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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

COLUMBIA COUNTY; COLUMBIA COUNTY SHERIFF'S OFFICE; JEFF DICKERSON, individually and in his capacity as Columbia County Sheriff,

Defendants.

No. 3:12-CV-71-SI

PLN'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT ON DEFENDANTS' FAILURE TO MITIGATE AFFIRMATIVE DEFENSE

Defendants' asserted affirmative defense seeks to break new ground, claiming that citizens of this Country have a duty to refrain from exercising their First Amendment rights whenever they believe the government might violate their free speech. Defendants' defense is illegitimate and futile as a matter of law, and unsupportable as a matter of fact.

I. FACTS

The facts establishing Defendants' violations of Constitutional rights of prisoners and their correspondents, including PLN, are described in the Court's order granting a preliminary Injunction. Dkt. 64 at 5-9; *see also* Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, Dkt. 15, at 4-13; Memorandum in Support of Plaintiff's Motion for Summary Judgment on Claims of Declaratory and Injunctive Relief, Dkt. 98.

II. ARGUMENT

The issue presented by this Motion is question of law: does an entity or person who suffers repeated acts of censorship and repeated denials of due process notice and an opportunity to appeal censorship decisions have a legal duty to attempt to persuade the violators to mend their ways before the person or entity exercises the Constitutional rights again? The answer to that question is clearly "no."

A. Mitigation is Not a Defense to the Damages Alleged by PLN.

Defendants assert that PLN sent mail to prisoners "for a period of over one year" expecting that some mail would be rejected for unconstitutional reasons. Dkt. 66, at 1. Even if true, that does not provide a "failure to mitigate damages" defense.[1]

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[1] Defendants appear to argue that whether mail is solicited or not is relevant to damages. Dkt. 66, at 1, 4. They never explain why this would be so. Solicited or not, a publisher's mail to prisoners is protected by the First Amendment. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1055 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1544 (2012) ("a publisher has a First Amendment interest in distributing, and inmates have a First Amendment interest in receiving, unsolicited publications."). In *PLN v Livingston*, which notes that PLN has a right to send mail to prisoners, the Court explained: "The general right to receive unsolicited communications free from government interference is not only well-established, it is also quite valuable, a fact that is particularly apparent in the prison context: prisoners have an obvious interest, for example, in receiving unsolicited mailings from family members attempting to reconcile, ministries reaching

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Defendants concede that they are liable for their acts of censorship and due process violations. *See, e.g.*, Ex. I at 151:13-23[2] (Q. "You believe that the sheriff's department violated the U.S. Constitution by not providing due process notice before January 26, 2012? A. Yes;"); *id.* at 162:23-165:7 (regarding rejection of Prison Legal News Magazine, "Q. And do you believe that the censorship of this item, the rejection of Exhibit 20 violated the 1st Amendment? A. Yes."); *id.* at 165:8-172:16 (admitting multiple violations of PLN's First Amendment rights).

Yet, Defendants want to be able to argue to the jury that while they are liable for serially violating the Constitution for more than a year (over 100 unconstitutional acts against PLN alone), they are not responsible for all the damages they caused, because they appear to plan to claim to the jury they might have stopped if only PLN had asked. While their reaction to the filing of this lawsuit belies this assertion, even if it were true, it would not reduce the damages to which Plaintiff is entitled, for that would require a legal ruling that Plaintiff, not Defendants, have a responsibility to see that government entities behave constitutionally. There is no basis for such a ruling.

The many flaws with Defendants' intended defense include:

1. The Duty to Mitigate Damages Does Not Impose a Duty to Prevent The Defendant from Causing Damage.

The mitigation of damages defense applies when a Plaintiff fails to do something after, not before, suffering injury: "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure *after the commission* of the tort." (Emphasis added) RESTATEMENT (SECOND) OF TORTS § 918 (2006). Contrary to the entire thrust of Defendants' argument, "There can be no duty to mitigate

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out to convicts, and those attempting to offer legal assistance, because prisoners would often be practically unable to initiate such contact themselves." 683 F.3d 201, 214 (5th Cir. 2012)

[2] All Roman numeral exhibits are to deposition transcripts, which are attached to Declaration of Jesse Wing, submitted herewith.

