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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE 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.

CIVIL ACTION FILE

NO. 1:17-cv-151-BLW

DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S MOTION FOR INDICATIVE RULING UNDER FEDERAL RULE OF CIVIL PROCEDURE 62.1 & 60(a) AND REQUEST FOR EXPEDITED CONSIDERATION UNDER LOCAL RULE 6.1

COME NOW, Defendants the Idaho Department of Correction ("IDOC"), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert (collectively, "IDOC Defendants"), by and through their counsel of record, Moore Elia Kraft & Hall, LLP (collectively referred to as "Defendants"), Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery (collectively, "Corizon Defendants"), by and through their counsel of record, Parsons Behle & Latimer, and hereby submit this response to Plaintiff's Motion for Indicative Ruling Under Federal Rule of Civil Procedure 62.1 & 60(a). (Dkt. 185).

I. INTRODUCTION

Plaintiff has identified a significant deficiency in her Motion for Preliminary Injunction and the Court's related December 13, 2018 Order (Dkt. 149) granting the motion: the Order does not comply with the Prison Litigation Reform Act ("PLRA"). Indeed, the Court's Order did not find, as required under the PLRA, that it is narrowly drawn, extends no further than necessary to correct the violation of the federal right, is the least intrusive means necessary to correct the violation of the Federal right, and that there is no evidence that granting this relief will have any adverse impact on public safety or the operation of the criminal justice system. *See* 18 U.S.C.A. § 3626(a)(1)(A). Plaintiff requests a Motion for Indicative Ruling, asking this Court to rule that it would grant a motion under Rule 60(a) to modify its December 13, 2018 Order to expressly include these necessary findings. Plaintiff would not seek such a drastic remedy unless there was a significant and substantive issue on appeal that Plaintiff attempts to correct by this Court.

Plaintiff's Motion for Indicative Ruling should be denied for three reasons. First, because this Court did not make the particularized PLRA findings and did not make the Order final within 90 days as required by the PLRA, this Court's December 13 Order has expired, rendering

Plaintiff's motion related to the Order moot and this Court without jurisdiction to modify it. Second, Plaintiff's Motion for Indicative Ruling should be denied because a motion to modify, which is a prerequisite under the applicable Rule 62.1, has not yet been filed. As a result, Plaintiff's motion is procedurally improper and affords no opportunity to either the Defendants or the Court to evaluate or respond to the merits of the non-existent motion. Finally, even if the Court determines that Plaintiff has followed the proper procedures for filing a Motion for Indicative Ruling, the Motion should be denied because Plaintiff is not entitled to relief under Rule 60(a). Specifically, Plaintiff seeks to correct a substantive error of law, which is impermissible under Rule 60(a).

II. FACTS

On December 13, 2018, this Court issued an Order granting Plaintiff's Motion for Preliminary Injunction and ordered Defendants "to provide Plaintiff with adequate medical care, including gender confirmation surgery" and to provide the surgery as promptly as possible and no later than six months from the date of the order. (Dkt. 149, p. 45) (hereinafter "December 13 Order"). On January 9, 2019, IDOC and Corizon Defendants timely filed Preliminary Injunction Appeals with the Ninth Circuit Court of Appeals appealing the December 13 Order. (Dkt. Nos. 154 and 155.) On March 6, 2019, IDOC and Corizon Defendants timely filed their Joint Opening Appeal Brief with the Ninth Circuit Court of Appeals. Among the arguments in their joint opening brief, Defendants contend that the Order must be reversed because it does not include any findings pursuant to the Prison Litigation Reform Act "that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least

intrusive means necessary to correct the violation of the Federal right." No. 19-35017, Dkt. No. 11-1 at 60-61. See also, 18 U.S.C.A. § 3626(a)(1)(A).

The Court has not modified its December 13 Order since it was first issued. Moreover, it did not make the need-narrowness-intrusiveness findings under the PLRA and did not render its Order final by March 13, 2019 (90 days after the December 13 Order was original entered).

III. ARGUMENT AND ANALYSIS

a. Plaintiff's Motion for Indicative Ruling is Moot because the December 13, 2018 Order it Pertains to has Expired.

