IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00756-PAB

EDWARD NELLSON, individually, and
a CLASS of similarly-situated persons,

Plaintiffs,

v.

WARDEN J BARNHART, in his individual and official capacity, and
UNITED STATES FEDERAL BUREAU OF PRISONS,

Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE [ECF No. 17] TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Mr. Edward Nellson, by and through undersigned counsel, hereby submits his Reply to Defendants' Response to Motion for Temporary Restraining Order and Preliminary Injunction:

INTRODUCTION

Defendants want Mr. Nellson and all other prisoners within USP Florence to wait three months before filing this lawsuit to exhaust their administrative remedies while COVID-19 runs rampant. The law, as applied to these facts, does not require Mr. Nellson and other prisoners to risk death while Defendants deny grievance after grievance. *Fletcher v. Menard Correctional Center*, 623 F.3d 1171, 1173 (7th Cir. 2010). Defendants promised many precautions in their Response, such as hand soap for all prisoners, but Mr. Nellson and other prisoners have no hand soap, hand sanitizer, or other precautions available.[1]

[1] Undersigned counsel represents that Mr. Nellson reported the factual assertions regarding Defendants' inactions. Undersigned counsel attempted to speak with Mr. Nellson to obtain his

REFUTATION OF DEFENDANTS' FACTUAL BACKGROUND

In their Response, Defendants explained the numerous precautionary measures they are allegedly taking to prevent the spread of COVID-19. Response, ECF No. 17 at 2-9. Unfortunately, though, as of Wednesday, April 9, 2020, Defendants are not protecting the prisoners and are not providing these precautionary measures.

While USP Florence has placed its prisoners in lockdown, prisoners are otherwise unprotected and open to risk. Defendants claim that prisoners have "access to sinks, water, and soap at all times." ECF No. 17 at 7. However, Mr. Nellson and his fellow prisoners have no hand soap available. They also do not have any hand sanitizer. Defendants' have explained to Mr. Nellson and other prisoners that they have run out of hand soap and hand sanitizer. Within the close confines of the prison and without the ability to wash their hands consistently, Mr. Nellson and other prisoners run an elevated risk of catching and spreading COVID-19. Additionally, Defendants claim that "all [prisoners] and staff were provided protective face masks for daily use." ECF No. 17 at 8. Defendants have provided masks to prisoners, but these masks are flimsy cloth masks rather than protective face masks (like the N-95 respirator masks that Defendants claim to have an abundance of) that would help prevent the spread of COVID-19. Moreover, Defendants have failed to either provide their employees masks or they have failed to implement procedures requiring their employees to wear masks, because the Bureau of Prisons ("BOP") employees who work daily with these prisoners fail to wear any protective gear at all, including masks.

declaration after this Court's order on April 9, 2020, but his counselor was unable to schedule a call prior to the filing deadline. Mr. Nellson will supplement this Reply with his declaration this week after he can speak with undersigned counsel.

Defendants also recognize the necessity of social distancing, claiming they have taken steps to promote distancing in addition to locking the complexes down. ECF No. 17 at 7. Despite this, Defendants are forcing prisoners out of their cells into spaces such the law library or the restrooms, in which it is impossible for prisoners to be more than two feet apart at all times.[2]

COVID-19's presence in USP Florence, or even the Federal Correctional Complex broadly, is not a question of if, but when. As of April 12, 2020, there are 352 federal prisoners and 189 BOP staff who have confirmed positive test results for COVID-19 nationwide across 40 BOP facilities. Federal Bureau of Prisons, "COVID-19 Virus," Apr. 12, 2020, available at: https://www.bop.gov/coronavirus (last accessed April 13, 2020). Thus far, COVID-19 has caused ten federal prisoners' deaths. *Id.* There are now seven confirmed cases of COVID-19 in Fremont County, where FCC Florence is located, and fifty-eight confirmed cases in nearby Pueblo County. https://covid19.colorado.gov/case-data (last accessed April 12, 2020). Note that this is a change from the original TRO motion at which point there were no cases in Fremont County and only one case in Pueblo County. Defendants must act now to protect both their prisoners and staff.

ARGUMENT

I. Mr. Nellson Has Carried His Burden of Showing a Likelihood of Success

The administrative remedy system established in the BOP is not available to Mr. Nellson. Even assuming, *arguendo*, that it is available, it falls into one of the *Ross* exceptions as a "dead end," and Mr. Nellson requires a separate exception due to the urgent nature of COVID-19.

[2] Of additional concern, Defendant BOP planned a cell rotation for the U.S. Penitentiary – Administrative Maximum facility, located on the same complex as USP-Florence, for April 11, 2020. Such a procedure would place a large number of prisoners at great risk of contracting COVID-19, as each cell would not be properly sanitized prior to each new occupant moving in.