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damages until the injury causing those damages actually occurs." *Miller v. Lovett*, 879 F.2d 1066, 1070 (2d Cir. 1989). As the Second Circuit explained in *Miller*, a civil rights case:

> If a plaintiff's duty to mitigate damages were to include the duty to avoid the underlying injury, few arrestees could recover damages under § 1983 since most could have "avoided" engaging in the conduct that precipitated the arrest. By instructing the jury to consider whether Miller could have avoided the harm that he suffered, the district court created the erroneous impression that Miller could have mitigated his damages by walking away from the altercation.

Id. The Court went on to hold that a failure to mitigate damages instruction was "clearly and erroneously prejudicial" and reversible error:

> A properly phrased mitigation charge should limit the jury's consideration to what the plaintiff did or should have done after being injured. See E. Devitt, C. Blackmar & M. Wolff, Federal Jury Practice & Instructions § 85.13 (1987). It focuses on the plaintiff's duty "to prevent the aggravation" of injuries already received and "to effect a recovery from such injuries." *Id.*

Miller, 879 F.2d at 1070. *Miller* has been cited with approval by the Ninth Circuit on other grounds. *See Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989).

And this is true even when a Plaintiff acquiesces in violations. In *Blackburn v. Snow*, 771 F.2d 556, 576-78 (1st Cir. 1985), the court rejected the government's argument that a visitor to a jail who was strip searched could not claim damages because she visited the jail three times knowing that she would be strip searched and thereby "consented":

> [W]hether ... a constitutional right ... or a mere privilege, ... the Sheriff was not free to condition the visitation opportunity on the sacrifice of Blackburn's protected Fourth Amendment rights.

As in *Miller*, the First Circuit explained that—akin to the Defendants' mitigation defense here—the "consent" argument suggests illegitimately that the plaintiff had a legal duty not to exercise her rights because the government intended to violate them:

> Nor is it any answer to say that Blackburn could have left at any time, or declined to return after the first strip search, for it is the very choice to which she was put that is constitutionally intolerable--and it was as intolerable the second and third times as the first.

Id.

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Each act of censorship and denial of due process is a separate violation. For example, in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), the Supreme Court explained that "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII…." Under the government's theory of mitigation, a black employee would have a legal duty to mitigate his future unequal pay by complaining to his employer to comply with the law *before* showing up for work each week or risk blame for causing his own damages. That has never been the law.

Each act of censorship, like each rock thrown, is independently wrongful. A publisher could sue for the first broken window, the last broken window, or every broken window. If PLN was motivated to sue after the government had broken five windows, the government cannot legitimately complain—as in effect it does—that PLN should have told the Sheriff to stop throwing rocks earlier. The government and its top law enforcement officials are presumed to know that throwing rocks through Plaintiff's window—or censoring Plaintiff's mail—violates the Constitution. *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) and *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005), among many other binding court opinions, gave them ample notice that their conduct violated the First and Fourteenth Amendments. The fact that plaintiff did not sue immediately or call to tell the Sheriff he was violating the Constitution is not a failure to mitigate. Any requirement that Plaintiff tell the Sheriff to stop throwing rocks suddenly shifts the Sheriff's duty to know and obey the law onto PLN's shoulders at the risk of depriving PLN, who is innocent of any wrongdoing, of receiving make-whole compensation for the Sheriff's Constitutional violations.

None of the eight cases cited by Defendants in support of their motion to add a mitigation of damages defense to their Answer is to the contrary. Three of the eight are employment cases that unremarkably acknowledge wrongfully terminated employees are "entitled to an award of back pay, diminished by earnings in the interim." *Smith v. Hampton Training Sch. for Nurses*, 360 F.2d 577, 581 (4th Cir. 1966); *Gieringer v. Ctr. Sch. Dist. No. 58*, 477 F.2d 1164 (8th Cir.

