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Of Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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

Plaintiffs,

v.

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

Defendants.

No. 3:12-cv-0071-SI

RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSE OF MITIGATION

Oral Argument: November 16, 2012

Columbia County, Columbia County Sheriff's Office and Jeff Dickerson (collectively referred to as "defendants") submit this brief in response to Prison Legal News' ("PLN" or "plaintiff") Motion for Summary Judgment on Defendants' Failure to Mitigate Damages Defense.

INTRODUCTION

In this case, PLN asserts two constitutional claims based on 42 U.S.C. § 1983, claiming that the inmate mail policy at Columbia County Jail (the "Jail") violates the First and Fourteenth Amendments. (Compl. ¶¶ 5.5-5.8). PLN seeks summary judgment on the mitigation defense only. In short, PLN argues that it had no duty to mitigate its damages in the context of this lawsuit, confusing the exercise of a constitutional right with the duty to avoid or minimize

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damages. PLN also argues that even if it had a duty to mitigate its damages, there is no evidence to support the defense and it should be rejected as a matter of law. Neither argument has merit.

Mitigation concerns the calculation of damages. Liability is not at issue. PLN's motion raises two questions. First, is the generally recognized duty to mitigate applicable to PLN, a §1983 plaintiff who alleges compensatory damages resulting from constitutional violations? Second, if so, is there any evidence that PLN failed to take reasonable efforts to minimize its claimed damages. The answer to both questions is yes. Accordingly, PLN's motion for summary judgment should be denied.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). If the moving party fails to carry out its burden, then the "non-moving party has no obligation to produce anything, even if the non-moving party would have the ultimate burden of persuasion." *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102-03 (9th Cir.2000).

If the moving party satisfies its initial burden, the burden shifts to the non-moving party to demonstrate that a genuine issue as to any material fact actually exists. *Celotex Corp*, 477 U.S. at 323. This requires the production of evidence setting forth specific facts showing that there is a genuine issue for trial. *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir.2008). As the party opposing the motion for summary judgment, the evidence, and all reasonable inferences from it, must be viewed in the light most favorable to the defendants. *See Universal Health Services, Inc. v. Thompson,* 363 F.3d 1013, 1019 (9th Cir.2004).

FACTUAL SUMMARY

By now the court is familiar with the factual background of this case. On May 29, 2012, this court issued an Opinion and Order on PLN's Motion for Preliminary Injunction that sets forth in detail the facts pertaining to the Jail's inmate mail policy at issue in this case. (Dkt. 64 at

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3-9).[1] Because the issue presently before the court pertains to PLN's claimed damages and not defendants' liability for constitutional violations, defendant submits the following additional facts excluded from PLN's motion for summary judgment.

Beginning in December of 2010 through July of 2011, PLN mailed at least thirty-seven copies of its monthly magazine to inmates in the Jail. (Compl. ¶¶ 4.4-4.29; Dkt. 8, Wright Decl. ¶ 10). The Jail rejected many of these mailings and either returned them to PLN or failed to deliver them to the inmates. (Compl. ¶¶ 4.5-4.64). During the same eight-month period, PLN mailed at least 26 "Informational Brochure Packets"[2] (*Id.* ¶¶ 4.36-4.43); eight "Subscription Renewal Packets"[3] (*Id.* ¶¶ 4.47-4.52); and two "Fundraising Packs" (*Id.* ¶¶ 4.57-4.63). These mailings were sent in envelopes by first-class U.S. mail. (Dkt. 8, Wright Decl. ¶ 11). Most of these mailings were rejected by the Jail. (Ans. ¶¶ 4.5-4.64). Nevertheless, by mid-February of 2011, PLN knew that the Jail did not deliver numerous mailings to inmates. (Ans. ¶¶ 4.7-4.17, ¶¶ 4.36-4.37 (admitting allegations but for mail sent to inmate Lloyd Meyers)).

