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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 PARTIAL SUMMARY JUDGMENT ON DECLARATORY AND INJUNCTIVE RELIEF

Oral Argument: November 16, 2012

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I. SUMMARY OF ARGUMENT

PLN seeks summary judgment on its claims for declaratory and injunctive relief, despite providing no evidence that its mail, or that of any inmate at the Columbia County Jail ("Jail"), has been wrongfully rejected since prior to the filing of its Complaint in January, 2012. PLN does not challenge the current inmate mail practices of the Columbia County Sheriff's Office ("Sheriff's Office"), yet it seeks extraordinary relief in the form of a permanent injunction and declaratory relief. Defendants rely upon the Declaration of Gregory R. Roberson and Declaration of Sheriff Jeffrey Dickerson, together with supporting exhibits, and the facts and argument set forth below.

With respect to declaratory relief, defendants have mooted PLN's motion. To the extent PLN's motion is not deemed moot, it does not have standing and has failed to prove that declaratory relief should be granted at this summary judgement stage.

With respect to permanent injunctive relief, defendants have mooted PLN's motion, and even if not moot, PLN does not have standing and has failed to prove that the permanent injunctive relief it seeks is necessary or appropriate.

Finally, PLN's Motion does not distinguish between Columbia County, the Sheriff's Office, and Sheriff Dickerson. Columbia County has nothing to do with inmate mail, and neither the Sheriff's Office nor Sheriff Dickerson is an agent of Columbia County regarding inmate mail. (Ans. ¶¶ 3.3-3.5.) For these reasons, PLN's Motion must be denied as to defendant Columbia County.

II. 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 initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the nonmoving party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) . On a motion for summary judgment, the

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evidence is viewed in the light most favorable to the nonmoving party. *Universal Health Services, Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).

III. RELEVANT FACTS

As soon as Sheriff Dickerson determined that the Sheriff's Office was handling some inmate mail in an unconstitutional manner, the deficient practices and the mail policy were changed.[1] All of the constitutional issues PLN raised in its complaint have been addressed and eliminated. Below is a timeline of significant events demonstrating the action taken by defendants to ensure that its inmate mail policy and practices comply with constitutional standards.

A. Timeline.

To assist the Court, a brief timeline of significant events is given below. All of these events are discussed and supported by evidence in Parts B-H, *infra*.

June, 2011	Last approximate date the Jail rejected PLN's subscription renewal letter
July, 2011	Last approximate date the Jail rejected PLN's magazine and informational brochure packet
November, 2011	Last approximate date the Jail rejected PLN's fundraising pack
December, 2011	The Jail rejected most of Lucy Lennox's mailings of an article printed from PLN's website
January 13, 2012	Complaint filed
January 26, 2012	Adoption of new Inmate Mail Policy (hereinafter "IMP") drafted from Washington County Sheriff's Office mail policy
February 1, 2012	Formal training on inmate mail procedures

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[1] Defendants incorporate the facts asserted in the Declaration of Sheriff Jeffrey Dickerson (Dkt. 32) and the Declaration of Bryan Cutright (Dkt. 30) filed in support of their response to PLN's Motion for a Preliminary Injunction.

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February 10, 2012	Minor revisions[2] to inmate mail policy ("February IMP")
Mid-February, 2012	The Jail rejected Lucy Lennox's mailings of an article printed from PLN's website
February 16, 2012	Answer filed admitting constitutional violations
April 4, 2012	Hearing on PLN's Motion for a Preliminary Injunction
May 8, 2012	PLN's Inspection of the Jail
May 16, 2012	New Inmate Manual issued with revised inmate mail procedures
May 25, 2012	Revised inmate mail policy ("May IMP") retaining postcard restriction on personal inmate mail
May 29, 2012	Court's Opinion and Order on PLN's Motion for a Preliminary Injunction
June 18, 2012	Revised inmate mail policy ("June IMP") discarding postcard restriction
July 3, 2012	Formal training on inmate mail procedures
July 5, 2012	Minor revision[3] to inmate mail policy ("current IMP")
August 8, 2012	Formal training for additional staff on inmate mail procedures

B. Defendants Took Immediate Action to Identify and Correct the Handling of Inmate Mail.

The facts show that shortly after this lawsuit was filed, Sheriff Dickerson learned that staff had been rejecting magazines and the Sheriff's Office's website incorrectly stated that magazines were not allowed into the facility. (Dkt. 32, Dickerson Decl. ¶¶ 8-9.) Additional investigation revealed that the inmate mail policies effective since at least 2009 provided due process to the inmate for incoming mail, but was deficient as to the sender, and due process was deficient for outgoing inmate mail. (*See id.* ¶ 4, Ex. A, pp.3-5; *id.* ¶ 5, Ex. B, pp.3-6; *id.* ¶ 6, Ex.

[2] The revision to the January IMP in the February IMP was to clarify that the Prohibited Mail Notice form was the means to communicate the appeal process for mail that the Jail rejected. (Dkt. 32, Dickerson Decl. ¶ 10.)

[3] The June IMP no longer limited inmates to receiving three books in a single mailing, however, one reference to that rule was left in the June IMP. The July IMP removed the reference. (Dickerson Decl. ¶ 5.)

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C, pp.3-6; *id.* ¶ 7, Ex. D, pp.3-7.) This lawsuit was Sheriff Dickerson's first notice that the Sheriff's Office had unconstitutional inmate mail practices. (*Id.* ¶¶ 8-9.)

At his deposition on May 10, 2012, Sheriff Dickerson testified that he understood that the Sheriff's Office had violated the First and Fourteenth Amendments with respect to handling inmate mail. (Wing Decl. I (Dickerson Dep. 151:12-152:1, 167:1-13, 169:2-173:16).) Although the Jail had rejected magazines on an inconsistent basis, the Sheriff's Office's inmate mail policies had undergone no changes with respect to the receipt of magazines and all of them contained the same language, which was that periodicals were accepted. (Dkt. 32, Dickerson Decl. ¶ 4, Ex. A, p.3; *id.* ¶ 5, Ex. B, p.3; *id.* ¶ 6, Ex. C, p. ; *id.* ¶ 7, Ex. D, p.3 ("Books and/or periodicals may be procured from outside the jail, however, any such book, hardbound or otherwise, must be sent directly from the publisher or bookstore via the U.S. Mail.").) The evidence supports that the rejection of magazines and other correspondence by Jail staff was done inconsistently. (*Compare* Compl. ¶¶ 4.5-4.23; Ans. ¶¶ 4.5-4.23 (admitting thirty-seven magazines were rejected), *with* Plf. Mot. Prelim. Inj., Dkt. 11, McCarter Decl. ¶¶ 5-6; Dkt. 13, Kay Decl. ¶ 6; Dkt. 14, St. Helen Decl. ¶¶ 5-6 (showing some magazines were delivered); Roberson Decl. ¶ 8, Ex. G (September 16, 2011 shift summary email stating, "Please remove the staples from the Prison Legal News papers and hand them out."); *Id.* ¶ 9, Ex. H (January 23, 2012 Jail incident report stating that thirteen inmates reported regularly receiving *Prison Daily* [sic] *News*); *id.* ¶ 3, Ex. B (Moyer Dep. 121:6-123:6, 219:7-220:9) (Undersheriff Moyer instructed staff to interview inmates to determine if they were receiving *Prison Legal News*); Dkt. 39, Plf. Mot. Prelim. Inj., Weisenberger Decl. ¶ 5 (stating that he received three magazines regularly for eight months before being informed they were not allowed into the facility).)

Materials produced by PLN show that from late 2010 to the present, forty-one inmates received six-month complimentary magazine subscriptions, a free book entitled *Protecting Your Health and Safety*, and informational brochure packets; three of those inmates received a second complimentary six-month subscription and duplicate copy of the free book and informational brochure. (Roberson Decl. ¶ 11, Ex. J.) Twelve inmates began to receive these materials in

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March and April, 2012, subsequent to the filing of this lawsuit. (*Id.* (inmates Bahr, Campo, Engle, Harris, Hinkle, Sanders, Stinson, Stratton, Vandolah, Wilcoxson, Wilke, Young).)

Sheriff Dickerson moved swiftly to comply with the First and Fourteenth Amendments and issued a new IMP on January 26, 2012, with minor modifications on February 10, 2012. (Dkt. 32, Dickerson Decl. ¶ 10; Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 96:1-96:7) (drafting of prohibited mail notice); *Id.* (Moyer Dep. 195:15-21) (drafting of January IMP); *see also id.* ¶ 2, Ex. A (Dickerson Dep. 273:2-8) (January IMP adapted from Washington County Sheriff's Office IMP).) Jail deputies were trained on the new inmate mail procedures on February 1, 2012. (Dkt. 32, Dickerson Decl. ¶¶ 27-28.) The revisions adopted in the new inmate mail policy and practice allowed publications to be delivered to inmates, as long as it did not violate other rules that protected jail security,[4] and provided due process to the sender and receiver of inmate mail. (Dkt. 29, Defs. Resp. Plf. Mot. Prelim. Inj. at 3-9.) The postcard-only portion of the policy was maintained and restricted to personal inmate mail. (*Id.*)

Defendants filed its Answer to the Complaint on February 16, 2012, admitting most of PLN's factual allegations and admitting liability for rejecting PLN's magazines and other correspondence, and failing to provide adequate due process. (Compl. ¶ 1.1, Ans. ¶ 1.1.)

C. Washington County Sheriff's Office Promoted the Statewide Adoption of a Postcard-Only Policy.

The postcard restriction for personal inmate mail was spearheaded by the Washington County Sheriff's Office. At a conference for the Oregon State Sheriff's Association in December, 2009, presenters from the Washington County Sheriff's Office discussed implementation of a postcard-only policy. (*Id.* ¶ 3, Ex. B (Moyer Dep. 221:2-8); Wing Decl. I (Dickerson Dep. 83:17-85:2).) The postcard restriction had passed constitutional muster, according to the presenters. (Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 223:10-224:1).) An

[4] In the Court's Opinion and Order dated May 29, 2012, it found that there was a dispute as to whether the mail policy prohibited an inmate's ability to reply to PLN's catalog offers because the return mail was not in postcard-form. Although the Court noted this was a dispute, the intent of the policy, and the new practice of the Jail, was to allow that to occur.

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"implementation plan" was provided that gave a suggested timeframe to implement the postcard restriction by the end of March, 2010 and that stated the postcard restriction had "withstood court challenges." (Roberson Decl. ¶ 7, Ex. F.)

