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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,

Defenda nts.

No. 3:12-cv-0071-SI

DEFENDANTS' POST TRIAL BRIEF

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

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Defendants submit the following memorandum of authorities in response to the court's questions following the completion of the first stage of trial.

I. INTRODUCTION

The testimony and exhibits submitted at trial demonstrate that neither Sheriff Dickerson, nor his staff, knowingly violated the Constitution. When it was finally brought to the attention of the Sheriff, via the Complaint, of the unconstitutional practices that were occurring, they were stopped and appropriate changes implemented. Defendants' evidence also showed that, had plaintiff notified the Sheriff, or County Counsel, of the unconstitutional practices that were occurring at the jail when plaintiff first began monitoring the jail, the activities would have stopped at that time.

The only significant issues in dispute in this entire, yearlong lawsuit, are whether the postcard policy violated the Constitution and how much in damages plaintiff should receive.

II. LEGAL ARGUMENT

A. Equitable Relief is Not Warranted in this Case

The first issue the court asked the parties to address involved the question of injunctive relief. As injunctive relief is a form of equitable relief, in this section defendants will first address the issue of equitable relief generally (which includes plaintiff's claim for a declaratory judgment as it is also a form of equitable relief). In the next section, defendants will specifically discuss the criteria for granting a permanent injunction.

At the outset, defendants request that the court reject all of plaintiff's claims for equitable relief, which include the claims for a declaratory judgment and permanent injunction. Defendants are no longer engaging in the conduct which plaintiff asserts is unconstitutional. Even if one assumes the plaintiff had been deprived of a constitutional right in the past, there is not a real and immediate threat that the same deprivation will occur in the future so as to justify equitable relief.

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In the case of *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983), the United States Supreme Court rejected a plaintiff's claim for equitable relief in a case challenging the use of chokeholds. By the time the case reached the Supreme Court, the Los Angeles Board of Police Commissioners had imposed a six-month moratorium on the use of certain chokeholds, except under circumstances where deadly force is authorized. *Id.* The Court noted that it was "no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury." *Id.* Therefore, even though Lyons had standing to pursue his claim for damages against the city based on the prior actions of its officers, the Court found that he did not have standing to seek injunctive relief. *See also O'Shea v. Littleton*, 414 U.S. 488 (1974) (even if plaintiffs were subjected to discriminatory practices in past, that is not enough for injunctive relief without continuing, present adverse effects); *Eggar v. City of Livingston*, 40 F.3d 312, 316 (9th Cir. 1994) (plaintiffs lack standing to challenge alleged municipal court policy of denying counsel to indigent persons accused of crime because their being subjected to policy in future was too speculative); *Partington v. Gedan*, 961 F.2d 852, 862 (9th Cir. 1992), as amended, (July 2, 1992) (attorney challenging disciplinary proceedings could not demonstrate concrete likelihood of future deprivations); *Caldwell v. LeFaver*, 928 F.2d 331, 335 (9th Cir. 1991) (past exposure to alleged unlawful conduct insufficient to establish standing to seek injunction).

The rationale of *Lyons* has been applied to bar equitable requests for declaratory relief, as well as injunctive relief. For example, in the case of *Perry v. Sheahan*, the Seventh Circuit Court of Appeals found that the plaintiff lacked standing to seek declaratory and injunctive relief in an action alleging a violation of his constitutional rights by law enforcement officials who seized firearms and other items from his apartment during an eviction. 222 F.3d 309, 313-315 (7th Cir. 2000). As in this case, the

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court found that declaratory and injunctive would not help the plaintiff because it was unlikely that the plaintiff would be subjected to a future injury because (1) most of the property seized from him had been returned after a summary judgment motion had been filed and (2) plaintiff made no showing that he was likely to be subjected to an eviction in the future. *Id.* at 314-315. The court noted that the plaintiff alleged only past injury and could not demonstrate a realistic threat that he would be the subject of another forcible eviction in the county that would result in the seizure of his property. A plaintiff must demonstrate a "realistic threat" that it will again be to subjected to an unconstitutional practice. *Id.* at 313 (*citing Lyons*, 461 U.S. at 102.)

A request for declaratory judgment may be rendered moot by governmental changes that cure the constitutional defects. For example, when a statute is amended or repealed "the case is moot, there is no exception for declaratory relief." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167 (9th Cir. 2011), *see also, Valero Terrestrial Corp. V. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)(statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature has the power to reenact the statute after the lawsuit is dismissed). *See, also County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (case was moot where County complies with court order and displayed no inclination to reinstate discriminatory hiring practices). A case may be found "moot if subsequent events made it absolutely clear that the allegedly wrongful behaviour could not reasonably be expected to recur." *Friends of Earth v. Laidlaw Environmental Servs.* 528 U.S. 167, 170 (2000).

