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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

JUDITH REGAN, JANE DOE, JANE MOE, SUSAN SORENSEN and SANG YO WATTERS, on behalf of themselves and all others similarly situated, Plaintiffs, v. COUNTY OF SALT LAKE; DARREL B. BRADY, individually and as Commander of Salt Lake County Jail; ROBERT SALTER, as Salt Lake County Commissioner; WILLIAM DUNN, as Salt Lake County Commissioner; JACQUELINE LLOYD, ANNICK COOMBS, and JANE FOES I, II, and III, individually and as officers or agents of Salt Lake County, Defendants.	Case No. C-80-131J **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TERMINATE CONSENT DECREE.** Honorable Bruce S. Jenkins

Plaintiffs oppose the motion of defendants to terminate the consent decree and file this memorandum in support of that opposition.

POINT I

THE DEFENDANTS' OWN PROCEDURES ARE CONTRADICTORY AND AMBIGUOUS, PARTICULARLY WHEN THE EMAIL ATTACHED TO DEFENDANTS' MEMORANDUM IS REVIEWED

Attached to the New Policy (Salt Lake County Jails Policy Manual, Revised July 7, 2001) is an email message from Carol McAlister to SH Corrections Bureau DL dated February 19, 2004 (Exhibit B, Plaintiffs' Motion for Appointment of an Expert). This email message appears to contradict parts of the published policy in Attachment B. It is unclear what relationship this email has to the rest of the defendants' strip search policy, whether this email has been incorporated into the policy, and what section(s) of the policy it amends or supersedes. Without further information about the source, reason for, and use of this email, it is impossible for anyone to determine precisely what the current search policies at the jail actually are.

Only by having a qualified expert review the procedures and report to the Court will it be possible to determine if the procedures comport with constitutional requirements.

POINT II

THIS COURT SHOULD NOT RULE ON TERMINATION OF THE CONSENT DECREE WITHOUT GIVING PLAINTIFFS THE OPPORTUNITY TO PRESENT FINDINGS THAT PROSPECTIVE RELIEF REMAINS NECESSARY TO CORRECT THE VIOLATION OF FEDERAL RIGHTS.

18 U.S.C. Section 3626(b)(3) of the Prison Litigation Reform Act provides that a consent decree granting prospective relief

> "shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation."

As one Tenth Circuit court has noted, "the party opposing termination must be given the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations." Ginest v. Bd. of County Comm'rs., 295 F. Supp. 2d 1274, 1276 (D. Wyo. 2003). The party must be allowed to present additional evidence because, "the PLRA directs a district court to look to current conditions, and because the existing record at the time the motion for termination is filed will often be inadequate for purposes of this determination." Id.

In Ginest, the defendant government officials moved for immediate termination of a 1987 consent decree without allowing the plaintiff to present evidence of ongoing violations. Id. at 1275. The court rejected this argument, finding that the plaintiffs were "entitled to pursue discovery and that the Court must first hold an evidentiary hearing as to the existence of alleged ongoing and continuing constitutional violations by the defendants." Id. Citing numerous other courts, including the Sixth, Eighth, and Eleventh Circuits, the court reasoned that to refuse to hold a hearing and allow the party opposing the motion to present evidence prior to terminating a consent decree "would read all meaning out of [§ 3626(b)(3)]." Id. at 1276 (citing Loyd v. Ala. Dep't. of Corrections, 176 F.3d 1336, 1342 (11th Cir.), cert. denied, 528 U.S. 1061 (1999)).

In this case, Plaintiffs have not provided information about present policies, actions or complaints, nor been given the opportunity to present evidence of current and ongoing violations at the jail. Therefore, the court should appoint an expert pursuant to Federal Rules of Evidence 706 so that Plaintiffs may have an opportunity to supplement the record with current information. See, e.g., Hadix v. Johnson, 228 F.3d 662, 671 (6th

Cir. 2000); Laaman v. Warden, N.H. State Prison, 238 F.3d 14, 18-19 (1st Cir. 2001); Gilmore v. California, 220 F.3d 987, 1008-09 (9th Cir. 2000). The appointment of an expert or provision for a similar discovery mechanism would assist the court in making the necessary "written findings based on the record" that relief "remains necessary to correct a current and ongoing violation of the Federal right" and meets the same requirements of narrowness and least-intrusiveness as required for the initial entry of relief. 18 U.S.C. § 3626(b)(3). An evaluation of current procedures and actual practices at the Salt Lake County Jail would provide the Court with current information upon which it may base its determination.

The Jail's own current policy on prisoner searches (Defendants' "Attachment 'B,'" or "New Policy") demonstrates the need for a court-appointed expert to examine conditions at the Jail. Many of these policies range from ambiguous to highly invasive and suggest a high likelihood that there are current and ongoing violations of a Federal right at the Jail. In fact, the search procedures at the Jail are substantially similar in many respects to the December 20, 2004, version of the same procedures ("1978 Policy")—a policy that was inadequate to prevent the kind of abuses that led to the entry of the consent decree. Worse, in some cases safeguards that were in place to limit unreasonable searches even before the consent decree was entered have actually been removed in the New Policy. Even without the safeguards imposed by the PLRA itself, a comparison of these two manuals shows the need for further discovery before the court makes a determination whether there are ongoing violations of Federal rights at the Jail.

For instance, the 1978 Policy provides that, "Women will, of course, be searched by matrons instead of Escort Officers." 1978 Policy at 3625.00. That policy was in place

for both frisk searches and strip searches. The 1978 Policy also provides that strip searches are to be conducted in the dressing room. Id. at 3620.02(1).

The New Policy makes no such provisions. Instead, it provides that strip searches of prisoners may be observed by staffers conducting or assisting with the search, or by staff members working in the area. New Policy at F03.03.05(A)(2). There is no longer any restriction as to the sex of the personnel who may observe or conduct a strip search. The New Policy also does not provide where strip searches may be conducted. In fact, the New Policy is similarly permissive concerning visual body-cavity searches, making no provision for prisoners only being searched by members of the same sex. Instead, any "staff members conducting or assisting with the search" may observe this extremely invasive search. New Policy at F03.03.06(B)(1).

As another example of potential problems with the New Policy, the 1978 Policy provided that if during a body cavity search the individual conducting the search observed a string, balloon, or other item protruding from the anus or vagina, he or she could ask the inmate to remove it. If the inmate refused, he or she was to be kept under watch until a medical person arrived to remove it. 1978 Policy at 3/06-06.02, .03. The Defendants' New Policy ("Attachment B") contains no provision instructing what an officer may properly do if an object is seen protruding from a body cavity. This ambiguity could easily lead to the violation of a Federal right.

CONCLUSION

This court should reserve ruling on the Defendants' motion until it appoints an expert pursuant to Federal Rule of Evidence 706 to observe conditions at the Jail and report to the Court. The expert will provide the court with facts needed for written

findings whether prospective relief remains necessary to correct a current and ongoing violation of a Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

DATED this _____ day of November, 2004.

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Certificate of Service

I hereby certify that on the _____ day of November, 2004, a true and correct copy of the above and foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TERMINATE CONSENT DECREE was mailed, first-class postage prepaid, to:

David E, Yocum, Esq.
Salt Lake County District Attorney
Patrick F. Holder, Esq.
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