In April, 2011, after Washington County received an "upsurge" of prisoner-complaints about the postcard restriction after the ACLU sent postcards to inmates at the Washington County Jail, a standard response to those complaints was drafted by Washington County legal counsel and shared with the Columbia County Sheriff's Office. (Wing Decl. ¶ II (Cutright Dep. 145:22-25); Roberson Decl. ¶ 6, Ex. E (showing Washington County legal counsel drafted the standard response).) This standard response was used by the Sheriff's Office to respond to inmate complaints about the postcard-only policy. (Chamberlain Decl. Exs. 13, 15, 16, 17, 18.)

D. After January and February of 2012, the IMP Continued to Remain Under Significant Review.

Although the January and February IMPs contained significant changes from prior policies, the Sheriff's Office continued to improve its mail practices and procedures. (Dickerson Decl. ¶ 9.) For example, the Sheriff's Office changed the definition of "sexually explicit" that was adopted from the Washington County Sheriff's Office, deleting the part of the definition that stated "depiction[s] of lewdness, licentiousness, or graphic erotic behavior designed to cause sexual excitement." (*Compare* Dickerson Decl. ¶ 5, Ex. B (current IMP), *with* Dkt. 32, Dickerson Decl. ¶ 10, Ex. F (February IMP); *see also* Roberson Decl. ¶ 2, Ex. A (Dickerson Dep. 365:1-366:7) (training included covering the new definition of "sexually explicit").)

Another significant change was to require jail supervisors to approve of any decision by a deputy to reject a piece of mail. (*Compare* Chamberlain Decl. Ex. 63, pp.13-14, 15-16 (May IMP), *with* Dkt. 32, Dickerson Decl. ¶ 10, Ex. F (February IMP). *See infra* Part III.E.3 (explaining clarifications on due process procedures).)

An issue arose as to whether stamps should be cut-off or peeled from postcards. (Chamberlain Decl. Ex. 41 (February 17, 2012 email reminder to peel-off stamps); *id.* Ex. 45 (February 24, 2012 email from a deputy explaining the problems with peeling stamps); Roberson

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Decl. ¶ 5, Ex. D (Miller Dep. 92:12-94:4) (explaining that she did not take stamps off postcards); Wing Decl. II (Cutright Dep. 114:20-115:23) (explaining that stamps were removed and that removal was required by the policy).) The Sheriff's Office came up with a practical solution, which was to peel-off the stamp when it was easy to do, but to otherwise leave it on. (Wing Decl. VII (Moyer Dep. 283:11-284:4).)

The Sheriff's Office also decided to no longer limit the number of books or periodicals that can be delivered to an inmate in a single day. (*Compare* Dickerson Decl. ¶ 5, Ex. B (current IMP), *with* Dkt. 32, Dickerson Decl. ¶ 10, Ex. F (February IMP).)

E. Action Taken Prior to Court's Opinion and Order on PLN's Motion for a Preliminary Injunction.

1. Postcard Restriction on Personal Inmate Mail Was Clarified.

In the Court's Opinion and Order, it found that there were disputed facts as to whether the February IMP prevented the delivery of some of PLN's correspondence on the basis that it was not on a postcard. (Dkt. 64, Op. & O. Prelim. Inj. at 10.) The May IMP resolved those issues prior to the Court's Opinion and Order. In that policy, "personal mail" was defined as "[m]ail to or from family, friends, or for personal business. Personal mail does not include legal mail, official mail, publications, or junk mail/bulk mail." (Chamberlain Decl. Ex. 63, p.3.) The definition of "junk mail/bulk mail" was broadly defined as:

> Printed materials, often sent as mass mailings, such as catalogs, advertisements, brochures, circulars, newsletters, and pamphlets whose primary purpose is to sell, promote or solicit for, a product or service. Junk mail/bulk mail may come using a variety of postage rates, including but not limited to bulk mail rates. Junk mail/bulk mail may be solicited or unsolicited.

(*Id.* Ex. 63, p.2-3.) "Publications" included "periodicals and books," and periodicals included magazines. (*Id.* Ex. 63, p.3.) These definitions allowed PLN's magazines and other correspondence to be delivered to inmates. (*See id.* Ex. 63, pp.4-5 (publications permitted), p.9 (junk/bulk mail permitted).)

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Personal mail to and from inmates had to be sent and received in postcard form. (*Id.* Ex. 63, p.4.) Exceptions were made if an inmate needed to take care of personal business or was involved in a rehabilitation program. (*Id.*; *see also id.* p.7 (personal business permitted).)

The Court expressed concern that the postcard restriction prevented "educational, community, and religious organizations" from sending "lessons, books and periodical offers, and fundraising appeals." (Dkt. 64, Op. & O. Prelim. Inj. at 20.) Although there was a dispute over whether the February IMP's postcard restriction prohibited this material, the intent was that such organizations could send these materials. In the May IMP, it was clarified that the postcard restriction did not apply to mail from organizations. (Chamberlain Decl. Ex. 63, pp.2-5, 9.) Furthermore, an inmate could communicate by letter to "other confining authorities, ... medical provider[s], ... religious leader[s], ... [or] the news media." (Chamberlain Decl. Ex. 63, p.3 (defining "official mail"); *id.* ("personal mail" definition excluded "official mail"); p.5 (legal and official mail procedures).)

2. A New Inmate Manual Was Issued in May, 2012.

After county counsel finished her review, a new inmate manual was issued on May 16, 2012 and a new mail guide was posted to the Sheriff's Office website. (Chamberlain Decl. Ex. 56 (Inmate Manual); *id.* Ex. 9 (copy of inmate mail section of website); Plf. Mot., Berg Decl. ¶¶ 8-9, Ex. C (Inmate Manual); Roberson Decl. ¶ 2, Ex. A (Dickerson Dep. 213:20-214:3 (revised inmate manual being reviewed by legal counsel).) The inmate manual expressly permitted periodicals such as magazines and notified inmates of their appeal rights for rejected mail. (Chamberlain Decl. Ex. 56, p.12 (periodicals allowed), p.16 (appeals process).) As PLN mentions in its motion, the Jail mistakenly provided new inmates an old inmate manual for several months prior to May 16, 2012 that stated that magazines were not permitted. (Wing Decl. Ex. I (Dickerson Dep. 125:24-126:5).) Beginning May 16, 2012, all current inmates were given a copy of the new inmate manual. The only version available at this time is in English, but the Sheriff's Office plans to issue a Spanish version when an update of the entire manual is completed. (Dickerson Decl. ¶¶ 12-13.)

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Prior to May, 2012, an outdated memorandum stating that magazines were not allowed in the facility could still be found in some pods at the Jail. (Chamberlain Decl. Ex. 2.) By early May, Undersheriff Moyer instructed jail staff to remove the old memorandum for the new mail guide and explain the new mail process to the inmates. (Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 81:17-82:13, 84:3-21).) Moyer made it clear these instructions could have been made at separate times. (*Id.* (Moyer Dep. 84:14-21).) PLN inspected the Jail on May 8, 2012. Two emails sent to jail staff prior to the May 8, 2012 date reminded staff that Moyer wanted the old mail memorandum removed, if it was found. (Chamberlain Decl. Exs. 43-44.)

3. Due Process Procedures Have Been Further Clarified.

While denying PLN's Motion for a Preliminary Injunction on its due process claim, the Court found that the February IMP's due process procedures were "not a model of clarity, [but] they appear to broadly afford due process notice to inmates and their correspondents." (Dkt. 64, Op. & O. Plf. Mot. Prelim. Inj. at 25.) Four days prior to the Court's Opinion and Order on May 29, 2012, the Sheriff's Office issued a new IMP clarifying the due process procedures. (Chamberlain Decl. Ex. 63.) The May IMP expressly required a Prohibited Mail Notice to be completed by a jail deputy for each piece of mail that was found to have violated the policy for incoming and outgoing inmate mail. (*Id.* Ex. 63, p.10 (Paragraph M), p.13 (Paragraph C).) To ensure the consistent application of the new mail rules, a supervisor's written approval was required before a deputy could decide not to send or deliver inmate mail. (*Id.*; *see also id.* Ex. 63, p.16.) The Prohibited Mail Notice form was changed to more clearly state that it applied to incoming and outgoing inmate mail when mail was rejected. (*Id.* Ex. 63, p.16.) The appeals process was specified in the policy as well as on the Prohibited Mail Notice form. (*Id.* Ex. 63, p.15 (Paragraphs A-B), p.16.) These due process procedures have largely remained unchanged to the present time. (Dickerson Decl. ¶¶ 4-5, Exs. A-B.)

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F. Action Taken After Court's Opinion and Order Dated May 29, 2012.

In response to the Court's Opinion and Order, the Sheriff's Office updated its website to state that the IMP was under review but that mail in envelopes would be accepted. (Chamberlain Decl. Ex. 10.)

Inmates were allowed to use paper and envelopes after supplies were ordered. (*See* Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 175:9-176:16).)

The Sheriff's Office issued a new IMP on June 18, 2012, with a minor revision on July 5, 2012. (Dickerson Decl. ¶¶ 4-5, Exs. A-B.) Staff was trained on the new mail procedures on either July 3, 2012 or August 8, 2012. (Chamberlain Decl. Ex. 37; Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 113:20-118:13).)

G. The Sheriff's Office Has Discarded the Postcard-Only Policy and Will Not Go Back.

The Sheriff's Office has no intention of going back to the postcard-only policy. (Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 176:17-182:3).) When asked by PLN's attorney if the Court was legally wrong in issuing a preliminary injunction, Sheriff Dickerson stated, "I don't judge whether The Court got it wrong or not. What I consider is that the judge made a ruling and we're going to go with what the judge said. And I'm not fighting against it. I'm not opposed to it. We're moving on." (*Id.* ¶ 2, Ex. A (Dickerson Dep. 378:22-379:14).)

H. Columbia County Has No Control Over the Mail Practices of the Sheriff's Office, and the Sheriff's Office Is Not an Agent of Columbia County.

Sheriff Jeff Dickerson is an elected official. *See* ORS chapters 204.005(1)(a) and 206. He has authority to hire and terminate employees of CCSO subject to budgetary constraints imposed by the Columbia County Board of Commissioners. *See, e.g.*, ORS 204.601, ORS 204.635, ORS 206.210. Columbia County has no authority or control over the Sheriff's Office's inmate mail practices. (Dickerson Decl. ¶ 6; *see also* Ans. ¶¶ 3.3-3.5.)

