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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

DEFENDANTS' TRIAL BRIEF

Defendants Columbia County, Columbia County Sheriff's Office, and Sheriff Jeff Dickerson submit the following trial brief:

INTRODUCTION

Plaintiff Prison Legal News asserts constitutional claims arising from mail sent to inmates at the Columbia County Jail (CCJ) in 2010 and 2011. During that time and up to the present time, CCJ was operated by the Columbia County Sheriff's Office (CCSO) and Jeff Dickerson was Columbia County's sheriff. Plaintiff mailed magazines, books, and advertising material to inmates. CCSO rejected some of this mail in violation of the First Amendment's free speech clause and the Fourteenth Amendment's due process clause,

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and defendants have admitted that CCSO is liable to plaintiff for damages determined by a jury.

The jury will whether damages are owed to plaintiff and, if so, the amount. The Court will decide whether plaintiff is entitled to declaratory and permanent injunctive relief, and should make its decision after hearing all the evidence at trial. The jury should not learn of the Court's decisions on plaintiff's claims for declaratory and permanent injunctive relief.

The Court will decide the constitutionality of CCSO's postcard policy. However, it is not relevant for the jury's consideration of damages that it learn of the Court's prior ruling on plaintiff's motion for a preliminary injunction, or the Court's ultimate decision on CCSO's postcard policy. Defendants agree that it is relevant for the jury that CCSO had a postcard policy and that its staff rejected some of Plaintiff's mail on that basis that it was not on a postcard.

Ensuring that the jury only hears evidence relevant to the issues it must decide obviates the need for plaintiff's proposals stated in its trial brief. *See* Plf. Tr. Br. at 3. Plaintiff wants the jury to hear all the testimony, even though it agrees that the Court will decide six issues and the jury will only decide damages. *Id.* at 2-3. Plaintiff's proposal increases the chance of confusing the jury given the weight and number of issues that the Court must decide, and it also unnecessarily lengths the jury portion of the trial.

FACTUAL SUMMARY

In March, 2010, CCSO implemented a policy that limited correspondence to and from inmates and their friends and family to postcards. The policy was adapted from a proposal by the Washington County Sheriff's Office, whose Jail Commander, Sheriff, and legal counsel proposed it at an Oregon State Sheriff's Association conference in December, 2009. Mail excluded from the postcard restriction included periodicals, books, and mail defined as legal or official mail.

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In August, 2010, plaintiff's founder and editor, Paul Wright, decided to mail complimentary issues of *Prison Legal News*, plaintiff's monthly magazine, and a book, to inmates at the Columbia County Jail. When he made this decision, Wright knew CCSO's website stated inmates were not allowed to receive magazines. By the end of 2010, Wright also knew that CCSO's inmate manual stated that magazines were not allowed in the jail. After CCSO rejected some of plaintiff's magazines, Wright substantially increased the amount of mail sent to the jail. Plaintiff also sent advertising material and fundraising appeals to inmates. None of plaintiff's mailings were on postcards.

Over the course of approximately one year, jail staff delivered some of the mail but not all of it. In total, jail staff rejected thirty-seven magazines (Compl. ¶¶ 4.5-4.23; Ans. ¶¶ 4.5-4.23), twenty-five informational brochure packets (Compl. ¶ 4.36; Ans. ¶¶ 4.36-4.37), eight subscription renewal packets (Compl. ¶ 4.47; Ans. ¶ 4.47), and two fundraising packets (Compl. ¶ 4.57; Ans. ¶ 4.57). Plaintiff was aware that its mail was being returned. Despite knowing that some of its mail was not being delivered, plaintiff continued to send mail to inmates at the jail. Plaintiff made no inquiry with CCSO's staff or Sheriff Dickerson as to why some of its mail was being returned. Plaintiff was aware that the rejected mailings violated its First and Fourteenth Amendment rights.