In the beginning of the eight month period of mailings, PLN knew that the Columbia County Sheriff's Office website stated that magazines were not allowed into the facility, and it had received the inmate mail section of the Jail's inmate manual from an inmate. (Roberson Decl. ¶ 3, Ex. B (Wright Dep. 199:4-201:6); *Id.* ¶¶ 7-8, Exs. F-G (showing receipt by PLN of inmate mail section of inmate manual)). The inmate manual in effect in December of 2010 stated that magazines were not allowed into the facility. (Plf. Mot., Chamberlain Decl. Ex. 54, p.12 ("We do not accept any periodicals.")).

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1 The specific facts of the mail policy, though important background information, are of little relevance to the damages issue presently before the court. Defendants have admitted that some of its previous mail policies violated PLN's constitutional rights. (Ans. ¶ 1.1).

2 These packets combine informational brochures, book catalogs and book offers into a single mailing. (Dkt. 8, Wright Decl. ¶ 15).

3 These packets combine subscription renewal letters and informational brochures into a single mailing. (Dkt. 8, Wright Decl. ¶ 26).

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PLN seeks declaratory and injunctive relief as well as nominal and compensatory damages arising out of the admitted and alleged constitutional violations. (Compl. ¶¶ 5.4, 5.8). PLN seeks compensatory damages for *each* constitutional violation that occurred. (*Id.* at ¶¶ 7.2-7.3). PLN does not specify the amount of compensatory damages it claims for each violation, asserting that the amount "can only be determined by a jury at trial[.]" (Roberson Decl. ¶ 2, Ex. A, p. 8). However, PLN suggests that $1,000 award for each violation "would be a reasonable estimate." (*Id.*). Accordingly, this component of PLN's compensatory damages claim alone allegedly amounts to over $100,000. (Plf. Memo at 3 (claiming over 100 constitutional violations)). PLN also intends to recover the value of lost subscriptions and book purchases, in an amount to be proven at trial. (*Id.*).

Two other components to PLN's claim for compensatory damages are its "Diversion of Resource Damages" and "Frustration of Mission Damages." (*Id.* ¶ 2, Ex. A, pp. 7-8). PLN's claim for "Diversion of Resources Damages" seeks to recover the wages of several staff members who spent time "investigating the mail policies and censorship" at the Jail and "litigating censorship and due process claims" and "testing the mail policies and censorship practices" at the Jail, including "the cost of materials and postage." (*Id.* p. 9).

PLN currently estimates the "Diversion of Resources Damages" at $34,217.50, itemized as follows:

Paul Wright	159 Hours at $200 per hour	$31,800
Zach Phillips	13.1 Hours at $105 per hour	$ 1,375
Dennis Curran	3 Hours at $90 per hour	$ 270
Jen Kovacs	10.3 Hours at $75 per hour	$ 772.50

(*Id.* p.7). Paul Wright's annual salary is $60,000. (*Id.* ¶ 3, Ex. B (Wright Dep. at 162:17-163:5)). His hourly rate for PLN is approximately $35. (*Id.*). Zach Phillips, a paralegal at PLN, "diverts" 100% of his time to litigation activities. (*Id.* (Wright Dep. 74:21-75:3)). Paul Wright admits that Zach Phillips is paid an hourly wage that is far less than what PLN is seeking as damages in this lawsuit. (*Id.* (Wright Dep. 165:18-166:14, 167:12-19)). At the relevant time,

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Phillips was actually paid an hourly rate of $11 with no benefits. (*Id.* ¶ 4, Ex. C (Phillips Dep. 23:3-12)). Dennis Curran, PLN's Office Manager, was paid an hourly rate of $12 with no benefits. (*Id.* at ¶ 5, Ex. D (Curran Dep. 17:16-18:3)).

