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12
13 UNITED STATES DISTRICT COURT

14 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

15
16 ROBERT HECKER, et al.,

17 Plaintiffs,

18 v.

19 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
20 et al.,

21 Defendants.

Case No. 2:05-CV-02441 LKK JFM

**PLAINTIFFS' RENEWED MOTION
FOR RELIEF FROM STAY**

Judge: John F. Moulds
Date: October 25, 2012
Time: 11:00 a.m.
Crtrm.: 16th Floor, Courtroom 1

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 25, 2012 at 11:00 a.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable John F. Moulds,
4 located at 501 I Street, Sacramento, CA 95814, 16th Floor, Courtroom 1, Plaintiffs Robert
5 Hecker, et al., will and hereby do move the Court to lift the stay in this matter.

6 This motion is based on this Notice of Motion, the Declarations of Claudia Center
7 and Michael W. Bien filed herewith, the entire record in this action, and such other
8 materials and arguments as may be presented before or at the hearing.

9 **INTRODUCTION**

10 Plaintiffs are persons with psychiatric disabilities who allege disability-based
11 discrimination in numerous programs, services and activities conducted by defendants
12 California Department of Corrections and Rehabilitation (CDCR) and various state
13 officials, and who seek to represent a class of similarly situated individuals. Since March
14 15, 2007, Plaintiffs' action has been stayed by Court order. Given the passage of time
15 since the entry of the stay (over five years), the ongoing injuries to the named Plaintiffs
16 and the putative class, and the fact that the purpose of the stay has been served, Plaintiffs
17 respectfully request that the Court lift the stay.

18 **PROCEDURAL AND FACTUAL BACKGROUND**

19 This action was filed more than six years ago, on December 1, 2005. Docket No. 1.
20 Amended complaints were filed on February 23, 2006 and October 20, 2006. Docket Nos.
21 12, 35. On November 17, 2006, the defendants filed a Rule 12(b) and (f) motion to
22 dismiss the case; all briefing was completed on January 4, 2007. Docket Nos. 38-43, 45-
23 60. Defendant's motion to dismiss was heard on February 8, 2007, and has not yet been
24 decided. Docket No. 61. The case was stayed on March 15, 2007. Docket No. 71.
25 Disability-Based Discrimination by Defendants.

26 As detailed in the operative complaint and in responses to discovery and in other
27 communications related to this action, Plaintiffs have alleged that Defendants have
28 engaged in policies and practices that violate the Americans with Disabilities Act (ADA)

1 and the Rehabilitation Act, including but not limited to:

- 2 • excluding qualified inmates with psychiatric disabilities at the Enhanced
3 Outpatient Program (EOP) level of care from mainline vocational and
4 educational programs;
- 5 • failing to provide “reasonable modifications” to enable inmates covered by
6 heat plans to access equivalent programming;
- 7 • excluding qualified inmates with psychiatric disabilities from Prison Industry
8 Authority jobs and other employment positions;
- 9 • excluding qualified inmates with psychiatric disabilities at the EOP level of
10 care from the Substance Abuse Program (SAP);
- 11 • assigning inmates with psychiatric disabilities to higher-security housing
12 based upon their need for psychiatric services;
- 13 • excluding inmates and parolees with psychiatric disabilities from numerous
14 community-based and/or minimum security programs;
- 15 • failing to give service credits to inmates with psychiatric disabilities who
16 experience disability-based delays at receptions centers;
- 17 • failing to give inmates at the EOP level of care classification score
18 deductions for “average or above average performance” in vocational and
19 educational programs;
- 20 • adding four points to the classification scores of incoming inmates with
21 psychiatric disabilities, without lawful basis;
- 22 • excluding qualified inmates with psychiatric disabilities from conservation
23 and fire camp programs; and
- 24 • additional discriminatory treatment.

