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

ADREE EDMO,

Plaintiff,

vs.

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-151-BLW

)

) **IDOC DEFENDANTS’ OBJECTION AND**
) **REQUEST THAT THE COURT REFRAIN**
) **FROM HEARING PLAINTIFFS’ EX**
) **PARTE APPLICATION FOR**
) **EMERGENCY RELIEF (DKT. 285)**

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COME NOW, Defendants Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert (“IDOC Defendants”), by and through their counsel of record, Moore Elia Kraft & Hall, LLP, hereby request that this Court refrain from ruling on *Plaintiff’s Ex Parte Application for Emergency Relief to Enforce Court Order to Provide Surgery* (Dkt. 285) (hereinafter “*Ex Parte Application*”). Ms. Edmo’s *Ex Parte Application* is procedurally improper as it is neither necessary nor supported by legal authority. Moreover, the Defendants and public’s shared interest in the safe and orderly operation of the prison system, which must be considered fully, warrant against granting Ms. Edmo the relief she requests.

LEGAL STANDARDS

This Court recently recognized that ex parte applications are the “forensic equivalent of standing in a crowded theater and shouting, ‘Fire!’ There had better be a fire.” *ETA Compute, Inc. v. Semones*, 2019 WL 267702 * 2 (Winmill, J., Dist. Idaho 2019) (quoting *Engineering Co. v. Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D.Cal. 1995)). Ex parte applications “contravene the structure and spirit of the Federal Rules of Civil Procedure and the Local Rules of this court,” both of which contemplate that “*noticed* motions should be the rule and not the exception.” *United States v. Martin*, 2013 WL 6018068 * 2-3 (Winmill, J., Dist. Idaho 2013) (quoting *In re Intermagnetics Am., Inc.* 101 B.R. 191, 193-94 (C.D.Cal.1989) and noting it was cited with approval by *United States v. Real Property Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 870 (9th Cir. 2001)) (emphasis in the original). “Ex parte applications, in contrast, ‘throw the system out of whack,’ ‘impose unnecessary adversarial burden on opposing counsel,’ and ‘demand priority consideration, where such consideration is seldom deserved.’” *Id.* (Citations omitted).

Accordingly, “[e]x parte applications are legitimate only when there is some genuine urgency, such as an ex parte temporary restraining order, or when there is danger that opposing party will flee, destroy evidence, or hide assets if notified.” *Martin*, *3. Rule 7.2 of the District Local Rules, titled “Ex

Parte Orders,” mandates that “[a]ll applications must be accompanied by a memorandum and/or affidavit outlining the necessity and authority for issuance of the order ex parte.” (Emphasis added). “An ex parte application must first address why the regular noticed motion procedures must be bypassed.” *Martin*, *3 (citing *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F.Supp. 488, 489 (C.D.Cal.1995)).

ANALYSIS

This Court should refrain from hearing (or in the alternative deny) Ms. Edmo’s *Ex Parte Application* because Ms. Edmo has failed to show why such an extraordinary procedural request is necessary or supported by the requisite legal authority. The actual date of Ms. Edmo’s surgery was filed under seal in *Defendants’ Joint Status Report* on March 2, 2020 (Dkt. 271, p. 3) and again on April 6, 2020 (Dkt. 276, p. 3). As of today, more than sufficient time exists for this Court to hear Ms. Edmo’s request as a motion on an expedited schedule and in a manner that affords the Defendants an opportunity to be heard and for the public’s significant interest in health and safety to be considered. Moreover, Ms. Edmo has failed to demonstrate any authority for the relief she requests. For example, Ms. Edmo has made no attempt to meet a moving party’s burden for receiving an ex parte temporary restraining order. See, e.g., FRCP 65(a) and *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

Ms. Edmo incorrectly suggests that “[i]mmediate action is necessary to preserve Ms. Edmo’s access to the surgery ordered by this Court.” (Dkt. 285, p. 3) However, Ms. Edmo has not demonstrated that she will be precluded from receiving the surgery if her *Ex Parte Application* is not granted or that granting her request is the only means necessary to implement this Court’s Order. This Court ordered that “Defendants shall take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order.” (Dkt. 149, p.

45) Defendants have taken reasonable measures to date and, when the Ninth Circuit lifted the stay in

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February, Defendants promptly scheduled the surgery for early July. On April 17, 2020, this Court recognized that subsequent delays posed by COVID-19 were “unavoidable” and necessary. (Dkt. 277, p. 6, n. 1) Defendants remain committed to taking reasonable steps necessary to carry out this Court’s Order.