A. Defendants' Administrative Remedy Program is Not an Available Program Through Which Mr. Nellson Can Obtain Immediate Relief

The Prison Litigation Reform Act requires prisoners to exhaust "all such administrative remedies as are available." 42 U.S.C. § 1997e(a). The Court recognized, "the ordinary meaning of the word 'available' is capable of **use for the accomplishment of a purpose**, and that which is accessible or may be obtained." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (internal quotation marks omitted); *see also Booth v. Churner*, 532 U.S. 731, 737-38 (2001). This definition takes into account whether an imminent risk of severe harm poses such a danger as to render exhaustion unavailable. *Fletcher v. Menard Correctional Center*, 623 F.3d 1171, 1173 (7th Cir. 2010).

In *Fletcher*, the court clearly stated, "If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available."[3] *Id.*; *see also Thornton v. Snyder*, 428 F.3d 690, 695-96 (7th Cir. 2005); *Dixon v. Page*, 291 F.3d 485, 491 (7th Cir. 2002); *Kaemmerling v. Lappin*, 553 F.3d 669, 675 (D.C. Cir. 2008); *Beharry v. Ashcroft*, 329 F.3d 51, 58 (2d. Cir. 2003). The court also hypothesized, "[i]f it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of some relief' and so nothing for the prisoner to exhaust." *Id.* at 1174; *see also Ross*, 136 S. Ct. at 1859 (reasoning that a prisoner is only required to exhaust his administrative remedies that "are capable of use to obtain some relief for the action complained of.") (citation omitted).

[3] To be sure, the same court stated that imminent danger does not excuse the duty to exhaust *available* administrative remedies. *Fletcher*, 623 F.3d at 1173. Here though, the remedies were unavailable.

In this case, each day is significant because Mr. Nellson and other prisoners are confronted by a pandemic virus that is spreading like wildfire across prisons and our general population. *See, e.g.*, *Mays v. Dart*, JC-IL-0054-0002, Doc. 1 (N.D. Ill., Apr. 3, 2020) (describing the rapidly escalating public health disaster occurring in Cook County Jail, where both prisoners and staff are contracting COVID-19 at an alarming rate). In response, Defendants demand Mr. Nellson use their "four-step administrative remedy program" to exhaust his claim here, a process that would take approximately **ninety days to complete**. *See* ECF No. 17 at 12; *see also* 28 C.F.R. §§ 542.10-542.19.[4] An administrative remedy program that provides exhaustion after ninety days is not "capable of use for the accomplishment of [the] purpose[s]" these prisoners require to prevent a known and serious risk of death from COVID-19. *Ross,* 136 S. Ct. at 1858.

Relevantly, the first confirmed case of COVID-19 in the United States occurred on January 20, 2020. Michelle Holshue, et al., First Case of 2019 Novel Coronavirus in the United States, 382 N Engl J Med. 2020 929-36, (March 5, 2020). On the date of this filing (April 13, 2020), it has been eighty-four days since COVID-19 was confirmed in the United States. Even if Mr. Nellson had begun exhausting his administrative remedies when COVID-19 first started spreading in this country, he still would not have completed the exhaustion process today. Defendants' administrative remedy program crawls at such a slow pace that it cannot and does not offer any "possible relief in time to prevent the imminent danger from becoming an actual harm." *Fletcher*,

[4] Mr. Nellson recognizes that he may be able to skip the first step by submitting his request for relief to the Regional Director first if he explains it is a sensitive issue, and the Regional Director has discretion to decide if it is sensitive or not. 28 C.F.R. § 542.14(d). Though Mr. Nellson assumes Defendants intentionally omitted this from their Response, even achieving this only shortens the process by twenty days. Mr. Nellson would still be subject to seventy days while waiting for the remaining responses.

623 F.3d at 1173. Mr. Nellson and the other prisoners need immediate relief. The only way to ensure that Mr. Nellson and the prisoners are protected is an Order from this Court, as evidenced by Defendants' argument that they are doing enough yet Mr. Nellson has not seen these changes. *See* Response at 2-7. If Mr. Nellson must wait three more months to exhaust his administrative remedies, this lawsuit will be too late. Additionally, if this Court determines that there are available administrative remedies for Mr. Nellson to pursue, he also qualifies for both explicit and implicit exceptions under *Ross*.

B. Mr. Nellson Qualifies for Both the "Dead End" Exception and an Emergency Exception to the Exhaustion Requirement

Defendants essentially rest their argument on *Ross* to show Mr. Nellson does not qualify for an exception. ECF No. 17 at 1. Defendants' argument fails, however, from the beginning because it distorts the language of *Ross*.