Under its claim for "Frustration of Mission Damages," PLN seeks to recover "future expenditures" that it says will be necessary "to counter the adverse effects of Defendant's unconstitutional mail policy and censorship of incoming and outgoing mail [sic] prisoner mail, including outreach, education, and testing." (*Id.* ¶ 2, Ex. A, p. 7). These claimed future expenses currently total $19,870.86, specified as follows:

Letters to Columbia Co. Jail Prisoners	$	1,131.00
Ads in St. Helen's Chronicle and News Advertiser	$	826.86
Presentation to local bar, legal services	$	3,500.00
Production of short video for families	$	2,500.00
Compliance Monitoring	$	11,913.00
	$	19,870.86

(*Id.* p. 8).

PLN's website states that after 20 years of litigation, it "always tried to resolve censorship issues administratively." (*See id.* ¶ 6, Ex. E). In his deposition, Paul Wright testified that he and others working on behalf of PLN have sent letters to institutions expressing concern about censorship practices or other possible violation of rights issues prior to filing a lawsuit. (*Id.* ¶ 3, Ex. B (Wright Dep. at 24:14-25:25)). However, in the present matter, PLN sent no letters or e-mails to the administrative staff at the Columbia County Jail or made any attempts to express their concerns regarding the censorship issues with the Jail prior to filing this lawsuit. (*Id.* (Wright Dep. 35:15-36:25)). Paul Wright testified that he believed that such efforts would have been "futile" in this case. (*Id.*).

PLN first notified defendants of its censorship concerns when it filed the complaint in this matter over a year after PLNs mailings were first rejected. (Dkt. 9, Plf. Mot. Prelim. Inj., Chamberlain Decl. ¶ 16, Ex. 14). Shortly after PLN filed its complaint in this matter, the Jail issued a new inmate mail policy on January 26, 2012, with minor modifications on February 10, 2012. (Dkt. 32, Dickerson Decl. ¶ 10)). Corrections deputies were trained on the new policy on February 1, 2012. (*Id.* ¶ 27, Ex. G).

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LEGAL ANALYSIS

A. The Rule of Mitigation Applies To PLN's Claimed Compensatory Damages.

It is well established that 42 U.S.C. § 1983 creates "a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 305, 106 S.Ct 2537 *(1986)* (quoting from *Carey v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042 (1978) (internal quotation and citation omitted)); *see also City of Monterey v. Del Monte Dunes at Monterrey, Ltd.*, 526 U.S. 687, 709, 119 S.Ct. 1624 (1999) ("[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort."); *Pony v. County of Los Angeles*, 433 F.3d 1138, 1143 (9th Cir.2006) ("The Supreme Court has construed claims brought under Section 1983 as tort claims for personal injury."). Damages in § 1983 "cases are designed to provide 'compensation for the injury caused plaintiff by defendant's breach of duty.'" *Stachura*, 477 U.S. at 306 (quoting from 2 F. Harper, F. James, & O. Gray, Law of Torts § 25.1 (2d ed. 1986)). To that end, when a plaintiff seeks damages for violation of a constitutional right under § 1983, "the *level* of damages is ordinarily determined according to principles derived from the common law of torts." *Stachura*, 477 U.S. at 306 (emphasis added).

The duty to mitigate damages is a general rule of tort law that applies to determine the amount of damages, if any, a plaintiff may recover. Under common law, "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." *Restatement (Second) of Torts* § 918 (2006). As one court has noted: "The doctrine is simple: 'when a tort victim fails to take reasonable steps to mitigate his damages, those damages are either cut down or eliminated altogether * * *.'" *Lawson v. Trowbridge*, 153 F.3d 368, 377 (7th Cir.1998) (*quoting Brooks v. Allison Div. Of Gen'l Motors Corp.*, 874 F.2d 489, 490 (7th Cir.1989)).