In the case of *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), the Ninth Circuit Court of Appeals, rejected a claim for equitable relief where the plaintiffs lacked sufficient evidence to show that they would be stopped by the border police and subjected to unconstitutional conduct in the future. In making this determination, it was noted that courts will "assume that [defendants] will conduct their activities within the law." *Id.* at 1041 (quoting *O'Shea*, 414 U.S. at 497). The court ultimately concluded that

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there was insufficient evidence of a future injury because the named plaintiffs had only been stopped once in ten years of traveling across the border.

In addition to the reasons set forth above, a district court may refuse to grant declaratory relief as a matter of discretion. The Declaratory Judgment Act "gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Associates, Inc. v. Rickover*, 369 US 111, 112 (1962). "Essentially, the district court 'must balance concerns of judicial administration, comity, and fairness to the litigants.'" *American States Ins. Co. v. Kearns*, 15 F.3d 142, 144 (9th Cir 1994) (*quoting Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir 1991)). Courts will also weigh factors such as whether the evidentiary record is adequate and whether granting relief will settle the legal relations in issue and terminate the proceedings. *United States v. Washington*, 759 F.2d 1353 (9th Cir 1985); *Fern v. Turman*, 736 F.2d 1367, 1370 (9th Cir 1984).

In the case at hand, the previous policies at issue in this case are no longer in use. Plaintiff has failed to demonstrate any likelihood that the defendants will not "conduct their activities within the law" and will revert to the former policies. Accordingly, plaintiff is not entitled to *any* form of equitable relief, either by way of a declaratory judgment or a permanent injunction.

B. Permanent Injunctive Relief Is Not Appropriate

In addition to the authority cited above as to equitable relief in general, there are further reasons to support the denial of plaintiff's request for the extraordinary equitable remedy of a permanent injunction. Plaintiff seeks a permanent injunction enjoining defendants from (1) prohibiting Columbia County Sheriff's Office ("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.

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The United States Supreme Court has set forth the test for a permanent injunction as follows:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury, (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted and (4) that the public interest would not be disserved by a permanent injunction.

eBay v. MercExchange, LLC, 547 U.S. 388, 391 (2006). A plaintiff must also establish actual success on the merits. *Perfect 10, Inc. V. Google, Inc.*, 653 F.3d 976, 979-80 (9th Cir. 2011) (noting that in *eBay*, the Supreme Court noted that a permanent injunction involves "actual success" on the merits). 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).

A permanent injunction is not warranted in this case because: (1) the postcard policy is constitutional, (2) there is no irreparable injury for which monetary damages are inadequate compensation, (3) a remedy in equity is not warranted considering the balance of hardships between plaintiff and defendants, and (4) a permanent injunction is not in the public interest.

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1. The plaintiff should not succeed on the merits with respect to the postcard policy.

The court has indicated that, with respect to the postcard policy, it has not made a final decision as to whether the policy is constitutional and indicated that defendants were entitled to brief the issue of the constitutionality of the policy. Accordingly, defendants will first address whether plaintiff can achieve "actual success" on this claim before proceeding to the additional factors plaintiff is required to prove to obtain a permanent injunction as to all claims. *See Perfect 10*, 653 F.3d at 979-80.

A prison regulation does not violate the First Amendment if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The *Turner* Court identified four factors to be considered in making this determination: (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 test applies to regulations affecting a publisher's right to communicate to inmates. *Id.*

Plaintiff has failed to demonstrate that there is a First Amendment violation based upon these four factors.

a. Rational Relationship to Legitimate and Neutral Governmental Interest.

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.) At that time, the Court was not yet convinced that a postcard restriction was rationally related to these interests. (*Id.* at 17.) Defendants submit that the evidence at trial supports the rationality of the postcard

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policy. As well, there is another court decision recently approving the use of a similar postcard policy. *See*, *Althouse v. Palm Beach County Sheriff's Office*, 2013 W.L. 536072 (S.D. Fla. Feb. 12, 2013).

It was undisputed the Sheriff's Office administrators attended a conference sponsored by a reputable organization (Oregon State Sheriff's Association) and taught by reputable instructors (Washington County Jail Commander and County Counsel) where the implementation of a postcard only policy was discussed. Indeed, the evidence in this case demonstrated it was the topic of a presentation. The administrators learned a number of key pieces of information that support defendants' position that the decision to implement the postcard policy had a rational relationship to legitimate and neutral government interests. They were taught a postcard only policy reduces the chance of contraband entering the jail. They were taught the postcard policy was Constitutional and had already been approved by another Federal Court within this Circuit. They were taught the postcard policy saved time processing the mail.