In *Ross*, the Court established three circumstances in which administrative remedies were effectively unavailable to the plaintiff, thereby creating exceptions to the exhaustion requirement: (1) when the administrative procedure operates as a "dead end;" (2) when the administrative scheme is so opaque it is incapable of use; and (3) when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, 136 S. Ct. at 1859-60. Defendants begin their argument by stating "[i]n fact, the *only* exception to the exhaustion requirement is when the administrative remedy process is 'unavailable'" as established in *Ross*. Response at 11 (citing *Ross*, 136 S. Ct. at 1858). This distorts the holding of *Ross* by making these categories appear to be exclusive.

Contrary to Defendants' position though, in *Ross*, the Court prefaced its list of categories by first stating "[b]uilding on our own and lower courts' decisions, we note *as relevant here* three

kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief . . .” *Ross*, 136 S. Ct. at 1859 (emphasis added). A number of courts have recognized these categories are non-exhaustive. *See e.g., Williams v. Correction Officer Priatno*, 829 F.3d 118, 124 n. 3 (2d. Cir. 2016) (“We note that the three circumstances discussed in *Ross* do not appear to be exhaustive, given the Court’s focus on three kinds of circumstances that were ‘relevant to’ the facts of that case.”); *accord, Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017); *Doe v. County of Milwaukee*, 2017 WL 1843262, *7 (E.D. Wis., May 5, 2017); *Millner v. Biter*, 2017 WL 735688, *4 (E.D. Cal., Feb. 24, 2017); *Mena v. City of New York*, 2016 WL 3948100, *4 (July 19, 2016).

Here, Mr. Nellson certainly qualifies for the exception under *Ross* because the Defendants’ administrative remedy operates as a “dead end.” Defendants’ Response itself demonstrates exactly this; Defendants assert they are already taking proper measures to protect its prisoners and its staff. Response at 12-13. Defendants believe their conduct already falls within constitutional standards, indicating no change would occur even if Mr. Nellson had grieved these issues. *Id.* Such a result would leave Mr. Nellson and his fellow prisoners woefully unprepared for COVID-19 because Defendants are not implementing the most basic of protections, such as providing hand soap or hand sanitizer, or systematically screening prisoners. If Mr. Nellson and his fellow prisoners are required to wait three more months before petitioning this Court for relief, they risk meeting a very literal “dead end.”

Additionally, because *Ross* was not exclusive in its list of exceptions, Mr. Nellson cannot be expected to delay his cry for help in an emergency such as this. COVID-19 is spreading rapidly and will soon be at the steps of USP-Florence. If Defendants do not implement the requisite change

now, all prisoners, including Mr. Nellson, will continue to risk infection and even death from COVID-19. *See, e.g.*, *Mays v. Dart*, JC-IL-0054-0002, Doc. 1 (N.D. Ill., Apr. 3, 2020).

C. Mr. Nellson is Likely to Succeed on his Eighth Amendment Claim

Defendants concede the objective element of Mr. Nellson's Eighth Amendment claim; as their Response and attached declarations make clear, COVID-19 is an extremely serious threat to both prisoners and staff. *See, e.g.*, ECF No. 17 at 2-7; ECF No. 17-1, Hemlie Declaration at ¶¶ 5-6.

Defendants argue that Mr. Nellson has not shown that they have failed to respond to the COVID-19 crisis by detailing the measures they are supposedly taking over seven pages of their Response. ECF No. 17 at 2-9. However, these measures must be *implemented* to be effective. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (establishing that the government is obligated to provide medical care to its prisoners and failure to do so causes unnecessary and wanton infliction of pain). As of now, Defendants have not taken reasonable steps to abate the risk of COVID-19.

As described above, Mr. Nellson and other prisoners have access to neither soap nor hand sanitizer at USP Florence, despite Defendants' claims that they are "providing soap for hand-washing." ECF No. 17 at 14. Defendants also are not systematically testing the prisoners' temperatures and are only allegedly testing their employees' temperatures upon entering the facilities, even though Defendants know that a fever is a tell-tale sign of COVID-19. *See, e.g.*, ECF No. 17-1 at 25. The masks that Mr. Nellson and the other prisoners have are simple cloth masks, not the protective masks such as the N-95 respirator masks that Defendants say they have plenty of. ECF No. 17 at 8. Moreover, Defendants specifically state that its staff "were provided protective face masks for daily use." ECF No. 17 at 8. Mr. Nellson has not seen a single staff

member wear a protective mask in the prison. Defendants also acknowledged themselves that prisoners are only allowed to wash their laundry "*at least once weekly*." ECF No. 17 at 8 (emphasis added). This practice hardly maintains sanitary conditions in the face of a pandemic. Finally, Mr. Nellson and other prisoners cannot maintain social distancing in communal areas such as the restrooms or the law library; they can only be two feet apart in those spaces at most. Notably, this is not an isolated incident of misrepresentations; Defendants have also misrepresented their efforts in at least one other case involving the Metropolitan Detention Center in New York. Ex. 1 (demonstrating that infected prisoners have not been held in isolation nor have BOP staff been given sufficient protection gear, despite the BOP's representations about their practices).

