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

Unknown Parties, et al.,
Plaintiffs,
v.
Jeh Johnson, et al.,
Defendants.

No. CV-15-00250-TUC-DCB
ORDER

On November 18, 2016, this Court entered a preliminary injunction in favor of Plaintiffs. Defendants sought reconsideration, which was denied by the Court on January 3, 2017. On March 2, 2017, both parties filed interlocutory cross-appeals.

On April 13, 2017, the Defendants filed a Motion to Stay this Court’s proceedings or at least stay the expert discovery, or in the alternative, grant Defendants a 90-day stay of production of video evidence. The latter, alternative, request pertains to the Defendants’ responsibility to preserve video evidence, which was the subject of the Court’s entry on March 13, 2017, of a civil contempt ruling against Defendants for destruction of video recordings since January 2016.

To be clear, the Defendants do not ask this Court to stay the directives regarding conditions of confinement contained in its preliminary injunction, which required Defendants to provide sleeping mats and some means to maintain personal hygiene to all detainees after 12 hours, required the universal use of Defendants’ Medical Screening Form, and required ongoing monitoring to ensure compliance with the Border Patrol

1 2008 Hold Rooms and Short Term Custody Policy (the Policy) and the National
2 Standards on Transport, Escort, Detention, and Search (TEDS standards) for personal
3 hygiene, sanitation, and nutrition. (Order (Doc. 244)).

4 Both parties agree that the standard of review is as follows:

5 “[T]he power to stay proceedings is incidental to the power inherent in
6 every court to control the disposition of the causes on its docket with
7 economy of time and effort for itself, for counsel, and for litigants.” *Landis*
8 *v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court’s discretionary exertion of
9 this power must be based on a weighing of the competing interests that will
10 be affected by the granting or refusal to grant a stay. Among these
11 competing interests are the possible damage which may result from the
12 granting of a stay, the hardship or inequity which a party may suffer in
13 being required to go forward, and the orderly course of justice measured in
14 terms of the simplifying or complicating of issues, proof, and questions of
15 law which could be expected to result from a stay. *CMAX, Inc. v. Hall*, 300
F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). A trial
court may “find it is efficient for its docket and the fairest course for the
parties to enter a stay of an action before it, pending resolution of
independent proceedings which bear upon the case.” *Leyva v. Certified*
Grocers of California, Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979). In fact,
the general principle that a district court possesses the inherent power to
control its docket “applies whether the separate proceedings are judicial,
administrative, or arbitral in character, and does not require that the issues
in such proceedings are necessarily controlling of the action before the
court.” *Id.*

16 (Motion for Stay (Doc. 291) at 3-4.)¹ The burden is on the moving party to show that
17 these competing interests favor granting the stay. *Landis*, 299 U.S. at 257.

18 The Issues on Cross Appeal:

19 The Defendants ask the Ninth Circuit Court of Appeals to vacate the preliminary
20 injunction because the Court did not properly apply *Bell v. Wolfish*, which precludes pre-
21 conviction conditions of detention that amount to punishment because the conditions of

22
23 ¹The Court notes that a stay pending appeal is extraordinary relief. Normally, the Court
24 would be guided to grant a stay when four conditions are met: (1) the movant establishes
25 a likelihood of success on the merits; (2) the movant would suffer irreparable injury if a
26 stay is not granted; (3) the movant shows that the stay would not substantially harm the
27 other party; and (4) the movant demonstrates that the stay would serve the public interest.
28 *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *NRDC v. Winter*, 502 F.3d 859, 862 (9th
Cir. 2007). The movant need not always show a strong likelihood of success on the
merits; instead, the movant “may be entitled to prevail if he can demonstrate a substantial
case on the merits and the second and fourth factors militate in his favor.” *Winter*, 502
F.3d at 863. Here, however, the Defendants do not seek a stay of the injunction but only
seek to stay the proceedings. The Court agrees with the parties that the standard of
review is more akin to an interlocutory appeal of an order resolving fewer than all claims
asserted in the action. *See* 28 U.S.C. 1292(b).

1 confinement in Tucson Sector border patrol facilities serve legitimate governmental
2 objectives. Defendants also argue that the Due Process Clause of the United States
3 Constitution does not impose a mandate for sleeping mats after 12 hours. (Reply (Doc.
4 296) at Ex. 1.)

5 On the other hand, the Plaintiffs ask the Ninth Circuit Court of Appeals to find that
6 this Court abused its discretion in fashioning injunctive relief because it did not go far
7 enough in respect to its directives for constitutionally adequate medical care, bedding,
8 and showers. (Response (Doc. 293) at Ex. 1.)