Admittedly, the evidence at trial demonstrated, at most, one or two instances where contraband may have entered the facility through the mail, as far back as witnesses could recall. However, that cannot be the standard by which this court determines whether the mail policy had a rational relationship to a legitimate and neutral government interest. If it were, then an argument could be made that mail should not even be inspected at an individual jail until that individual jail could demonstrate contraband entered the jail through the mail. Likewise, one could argue individuals coming into the jail should not be searched until such time as that individual jail documented contraband being brought into the facility by an inmate who had not been searched. Defendants are aware of no case law suggesting that the administrators at a jail are not permitted to learn from the experiences at other jails. In this case, the postcard policy was implemented at a presentation that was based upon the experiences learned at other jails. Defendants readily acknowledge many may disagree with the decision made to enact the postcard

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policy, including plaintiff and, at least initially, this court. However, the standard should not be whether or not plaintiff, or even this court, might choose to implement a postcard only policy if it were administering the jail. Rather, the standard is only whether there is a rational relationship to a legitimate and neutral governmental interest, and defendants respectfully submit the evidence offered at trial demonstrated that relationship existed.

Plaintiff was able to show that the time savings for the jail was, at best, minimal. However, that was nothing more than a product of the fact that Columbia County is a jail with a small inmate population, made even smaller by drastic and real budget cuts. Put another way, had this been a facility where 300, or 3,000 pieces of mail are processed each day, the time savings would have been much greater, eventually reaching the point of being substantial. The standards should not be different, depending upon the size of the facility.

The current mail policy allows plaintiff's magazines, catalogs, brochures, subscription renewal forms, and fundraising letters to be distributed to inmates as long as they are mailed from plaintiff's business address. The postcard policy bears a rational relationship to legitimate and neutral interests.

The postcard policy was rationally related to the needs of the Jail's limited resources and need for security and safety of inmates and the jail's staff. These goals are legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *see also*, *O'Keefe v. Van Boening*, 82 F.3d 322 (9th Cir. 1996) ("[P]revention of criminal activity and the maintenance of prison security are legitimate penological interests which justify the regulation of both incoming and outgoing prisoner mail").

There are several district court cases upholding postcard policies, including one issued earlier this month. *See Althouse*, 2013 W.L. at 536072. In *Covell v. Arpaio*, 662 F. Supp.2d 1146 (D. Az. 2009), the court granted the defendant's motion for summary judgment against the plaintiff's claim that restricted incoming inmate mail to postcard size. The court found that the postcard restriction was a neutral policy that was rationally

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related to the legitimate purpose of reducing the risk of contraband entering the facility and compromising jail security. *Id.* at 1153; *see also, Rogers v. Maricopa County Sheriff's Office*, 2008 WL 898721, No. CV07-00641 (D. Az.) (not reported) (dismissing plaintiff's claim relating to postcard restriction for failure to state a claim); *Jordan v. Arpaio*, 2008 WL 22622401, No. CV08-00856 (D. Az.) (not reported) (dismissing plaintiff's claim relating to a postcard restriction for failure to state a claim); *Medley v. Arpaio*, 2008 WL 3911138, No. CV08-00086 (D. Az.) (not reported) (denying plaintiff's motion for a preliminary injunction for failing to show that legal mail was barred by the postcard restriction); *Gibbons v. Arpaio*, 2008 WL 4447003, No. CV07-1456 (D. Az.) (not reported) (granting jail's motion for summary judgment against plaintiff's claim that postcard restriction violated the First Amendment).

At the preliminary injunction stage, this court had found that the evidence at that stage was insufficient as to a rational relationship with legitimate penological interests and declined to follow the conclusion of *Covell*. However, as stated above in this section, at trial the evidence demonstrated that in addition to the policy saving time, it also served to prevent or deter contraband from entering the facility. The jail officials were aware of the types of contraband that had been found at other jails. In light of this evidence, and the recent *Althouse* decision, defendants submit that they have established at trial that the postcard policy bears a rational relationship to a legitimate and neutral government interest.

b. Second Turner Factor: Alternative Avenues for Plaintiff.

The evidence established that alternative methods of communication were available. Although plaintiff presented a number of witnesses who complained about the limitations of the other methods of communication that were available, it is worth pointing out there is no suggestion that any of these other methods were unconstitutional. For example, there was no suggestion that the nature of the telephone calls or the nature of the personal visits were any different at Columbia County than at any other facility

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throughout the entire country. There was no suggestion that a letter is reviewed more closely than a postcard. Further, there was no evidence whatsoever that a postal worker has any interest, let alone the time, to read postcards between inmates and people outside of facilities. Indeed, this is nothing but speculation. Likewise, there was no evidence presented by plaintiff that a postcard policy inhibited rehabilitation or communication with family members, at least to the extent that such limitation reaches the point of being unconstitutional.

c. Third Turner Factor: Impact on Inmates, Jail Staff, and Jail Resources.

