IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ASHLEY DIAMOND,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	5:20-cv-00453-MTT
	:	
TIMOTHY WARD, *et al.*,	:	
	:	
Defendants.	:	

CONSOLIDATED RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND MOTION FOR PROTECTIVE ORDER

Defendants Timothy Ward, Sharon Lewis, Javel Jackson, Ahmed Holt, Robert Toole, Benjamin Ford, Jack Sauls, Brooks Benton, Grace Atchison, Lachesha Smith, and Rodney Jackson (collectively, "Defendants"), through counsel, submit this consolidated response in opposition to Plaintiff's Motion for a Preliminary Injunction and motion for protective order.

INTRODUCTION

Plaintiff Ashley Diamond, a male-to-female transgender state prisoner, filed her initial complaint on November 23, 2020, alleging that Defendants, all current or former officers or officials of the Georgia Department of Corrections ("GDC"), failed to provide her with constitutionally adequate medical care and failed to take reasonable steps to protect her from sexual assault by housing her in a men's facility. Defendants appeared and filed an answer on February 16, 2021. That same day, February 16, 2021, Diamond amended her complaint, and Defendants answered the amended complaint on March 9, 2021. At no point in all of this extended time period did Diamond move for temporary or preliminary injunctive relief. Now, many months after the initial complaint was filed, Diamond has filed a motion for preliminary

injunctive relief that in essence seeks the entry of summary judgment on the merits of her claims in this complex civil rights action before discovery has even commenced, let alone been completed.

Diamond's motion should be denied because she is unable to satisfy each of the four prerequisites for preliminary injunctive relief. As shown by the declarations and materials collected on an expedited basis and submitted herewith, the alleged "assaults" that form the basis of her motion occurred, if at all, too far in the past to reasonably form the basis for emergency injunctive relief. The most extreme of the alleged "assaults" occurred before (and some long before) Diamond filed her initial complaint. Moreover, whether or not these alleged "assaults" occurred at all is disputed. Before a determination is made on disputed facts or the credibility of witnesses surrounding these disputed facts, discovery should be permitted in this case just as in any other case.

The declarations and materials submitted herewith also show that Diamond has received and continues to receive a course of treatment for her gender dysphoria and other conditions as recommended and determined by her care providers, including counseling, psychiatric medication, and hormone therapy. While further discovery is needed to determine whether Diamond's other requests—including medicated hair removal products, gender expressive commissary items, or placement in a women's facility—are medically necessary or merely Diamond's stated preference, it is clear based on the level of care she has received that Defendants have not knowingly disregarded her medical or mental health needs.

As the Court is aware, shortly before the pending motions were filed, counsel for the parties met and conferred and presented a planning report that called for nine months of discovery, including expert witness disclosures and depositions at the end of that time period.

As the planning report and the agreed-upon time periods fairly reflect, this is a complex case with complex factual and legal issues. No party should be put to the burden of proving its case without the benefit of discovery, particularly discovery that has been agreed to. Resolution of the disputed issues presented in Diamond's amended complaint is a task best informed by the discovery process and ultimately left to the consideration of a jury. For these and other reasons as set forth herein, Diamond's motions should be denied and the parties permitted to complete discovery before any relief is granted in this case.

REQUESTED RELIEF

By her motion for a preliminary injunction, Diamond requests the following relief:

- An order directing Defendants Ward, Lewis, Jackson, Toole, Atchison, Holt, and Benton "to transfer Ms. Diamond to a female facility for safety purposes for the remainder of her time in custody." ECF No. 50 at 1;

- An order directing the same Defendants "to allow Ms. Diamond to shower privately." *Id.*;

- An order enjoining the same Defendants "from using male correctional officers to conduct strip searches of Ms. Diamond, absent exigent circumstances." *Id.*;

- An order directing Defendants Lewis, Jackson, and Sauls "to provide Ms. Diamond with medically necessary treatment for gender dysphoria, including but not limited to consistent and therapeutic doses of hormone therapy, access to permanent body hair removal, and gender-affirming care including access to female canteen items, accommodations for female hairstyle and grooming standards, or, alternatively, a transfer to a female facility." *Id.;* and

- An injunction "enjoining Defendants from enforcing the De Facto Placement Ban and any other policies, customs, or practices that have served as a moving force behind their actions denying Ms. Diamond protection from sexual assault or adequate gender dysphoria treatment." *Id.*

In addition to the motion for a preliminary injunction, Diamond has also filed a motion for a protective order, which upon close reading is an additional request for injunctive relief seeking the following:

- An order "enjoining Defendants and their agents from retaliating against Ms. Diamond and John Doe, or any other witnesses, including GDC staff." ECF No. 51 at 1; and

- An order "enjoining Defendants and their agents from taking any adverse action against Ms. Diamond based on the altered designations of her as a PREA aggressor and security threat group member."[1] *Id.*

For the reasons that follow, Diamond's motions for preliminary injunctive relief are due to be denied.

