

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

<p>Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Christopher John Thuringer, Kenny S. Daywitt, and Bradley Wayne Foster,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>Lucinda Jesson, Dennis Benson, Kevin Moser, Tom Lundquist, Greg Carlson, and Ann Zimmerman, in their individual and official capacities,</p> <p style="text-align: center;">Defendants.</p>	<p>Court File No. 11-cv-03659 (DWF/JJK)</p> <p>PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER</p>
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INTRODUCTION

Plaintiffs bring this motion seeking an Order to require Defendants to provide adequate storage space for legal materials relating to this case and to enjoin the Defendants from engaging in room searches of the Named Plaintiffs outside the presence of the Named Plaintiffs while this litigation is pending.¹ The Defendants' policy is to allow each individual committed to the MSOP three storage bins for their personal items.

¹ The Parties in this case have been working diligently and in good faith to resolve the issue of whether or not the Named Plaintiffs can have additional storage space for their legal materials. Although the Parties are continuing to try and resolve these issues, an agreement has not yet been reached. If the issues are resolved prior to the hearing, the Plaintiffs will withdraw this motion.

These bins are kept in the patients' rooms. Without this restraining order, Plaintiffs are being effectively punished for bringing this litigation as they have to use their limited personal storage space for legal materials while other non-litigant MSOP clients do not have to store such documents. This jeopardizes the Named Plaintiffs' ability to effectively litigate their case because they may not have sufficient room to store their legal materials without compromising their own personal space.

Furthermore, it is also the Defendants' policy to prohibit MSOP patients from being present while room searches (either random or for a specific reason) are being conducted. This jeopardizes the Named Plaintiffs' ability to ensure that their attorney client privileged materials are not being compromised. As such, without this restraining order, the Defendants have unfettered access to the Named Plaintiffs' legal materials relating to this matter.

Allowing the Named Plaintiffs to have additional storage space in their room permits these Plaintiffs to effectively litigate their cases, while still being treated the same as other individuals committed to MSOP. This is not the same as allowing all litigants extra storage because these Plaintiffs serve as Class Representatives in litigation that affects all individuals committed at MSOP. Additionally, allowing the Named Plaintiffs to be present during the room searches prevents Defendants from being able to review these materials without the Named Plaintiffs' knowledge. Given the importance of these issues, Plaintiffs' motion for a temporary restraining order should be granted.

BACKGROUND

This case was originally filed on December 21, 2011 as a *pro se* case. The undersigned counsel filed a Notice of Appearance on January 20, 2011. Plaintiffs filed an Amended Complaint on March 15, 2012 alleging the following conduct by Defendants: 1) failure to provide treatment, 2) denial of right to be free from punishment, 3) denial of less-restrictive alternatives, 4) denial of right to be free from inhumane treatment, 5) denial of right to religious freedom, 6) unreasonable restrictions on speech and association, 7) unreasonable searches and seizures, 8) the civil commitment statute is unconstitutional as applied, 9) violation of court-ordered treatment, and 10) breach of contract.

The Amended Complaint also asserts class allegations and Plaintiffs are seeking to certify a class of “All patients currently civilly committed in the Minnesota Sex Offender Program pursuant to Minn. Stat. § 253B.” The above-named Plaintiffs are all civilly committed pursuant to Minn. Stat. § 253B. They are all being housed at the Moose Lake facility and are subject to the policies of the MSOP. The above-named Plaintiffs are seeking to be the Class Representatives for the proposed class.

It is the MSOP’s policy that each individual committed at the MSOP must be able to fit their personal belongings – including correspondence, notebooks and other materials that would presumably constitute litigation materials – into three storage bins which are kept in their rooms. *See* MSOP Property List policy, Affidavit of Daniel E. Gustafson, Ex. A. Plaintiffs have requested additional storage space to store their legal materials relating to this case. At this time, given that the litigation is still in its early

stages, the storage need is likely not that cumbersome. As the litigation progresses, the need for additional storage may increase. Plaintiffs seek adequate additional storage to allow them to store their litigation materials without having to give up their own personal storage space to do so.

MSOP Policy No. 301.011 governs searches of the Plaintiffs rooms. It states that “All clients of any Minnesota Sex Offender Program (MSOP) facility are subject to search. Searches are only authorized to accomplish the purpose of this policy and will avoid unnecessary force, embarrassment or indignity to the subject. Facilities may create procedures or security procedures to implement this policy.” *See* Affidavit of Daniel E. Gustafson, Ex. B. The policy further notes that “Staff conducting the search will inform the client(s) that their room will be searched. Clients at programming will be informed of the search upon return to the unit (staff will pat search the client at that time).” *Id.* The policy also states that “Using standard precautions, staff will pat search the client and ***move them from the immediate search area.***” *Id.* (emphasis added).

Given Plaintiffs’ role in this litigation as Class Representatives, they have documents in their rooms that contain attorney-client privileged information (including personal notes). As such, Plaintiffs move for a temporary restraining order allowing them to be present in their room at the time of any search (including if the search is a result of a computer generated random search or a search for cause of their roommate) in order to assure that the Defendants do not have access to attorney-client privileged information.