Plaintiff's Motion for Indicative Ruling should be denied as moot because the December 13 Order of this Court has expired, is no longer in effect, and is no longer binding on Defendants. The PLRA provides that "[p]reliminary injunctive relief **shall automatically expire** on the date that is 90 days after its entry" unless the district court affirmatively takes two actions. 18 U.S.C. § 3626(a)(2) (emphasis added). The first action the district court must take to keep a preliminary injunction alive past the 90-day deadline is "make[ ] the findings required under subsection (a)(1) for the entry of prospective relief." *Id.* Under subsection (a)(1), the district court "shall not grant or approve any prospective relief unless the court *finds* that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* § 3626(a)(1)(A) (emphasis added) (hereinafter referred to as "need-narrowness-intrusiveness requirements of the PLRA.") The second action required by the district court is to "make[ ] the order final before the expiration of the 90-day period." *Id.*

In this case, this Court did not make the required need-narrowness-intrusiveness findings required by the PLRA and did not finalize its order within 90-days after the order was initially

entered. The PLRA 90-day clock on the Court's December 13, 2018 Order started to run the next day. *See* 18 U.S.C. § 3626(a)(2); Fed. R. Civ. P. 6(a)(1). Neither the December 13 Order nor any subsequent orders of the court include any specific findings that any of the preliminary injunction's requirements satisfied the need-narrowness-intrusiveness criteria in Section 3626(a)(1) and also are absent of any explanation as to how such findings were met. The Court also did not indicate in its December 13 Order or in any subsequent order that the December 13 Order was final. As a result, the Court's December 13 Order issuing a preliminary injunction expired by operation of law on March 13, 2019.[1] Accordingly, Plaintiff's Motion for Indicative Ruling is moot because the Order it pertains to has expired.

Contemporaneously with the filing of this response brief, Defendants are also filing a Motion to Vacate the Court's December 13 Order with the Ninth Circuit Court of Appeals arguing that this Order automatically expired on March 13, 2019 because it did not comply with the above-discussed PRLA requirements within 90 days after the order was originally executed. *See U.S. v. Secretary, Florida Department of Corrections*, 778 F.3d 1223 (2015).

b. Plaintiff's Motion for Indicative Ruling is Improper because Plaintiff did not first file a Motion to Modify the Court's Order.

Plaintiff's Motion for Indicative Ruling is also procedurally defective and, therefore, must be denied. Federal Rule of Civil Procedure 62.1(a) provides:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
> (1) Defer considering the motion;
> (2) Deny the motion; or
> (3) State either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

[1] March 13, 2019 fell after Defendants were required, and did, file their Joint Opening Appeal Brief on March 6, 2019.

Under the plain language of this rule, the filing of a motion for relief, e.g., a motion to modify, is a prerequisite to seeking an indicative ruling, i.e. an indicative ruling may be sought "[i]f a timely motion is made for relief." In this instance, Plaintiff's Motion for Indicative Ruling should be denied because Plaintiff never filed a motion to modify. Plaintiff's brief makes clear that Plaintiff seeks a premature a ruling *if* Plaintiff files a motion to modify at some unknown point in the future. For example:

- Plaintiff "hereby moves this Court for an indicative ruling under Federal Rule of Civil Procedure 62.1 that it would grant **a** motion under Federal Rule of Civil Procedure 60(a) to modify its December 2018 Order" to add the need-narrowness-intrusiveness requirements of the PLRA. (Plaintiff's Memo in Support of Motion for Indicative Ruling, Dkt. 185, p. 2) (emphasis added).
- "[I]n an abundance of caution, Plaintiff seeks an indicative ruling from this Court under Federal Rule of Civil Procedure 62.1 that the Court would grant **a** motion to modify its Order pursuant to Federal Rule of Civil Procedure 60(a)" to make the express findings required under the PLRA. (Plaintiff's Memo in Support of Motion for Indicative Ruling, Dkt. 185-1, p. 2) (emphasis added).
- "An indicative ruling from this Court under Rule 62.1 that it would grant **a** Rule 60(a) motion to modify its Order to expressly include the PLRA findings …" (Plaintiff's Memo in Support of Motion for Indicative Ruling, Dkt. 185-1, p. 2-3).

In her brief, Plaintiff does not reference a motion to modify she has actually filed. Indeed, Plaintiff's Motion for Indicative Ruling only references "a" Rule 60(a) motion, not "the" Rule 60(a) motion, indicating a motion to modify has not been filed and, at most, is contemplated as

being filed in the future. Further, the caption to Plaintiff's Motion for Indicative Ruling does not state that it is also a Motion to Modify and such is not clear in the body of the motion and supporting memorandum. Hence, there is no motion to modify for the defendants to brief and the court to consider.

Although Plaintiff has indicated generalized findings that she wants the Court to add to the Order under the PLRA if a motion to modify is later filed, Plaintiff has not indicated exactly how she wants the Order modified and has not provided any proposed modifications (such as by redline or highlighting) to show the exact language she wants added or changed in the Court's December 13 Order. Such would be expected with a motion to modify. It should be obvious that any proposed modifications and language to the December 13 Order are critical since such changes could impact the appeal of the Order and potentially the effectiveness of the Order moving forward. Defendants and this Court should be able to consider the exact proposed modifications and language and respond accordingly, which has not been done. Since Plaintiff has not yet filed a motion to modify, which is a prerequisite to obtaining an indicative ruling, the court should deny Plaintiff's Motion for Indicative Ruling.[2]

c. Plaintiff is Not Entitled to Relief Under Rule 60(a).