The Ninth Circuit recognizes the broad application of the common law duty to mitigate damages. *Sangster v. United Airlines, Inc.*, 633 F.2d 864, 867 (9th Cir.1980)("As a broad proposition, injured parties are expected to mitigate the damage they suffer."); *see also 999 v.*

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C.I.T Corporation, 776 F.2d 866, 871 (9th Cir.1985)("The general principle that victims of a legal wrong should make reasonable efforts to avoid incurring further damage is undisputed." (internal quotations and citations omitted)). In *Commodity Credit Corp Commodity Credit Corp. v. Resenberg Bros. & Co.*, 243 F.2d 504, 511 (9th Cir.1957), the court summarized the duty to mitigate as follows:

> It is the general rule that one who is injured by the wrongful acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and, to the extent that his damages are the result of his active and unreasonable enhancement thereof, or due to this failure to exercise such care, he cannot recover. He is bound to protect himself if he can do so with reasonable exertion or at a trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. He must do nothing to aggravate his loss, but must do all he can to mitigate or reduce it.

The Ninth Circuit Model Civil Jury Instructions provide:

> The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.
> 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.

Ninth Circuit Model Civil Jury Instructions § 5.3. The Ninth Circuit has held that a defendant is entitled to an instruction concerning its theory of the case if it is supported by the law and has some foundation in the evidence. *Cauthier v. AMF, Inc.*, 788 F.2d 634, 635 (9th Cir.1986).

Federal courts have uniformly held that the duty to mitigate applies specifically to 42 U.S.C. § 1983 claims. *See, e.g., McClure v. Indep. Sch. Dist.*, 228 F.3d 1205, 1214 (10th Cir.2000) (14th Amendment violation); *Lawson*, *supra*, 153 F.3d at 376-77 (Fourth Amendment claim for wrongful arrest and constitutional injuries while in jail); *Meyers v. City of Cincinatti*, 14 F.3d 1115, 1119 (6th Cir.1994) ("In a § 1983 case the plaintiff has a duty to mitigate damages."); *Pattee v. Ga. Ports Auth.*, 512 F.Supp.2d 1372 (11th Cir. 2007) (First Amendment); *O'Neal v. Gresham*, 519 F.2d 803, 805-06 (4th Cir.1975).

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Accordingly, the rule of mitigation applies to PLN's claimed compensatory damages in this Section 1983 case. PLN's position is contrary to well established federal law and is not supported by any legal authority.[4]

B. The Evidence Of Failure To Mitigate Creates A Jury Question.

Whether a plaintiff has failed to mitigate damages is generally a question of fact for the jury. *Jackson v. Shell Oil Co.*, 702 F.2d 197, 201-02 (9th Cir.1983). The jury question is whether the plaintiff acted reasonably under the circumstances to avoid or reduce its damages. *Ninth Circuit Model Civil Jury Instructions*, §5.3.

The Ninth Circuit recognizes that pursuant to the rule of mitigation, an injured party may not recover compensatory damages to the extent the "damages are the result of [the plaintiff's] active or unreasonable enhancement thereof * * *." *Commodity Credit Corp, supra,* 243 F.2d at 511. The injured party may recover "only such damages as he could not, with reasonable effort, have avoided." *Id.* Further, the injured party "must do nothing to aggravate his loss, but must do all he can to mitigate or reduce it." *Id.; see also Life Investors Insurance Co. Of America v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529 (App.1995) (citing *McCormick On Damages*, § 34 at 131 (1934) (damages should be reduced where a plaintiff's "own voluntary activity has unreasonably exposed itself to damage or increased its injury")).

Despite PLN's contention otherwise, the evidence supports submitting the question of whether PLN used reasonable efforts to mitigate the damages comprising its compensatory damages claim to the jury. The unique circumstances of this case are that after having multiple mailings rejected and knowing that at least part of the Jail's inmate policy was unconstitutional, PLN did not communicate with defendants or attempt resolution of its concerns administratively, as it publicly purports to try to do so, but instead continued sending mail to the inmates and expending "diverted" and expensive resources pursuing litigation. The evidence in this case

[4] PLN made the same unsupported argument in its opposition to defendants' motion for leave to amend its answer to include the defense of failure to mitigate damages, which this court rejected and allowed the amendment. (Dkt. 74).