25 Declaration of Claudia Center (Center Decl.), ¶ 5.

26 Case Related to *Coleman*.

27 In filing their complaint, and pursuant to Local Rule 83-123, Plaintiffs identified
28 several related cases, including *Coleman v. Schwarzenegger*, Case No. 2:90-cv-00520
LKK JFM P. Docket No. 3. The *Coleman* case was brought under the Eighth Amendment
alleging unconstitutional failures in the provision of mental health care on behalf of
inmates with severe mental disorders. The *Coleman* case was filed in 1990 and tried in

1 1993, and remains in a monitoring phase following a 1995 order on the merits. As
2 litigated, the *Coleman* class case included only Eighth Amendment claims. On July 12,
3 1995, the Court decertified the *Coleman* case as to claims originally pled under the
4 Rehabilitation Act. Center Decl., Exh. A. As well, there were no findings of law or fact
5 regarding federal disability nondiscrimination standards. *See id.* (“The Magistrate Judge
6 issued Findings and Recommendations on June 6, 1994, but did not decide plaintiffs’
7 claims under the Rehabilitation Act. Defendants ... did not address the Rehabilitation Act
8 claim.”). However, the claims were related, in that the effects of the disability
9 discrimination being experienced, such as undue segregation and the exclusion from
10 beneficial programs, exacerbated the Eighth Amendment violations. Center Decl., ¶ 6.
11 The case was related to *Coleman*. Docket No. 14.

12 Defendants File Motion to Dismiss.

13 On November 17, 2006, the defendants filed a Rule 12(b) and (f) motion to dismiss
14 the case. Docket No. 38. Defendants contended that this action was barred by the
15 *Coleman* case. Plaintiffs responded that the claims and allegations of this case arose years
16 after the *Coleman* trial, under a different legal framework (federal statutory disability
17 nondiscrimination standards as opposed to Eighth Amendment mental health care
18 standards), and were not barred. All briefing on this motion was completed on January 4,
19 2007. Docket Nos. 38-43, 45-60. Defendants’ motion to dismiss was heard on February 8,
20 2007. Docket Nos. 61, 62. The Court has not ruled on the Defendants’ motion to dismiss.

21 Court Issues Stay on Litigation.

22 On February 27, 2007, the Magistrate Judge issued findings and recommendations,
23 including recommendations that the matter to be referred to the special master in *Coleman*
24 and that the matter be stayed. Docket No. 65. Plaintiffs objected. Docket Nos. 66-68. On
25 March 15, 2007, the Court adopted the findings and recommendations, and issued an order
26 staying this action, stating: “This matter is referred to the special master in *Coleman v.*
27 *Schwarzenegger*, No. CIV S-90-0520 LKK JFM P for a report and recommendation as to
28 whether the claims raised herein can be resolved within the remedial phase of that action,

1 said report to be filed within ninety days from the date of this order[.] This action is stayed
2 until said report from the *Coleman* special master has been filed and considered by this
3 court.” Docket No. 71 at 3.

4 Following this Court’s referral, the *Coleman* special master and the deputy special
5 master conferred with the parties in this matter through meeting jointly and separately, by
6 telephone and in person. *See* Docket No. 72. The parties submitted their positions, and
7 provided additional information and documents. On June 12, 2007, the special master and
8 the deputy special master tendered their report and recommendation, to which the parties
9 filed responses. Docket Nos. 72-77. The report concluded that the parties’ differences
10 “present an insurmountable obstacle to negotiating an agreement to consolidation or
11 merger of the *Hecker* claims into the *Coleman* case at this time.” Docket No. 72, p. 6; *see*
12 *also id.* (“This leaves the parties to their respective legal positions, which are beyond the
13 special master’s jurisdiction and must be decided by the court.”).