Even if the Court determines that Plaintiff has followed the proper procedures in filing the Motion for Indicative Ruling, and that this Court has jurisdiction to grant Plaintiff's motion, said motion should be denied because Plaintiff is not entitled to relief under Rule 60(a).

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[2] Plaintiff's Rule 62.1 motion should also be denied because it asks the court to render an unconstitutional advisory opinion, that, among other things, has no legal impact on the parties, could be changed by the district court at later date, and could inappropriately influence the disposition of appellate opinions. Jesse D.H. Snyder, *Does Federal Rule of Civil Procedure 62.1 Entice District Courts to Render Unconstitutional Advisory Opinions?*, 42 U. Dayton L. Rev. 1, 2 (2017).

First, if Plaintiff seeks an amendment to the December 13 Order based on Rule 60(a), there is no reason to request an indicative ruling under Rule 62.1. Rule 60(a) explicitly states, if there has been an appeal of an order, the court may correct a clerical mistake or a mistake arising from oversight or omission with respect to that order "only with the appellate court's leave." This language is notably absent from Rule 60(b), which is the focus of the discussion in the Advisory Committee Notes to Rule 62.1. Here, the December 13 Order at issue is pending on appeal with the Ninth Circuit. Plaintiff's motion has not identified any order or authority from the Ninth Circuit granting this Court leave to make corrections under Rule 60(a) to its December 13 Order. Moreover, Defendants are not aware of any such leave granted by the Ninth Circuit to date. Therefore, Plaintiff's motion should be denied because the Ninth Circuit has not granted leave to this Court to make any corrections to its Order under Rule 60(a) as required by the rule.

Second, Plaintiff's Motion for Indicative Ruling should be denied because Plaintiff apparently would seek substantial changes in a future motion to modify, which is not allowed under Rule 60(a). Under this rule,"[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). "In deciding whether the district court may alter a judgment pursuant to Rule 60(a), [the] focus is on what the court originally intended to do. Rule 60(a) is limited, however, to correcting errors arising from omission and may not be used to correct more substantial errors, such as errors of law." *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990), *as amended on denial of rehg* (Feb. 27, 1991), *as amended on denial of reh'g* (May 24, 1991) (emphasis added) (quotation marks and citation omitted).

If Plaintiff were to file a motion to modify, she would apparently request that the Court revise its Order to include an explicit finding that the injunction meets the need-narrowness-intrusiveness requirements of the PLRA. Plaintiff would request this modification in the apparent hope of mooting Defendants' argument on appeal that the Court committed legal error by failing to make this explicit finding in its order. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010). Plaintiff claims the Order complies with the requirements of the PLRA, but then would apparently request relief under Rule 60(a) "in an abundance of caution."

Plaintiff's request is self-defeating because her proposed revision to the December 13 Order either serves no purpose at all or serves an impermissible purpose. If Plaintiff is correct that an explicit finding is not required under the PLRA, then the proposed revision serves no purpose and the motion should be denied as unnecessary. On the other hand, if Defendants are correct that failing to make an explicit finding constitutes legal error, then Rule 60(a) cannot be used to correct that error. *See Sanchez*, 936 F.2d at 1033 (holding Rule 60(a) cannot be used to correct "errors of law.").

Additionally, Plaintiff apparently would seek substantial changes to the December 13 Order in a potential motion to modify, which are not permitted under Rule 60(a). *Sanchez*, 936 F.2d at 1033 (holding that Rule 60(a) "may not be used to correct more substantial errors"). The need-narrowness-intrusiveness requirements of the PLRA are not only required, but also the PLRA requires the Court "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. Section 3626(a)(1)(A). The December 13 Order is wholly absent of any indication that the court weighed (let alone gave substantial weight to) any adverse impact on public safety or the criminal justice system; there is

no citation to any such facts that were weighed and there is no specific finding of such. (See Dkt. 149, generally.) Such a modification to the Court's December 13 Order is clearly a substantive change not allowed under Rule 60(a) because it requires the citation, evaluation, and weighing of specific evidence that goes well beyond the correction of any clerical error, omission, and oversight.

In sum, the Court should not grant Plaintiff's Motion for Indicative Ruling because the modifications Plaintiff intends to seek to the December 13 Order are precluded under Rule 60(a).

IV. CONCLUSION

In conclusion, Defendants request that Plaintiff's Motion for Indicative Ruling (Dkt. 185) be denied in its entirety based on the record before this court and the court of appeals and the facts, authority and arguments contained herein.

DATED this 3rd day of April, 2019.

PARSONS BEHLE & LATIMER

By: */s/ Dylan A. Eaton*
Dylan A. Eaton
Counsel for Defendants Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery

DATED this 3rd day of April, 2019.

MOORE ELIA KRAFT & HALL, LLP

By: */s/ Brady J. Hall*
Brady J. Hall
Counsel for Defendants Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of April, 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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