ARGUMENT AND AUTHORITIES

I. The standard for preliminary injunctive relief.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The primary purpose and "chief function" of such relief "is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated.'" *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (quoting *Ne. Fla. Chapter of Ass's of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990)). "'Preserving the court's ability to render a meaningful decision after a trial on the merits is the primary justification for granting a preliminary injunction.'" *Redding v. Fanning*, 2015 U.S. Dist. LEXIS 139520, at *2 (M.D. Ga. Oct. 14, 2015) (Treadwell, J.) (quoting *Campos v. I.N.S.*, 70 F. Supp. 2d 1296, 1307 (S.D. Fla. 1998)).

[1] Notably, Diamond's requests for an order directing Defendants to provide her with "medically necessary treatment" and enjoining them from retaliating against her are in essence a request for prison officials to comply with their obligations under the First and Eighth Amendments. *See Estelle v. Gamble*, 429 U.S. 97, 102–103 (1976); *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003). The Eleventh Circuit has repeatedly held that similar "obey the law" injunctions do not satisfy the specificity requirements of Fed. R. Civ. P. 65 and are incapable of enforcement. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978). More importantly, there is no retaliation in this case, and the requested relief as to retaliation exceeds the relief sought in the amended complaint.

To be eligible for preliminary injunctive relief, a "movant must clearly carry the burden of persuasion" as to each of the four prerequisites, which are: (1) a substantial likelihood of success on the merits of the underlying case; (2) irreparable harm to the movant in the absence of an injunction; (3) the threatened harm to the movant would exceed any harm suffered by the non-moving party if the injunction were issued; and (4) if issued, an injunction would not disserve the public interest. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008); *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.

"When a preliminary injunction is sought to force another party to act, rather than simply to maintain the status quo, it becomes a 'mandatory or affirmative injunction.'" *Exhibitors Poster Exch. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971).[2] "A mandatory injunction requires a defendant to do some positive act, as opposed to a standard preliminary injunction where a defendant is ordered to stop doing something or not to do something." *Dantzler, Inc. v. Hubert Moore Luber Co.*, 2013 U.S. Dist. LEXIS 78664, at *3–4 (M.D. Ga. June 5, 2013). A request for a mandatory injunction, "which goes well beyond simply maintaining the status quo *pende lite*, is particularly disfavored." *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Thus, when the request is one for a mandatory injunction, "the burden on the moving party increases." *Exhibitors Poster Exch.*, 441 F.2d at 561; *see also Redding*, 2015 U.S. Dist. LEXIS 139520, at *2 ("[W]hen the moving party is seeking to have the

[2] The Eleventh Circuit accepts as binding precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

opposing party perform an affirmative act, the burden is even higher."); *Dantzler, Inc.*, 2013 U.S. Dist. LEXIS 78664, at *3 ("Plaintiff's request must be considered by the Court with greater scrutiny because the burden for a movant requesting a mandatory injunction is higher than for a movant requesting a standard preliminary injunction."). This Court has held that "'[a] mandatory injunction . . . especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party.'" *Redding*, 2015 U.S. Dist. LEXIS 139520, at *2 (quoting *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958)).

II. Diamond's motion fails to meet the standard for preliminary injunctive relief.

A. Diamond has not established a likelihood of success on the merits.

To satisfy the first prerequisite for preliminary injunctive relief, the movant must demonstrate that there is a *substantial likelihood* of success on the merits of their underlying claims. *See Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1474 (11th Cir. 1985). The case law of this circuit "uniformly require[s] a finding of *substantial likelihood* of success on the merits before injunctive relief may be provided." *Pittman v. Cole*, 267 F.3d 1269, 1292 (11th Cir. 2001) (emphasis added). "[W]hen a plaintiff fails to establish a *substantial likelihood* of success on the merits, a court does not need to even consider the remaining three prerequisites of a preliminary injunction." *Id.* (citing *Church of City of Huntsville*, 30 F.3d 1332, 1342–47 (11th Cir. 1994)).

1. Diamond has not established as substantial likelihood of success on the merits of her Eighth Amendment Failure to Protect Claim (Counts I and IV).

Section 1983 provides a cause of action for damages against every person who, acting under color of state law, deprives another of "rights, privileges, or immunities, secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The statute "is not itself a source

of substantive rights," but instead provides a "method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979)). When a court considers a § 1983 claim, it must first identify the specific right allegedly infringed and then determine the validity of the claim "by reference to the specific constitutional standard which governs that right." *Albright*, 510 U.S. at 271; *Graham v. Connor*, 490 U.S. 386, 394 (1989).

In the context of a failure to protect claim, the Supreme Court has said that an "official's 'deliberate indifference' to a substantial risk of serious harm . . . violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); *accord Carter v. Galloway*, 352 F.3d 1346, 1349 (11th Cir. 2003). Inherent in this standard is the recognition that facility officials have a duty to protect detainees from violence at the hands of other detainees, *see Farmer*, 511 U.S. at 833; but also that "it is not ... every injury suffered by one inmate at the hands of another that translates into a constitutional liability for prison officials responsible for the victim's safety," *id.* at 834.