IV. PLN LACKS STANDING TO ASSERT INJUNCTIVE AND DECLARATORY RELIEF

Defendants incorporate the legal standards given in response to PLN's Motion for a Preliminary Injunction that PLN lacks standing. (Defs. Resp. Prelim. Inj. at 10-13.) Here, PLN

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fails to meet the standard for Article III standing because it has not demonstrated any imminent injury that could be redressed by permanent injunctive or declaratory relief. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000).

In the Court's Opinion and Order, it found that PLN had standing because there was a dispute over whether the then current IMP prohibited PLN's mail. (Dkt. 64, Op. & O. Plf. Mot. Prelim. Inj. at 11.) That dispute no longer exists. PLN raised no objections about the Sheriff's Office's now current June IMP (with a minor revision on July 5, 2012), presumably because it has none. As for the Sheriff's Office's practices, the record shows that the last magazine rejected by the Jail was in July, 2011. (Compl. ¶ 4.23; Ans. ¶ 4.23 (admitting fact).) The last "informational brochure packet" rejected by the Jail was also in July, 2011. (Compl. ¶ 4.36; Ans. ¶ 4.36 (admitting fact).) The last subscription renewal letter rejected by the Jail was in June, 2011. (Compl. ¶ 4.47; Ans. ¶ 4.47 (admitting fact).) The last "fundraising pack" rejected by the Jail was in November, 2011. (Compl. ¶ 4.57; Ans. ¶ 4.57 (admitting fact).) Paul Wright stated in his March 6, 2012 declaration that PLN had an average of twenty subscribers at the Columbia County Jail in the prior year, although it is unknown to defendants whether there are any current subscribers. (*See* Dkt. 44, Wright 2d Decl. ¶ 35.)

The Court also found that PLN had standing to assert the rights of "other correspondents," such as inmates and their family and friends, due to its advocacy for prisoners and contact with inmates and others who complained to PLN about the postcard-only policy. (Dkt. 64, Op. & O. Plf. Mot. Prelim. Inj. at 11.) The postcard-only policy was discarded in response to the Court's issuance of a preliminary injunction, and as explained in Part III.G, the Sheriff's Office has no intention of re-implementing it. Thus, no inmates or correspondents are in danger of suffering any imminent injury as a result of a non-existent postcard-only policy. PLN has not shown that any mail has been rejected by the Jail on the basis that it is not in postcard form since the Court issued the preliminary injunction, nor will any mail be rejected on this basis in the future.

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PLN reasserts that it has "organizational" standing but has not shown that its resources are diverted or its mission frustrated under the current mail policy, or even the May IMP, which allowed PLN to mail its correspondence to inmates and receive book orders or subscription renewal forms in return. *See supra* Part III.E.1.

V. PLN'S CLAIM FOR INJUNCTIVE RELIEF IS MOOT

PLN seeks an order permanently enjoining defendants "from rejecting or otherwise censoring mail on the ground that it is not in the form of a postcard, or on the ground that it is a magazine or periodical[.]" PLN also seeks an order permanently enjoining defendants "from denying due process to prisoners and their correspondents when rejecting or otherwise censoring mail." (Plf. Mem. at 22.) PLN's request is stale. There is no policy or practice to enjoin. The Sheriff's Office conformed its policy and practices to the First and Fourteenth Amendments in January, 2012 and the current IMP implemented in June, 2012 is not challenged by PLN.

As this Court has instructed, "[a] claim is moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" (Dkt. 64, Op. & O. Plf. Mot. Prelim. Inj. at 10, *quoting United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1990) (internal quotations and citations omitted).) Further, this Court recognized that "'if events subsequent to the filing of the case resolve the parties' dispute, [the court] must dismiss the case as moot[.]'" (*Id.*, *quoting Pitts v. Terrible Herbst, Inc.*, 653 P.3d 1081, 1087 (9th Cir.2011).) Such is the case here. As the evidence demonstrates, defendants revised the then current IMP in compliance with this Court's Opinion and Order so that the issues presented in PLN's motion for permanent injunction are no longer live. The now current IMP entirely resolves PLN's claims.

In its Opinion and Order, the Court declined to find that the dispute was moot because questions of fact remained on whether PLN's could communicate with inmates through the mail. (Dkt. 64, Op. & O. Plf. Mot. Prelim. Inj. at 10.) These issues are no longer in dispute and the postcard restriction was discarded and will not be re-implemented. *See supra* Part III.G.

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PLN argues that as to mootness it is defendants' burden to prove that it will never violate the Constitution again. (Plf. Mem. at 22.) This is not the standard. Rather, defendants must prove that its cessation of a challenged practice make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 180-81. PLN cites *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274 (9th Cir. 1998), for the proposition that defendants must show that its current IMP has "completely and irrecovably eradicted the effects of the alleged violation." (Plf. Mem. at 22.) In *Norman-Bloodsaw*, the court denied that a dispute over employee medical testing was moot because the defendants had merely claimed that the testing was discontinued. The defendants did not issue a new policy prohibiting future testing, or even issue a statement that such testing would not be conducted in the future; additionally, the defendants continued to keep on file the results from the disputed testing. *Id.* at 1274-75. The facts of the present case are remarkably different.

In the present case, the effects of the constitutional violations resulting from the old IMP have been completely eliminated. Here, the Sheriff's Office admitted liability and immediately ceased unconstitutional conduct with respect to categorically rejecting magazines and other correspondence and not providing due process notification for rejected mail. The admission of liability, in addition to the consistent effort since then to revise the IMP to comply with constitutional standards, makes it absolutely clear that the conduct will not be repeated in the future. *Smith v. University of Washington Law School*, 233 F.3d 1188, 1194-95 (9th Cir. 2000) (holding dispute moot because, after law school stopped the use of race in the admissions process in response to a change in state law, if law school was "temerarious enough" to violate state law, then plaintiff or others "can commence a new battle at that time").

Further, PLN has not shown that the Jail has rejected its mail in violation of the Constitution since prior to January, 2012. With respect to the postcard restriction, despite defendants' defense of the policy in court, the Sheriff's Office has eliminated it in the current IMP and represented that it will not be implemented in the future. *See supra* Part III.H. The

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evidence is that the Sheriff's Office is not categorically rejecting magazines and other correspondence, is providing due process when mail is rejected, and is not restricting incoming or outgoing inmate mail to postcard-form. Accordingly, defendants have met their burden and permanent injunctive relief has been mooted.

VI. SUMMARY JUDGMENT ON PLN'S CLAIM FOR PERMANENT INJUNCTION SHOULD BE DENIED

A. Legal Standard for Permanent Injunction.

The decision to grant or deny a permanent injunction is an act of equitable discretion by the district court. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) The fact that this Court issued a preliminary injunction as to defendants' postcard restriction on all incoming and outgoing inmate personal mail is not decisive here. Preliminary injunctive relief and a permanent injunction are "distinct forms of equitable relief that have different prerequisites and serve entirely different purposes." *Lermer Germany GmbH v. Lermer Corp.*, 94 F.3d 1575, 1577 (Fed.Cir. 1996).

To issue a permanent injunction, PLN must show (1) actual success on the merits, (2) an irreparable injury for which monetary damages are inadequate to compensate for that injury, (3) a remedy in equity is warranted considering the balance of hardships between the plaintiff and defendant, and (4) a permanent injunction is in the public interest. *eBay*, 547 U.S. at 391. Plaintiff bears the burden of proof on each of these elements of a permanent injunction. *Olagues v. Rossoniello*, 770 F.2d 791, 799, 803 (9th Cir. 1985).

Even if a plaintiff establishes success on the merits, an injunction does not follow as a matter of course and it remains in the Court's equitable discretion whether to issue one. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). "[Injunctive] relief is not automatic, and there is no rule requiring automatic issuance of a blanket injunction when a violation is found." *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007).

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In the context of a correctional facility, courts must abide by the Prison Litigation Reform Act. 18 U.S.C. § 3626(a)(1). This statute holds that prospective relief, such as a permanent injunction, "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *Id.*

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

Id. § 3626(a)(2). This statute "operates simultaneously to restrict the equity jurisdiction of federal courts and to protect the bargaining power of prison administrators – no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum." *Gilmore v. People of the State of California*, 220 F.3d 987, 999 (9th Cir. 2000)**Error! Bookmark not defined.**.

B. PLN Has Failed to Meet its Burden for Permanent Injunction.

The circumstances of the case are not appropriate for the equitable remedy of a permanent injunction. At this summary judgment stage of the proceedings, PLN has the burden to show that there is no genuine issue as to any material fact with respect to the four elements of permanent injunction. *Olagues*, 770 F.2d at 799, 803. PLN has not and cannot satisfy this burden. Moreover, PLN has failed to demonstrate that a permanent injunction is a necessary remedy, narrowly drawn and the least intrusive means to correct the constitutional violation. *See* Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(2).

1. No Demonstration of Irreparable Harm.

The Supreme Court has instructed that a permanent injunction "is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again – a 'likelihood of substantial and immediate irreparable injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 110, 103 S. Ct. 1660

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(1983)**Error! Bookmark not defined.**, quoting *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S. Ct. 669 (1974). "[P]ast wrongs do not themselves amount to that real and immediate threat of injury * * *." *Id.* at 103. The speculative nature of a claim of future injury "requires a finding that this prerequisite of equitable relief has not been fulfilled." *Id.*; *see Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (the mere possibility of irreparable harm is not sufficient).

The evidence is that PLN is no longer subject to a threat of constitutional injury and the likelihood of substantial, immediate and irreparable injury is speculative, at best. In support of its claim for a permanent injunction PLN relies solely on violations that occurred under prior policies and practices. Neither PLN, nor inmates and their correspondents, are at risk of suffering any harm caused by a non-existent and abandoned policy. The evidence shows that these policies and practices have been eliminated and abandoned, and there is no dispute that the current policy and practice comports with constitutional standards. *See supra* Part III.B, E, F, G. PLN's argument that defendants cannot be trusted to maintain constitutionally acceptable policies and practices is contrary to the evidence and, in any event, does not satisfy the prerequisite for a permanent injunction. *See infra* Part VI.C. To the extent there is a genuine issue of material fact relating to whether defendants are to be trusted, PLN's motion for summary judgment for declaratory and permanent injunctive relief should be denied. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-47 (1986).