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1973) (same); *Ramsey v. Hopkins*, 447 F.2d 128, 128 (5th Cir. 1971). *See also Pattee v. Georgia Ports Auth.*, 512 F. Supp. 2d 1372 (S.D. Ga. 2007). None of these cases suggests that a plaintiff had a duty to try to convince the employer not to fire them in the first place.

Commodity Credit Corp. v. Rosenberg Bros. & Co., 243 F.2d 504 (9th Cir. 1957) and *999 v. C.I.T. Corp.*, 776 F.2d 866 (9th Cir. 1985), are breach of contract, not tort, cases. The former held that a government contractor had no claim when subsequent conduct by the government increased the price it had to pay to acquire product to supply under the contract. The latter held, under California law, that a plaintiff has no duty to "mitigate damages" by acceding to additional terms imposed by the defendant in breach of contract unless those terms were trivial or inconsequential as a matter of law. PLN does not see how either of these cases bears on Defendants' mitigation defense.

The seventh case cited by the Defendants, *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322 (9th Cir. 1995), is a legal malpractice case in which the court held that a law firm was *not* entitled to a mitigation defense. PLN fails to see how this case supports Defendants' right to assert a mitigation defense.

Lawson v. Trowbridge, 153 F.3d 368, 377 (7th Cir. 1998), the final case cited by the Defendants, also fails to support a mitigation defense. In this case of wrongful arrest/false imprisonment/denial of medical care, the government asserted that the plaintiff failed to mitigate his damages by failing to post bail to secure his release. The court rejected this defense:

> Whether jury instructions infused with common law doctrines such as avoidance of consequences have a place in suits involving the deprivation of constitutional rights is another question, also difficult. This much is certain--while there may be a case wherein the mitigation instruction used here has a place, this isn't the one. We have found no other court (probably for good reason) requiring a defendant to divert committed funds in order to avoid suffering injury at the hands of his jailors.

Id. at 378. Notably, the Seventh Circuit cited *Miller v. Lovett*, in reaching its conclusion. *See id.*, at 377.

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The fallacy of Defendants' position is shown by their implicit concession that Plaintiff's alleged failure to attempt to persuade them to abandon their unconstitutional conduct is no defense to *liability.* That being the case, how can it be a defense to damages? Only *after* a violation, does a plaintiff have a duty to mitigate damages and that duty applies only to the damages caused by *that* violation, not some future possible violation. *See Miller v. Lovett*, *supra*.

Defendants do not claim that Plaintiff failed to mitigate the damage caused by their unconstitutional rejection of a constitutionally protected mailing; they claim that Plaintiff had a duty to stop them from committing future violations. Plaintiff had no such duty. Defendants do not have a cognizable failure to mitigate defense.

2. Duty to Mitigate Does Not Require a Party to Surrender Constitutional Rights.

Miller v. Lovett, 879 F.2d 1066, 1070 (2d Cir. 1989), and *Blackburn v. Snow*, 771 F.2d 556, 576-78 (1st Cir. 1985), make clear that a party has no duty to mitigate damages by forgoing the exercise of a Constitutional right. Defendants have not cited any case that suggests such a duty exists. This is unsurprising since there is no duty: would the government be entitled to argue to the jury that a peaceful protester's damages for false arrest should be reduced because she should have warned the police that arresting her would violate her First Amendment rights? Of course not.

Nearly fifty years ago, in a mail censorship case, the United States Supreme Court found it unconstitutional for the government to place a burden on the public to request delivery of specific mail in advance:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him.

