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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' MARCH 2, 2020 JOINT MOTION TO STAY

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

INTRODUCTION

In February 2020, the Ninth Circuit rejected Defendants' petition for a rehearing *en banc* and issued the mandate effectuating the injunctive relief—gender confirmation surgery—that this Court ordered in December 2018 and the panel affirmed *per curiam* in August 2019. ECF 263. Defendants now move to stay all proceedings on Plaintiff's remaining claims pending their anticipated petition for certiorari to the U.S. Supreme Court and any subsequent Supreme Court proceedings. Such a stay could last at least through summer 2021, should the Supreme Court accept review.

This Court has full jurisdiction over this case, and, even if the Supreme Court grants certiorari, will continue to have jurisdiction over Plaintiff's claims that were not the basis for Plaintiff's motion for injunctive relief.[1] This Court thus has discretion over whether to stay the proceedings on Plaintiff's separate claims. *See 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 generally does not oppose the Court exercising its discretion to grant a stay,[2] any such stay should include limited exemptions to preserve critical evidence that, if compromised, would prejudice Plaintiff's case. Specifically, Plaintiff requests that a stay order: 1) permit Plaintiff to depose three individual Defendants and one key witness who have moved to other correctional systems or retired; 2) require Defendants to provide Plaintiff ongoing access to her custody and medical records; and 3) ensure preservation of relevant documentary and electronic evidence regardless of Defendants' default retention practices.

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[1]Defendants are wrong that the Supreme Court granting certiorari would divest this Court of jurisdiction over Plaintiff's remaining claims not subject to appellate review. ECF 272-1 at 5, n.3. As Plaintiff explained in response to Defendants' prior stay motion, interlocutory appeal of injunctive relief does not divest jurisdiction over the entirety of the case. *See* ECF 223 at 8-9.

[2]Plaintiff would agree to a stay related only to claims not yet adjudicated, with the exemptions set forth herein. Plaintiff does not agree to a stay of any kind regarding this Court's enforcement of its December 2018 Order requiring Defendants to provide Ms. Edmo with all necessary medical care to effectuate gender confirmation surgery. The Ninth Circuit denied Defendants' motion to stay the injunction pending petition for certiorari on February 19, 2020.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

After Plaintiff moved for expedited injunctive relief as to three of her claims, this Court permitted the parties to engage in four months of discovery in 2018 specifically targeted to Plaintiff's claims for that relief. ECF Nos. 70 & 71. Following this Court's December 2018 injunctive relief order, the Court set a schedule for discovery and litigation of Plaintiff's remaining claims,[3] including an August 15, 2019 cut-off for fact discovery. ECF 171. Pursuant to that schedule, Plaintiff noticed nine depositions, including individual Defendants and percipient witnesses, for dates in June through August 2019 and was meeting and conferring with Defendants about dates in that timeframe for additional depositions. ECF 223-1 at ¶ 2. However, Defendants refused to produce all but one deponent 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. *Id.*; ECF Nos. 207 & 208.

After the Ninth Circuit affirmed this Court's injunction and this Court lifted the stay in August 2019, ECF 210, Defendants requested a complete stay of litigation of remaining claims while they petitioned for a rehearing *en banc* of their interlocutory appeal. ECF 214. During meet and confer efforts, the parties identified three individual Defendants—Craig, Whinnery, and Young—and one key witness (and former official capacity Defendant)—Zmuda—who had moved to different states' correctional systems or retired from IDOC or Corizon. ECF 223-1 at ¶ 6. Plaintiff offered to stipulate to a stay that would allow these depositions to proceed in order to preserve critical evidence, as well as require Defendants to preserve electronic and other

[3] Plaintiff's remaining claims, on which she did not move for expedited injunctive relief, are: discrimination based on diagnosis in violation of Fourteenth Amendment against all Defendants except IDOC; discrimination based on disability in violation of Americans with Disabilities Act/Rehabilitation Act against IDOC and Corizon; and state law negligence against IDOC official capacity Defendants, Defendant Yordy in his individual capacity, and Corizon (claims 3, 4, and 6 in the Third Amended Complaint, ECF 172). These are claims for both damages and injunctive relief not limited to gender confirmation surgery.

documentary evidence throughout the period of any stay[4] and to continue to produce Plaintiff's medical and custody records. ECF 223 at 6-8. Defendants refused to stipulate to these depositions, opting instead to move for a complete stay. *Id.* at 7-8. Plaintiff's responsive filing indicated that, although she did not oppose a stay generally, any stay must include these limited exemptions to avoid undue prejudice to her ability to litigate her case. *See id.* This motion remained pending until this Court denied it on February 11, 2020, following the Ninth Circuit's denial of Defendants' petition for rehearing *en banc*. ECF 264.