Additionally, the evidence that PLN remained silent as to the constitutional violations that occurred in the months preceding the filing of this lawsuit and the continued initiation of mailings that PLN knew would be rejected under the old and admitted unconstitutional mail policies, suggests that the harm suffered in this case was not "great or immediate" irreparable injury. *See Lyons*, 461 U.S. at 112 (declining the "invitation to slight the preconditions for equitable relief" in the absence of "irreparable injury which is both great and immediate").

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Further, equitable relief is inappropriate when a plaintiff has an adequate remedy at law. *Lyons*, 461 U.S. at 110. PLN has made no showing that the equitable remedy of a permanent injunction is necessary because there is no adequate remedy at law. There is an adequate remedy at law.[5] As the Supreme Court has explained, if someone has "suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983." *Lyons*, 461 U.S. at 113. PLN has not demonstrated that monetary damages are inadequate to compensate for past violations. This is not like an environmental injury claim, where courts have held that violations can seldom be remedied with damages. *See Norton*, 503 F.3d at 843.

PLN's two-pronged failure to demonstrate the existence of an irreparable injury for which such equitable relief is the only remedy precludes the issuance of a permanent injunction.

2. No Showing of Success on the Merits Because the Prior Postcard-Only Policy Was Constitutional under *Turner v. Safley*.

Defendants incorporate the facts and argument previously made to this Court. (Dkts. 29-32, Defs. Resp. Plf. Prelim. Inj., and supporting declarations; Dkt. 50, Defs. Resp. Amicus Curiae Br.; Dkt. 76, Defs. Resp. Plf. Mot. Am. Op. & O.)[6]

The Supreme Court has recognized that controlling both incoming and outgoing inmate correspondence is a "necessary adjunct to penal administration." *Thornburgh v. Abbott*, 490

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[5] Inmates have brought claims over postcard-only mail policies. *See*, *e.g.*, *Bennett v. Columbia County*, No. 3:12-cv-00304-AA (D. Or.) (inmates challenging postcard restriction at Columbia County Jail); *Pergande v. Trumbo*, No. 6:10-cv-06314-TC (D. Or.) (inmate challenging postcard restriction at Umatilla County Jail); *Daniels v. Harris*, 2012 WL 3901646 (M.D. Ga. Aug. 8, 2012); *Covell v. Arpaio*, 662 F. Supp.2d 1146 (D. Az. 2009); *Rogers v. Maricopa County Sheriff's Office*, 2008 WL 898721, No. CV07-00641 (D. Az.) (not reported); *Jordan v. Arpaio*, 2008 WL 22622401, No. CV08-00856 (D. Az.) (not reported); *Medley v. Arpaio*, 2008 WL 3911138, No. CV08-00086 (D. Az.) (not reported); *Gibbons v. Arpaio*, 2008 WL 4447003, No. CV07-1456 (D. Az.) (not reported).

[6] PLN argues that the higher standard announced in *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), *overruled in part and on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), applies to outgoing inmate mail. (Plf. Mem. at 13-14.) The Court rejected this argument. (Dkt. 78.) Defendants will apply *Turner v. Safley*.

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U.S. 401, 407-08 (1989). Further, restrictive prison regulations, including First Amendment restrictions, are permissible "if they are reasonably related to legitimate penological interests and not an exaggerated response to those concerns." *Beard v. Banks*, 548 U.S. 521, 528 (2006). Courts must give "substantial deference to the professional judgment of prison administrators." *Id.* *Turner v. Safley,* 482 U.S. 78, 79 (1987) established four factors to determine when a regulation is "reasonably related to legitimate penological interests."

PLN makes no argument that the Sheriff's Office's postcard-only policy affected the delivery of its mail to inmates subsequent to January, 2012. (*See generally* Plf. Mot.) The prior finding that disputed facts existed under the February IMP has been resolved, *see supra* Part III.E.1, and PLN has not shown that any of its mail was rejected under the February IMP or May IMP because it was in postcard-form. PLN does not specify which postcard-only policy it challenges, but instead it brings an overall challenge to the very concept of restricting inmates and their correspondents to postcards. Such a theoretical challenge seeking a permanent injunction should be denied as insufficient to satisfy the principles of the equitable remedy. As discussed below, defendants show that a postcard-restriction on personal inmate mail satisfies the standard announced in *Turner v. Safley*, 482 U.S. 78 (1987).

a. Postcard Restriction Is Rational.

At the preliminary injunction stage, the Court agreed that the safety and security of jail staff and inmates and the efficient use of a jail's resources are legitimate penological interests. (Dkt. 64, Op. & O. Prelim. Inj. at 16.) But the Court remained "unconvinced" that a postcard restriction was rationally related to these interests. (*Id.* at 17.) Discovery and subsequent events have further substantiated the rationality Sheriff's Office's postcard-only policy.

i. Envelope Mail Presents Increased Threats to Jail Security.

PLN argues that it was irrational for the Sheriff's Office to follow the Washington County Sheriff's Office in adopting a postcard-restriction. (Plf. Mem. 4-7.) PLN cites no authority for this contention. The Sheriff's Office relied on the Washington County Sheriff's Office because it is a leader in Oregon for jail practices and procedures. (Dickerson Decl. ¶ 7.)

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See Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (court must "accord substantial deference to the professional judgment of [corrections] administrators" in reviewing regulations). The Ninth Circuit specifically recognized that a prison regulation can be rationally related without the jail having to prove that prior problems existed.

> To show a rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned material actually caused problems in the past, or that the materials are 'likely' to cause problems in the future. Moreover, it 'does not matter whether we agree with' the defendants or whether the policy 'in fact advances' the jail's legitimate interests. The only question that we must answer is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests.

Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999); *see also Friedman v. Arizona*, 912 F.2d 328, 332-33 (9th Cir. 1990) ("*Turner* requires that courts allow prison officials to *anticipate* security problems and to adopt innovative solutions to the intractable problems of prison administration." (emphasis in original)).

The experiences of other correctional facilities demonstrate the increasingly sophisticated nature of attempts by inmates and their correspondents to send or receive contraband through the mail. In October, 2010, the Ventura County Sheriff's Office ("VCSO") adopted a postcard-only policy on incoming and outgoing mail. (Roberson Decl. ¶ 13, Ex. L (Unsealed Docs, Davidson Decl. ¶¶ 3-4).) Prior to the adoption of its policy, mail handlers confiscated narcotics, such as black tar heroin and LSD, in the seams of envelopes (*id.*, Martinez Decl. ¶ 6; *Id.*, Hernandez ¶¶ 6-7) as well as paperclips, staples (*id.*, Hernandez Decl. ¶¶ 11-12), and razor blades (*id.*, Wilkinson Decl. ¶ 8(b)(1).) An inmate can fashion multiple paperclips and staples into handcuff keys or weapons. (*Id.*, Martinez Decl. ¶ 13; *id.*, Hernandez Decl. ¶ 11.) The glue strips of envelopes have been found to be laced with heroin. (*Id.*, Held Decl. ¶¶ 16-19.) "Mail containers, such as manila envelopes, greeting cards, and their envelopes, as well as conventional mail envelopes and the papers which they contain, are being used to smuggle narcotics and currency into custody facilities." (*Id.*, Detective Decl. ¶ 7.) The type of contraband that can be sent through envelope mail included metal wire, lithium, gunpowder, and plastic explosives.

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(*Id.*, Detective Decl. ¶¶ 8-9.) "Once concealed, I was personally unable to detect the heroin by feeling or manipulating the envelope. The tar heroin was detectable by scientific means or by tearing the bottom flap of the envelope." (*Id.*, Detective Decl. ¶ 19.)

Postcard restrictions to personal inmate mail are a rational response to reduce the contraband risks described above. Unlike envelopes, postcards do not have glue strips or flaps that can hide contraband such as drugs, needles, paperclips, staples, metal wires, lithium, gunpowder, or plastic explosives.

A recent case in Georgia highlights a specific security risk with outgoing inmate mail. A district court granted defendants' motion for summary judgment with respect to a postcard-only policy for incoming and outgoing inmate mail. *Daniels v. Harris*, 2012 WL 3901646 (M.D. Ga. Aug. 8, 2012) (applying *Turner* to both incoming and outgoing mail). The Walton County Jail's ("WCJ") postcard-only policy was restricted to non-legal mail. According to the court:

> WCJ has encountered several problems with inmates receiving contraband from outside the prison. Because requests for contraband were buried inside of lengthy letters, the postcard-only mail policy assists in maintaining order and security by reducing the inmates' ability to hide contraband request [*sic*] within letters to their family and friends.

Id. at *2. The Sheriff's Office does not have to wait for an inmate to do the same before changing its mail procedures; it is rational to be proactive. *See Mauro*, 188 F.3d at 1060; *Friedman*, 912 F.2d at 332-33.

In upholding a postcard-only restriction on outgoing inmate mail, a district court in Florida found that the jail had demonstrated that the restriction "reduced mail-related incidents that impact security." *Martinez v. May*, No. 2:11-cv-14039, p. 24 (S.D. Fla. Apr. 25, 2012) (attached as Exhibit M to the Declaration of Gregory R. Roberson). Specifically, the postcard restriction reduced the number of incidents in which inmates wrote "in sophisticated code to communicate with gang members" and "address[ed] envelopes to relatives, but sen[t] therein written communications of a threatening nature for the relatives to forward to other persons with whom the inmate is forbidden to communicate." *Id.* p.14. Although postcards could be used for

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the same purposes, the court found that the reduction in the number of incidents increased jail security. *Id.* p.24.

The serious dangers experienced by VCSO were not limited to incoming inmate mail. Gang members often use symbols and codes to send covert communications. (Roberson Decl. ¶ 13, Ex. L (Unsealed Docs, Wilkinson Decl. ¶ 3.) Prisoners also use coded messages to coordinate testimony, provide instructions to destroy evidence, and "generally confound criminal investigators." (*Id.*, Wilkinson Decl. ¶ 7.) As determined by the *Martinez* court, the fact that a postcard restriction does not eliminate the risk of these security problems does not mean that the prison regulation is irrational; the reduction in the number of security-related incidents is sufficient. *See also Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (prison regulations restricting who can visit an inmate to reduce the number of visitors were rationally related to jail security).