To violate the Eighth Amendment, an official must have a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 823. The required culpability—deliberate indifference—occurs only when the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Because the official's responsibility is to take "reasonable measures" to protect an inmate, *id.* at 832 (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)), the Eighth Amendment is not violated so long as he responds reasonably to the known risk "even if the harm ultimately was not averted," *id.* at 844; *accord Marsh v. Butler Cnty.*, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) ("An Eighth

Amendment violation will occur when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not 'respond[] reasonably to the risk.'") (quoting *Farmer*). Causation is an essential element of the claim. *Carter*, 352 F.3d at 1349.

Thus, to make out an Eighth Amendment claim based on deliberate indifference to detainee safety, the plaintiff must allege and ultimately prove: (1) a substantial risk of serious harm; (2) the facility official was subjectively aware of that risk; (3) the official disregarded the known risk by not responding reasonably to it; and (4) causation. *Farmer*, 511 U.S. at 832, 837; *Marsh*, 268 F.3d at 1028; *Carter*, 352 F.3d at 1349. To meet this standard "there must be more than a mere possibility of serious harm; instead, there must be a strong likelihood." *Turner v. Burnside*, 444 F. App'x 394, 396 (11th Cir. 2011). In determining subjective knowledge, the court asks whether the defendant was aware of a "particularized threat or fear felt by [the plaintiff]." *Carter*, 352 F.3d at 1350.

Section 1983 claims cannot be based upon *respondeat superior* or vicarious liability. *See Brown v. Smith*, 813 F.2d 1187, 1188 (11th Cir. 1987); *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). Without some degree of personal participation in the alleged deprivation of the plaintiff's rights by the defendant, no liability exists. *See id.* To state a claim against a supervisory official, a plaintiff must allege that the supervisor personally participated in the alleged unconstitutional conduct or that there is a "causal connection" between the actions of the supervisor and the alleged constitutional deprivation. *See Simpson v. Stewart*, 386 Fed. Appx. 859, 860 (11th Cir. 2010). A causal connection may be shown by establishing that the supervisor (i) was on notice of a "history of widespread abuse" of constitutional rights but failed to take corrective action; (ii) established or put in place a policy that condoned the alleged constitutional deprivation; or (iii) directed subordinates to act unlawfully or knew that

subordinates would act unlawfully and failed to stop them from doing so. *See Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007); *accord Zatler*, 802 F.2d at 401 ("An official may also be liable where a policy or custom that he established or utilized results in deliberate indifference to an inmate's constitutional rights."); *Dale v. White Cnty.*, 238 Fed. Appx. 481, 484 (11th Cir. 2007) ("a plaintiff can show a supervisor imposed an improper custom or policy that constituted deliberate indifference to constitutional rights.").

Diamond has not shown a likelihood of success on the merits of Counts I and IV of the amended complaint, which assert Eighth Amendment failure to protect claims. Stated simply, Diamond's contentions of repeated "assaults" are disputed. Defendants refer to the Declaration of Grace Atchison and the incident reports and PREA documents referenced therein. As the Atchison declaration and the supporting documents show, there has not been one substantiated allegation of assault on Diamond at Coastal State Prison. As the Atchison declaration and supporting documents further show, there is both an incident reporting and investigation process and also a PREA reporting and investigation process, both of which have been created and designed to protect offenders such as Diamond, and Diamond on the advice of her counsel has refused to participate, to be interviewed, and to provide information in that process. This conduct of refusal to participate in investigations is fundamentally at odds with a claim that requires proof of deliberate indifference. And the evidence does not show deliberate indifference—meaning knowledge of risk and failure to address that risk. Rather, the evidence shows that GDC and Coastal State Prison have policies and practices in place that are designed to protect offenders including Diamond, and also that Coastal State Prison has people on the ground ready to investigate and act on allegations of assault. Diamond has not shown a likelihood of success

on the merits of Count I (the Eighth Amendment failure to protect claim), which appears to be premised on alleged individual deliberate indifference.

Diamond also has not shown a likelihood of success on Count IV of the amended complaint. Diamond asserts in Count IV supervisor liability claims based on an alleged "de facto placement ban" which she contends keeps her from being assigned to a women's facility where, she further contends, she will be safer and better protected from offender assaults. But, as shown by the Atchison declaration and also by the Declaration of Ahmed Holt, there is no "de facto placement ban." Diamond's housing assignment was made after assessment of her medical and mental health condition, her transgender status, her stated housing preference—which was somewhat inconsistent but which included her statement that she would be ok with placement in a medium-security men's prison (there is an audio recording of the interview with Grace Atchison where Diamond made this statement)—and then also after Mr. Holt and Robert Toole, GDC's Director of Facility Operations, considered and decided upon the placement at Coastal State Prison based on a number of health and security considerations that are identified in Holt's declaration. As further shown by the Holt declaration and also by the Declaration of Coastal State Prison Warden Brooks Benton, Diamond has been placed at Coastal State Prison for a number of reasons specifically related to her security, and she has been assigned to and consistently housed in a dormitory with other offenders who as a rule are focused on self-improvement and life after incarceration, not on committing rules infractions such as assaulting other offenders. All of this evidence points to efforts to protect and ensure Diamond's safety, not deliberate indifference.