14 Plaintiffs Seek Resolution of Disability Discrimination Issues Within *Coleman*
15 Framework, With Limited Results.

16 Despite the special master’s findings, Plaintiffs’ counsel have made good faith
17 efforts to address some “*Hecker* issues” within the *Coleman* framework, where possible.
18 Center Decl., ¶ 11; Declaration of Michael Bien (Bien Decl.), filed herewith, ¶ 7-10. As
19 well, Defendants have issued various memoranda that appeared to reflect an effort to
20 address certain issues raised in the *Hecker* case. Center Decl., ¶ 11. Nevertheless,
21 attempts to resolve issues raised in *Hecker* through the *Coleman* framework remained
22 awkward and often infeasible. *Id.* The *Coleman* monitoring framework focuses on basic
23 obstacles to care (e.g., a shortage of beds and staff) and not issues of disability
24 discrimination. Bien Decl., ¶ 9. Thus, for example, after the CDCR issued memoranda
25 regarding *Hecker* issues, Plaintiffs’ counsel wrote to counsel for the CDCR and to the
26 *Coleman* Special Master commenting on the purported changes and seeking clarifications,
27 improvements, and commitments regarding implementation. Bien Decl., ¶ 10. Plaintiffs,
28 however, received no written response to this request, and the *Coleman* framework is not

1 designed to require such response. *Id.* As a result of this disconnect, discrimination
2 issues continue to injure the putative *Hecker* class without remedy. Bien Decl., ¶¶ 7-9;
3 Center Decl, ¶¶ 17-19.

4 Plaintiffs' Initial Motion to Lift Stay.

5 On December 14, 2007, Plaintiffs in this matter filed a motion to lift the stay.
6 Docket Nos. 78-79. Defendants opposed Plaintiffs' motion to lift the stay. Briefing on the
7 matter was completed by January 16, 2008. Docket Nos. 87, 91. The Court has not ruled
8 on the Plaintiffs' motion to lift the stay. Plaintiffs are suffering ongoing harm, as
9 described below. Plaintiffs also need to be able to file an amended complaint to update the
10 status of the Plaintiffs in the original complaint. For example, Plaintiffs had agreed that
11 Plaintiff Askia Ashanti would be dismissed from the case, but Plaintiffs have been unable
12 to do so while the stay has been in place. *See* Docket No. 78 at 6.

13 Ongoing Problems With Disability Discrimination.

14 As Plaintiffs have confirmed by surveying hundreds of inmates who are known to
15 be members of the *Hecker* class, policies and practices that discriminate against inmates
16 with psychiatric disabilities continue on without remedy. Bien Decl., ¶¶ 7-10; Center
17 Decl., ¶¶ 17-19. These include "out-of-level housing" (routinely housing inmates with
18 psychiatric disabilities in higher security levels) and excluding inmates with psychiatric
19 disabilities from participation in critical employment, educational, vocational, and
20 substance abuse programs. Bien Decl., ¶ 8; Center Decl, ¶ 18. Inmates are punished for
21 the symptoms of their psychiatric conditions. Bien Decl., ¶ 9. Inmates using heat
22 medications for their psychiatric disabilities are required to return to their cells during heat
23 alerts, and are not provided with alternative safe programming. Center Decl., ¶ 18.
24 Inmates report that they have not had the four points removed from their classification
25 score, despite the September 5, 2008 memo. *Id.* When inmates attempt to file grievances
26 about the discrimination they have experienced, they report that their appeals are rejected
27 as "not ADA," or that they are unable to effectively access the procedures. *Id.*

28

1 The Coleman/Plata Overcrowding Proceedings.

2 Plaintiffs are cognizant of the fact that the *Coleman/Plata* overcrowding
3 proceedings consumed significant judicial resources from 2006 through 2011. Bien Decl.,
4 ¶ 6; Center Decl., ¶¶ 14-15. Throughout this period, Plaintiffs' counsel has been contacted
5 by *Hecker* plaintiffs, asserting their frustration at the lack of progress in their case. Center
6 Decl., ¶ 16. Plaintiffs' counsel explained the stay, and advised that once the overcrowding
7 proceedings had drawn to a close, counsel would again request that the stay be lifted. *Id.*
8 Given that part of CDCR's overcrowding remedy involves increasing its rehabilitative
9 programming for prisoners, remedying the discriminatory disparities in access to such
10 programming is more significant now than ever before. Bien Decl., ¶ 11. We therefore
11 renew our request for an order from the Court lifting the stay, and permitting this case to
12 go forward.