Recent events in Oregon also support the rationality of a postcard-only policy. In April, 2012, an inmate housed in Multnomah County mailed six letters containing a white powder that was represented to be anthrax. (Roberson Decl. ¶ 12, Ex. K.) Multnomah County does not limit any inmate mail to postcards. (Dkt. 9, Plf. Mot. Prelim. Inj., Chamberlain Decl. Ex. 4.) Referencing these events during his deposition, Undersheriff Moyer stated that a risk with envelope mail is that inmates can hide contraband in them. (Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 169:1-170:18).) An inmate can get powder by grinding up toothpaste or pills and then send it through the mail in an envelope, shutting down public buildings. (*Id.* (Moyer Dep. 169:15-170:1).) The inmate who did it in Multnomah County was moved to the Columbia County Jail, which at the time had a postcard-only policy for personal mail. (*Id.* (Moyer Dep. 170:6-8).)

Although the inspection of outgoing mail is similarly designed to determine if an inmate has created a safety or security risk from hidden contraband or coded messages, it is certainly rational in terms of jail security to have overlapping security systems in place to prevent harm to the public and to inmates.

In addressing the rationality of the postcard-only policy, the Court's Opinion and Order cited to several Ninth Circuit opinions that held that it is irrational for a correctional institution to

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treat standard-rate mail differently than first-class mail, or bulk-rate mail differently than first- or second-class mail, or to ban bulk-rate mail. (Dkt. 64, Op. & O. Plf. Mot. Prelim. Inj. at 18.) In those cases, the government could not put forth a rational reason to treat the mail differently. Here, the Sheriff's Office made a rational distinction between personal inmate mail (*i.e.*, to and from inmates and their family and friends, *see* Chamberlain Decl. Ex. 63, p.3) and other types of mail. This distinction had nothing to do with postage rates or treating one type of mail arbitrarily over other types of mail; it was based on the fact that friends and family of inmates are more likely to pass contraband through the mail, and inmates are more likely to make threats or prohibited requests to people they know via the mail. (*See* Dkt. 32, Dickerson Decl. ¶ 18.) These security risks are unlikely to come from people and entities that send business or legal mail.

ii. Efficient Use of Limited Jail Resources.

Bryan Cutright's testimony remains the most reliable statement on the time-savings gained by adopting the postcard-only policy in 2010. (Dkt. 30, Cutright Decl.) His deposition testimony further bolstered this fact. PLN misrepresents his testimony. Mr. Cutright did not state that his time-savings estimate was based on comparing a four-page letter with one postcard. (Wing Decl. II (Cutright Dep. 109:9-110:17).) In fact, he explained that the time-savings was based on his personal experience in processing all inmate mail, as well as on time-tracking studies of various deputy tasks, including mail processing, done several years ago. (*Id.* (Cutright Dep. 113:10-19).)[7] His estimate was not based on an extrapolation of scanning a four-page letter versus one postcard. Because he removed stamps from mail, *see* Wing Decl. II (Cutright Dep. 114:20-115:23), his estimate included the amount of time taken to remove stamps. Lee Rigdon

[7] Mr. Cutright did not accurately state the number of pieces of paper indigent inmates received. He stated that before the postcard policy, inmates "got two sheets of paper and two envelopes, <u>or</u> four sheets of paper and two envelopes." (*See* Wing. Decl. II (Cutright Dep. 22:15-18) (emphasis added).) The October 21, 2011 IMP stated, "Indigent inmates will be provided writing material and postage for a maximum of two (2) personal mail pieces per week." (Dkt. 32, Dickerson Decl. ¶ 7, Ex. D, p.1; *see also id.* ¶ 4, Ex. A (same language for mail policy effective November 16, 2009).) Thus, inmates received two pieces of paper per week, not four.

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stated that he "had never done a study" on whether it took longer to process mail since the postcard-policy was ended, but he did say it took him a "little longer" to process mail after the Sheriff's Office ended the postcard restriction. (*Id.* X (Rigdon Dep. 3:11-15).) This does not rebut Mr. Cutright's more thorough testimony. PLN claims Sheriff Dickerson "did not do anything" to determine the time-saving, yet it also cites his testimony that he relied on Mr. Cutright. (Plf. Mem. at 9.)

The absence of a rigorous study relating to the time-saving is not required by *Turner*. "[E]ven in the absence of institution-specific or general social science evidence, as long as it is plausible that prison officials believed the policy would further a legitimate objective, the governmental defendant should prevail on *Turner's* first prong." *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999) (relying on *Mauro*, 188 F.3d at 1060).

PLN points to the financial burden of increased postage. This amount is minimal, and has nothing to do with the efficient use of the Jail's limited resources.

PLN also discussed the effect of one aspect of the postcard-only policy, which was that indigent inmates received two postcards per week. Defendants agree that switching from two pieces of paper per week to two half-sized postcards reduced the amount of writing space available to an inmate by one-fourth, however, inmates were not limited in the number of postcards they could purchase. (*See* Dkt. 32, Dickerson Decl. ¶ 19.) PLN claims it was one-sixteenth the amount of space, but that assumed eight pieces of paper for two half-sized postcards, *see* Plf. Mem. at 7-8, when in fact it was two pieces of paper. Regardless, this has nothing to do with the time-savings gained by the postcard restriction. The Constitution does not require a certain number of writing materials. *See Van Poyck v. Singletary*, 106 F.3d 1558, 1559 (11th Cir. 1997) (holding that inmates do not have a constitutional right to free postage and rejecting the argument that the Constitution requires five free letters per week); *Hershberger v. Scaletta*, 33 F.3d 955, 957 (8th Cir. 1994) (holding "indigent inmates have no constitutional right to free postage for nonlegal mail").

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PLN then raises its old arguments against the February IMP, *see* Plf. Mem. at 9-10, without any discussion of the May IMP that clarified the postcard restriction on personal mail. The intent of the February IMP was to apply the postcard restriction to inmate mail to and from and inmates and their friends and family. As discussed above, the May IMP clarified this issue. The Inmate Manual issued May 16, 2012, and provided to all inmates, conformed to the May IMP. (Chamberlain Ex. 56.)

PLN correctly notes that an article printed from PLN's website and mailed to inmates by Lucy Lennox in February, 2012 was rejected by the Jail on the basis that it was not in postcard form. (Plf. Mem. at 9-10.) The Court does not need to reach the issue of whether this violated the First Amendment for two reasons. First, the Complaint does not allege that the rejection of Ms. Lennox's "internet-generated" mailings violated the First Amendment; PLN alleges she was not provided due process. (Compl. ¶¶4.65-4.71.) Second, the current IMP allows this form of personal mail. (Wing Decl. V (Moyer Dep. 193:2-21) (stating that internet-generated mail is treated like any correspondence).) If the Court were to reach the merits, the mail was properly rejected because the postcard restriction is constitutional.

b. Alternative Avenues Exist.

The Supreme Court in *Turner* stated that a prison regulation was reasonable if "there are alternative means of exercising the right that remain open to prison inmates. Where 'other avenues' remain available for the exercise of the asserted right, ... courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials ... in gauging the validity of the regulation.'" *Turner*, 482 U.S. at 90; *id.* at 81-82 (prison regulation banned correspondence between inmates at different institutions with exceptions for family, legal concerns, or if determined to be in the best interest of the prisoners). In interpreting *Turner*'s second prong, the Supreme Court said that "it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available." *Thornburgh v. Abbott*, 490 U.S. 401, 417-18 (1989). Accordingly, the second prong was "clearly satisfied" when a prison

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regulation banned certain publications but still allowed a broad range of publications to be sent and received. *Id.* at 418.

Importantly, the test is not whether the person can engage in the particular type of expression he or she seeks (*e.g.*, by written correspondence), but whether alternative means of expressing the same message are available. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 352 (1987) ("In *Turner*, we did not look to see whether prisoners had other means of communicating with fellow inmates, but instead examined whether the inmates were deprived of 'all means of expression.'" (citing *Turner*, 482 U.S. at 92)); *see also Mauro*, 188 F.3d at 1061 (alternative means test satisfied because prison regulation banned depictions of frontal nudity but inmates could read sexually explicit material and view depictions of clothed females); *Friedman v. Arizona*, 912 F.2d 328, 332 (9th Cir. 1990) (alternative means test satisfied because inmates were not denied "all [alternative] means of expression" of their religion due to a prison regulation prohibiting full or partial beards), *cert. denied* 498 U.S. 1100 (1991); *Forter v. Greer*, 2012 WL 1340223, *8 (D. Or. Apr. 17, 2012) (holding that the "alternative means" test in *Turner* "merely requires that a plaintiff has alternative means of religious expression, not that a plaintiff has 'alternative means' of engaging in the particular religious practice," where prisoner alleged that prison officials unconstitutionally withheld certain written religious materials).

As pointed out by PLN, the Sheriff's Office had (when the postcard restriction was followed) alternatives means for inmates and their correspondents of communicating the same messages. (Plf. Mem. at 10-11.) PLN claims that, as a publisher, it had no other practical way of communicating with inmates other than through the mail. Although true, defendants have demonstrated that PLN's mail was not affected by the postcard restriction in the February and May IMPs and PLN has not shown that any of its correspondence was rejected under those IMPs.

The Court expressed concern that the postcard restriction prevented "educational, community, and religious organizations" from sending "lessons, books and periodical offers, and fundraising appeals." (Dkt. 64, Op. & O. Prelim. Inj. at 20.) Although there was a dispute over whether the February IMP prohibited this material, the intent was that such organizations could send

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these materials. In the May IMP and as explained above in Part III.E.1, it was clarified that the postcard restriction did not apply to mail from organizations. Furthermore, an inmate could communicate by letter to "other confining authorities, ... medical provider[s], ... religious leader[s], ... [or] the news media." (Chamberlain Decl. Ex. 63, p.3 (defining "official mail"); *id.* ("personal mail" definition excluded "official mail"); p.5 (legal and official mail procedures).) Thus, inmates, such as Bradley Berg, could communicate with their pastors. (Dkt. 36, Berg Decl. ¶ 5 (stating that he refrained from communicating with his pastor due to the postcard-only policy).)

Under the postcard-only policy implemented by the Sheriff's Office, photographs, report cards, and children's drawings could be mailed to inmates in the form of a postcard. They could be shown during visiting times or discussed on the phone. If the drawing could not fit on a postcard (or even larger size such as a piece of paper), a photograph could be taken and sent to the inmate in the form of a postcard.