Diamond's motion inexplicably asserts that she has been placed in a "serious of men's prisons where she faced an undue risk of assault." This assertion is simply false, and although

some parts of the motion touch on matters that are disputed (whether or not there have been "assaults"), here there is no dispute at all. In this period of incarceration, Diamond has been housed at one facility—Coastal State Prison. She has returned to Georgia Diagnostic and Classification prison only on a few instances and then only for medical or mental health reasons. Her placement at Coastal State Prison was a deliberate choice made for her safety, and again it was premised on the various mental health and security considerations that are set forth in Holt's declaration.

Finally, Diamond's motion asserts that "Defendants Benton and Toole placed Ms. Diamond in a cell that does not lock, and unjustifiably refused to repair the lock for months even after Ms. Diamond was repeatedly attacked by intruders." This assertion also is simply false as shown by the documentary record. Filed herewith under seal as Exhibit 15 are maintenance reports showing that the door to the cell that Diamond first occupied at Coastal State Prison (N-building cell 106) was fixed before she arrived at the facility, and further showing that the only other cell door locking issue was when Diamond placed a rag in the door to her cell 136. That issue was fixed by removal of the rag. Offender Diamond has compromised her own safety as the disciplinary records show by tampering with the cell door in this way.

2. Diamond has not established a substantial likelihood of success on the merits of her Fourteenth Amendment Equal Protection Claim (Count V and VI).

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Supreme Court has interpreted this clause as "a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985). To establish an equal protection violation, a plaintiff must allege, and ultimately prove, (1) that he or she is similarly situated with others who received more favorable

treatment, and (2) the discriminatory treatment was based on a constitutionally protected status or interest. *See Jones v. Ray*, 279 F.3d 944, 946–47 (11th Cir. 2001); *Damiano v. Fla. Parole & Probation Comm.*, 785 F.2d 929, 932 (11th Cir. 1986). The plaintiff also must plead specific facts showing the similarities of the comparators that he or she contends were treated more favorably. *Jackson v. Bellsouth Telecomm.*, 372 F.3d 1250, 1273–74 (11th Cir. 2004). And the plaintiff must allege, and ultimately prove, that the alleged different treatment was the result of a discriminatory motive or purpose. *See Sweet v. Sec'y, Dep't of Corr.*, 467 F.3d 1311, 1318–19 (11th Cir. 2006) (stating that the plaintiff must demonstrate that similarly situated persons outside his protected class were treated more favorably and that "the state engaged in invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis"); *see also Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1180 (11th Cir. 2009); *Parks v. City of Warner Robins*, 43 F.3d 609, 616 (11th Cir.1995) (requiring "proof of discriminatory intent or purpose" to show equal protection violation).

The equal protection clause requires similar treatment *for similarly situated persons*. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006) (noting "different treatment of dissimilarly situated persons does not violate the equal protection clause"). Comparators must be similarly situated in all relevant respects. *See id; accord Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202–03 (11th Cir. 2007).

To show discriminatory motive, the complaint must set forth more than "bare allegations of malice." *Terrero v. Watts*, 2003 U.S. Dist. LEXIS 27372, at *10 (S.D. Ga. Sept. 8, 2003). "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course

of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Diamond has not shown a likelihood of success on the merits of Counts V and VI of the amended complaint, which assert equal protection claims under the Fourteenth Amendment. In Count V, Diamond alleges that she is similarly situated to "cisgender women" who would be at risk if placed in men's prisons, yet she still has been placed in men's prisons. Diamond's motion takes aim at what she contends are gender stereotypes lurking behind GDC's placement determinations. But it is Diamond's motion that relies upon pure generalizations rather than pertinent facts. As evidence on the essential "similarly situated" component of her claim, Diamond's counsel have pulled and presented public information on the offenses that were committed by offenders who are held in women's prisons. (Presumably, similar offenses were committed by many offenders who are held in men's prisons). Whether Diamond as a transgender woman should be placed in a women's prison surely will not be determined by whether she committed the same offense as some offenders in women's prisons. Rather, more relevant in the analysis would be whether Diamond's presence in a women's facility may create security risks to her or to other offenders and whether, in connection with that risk, Diamond has demonstrated a willingness to ignore prison rules. There already is evidence before the Court that cuts against Diamond on both counts— she is sexually active, as is demonstrated by the disciplinary report and findings in relation to the October 31, 2020 incident, and she flaunts or ignores basic security rules, for example by blocking and tampering with locks and also by consorting with other offenders inside her cell. This is evidence that Diamond is a security risk, notably both to herself and to others, and she would be such a security risk at a women's facility. Because Diamond's equal protection argument is literally just that at this point in the case—a

legal brief without demonstrated undisputed evidence supporting the position put forth in the brief—preliminary injunctive relief should not be granted on this aspect of her lawsuit.