9 Preliminarily, the Court found the evidence reflected that Defendants failed to
10 actually provide the conditions of confinement that they asserted were the constitutional
11 status quo because the record did not reflect border patrol facilities to be in compliance
12 with the 2008 Policy and the TEDS standards. The Court assumed the 2008 Policy and
13 TEDS to be a constitutional minimum for border patrol station conditions of
14 confinement. The Court clarified that to be constitutional the bedding being provided to
15 all detainees had to include sleeping mats for detainees held longer than 12 hours and
16 these detainees had to be provided with some means for maintaining personal hygiene;
17 the Defendants had to implement the universal use of its intake medical questionnaire,
18 and compliance monitoring was needed to ensure Defendants maintained the asserted
19 status quo including the above directives, general maintenance, sanitation, and providing
20 for the nutritional needs of detainees.

21 If affirmed, this Court anticipates the Ninth Circuit Court of Appeals will provide
22 helpful discussion regarding the applicable constitutional standard for border patrol
23 station detentions, especially for conditions of confinement related to sleeping and
24 personal hygiene. If reversed in favor of Plaintiffs, the Defendants' likelihood of
25 prevailing will substantially decrease and further preliminary relief may be warranted. If
26 reversed in favor of the Defendants, the Plaintiffs' case will be more likely to fail.
27 Therefore, knowing the outcome of the interlocutory appeal will assist in the orderly
28 course of justice—as measured by the simplification or complication of issues, proof, and

1 questions of law which may be expected to result from the stay and a decision by the
2 Ninth Circuit Court of Appeals.

3 Stay of proceedings, stay of expert discovery, or 90-day stay of video recordings

4 The Court looks at the competing interests in respect to the possible damage which
5 may result from the granting of a stay, the hardship or inequity which a party may suffer
6 in being required to go forward or not.

7 On April 28, 2017, the Court approved the parties' stipulation to continue expert
8 discovery to be 30 days following this Court's resolution of this motion. *Sua sponte*, the
9 Court correspondingly continued the remaining case management deadlines for closing
10 all discovery, for filing dispositive motions and the pretrial order. Before this extension,
11 discovery was scheduled to end on June 30, 2017, with expert discovery to begin April
12 28, 2017. According to the Plaintiffs, discovery is nearly complete but for the expert
13 reports and depositions.

14 Plaintiffs object to staying expert discovery but admit that their experts cannot
15 prepare the required reports until the full extent of spoliation sanctions is known. In other
16 words, the Plaintiffs intend to opine regarding conditions of confinement based on
17 negative inferences and/or preclusion where there has been destruction of video recording
18 evidence. Plaintiffs ask "to continue expert deadlines until *the later of* (1) 30 days after
19 the Court rules on this motion, as set forth in the Parties' joint motion, or (2) 45 days
20 from the date of this opposition, in light of Defendants' ongoing video issues and to
21 enable the Court to resolve Plaintiffs' forthcoming request for evidentiary sanctions."
22 (Response (Doc. 293) at 10.)

23 It appears that Defendants have still not assessed the full extent of the video
24 recording evidence lost due to spoliation which began January 2016. The Defendants'
25 request for a 90-day stay of production of any additional video recordings strongly
26 suggests destruction of evidence continues to date. *See* Motion for Stay (Doc. 291) at 5)
27 (admitting to inaccuracies in its February 3, 2017, Response to Ps' Motion for Sanctions
28 (Doc. 275), Ex. 7: Station by Station Status Report of Video Archiving, which was relied

1 on by the Court in granting limited sanctions to the Plaintiffs and reporting assiduously
2 working to identify the scope of video recording and archiving issues in the Tucson
3 Sector). According to Defendants, they need 90-days for the vendor they have hired to
4 “visit Tucson Sector stations to audit the conditions of existing technical infrastructure,
5 diagnose root causes of recording and archiving issues, and recommend corrective
6 action.” *Id.* Defendants submit the Plaintiffs will not be prejudiced by this stay because
7 “they have received thousands of hours of video footage and presently have not requested
8 any additional video from Defendants.” *Id.* Plaintiffs respond that “they *do* need and
9 intend to request additional video, especially recent video,” which Plaintiffs need to
10 monitor Defendants’ compliance with the PI Order.” (Response (Doc. 293) at 6.)