It naturally follows that a failure to take reasonable steps to mitigate a serious risk of harm from a pandemic virus necessitates a conclusion of deliberate indifference. *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005) ("[I]t is enough that the official acted or failed to act *despite his knowledge of a substantial risk* of serious harm.") (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). As clearly outlined in both Defendants' Response and the declarations attached thereto, Defendants are fully knowledgeable about COVID-19 and the risk it poses to both the prisoners and the BOP's staff. *See generally*, Response, ECF No. 17. Defendants are also undoubtedly aware of these concerns, as they have been raised in other lawsuits at different facilities. *See, e.g.*, *Chunn v. Edge*, 1:20-cv-01590, Doc. No. 1 (E.D.N.Y. Mar. 27, 2020); *Livas v. Myers*, 2:20-cv-00422-TAD-KK, Doc. No. 1 (W.D. La., Apr. 6, 2020). Yet, despite this knowledge, Defendants still expect Mr. Nellson and others to wait ninety days to exhaust their claims while Defendants fail to implement the bare minimum measures to protect them. *Id.*; Response at 13-17.

CONCLUSION

This is a matter of life and death. The Court must act.

Respectfully submitted this 13th day of April 2020.

/s/ Maria-Vittoria G. Carminati
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April 9, 2020

BY ECF AND EMAIL

Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: United States v. Rabadi
13 Cr. 353 (KMK)

Dear Judge Karas:

We write to briefly supplement our reply, filed this morning, based on factual information we just received from correctional staff at the MDC that directly contradicts information provided by the BOP to the government, and relied on by the government in opposing Mr. Rabadi's compassionate release, with respect to the measures being taken by the BOP to control the spread of COVID-19 within the facility. Specifically, we learned that the Vice-President of the Union that represents correctional staff at the MDC sent the below email to the Warden of the MDC this morning:

Good morning,
The Preamble states that we recognize that the employees are the most valuable resource of the agency.
It has come to the Union's attention that management has shown that inmates are the most valuable asset to the Bureau. Can we please address the following concerns:

Why are staff not quarantined who have been in direct contact with inmates who have tested positive or were symptomatic? Meanwhile, you are quarantining an entire unit, and not saying a word to those staff members left behind.
When will we show staff that we care about them? You only gave us 2 surgical masks to enter the building for protection, one more mask than you gave the inmates to reuse weekly.

Why do we have 2 inmates who tested positive on regular housing units? J-73 and G-43. These inmates were released to general population even before 7days of quarantine. Why aren't those

housing units on quarantine with appropriate PPE for staff? if a staff member gets sick or even dies from the COVID19 virus in one of these units it's now noted that you were well aware. We are asking for N-95's on those units and for all staff entering these housing units.

Once staff test positive why haven't we informed all staff who have been in direct contact with those individuals? Why are they not quarantined? Why are we not appropriately informing the staff?

Rhonda Barnwell,
A.F.G.E Local 2005 - Deputy Chief
U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Detention Center
80 29th Street Brooklyn, NY 11232
[redacted]

The BOP has repeatedly asserted in litigation in the Southern and Eastern Districts of New York that it is containing the spread of coronavirus by keeping positive and symptomatic inmates on isolation (*Gov't Opp.* at 17-18; April 9 Letter to Chief Judge Mauskopf, pursuant to Administrative Order No. 2020-14, from Warden Edge and Warden Licon-Vitale, attached as Ex. A), but the Union, whose members are required to work inside the facility every day, states that two inmates who have tested positive were returned to regular housing units after less than 7 days, that those units are not now quarantined, and staff on those units have not been given appropriate personal protective gear. The Union also raises the clear problem of exposed staff not being quarantined, but rather, continuing to work on the units, and of staff members not being informed when other staff members whom they were in contact with have tested positive.

These assertions by the Union call the credibility of the BOP's representations about the practices at MDC Brooklyn into serious question and further speak to the risk to all the inmates from such practices that are contrary to the CDC's advice, and in particular the risk to vulnerable inmates such as Mr. Rabadi.

Respectfully Submitted,

/s/
Sylvie J. Levine
Deirdre D. von Dornum
Federal Defenders of New York

CC: AUSA Daniel Richenthal
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