunity for a hearing on the record with regard to sanctions, and the Court may not award Plaintiff sanctions merely because a request for the same was included in her response briefing.

The issue of sanctions is not properly before this Court and Defendants are not obligated to address the substance of Plaintiff’s contentions with regard thereto. Notwithstanding, in the event that Plaintiff properly brings the issue of sanctions before this Court, Defendants reserve the right to exercise their applicable due process protections to the fullest extent and reserve the right to fully brief the issues and to raise any and all applicable legal and factual defenses. That being said, Defendants note as a preliminary matter that Plaintiff’s briefing fails to present a coherent argument as to why this particular appeal might be sanctionable.

It is not clear to Defendants how Plaintiff could conceivably establish that Defendants' appeal is frivolous—that Defendants' arguments have absolutely no merit—when Plaintiff agrees with the merits of the appeal: that the preliminary injunction is invalid because it has merged with the permanent injunction. In reality, Plaintiff cannot show that this appeal is without merit, vexatious, or improper, and instead muddies the waters by presenting scattered anecdotal snippets of other filings in related litigation, devoid of context, characterizing them as “improper” or “oppressive,” yet she cannot point to a single instance wherein Defendants have, in fact, violated a court directive or otherwise been found to have acted “improper.” Plaintiff's accusations, alone, do not make it so.

This lawsuit involves complex and novel legal and procedural questions that provide ample justification for Defendant's appropriate exercise of appellate rights. In a confusing and unprecedented procedural maneuver, the district court clarified that it entered a permanent injunction while simultaneously renewing a preliminary injunction. The renewed preliminary injunction subsequently expired and Defendants are obligated to secure a vacatur of the expired preliminary injunction so as to not be potentially bound by the terms of an expired injunction and/or be accused of waiving a challenge to the renewed preliminary injunction.<sup>4</sup> Under the

---

<sup>4</sup> Defendants appreciated that this Court noted that “[n]o party need file a new notice of appeal” in its order on limited remand. (*Edmo I*, DktEntry: 90, p. 4) However, unlike in the case this Court cited therein, *Mujica v. AirScan Inc.*, 771

circumstances, it would be illogical and unfair to find this appeal was filed or pursued frivolously, especially since this Court discharged its order to show cause after Defendants raised this issue in its prior response. (*Edmo II*, DktEntry: 9, 10 at p. 9, and 11)

Nonetheless, Plaintiff has consistently construed any effort to seek appellate review as an “abuse of process.” To be sure, Plaintiff has also shown a proclivity for arguing an extremely expansive understanding of what Defendants might waive by failing to appeal or object, placing Defendants in a “darned-if-you-do, darned-if-you-don’t” position whereby their actions are largely portrayed as being either “frivolous” or a waiver of right. Plaintiff allows Defendants no middle ground.

At this time, the issue of sanctions is not appropriately before this Court and Plaintiff’s request should be denied. Defendants are not obliged to provide any meaningful response to the substance of Plaintiff’s allegations underlying her claim for sanctions. Defendants unequivocally reserve their right to do so to the fullest extent in the event that Plaintiff decides to pursue her claim for sanctions through the appropriate channels. Defendants intend that nothing in this brief be construed as a waiver of any kind with regard to sanctions.

---

F.3d 580, 589-90 (9<sup>th</sup> Cir. 2014), the district court here subsequently renewed the preliminary injunction and/or entered an entirely new injunction causing Defendants to question whether *Mujica* was controlling or applicable. Defendants expressly raised these concerns in their *Notice of Defendants’ Joint Preliminary Injunction Appeal* (ER 2).

## CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should find that the appeal is moot and enter an order vacating the renewed preliminary injunction the district court entered on May 31, 2019. This Court should also refrain from entertaining Plaintiff's procedurally improper requests for sanctions.

This 2<sup>nd</sup> day of January, 2020.

*s/ Dylan A. Eaton*

\_\_\_\_\_  
Dylan A. Eaton, ISB #7686

*s/ Brady J. Hall*

\_\_\_\_\_  
Brady J. Hall, ISB #7873

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Joint Reply Brief of Defendants-Appellants Corizon Inc., Scott Eliason, Murray Young, Catherine Whinnery, Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert by electronic filing on the date stated below to:

Office of the Clerk  
United States Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939

Lori E. Rifkin  
RIFKIN LAW OFFICE  
2855 Telegraph Ave, Suite 517  
Berkeley, CA 94705

Dan Stormer  
Shaleen Shanbhag  
HADSELL STORMER & RENICK, LLP  
128 N. Fair Oaks Avenue  
Pasadena, CA 91103

Amy Whelan  
Julie Wilensky  
Alexander Chen  
National Center for Lesbian Rights  
870 Market Street, Suite 370  
San Francisco, CA 94102

Craig H. Durham  
Deborah A. Ferguson  
FERGUSON DURHAM, PLLC  
223 N. 6th Street, Suite 235  
Boise, ID 83702

DATED: January 2, 2020.

*s/ Dylan A. Eaton*

---

J. Kevin West, ISB #3337  
Dylan A. Eaton, ISB #7686  
PARSONS BEHLE & LATIMER  
800 W. Main Street, Suite 1300  
Boise, ID 83702  
Telephone: 208-562-4900  
Facsimile: 208-562-4901  
Email: deaton@parsonsbehle.com  
*Attorneys for Defendants-Appellants  
Corizon Inc., Scott Eliason,  
Murray Young, and Catherine Whinnery*

*s/ Brady J. Hall*

---

Lawrence G. Wasden,  
Attorney General State of Idaho  
Brady J. Hall, ISB #7873,  
Special Deputy Attorney General  
Moore Elia Kraft & Hall, LLP  
P.O. Box 6756  
Boise, ID 83707  
Telephone: (208) 336-6900  
Email: brady@melawfirm.net  
*Attorneys for Defendants-Appellants  
Idaho Department of Corrections, Henry Atencio,  
Jeff Zmuda, Howard Keith Yordy, Richard Craig,  
and Rona Siegert*

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains  words, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
  - it is a joint brief submitted by separately represented parties;
  - a party or parties are filing a single brief in response to multiple briefs; or
  - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)