Again, under the postcard policy, plaintiff's correspondence was distributed to inmates. To the extent that plaintiff has standing to challenge defendants' personal mail policy, the unfettered ability of persons to send inmates materials in any format—postcard, non-postcard, hardcover books, soft cover books, magazines, notepads, post-it pads, etc.— greatly increased the risks of contraband entering the Jail, along with the time required for screening personal mail. "When an accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90.

Plaintiff had previously claimed it was not aware of other jails or prisons that limit inmates to postcards for personal mail. A review of case law shows that jails across the country have adopted postcard restrictions on incoming and outgoing inmate mail. *See, e.g.*, *Althouse*, 2013 W.L. at 536072 (Palm Beach County detention facilities); *Jamison v. Alachua County Jail*, 2011 U.S. Dist. LEXIS 99225, No. CV10-00250 (N.D. Fla.) (Alachua County Jail); *Price v. Cameron*, 2011 U.S. Dist. LEXIS 121550, No. CV11-00199 (M.D. Fla.) (Charlotte County Jail); *United States v. Kosoko*, 2010 WL 3636276, No. CV08-00332 (D. Nev.) (North Las Vegas Detention Center); *Omar v. Maketa*, 2011 WL 4485955, No. CV 10-08975 (D. Colo.) (Cheyenne Mountain Re-Entry Center).

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d. Fourth Turner *Factor: Existence of Easy and Obvious Alternatives Suggesting an Exaggerated Response by Prison Officials.*

Again, under the postcard policy, plaintiff's correspondence addressed to inmates at the jail was distributed. The burden is on plaintiff to show that there are obvious and easy alternatives to the postcard restriction on personal mail. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987). This test is not a "least restrictive alternative" test:

> [P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate can point to an alternative that fully accommodates the prisoner's right at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90-91. Because of the increased risk of contraband with personal mail and the time-consuming nature of screening personal mail for appropriate mail violations, discarding the postcard restriction would have more than a de minimis cost to the Jail. Plaintiff has the burden to show otherwise and has not done so.

For the above reasons, the postcard policy satisfied the *Turner* test in all respects, and defendants request that the court find that the policy was not in violation of the First Amendment.

2. No irreparable injury for which monetary damages are inadequate

Plaintiff has not submitted evidence to show "irreparable" harm. The evidence at trial revealed just the opposite. For example, a great deal of time was spent both with Paul Wright and Sheriff Dickerson discussing the various material sent to the jail, but not delivered to inmates. Plaintiff's own evidence established plaintiff was aware its mail was not being delivered no later than late 2010, perhaps as early as in August, 2010. The evidence also established Mr. Wright was fully aware of the applicable constitutional rights and case law related to the very issues in this lawsuit. PLN had multiple attorneys providing appropriate legal advice. Although plaintiff certainly had the choice whether or not to notify jail administration of unconstitutional practices, and it can make the

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decision how to communicate its concern about unconstitutional practices to the jail (via telephone call, email, letter or a Complaint), it should not be permitted to come to this court and claim "irreparable harm" for which money damages are not adequate, when plaintiff made the knowing choice to take no steps to stop the harm from occurring and, actually took affirmative steps to allow itself to be harmed – by continuing to send material to the jail, knowing it would be rejected. Therefore, even if this court decides a declaratory judgment on the postcard policy or even the other issues before it (the failure to provide due process and the rejection of the magazines as separate First Amendment violations), the evidence demonstrates that a Declaratory Judgment, without a permanent injunction, is sufficient. The declaratory judgment is a "milder alternative to the injunction remedy." *Perez v. Ledesma*, 401 U.S. 82, 111 (1971).[1] A declaratory judgment is more appropriate when a court finds that officials, such as Sheriff Dickerson, are making good-faith efforts to rectify violations of federal law. *Morrow v. Harwell*, 768 F.2d 619, 627-28 (5th Cir. 1985).

3. A remedy in equity is not warranted

As set forth in Section A above, incorporated herein, the evidence is undisputed that the postcard policy was been changed to be consistent with the court's order. As well, the jail voluntarily implemented a practice to ensure that the written policy permitting magazines was followed. This was done upon the first notice to defendants of

[1] As set forth above, defendants do not agree or concede that a declaratory judgment should be entered in this case, but simply point out that if the court finds that the plaintiff is entitled to *some* form of relief, then any remedy beyond a declaratory judgment would be unnecessary. Courts generally do not grant injunctive relief if declaratory relief will suffice. *Wooley v. Maynard*, 430 U.S. 705 (1977). For example, a court will not grant an injunction as further relief to a declaratory judgment when the court expects its declaration to be given full credence. Doe v. Turner, 361 F Supp 1288, 1292 (S.D. Iowa 1973). Similarly, no injunction will ordinarily issue without evidence that the defendant may ignore the declaratory judgment. *United States v. Anderson Seafoods, Inc*., 447 F. Supp. 1151 (N.D. Fla. 1978), aff'd, 622 F.2d 157 (5th Cir 1980).