Diamond also has not shown a likelihood of success on Count VI of the amended complaint. Diamond asserts in Count VI supervisor liability claims based on the alleged "de facto placement ban" which she contends results in her being kept in a men's facility whereas, she further contends, similarly situated "cisgender women" are housed in female facilities where they are safer and better protected from offender assaults. But here again, as shown by the Atchison declaration and also by the Declaration of Ahmed Holt, there is no "de facto placement ban." Diamond's housing assignment was made after assessment of her medical and mental health condition, her transgender status, her stated housing preference—which, again, included her statement that she would be ok with placement in a medium-security men's prison—and then also after Mr. Holt and Mr. Toole considered and decided upon the placement at Coastal State Prison based on a number of health and security considerations that are identified in Holt's declaration. As further shown by the Holt declaration and also by the Declaration of Coastal State Prison Warden Brooks Benton, Diamond has been placed at Coastal State Prison for a number of reasons specifically related to her security, and she has been assigned to and consistently housed in a dormitory with other offenders who as a rule are focused on self-improvement and life after incarceration, not on committing rules infractions such as assaulting other offenders. None of this evidence suggests differential treatment based on sex.

Finally, Diamond's motion is deficient in another respect as to Count VI. The motion assumes, but provides no evidence, that as a transgender woman, Diamond will be safer in a women's facility. Here again, the motion relies on generalizations and presents no evidence

whatsoever on the experience and relative safety of transgender women in women's prisons. Absent real evidence on this point, Diamond has not made out her equal protection claims.

3. Diamond has not established a substantial likelihood of success on the merits of her Eighth Amendment medical deliberate indifference claim (Count VII).

In any Eighth Amendment deliberate indifference claim, success turns on whether the plaintiff can demonstrate an objectively serious medical need coupled with a defendant's knowing disregard of a risk of serious harm. *See Farrow*, 320 F.3d at 1243. "[O]nly the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (internal quotations omitted). The record must show acts or omissions "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986). Additionally, these acts or omissions must be sufficiently harmful to evidence "deliberate indifference to a serious medical need." *Estelle*, 429 U.S. at 106.

As these requirements make clear, "mere accidental inadequacy, negligence in diagnosis or treatment, or even medical malpractice" is not actionable under the Eighth Amendment. *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000). The plaintiff must show a "need for medical care and the intentional refusal to provide care" tantamount to a "subjective intent to punish." *Id.; Ancata v. Prison Health Svs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985). As with failure to protect claims against prison officers, a prison physician is not liable for known risks if they responded reasonably to the risk, even if the harm ultimately was not averted. *Chandler v. Crosby*, 379 F.3d 1278, 1290 (11th Cir. 2004).

The Eighth Amendment does not require prison officials to provide the most cutting-edge treatments available, but only an adequate level of treatment. *See Estelle*, 429 U.S. at 105; *see*

also United States v. DeCologero, 821 F.2d 39, 42 (1st Cir. 1987) ("[T]hough it is plain that an inmate deserves adequate medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy."). The Supreme Court has explained that "society does not expect that prisoners will have unqualified access to health care." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

Of particular importance in this case, an inmate cannot establish a constitutional violation simply because she "may have desired different modes of treatment" than that which was provided to her. *See Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1576 (11th Cir. 1985); *see also Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (Eighth Amendment "does not impose upon prison administrators a duty to provide care that is ideal, or of the prisoner's choosing"). One circuit court decision analyzing deliberate indifference in the context of a transgender inmate requesting additional treatment for her gender dysphoria described the issue as follows:

> [W]e have consistently held that prison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants. These holdings apply here because [plaintiff] is obtaining psychological counseling and hormone treatments, including estrogen and testosterone-blocking medication. Though prison officials have not authorized surgery or the hormone dosages that [plaintiff] wants, the existing treatment precludes a reasonable fact-finder from inferring deliberate indifference.

Lamb v. Norwood, 895 F.3d 756, 760 (10th Cir. 2018).

As described in detail below, Diamond has not shown a likelihood of success on the merits on Count VII of the amended complaint, which asserts that Defendants Lewis, Jackson, and Sauls have acted with deliberate indifference in violation of the Eighth Amendment by failing to provide adequate medical and mental health care. Specifically, Diamond claims that these defendants were subjectively aware of and yet knowingly disregarded recommendations by Diamond's care providers for specific forms of treatment for her gender dysphoria, including 1)

gender expression accommodations such as medicated hair removal treatments; 2) timely and consistent hormone treatments and monitoring of Diamond's blood work to ensure therapeutic hormone levels; and 3) transfer to a female facility. As discussed in further detail below, Diamond's claims that she has not received timely and consistent hormone therapy is shown to be incorrect by the documentary evidence, and her requests for treatments such as medicated hair removal do not fall within the ambit of Eighth Amendment protections. Most importantly, there has been no recommendation by a medical or mental health care provider that a transfer to a female facility is medically necessary to treat Diamond's conditions.

Defendants are providing with this response the declarations of Dr. Sharon Lewis, GDC's Statewide Health Director, and Dr. Marc Weinstein, GDC's Interim Statewide Mental Health Director and Chief Psychologist. *See* Declaration of Sharon Lewis ¶ 2; Declaration of Marc Weinstein ¶ 2. These officials are familiar with GDC's policy concerning the classification and management of transgender and intersex offenders, including offenders with gender dysphoria, and the individualized assessments and care Diamond has received under that policy. Lewis Decl. ¶ 3; Weinstein Decl. ¶ 3.