These problems were identified and corrected by Sheriff Dickerson after he received notice of them when plaintiff filed its lawsuit on January 13, 2012. A new mail policy was adopted on January 26, 2012 (with minor revisions on February 10, 2012) and jail staff was trained on it. CCSO retained the postcard policy on mail between inmates and their family and friends.

CCSO's mail policy and practices continued to be revised. In May, 2012, CCSO issued a revised mail policy, retaining the postcard restriction but clarifying its due process procedures. CCSO also updated its inmate manual and website with the new mail procedures.

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After the Court issued a preliminary injunction regarding CCSO's postcard policy on May 29, 2012, CCSO discarded it, issued a new mail policy that allowed inmates to send and receive letters from their family and friends, trained its staff, and updated its website and inmate manual.

MEMORANDUM OF LAW

I. CCSO Has Admitted to Constitutional Violations

Defendants have admitted in their Answer that CCSO's rejection of plaintiff's mail violated plaintiff's First and Fourteenth Amendment rights. Although CCSO's inmate mail policy was facially constitutional with respect to plaintiff's mail – it permitted the delivery of magazines and its postcard policy was restricted to an inmates' correspondence with family and friends – CCSO's practice violated these rights.

II. Plaintiff's Claimed Damages Are Excessive and Unreasonable

a. Plaintiff Has Failed to Prove Damages

Plaintiff seeks economic, "presumed," and nominal damages from defendants, and punitive damages against Sheriff Jeff Dickerson. Plaintiff's economic damages are briefly addressed here, but all of plaintiff's damages are subject to defendant's motions in limine because they are improper requests.

Plaintiff calls its economic harm "diversion of resources" that it defines essentially as any time its staff spends on litigation. But there will be no evidence that plaintiff suffered damages due to a lost opportunity, so its time spent on litigation did not cause any loss. Plaintiff will call Serena Morones, a Certified Public Accountant specializing in financial loss and business valuation, to testify regarding plaintiff's lack of economic damages.

Plaintiff's characterization of its "diversion of resource" damages appears similar to a post-judgment proceeding to award attorney fees and costs, which is not appropriate pre-judgment and not appropriate for a jury to award.

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Plaintiff also seeks economic damages that it labels "frustration of mission," but is really a request for money that it says is necessary to be spent in the future to counteract defendants' prior unconstitutional conduct. Plaintiff relies upon housing discrimination cases filed under the Fair Housing Act, and not 42 U.S.C. § 1983 cases, in which these types of damages are awarded to counteract the effects of longstanding and ongoing patterns of discrimination. In this case, plaintiff has not submitted any evidence showing a need to counteract any lingering effects of defendants' unconstitutional conduct.

b. Plaintiff's Failed to Mitigate Its Damages

Defendants are entitled to an instruction on Plaintiff's failure to mitigate. Plaintiff again seeks to dismiss it. Mitigation is a defense to damages, not to liability. *See Sangster v. United Airlines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980) ("As a broad proposition, injured parties are expected to mitigate the damage they suffer."); *999 v. C.I.T Corporation*, 776 F.2d 866, 871 (9th Cir.1985) ("The general principle that victims of a legal wrong should make reasonable efforts to avoid incurring further damage is undisputed." (internal quotations and citations omitted)). By seeking to exclude it, plaintiff is claiming that it does not have to act reasonably to minimize its damages. Plaintiff cites no authority in support of this position.

Contrary to plaintiff's claim, defendants do not claim that plaintiff had to "warn" defendants or "refrain" from exercising its constitutional rights. Plaintiff could send as much mail to the jail as it desired. The question presented by defendants' mitigation defense is how much of plaintiff's purported damages would have been avoided had plaintiff acted reasonably. To support its mitigation defense, defendants will present the testimony of Paul Wright and numerous exhibits showing that plaintiff communicated with inmates at the jail to determine if the inmates were receiving plaintiff's mail. Wright quickly learned that the jail was not delivering some of plaintiff's mail, and he knew it was unconstitutional. If it truly desired to communicate with its inmate correspondents, a reasonable publisher would take mitigation action by inquiring with the

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jail as to why its mail was not being delivered or, if it was not happy with the result of the inquiry, filing a lawsuit sooner. This does not excuse CCSO's unconstitutional conduct, but it is evidence that will help the jury calculate the value of the rights violated.