The Court stated that the postcard restriction placed a "hurdle" for constructive written communication between an inmate and his or her family and friends. (Dkt. 64, Op. & O. Prelim. Inj. at 20.) Under *Turner*, the alternative avenues analysis is not limited to the same kind of communication (here, written communication). Thus, telephone calls and jails visits, in addition to other forms of written communication, are alternative means. Further, hurdles can be put in place as long as they do not deprive the inmate (or their correspondents) other means of communication. In the declarations from family members submitted by PLN, they expressed their frustration with the postcard-only policy because it cost more (without giving any estimates of the increased cost, but they are likely minimal), they had to go buy postcards (which is no more burdensome than buying paper and envelopes), the writing space on a postcard was less than a piece of paper (there is no constitutional requirement that the medium for written communication must be at least 8.5 by 11 inches), and it was a long drive for some of them to visit an inmate. (Dkt. 37, Sharon Berg Decl. ¶¶ 4-7; Dkt. 39, Weisenberger Decl. ¶¶ 3-4; Dkt. 40, Popa Decl. ¶¶ 4, 6; Dkt. 53, Mendoza Decl. ¶ 7.) All of the family members were able to exercise the available alternative means of communication.

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The Court stated that the postcard restriction inhibited rehabilitation. However, there is no evidence in the record that the postcard-only policy inhibited any inmate's rehabilitation. A specific exception to the postcard restriction allowed an inmate involved in a rehabilitation program to correspond with a specific person in letter form. (Chamberlain Decl. Ex. 63, p.4 (May IMP); *see also* Dkt. 32, Dickerson Decl. ¶ 10, Ex. F, p.3 (February IMP).) An example includes "a letter sent to reconnect with family prior to release." (Chamberlain Decl. Ex. 63, p.4.)

The evidence establishes that even under the Sheriff's Office's postcard-only policy, inmates had a broad ability to communicate with the outside world. An inmate could communicate with loved ones on postcards, by phone, and during visiting hours. An inmate could read newspapers, magazines, and books. An inmate could correspond by letter with his or her religious leaders, to government officials, civil rights organizations, and the news media. An inmate could freely correspond by letter to probation officers, district attorneys, state attorney generals, governors, and court officials.

c. Impact on Resources.

As detailed in Part VI.C.1., the security risks inherent in envelope mail are real. The disruptive effects of contraband entering or leaving a correctional facility can be wide-ranging, in the case of white powder (harmless or not), or devastating to an individual inmate who should be drug-free, or dangerous to jail staff and other inmates when weapons can be fashioned from multiple paperclips or staples, and coded messages delivered to destroy evidence or coordinate testimony. *See supra* Part VI.C.1. The fact that specific threats have not yet materialized at the Columbia County Jail is not a reason to discount the significant impact on resources that will follow from the contraband risks. *See Friedman v. Arizona*, 912 F.2d at 332-33 (under *Turner* courts should allow prison officials to anticipate security problems). As methods of sending and receiving contraband into a correctional facility become more sophisticated, a postcard restriction on personal mail is a rational response to limit the impact on jail resources.

Furthermore, although the Court found the time-savings "modest, at best," *see* Dkt. 64, Op. & O. Prelim. Inj. at 22, it should also consider the resulting impact on a small county jail

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when a postcard restriction on personal mail significantly reduces the chance that security disruptions occur.

d. No Easy and Obvious Alternatives.

Although the Sheriff's Office opened and inspected personal inmate mailed in envelopes prior to the postcard restriction, and has done so since the Court issued a preliminary injunction, the costs to security have been more than *de minimus*. *See supra* Part VI.C.1-2. The test is not the financial cost of an alternative; it is the cost to the penological interest served (here, jail security and efficiency). *See Turner*, 482 U.S. at 90-91 ("But if an inmate claimant can point to an alternative that fully accommodates the prisoner's right at *de minimus* cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship test.") Although the Court in part relied on mail policies of other correctional institutions, nothing is in the record but for the existence of the mail policy for these institutions. (Dkt. 64, Op. & O. Prelim. Inj. at 22.) The resources and mail procedures of these correctional institutions are likely to differ greatly. The Columbia County Jail is much smaller than the Washington Department of Corrections or the U.S. Bureau of Prisons, and nothing is in the record as to how similar the jail in Lane County is to the Columbia County Jail. (*See* Dickerson Decl. ¶¶ 8, 10 (describing staffing reductions).) Further, the clear trend is for jails to adopt postcard-only policies in response to the increasingly sophisticated nature of sending contraband through the mail. *See supra* Part VII.C.1; (Dkt. 29, Defs. Resp. Plf. Prelim. Inj. at 19 (citing cases showing that correctional facilities across the county adopted postcard restrictions on personal inmate mail).)

Oddly, PLN claims the Jail should have considered opening and inspecting inmate mail during the night shift, investigate how contraband enters the facility, and how the mail processing could be more efficient. The evidence shows this is exactly what the Sheriff's Office did. *See supra* Part III. While the postcard-only policy was in effect, mail processing was changed to the night shift from the day shift in late 2011 or early 2012. (Plf. Mot, Wing Decl. II (Cutright Dep. 121:6-23).) The reason was due to cuts in staffing levels. (*Id.*)

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PLN offers no explanation for why there is a greater risk of contraband entering the Jail through outside workers, maintenance persons, and its own jail staff, than through personal inmate mail. (Plf. Mem. at 12.) The comparison to personal inmate mail makes no sense, and the records shows that the security risks are with personal inmate mail.[8]

3. Balance of Hardships Does Not Tip in PLN's Favor for a Permanent Injunction.

The third element PLN has the burden to establish is that a permanent injunction is warranted because of the balance of hardships between it and defendants. PLN has failed to demonstrate that it faces any hardships with respect to the issues raised in the Complaint: the Sheriff's Office has changed it mail practices.

4. A Permanent Injunction Does Not Serve The Public Interest.

PLN also fails to establish the fourth element for permanent injunction. Although the public interest is always implicated when the First Amendment is at issue, a permanent injunction is not appropriate here. A permanent injunction would only bind the Columbia County Sheriff's Office. Given that the Sheriff's Office will not re-institute the postcard restriction, the public interest is not served to enjoin conduct that defendants no longer engage in.

C. PLN's Arguments Do Not Support a Permanent Injunction.

PLN's position in support of a permanent injunction boils down to one argument, which is that the Sheriff's Office cannot be trusted to follow its current IMP. PLN has dissected that argument into thirteen headings, giving the appearance of a multitude of reasons supporting the issuance of a preliminary injunction. However, scrutiny of the arguments reveals that they lack merit and either (1) attack parts of the past policy and practices that defendants have admitted are unconstitutional and have eliminated; (2) focus on a transitional time frame during which the Jail

[8] PLN makes a claim that a deputy gave an inmate "contraband" and the Sheriff's Office ignored it. (Plf. Mem. at 13.) What the evidence actually shows is that an inmate wrote a request for additional postcards and claimed that "another deputy" – unnamed – had given him some before. (Chamberlain Decl. Ex. 49; Wing Decl. VII (Moyer Dep. 287:9-22 (stating that there has never been claim that a deputy gave an inmate contraband).) There is no evidence that what the inmate said was true. A reminder message to other jail deputies to not give inmates extra postcards is a reasonable approach to the situation. Regardless, this evidence is not related to alternatives to a postcard restriction.

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borrowed Washington County Sheriff's Office's IMP and then determined that further revisions were necessary; or (3) have no significance to this Court's determination of whether to grant summary judgment and issue a permanent injunction.

1. The Postcard Policy Has Been Eliminated and Defendants Will Not Reinstitute It.

PLN argues that a permanent injunction should be issued because defendants chose to defend the postcard policy in court in response to PLN's Motion for a Preliminary Injunction. (Plf. Mem. at 23.) To accept this logic would chill the right of litigants to seek a court's determination of an issue of first impression. This is especially true in this matter because PLN failed to cite to a single case holding that postcard restrictions are unconstitutional and defendants cited to cases upholding postcard restrictions, which the Court distinguished. Further, on the broader issue of prison regulations affecting the method of inmate communication, which is what a postcard restriction is, no cases were cited to the Court. The cases cited to the Court have largely involved a content-based prison regulation. (Dkt. 50, Defs. Resp. Amicus Curiae Brief at 4-8 (discussing prison regulation cases); Dkt. 76, Defs. Resp. Plf. Mot. Amend Op. & O. Plf. Mot. Prelim. Inj. at 3-4 (same).)

Defendants have met their burden to show that the postcard-only policy has been eliminated and will not be re-instituted. *See supra* Part III.H & Part V.

2. Defendants Have Admitted to Unconstitutional Practices and No Longer Restricts Mail to Postcard Form.

When the Sheriff's Office responded to inmate complaints relating to the postcard restriction, no court had ruled that such a restriction was unconstitutional. In fact, courts had upheld postcard restrictions on incoming inmate mail. (Defs. Resp. Plf. Mot. Prelim. Inj. at 14-15 (citing cases).) None of the inmate complaints were answered by the Sheriff or Undersheriff, who have overseen the changes to the Sheriff's Office's inmate mail practices, and defendants have admitted that the Sheriff's Office had prior unconstitutional practices with respect to magazine delivery and due process. The evidence relied on by PLN fails to rebut defendants'

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showing that measures are in place to ensure that the prior unconstitutional conduct will not recur.

3. Sheriff Dickerson Immediately Conformed the Jail Practices to the Constitution. PLN Has Presented No Evidence that Its Mail Has Been Wrongfully Rejected Since Before January, 2012 and It Does Not Challenge the Current IMP.

PLN claims the Sheriff does not "respect" the U.S. Constitution, despite all the efforts recounted in Part III of this memorandum to rectify prior unconstitutional practices as soon as he learned of them and to comply with the Court's preliminary injunction against the postcard restriction.

PLN misrepresents Sheriff Dickerson's testimony by claiming that he said the Jail never had a ban on magazines. (Plf. Mem. at 25.) Sheriff Dickerson correctly stated that the old IMP allowed magazines, but its inmate manual reflected its practice (albeit, inconsistently applied) of not allowing magazines into the Jail. (Wing Decl. I (Dickerson Dep. 124:19-125:3).)

PLN suggests that Sheriff Dickerson will violate due process if the Jail is not monitored by this Court. (Plf. Mem. at 25.) However, PLN provides no evidence that due process has been violated since prior to January, 2012. PLN supports its position with a grievance of the postcard-only policy by inmate Brad Berg from December of 2011. (*Id*.) This grievance had nothing to do with due process, but was instead a complaint about the postcard-only policy. *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (grievance procedures do not create liberty interests protected by Fourteenth Amendment's due process clause), *cert. denied* 488 U.S. 898 (1988). According to the inmate manual's instructions, Mr. Berg should have appealed to the Facility Supervisor, not the Sheriff. (Dkt. 36, Plf. Mot. Prelim. Inj., Berg Decl. ¶ 7, Ex. A, p.9.)