Now, pending their pursuit of interlocutory Supreme Court review, Defendants again move to stay the remaining claims and have rejected Plaintiff's proposal to exempt time-sensitive depositions that Defendants have already delayed for almost a year.

ARGUMENT

I. Balancing the Parties' Interests Requires that a Stay Include Targeted Discovery and a Retention Order to Prevent Prejudice to Plaintiff

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 F.R.D. 60, 63 (D.N.J. 1992); *In re Am. Apparel, Inc. S'holder Derivative Litig.*, No. CV 10-06576 MMM

[4] The operative discovery plan references Defendants' routine document retention practices for electronically stored information, which do not maintain emails longer than two years. ECF 159 at 1-2. While Defendants are obligated to preserve all relevant evidence, given the discovery plan reference to these retention policies, Plaintiff seeks an order to ensure preservation of evidence during the extended nature of this litigation.

RCX, 2012 WL 9506072, at *43 (C.D. Cal. July 31, 2012).

This standard applies to claims for damages as well as injunctive relief, despite Defendants' misconstruing of *Lockyer*, ECF 272-1 at 6. While delay in a plaintiff's monetary recovery alone is not sufficient to establish harm from a stay, prejudice to a party's ability to prove their case must be considered. *Lockyer*, 398 F.3d at 1110. Moreover, as Plaintiff pointed out in her prior response to Defendants' motion for a stay, ECF 223 at 12, n.5, Defendants' err in asserting 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 272-1 a 6; ECF 214-1 at 8. This Court made no such finding of fact or law, nor did Plaintiff waive her ability to seek non-surgery injunctive relief if it remains necessary concerning, for example, access to appropriate clothing and commissary items, or Defendants' discipline and punishment of her for expressing her gender identity. *See* ECF 149 at 45.

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 *Lockye*r, 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 subject to Defendants' planned petition for Supreme Court review and the remaining claims in the District Court such that completion of the appeal process would likely 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 who have retired or otherwise left the IDOC system, 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 a stay with targeted exemptions 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).

Facts relevant to Plaintiff's claims date back to 2012, when she entered IDOC and was diagnosed with gender dysphoria. 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 about topics related to her remaining claims (including Fed. R. Civ. P. 30(b)(6) witnesses). There are four depositions for which additional delay would

substantially risk prejudicing Plaintiff's ability to litigate her case.[5] Three of these depositions are of individual Defendants: Defendants Craig, Whinnery, and Young. Plaintiff has alleged that each of these three individuals were personally involved in violating her rights, and so their testimony is particularly important to her claims. *See* ECF 172 at ¶¶ 19-22. These 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. ECF 223-1 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 id.*; ECF 172 at ¶ 16.

Postponing these depositions for more than another year pending Supreme Court review will substantially decrease these deponents' abilities to recall key events and testify accurately in the case. 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)); *Alexander*, 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

[5] By identifying these four depositions to proceed as a limited exemption to a stay, Plaintiff does not waive her right to additional depositions pursuant to the operative Discovery Plan, ECF 159 at 5, or to petition the Court for additional depositions should she learn of other parties or key witnesses who may become unavailable or whose testimony may otherwise need to be preserved.

will fade more quickly as their time out of those positions increases. *See id.*

Defendants do not cite any case law to support their argument that Plaintiff should be denied limited depositions to preserve evidence. Rather, they cite two cases finding that generic concerns about "potential loss of memory or evidence" are not sufficient to defeat a stay. *See* ECF 272-1 at 8; *Arris Enterprises LLC v. Sony Corp.*, No. 17-CV_02669-BLFG, 2017 WL 3283937, at *2 (N.D. Cal. Aug. 1, 2017); *Herbalife Int'l of Am. Inc. v. Ford*, No. CV 07-2529 GAF (FMOx), 2008 WL 11491587, at *3 (C.D. Cal. Mar. 12, 2008). Here, Plaintiff does not oppose a stay generally, and has articulated specific bases for exemption of specific depositions from such stay.[6]

Defendants also object to exempting these depositions from the stay because Plaintiff's arguments regarding their necessity differ from the examples provided by this Court during the most recent status conference: "age" or "intention to leave the country." ECF 272-1 at 2-3 & 7; ECF 272-3 at 13:22-14:7. The Court's examples, however, were just that—examples—not an exhaustive list, as Defendants suggest. Indeed, Defendants fail to quote the Court's full statement regarding this topic, including that it would consider allowing limited depositions in circumstances where "depositions need to be taken just to preserve the record," and that the Court did not know exactly "who that might be or what the circumstances would be," but anticipated that it would not be a very long list. ECF 272-3 at 13:22-14:7. As set forth above and in Plaintiff's response to Defendants' prior motion for a stay, where there is a specific and well-grounded concern with a witness's memory fading that "justif[ies] more immediate discovery, the Court can avoid prejudice to Plaintiff by permitting discovery from these witnesses on a case-by-case basis." *Alexander*, 2010 WL 5388000, at *4. Plaintiff has demonstrated why these four depositions should be exempted from a stay.