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Lamont v. Postmaster Gen. of U. S., 381 U.S. 301, 307 (1965). That is precisely what the government apparently intends to argue to the jury here, essentially: "PLN failed in its duty to contact us in advance of sending its mail to our prisoners to ask that we deliver it." The Constitution cannot abide such an instruction to the jury. Defendants' defense that Plaintiff was required to notify the government of its intent to speak—like getting government permission—is akin to imposing a prior restraint so long as the speaker doesn't complain. Besides impermissibly chilling speech, that simply puts the cart before the horse.

3. Plaintiff had No Duty to Mitigate Damages for Defendants' Unconstitutional Conduct Depriving PLN of Due Process and Violation of PLN's Free Speech Rights.

The most ironic thing about Defendants' mitigation of damages defense is that it seeks to fault Plaintiff for failing to bring to Defendants' attention their own illegal conduct, when Defendants were illegally failing to give Plaintiffs and the prisoners they were communicating with notice of that very fact. Defendants admit they violated due process by not providing adequate notice or an opportunity to be heard. *Compare* Dkt. 1 at ¶¶4.4 through 4.4.6 with Dkt. 25 at ¶¶4.5 through 4.27, 4.36, 4.37, 4.45 through 4.51, and 4.55 through 4.61. To allow Defendants to present a mitigation defense under these circumstances would reward Defendants for the very misconduct at issue.

Defendants assert that PLN should not have exercised its free speech rights without first trying to get the Sheriff on board with the United States Constitution. Defendants cite no precedent or logic for that proposition, and that is fatal to their affirmative defense.

4. Defendants Cannot Establish Their Affirmative Defense.

Failure to mitigate damages is an affirmative defense for which the government bears the burden of proof. "[T]he Ninth Circuit has joined the overwhelming majority of federal courts in concluding that lack of mitigation is a recognized Rule 8 affirmative defense." *Holscher v. Olson*, CV-07-3023-EFS, 2008 WL 2645484 (E.D. Wash. June 30, 2008) (citing *999 v. C.I.T. Corp.*, 776 F.2d 866, 870 n. 2 (9th Cir.1985); *Modern Leasing, Inc. of Iowa v. Falcon Mfg. of*

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Cal., Inc., 888 F.2d 59, 62 (8th Cir.1989). *See also Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978) (Title VII action); *Binder v. Disability Group, Inc.*, 772 F. Supp. 2d 1172, 1184 (C.D. Cal. 2011) (Trademark infringement action).

Accordingly, as the cases cited above establish, the burden of proving a failure to mitigate damages is on the defendant. *See, e.g.*, *Sias*, 588 F.2d at 696. The Ninth Circuit Model Civil Jury Instruction 5.3 on "Mitigation" spells out that "The defendant has the burden of proving by a preponderance of the evidence: 1. that the plaintiff failed to use reasonable efforts to mitigate damages; and 2. the amount by which damages would have been mitigated."

Here, the Defendants cannot meet either element of their burden.

B. Even if the Defense is Cognizable, As a Matter of Law Defendants Cannot Show that it is Unreasonable for PLN to Engage in Communicating with Prisoners Via Mail Without First Trying to Convince Law Enforcement Officials to Comply with The Constitution.

Placing the burden on PLN to notify the Defendants that PLN has not received due process turns the Constitution right on its head. The purpose of due process is for the government to notify PLN when the government has deprived PLN of some legally-protected interest—like free speech. *Procunier v. Martinez*, 416 U.S. 396, 418 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 ("The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment…."). Relying on *Procunier*, the Ninth Circuit has repeatedly held that a prison is required to provide such notice to publishers when censoring their mail. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir. 2005).

It mocks the whole concept to suggest that PLN must educate the government on its duty to give due process to PLN or else suffer loss or diminishment of its rights.

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Similarly, it is unreasonable to demand that PLN abstain from exercising its constitutional right to communicate with prisoners unless it first notifies the public officials in charge of the Columbia County Jail that they must comply with the Constitution.

C. Defendants Can Offer Only Mere *Post Hoc* Conjecture that They Would Have Stopped Violating the Law, Conjecture that is Refuted By the Available Evidence.