Based on a review of Diamond's records, Drs. Lewis and Weinstein state that she is regularly seen by medical and mental health care providers for a variety of complaints (including those related to gender dysphoria), each time receiving consultation, assessment, and treatment as determined by her providers. Lewis Decl. ¶ 15; Weinstein Decl. ¶ 9. Diamond has received and continues to receive treatment for her gender dysphoria as recommended and deemed necessary by her care providers, including regular counseling and therapy by a team of qualified practitioners, psychiatric medications, and hormone therapy. Lewis Decl. ¶ 24; Weinstein Decl. ¶ 18. Diamond has also been provided a comprehensive treatment plan to address her gender

dysphoria (among her other conditions), and her treatment plan is periodically reviewed and updated. Lewis Decl. ¶ 24; Weinstein Decl. ¶ 18. Diamond's condition is stable with treatment presently provided for her gender dysphoria. Lewis Decl. ¶ 24; Weinstein Decl. ¶ 18.

These statements are bolstered by the medical and mental health records, which show that upon entering into GDC custody, Diamond underwent screening to assess for potential mental health issues and was referred for specialty consultation with an endocrinologist to determine her medical need for hormone treatments. Lewis Decl. ¶ 7; Weinstein Decl. ¶ 7. The request for consultation with an endocrinologist was submitted on Diamond's behalf and promptly approved by GDC. Lewis Decl. ¶ 7. Diamond continues to receive hormone therapy as part of her treatment for gender dysphoria. *Id.* ¶ 8.

Contrary to Diamond's claim that she has had difficulty accessing hormone therapy and that the hormone therapy she receives is erratic and unmonitored, the medical records reflect that she has been seen by an endocrinologist on at least three occasions for monitoring, medication adjustments, and management of her hormone treatments since entering into GDC custody. *Id.* ¶ 10. For each consultation, blood work was completed allowing the endocrinologist to monitor Diamond's hormone levels and to adjust the dosages of her hormone treatments as medically warranted. *Id.* ¶ 12. The medical records further reflect that Diamond was seen by an endocrinologist as recently as April 21, 2021, and that she is currently scheduled to meet with him again on August 4, 2021. *Id.* ¶ 11. Diamond has consistently been receiving and continues to receive hormone therapy as determined and prescribed by her endocrinologist to treat her gender dysphoria. *Id.* ¶¶ 8, 13. In addition to hormone therapy, Diamond's mental health records reflect that she also receives psychiatric medications as prescribed by her mental health care providers to treat her gender dysphoria and related symptoms. Weinstein Decl. ¶ 9.

Discovery is needed to determine whether Diamond's other requests—including medicated hair removal products, gender expressive commissary items, and placement in a women's facility—are medically necessary as the case posits or merely Diamond's preferred forms of treatment. Importantly, there has not been any determination, finding, or formal recommendation by Diamond's care providers that these accommodations are medically necessary to treat her gender dysphoria. Lewis Decl. ¶¶ 22–23; Weinstein Decl. ¶ 17. Indeed, none of Diamond's care providers have submitted a referral or consultation request for medical intervention for gender dysphoria beyond what she is already receiving. Lewis Decl. ¶ 22. The only consultation requests submitted concerning Diamond's gender dysphoria have been requests for hormone treatments and consultations with an endocrinologist, all of which have been approved by GDC. *Id.* Thus it cannot be said that Defendants Lewis, Jackson, or Sauls disregarded a known risk that failing to provide Diamond with *her* requested accommodations (as opposed to requests by her care providers) would exacerbate her condition.

Given the level of medical and mental health care provided to Diamond, it is clear at this preliminary stage that Defendants' response to Diamond's medical needs has not been so poor as to constitute "an unnecessary and wanton infliction of pain." *Taylor*, 221 F.3d at 1258. Diamond has been provided with consistent care based on the assessments of her providers, including regular counseling and therapy, psychiatric medication, consultation with an endocrinologist, and hormone therapy. *See Lamb*, 895 F.3d at 760 (finding no deliberate indifference where gender dysphoric inmate was provided with psychological counseling and hormone treatments). There is no evidence that the care provided is grossly inadequate as would be required to show deliberate indifference. *See Rogers*, 792 F.2d at 1058. Therefore, Diamond

is unable to show a substantial likelihood of success on the merits at this early stage of the litigation.

B. Diamond has not shown that she will suffer irreparable injury unless the injunction issues.

"A showing of irreparable injury is 'the *sine qua non* of injunctive relief.'" *Siegel*, 234 F.3d at 1176 (quoting *Ne. Fla. Chapter of Ass's of Gen. Contractors of Am.*, 896 F.2d at 1285). To make such a showing, the irreparable harm "'must be neither remote nor speculative, but actual and imminent.'" *Id.* (quoting *Ne. Fla. Chapter of Ass's of Gen. Contractors of Am.*, 896 F.2d at 1285). Stated differently, the movant must establish "that the irreparable harm is not merely possible, but likely." *United States v. Jenkins*, 714 F. Supp. 2d 1213, 1222 (S.D. Ga. 2008) (citing *Winter*, 555 U.S. at 24). "[E]ven if Plaintiff establishes a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Siegel*, 234 F.3d at 1176 (citing *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11th Cir. 1990)).