Finally, Defendants did not, and cannot, meet their burden to demonstrate "a clear case of

[6] Moreover, one of the cases cited by Defendants, *Herbalife*, specifically noted that the concerns about evidence preservation in that case were addressed by a court order that defendants, "in addition to their normal discovery obligations…preserve all hard copy and electronic information…including without limitation all electronic information on defendants' computers and databases." 2008 WL 11491587, at *2, n.4 (internal quotations omitted). Plaintiff requests a similar retention order here.

hardship or inequity" if they are required to go forward with this limited number of depositions. *See Clinton*, 520 U.S. at 708; *Landis*, 299 U.S. at 255; *Lockyer*, 398 F.3d at 1112; *Broadcom Corp.*, 2017 WL 7833636, at *3. Defendants vaguely complain that permitting these limited depositions will "create confusion, potential multiple depositions of the same witness, and be unfair because it would allow one party to conduct discovery while the other cannot." ECF 272-1 at 8. If Defendants also wish to take discovery, they have a simple solution: they can withdraw their motion for a stay or file a more limited motion. As for their argument about repeat depositions, Defendants fail to explain how allowing these four depositions will necessitate repeated depositions of those witnesses later. Nor does Defendants' complaint that allowing these four depositions will "unnecessarily increase litigation costs," *id.*, establish a cognizable hardship or inequity. *See Lockyer*, 398 F.3d at 1112 (holding that being required to defend a suit does not constitute hardship or inequity).

Because Plaintiff's case will be prejudiced without these limited depositions, and because Defendants have failed to establish actual cognizable hardship or inequity from these depositions move forward, this Court should allow them as part of its stay order.

II. Plaintiff Did Not Waive Her Right to the Depositions at Issue

Defendants newly claim, without authority, that Plaintiff "waived" her ability to depose these individuals by not deposing them during the targeted discovery period related to Plaintiff's motion for expedited injunctive relief. ECF 272-1 at 8. That discovery, however, was limited to the claims underlying Plaintiff's motion for preliminary injunction. The Court made no ruling that Plaintiff would somehow waive discovery pertinent to her *other* claims if she failed to conduct it during that period, nor have Defendants cited any case law supporting such a far-fetched result.

Plaintiff has a right to discovery related to her remaining claims and Defendants have no legitimate basis for contesting her need to preserve evidence related to these claims. 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 regarding the 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 172 at ¶¶ 81-82, 91, 102-103. Plaintiff's negligence claim is also not mooted or overcome even were the Supreme Court to reverse this Court's finding of Defendants' Eighth Amendment liability. Thus, regardless of the outcome of any further appellate review of this Court's December 23, 2018 Order, Plaintiff is entitled to conduct discovery on her remaining claims against IDOC, Corizon, and individual Defendants, for both damages and non-surgery injunctive relief.

In sum, Plaintiff will be prejudiced in her ability to prove these remaining claims if limited discovery is not carved out of a stay order. Defendants have not demonstrated hardship or inequity from a narrow exemption of four depositions, ongoing production of her medical and custody records, and an evidence preservation order, especially given that Ms. Edmo has claims against these individual deponents (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; *Kuang v. United States Dep't of Justice*, Case No. 18-cv-03698-JST, 2019 WL 1597495, at * 5 (N.D. Cal. Apr. 15, 2019)(ordinary burdens of discovery do not establish clear case of hardship or inequity).

CONCLUSION

While Plaintiff does not oppose a stay in its entirety, any such stay must balance the parties' interests and moderate the substantial risk of prejudice to Plaintiff that would otherwise result. For the reasons stated above, Plaintiff requests that this Court enter a stay order that makes the following provisions: 1) Plaintiff may depose Defendants Craig, Whinnery, and Young, as well as former official capacity Defendant Zmuda, with these depositions to be completed in the 2020 calendar year; 2) Defendants must produce Plaintiff's updated custody and medical records on an ongoing and at least bi-monthly basis; and 3) Defendants must preserve all potentially relevant

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documentary evidence, including electronic evidence, regardless of any internal retention policies.

Dated: March 11, 2020

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

I HEREBY CERTIFY that on the 11th day of March, 2020, 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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