11 The Court has reviewed the parties’ last stipulated extension of the case
12 management deadlines, which was made December 22, 2016, after the Court’s entry of
13 the preliminary injunction. The parties agreed, and the Court approved, for discovery of
14 electronically stored information (ESI), to be continued for Defendants to substantially
15 complete it on or before February 28, 2017, with weekly rolling ESI productions being
16 made as agreed to by the parties. Expert discovery would then begin, with all discovery
17 to end on June 30, 2017, and dispositive motions to be filed by July 31, 2017. It appears
18 to this Court that by the time the parties sought to extend the time for expert discovery all
19 other discovery was, or should have been, completed. Plaintiffs are correct that discovery
20 is nearly complete but for the expert reports and depositions. This is important because
21 the Defendants’ responsibility to produce evidence during discovery has ended. The
22 Court will grant a 30 day extension for the parties to complete discovery in this case, with
23 expert discovery to follow.

24 This does not mean that the Defendants no longer have discovery responsibilities,
25 including supplementing the video tape recordings, pursuant to Fed. R. Civ. P. 26(e),
26 which by all accounts are incomplete. The Defendants also have responsibilities under
27 the preliminary injunction to provide video recordings necessary for monitoring
28 constitutional compliance. Given the changed posture for future video recordings,

1 however, the parties should meet and confer to review the video recording procedures
2 adopted for purposes of discovery to determine whether there are less burdensome video
3 recording measures that can be implemented for monitoring purposes and for
4 supplementing the video recording, if necessary.

5 The Court notes that the Defendants have not sought relief due to impossibility nor
6 even argued that their video recording obligations are too burdensome, except after the
7 fact of making disclosures and in response to Plaintiffs' complaints of noncompliance.
8 This posture continues now. The Defendants Reply omits arguments related to the 90-
9 day stay requested for production of video recordings.

10 This case cannot move forward until discovery is complete: expert discovery and
11 further motions for sanctions due to spoliation, such as adverse inferences, depend on the
12 video recordings that are finally and ultimately produced by the Defendants; dispositive
13 motions depend on this fact discovery and the expert discovery, and ultimately the
14 question of evidentiary spoliation must be addressed before the case can proceed to trial.
15 And so, the Court has reviewed the record relevant to the video-recording discovery,
16 including Defendants' Notice of Compliance with the Court's Order for expedited
17 discovery (Doc. 53), Defendants' Second Notice of Compliance (Doc. 55), Order Re:
18 Sanctions (Doc. 64), Defendants' Motion to Modify Order for Sanctions (Doc. 66), Joint
19 Status Report Re: Video Productions (Doc. 71), Stipulated Discovery Plan Re: Additional
20 Production of Video Data (Doc. 123), Order Re: Stipulation (Doc. 132), and Order for
21 Sanctions (Doc. 285). The Court also recalls being misled by the status report in
22 Defendants' Response to the Plaintiffs' last Motion for Civil Contempt (Doc. 275), which
23 Defendants now admit was "inaccurate." (Motion for Stay (Doc. 275) at 5.)

24 Based on this review, it appears to this Court that the past discoveries of non-
25 compliance have all been made as a result of the Defendants' production of video
26 recording evidence to Plaintiffs. Since the June 2016 discovery that spoliation of video
27 recordings was occurring, the Defendants have submitted they are trying to assess and
28 still need more time to assess the full extent of the destruction. This is essentially the

1 basis for the current requested 90-day stay of video recording production. Given the
2 Defendants' continued inability for approximately one year to assess and correct video
3 recording problems, the Court is concerned that the admitted spoliation of video
4 recordings may necessitate a continuance in discovery of video recordings even though
5 all other discovery, except expert discovery, is closed. The Court is equally concerned
6 that the true extent of spoliation will not be known until the video evidence is produced.
7 The Court finds that a stay in production of video recordings will only delay the
8 assessment of spoliation and postpone Plaintiffs' analysis of whether or not to seek an
9 extension of time to conduct further video recording discovery due to spoliation.

10 As noted above, the Court must weigh the competing interests that will be affected
11 by granting or refusing to grant a stay of the discovery related to the border patrol station
12 video recordings. The Court looks at the parties' competing interests in respect to the
13 possible damage which may result from the granting of a stay, and the hardship or
14 inequity which a party may suffer in being required to go forward or not. The hardship
15 and inequity falls decidedly on the Plaintiffs. Staying this discovery, suspends not only
16 resolution of the case but puts the Plaintiff at an evidentiary disadvantage. It creates a
17 chronic state of evidentiary suspension, with any end in sight being totally dependent on
18 the Government's ability to correct a problem which it has been unable or unwilling to
19 correct for over a year.

