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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, JAMES H. HAIRSTON, RICHARD A. LEAVITT, GENE F. STUART,)

Plaintiffs,)

v.)

BRENT REINKE, in his official capacity as Director, Idaho Department of Corrections;)

KEVIN KEMPF, in his official capacity as Chief, Operations Division, Idaho Department of Corrections;)

JEFF ZMUDA, in his official capacity as Deputy Chief, Bureau of Prisons, Idaho Department of Corrections;)

JOSH TEWALT, in his official capacity as Deputy Chief, Bureau of Prisons, Idaho Department of Corrections; and)

RANDY BLADES, in his official capacity as Warden, Idaho Maximum Security Institution, Idaho Department of Corrections,)

Defendants.)

Case No. 12-00173-S-EJL
CAPITAL CASE

Civil Action

**OPPOSITION TO
DEFENDANT’S 12(b) MOTION
TO DISMISS**

Expedited Oral Argument and
Evidentiary Hearing Requested

**Execution Scheduled June 12,
2012**

On May 15, 2012, Defendants moved to dismiss this action. Dkt. No. 10. They make two arguments in support of their motion. Defendants argue that all Plaintiff Leavitt's ("Leavitt's") claims should be dismissed "because [Leavitt has] failed to properly exhaust [his] administrative remedies pursuant to the PLRA[.]" Dkt. No. 10-1 at 20 (Defendant's Memorandum in Support of 12(b) Motion to Dismiss). Defendants argue, second, that Mr. Leavitt's "Claims 3, 4, 5, 6 [] and 7" fail to state a claim as a matter of law. *Id.*

Earlier today, Defendants filed their IDOC Notice Of Intent To Use One-Drug Protocol In The Execution Of Richard Leavitt ("Notice"). Dkt. No. 18. In their Notice, Defendants state that they "will be proceeding with implementing the one-drug pentobarbital protocol (method 4) outlined in SOP 135 for the execution of Richard Leavitt on June 12, 2012." Notice at 2 (citing to Dkt. No.10-3 at p. 41). Additionally, Defendants state that they "will not invoke [their] authority to deviate from the one-drug pentobarbital protocol outlined in SOP 135 for the execution of Richard Leavitt on June 12, 2012." Notice at 2.

Opposing counsel's representations are similar to those made by state counsel in *Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012). There, the Ninth Circuit Court of Appeals ruled those state counsel's representations were binding on the state department of corrections. *Id.* at 658. This Court should find opposing counsel's representations binding on the Idaho Department of Corrections ("IDOC"), including Defendants. Based on Mr. Leavitt's understanding that the Notice is binding on the IDOC, including Defendants, it appears that his Claims 1 (notice of protocol), 4 (use of pentobarbital in a

three-drug protocol), 5 (Idaho should use one-drug protocol), and 6 (fundamental right against cruel and unusual punishment) are moot. However, should Mr. Leavitt's understanding be wrong, he requests leave to file a supplemental opposition.

I. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO THE ADMINISTRATIVE REMEDIES EXHAUSTION REQUIREMENT.

Defendants argue that because Plaintiffs' claims are not administratively exhausted, they must be dismissed. Dkt. No. 10-1 at 5 – 16. None of Plaintiffs' claims concern prison conditions, the subject of the Prison Litigation Reform Act's ("PLRA's") administrative remedies exhaustion requirement. The claims at issue attack the particular procedures employed to end a prisoner's life, not any particular or general incidents of prison life. The PLRA's administrative remedies exhaustion requirement does not apply to any of Plaintiffs' claims.

Defendants wrongly assert that in *Nelson v. Campbell*, 541 U.S. 637 (2004), the Supreme Court "made clear that a §1983 action challenging an execution procedure would be an action 'with respect to prison conditions' that could not be brought unless the PLRA exhaustion requirement had first been satisfied." 541 U.S. at 650. Whether a Section 1983 challenge to a specific method of execution constitutes a prison conditions suit subject to the PLRA was not an issue before the Supreme Court. Rather, the issue was whether Section 1983 was "an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief." *Id.* at 639. It is true that in *Nelson* the Court noted the PLRA's administrative remedies exhaustion

requirement, but in doing so it acknowledged that the requirement is limited to inmate “action[s] challenging the conditions of their confinement.” *Id.* at 650 (citing to and quoting 42 U.S.C. §1997e(a) (“No action shall be brought with respect to *prison conditions* under section 1983 of this title . . . until such administrative remedies as are available are exhausted.”)). *Nelson* does not hold that Section 1983 challenges to specific methods of execution are subject to the PLRA’s administrative remedies exhaustion requirement.

Defendants acknowledge that the Supreme Court has held “that ‘the PLRA’s exhaustion requirement applies to all inmates suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.’” Dkt. 10-1 at 5-6 (quoting *Porter v. Nussle*, 534 U.S. 516, 532 (2002)). Plaintiffs’ claims challenge the particular procedures employed to end a prisoner’s life, not any particular or general incidents of prison life.