The premise of Defendants' failure to mitigate defense is that had PLN notified them that they were violating the Constitution they would have stopped, ending the damage to PLN. Defendants have no actual evidence to offer—just hypothetical self-serving speculation. And the Defendants have failed at even that. At the Sheriff's follow-up deposition on the last day of discovery, taken in part for the express purpose of allowing Plaintiff to explore his affirmative defense of mitigation of damages, the Sheriff testified as follows:

> Q. BY MR. WING: Sheriff, is it your opinion that if Prison Legal News had asked you to get rid of your postcard-only policy, you would have done so?
> A. I don't know.
> Q. Well, PLN notified you when it filed the lawsuit that it wanted you to get rid of the policy and you didn't; right?
> A. We didn't right away, no.
> Q. Well, you didn't until you were ordered to by The Court; right?
> A. Correct.
> Q. So what reason would anybody have to believe that if PLN had written you a letter or called you on the phone rather than sued you, that you would have given up the policy?
> MR. KRAEMER: Object to form, argumentative and vague.
> THE WITNESS: *I don't know. I don't know how to answer that question. I really don't.*

Ex. VIII at 356:19-357:13 (emphasis added). The Sheriff's failure to articulate *any* basis for his own *affirmative* defense should put an end to it on summary judgment. The Sheriff would have been the decision-maker responding to PLN's letter or telephone call, so the testimony of other witnesses and the arguments of his lawyer cannot save this defense. The Sheriff fails to create an issue of fact to allow his defense to get to the jury by answering "I don't know."

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Further, after defending their Postcard-Only Policy in litigation for six months, refusing to forego the policy until enjoined by the Court, the Defendants can hardly be permitted to ask the jury to find that if only PLN had asked, rather than sued, the Sheriff would have changed his policy. That is contrary to all the evidence and to common sense.

Defendants cannot be permitted to argue that they would have given up their Postcard-Only Policy, and they should not be able to argue that they would have given up their magazine ban and their failure to afford due process either.

They did a terrible job giving notice of a reason for censorship. The Memorandum in Support of Plaintiff's Motion for Preliminary Injunction articulated the Jail's universal failure to identify a specific reason *other than* its Postcard-Only Policy for any of the mail that Defendants censored. *See* Dkt. 15, at 4-5. Apart from contemporaneously marking on certain pieces of mail that its Postcard-Only Policy was the reason for rejecting that mail, *see* Dkt. 15, at 4:16-18, 5:2-5, and 5:11-15, the Jail wrote only the following two censorship reasons on the rejected mail: (1) "Refuse/Violates Security," at *id.* at 4:13-16, 4:22-5:5; and (2) "Contraband," at *id.* 4:26-5:2.

"Violates Security" and "Contraband" are vague and ambiguous, insufficient to document the reasons that Defendants actually censored these items of mail. Defendants should not benefit from their ambiguity in violation of the Fourteenth Amendment by being permitted to argue now that the reason for this censorship was their ban on magazines, or junk mail, or bulk mail, or catalogs, or some other reason. Nor should they be permitted now to contend that they would have changed their practices in censoring these items had Plaintiff called them.

Failure to specify a reason for censorship is a stark violation of due process, and as the wrongdoer the Defendants should not be afforded the chance to exploit their violation in this litigation. Two important reasons for adequate due process notice when mail is censored is to notify the sender and recipient of the purported basis for the censorship and to create an accurate contemporaneous record, which allows for meaningful judicial review. *C.f., Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) ("*the requirement that government articulate its aims with a*

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reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits *meaningful judicial review*.") (Emphasis added).

Having violated clearly-established 38-year-old precedent, *Procunier v. Martinez*, 416 U.S. 396 (1974), and its progeny including other Oregon cases, that PLN was entitled to due process notice of censorship, *see, e.g.*, *PLN v. Cook*, 238 F.3d 1145 (9th Cir. 2001), the Defendants cannot be allowed to capitalize on their reckless disregard of the law. To do so would create incentives to violate the law, not to follow it.