13 **ARGUMENT**

14 "A trial court may, with propriety, find it is efficient for its own docket and the
15 fairest course for the parties to enter a stay of an action before it, pending resolution of
16 independent proceedings which bear upon the case." *Leyva v. Certified Grocers of*
17 *California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). However, the Ninth Circuit has held
18 that, in deciding whether to stay an action, the court must weigh "the competing interests
19 which will be affected by the granting or refusal to grant a stay." *Lockyer v. Mirant Corp.*,
20 398 F.3d 1098, 1110 (9th Cir. 2005), quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th
21 Cir. 1962). The three interests the Court must consider are: (1) the possible damage that
22 may result from the granting of a stay; (2) the hardship that the party seeking the stay may
23 suffer by being required to go forward; and (3) the orderly course of justice measured by
24 considering whether the issues, proof or questions of law will be simplified or complicated
25 as a result of the stay. *Lockyer*, 398 F.3d at 1110; *see also CMAX*, 300 F.2d at 268;
26 *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). "[T]he suppliant for a stay
27 must make out a clear case of hardship or inequity in being required to go forward, if there
28 is even a fair possibility that the stay for which he prays will work damage to someone

1 else.” *Landis v. North American Co.*, 299 U.S. 248, 255 (1936).

2 Here, the damage to the Plaintiffs caused by this ongoing stay far outweighs any
3 potential damage to Defendants that could result from lifting it. Further, not only has the
4 specific purpose of the stay – the report and recommendations of the special master – been
5 completed, but the *Coleman/Plata* overcrowding trial and subsequent appeal have
6 concluded. The resolution of that matter has not only informed the Court of overcrowding
7 remedies to take place which may affect *Hecker* plaintiffs, but has also eliminated the basis
8 for the stay.

9 **I. The Damage Resulting from the Ongoing Stay Outweighs the Importance of**
10 **Continuing It.**

11 **A. Indefinite Stays are Disfavored, and Can Substantially Prejudice**
12 **Litigants.**

13 The Ninth Circuit has a “general policy favoring stays of short, or at least
14 reasonable, duration,” noting that “[g]enerally, stays should not be indefinite” due to the
15 substantial prejudice such delays can cause for a litigant. *Dependable Highway Exp., Inc.*
16 *v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th Cir. 2007); *see also Consolidation*
17 *Coal Co. v. U.S.*, 102 Fed. Cl. 489 (2011) (“A court ... abuses its discretion by issuing a
18 stay of indefinite duration in the absence of a pressing need and must weigh competing
19 interests and maintain an even balance; while conducting this balance, the court must keep
20 in mind its paramount obligation to timely exercise jurisdiction in cases properly before
21 it.”) (internal quotation marks and citations omitted).

22 Although a court may stay an action “pending the resolution of independent
23 proceedings which bear upon the case.... [a] stay should not be granted unless it appears
24 likely the other proceedings will be concluded within a reasonable time in relation to the
25 urgency of the claims presented to the court.” *Leyva*, 593 at 863-64; *accord Landis*, 299
26 U.S. at 259 (remanding to consider whether to grant a stay where duration of stay was
27 likely to be fairly short). Although the special master’s report and recommendations were
28 completed within a reasonable time after the Court issued its stay, the stay has continued
for years after this proceeding took place.