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supports the view that PLN had an incentive to pursue litigation rather than seek resolution prior to filing a lawsuit. These facts are relevant to PLN's compensatory damages claim. They are not relevant to any issue of liability or the exercise of a constitutional right. Defendants are entitled to present to the jury its theory that PLN failed to use reasonable efforts to minimize and avoid aggravation and enhancement of the damages it includes in its compensatory damages claim.

PLN acknowledges that its "diversion of resources" component of its claimed compensatory damages is based on a calculation of hourly wages that are far higher than PLN actually paid its employees. Paul Wright has testified that despite his $60,000 annual salary, he is seeking compensatory damages of $200 per hour for his time spent time working on matters concerning this lawsuit rather than other activities. (Roberson Decl. ¶ 3, Ex. B (Wright Dep. 162:17-163:5)). The same is true for Zach Phillips, a paralegal at PLN, who "diverts" 100% of his time to litigation activities. (*Id.* (Wright Dep. 74:21-75:3, 165:18-166:14, 167:12-19)). The evidence is that PLN seeks to profit from the hours spent by its staff working on the litigation efforts in this matter, in an amount that is approximately six times the regular hourly wage.

The claimed damages comprising of these inflated rates demonstrate an incentive for PLN to pursue litigation rather than to have made a reasonable effort to communicate with defendants in attempt to resolve their censorship concerns prior to filing this lawsuit. Contrary to PLN's assertions, defendants do not contend that PLN was required to notify defendants of its censorship concerns in order to recover damages. Rather, it is defendants' position that this evidence is necessary for the jury in evaluating the *level* of damages PLN may recover.

The evidence of defendants' prompt response to the admitted unconstitutional provisions of its inmate mail policy in contrast to PLN's position that it would have been "futile" to seek a resolution short of litigation is relevant to the jury's determination of whether PLN could have reasonably avoided or reduced the amount of the inflated "diversion of resources" component of

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its claimed damages. The evidence is that Paul Wright's assumption of futility turned out to be wrong with respect to many of PLN's censorship concerns.[5]

As demonstrated by the evidence set forth in the Factual Summary, *supra,* PLN's claim for compensatory damages places at issue the reasonableness of PLN's decisions to "divert" resources to "investigating" its claims by continuing to send mail, knowing that many mailings would be rejected, and pursue litigation without making any attempt to communicate or resolve its concerns with defendants.

C. PLN's Arguments Do Not Support Summary Judgment.

1. PLN misstates the question presented by its motion for summary judgment.

PLN begins its argument in support of summary judgment against the mitigation defense by misstating the question presented by its motion as whether a victim of unconstitutional conduct has a legal duty to attempt to persuade the violator to stop its unconstitutional conduct before the victim may again exercise its same constitutional right. This perspective on the role of the mitigation rule displays a misunderstanding of the rule and suggests a ridiculous scenario in an attempt to prevent the application of the rule to the circumstances of the present case. As stated earlier, PLN's motion raises two straightforward questions: (1) whether the duty to mitigate applies to the compensatory damages PLN has claimed in this § 1983 action; and (2) whether there is evidence to support defendants' theory that PLN did not act reasonably to reduce its claimed compensatory damages.

PLN's memorandum in support of summary judgment is wrought with mischaracterizations of defendants' position, irrelevant factual scenarios and inappropriate attacks on the persuasiveness of the mitigation evidence. PLN's arguments demonstrate a confusion of the issue of damages with the undisputed constitutional rights of a Section 1983 plaintiff. The duty to mitigate does not impose a standard of conduct or an affirmative duty to act in a particular manner. Rather, it is a

5 PLN's claim that defendants have no evidence that the Jail would have changed its unconstitutional practices had PLN given pre-litigation notice of its concerns is not only wrong, it is of no import. The jury will not need to decide whether pre-litigation notice would have, in fact, caused defendants to change the mail policy. Rather, the evidence of the change in policy is relevant to challenge the reasonableness of PLN's decision not to communicate or make any effort to resolve its concerns prior to litigation.