This is illustrated by the Sheriff's testimony when asked more broadly how he would have responded to a letter or call from PLN:

Q. BY MR. WING: Okay. And what is it that you think Prison Legal News could have said to you that would have made you change your policies?
A. *It's hard to answer that question.* There's so many things.
Q. Like what?
A. As simple as we're Prison Legal News and we want to *appeal your decision not to permit this mail to be delivered.*
Q. Now, y*ou didn't have a policy for such an appeal*, did you?
A. I'd have to review our policy back then. I'm under the impression that we did, but I'd have to review that policy.
Q. It was not in your inmate manual; right?
A. No.
Q. Is that correct?
A. I believe it was not.
Q. And it was not on your website; right?
A. That's correct.
Q. And you never sent Prison Legal News any notification on the censored mail or in the form of some other communication that they could appeal; is that right?
A. I don't know that part of it.

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Ex VIII at 345:4-346:3. The Sheriff's Policy in effect at that time PLN filed this lawsuit, Ex. 62 (dated October 21, 2011), failed to require any notice to or opportunity to appeal for the publisher or other sender of incoming mail, or to the prisoner or intended recipient of rejected outgoing mail, *see* Dkt. 9-4; Ex. 62 at 6, II.D.1.b. And he never made his policy publicly available. Ex. 68 at ROG 7(d).

So, the Sheriff again left himself with no answer to present to the jury. His own deficient due process policies and practices undermine his suggestion that PLN bear the burden of trying to make sense of them. Indeed, apart from his staff's "postcard-only stickers" the Sheriff's staff failed to notify PLN of any meaningful justification for censoring its mail. It wasn't, and isn't, up to PLN to contact the government in search of reasons. The Sheriff has acknowledged this: "Q. Is it your view of law enforcement that law enforcement needs to be notified before they are obligated to comply with the Constitution? A. No." *Id.* at 346:10-13. That should be the end of the affirmative defense.

And, since no staff members signed or initialed the mail that they rejected the Jail cannot be permitted now to make up explanations for why it censored PLN's mail on top of which Defendants want to argue then that had PLN called or wrote to the Jail asking for an explanation the Jail would have agreed to forgo their censorship.

Further, the Defendants ignored many complaints alleging constitutional violations, *see, e.g.*, Exs. 13-20, 29, 38, and repeatedly wrote (or left in) in their policies, websites, memos to staff and prisoners, and their Inmate Manuals provisions that violated the Constitution. *See, e.g.,* Plaintiff's Memorandum in Support Motion for Summary Judgment on Declaratory and Injunctive Relief, Dkt. 98, at 20-21. The complaints began "the day the policy changed." Ex. II, at 145:3-15. And, the complaints identified above range all the way through PLN's lawsuit in 2012. No reasonable jury could conclude that Defendants would have changed their policies in response to a letter or telephone call from PLN.

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Indeed, Defendants' conduct to the contrary speaks louder than their speculation. Prisoners notified the government on numerous occasions that its mail policies and practices at issue violate the Constitution. Exs. 13-20, 29, 38.[3] That did not cause Defendants to cease their illegal conduct. Indeed, regarding their Postcard-only Policy, Defendants adopted a stock boilerplate answer that they sent in response to prisoner grievances. Ex. II at 145:16-146:9; Ex. 48 ("The attached letter will be the standard answer for the Columbia County Jail on all postcard grievances."); Exs. 13-20, 29. So, there is no reason to accept Defendants' bald assertion that they *might* have stopped their illegal behavior if PLN had asked.

And, after Plaintiff filed this lawsuit, on January 13, 2012, the Sheriff announced to the Court that he had adopted a new mail policy. *See* Dkt. 32 ¶10. But, he never announced a change in policy to the rest of the world. Instead, when he took down his old unconstitutional policy from his website, he replaced it with a statement that the policy was under review. *See* Dkt. 45-1 at 2. Even under the scrutiny of litigation, the Sheriff left his statement on the website for more than four months after he told the court that he had adopted a new mail policy—failing to notify the public of his policy change. Ex. I at 107:8-108:4.