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an allegation that there were alleged unconstitutional practices regarding magazines. There is no evidence that unconstitutional policies are currently in place, or that unconstitutional practices exist at this time. Plaintiff has failed to show the likelihood of future harm and, thus, an award in equity is not warranted.

4. A permanent injunction is not in the public interest

The issuance of a permanent injunction will not advance the public interest because there is nothing to be gained where the mail policy regarding postcards was revised, and the practice involving magazines was voluntarily changed to be consistent with the written policies to allow magazines.

The Supreme Court has repeatedly stated that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a local government to conduct its business in a particular way. *See O'Shea*, 414 U.S. at 488; *Rizzo v. Goode*, 423 U.S. 362 (1976); Lyons, 461 U.S. at 95; *Lewis v. Casey*, 518 U.S. 343 (1996). For example, in *Rizzo v. Goode*, the Court overturned an injunction that would have revised the internal procedures of the Philadelphia police department to minimize incidents of unconstitutional police conduct. *Rizzo*, 423 U.S. at 380-81. The Court was concerned about "inject[ing] itself by injunctive decree into the internal disciplinary affairs" of a local government. *Id.*

Similarly, there is no need for the extraordinary remedy of a permanent injunction in this case. The evidence has established that the Sheriff's Office has no history of knowingly violating the Constitution and no history of violating any Order of this court. Further, a permanent injunction, that would by definition be limited to this Sheriff's Office, prohibiting conduct this Sheriff's Office will no longer engage in, in any event, does not serve the public interest because, to the extent the message the court wants to send is the postcard policy is unconstitutional, that message can be given with a declaratory judgment, without a permanent injunction.

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C. The Evidence Does Not Support an Award of Punitive Damages.

The court has also asked the parties to consider the evidence at trial and address whether the court should allow punitive damages to be presented to the jury. Defendants submit that the evidence in this case is not sufficient for the jury to consider an award of punitive damages against Sheriff Dickerson.

A jury may assess punitive damages in an action under 42 U.S.C. § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30 (1983). Punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." *Id.* at 52. An award for punitive damages requires an assessment of the defendant's subjective state of mind. *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989). "Punitive damages are available against individual [government officials] in a § 1983 claim only where the [officials'] 'conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Dubner v. City and County of San Francisco*, 266 F.3d 959, 969 (9th Cir. 2001) (citing *Smith*, 461 U.S. at 56). Punitive damages may not be awarded where a defendant's conduct is merely negligent. *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998), *cert dismissed*, 526 U.S. 1142 (1999) (analysis under similar standard used for Title VII claims). An award of punitive damages under 42 U.S.C. § 1983 "requires proof that the defendant '*almost certainly knew* that what he was doing was wrongful and subject to punishment.'" *Thomas v. City of Portland,* 2007 WL 2286254, *18 (D. Or. Aug. 3, 2007) (quoting *Ngo*, 140 F.3d at 1304) (emphasis added). Even if there is liability, punitive damages will not be awarded when there is a lack of evidence that an officer "acted with evil intent." *Ward v. City of San Jose*, 967 F.2d 280, 286 (9th Cir. 1991).

Plaintiff does not advance any evidence that Sheriff Dickerson had the required state of mind to support an award of punitive damages. The federal courts have

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cautioned against awarding punitive damages *automatically* after a determination that the constitution was violated. For example, the Second Circuit Court of Appeals has held that although a defendant police officer's warrantless search violated clearly established Fourth Amendment law, the plaintiff was not entitled to a punitive damages jury instruction. *McCordle v. Haddad*, 131 F.3d 43 (2d Cir. 1997). The court rejected the plaintiff's argument that because the officer's search violated clearly established Fourth Amendment principles, "his conduct ipso facto revealed reckless or callous indifference to her rights. To accept that proposition would essentially expose a defendant to . . . punitive damages for any conduct not protected by qualified immunity, and would thereby make the availability of punitive damages equal to the availability of compensatory damages." *Id.* at 53. In evaluating whether the defendant officer had sufficient motive or intent to support a punitive damages instruction, the court found it significant that the defendant officer had given the plaintiff "a break by crossing off one of the charges he had written onto the ticket." *Id.* This positive conduct on the part of the officer appears to have played into the court's decision that there was insufficient bad intent.