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principle that applies to the calculation of the "level" of recoverable compensatory damages by requiring an injured party to take reasonable measures to minimize the damages suffered.

2. Mitigation does not require an injured party to surrender its constitutional rights.

PLN argues that a mitigation defense equates to the imposition of a duty to prevent the unconstitutional conduct from occurring, thereby requiring an injured party to surrender its constitutional rights. PLN made this same argument in its opposition to defendants' motion to amend its answer. (Dkt. 74, Plf. Resp. at 6-7). Just as then, it is still without merit now.

Mitigation does not limit PLN's free speech or due process rights. Mitigation requires PLN act reasonably under the circumstances to avoid or reduce resulting damage and refrain from active and unreasonable enhancement of damages. *See Commodity Credit Corp., supra,* 243 F.2d at 511 (9th Cir.1957). Mitigation has nothing to do with PLN's desire to correspond with inmates; it has to do with PLN's responsibility to act reasonably to avoid repeated use of excessive resources at inflated hourly rates and manufacturing claims at an estimate of $1,000 per constitutional violation.

PLN's position is that they can send as much mail as they want to inmates, for as long as they want, using inflated hourly rates, and receive $1,000 per violation, with absolutely no duty to avoid skyrocketing damages. In essence, PLN is disclaiming any duty to act like a reasonable publisher. Contrary to PLN's arguments, acting like a reasonable publisher does not require obtaining or requesting government permission prior to sending mail to inmates. Rather, a reasonable publisher, like PLN, who is well aware of its First and Fourteenth Amendment rights in over 20 years of litigation, would have sought an explanation from the institution that rejected its mail. The evidence shows that PLN did not act like a reasonable publisher. PLN continued to send mail to inmates knowing that the Jail would likely reject it. Mitigation does not excuse the constitutional violations, for which defendants have admitted. Rather it prevents the injured party from escaping the responsibility of acting like a reasonable victim of an unconstitutional violation.

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PLN's reliance on *Lamont v. Postmaster General*, 381 U.S. 301 (1965) is misplaced. In *Lamont*, the Supreme Court held unconstitutional a federal statute restricting the delivery of mail considered "communist political propaganda" because it required the addressee of mail to request in writing that it be delivered. *Id.* at 307. *Lamont* does not address the rule of mitigation and has no instructional value here. Defendants do not suggest that PLN should have sought permission from the Jail to deliver its mail or make a written request to the Jail to deliver mail prior to sending mail. In fact, defendants have mostly admitted liability for constitutional violations.

3. PLN's position that the duty to mitigate applies only to damages arising from each separate violation is untenable and without legal support.

PLN argues that the duty to mitigate applies only to damages arising after each discrete violation. PLN cites no case law to support this theory, and instead relies on the uncontroverted rule that the duty to mitigate comes into play after a plaintiff has suffered injury. (Plf. Memo., p. 3). Defendants do not dispute that the rule of mitigation applies after an injury has occurred. However, application of that rule in this case does not mean that PLN was relieved of the duty to take reasonable measures to avoid or reduce its damages after it realized that it was the victim of a constitutional violation and it continued to actively enhance its claimed damages.