II. CLAIMS 3 AND 7 STATE CLAIMS AS A MATTER OF LAW.

Defendants assert that Claim 3 and 7 should be dismissed because neither states a claim for relief. For the reasons below, Defendants’ arguments fail.

A. Claim 3: Plaintiff’s Factual Allegations Are Sufficient To State A Claim

Claim 3 contends that the use of adulterated or illegally obtained Drugs creates a substantial risk of harm. Defendants contend that Mr. Leavitt fails to state sufficient facts to state a claim. Defendants’ argument is based on an inadequate accounting of

Plaintiff's factual allegations. Further, recent communications between opposing and undersigned counsel support Claim 3.

Defendants fail to acknowledge factual support Plaintiffs proffer with their Complaint. Specifically, Plaintiff's proffered Exhibit 11 is a series of emails between Defendant Blades and Chris Harris, identified as the CEO of Harris Pharma LLP, located in Kolkata, India, as well as the Director of Sales & Marketing for KAYEM Pharmaceuticals Pvt. Ltd., located in Mumbai, India. The first email, dated March 15, 2011, is from Defendant Blades to Harris and inquires about the availability of pentobarbital. Harris responded the next day, March 16, noting that he did not have any available pentobarbital. He continued:

We can manufacture it but the quantity will need to be large for the order and I am sure you not require such a large quantity.

Exhibit 11. Defendant Blades responded that same day, asking "what quantity of Pentobarbitol [sic] are we talking about to manufactor [sic]?" *Id.* On May 18, 2011, Harris emailed Defendant Blades about a subject not raised in the earlier emails, "your concern for importing." *Id.* Harris went on to offer a solution: "There is a company in the USA who can import these products legally and supply to you." Defendant Blades' and Harris's email correspondence stopped in May. It is a "reasonable inference" from Defendant Blades' contacting an executive in India to obtain pentobarbital that there was no source of U.S. manufactured pentobarbital available to Defendants. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Likewise, it is a reasonable inference that the quality control and purity standards for pentobarbital manufactured in India is below U.S. requirements.

Further, in an effort to resolve this litigation, counsel for the parties have

conferred. Defendant's Notice followed their discussion and directly addressed two of undersigned counsel's inquiries. Opposing counsel also supplied information to undersigned counsel directly addressing a third inquiry. However, she declined to address the substance of the final inquiry: whether "the pentobarbital which will be used in any June execution was manufactured by Lundbeck [the sole U.S. manufacturer], obtained directly from a US commercial distributor before July 1, 2011, [the date as of which Lundbeck no longer allowed distribution of pentobarbital to U.S. prisons carrying out lethal injections], and that its expiration date is after whatever is the ultimate June execution date." To this inquiry, opposing counsel responded that she is "not at liberty to discuss that information."

Together, these facts are enough to make the claim facially plausible, the standard for stating a claim for relief. *Id.* "The plausibility standard is *not* akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (emphasis added).

B. Claim 7: Plaintiff's Factual Allegations Are Sufficient To State A Claim.

Claim 7 seeks a declaratory judgment that if Defendants act in compliance with the 2012 Protocol and Idaho Code §19-2716, they will violate the Controlled Substances Act ("CSA"), 21 U.S.C. §§801 *et seq.* and the Federal Food Drug & Cosmetic Act ("FDCA"), 21 U.S.C. §353(b).

Both the CSA and FDCA require that pentobarbital be dispensed or administered by a practitioner licensed by law to administer such drug. Dkt. No. 1 at paras. 200-203,

205; 21 U.S.C. §353(b). To administer is to directly apply a controlled substance to the body. 21 U.S.C. §802(2). In an email earlier today, opposing counsel represented that “the medical team for Mr. Leavitt’s execution is comprised of the same medical team that was used in Mr. Rhoades[’s] execution. They will also be handling the same roles in this execution.” According to Defendant Zmuda’s unredacted affidavit in the *Rhoades* matter the role of “injector” was filled by an individual without a license allowing them to administer pentobarbital. *See Rhoades* at Dkts. 22, 23, & 49. (Only a redacted version of Defendant Zmuda’s affidavit appears in the *Rhoades* record.) Together, these facts are enough to make the claimed CSA and FDCA violations facially plausible, the standard for stating a claim for relief. *Id.* “The plausibility standard is *not* akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (emphasis added).

For all these reasons, the court should deny Defendant’s Motion to Dismiss.

Dated this 25th day of May, 2012.

Respectfully submitted,

_____/s/_____
Oliver W. Loewy
Teresa A. Hampton
Capital Habeas Unit
Federal Defenders Services of Idaho, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Krista Howard
khoward@idoc.idaho.gov

/s/
Oliver Loewy