Importantly, when examining a case involving the interception of jail mail, the Tenth Circuit Court of Appeals found that punitive damages were not appropriate when (1) there was no evidence that the defendant knew his actions were unconstitutional and (2) the defendant stopped the behavior when advised that it was unconstitutional. *Jolivet v. DeLand*, 966 F.2d 573, 577 (10th Cir. 1992). The Second Circuit Court of Appeals also vacated an award of punitive damages in a free speech case where the jury had decided that the defendants were motivated by a reasonable expectation that a plaintiff's speech would disrupt the effective and efficient operation of the university. *Jeffries v. Harleston*, 21 F.3d 1238, 1249 (2d Cir. 1994), *cert. granted, judgment vacated on other grounds*, 513 U.S. 996 (1994). *See also, Broderick v. Evans*, 570 F.3d 68, 74-75 (1st Cir. 2009) (upholding court's refusal to give punitive damages instruction in retaliation case because

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there was no evidence that defendant acted with a conscious purpose to violate the law). The evidence for punitive damages against Sheriff Dickerson is even weaker in this case, than in any of the cases cited above.

First, with respect to the postcard policy, this court has noted that its decision is the first to have held such a policy to be in violation of the U.S. Constitution. Moreover, Sheriff Dickerson attended a conference in which a well respected colleague recommended the institution of the policy. He further testified that he had no intention of being a "test case" and that he would not have adopted such a policy if there was any doubt as to its legality. Thus, he most certainly could not have been aware that at some point in the future a federal court would have held the policy to be in violation of the constitution. Accordingly, the jury should not be permitted to consider an award of punitive damages with respect to the postcard policy.

Second, with respect to the practice of rejecting the magazines and the Due Process violations, the evidence was undisputed that Sheriff Dickerson delegated the operation of the jail to experienced staff, already working for the Sheriff's Office, when he was elected. Indeed, his testimony was that of all departments within the Sheriff's Office, the jail was near the bottom of his concern, in part because it was inspected by outside agencies. No significant concerns (and none at all related to the issues in this lawsuit) were brought to his attention. Further, the evidence was undisputed that Sheriff Dickerson did not have experience or training in operating a jail or, specifically, in legal issues surrounding inmate mail. The delegation of these tasks to personnel the Sheriff understood to be experienced and qualified would seem entirely appropriate but, at a minimum, demonstrates that no reasonable juror could find that he was at any time possessed of an evil motive or intent, or that his conduct involved a reckless or callous indifference to the federally protected rights of others. As stated, the evidence clearly showed he wasn't even aware the rights were being violated.

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D. Plaintiff Presented Insufficient Evidence to Allow the Jury to Consider Awarding Diversion of Resources or Frustration of Mission Damages.

The court had indicated that it was still considering the issues presented concerning diversion of resources and frustration of mission damages. As set forth below, defendant argues that such damages should not be awarded in this case.

1. Diversion of resources

Damages for a "diversion of resources" are not appropriate in this case. A plaintiff seeking these types of damages must provide evidence that outreach is necessary to "reach out" and address "ongoing" problems associated with unconstitutional conduct. *Spann v. Colonial Vill. Inc.*, 899 F.2d 24, 27-29 (D.C. Cir. 1990). There must be some increase of resources separate and apart from its standard mission which places "concrete drains on [its] time and resources." *Id.*

In the case of *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010), the Ninth Circuit Court of Appeals reviewed a claim for these damages in the context of determining whether the plaintiff, an organization, had standing. Importantly, it does not appear that the court was asked to decide whether these damages were recoverable in a claim asserted under 42 U.S.C. § 1983. Rather, in the context of determining in the first instance whether the plaintiff had standing to file suit, the court referred to some of the Fair Housing Act cases which discussed these types of damages.

In *Lake Forest*, the court rejected plaintiff's assertion that it had suffered an injury and, therefore, found it lacked standing. In reaching this decision, the court noted that a party "'cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that would otherwise not affect the organization at all.'" *Id.* at 1088 (quoting *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994). The organization "must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.* The

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court concluded that the plaintiff failed to assert any factual allegations to show that it was forced to divert resources to help an association of day laborers. Similarly, in this case, plaintiff presented no evidence that it incurred damages because it took time away from the usual and customary work performed by its employees. Rather, it has essentially "manufacture[d] the injury by incurring litigation costs" which is exactly what the court held could not result in a claim for damages. Moreover, the costs of employee time spent mailing out newsletters that were rejected did not take the employees away from their usual work so that they could help prisoners. In fact, the processing of mailings was their usual work. They are simply asking for time spent on tasks they would have been performing anyway if the mail was not rejected.[2] Moreover, even if the employee's time was recoverable, plaintiff has not submitted evidence to support the inflated numbers sought by plaintiff in this case, which greatly exceed the actual hourly rates paid to employees for their work. *See*, Def's Motions in Limine, pp. 6-7.