1 **B. Plaintiffs Have Been and Continue to Be Damaged by this Stay.**

2 Plaintiffs have suffered and continue to suffer harms during the court’s lengthy stay
3 of this matter. Instances of discrimination have continued. In the fall of 2011, in
4 preparation for this motion, plaintiffs’ counsel conducted a survey of the several hundred
5 inmates known to be members of the putative *Hecker* class. The responses to these
6 surveys confirmed that inmates are continuing to experience discrimination, including:

7 Being excluded from jobs, including PIA jobs, fire camp jobs, and other jobs, on the
8 basis of being part of the Mental Health Services Delivery System.

9 Being forced to return to a cell during a heat alert instead of being given access to
10 alternative safe programming.

11 Being excluded from programs, activities, and jobs on the basis of being EOP,
12 despite the March 30, 2007 memo.

13 Being excluded from substance abuse programs on the basis of being CCCMS or
14 EOP.

15 Not having had the four points for “mental illness” removed from their
16 classifications scores, despite the September 5, 2008 memorandum.

17 Being excluded from lower security placements (Level I, Level II, or minimum
18 security placements) on the basis of being CCCMS or EOP.

19 Being denied credits and point reductions for completion of programs during annual
20 reviews.

21 Being forced to choose between receiving mental health care and obtaining a
22 desired housing assignment.

23 Being denied remedial sanctions in lieu of incarceration for a parole violation based
24 on a psychiatric condition.

25 Being denied single-cell assignment and other modifications needed as a reasonable
26 accommodation to a psychiatric disability.

27 Being denied access to an effective appeals process for complaining about
28 discrimination on the basis of psychiatric disability, including having an 1824
appeal based on a psychiatric disability screened out as “not ADA,” and/or being
denied reasonable accommodation to participate in appeals process.

Center Decl., ¶ 18; Bien Decl., ¶¶ 8-10.

1 **C. The Purpose of the Stay has Been Satisfied.**

2 The Court’s primary rationale for the stay is no longer an issue, as the purpose for
3 which the Court issued the stay has been fulfilled. The Court stayed the action for the
4 following stated purpose:

5 This matter is referred to the special master in Coleman v. Schwarzenegger,
6 No. CIV S-90-0520 LKK JFM P for a report and recommendation as to
7 whether the claims raised herein can be resolved within the remedial phase
8 of that action, said report to be filed within ninety days from the date of this
9 order; [and]

 This action is stayed until said report from the Coleman special master has
 been filed and considered by this court[.]

10 Docket No. 71, at 3:4-9.

11 Following this Court’s referral, the *Coleman* special master and the deputy special
12 master conferred with the parties in *Hecker* by meeting jointly and separately, by telephone
13 and in person. Docket No. 72. The parties submitted their positions to the special master,
14 and provided additional information and documents. On June 12, 2007, the special master
15 and the deputy special master tendered their report and recommendation. The parties
16 thereafter filed responses. Docket Nos. 72-77. The report concluded that the parties’
17 differences “present an insurmountable obstacle to negotiating an agreement to
18 consolidation or merger of the *Hecker* claims into the *Coleman* case at this time.” Docket
19 No. 72 at 6.

20 As an intermediate step, the stay enabled the parties and the Court to explore the
21 role of the *Coleman* remedial process in resolving claims in this case. The conditions and
22 purposes of the stay have been satisfied: The Court has had the benefit of the report from
23 the *Coleman* special master and deputy special master, and any issues that could be
24 resolved via *Coleman* have been resolved. The stay should be lifted, and the case should
25 proceed. *See* Docket No. 72 at 6 (“This leaves the parties to their respective legal
26 positions, which are beyond the special master’s jurisdiction and must be decided by the
27 court.”). Further extension of the stay is no longer constructive. Fed. R. Civ. Proc. 1
28 (“These rules ... should be construed and administered to secure the just, speedy, and

1 inexpensive determination of every action.”). The continued stay permits the ongoing
2 discrimination without remedy against inmates with psychiatric disabilities.

