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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

4:19-cv-00035-TUC-RM (LAB)

PLAINTIFF’S MOTION TO ENFORCE COURT ORDER (Doc. 241)

1 Plaintiff Russell B. Toomey (“Plaintiff”) respectfully bring this motion in further
2 response to State Defendants’ Motion to Stay (“Motion”) (Doc. 242) enforcement of this
3 Court’s September 21, 2021 Order (“Order”) (Doc. 241), and to supplement Plaintiff’s
4 Memorandum of Law in Opposition to State Defendants’ Motion to Stay an Order
5 Compelling the Production of Documents (“Opposition”) (Doc. 243). Pursuant to the
6 Order, this Court instructed State Defendants to “produce all documents related to
7 Defendants’ decision-making regarding the exclusion of coverage for gender
8 reassignment surgery” on or before October 5, 2021. (Order at 8). State Defendants did
9 not produce the documents subject to that Order on or before October 5, 2021, and have
10 yet to do so. State Defendants have therefore failed to comply with this Court’s Order.

11 The Federal Rules of Civil Procedure provide that “[i]f a party . . . fails to obey
12 an order to provide or permit discovery, including an order under Rule . . . 37(a), the
13 court where the action is pending may issue further just orders.” Fed. R. Civ. P.
14 37(b)(2)(A). In addition, this Court has authority to sanction litigants for discovery
15 abuses, including “where such sanctions are necessary to enforce compliance with a valid
16 discovery order.” *Grimes v. City and County of San Francisco*, 951 F.2d 236, 241 (9th
17 Cir. 1991) (District Court did not err in affirming sanction where party’s “obstruction of
18 the discovery process caused unnecessary delay and expense, and its willful
19 disobedience of the magistrate’s orders threatened the court’s integrity”).

20 Plaintiff is aware of no reasonable basis for State Defendants’ failure to comply.¹
21 On the night of Friday, October 1, 2021—mere days prior to the production deadline—
22 State Defendants filed its Motion. State Defendants’ Motion does not automatically stay
23 this Court’s Order. *See Zapon v. United States Dep’t of Just.*, 53 F.3d 283, 285 (9th Cir.

24
25 ¹ On the evening of Tuesday, October 5, 2021, State Defendants informed Judge
26 Márquez’s chambers and counsel by email that they intended to submit further
27 briefing in support of their Motion. Plaintiff is unaware of whether this forthcoming
28 submission addresses State Defendants’ failure to comply with the Order, but in all
events, Plaintiff believes there are no reasonable grounds for State Defendants’
noncompliance.

1 1995) (“obedience to even an assertedly void (not merely voidable) order is required
2 unless and until it has been vacated or reversed” (emphasis added)); *Guardian Life Ins.*
3 *Co. of Am. v. Andraos*, CV075732SJOFMOX, 2009 WL 10675048, at *3 (C.D. Cal. Feb.
4 10, 2009) (“[B]y refusing to comply with discovery merely because a motion to stay is
5 pending, a party effectively is granting its own motion to stay—even before the court
6 has ruled . . . a phenomenon [that] would reduce a court's orders to useless and senseless
7 formalities” (quoting *Tinsley v. Kemp*, 750 F. Supp. 1001, 1013 (W.D. Mo. 1990))); *In*
8 *re Lernout & Hauspie Securities Litig.*, 219 F.R.D. 28 (D. Mass. 2003) (holding that a
9 “party [who] seeks a stay . . . has the duty to stay sufficiently in advance of the date set
10 for compliance so that the Court will have the opportunity to rule on the motion prior to
11 the compliance date” (emphasis added)).

12 While State Defendants have no legal basis to obtain a stay, nothing stopped
13 them from seeking one promptly after the Order was issued. Instead, State Defendants
14 waited until the second-to-last business day before their ordered date of production, in
15 an obvious attempt to back the Court into ruling on an expedited basis. Having now
16 failed to do so, State Defendants have unilaterally claimed the relief sought in the
17 Motion, declaring that they will “produce the documents within 5 court days of the
18 denial” of their petition for writ of mandamus. (Doc. 242 at 5).

19 There is no legal justification for State Defendants’ non-production. Plaintiff
20 asks that the Court immediately enter the Proposed Order submitted alongside this
21 motion and grant relief provided therein, including ordering, under penalty of sanction
22 and fine, the production of documents subject to the Court’s September 21, 2021 Order
23 within 48 hours. The 48-hour grace period will allow State Defendants to submit a
24 request for a stay to the Ninth Circuit if they so choose. In the alternative, Plaintiff
25 requests that this Court impose an adverse inference with respect to the documents to be
26 produced with such inference to be determined at a later date and upon further
27 submission to the Court. Fed. R. Civ. P. 37(b)(2); *Renteria v. Ramanlal*, 07-CV-00658-

1 PHX-ROS, 2008 WL 11338783, at *2 (D. Ariz. Aug. 25, 2008) (“Courts have an
2 ‘inherent power ... to levy sanctions in response to abusive litigation practices’” (quoting
3 *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764-65 (1980))).

4 **CONCLUSION**

5 For all the reasons discussed above, this Court should grant Plaintiff’s Motion
6 and award Plaintiff costs and fees as this Court deems just and proper.

7 Dated: October 6, 2021.

8
9 **ACLU FOUNDATION OF ARIZONA**

10 By /s/ Christine K. Wee

11 Victoria Lopez
12 Christine K Wee

13 **WILLKIE FARR & GALLAGHER LLP**

14 Wesley R. Powell*
15 Matthew S. Freimuth*
16 Jordan C. Wall*
17 Victoria Sheets*

18 **AMERICAN CIVIL LIBERTIES UNION
19 FOUNDATION**

20 Joshua A. Block*
21 Leslie Cooper*

22 *admitted pro hac vice

23 *Attorneys for Plaintiff Russell B. Toomey*
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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2021, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee
Christine K. Wee

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Defendants.

4:19-cv-00035-TUC-RM (LAB)

[PROPOSED] ORDER

1 This matter is before the Court on Plaintiff’s Motion to Enforce Defendants State
2 of Arizona’s, Andy Tobin’s, and Paul Shannon to comply with the Court’s September
3 21, 2021 Order compelling production of “all documents related to Defendants’
4 decision-making regarding the exclusion of coverage for gender reassignment surgery as
5 requested in Plaintiff’s Requests for Production One, Three, and Nine, including legal
6 advice that may have informed that decision-making,” excluding “documents that relate
7 solely to their defense in the instant litigation” no later than October 5, 2021.

8 **IT IS ORDERED** that Plaintiff’s Motion to Enforce is **granted**. Defendants
9 State of Arizona, Andy Tobin, and Paul Shannon shall produce, under penalty of sanction
10 and fine, documents subject to the Court’s September 21, 2021 Order (Doc. 241) within
11 48 hours.

12 **IT IS FURTHER ORDERED** Defendants’ Motion to Stay (Doc. 242) is **denied**.