Also, plaintiff cannot seek recovery to pay for *future* acts that it would like to take to do what it believes would counteract the injury. "An organization may sue only if it was *forced* to choose between suffering an injury and diverting resources to counteract the injury." *Lake Forest*, 624 F.3d at 1088, n.4 (citing *BMC Mktg.*, 28 F.3d at 1277) (emphasis added). *See also, Scocca v. Smith*, 2012 WL 2375203, *3 (N.D. Cal. June 22, 2012) (sending official to pre-litigation meeting was not a diversion of resources where no showing was made that plaintiff had to "choose between suffering an injury and diverting resources"). Plaintiff has not yet incurred these costs, and the costs were not forced upon them.

In *Fowler v. Assoc. of Comm. Orgs. for Reform*, 178 F.3d 350 (5th Cir. 1999), the Fifth Circuit Court of Appeals also reviewed these damages in the context of determining

[2] As well, in regard to defendant's mitigation defense, plaintiff continued to process mailings it knew would be rejected, thereby making the decision to incur costs on mail that it believed would not be delivered.

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whether the plaintiff had organizational standing by incurring diversion of resources damages when assisting with voter registration efforts. In *Fowler*, the court rejected almost all of the plaintiff's theories of recovery, including litigation costs, monitoring costs and some voter registration drives that did not involve counteracting an area that had not implemented various Voting Rights Act requirements. The court *did* allow one limited claim for damages to survive summary judgment because plaintiff had provided evidence that it instituted a voter registration campaign in a particular location because of past failures to implement the voting act requirements in those geographical areas. Plaintiff lacks this type of evidence in the case at hand.

2. Frustration of Purpose

At the outset, since no diversion of resources has been established, plaintiff cannot obtain damages for frustration of its mission or purpose. The Ninth Circuit Court of Appeals has noted that a plaintiff must show "*both* a diversion of resources *and* a frustration of its mission." *Lake Forest*, 624 F.3d at 1088 (emphasis added) (citing *Fair Hous. of Marin v. Combs,* 285 F.3d 899, 902 (9th Cir. 2005)). Accordingly, in the case at hand, because diversion of resource damages should not be awarded, plaintiff is also not entitled to request frustration of mission damages.

Additionally, these types of damages are not appropriate because there was no showing of a significant drain on plaintiff's resources. This court had previously requested information on the impact of the case of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) on the "frustration of mission" damages allegation. In *Havens*, the court stated that to recover such damages, a plaintiff must show "that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities-with the consequent drain on the organization's resources. ...'" *Id.* at 379. Such an injury must be "concrete and demonstrable." *Id.* In the case at hand, plaintiff has not provided evidence of a "significant" impairment or "drain" on its resources.

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E. Plaintiff's Own Conduct in Failing to Notify the Defendants of Alleged Violations Should Prevent It From Manufacturing or Creating Damages.

Plaintiff should not be permitted to manufacture a theory of damages when it could have easily and with little or no effort notified the jail that it believed the jail had unconstitutional mail practices and polices. The evidence is undisputed that the first knowledge from plaintiff of potential unconstitutional conduct came to the defendants when the Complaint was filed, with no prior communication from plaintiff. As the evidence has demonstrated, plaintiff became aware of such violations in 2010, yet continued to send publications knowing and expecting they would be ejected. In fact, almost all of the material was submitted by plaintiff only *after* plaintiff became aware it was certain it would be rejected. Put bluntly, plaintiff made the odd business decision to expend its claimed limited resources, some of it donated to plaintiff, on sending material to the jail it knew would not be delivered.

Plaintiff should not be rewarded for such wasteful, litigious activities.

F. Presumed Damages are Not Appropriate in this Case.

Finally, the court had also provided defendants with the opportunity to address the issue of presumed damages. In requesting presumed damages, plaintiff is essentially stating that there *must* be damages awarded if there is a constitutional violation. However, that is not the law. Rather, in a case such as this where there is a lack of proof of damages, the appropriate award is one of *nominal*, not presumed damages. *See*, *e.g., Calhoun v. Detella*, 319 F.3d 936, 942 (7th Cir. 2003) (prisoner may recover nominal damages for constitutional violation when he cannot establish compensable harm); *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001) (if jury found no monetary value to constitutional violation, it could award nominal damages).