3 **II. Lifting the Stay Would Pose No Hardship to Defendants.**

4 In their opposition to Plaintiffs’ initial motion to lift this stay, filed on December 14,
5 2007, Defendants set forth two arguments for continuing the stay. First, Defendants
6 argued that they were working with Plaintiffs to address their concerns through the
7 *Coleman* framework. Docket No. 87 at 3-5. In fact, Defendants have been limited in their
8 willingness to address Plaintiffs’ federal disability discrimination claims, and have
9 objected that the disability discrimination claims in *Hecker* were not part of the *Coleman*
10 case. Bien Decl. ¶¶ 4-5; *Coleman* Docket No. 1761. And even where progress has been
11 made that provides some basic relief to *Hecker* and *Coleman* plaintiffs alike,
12 discrimination adversely affecting *Hecker* plaintiffs is still endemic. After five years of
13 attempting to work in good faith with defendants through the *Coleman* framework,
14 plaintiffs believe the parties have reached a plateau. The *Hecker* plaintiffs cannot fully
15 remedy the discrimination against them through the *Coleman* framework.

16 Second, Defendants argued that the stay should be continued until the conclusion of
17 the *Coleman/Plata* overcrowding proceedings, as the outcome of those proceedings might
18 affect *Hecker* claims. Docket No. 87 at 5. To the extent that the Court was persuaded by
19 this argument, it is now moot – those proceedings have concluded and are now in the
20 remedial phase. Where defendants advised prolonging the stay until the conclusion of
21 these proceedings, plaintiffs now urge that the conclusion of these proceedings necessitates
22 the urgent lifting of this stay. This is especially important because the CDCR is enhancing
23 its programming as part of its remedy to overcrowding, yet continues to exclude inmates
24 with psychiatric from these programs.

25 **III. Lifting the Stay Promotes the Orderly Course of Justice and Reduces the Risk
26 of Mootness Including by Permitting Plaintiffs to File for Class Certification.**

27 The longer a matter is delayed, the greater the risk that “memories will fade,
28 litigation costs will balloon, and resolve will dwindle.” *Cherokee Nation of Oklahoma v.*

1 U.S., 124 F.3d 1413, 1418 (Fed. Cir. 1997); *see also Clinton v. Jones*, 520 U.S. 681, 707-
2 708 (1997) (“delaying trial would increase the danger of prejudice resulting from the loss
3 of evidence, including the inability of witnesses to recall specific facts, or the possible
4 death of a party.”). Here, some of these risks have already been realized. Plaintiff’s
5 counsel has regularly heard from many clients who are frustrated with the indefinite stay,
6 and one has requested to be dismissed from this matter altogether due to the significant
7 delays. *See* Center Decl. ¶¶ 16, 21; Docket No. 93, Motion By Plaintiff Christopher Lee
8 Jenkins to Dismiss as Plaintiff. Other named plaintiffs have paroled, and many others been
9 reassigned, or have experienced other changes in circumstances affecting their
10 participation in this case. Center Decl., ¶ 20. Plaintiffs must be permitted to amend their
11 complaint to provide updated information about these inmates and parolees.

12 Here, class certification is also critical to reaching enforceable and effective relief.
13 Accordingly, plaintiffs’ counsel prepared a motion for class certification, with supporting
14 declarations, for filing in March 2007; the stay prevented Plaintiffs from proceeding.
15 Lifting the stay would allow the Court to fully address the claims of inmates and parolees
16 against whom CDCR has promulgated and applied discriminatory policies. There is no
17 remedy, or process for shaping a remedy, for these violations in *Coleman*.

18 **CONCLUSION**

19 For all of the reasons stated herein, the stay should be lifted, and the *Hecker*
20 plaintiffs should be permitted to pursue their claims for discrimination in violation of the
21 Americans with Disabilities Act and the Rehabilitation Act.

22 DATED: September 19, 2012 Respectfully submitted,

23 ROSEN BIEN
24 GALVAN & GRUNFELD LLP

25
26 By: /s/ Michael W. Bien
Michael W. Bien

27 Attorneys for Plaintiffs
28