Similarly, although the Sheriff announced to the Court that the Jail *never* had a policy that prohibited delivery of magazines, *see* Dkt. 29 at 3 ("[t]he Jail's policies . . . have always allowed inmates to receive magazines. . ."), along with PLN's reply brief in support of its Motion for Preliminary Injunction, on March 3, 2012, PLN submitted the Sheriff's current Inmate Manual which pointedly prohibited magazines, *see* Dkt. 36 at 17 ("We do not accept any periodicals."). Months then passed during which the Jail, with the Sheriff's knowledge, continued to hand out the very same Inmate Manuals to newly-incarcerated prisoners stating that the Jail prohibits all periodicals. Ex. III at 101:11-103:10; Ex. I at 48:18-49:8; 122:12-126:9. This was true as of the date of the Mail Inspection at the Jail and as of the deposition of the Sheriff (May 8 and 9, 2012). Ex. III at 101:23-102:13; Ex. I at 125:24-126:9 ("If somebody was

[3] Exhibits 1 through 76 are attached to the Declaration of Katherine Chamberlain, Dkt. 87.

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booked in the jail last night or within the past week, what inmate manual would they receive? A. The same one that we have" that "says no magazines are allowed" and the "due process provision…that [is] deficient."); Ex. 54.

At his deposition, the Sheriff admitted that the offending provision of the Inmate Manual violates the First Amendment. *Id* at 123:2-125:22. He admitted that the Jail was still continuing to issue the Inmate Manual informing prisoners that they could not receive magazines as of the day of his deposition, offering no justification for continuing to violate the First Amendment in this way. *Id* at 125:24-126:9. So, even after Plaintiff filed this lawsuit notifying Defendants of their unconstitutional mail policies, Defendants failed to correct their unconstitutional policy by affirmatively publicizing it to prisoners and by failing to notify the rest of the world that it was not longer in effect.

Additionally, as the Court knows, Defendants continued to maintain their irrational Postcard-Only Policy long after PLN filed this lawsuit, despite PLN's contact with Columbia County counsel and Defense counsel in three separate conversations before filing its Motion for Preliminary Injunction. Dkt. 9 at ¶¶16, 17, 19, 20, 21.

Allowing Defendants to argue that if PLN had only asked the Jail *might* have given up their unconstitutional ways would be futile, and grossly misleading to the jury.

D. PLN Did Attempt to Mitigate

The government does not argue that PLN failed to mitigate the damages that flowed from each violation (just that PLN did not attempt prevent the government from committing future violations). But even if the government made that assertion, it would fail. After the Jail censored its mailings, PLN did not give up. Rather, PLN mailed more materials to prisoners in the Jail to achieve its mission of communicating with the prisoners in Columbia County Jail. Indeed, that is the essence of the government's factual basis for its motion, that PLN kept sending mail to prisoners for more than a year. *See* Dkt. 66, at 1. But the Jail thwarted PLN's efforts, censoring those mailings as well. Defendants cannot legitimately contend that their

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repeated illegal activity directly undermining PLN's mitigation efforts requires PLN to take on a legal responsibility to educate the Sheriff on clearly established law under the First Amendment.

E. The Defense Can Challenge PLN's Damages But Not Argue Failure to Mitigate

The government claims that "plaintiff continued to mail publications to the Jail for the purpose of determining if the Jail would reject it." Dkt. 66, at 4. The government can argue this point to the jury, alleging that PLN was not as harmed as PLN claims. But the government is not entitled to argue as an affirmative defense that PLN failed to meet a legal obligation to mitigate its damages, accompanied by a jury instruction to that effect.

