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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

ADREE EDMO,	)	Case No. 1:17-cv-151-BLW
	)	
Plaintiff,	)	
vs.	)	<b>REPLY IN SUPPORT OF MOTION FOR</b>
	)	<b>EXTENSION</b>
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.	)	
_____	)	

COME NOW Defendants Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Al Ramirez, and Howard Yordy (“IDOC Defendants”) by and through undersigned counsel of

record, Moore, Elia & Kraft, LLP and hereby submit this *Reply in Support of Motion for Extension* as follows.

### **INTRODUCTION**

The IDOC Defendants made their *Motion for Extension* on the basis that, despite good faith efforts to develop and implement strategies by which the IDOC Defendants could properly avail themselves of the applicable procedural rules within the framework of this Court's order, additional time was necessary to do so. Dkt. 346, PP. 4-5. Specifically, the IDOC Defendants raised concerns about their ability to either (1) post of a bond; or (2) pay the judgment for attorney fees within the fourteen (14) day period provided by the Court. It now appears that the IDOC Defendants' concerns were warranted: the IDOC Defendants are not able to obtain a bond *nor* are they able to procure funding to pay the judgment of attorney's fees within the timeframe provided by the Court, and there is good cause to provide the IDOC Defendants sufficient time to ensure that their actions are in compliance with Idaho law. Conversely, there is no good cause to uphold an order that the IDOC Defendants lack the ability to satisfy in the timeframe provided, and which would unnecessarily deprive the IDOC Defendants of protections they are due under the Federal Rules of Civil Procedure.

### **REPLY**

Underlying the action for attorney fees in this case is the indemnification agreement by which the Corizon Defendants have agreed that they shall be liable for all attorney fees and costs in this matter, without exception. Declaration of Faith Cox, ¶ 1. While the IDOC Defendants acknowledge that the judgment for attorney fees and costs entered by this Court applies with equal force to all Defendants in this lawsuit, the indemnity agreement between IDOC and Corizon is instructive as to the IDOC Defendants' decision making process in this action for attorney fees,

and their current request for additional time to develop a litigation plan. As relevant, the indemnity agreement was entered into as part of Corizon's withdrawal as IDOC's medical provider. *Id.*, ¶ 2. The agreement in reference was not a "standard term" in a service contract. Corizon's promise to indemnify the IDOC Defendants was reached during the course of negotiations that contemplated this specific litigation as part of a larger set of agreements between IDOC and Corizon with regard to numerous lawsuits involving both IDOC and Corizon. *Id.*, ¶ 3. In other words: the indemnity agreement was a discreetly agreed-upon set of terms that left no ambiguity that Corizon is unequivocally responsible for attorney fees and costs in this matter and that the IDOC Defendants would not bear any such risk. *Id.*

Complicating the IDOC Defendants' understanding of matters is Corizon's apparent reorganization by which, essentially, Corizon was split into at least two separate entities. *Id.*, ¶ 4. This reorganization was an attempt to transfer all of Corizon's assets and productive contracts into the "new" entities, while retaining all the liabilities—including this lawsuit, *among hundreds of other lawsuits*—in the original Corizon entity that remains party to this action. *Id.*, ¶¶ 4-5. The reorganization documents, which the IDOC Defendants have obtained, appear to show that the Corizon entity was left with around one million dollars in cash and conditional access to *some* amount of insurance proceeds. *Id.*, ¶ 6. See also *Kelly v. Corizon Health Inc.*, No. 2:22-CV-10589, 2022 WL 16575763, at \*2 (E.D. Mich. Nov. 1, 2022) ("Corizon retained all of its expired contracts and their corresponding liabilities. Corizon also held onto one million dollars in cash, the right to collect on its insurance policies, and the right to collect up to four million dollars under a "funding agreement" with an affiliate of Corizon Health.") Presumably, these assets are intended to be used to settle the aforementioned numerous lawsuits and other remaining liabilities. In all candor to the Court, Corizon's reorganization was implemented under Texas law, which appears to be unique in

its tolerance of the aforementioned type of liability-shielding reorganizations for corporate reorganization, by which a business entity may simply transfer all of its assets to a new business entity and practically avoid all liabilities. *Kelly v. Corizon Health Inc.*, No. 2:22-CV-10589, 2022 WL 16575763, at \*2 (E.D. Mich. Nov. 1, 2022). However, in *Kelly* Corizon’s attempt to employ this reorganizational liability shield were soundly rejected under a routine “choice of law” analysis. See. *Kelly v. Corizon*.

This information regarding Corizon’s reorganization is relatively new to the IDOC Defendants, and provides context for the instant *Motion for Extension*, in light of the IDOC Defendants’ previous understanding that they all costs and fees would be borne by the Corizon Defendants, including the costs of the appeal. As such, the IDOC Defendants litigation strategy is necessarily being developed in an ongoing way and with the best knowledge available at any given time. Nonetheless, the IDOC Defendants continue to make good faith efforts towards identifying and resolving the issues raised by the attorney fees judgment. The IDOC Defendants’ most up-to-date understanding is that they are (1) not able to obtain a bond as contemplated by this Court in the *Memorandum Decision and Order* (Dkt. 345), and (2) are not able to satisfy the judgment for attorney fees within the timeframe provided by the *Memorandum Decision and Order*, as explained below.