PLN's citation to *Miller v. Lovett*, 879 F.2d 1066, 1070 (2nd Cir.1989), in which the court instructed that the duty to mitigate does not require the victim of a constitutional violation to avoid the "precipitating" conduct that caused the injury, is not helpful here. In *Miller*, the court found that the given duty to mitigate instruction, under the facts of that case, created the erroneous impression that the plaintiff who suffered a one-time constitutional injury during an arrest could have mitigated his damages by choosing not to engage in "the conduct that precipitated the arrest" and by "walking away from altercation" that led to the arrest. *Id.* *Miller* does not support PLN's argument that the duty to mitigate in this case applies to damages suffered after *each* individual violation. The facts of *Miller* are unlike those here where the PLN

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knew of the unconstitutional policies and continued to "test" them with the expectation that the violations would persist.[6]

The *Blackburn v. Snow*, 771 F.2d 556 (1st Cir.1985) decision is equally unhelpful. In *Blackburn*, the court held that the plaintiff's constitutional rights were violated when she was strip searched three times while visiting a jail, despite the defendant's contention that she could not claim damages because she had consented to the searches. *Blackburn* did not address the rule of mitigation. The issue in *Blackburn* was whether the plaintiff could claim damages as a result of strip searches she "consented to" at a jail that violated the 14th Amendment. *Id.* at 567. The court rejected the defendant's "consent" argument finding that, under the circumstances, the plaintiff could not have properly consented to the searches because the access to the jail was conditioned on that submission. *Id.* Whether a plaintiff allegedly consenting to constitutional violations can recover damages has no bearing on the present lawsuit. Defendants do not assert that PLN "consented" to having its mail rejected. Thus, PLN's reliance on *Blackburn* is unfounded.

PLN's suggestion that *Bazeman v. Friday*, 478 U.S. 385 (1986) supports its view that the duty to mitigate only applies to damages caused by each individual violation is wrong. *Bazeman* concerned racial discrimination in employment that violated Title VII of the Civil Rights Act of 1964. *Id.* at 397-98. It did not address mitigation of damages or the application of the rule to constitutional violations. *Id.*

PLN's "rock throwing" analogy and "pre-employment, unequal-pay complaint" scenario are also unhelpful. In fact, both highlight the illogic in PLN's position. First, in the situation of actionable employment discrimination, the duty to mitigate does not require the wronged employee to complain to his discriminatory employer before showing up for work in order to recover damages for the unlawful conduct, as PLN suggests. Instead, as is clear throughout Title

[6] PLN's statement that *Miller* has been cited with approval by the Ninth Circuit on other grounds not at issue in this matter is pointless since that citation does not make *Miller* controlling or persuasive authority.

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VII case law, the duty to mitigate *in that context* requires the employee who quits his job as a result of the unlawful conduct to make reasonable efforts to find alternative employment. In other words, the duty to mitigate simply requires the injured party to act reasonably under the circumstances.

Second, the "rock-throwing" analogy is also flawed in that it factually does not reflect the situation presented in this case. Perhaps if the facts of the "rock-throwing" scenario included that PLN knew the rock throwers were acting pursuant to a policy or practice that stated that it would throw rocks in the direction of PLN's windows at a certain time each day and PLN stayed silent as to the harm it suffered due to the broken windows but continued to replace the windows with the top brand, highest quality windows on the market, then the factual analogy might be more applicable.

Despite PLN's ill-fitting factual scenarios, the relevant issue is that PLN's position is not supported by the law and, if adopted, would nullify the duty to mitigate damages involving similar constitutional violations. Indeed, adoption of PLN's position would permit plaintiffs who sue for constitutional violations to purposefully incur hundreds of such violations and accrue vast sums of damages with no duty or responsibility to mitigate those damages.

4. PLN's arguments as to the reasonableness of its conduct spotlights the factual dispute that presents a jury question.

PLN's arguments attacking the evidence of its failure to use reasonable efforts to mitigate its claimed damages, demonstrates that this issue is not appropriate for summary judgment. PLN's arguments go to the persuasiveness of the evidence; not the admissibility, relevance or absence thereof. As such, they are arguments for a jury and do not establish, as a matter of law, that PLN used reasonable care to mitigate its claimed compensatory damages.

