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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

SURREPLY MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS TO STRIKE

Oral Argument: November 16, 2012

Pursuant to LR 56-1(b), defendants oppose plaintiff Prison Legal News' (PLN) motions to strike three exhibits attached to the Declaration of Gregory R. Roberson and submitted in support of defendants' Response to PLN's Motion for Summary Judgment on Claims for Declaratory and Injunctive Relief: (1) a document containing implementation guidelines for a postcard restriction on inmate mail, Ex. F; (2) declarations from employees of the Ventura County Sheriff's Department, Ex. L; and (3) an online newspaper article, Ex. K.

I. Document on a CD Entitled "Transition to Postcards for Inmate Mail."

The Court should deny PLN's motion to strike Exhibit F to Roberson's declaration, which was a document on a CD entitled "Transition to Postcards for Inmate Mail." The CD was discovered on September 27, 2012 by retired Captain Jim Carpenter when he cleared out papers

in his former office. (Carpenter Decl. ¶¶ 2, 4). The CD was in a stack of other CDs. (*Id.* ¶ 4). Mr. Carpenter did not previously remember having the CD. (*Id.* ¶ 6). The CD contained documents relating to an Oregon State Sheriff's Association conference in December, 2009. (*Id.* ¶ 5, Ex. A). Mr. Carpenter immediately gave the CD to Sheriff Jeffrey Dickerson. (*Id.* ¶ 8). Defendants produced the CD and its contents to PLN on October 4, 2012. (2d Roberson Decl. ¶ 6, Ex. A).

According to F.R.C.P. 26(a)(1)(E), "A party must make its initial disclosures based on the information then reasonably available to it." Prior to the discovery cutoff, it was not possible to produce the contents of the CD because the CD was in a stack of other CDs and Mr. Carpenter did not remember it existed until he accidently found it. During his deposition, Mr. Carpenter said he had a poor memory, even in 2009, although he did recall attending the December, 2009 OSSA conference. (Roberson Decl. ¶ 8, Ex. C (Carpenter Dep. 30:4-35:14, 84:24-85:12)).

F.R.C.P. 26(e)(1) imposes on defendants the duty to supplement discovery responses "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." According to the Advisory Committee Notes, "The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect." F.R.C.P. 26, *Advisory Committee Notes*, 1993 Amendments. In this matter, defendants supplemented its discovery production in a timely manner soon after Sheriff Dickerson discovered the existence of the CD on September 27, 2012, the same day Mr. Carpenter found it.

Defendants' initial disclosures stated that they may use "documents produced in response to plaintiff's discovery requests" to support its defenses in this matter. (2d Roberson Decl. ¶ 7, Ex. B, p.2). The documents on the CD are relevant and responsive to PLN's discovery requests for documents relating to the implementation of the postcard restriction on inmate mail. (Dkt. 115, Roberson Decl. ¶ 7, Ex. F). Defendants were not required to supplement its initial disclosures because it had already disclosed to PLN that it may use documents produced to PLN

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in support of its defenses. However, defendants formally supplemented their initial disclosures on November 7, 2012 to include documents on the CD. (2d Roberson Decl. ¶ 7).

The fact that defendants found the documents after the discovery cutoff date does not foreclose their admissibility. "The purpose of a discovery cutoff date is to protect the parties from a continuing burden of producing evidence and to assure them adequate time to prepare immediately before trial. A discovery cutoff date does not, however, affect admissibility of evidence obtained outside of the discovery process of the case in which the cutoff date is ordered." *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1344 (9th Cir. 1984) (citations omitted). In *Whittaker*, it was error for the trial court to exclude the admission of documents obtained after the discovery cutoff, where the discovery was exchanged in a separate action between the parties. *Id.* In the present case, the CD was inadvertently discovered and promptly produced approximately four months prior to trial.

II. Declarations from the Ventura County Sheriff's Department Are Admissible.

A. Testimony Is Relevant and Not Stale.

The declarations from the Ventura County Sheriff's Department were based on the personal knowledge of the declarant and signed under penalty of perjury; they are not "stale," as PLN suggests, because they were signed in 2011 and relate to the adoption of a postcard policy in 2010, the same year the Columbia County Sheriff's Office adopted its postcard policy. Each declarant described his or her training and experience with contraband in mail or the sending of coded messages. The facts are relevant to show that the adoption of a postcard restriction on incoming and outgoing mail is a rational response to contraband threats. PLN admits the declarations are relevant for the "proposition that correspondents sometimes try to send contraband to prisoners via the mail," yet it also claims they are "irrelevant." (Plf. Reply at 31).