4. Columbia County Sheriff's Office Has Permanently Changed Its Mail Policy and Practices.

PLN counts the number of revisions to the Sheriff's Office's inmate mail policies entirely ignoring the context of the changes. As explained above in Part III, the only significant change from the January IMP, which was adopted after PLN first notified the Sheriff's Office of its unconstitutional practices, was the adoption of the June IMP discarding the postcard restriction.

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Surprisingly, PLN criticizes Sheriff Dickerson for striving to develop and implement an efficient mail policy. (Plf. Mem. at 26.) The Sheriff's Office changed its mail policies to correct unconstitutional procedures, adapted to the Court's Opinion and Order, re-formulated parts of Washington County Sheriff's Office's IMP for the Columbia County Jail, and corrected minor errors. Though the current IMP reflects several revisions to the January IMP, these changes demonstrate a commitment to improved mail handling procedures and practices and should not be viewed as evidence of a likelihood to return to admittedly unconstitutional policies and practices.

PLN's purely speculative argument that the next Sheriff will re-institute the postcard restriction on inmate mail, is contrary to the evidence and cannot support the issuance of a permanent injunction.

5. The Sheriff's Office's Training Was Adequate and Has Worked.

PLN's critique of the Sheriff's Office's training is irrelevant because it does not argue or provide any evidence showing that the current policy or practice at the Jail is unconstitutional.

PLN makes two misrepresentations by arguing that the Jail failed to provide due process to Lucy Lennox when she mailed an article printed from PLN's website to eleven inmates in February, 2012. (Plf. Mem. at 27; Dkt. 34, Plf. Reply Mot. Prelim. Inj., Lennox 2d Decl. ¶¶ 4-5 (out of eleven mailings, the Jail returned three of them and two prohibited mail notices were included); *see also* Chamberlain Decl. Ex. 30 (showing that of the eight envelopes that were not returned to Ms. Lennox, the eight inmates were advised that that the mail would not be delivered).) First, Ms. Lennox did receive due process notice. Second, her mail was properly rejected under the then-applicable IMP.

Ms. Lennox received two prohibited mail notices informing her of the reason for the rejection (*i.e.*, that it was deemed personal mail not on a postcard) and of her right to appeal. (Dkt. 34, Lennox 2d Decl. ¶ 5, Exs. C, E.) She was reasonably on notice that all eleven mailings, containing the same article, were not delivered for the same reason. Even if she had a due process claim, her failure to appeal despite having been advised of her right means that she

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waived it. *See Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987) ("Waiver of a constitutional right must be knowing and voluntary.").)

When Undersheriff Moyer was deposed on July 6, 2012, he was asked if Ms. Lennox's mailings would be rejected under the "current" IMP, and he responded that they would not be rejected. (Wing Decl. V (Moyer Dep. 193:2-21).) The "current" IMP on July 6, 2012 was the one adopted on June 18, 2012 (with a minor correction on July 5, 2012) that discarded the postcard-only policy in response to the Court's Opinion and Order. Accordingly, the evidence cited by PLN shows that the Sheriff's Office's training was effective because Ms. Lennox's mailings were properly rejected in February, 2012 as personal mail not on a postcard.

PLN's argument based on Bryan Cutright's deposition testimony that he could not think of what the First and Fourteenth Amendments were at the time the questions were posed to him, is merely contentious and does not support the issuance of a permanent injunction. (Plf. Mem. at 28.) PLN did not ask Mr. Cutright any questions about whether inmates have free speech or due process rights, or show Mr. Cutright the text of those Amendments to refresh his memory. During Mr. Cutright's deposition, he displayed a working knowledge of inmate's First Amendment rights by stating that a Playboy magazine sent to an inmate was properly rejected because it contained inappropriate content. (Roberson Decl. ¶ 4, Ex. C (Cutright Dep. 176:14-177:20); Chamberlain Decl. Ex. 22 (copy of Dep. Ex. 25 discussed by Mr. Cutright).) Mr. Cutright also testified in detail regarding the Jail's pre- and post-lawsuit due process procedures. (*Id.* (Cutright Dep. 32:17-36:7).)

6. After Implementing Its New IMP in January and February, 2012, the Sheriff's Office Mistakenly Did Not Remove All References to Its Prior Practices.

PLN criticizes the Sheriff's Office for "withholding" information about the new inmate mail procedures because its website stated that IMP was "under review" for several months subsequent to the filing of the Complaint. (Plf. Mem. at 28.) This criticism is unwarranted and has nothing to do with PLN's permanent injunctive relief claim. The website statement was correct. The Sheriff's Office was revising its mail procedures. *See supra* Part III.D. The major

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changes that resulted were redefining sexually explicit materials, dropping the cap on the number of books and magazines that could be received in a single day, and ensuring that a supervisor approved of any decision to reject mail prior to notifying the sender or receiver of the rejection. *Id.*

The Sheriff's Office did not "withhold" information from the public; members of the public who wanted to know about any mail restrictions could get that information by calling the Jail. Defendants are also unaware of any constitutional requirement that a jail must have certain content on a website. If mail was sent to an inmate that violated the IMP, the sender and receiver would receive a Prohibited Mail Notice, which would state the reason for the rejection and their appeal rights. PLN cites no evidence that a member of the public was not told information about the IMP.

Defendants admit that while the mail procedures were under a thorough review, they mistakenly continued to provide the old Inmate Manual that contained erroneous language that magazines were prohibited and an erroneous description of the current due process procedures for rejected mail. Despite the outdated information contained in the Inmate Manual, consistent with its IMP and practices, the Jail delivered every magazine to inmates during this time period and provided due process for any rejected mail. On May 16, 2012, a new Inmate Manual was issued to all inmates. *See supra* Part III.E.2. The new Inmate Manual expressly stated that magazines were allowed into the facility and explained the Jail's due process procedure for rejected mail. *Id.*

Defendants also admit that in some of the jail pods, an outdated memorandum from March, 2010 about the postcard-only policy was available to inmates until early May, 2012 that stated that magazines were not allowed into the facility, which was not correct since January, 2012. *Id.* Two reminder emails sent to the jail staff on May 6 and 7, 2012 instructed staff to remove the outdated memorandum. (Chamberlain Decl. Exs. 43-44.) Although PLN claims it was misled, it relies solely on Undersheriff Moyer's deposition testimony for this accusation. (Plf. Mem. at 29.) The testimony cited does not support PLN's contention that it was misled.

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Undersheriff Moyer's testimony was that he instructed his staff to explain the new mail process to inmates and to place the new mail guide into the jail pods, and his instructions could have been given at different times. (Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 77:14-16, 81:17-82:13, 84:3-21).) Not remembering something is not misleading or dishonest, as PLN claims.

PLN cites to Mr. Berg's request on February 7, 2012 for a copy of the new IMP. (Plf. Mem. at 29.) Mr. Berg's request demonstrates that inmates were told of the new mail procedures back in February, 2012. (Chamberlain Decl. Ex. 28.) It was appropriate for the Jail to not provide Mr. Berg a copy of the new inmate mail policy because it was undergoing significant review. (*See* Dickerson Decl. ¶ 9; *see also* Wing Decl. I (Dickerson Dep. 211:13-212:20).) There is no evidence that Mr. Berg was given incorrect information about the Sheriff's Office's new mail procedures, and Mr. Berg only requested a copy of the IMP; he had no specific questions about what mail he could receive or send.

7. After Determining that Some of its Mail Practices Were Unconstitutional, the Sheriff's Office Adopted New Practices and Moved Forward.

PLN criticizes Sheriff Dickerson for his investigation into the Sheriff's Office's mail practices. However, the Sheriff's Office focused on "moving forward" after determining its prior mail practices were unconstitutional. (Wing Decl. I (Dickerson Dep. 120:24-121:3).) Undersheriff Moyer was also asked why the Jail rejected magazines even though the policy allowed them, he responded that people told him they did not know. (Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 113:11-17).) The former Jail Commander Captain Jim Carpenter, who retired in June, 2011, confirmed what was admitted in the Answer to PLN's Complaint: that that the Columbia County Jail had a prior practice of not allowing magazines. (Wing Decl. IV (Carpenter Dep. 74:7-77:25).) This is evidence of a desire to rectify the constitutional problems with its IMP and practices and is not evidence, as PLN suggests, of a continuing disregard for that result.

As noted by PLN, Sheriff Dickerson correctly stated that the incorrect language on the Sheriff's Office website was derived from the incorrect language in the Inmate Manual. (Wing

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Decl. I (Dickerson Dep. 120:3-10); Chamberlain Decl. Ex. 6 (showing that the "no magazines" language was posted to the Sheriff's Office website on or about March 18, 2010 at the request of Sergeant Bryan Cutright).) PLN criticizes the Sheriff for not knowing by name the people who sort the mail in the front office. PLN provides no explanation for why this matters. It does not matter for purposes of this Court's present determination, and is merely another point with no significance.

8. Sheriff Dickerson Has Upheld His Oath.

Sheriff Dickerson has upheld his oath to uphold the Constitution by quickly rectifying the prior unconstitutional mail practices as soon as he learned of them. *See supra* Part III. PLN's point that Sheriff Dickerson refused to answer some questions, on the advice of his counsel, at his continuation deposition on August 28, 2012, is again a point without significance.[9]

9. Sheriff Dickerson Has Held His Staff and the Sheriff's Office Accountable.

Although it is unclear why PLN's dissatisfaction has anything to do with its motion for summary judgment on its injunctive relief claim, as explained in Part III of this memorandum, Sheriff Dickerson has held his staff and the Sheriff's Office accountable by (1) admitting to constitutional violations in defendants' Answer, (2) admitting to constitutional violations at his deposition, (3) issuing a new inmate mail policy correcting the unconstitutional practices, and having staff trained on the new mail procedures. In addition, Sheriff Dickerson has explained to all jail staff that they can be personally liable for constitutional violations. (Chamberlain Decl. Ex. 46.)

PLN brushes aside these actions of accountability because Sheriff Dickerson did not discipline employees. As the evidence demonstrates, the constitutional violations were part of either a policy (*e.g.*, postcard-only if the Court upholds its Opinion and Order) or practice (*e.g.*,

[9] As PLN is aware, Sheriff Dickerson's deposition was re-opened solely for PLN to inquire about defendants' mitigation affirmative defense. Defendants also permitted PLN to question Sheriff Dickerson about discovery produced following his first deposition in May, 2012. PLN's questions about Sheriff Dickerson's oath of office should have been asked at his first deposition and, in any event, PLN was well past the seven-hour deposition limit under Fed. R. Civ. P. 30(d)(1).