The evidence will show that CCSO's mail practices immediately changed once Sheriff Jeff Dickerson learned of the problems and accordingly, a portion of plaintiff's claimed damages could have been avoided. Plaintiff's concern that it will be unfairly prejudiced because the jury may believe the plaintiff should have stopped sending its mail to inmates at the jail can be minimized with a limiting instruction. Further, plaintiff put itself in this position by taking no action to notify the Sheriff' office of the violations, but then filing this lawsuit seeking money damages for each of the violations.

III. Declaratory Relief Is Not Appropriate

Plaintiff seeks a Declaration (1) that CCSO's postcard policy violated the First Amendment and (2) CCSO's rejection of plaintiff's magazines and failure to provide notice and an opportunity to appeal violated the First and Fourteenth Amendments. *See* Dkt. 138, Plf. Suggested Findings of Fact and Conclusions of Law at 37-38.

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).

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The admission of liability in defendants' Answer for CCSO's rejection of plaintiff's magazines and failure to provide due process established the legal relations between the parties. Hence, there is no need *for the Court* to declare the legal relations of the parties pursuant to 28 U.S.C. § 2201(a) with respect to those issues. No practical purpose is served by such a declaration. *See Walsh*, 759 F.2d at 1357.

With respect to CCSO's postcard policies, including the versions implemented in January, 2012 and May, 2012, the Court should find them constitutional under *Turner v. Safley*, 482 U.S. 78 (1987). Thus, the Court should deny plaintiff's claim for declaratory relief that CCSO's postcard policy violated the First Amendment.

Substantial deference is given to prison administrators in the adoption of security measures to protect the safety of inmates, corrections officers, and the public. *See Beard v. Banks*, 548 U.S. 521, 528 (2006); *Overton v. Bazetta*, 539 U.S. 126, 132 (2003). This is especially true when a county jail is involved. *Turner*, 482 U.S. at 85 ("Where a state penal system is involved, federal courts have … additional reason to accord deference to the appropriate prison authorities."); *Martinez v. Procunier*, 416 U.S. 396, 405 (1974) (same), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

The *Turner* Court identified four factors to be considered in evaluating the constitutionality of a prison regulation: (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials. *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (citing *Turner*, 482 U.S. at 89-90).

The key issue in this matter is whether the postcard policy bears a rational relationship the CCSO's legitimate penological interest in jail security and efficiency. *Turner*, 482 U.S. at 89. The inquiry is whether CCSO "might reasonably have thought

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that the policy would advance its interests" in security and efficiency. *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.").

Importantly, 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"). Since the Constitution does not require a jail to provide an indigent inmate postage and sheets of paper for non-legal mail, it follows that a jail that only provides free postcards to indigent inmates does more than what the Constitution requires. Under this situation, these inmates could freely correspond using postcards with their friends, family, and others, and it would not be unconstitutional. It is therefore rational to restrict inmates to the use of postcards for their outgoing mail. And this is without even considering the risk of contraband entering or exiting the facility.

Sheriff Dickerson determined that the postcard policy would advance the security of the jail by reducing the possibility that contraband would enter and leave the jail through the mail. This was a rational conclusion. Postcards are mailed without the need for envelopes. Envelopes can hide contraband in the flaps and glue strips. Contraband can also be hidden in between sheets of paper. Contraband is much easier to identify with postcards because they are easier to handle and inspect than sheets of paper. Also, because the postcard policy did not regulate the content of a communication, and no limit was placed on the number of postcards an inmate could send or receive, it was a completely neutral regulation.