20 Twice the Defendants have asserted they inadvertently spoliated video evidence
21 and the Court has awarded sanctions in favor of the Plaintiffs. (Order (Doc. 64); Order
22 (Doc. 285)). But sanctions were necessarily limited because without knowing the extent
23 of the destruction, "neither this Court nor the Plaintiffs can determine whether the failure
24 to preserve the video evidence is de minimus." (Order (Doc. 285) at 11.) The Court has
25 expressed its inclination to either preclude argument or evidence and/or allow an adverse
26 inference to favor Plaintiffs where spoliation of video recordings adversely affects them.
27 *Id.*

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1 Here, there has been, and may be ongoing, spoliation of video recordings.
2 Granting a 90-day stay of production of video recordings will not move the parties closer
3 to knowing the full extent of the missing record and may in fact further prejudice the
4 Plaintiffs if ongoing video recordings continue to be spoliated. Given the importance of
5 the video recordings to monitor ongoing compliance with the preliminary injunction, the
6 Court will not stay production of them.

7 All discovery shall close, except for expert discovery, within 30 days of the filing
8 date of this Order. Within that time, the Plaintiffs shall make their requests for
9 production in respect to video recordings. Defendants shall have 30 days to make a full
10 and complete responsive production of evidence, including any information,
11 documentation, and/or software to enable the Plaintiffs to immediately view and use the
12 evidence. After Defendants production of the video recordings, the Plaintiffs may have
13 30 days to review the evidence and seek an extension of time to continue video recording
14 discovery, if necessary due to spoliation.

15 The parties shall meet and confer regarding Plaintiffs' ongoing video recording
16 needs for monitoring compliance with the preliminary injunction. The Plaintiffs shall
17 make every effort to conduct this monitoring with as little burden as possible to the
18 Defendants. The Court believes it is possible to strike a fair balance between Plaintiffs'
19 evidentiary needs and Defendants' limited resources because there is no need to video
20 record every hour of every day at every station. The parties should consider whether
21 alternative evidence sources are available to offset the need for video recordings.

22 **Accordingly,**

23 **IT IS ORDERED** that the Motion for Stay of Proceedings, Stay of Expert
24 Discovery, or Alternatively 90-day Stay of Video Evidence, (Doc. 291) is GRANTED IN
25 PART AND DENIED IN PART as follows:

26 1. The discovery deadline is stayed only for expert discovery. All other
27 discovery (fact discovery) shall be completed within 90 days of the filing date of this
28 Order.

1 2. Within 30 days of the filing date of this Order, Plaintiffs shall make their
2 requests for production in respect to video recordings. Within 30 days of the request, the
3 Defendants shall produce the video recordings and any information, documentation,
4 software, etc. necessary for Plaintiffs to immediately view and use this evidence. Within
5 30 days of the production of the video recordings, the Plaintiffs may seek an extension of
6 time to continue fact discovery limited to conducting further video recording discovery
7 due to spoliation.

8 3. Expert discovery shall commence 30 days after the close of the fact
9 discovery, with the Plaintiffs disclosing any expert witness and their reports to the
10 Defendant first. The Defendant shall have 30 days from the date of Plaintiff's expert
11 witness disclosure to disclose any experts and their reports. Plaintiff may have 15 days,
12 thereafter, to disclose any rebuttal expert opinions.

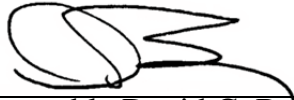
13 4. The deadline for filing dispositive motions is extended to be 30 days
14 following disposition by the Ninth Circuit Court of Appeals of the interlocutory cross-
15 appeals and issuance of the mandate.

16 5. The deadline for filing the joint pretrial order is extended to be 30 days
17 After this Court's disposition of any dispositive motion or, if no dispositive motions are
18 filed the joint pretrial order shall be due 30 days following disposition by the Ninth
19 Circuit Court of Appeals of the interlocutory cross-appeals and issuance of the mandate.

20 **IT IS FURTHER ORDERED** that the parties shall meet and confer regarding
21 procedures for future video recording needed to monitor the preliminary injunction and,
22 in good faith, should adopt procedures which impose the least possible burden on the
23 Defendants necessary to meet Plaintiffs' discovery needs.

24 Dated this 25th day of May, 2017.

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Honorable David C. Bury
United States District Judge