PLN's attacks on the merits of the declarations demonstrate that that the declarations are relevant; the attacks go to the weight of the evidence, not their admissibility. PLN's attacks are also inaccurate. Captain Jerry Hernandez was a full-time deputy with duties to sort and examine mail from 1985 to 2001. Thus, his experience was not limited to one year in 1985. (Dkt. 115,

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Roberson Decl. ¶ 13, Ex. L (Hernandez ¶ 2)). Deputy Aaron Wilkinson's mail inspection duties were from 2006 to 2009. (*Id.* (Wilkinson Decl. ¶¶ 2, 4, 6)). Tracy Martinez's experience from 1989 to 1991 highlights the long-standing problems associated with envelope mail. (*Id.* (Martinez ¶ 4)). In October, 2010, a confidential reliable informant showed a detective, whose identity was sealed by the court, how to conceal narcotics within envelopes and letters. (*Id.* (Detective Decl. ¶¶ 6-12)). The experience of the Ventura County Sheriff's Department with the increasingly sophisticated nature of smuggling contraband through envelopes and letters is directly relevant to the advantages and rationality of a postcard restriction on inmate mail.

B. Hearsay.

Defendants agree that portion of Mr. Held's declaration relied upon by defendants – showing that drugs have been hidden in the glue strip of envelopes – was hearsay. (*Id.* (Held Decl. ¶¶16-19)). Defendants withdraw reliance on his declaration.

None of the other declarants' statements contain hearsay. Their observations were based on their personal knowledge, training, and experience, and were made in the context of explaining the reasons the Ventura County Sheriff's Department adopted a postcard policy for incoming and outgoing inmate mail.

C. The Declarations Were Obtained After the Discovery Cutoff to Respond to PLN's Arguments in its Motion.

The challenged declarations were obtained in response to PLN's suggestion in its motion that a jail cannot rely on the experiences of other jails when formulating policies. (Dkt. 98, PLN's Mot., Mem. at 3-5 (arguing that following the lead of the Washington County Sheriff's Office was "irrational"), 12 ("Indeed, the Jail did not adopt its Postcard-Only Policy to address an actual problem …."), 13 ("Defendants could have investigated whether, and if so how, contraband actually enters the Jail …."). PLN filed its motion after the discovery cutoff. Defendants submitted the declarations to rebut PLN's arguments and to show the rationality of the Columbia County Sheriff's Office's prior postcard restriction.

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A discovery cutoff date does not prohibit a party from searching for evidence outside of formal discovery to support its claims and defenses. *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 933 (9th Cir. 2002) (holding that a parties' stipulation to not conduct further discovery did not forbid a party from obtaining relevant information outside of the discovery rules and using it to support a motion for summary judgment); *cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (holding that information gathered independently from the discovery process is not subject to the court's inherent control over documents produced in discovery). In the present case, defendants are not limited to using documents produced prior to the fact discovery deadline to support its defenses, particularly in light of the fact that PLN filed its motion after the discovery cutoff. Defendants obtained the declarations on October 5, 2012, *see* 2d Roberson Decl. ¶¶ 4-5, and submitted them to PLN on October 16, 2012, along with their response brief. Thus, the declarations were submitted in a timely fashion. *See* F.R.C.P. 26(e)(1). Although not required given defendants initial disclosures, defendants formally supplemented their initial disclosures on November 7, 2012. (2d Roberson Decl. ¶ 7).

D. Redactions Were Pursuant to a State Court's Order.

The redactions to some of the declarations were ordered by the state court judge. (Dkt. 115, Roberson Decl. ¶ 13, Ex. L, p.1). Defendants cannot violate a court order by submitting unredacted declarations. Defendants are not relying on any redacted factual information. PLN complains that the declaration of the unnamed detective is "unsworn," which is not accurate. The detective's declaration was sworn but his name redacted pursuant to the court's order.

This is not a situation in which defendants are relying on statements that are not part of the public record, or are withholding relevant information from PLN. Here, a state court ordered certain factual information – not relied upon by defendants – redacted. The Court should admit the declarations that have redactions. *Cf. Spreadbury v. Bitterroot Public Library*, 2011 WL 5530577 (D. Mont. Nov. 14, 2011) (refusing to strike a police report that was redacted pursuant to a state court order on the basis that there was no legal authority for a federal court to enforce a state court's ruling).

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III. Defendants Withdraw Exhibit K.

Defendants withdraw Exhibit K to the Declaration of Gregory R. Roberson, thus mooting PLN's motion. Defendants' continue to rely on Undersheriff Moyer's statement that the threat of an inmate mailing white powder in an envelope is eliminated for personal inmate mail with the Columbia County Sheriff's Offices' prior postcard policy. (Dkt. 115, Roberson Decl. ¶ 3, Ex. B (Moyer Dep. 169:1-170:8)).

Respectfully submitted this 9th day of November, 2012.

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