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The adoption of the postcard policy saved the jail thirty to sixty minutes per day. More importantly, the policy was rationally related to providing for the safety of inmates and staff, and reducing the chances of various types of contraband from entering the facility.

Furthermore, inmates had many options to communicate with the outside world and receive communications. The postcard policy did not apply to periodicals, newspapers, books, or mail defined as legal or official. Inmates could communicate in person or by phone with their family and friends. "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. The postcard policy affects only the form that an inmate may send or receive mail from his or her family and friends, so *Turner* is satisfied because inmates could still correspond in writing with their friends and family and inmates were not deprived of all means to communicate with those family and friends. *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)); *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).

For these reasons and those stated in its prior briefings to the Court, it should find that CCSO's postcard policies did not violate the First Amendment.

Even if the Court were to find that CCSO's postcard policies violated the First Amendment, it should deny declaratory relief because CCSO has discarded the postcard policy and determined that it will not re-institute it.

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IV. Permanent Injunctive Relief Is Not Appropriate

Plaintiff seeks a permanent injunction enjoining defendants from (1) prohibiting CCSO from rejecting mail solely on the grounds that it is not in the form of a postcard, (2) prohibiting CCSO from rejecting mail solely on the grounds that it is a magazine, and (3) requiring due process to the sender and receiver of mail.

To issue a permanent injunction, plaintiff 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 v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). 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).

In this matter, plaintiff's request for a permanent injunction is flawed because it only relies on past harm to show "irreparable harm." *See* Dkt. 138, Plf. Findings of Fact & Conclusions of Law at 31 ("PLN has shown that it *has suffered* "an irreparable injury" and therefore a permanent injunction would be warranted …."). The case plaintiff cited, *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 705 (9th Cir. 1997), involved a preliminary injunction. To obtain a permanent injunction, plaintiff cannot rely on previous claims of harm and must demonstrate the reasonable possibility of a recurrent injury for a permanent injunction to issue. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 854-55 (9th Cir. 1995). The factors to consider are:

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> the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the extent to which the defendant's professional and personal characteristics might enable or tempt him to commit future violations; and the sincerity of any assurances against future violations.

Id. (quoting *F.E.C. v. Furgatch*, 869 F.2d 1256, 123 (9th Cir. 1989)). In this instance, plaintiff has no reasonable expectation of recurrent harm. Furthermore, CCSO recognized the gravity of the unconstitutional conduct by admitting liability in their Answer and it quickly remedied the unconstitutional conduct.

In the event a permanent injunction is ordered, the Court must comply with 18 U.S.C. § 3626(a) by ensuring that prospective relief "is narrowly drawn, extends no further than necessary to correct the violation of Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Pursuant to 18 U.S.C. § 3626(g)(2), the statute applies to "any civil proceeding arising under Federal law with respect to prison conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison," excepting habeas corpus proceedings.

Plaintiff disagrees, but is silent as to the meaning of subsection (g)(2), which clearly applies § 3626(a) to this action. Plaintiff argues that 18 U.S.C. § 3626 does not apply because it was enacted by the Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321-66 to 1321-77, and plaintiff argues the Act only applies to lawsuits brought by prisoners. However, each the authority cited by Plaintiff refer to Sections 803 and 804 of the Act, which are codified at 42 U.S.C. § 1997a-h, 28 U.S.C. § 1915, and other statutes that specifically relate to prisoner lawsuits. Section 802 of the Act amended 18 U.S.C. § 3626 and by its terms it applies to any civil action regarding prison conditions or the effect of government action on the lives of prisoners.

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CONCLUSION

In accordance with the arguments set forth above, damages, if any, should be determined by the jury for the constitutional violations and the Court should deny plaintiff's claims for declaratory and permanent injunctive relief.

Respectfully submitted this 7th day of January, 2013.

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