1. The evidence suggests that the alleged irreparable harm to Diamond is speculative and hypothetical rather than actual and imminent.

Diamond contends that without the requested injunctive relief, she will "suffer severe physical and emotional injury, including sexual abuse, sexual assaults, depression, anxiety, suicidal ideation, worsening PTSD, and suicide and self-castration attempts." ECF No. 50-1 at 33. It bears repeating that to qualify for preliminary injunctive relief, the harm alleged must be "actual and imminent" or "real and immediate" as opposed to harm that is "merely conjectural or hypothetical." *Siegel*, 234 F.3d at 1176; *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994); *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) ("To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'")

(quoting *Wis. Gas. Co. v. Fed. Energy Regul. Comm'n*, 758 669, 674 (D.C. Cir. 1985)). In this instance, the documentary evidence submitted by Defendants suggests that the alleged irreparable harm to Diamond is neither certain nor imminent.

First, as previously shown, whether or not Diamond has been subjected to physical "assaults" is disputed. Diamond is currently housed in a facility—and in a dormitory within that facility—that has been specifically selected for her safety. Moreover, Diamond's allegations of physical "assault" go too far back to reasonably show that future harm is imminent.

With respect to Diamond's allegation that denying the requested relief will cause her to become depressed, anxious, and suicidal, the medical and mental health records reflect that Diamond generally denies experiencing suicidal ideation. *See* Weinstein Decl. ¶ 11. Thus, any allegation that she is faced with an "actual and imminent" risk of suicide or self-harm is directly contradicted by her statements to her care providers. There is also no medical encounter form, progress record, physician's order, or other document reflecting that Diamond has received medical treatment for a suicide attempt while in GDC custody. Lewis Decl. ¶ 20. If Diamond were to experience an acute crisis, her care providers have the option to admit her to a specialized care unit that provides a higher level of observation and treatment. *See* Weinstein Decl. ¶ 16.

This is not to say, however, that the risk of suicide should be ignored or downplayed. It is true, as Diamond's motion argues, that depression, anxiety, self-injurious behavior, and suicidal ideation are substantial harms that may rise to the level of an irreparable injury. *See, e.g.*, *Edmo v. Corizon, Inc.*, 935 F.3d 757, 798 (9th Cir. 2019) ("[O]ngoing psychological distress and the high risk of self-castration and suicide . . . constitute irreparable harm."); *Tugg v. Towey*, 864 F. Supp. 1201, 1209 (S.D. Fla. 1994) ("Psychological stress which could lead to suicide"

may constitute an "irreparable injury"); *Chalk v. United States Dist. Court*, 840 F.2d 701, 709 (9th Cir. 1988) (emotional distress, depression, and anxiety may constitute irreparable injury). It is also true that Diamond has a self-reported history of suicide attempts before entering into GDC custody and that she has engaged in self-injurious behavior (specifically, attempts to self-castrate by binding her genitals) while in Defendants' custody.

However, as described in detail above, Diamond has received and continues to receive treatment for these conditions as recommended and deemed necessary by her care providers, including regular counseling and therapy by a team of qualified practitioners, psychiatric medications, and hormone therapy. Lewis Decl. ¶ 24; Weinstein Decl. ¶ 18. For purposes of determining whether an inmate is likely to suffer irreparable harm while the litigation is pending, courts have often looked to whether the inmate has been provided with some form of adequate treatment as opposed to no treatment at all. *Compare Dollar v. Kemp*, 2011 U.S. Dist. LEXIS 73919, at *7–8 (S.D. Ga. May 25, 2011) (inmate failed to establish substantial threat of irreparable injury where the pleading "shows that he received medical treatment—albeit not treatment that was to his liking"), *with D'Amico v. Montoya*, 2016 U.S. Dist. LEXIS 121686, at *5–7 (N.D. Fla. July 28, 2016) (where the "[inmate] has shown the total withdrawal of treatment, and Defendants have not shown any treatment provided," the requested preliminary junction should issue because "[n]ot providing any treatment . . . creates a serious risk of irreparable harm."); *see also Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004) (inmate demonstrated "imminent danger of serious physical injury" for purposes of 28 U.S.C. § 1915(g) where prison officials "completely withdrew [his] prescribed treatment" for HIV and hepatitis). As these cases hold, any threat of irreparable harm to Diamond is greatly ameliorated by the care she is receiving.