*I. The IDOC Defendants Cannot Obtain a Supersedeas Bond as Contemplated by the Court’s Order.*

The IDOC Defendants have approached four separate sureties regarding the possibility of obtaining a supersedeas bond: Liberty Mutual, Travelers Insurance, Argonaut, and American Fire Insurance. *Id.*, ¶ 8. Each bond application reviewed would require the state of Idaho and/or IDOC to indemnify the subject surety against the risk of loss, including for attorney fees and costs. *Id.*

To be clear: the IDOC Defendants are not familiar with the process of obtaining a supersedeas bond, as the state of Idaho is not customarily required to post a bond on appeal—none of the individuals involved on the state of Idaho’s part have any experience with this process. *Id.*, ¶ 7. Regardless, the state Officials who investigated the possibility of obtaining a bond discovered that Idaho law prohibits Idaho officials and agencies from pledging indemnity to third parties by contract *absent* legislative appropriation of funding for that purpose. See 2019 Idaho Op. Atty. Gen. No. 19-01, 2019 WL 6655552. As such, efforts to enter contractual indemnification clauses without legislative authorization and corresponding appropriations are void and violate the Idaho Constitution's limitation on public indebtedness. See Idaho Code Section 59-1016 (“Any indebtedness attempted to be created against the state in violation of the provisions of this chapter, or any indebtedness attempted to be created against the state in excess of the appropriation provided for in any act, shall be void.”)

The IDOC Defendants—and their agents—attempted to negotiate around this limitation with the sureties such that a supersedeas bond might be obtained without obligating the state to indemnify a surety. *Cox Decl.*, ¶ 9. In response to some suggested modifications, Liberty Mutual responded as follows “unless there has been a specific legislative appropriate to fund payment of the judgments underlying these appeal bonds, the state agency may not be authorized to enter into this agreement.” *Id.* ¶¶ 10-12. As such, the Court’s *Memorandum Decision and Order* purported to require the IDOC Defendants, as one option, to obtain a supersedeas bond that it is unable to obtain as a matter of law. As indicated, the state of Idaho is not usually required to obtain supersedeas bonds, because supersedeas bonds are designed to address concerns that a judgment on appeal might go unpaid, and here, there is no concern that the judgment might go unpaid. A supersedeas bond from the state of Idaho would provide Plaintiff no additional security, would come at the

unnecessary expense of taxpayers, and cannot be obtained in any event. This Court should allow a stay without bond on appeal as no party can make a showing that the state would be unable or unwilling to pay a judgment at the conclusion of the appeal, should any judgment remain. Defendants request that the Court enter such a stay for the IDOC Defendants, or, in the alternative, will submit a renewed motion towards the same ends, if the Court so desires.

*II. The IDOC Defendants Cannot Satisfy the Judgment in the Manner Contemplated by the Court's Order.*

The state of Idaho does not suggest that it would not, or could not, pay the judgment for attorney's fees if such judgment survives appeal and Corizon breaches its indemnity agreement. Rather, the IDOC Defendants argue here that, in addition to being unable to obtain a supersedeas bond within the timeframe provided by the *Memorandum Decision and Order*, neither could they have satisfied the judgment within that fourteen (14) day window, and there is no good cause to take any adverse action against the IDOC Defendants. Rather, there is good cause to provide additional time: for all the reason stated above, state law prohibits officials and departments from disbursing state funds absent a specific legislative appropriation. Idaho Code Section 59-1015 ("no officer, employee, or state board...shall enter into any contract or agreement creating any expense or incurring any liability...legal or otherwise, or at all in excess of the appropriation made by law for the specific purpose...for which such expenditure is made.") Any such actions or agreement to pay any liability absent legislative appropriation would violate Idaho law, and any such arrangement would be void in any event. See Idaho Code Section 59-1016 & 59-1017.

In this case, IDOC does not have a legislative appropriation for the purpose of paying the substantial judgment for attorney fees in this matter—obtaining a supplemental appropriation would take longer than the time provided by the Court's *Memorandum Decision and Order*. *Cox*

*Decl.*, ¶ 12. Neither does State Risk have any authority to use its appropriation for the purpose of paying the attorney fees because such liability did not arise from the wrongful actions of any state employee. *Id.*, ¶ 13. While the State Board of Examiners conceivably have an applicable appropriation, the process by which the State Board of Examiners approves such claims could not be completed with the fourteen (14) days provided by the *Memorandum Decision and Order*. *Id.*, ¶ 15. Once again, the state of Idaho makes no suggestion that it would not pay judgments for which it is liable, but the processes for doing so would take longer than two weeks in this instance. The state's position in this regard is complicated further by the realizations regarding Corizon's reorganization, discussed above. There is good cause in this case to allow the IDOC Defendants additional time to comply with the Court's *Memorandum Decision and Order*.

Finally, the IDOC Defendants take no position with regard to whether any such extension of time should also apply to Corizon, and note that the *Memorandum Decision and Order* applied with equal force to Corizon. Ultimately, the IDOC Defendants have put forth significant and good faith efforts to determine whether it could satisfy any of the options provided in the *Memorandum Decision and Order*, and also determine the most effective legal strategy in light of Corizon's efforts to reorganize and create a liability shield. There is, therefore, good cause to *at least* provide the IDOC Defendants additional time under the *Memorandum Decision and Order* and, further, to grant the IDOC Defendants a stay on appeal without bond, because Plaintiff's judgment and ability to collect are secure, even if Corizon fails to uphold its end of the indemnity agreement.

Dated this 3<sup>rd</sup> day of February, 2023.

MOORE ELIA & KRAFT,LLP

*/s/ Steven R. Kraft*

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Steven R. Kraft

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3rd day of February, 2023, 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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