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magazines and due process) of the Jail, and there is no evidence that Jail employees engaged in conduct intending to violate the constitutional rights of inmates.

Furthermore, as PLN knows, all senior staff members have either retired or been removed from a supervisory role. Jim Carpenter retired in June, 2011. (Roberson Decl. ¶ 2, Ex. A (Dickerson Dep. 33:6-13).) Sergeant John McMiller retired in April, 2012. (*Id.* (Dickerson Dep. 26:4-25).) The four remaining sergeants – Bryan Cutright, Raquel Miller, Sheryl Westfall, and Lee Rigdon – were laid off in June, 2012 because budgets cuts required the elimination of the sergeant position. (Dickerson Decl. ¶ 10.) None of those employees have any supervisory role at the Jail. (*Id.*) The immediate jail supervisors since June, 2012 have been Lieutenants Tony Weaver and Brooke McDowall. (*Id.*; *see also id.* ¶ 3, Ex. B (Moyer Dep. 27:21-29:10) (explaining actions taken due to budget shortfalls).)

10. Undersheriff Moyer Also Acted Responsibly When He Learned that Constitutional Violations Occurred.

Undersheriff Moyer was actively involved in determining new mail procedures and ensuring they were followed. *See supra* Part III; Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 101:3-103:16) (summarizing his actions taken with respect to the mail procedures since January, 2012).) Although Undersheriff Moyer may not have personally reviewed discovery in this matter, he had received a report that the Jail was delivering magazines to inmates prior to the filing of this lawsuit. (Roberson Decl. ¶¶ 3, Ex. B (Moyer Dep. 121:6-123:6, 219:7-220:9); *id.* ¶ 9, Ex. H (report showing that thirteen inmates reported regularly receiving *Prison Daily* [sic] *News*).)

11. The Sheriff's Office Does Not Keep Interim Draft Policies.

PLN criticizes Sheriff Dickerson for discarding an edited version of Washington County's IMP, marked up by Washington County's legal counsel, which served as the template for the Sheriff's Office's January IMP. The Sheriff's Office does not typically keep interim suggested changes to its policies; the policy drafts are discarded once the new policy is finalized. (Dickerson Decl. ¶¶ 11-12.)

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12. PLN's Arguments Against Mootness Are Redundant and Unpersuasive.

As a final argument in support of its singular position that a permanent injunction should be issued because the Sheriff's Office cannot be trusted to maintain its constitutionally sound current IMP and practices, PLN reasserts the argument made in support of its Motion for a Preliminary Injunction that the issues are not moot. (Plf. Mem. at 33-34). As explained earlier, the Court's Opinion and Order on mootness at the preliminary injunction phase cannot simply be applied now to the current phase. The factual basis for that opinion has changed. There are now no longer any "live" issues. *See supra* Part IV.

VII. PLN'S SUMMARY JUDGMENT REQUEST FOR DECLARATORY RELIEF SHOULD BE DENIED

A. Legal Standard for Declaratory Relief.

Pursuant to 28 U.S.C. § 2201(a), the Court "may declare the rights and other legal relations of any interested party seeking such declaration" in cases of "actual controversy." The decision to grant declaratory relief is a matter of discretion. *United States v. Walsh*, 759 F.2d 1353, 1356 (9th Cir. 1985) (citing *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961)). Plaintiff has the burden of showing that equitable relief is necessary. *Olagues v. Rossoniello*, 770 F.2d 791, 799, 803 (9th Cir. 1985). "Declaratory relief should be denied when it will neither serve a useful practical purpose in clarifying and setting the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *Walsh*, 759 F.2d at 1357; *see also Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987) (same).

The Ninth Circuit cautioned "against making declaratory judgments upon issues of public moment unless the need is clear, not remote or speculative." *Washington Public Power Supply System v. Pacific Northwest Co.*, 332 F.2d 87, 88 (9th Cir. 1964) (vacating declaratory relief on "serious and far-reaching questions of state and federal law" relating to approval of a hydro-electric project on the basis that subsequent events made the declaratory relief unnecessary). "[C]ourts should withhold declaratory relief as a matter of discretion if such redress is unlikely to

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palliate, or not needed to palliate, the fancied injury, especially when refraining from issuing a declaratory judgment avoids the premature adjudication of constitutional issues." *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494 (1st Cir. 1992). The First Circuit in *El Dia* stated:

> [W]e believe that declaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration of uncharted constitutional terrain.

Id.

B. PLN's Declaratory Relief Claim With Respect to the Delivery of Magazines and Due Process Requirements Is Unwarranted.

1. The Claim for Declaratory Relief as to Magazines and Due Process Is Moot.

PLN's claim for declaratory relief is moot with respect to magazine delivery and due process procedures for the same reasons PLN's claim for permanent injunctive relief is moot. *See supra* Part V.

2. The Claim for Declaratory Relief as to Magazines and Due Process Is Baseless.

PLN's request for equitable relief with respect to defendants' admitted error in categorically rejecting correspondence and not providing due process is unnecessary. There is no actual controversy over these issues. PLN's declaratory judgment request is that of a general admonition and nothing more. PLN seeks a declaratory judgment that would say, in essence, "the Jail must deliver magazines and provide due process," which it is already doing. As the Ninth Circuit has instructed, "[i]t serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief." *Walsh*, 759 F.2d 1353, 1357 (9th Cir. 1985). Given defendants' admission of liability and change in the handling of inmate mail, equitable relief in the form of a declaratory judgment serves no useful purpose and fails to clarify or set the "legal relations in issue[.]" *Id.* at 1356. Defendants' admission of

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liability is a sufficient declaration of the legal relations between the parties. *Manriquez v. Huchins*, 2010 WL 3502529, *1 (E.D. Cal. Sept. 2, 2010) (admission of liability is sufficient declaration just as if defendants had denied liability but a verdict was entered against them).

Declaratory relief should also be denied when the issues are too fact-specific to permit a general ruling. *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987). PLN's request for a general declaratory statement that due process must be given when mail is rejected is inappropriate because of the fact-specific nature of a due process claim, and because the declaratory statement would be too "imprecise in definition and uncertain in dimension." *See Walsh*, 759 F.2d at 1357. The issues involved in the due process analysis are numerous and fact-specific, including whether: (a) mail was sent to an inmate; (b) mail was received by jail; (c) mail was rejected by jail staff for an impermissible reason; (d) notice of the rejection with the reason and appeal procedure was given to the sender and receiver of mail; (e) the notice of rejection was received by the sender or receiver; (f) the sender or receiver timely appealed the rejection; (g) a jail supervisor reviewed the appeal and denied it. The issuance of a declaratory statement in the nature PLN has requested could not definitively resolve inevitably reoccurring issues such as whether the reason given for the rejection was "impermissible" or whether the notice or appeal procedure was sufficient under the circumstances. PLN's request for a general admonition should be denied.

Although absent from its Motion, PLN identifies four specific requests for declaratory relief in its supporting memorandum. (Plf. Mem. at 18-19.) All four requests should be denied for the reason that none challenge the Sheriff's Office's current mail policy or practices. Additionally, the four requests are without merit.

In its first and second request for declaratory judgment, PLN asks this court to declare that the Sheriff's Office website on January 13, 2012 and a March 23, 2010 memorandum violated the Fourteenth Amendment because they failed to state any due process procedures. (*Id.*) PLN has failed to provide any authority or otherwise demonstrate that the omission of due

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process procedures on these sources constitute a constitutional violation. It does not. Thus, it would be improper for the court to make such a declaration.

In its third and fourth requests for declaratory relief, PLN asks this court to declare the Sheriff's Office's October 21, 2011, [10] January 26, 2012, and February 10, 2012 IMPs unconstitutional. (*Id.*) None of these policies reflect the current practices at the Jail and defendants have already admitted, thereby declaring, that its October 21, 2011 mail policy was deficient. *See supra* Part III.B, F. Accordingly, PLN has failed to meet its burden of demonstrating that declaratory relief is necessary, serves a practical purpose and is nothing more than a general admonition of unconstitutional policies and practices that defendants have already admitted.

C. The Claim for Declaratory Relief as to a Non-existent Postcard-Only Policy Is Moot and Should Be Denied.

Defendants no longer restrict inmate mail to postcard-form and have no intention of re-implementing that policy. *See supra* Part III.G. PLN's claim for declaratory relief is moot for the same reasons its claim for permanent injunction is moot. See *supra* Part V. As this Court has recognized, "'if events subsequent to the filing of the case resolve the parties' dispute, [the court] must dismiss the case as moot[.]'" (*Id., quoting Pitts v. Terrible Herbst, Inc.*, 653 P.3d 1081, 1087 (9th Cir. 2011).) The evidence is that PLN has eliminated the postcard-only policy and will not reinstitute it. Accordingly, PLN's claim against the policy has been resolved and declaratory relief would serve no practical purpose.

Alternatively, defendants have shown at this pre-adjudicative stage of the proceeding that there are genuine and material disputed facts over its current mail practices and the adoption, effect,

[10] PLN incorrectly states that the Sheriff never made the October 21, 2011 IMP publicly available, citing to the answer given to Interrogatory No. 7(d). PLN's interrogatory asked only if "modifications" to the inmate mail policies were made public. The answer to Interrogatory No. 7(d) was that the modifications made in the October 21, 2011 mail policy were not made public. There was nothing significant to notify the public about. As shown in the answer to Interrogatory No. 7(b), when significant modifications were made affecting the public, such as the postcard restriction, announcements to the public were made. (Chamberlain Decl. Ex. 68, p.8.)

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and stoppage of the postcard restriction on personal inmate mail, requiring denial of PLN's motion for summary judgment on its claim for declaratory relief. *See Anderson*, 477 U.S. at 247-48 (genuine issues of material fact require denial of motions for summary judgment). To the extent the Court reaches the merits of PLN's claim for declaratory relief, defendants' prior postcard-only policy on personal inmate mail did not violate the First Amendment.

VIII. CONCLUSION

For all the above-stated reasons, defendants ask the Court to deny PLN's Motion for Summary Judgment for Declaratory and Permanent Injunctive Relief. PLN has failed to meet its burden to show that no disputed issues of fact exist and all of the necessary elements for permanent injunctive and declaratory relief are present.

Respectfully submitted this 16th day of October, 2012.

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