PLN erroneously contends that the mitigation defense in this case is based solely on the position that had PLN notified defendants that its inmate mail policy violated the constitution, defendants would changed its practices "ending the damage to PLN." (Plf. Memo, p. 10). Though the evidence that shortly after defendants first learned of PLN's censorship concerns the inmate

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mail policy was changed and staff trained on the new policy is relevant to the failure to mitigate defense in this case, it is not the only evidence defendants rely on in support of the defense.[7] (*See* Factual Summary, *supra,* pp. 2-5).

PLN also makes the absurd argument that its duty to mitigate damages "incentives" defendants to violate the law. (Plf. Memo, p. 12). PLN fails to cite any case law that barred the mitigation defense on this basis.

PLN inexplicably argues that it mitigated its damages by continuing to send mail to inmates at the Jail despite the known censorship. (Plf. Memo, p. 15). This argument is illogical and, in any event, only lends support to defendants' position that a factual dispute exists barring summary judgment on the mitigation defense.

PLN also incorrectly claims that defendants seek to apply the rule of mitigation "merely" because PLN was investigating the Jail. (Plf. Memo, p. 16). Mitigation applies broadly to all injured plaintiffs depending on what their claimed damages are, and not on whether a claim exists. In this matter, after PLN knew it had the viable constitutional claims asserted in the complaint, it made no effort to reduce its damages. Instead, it continued to devote more resources at inflated hourly rates to drum-up manufactured damages.

PLN engages in irrelevant speculation on what defendants would or would not argue had PLN actually mitigated its damages. (Plf. Memo, p. 16.) Despite the speculation that defendants would not have admitted constitutional violations, the evidence shows that defendants accepted liability and quickly reversed its unconstitutional conduct.

PLN claims it has a heightened duty to investigate civil rights claims post-*Iqbal* (presumably, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)), which held that facts asserted in a

[7] PLN's contention that Sheriff Dickerson's deposition testimony regarding his uncertainty as to whether the post-card only policy would have been changed if PLN had notified the Jail of its censorship concerns prior to filing a lawsuit somehow negates *any* basis for the affirmative defense and requires this court determine that PLN reasonably mitigated its damages as a matter of law, ignores both the contradictory evidence supporting the conclusion that it would have been reasonable for PLN to communicate with defendants prior to filing this lawsuit as a way to have minimized its claimed damages and the other evidence supporting a jury determination that PLN failed to mitigate its claimed damages. (*See* III. Factual Summary, *supra,* pp. 3-6.)

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complaint must constitute plausible claims. (Plf. Memo, p. 16). However, pleading standards are irrelevant to mitigation of damages. PLN does not suggest that mitigation standards have changed pre-*Iqbal* or post-*Iqbal*. Moreover, whether PLN acted reasonably in continuing to expend the resources that constitute its "diversion of resources damages" in order to "investigate" the "continual practice of censorship" is a question for the jury.

PLN's reliance on *Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984), a "tester" case involving housing discrimination, does not assist its argument that defendants do not have a mitigation defense in this case because PLN was just "investigating" its claims for almost a year. A "tester" is a person who applies for rental housing with no intention of actually renting. PLN may send mail to a jail to "test" if the jail rejects it for an unconstitutional reason, but it still intends to communicate with the inmate. In any event, the question of whether the claimed compensatory damages PLN compiled during their "investigating" period could have reasonably been reduced or avoided is a question for the jury. "Tester" cases under the Fair Housing Act have no application here to the issue of mitigation.

CONCLUSION

Mitigation is a defense applicable to PLN's 42 U.S.C. § 1983 claim for compensatory damages. The evidence shows that PLN failed to use reasonable efforts to mitigate those damages. Viewing the facts in a light most favorable to defendants as the non-moving party, PLN's Motion for Summary Judgment on Defendants' Affirmative Defense of Mitigation should be denied.

Respectfully submitted this 9th day of October, 2012.

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