2. Diamond's assertion that she will suffer irreparable harm is undercut by her delay in bringing this motion.

Diamond's delay in bringing this motion demonstrates that she is not at risk of irreparable harm while this case proceeds in the normal course. Diamond in her motion alleges that she has endured numerous sexual assaults and been deprived of medically necessary care since her October 2019 return to custody. ECF No. 50-1 at 10–17. Yet despite the allegedly "endless torrent" of sexual harassment and abuse, *id.* at 12, Diamond has delayed bringing this motion until a year and a half after her return to GDC custody and four months after the commencement of this lawsuit.

It is well established that a delay in seeking a preliminary injunction weighs against a finding of irreparable harm. *See, e.g.*, *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2006) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm."); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985) ("[F]ailure to act sooner 'undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.'") (quoting *Le Sportsac, Inc. v. Dockside Research, Inc.*, 478 F. Supp. 602, 609 (S.D.N.Y. 1979)). Because Diamond has delayed in bringing her motion for preliminary injunctive relief, the Court should find she is unlikely to suffer irreparable harm while the case proceeds in the normal course.

C. Because there is no threat of irreparable injury, the balancing of interests weighs in favor of Defendants.

A movant for preliminary injunctive relief must also show that "the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party." *Siegel*, 234 at 1176. "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973). It is the established law of this circuit that courts "must afford 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures . . . consistent with consideration of costs and limited resources,'" *Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005)); *see also Pope v. Hightower*, 101 F.3d 1382, 1385 n.2 (11th Cir. 1996) ("Federal courts must scrupulously respect the limits on their role by not thrusting themselves into prison administration; prisoner administrators must be permitted to exercise wide discretion in the bounds of constitutional requirements.").

Diamond argues that she is entitled to a preliminary injunction because the alleged risk of harm to her (i.e., sexual abuse and assault, depression, anxiety, and the possibility of self-harm) is more serious than any risk of harm to Defendants. As noted above, however, the alleged risks of irreparable harm to Diamond are simply too speculative and are greatly ameliorated by being housed in a dormitory specially selected for her safety and by the regular medical and mental health treatment she receives. At the other end of the scale rests the potential burden of the Court's interference in matters of internal prison administration. Where, as here, "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner v. Safley*, 482 U.S. 78, 90 (1987). For this reason, the Court should find that

the potential damage to Defendants outweighs any alleged threat of irreparable harm to Diamond.

D. Diamond's requested relief would be adverse to the public interest.

Finally, Diamond's requested injunctive relief would be adverse to the public's interest in allowing prison officials to see to the daily administration of prisons free from judicial interference.

In enacting the Prison Litigation Reform Act of 1995 ("PLRA"), Congress placed limits on the scope of prospective relief that a federal court may enter in prison litigation. *See* 18 U.S.C. § 3626(a)(1). The limitations are consistent with the Supreme Court's view that federal courts should have less involvement in state prison systems. *See Parrish v. Ala. Dep't of Corr.*, 156 F.3d 1128, 1129 n.2 (11th Cir. 1998) (citing *Sandin v. Conner*, 515 U.S. 372, 481 (1995); H.R. Conf. Rep. 104–378 (1995) (stating that Congress designed § 3626 to ensure that prospective relief is the "minimum necessary to correct the violation of a federal right")). The PLRA specifically limits the scope of a federal court's authority to enter prospective relief as follows:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

As the cited text makes clear, among the essential prerequisites to the imposition of prospective injunctive relief in prison litigation are: (1) a finding of a violation of a constitutional right; and (2) an adequate description of the relief that is requested such that the federal court can

make a determination that the relief is "narrowly drawn, extends no further than necessary to correct the violation . . . and is the least intrusive means necessary to correct the violation." *Id.*

Aside from its failure to show a constitutional violation by any of the Defendants, Diamond's request for injunctive relief asks the Court to enjoin Defendants from using male correctional officers to strip-search Diamond absent exigent circumstances. It also requests that the Court direct Defendants to transfer Diamond to a female facility and to provide gender expression accommodations such as medicated hair removal treatments, access to female commissary items, and female hairstyle and grooming standards. Rather than being tailored to address a constitutional violation, the motion plainly seeks to interfere with the normal operation of the prison system. Diamond has failed to satisfy her burden as to each of the prerequisites and certainly has not satisfied the heightened burden of a mandatory injunction. *See Callander*, 256 F.2d at 415; *Dantzler, Inc.*, 2013 U.S. Dist. LEXIS 78664, at *3. For these reasons, Diamond's motions should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Diamond's requests for the extraordinary remedy of preliminary injunctive relief and allow the case to proceed in the normal course.

[Signature page follows]

Respectfully submitted this 5th day of May, 2021.[3]

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[3] Defendants' Consolidated Response in Opposition to Plaintiff's Motion for a Preliminary Injunction and Motion for Protective Order was originally filed on May 3, 2021. *See* ECF No. 77. On May 4, 2021, Defendants received a Notice of Deficiency concerning the excess number pages in their brief and the formatting of declarations submitted in support thereof. Defendants were directed to first obtain leave from the Court and then resubmit their filing in its entirety. Defendants have requested and obtained leave from the Court to file excess pages, *see* ECF No. 83, and are resubmitting this consolidated response and the supporting declarations in their entirety to correct this inadvertent error.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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