However, the actions Ms. Edmo invites this Court to order are not reasonable, but dangerous and impermissibly interfere with Defendants’ ability to safely operate a prison system amid an unprecedented pandemic. This Court “must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.” *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (Citing multiple cases). Perhaps more alarming, Ms. Edmo requests this Court to enter the relief without first hearing from Defendants or considering the public’s interest against transporting Ms. Edmo to another facility that does not yet have any confirmed cases of COVID-19. This Court should refrain from entertaining such an irresponsible invitation. In granting prospective relief, this Court must afford substantial weight to the adverse impact the relief has on public safety and the prison system, and further must use the least intrusive means available. 18 USC §3626(a)(1)(A).

If given the opportunity, Defendants will illustrate that, up until last week, Ms. Edmo’s surgery was scheduled to occur as planned. Defendants had organized and transported Ms. Edmo to her fourth hair removal appointment in May and Ms. Edmo’s remaining pre and post-surgical appointments had been scheduled. However, as of Friday, June 26, 2020, multiple inmates at the Idaho State Correctional Center (ISCC) – where Ms. Edmo is housed – had tested positive for COVID-19. Multiple staff members also tested positive and over 30 staff members were ordered to quarantine at home. Pursuant to a protocol that had been months in the making, IDOC placed ISCC on “secured status,” which is tantamount to a facility-wide lockdown. All inmates are confined to their cells and dormitories. IDOC’s

protocol also mandates that no inmates will be transferred in or out of ISCC except for medical emergencies. All off-site, non-emergency medical appointments, procedures, and surgeries have been postponed indefinitely.

In placing the facility on secured status and postponing transport for all non-emergency medical care, IDOC's foremost goal is to trace, contain, and prevent the spread of COVID-19 among the prison population, staff, and the public at large. To transport Ms. Edmo to an off-site hair removal clinic and then to the Idaho Correctional Institution – Orofino (ICIO) in northern Idaho in advance of the surgery in early July is contrary to IDOC's protocol and the public's interest, and would be irresponsible. Further, all weekly transports among IDOC facilities have been cancelled indefinitely. To arrange a special transport for Ms. Edmo will divert critical staff from the broader mission at hand at a time when IDOC is experiencing significant staffing reductions. As of today, 22 staff have tested positive and over 100 staff are in quarantine at home and unable to report to work at the affected facilities. Finally, to force IDOC to transport Ms. Edmo to ICIO is to provide her with special treatment over the many inmates who are currently unable to obtain non-emergency medical treatment off-site as IDOC attempts to curb the spread of the deadly virus within IDOC facilities.

Today, as yet another inmate at ISCC tested positive, IDOC began mass testing at ISCC with an emphasis on testing the areas where inmates have tested positive and where vulnerable inmate populations are housed. The most recent case involves an inmate housed in the same unit as Ms. Edmo. Mass testing is a complicated and time intensive process. IDOC tested all 258 inmates living in a single unit and expects to have the results back by Wednesday. IDOC is hopeful to have all inmates at ISCC tested by the end of this week, including Ms. Edmo. However, IDOC anticipates that a number of asymptomatic positives will be discovered. To provide special treatment and test Ms. Edmo before all other inmates as planned is unwarranted and will cause interruptions in IDOC's ability to safely and uniformly carry out mass testing. Even if Ms. Edmo tests negative, the risk that Ms. Edmo or a member

of a special transport team introduces the virus into ICIO remains.

As communicated to Ms. Edmo's counsel, IDOC will continue to "monitor the situation and undertake reasonable efforts to transport Ms. Edmo to ICIO next week in advance of the surgery." However, in light of the above, IDOC is unable to commit at this time to test Ms. Edmo immediately and then transport Ms. Edmo to ICIO.

CONCLUSION

For the foregoing reasons, Defendants request that this Court refrain from ruling on Ms. Edmo's procedurally improper *Ex Parte Application*. In the alternative, this Court should deny Ms. Edmo's application. Ms. Edmo has failed to show that ex parte relief is necessary or supported by authority. Moreover, transporting Ms. Edmo is contrary to the health and safety of other inmates and staff as well as the orderly operation of the prison system in a time of crisis. To the extent this Court entertains Ms. Edmo's request, it should convert the application into a motion and set an expedited briefing schedule that permits the Defendants an opportunity to be heard and the public's interest to be considered.

DATED this 29th day of June, 2020.

/s/ Brady J. Hall
Brady J. Hall
Counsel for IDOC Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2018, 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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