Importantly, presumed damages require that (1) an injury actually occurred because of a constitutional violation and (2) it is "difficult to establish" the value of the injury, thereby requiring this "substitute" remedy. *Memphis Community School Dist. v.*

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Stachura, 477 U.S. 299, 310-11 (1986). In this case, defendants submit that plaintiff has failed to show that it suffered an injury in that it can produce no evidence such as a delayed production schedule, loss of subscriptions etc. Moreover, an injury would not be "difficult to establish" because there are means of proving such damages, if they actually had occurred. However, this is simply a case in which no evidence of such damages was presented. Plaintiff's lack of proof in this regard should not permit it to manufacture a presumed damages claim. As stated above, the appropriate damages in a case such as this is an award of nominal damages.

In *Stachura*, the Supreme Court held that presumed damages "are a *substitute* for ordinary compensatory damages, *not* a supplement for an award that fully compensates the alleged injury." *Id.* (emphasis in original). Presumed damages are supposed to "roughly approximate the harm that the plaintiff suffered and thereby compensate *for harms that may be impossible to measure.*" *Id*. (emphasis added).

The United States Supreme Court has explained that the basic purpose of 42 U.S.C. § 1983 damages is "'to compensate persons for injuries that are caused by the deprivation of constitutional rights.'" *Id.* at 304 (citing *Carey v. Piphus*, 435 U.S. 247, 254 (1978)). Thus, Section 1983 authorizes compensatory damages not only for "out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . personal humiliation and mental anguish and suffering." *Id.* at 307. However, Section 1983 does not permit a jury to award damages based on its "subjective perception of importance of the constitutional rights as an abstract matter." *Id.*

The Court explained:

> [D]amages based on the "value" of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants. . . . Such damages would be too uncertain to be of any great value to plaintiffs,

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> and would inject caprice into determinations of damages in § 1983 cases. We therefore hold that damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in such cases.

Id. at 310.

Also instructive is the case of *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996), which further shows that presumed damages are not appropriate in this matter in which plaintiff has requested actual damages. Specifically, the court held:

> *Damages are not presumed to flow from every constitutional violation. Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978). Presumed damages are appropriate when there is a great likelihood of injury coupled with great difficulty in proving damages. *Id.* at 264, 98 S.Ct. at 1052.

Id. at 921 (emphasis added). In this case, there are types of damages plaintiff could potentially recover and, thus, presumed damages are not appropriate.

The case of *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558 (7th Cir. 1986), *aff'd* 479 US 1048) has been relied upon by plaintiff in support of its position. However, it appears to be an outlier which does not strictly follow the principles set forth in *Stachura*. *Stachura* said in no uncertain terms that presumed damages are a substitute for compensatory damages, but nevertheless and without explanation) the court in *Illinois Public Action Council* seemed to allow both presumed and itemized compensatory damages.

Notably, one year after the Seventh Circuit Court of Appeals issued its decision in *Illinois Public Action Council*, it seemed to rule just the opposite in *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987). The court specifically noted:

> [W]e are bound by the Supreme Court's decision in *Stachura* that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in [§ 1983] cases." The district court's Instruction 31A, allowing the jury to consider the inherent value of Bailey's constitutional rights, thus gave the jury an impermissible measure by which to assess damages.

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Id. at 376 (internal citation omitted).

The United States Supreme Court has rejected claims for presumed damages for a procedural due process violation. *Carey*, 435 U.S. at 264 (holding that "plaintiffs should be put to their proof on this issue, as plaintiffs are in most tort actions"). The courts have seemed to consistently reject presumed damages in all but rare cases with non-quantifiable damages. *See, e.g., George v. City of Long Beach,* 973 F.2d 706, 708 (9th Cir. 1992) (nominal damages instruction is appropriate in Section 1983 case against police officers alleging warrantless arrest when no actual damages are proved), cert. denied 507 U.S. 915 (1993).

The issue of presumed damages has also been addressed by the Second Circuit Court of Appeals in the case of *Conboy v. AT&T Corp.*, 241 F.3d 242 (2nd Cir. 2001). In *Conboy*, the Court held that, as a general matter, federal law permits the recovery of presumed damages only in very limited circumstances. As the Supreme Court has explained, presumed damages are generally available only where the offense, by its very nature, is "virtually certain" to cause mental and emotional distress, so "there arguably is little reason to require proof of this kind of injury." 241 F.3d at 251, *citing Carey*, 435 U.S. at 262 (referring to cases rejecting presumed damages and noting that courts have awarded such damages in only a few limited situations, such as in the common law of defamation per se).

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Plaintiff has not met its burden to demonstrate that this is one of those rare cases in which damages are unquantifiable and should, therefore, be "presumed" to exist. In this case there are ways in which a plaintiff could have potentially sustained damages. However, plaintiff simply has not sustained such damages. Therefore, the appropriate measure of damages is that of nominal, not presumed, damages.

Respectfully submitted this 22nd day of February, 2013.

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