To mitigate, a fired employee must look for another job to earn wages. To mitigate, a person injured in a car crash must seek appropriate medical aid to heal the injuries. But if the fired employee applies to the same company again, and the Defendant violates the person's rights, again, it is no defense to damages for the employer to blame the employee, saying in effect "you failed to mitigate because you didn't warn us not to violate your rights" or because "you didn't tell us that we discriminated against you when we denied your first application."

Defendants think that they are entitled to an affirmative defense of failure to mitigate merely because PLN was investigating whether the Jail was violating the Constitution. PLN was investigating whether the Jail was engaged in a continual practice of censorship, or whether instead censorship occurred only sporadically or for a limited period or was due to negligence and not a County policy, practice, or custom. *See* Dkt. 8, ¶¶11-31; Dkt. 44-0, ¶¶23-24; Dkt. 63-1. That could only be determined over time. Had PLN jumped the gun, the Defendants would now be arguing that their censorship and lack of due process were merely errors and mistakes by certain jail officials. PLN acted responsibly and carefully in its investigation. The time it took to do so does not provide a basis for a failure to mitigate defense. Post-*Iqbal*, plaintiffs and their attorneys have a heightened duty to investigate civil rights violations and ensure that constitutional violations are deliberate acts and not accidents, negligence, or mere mishaps which are not cognizable under section 1983. *See Daniels v. Williams*, 474 U.S. 327 (1986).

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Moreover, no precedent supports the Defendant's position. In fact, the body of Fair Housing Act opinions categorically rejects distinguishing the measure of damages available to testers from those available to others persons. For example, nearly thirty years ago, in an oft-cited fair housing opinion, a federal court explained that the harm to testers can be just as real and serious as to other individuals:

> The evidence also supports the award of actual damages to both Glindolyn and Cecil Johnson for the humiliation and *emotional distress arising from their audit* to The Mansards. Mrs. Johnson's testimony left no doubt that she was deeply affected by the realization that The Mansards had not given fair consideration to her application.

Davis v. Mansards, 597 F. Supp. 334, 347 (N.D. Ind. 1984). And, the Court pointedly concluded:

> *The fact that Mrs. Johnson was a tester does not affect the measure of her actual damages.* In 1984, no one should have to toughen themselves to racial discrimination—a tester has no reason to expect mistreatment at the hands of ostensibly fair-minded businesspeople.

Id. In effect, the Court dismissed the notion that a tester had a duty to avoid testing because in the course of testing someone might violate the law. Yet, that is precisely the argument that Defendants make here.

Moreover, in contrast with a tester—who does not intend to rent the apartment or buy the property they are inquiring about—PLN intends to reach the prisoner to communicate the contents of its monthly journal, its book catalog, its book offer, its subscription information and renewal notice, and its fundraising letter. Dkt. 44-0, ¶¶4-5, 8-11. Defendants suggest that by reading a single email between Lucy Lennox and Paul Wright about investigating the Jail that "neither desired to communicate with inmates at the jail." Dkt. 67, ¶4c. Apart from the fact that the email does not support Defendants' speculation, this notion is crushed under the weight of the unrebutted evidence that PLN is a long-standing award-winning publisher whose main audience is prisoners in more than 2,000 federal, state, and local detention facilities around the country who the courts have long recognized is engaged in core political speech. *See, e,g., PLN*

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v. Cook, 238 F.3d 1145 (9th Cir. 2001). When PLN's mail is delivered to the intended prisoner-addressee in Jail, PLN accomplishes its mission. When the government thwarts that communication, PLN is harmed. And, the Court should not accept as a basis for allowing the government its affirmative defense the government's mislabeling of PLN's First Amendment communications as worth less than other communications.

III. CONCLUSION

The Court should grant summary judgment and dismiss Defendants' failure to mitigate defense. It is an affirmative defense on which the government bears the burden of proof. The defense fails as a matter of law that would impermissibly shift the burden to the plaintiff and mislead the jury, causing reversible error. And, no facts support the defense.

DATED this 13th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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