ARGUMENT

The Courts have enumerated the critical showings for a Motion for a Preliminary Injunction as follows:

- 1) Irreparable injury to the movant;
- 2) The balance between the injury and the harm that the preliminary injunction will cause to the other parties;
- 3) The movant's probability of success on the merits; and
- 4) The public interest.

See Vonage Holdings Corp v. Nebraska Public Service Commission, 564 F.3d 900, 904 (8th Cir. 2009), (quoting *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.3d 109, 114 (8th Cir. 1981)); *Stuart Hall Co., Inc. v. Ampad Corp.*, 51 F.3d 780, 783 n. 2 (8th Cir. 1995), (citing *Calvin Klein Cosmetics Corp. v. Lenox Lab.*, 815 F.2d 500, 503 (8th Cir. 1987)).

“The burden of establishing the propriety of an injunction is on the movant.” *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003), citing *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995). “No single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction.” *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (citing *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1993), and *Calvin Klein Cosmetics Corp.*, 815 F.2d at 503).

Further, the “[f]ailure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.” *Watkins Inc., v. Lewis*, 346 F.3d at 844, (citing *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996)).

“When there is an adequate remedy at law, a preliminary injunction is not appropriate.” *Id.* (citation omitted). In addition, “an injunction cannot issue if there is no chance of success on the merits [.]” *Mid-America Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 972 (8th Cir. 2005), (citing *Firefighters Local Union No. 1784 v. Stotts*, 457 U.S. 561, 589 (1984) (O'Connor, J., concurring), and *AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002)).

The Plaintiffs satisfy each of the criteria for a preliminary injunction and as such, this motion should be granted.

1. Irreparable Injury To The Movant

Courts have recognized the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications. *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009) (citation omitted). The Supreme Court has noted that “[b]y assuring confidentiality, the privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation.” *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981)). The Supreme Court also noted that “[t]his, in turn, serves ‘broader public interests in the observance of law and administration of justice.’” *Id.*

The Eighth Circuit has also recognized the importance of the attorney-client privilege with respect to inmates receiving legal mail. In *Cody v. Weber*, 256 F.3d 768 (8th Cir. 2001), the Court recognizes that mail from an attorney to an inmate client cannot be opened for inspection outside the inmate’s presence (citing *Jensen v. Klecker*, 648

F.2d 1179, 1182 (8th Cir. 1981); *Powells v. Minnehaha County Sheriff Dep't*, 198 F.3d 711, 712 (8th Cir. 1999); *Thongvanh v. Thalacker*, 17 F.3d 256, 258-59 (8th Cir. 1994)).

The MSOP has a similar policy. *See* Policy No. 302.030 - Client Mail. Mail that is marked as “Legal” may not be opened by MSOP staff outside the presence of the MSOP recipient. This policy is intended to protect the attorney-client privilege by assuring the recipient that the MSOP staff is not reading their privileged communications. The same policy should apply to room searches.

There can be no dispute that the threat of irreparable harm is imminent and real. The Plaintiffs need to have access to their litigation materials and need to space to store such materials in order to effectively litigate their case. As such, they need additional storage in their rooms to accommodate for these documents.

Furthermore, if the Defendants have access to Plaintiffs’ attorney-client communications, the Plaintiffs are at a significant disadvantage. The Plaintiffs cannot determine that their attorney-client communications are not being read if they are not allowed to be present during the search of their rooms. Once the attorney-client privileged information is disclosed, the harm cannot be repaired. There is no amount of money damages that can cure the advantage of knowing the mental impressions or legal strategies of Plaintiffs and their counsel.

2. The Balance Between The Injury And The Harm That The Preliminary Injunction Will Cause To The Other Parties

Given the importance of allowing the Plaintiffs to have access to their litigation materials and, at the same time, protecting attorney-client communications by permitting these Plaintiffs to be present during room searches for the duration of the litigation

outweighs any extra burden it will place on the defendants to have them present.

Plaintiffs are not seeking to prohibit any such searches to occur but are merely seeking to be present while they occur.²

3. The Movant's Probability Of Success On The Merits

Plaintiffs have alleged in their complaint that their legal mail gets opened outside the presence of the recipient in violation of their constitutional rights as well as the MSOP policies. *Karsjens et al., v. Jesson, et al.*, 11-CV-0359 (DWF/JSM) (“*Karsjens Complaint*”) at ¶ 123. Furthermore, Plaintiffs have alleged that the searches of their rooms without being allowed to be present also violate their rights. *Id.* As such, there is a relationship between the claims in this case and this motion, unlike in the cases of *Devose v. Herrington*, 42 F.3d 470 (8th Cir. 1994) and *Jihad v. Fabian*, 2010 WL 1780238, Civ. No. 09-1604 (DSD/RLE) (D. Minn. 2010).

Given the recognized importance of attorney-client communications, Plaintiffs’ allegations with regard to violations relating to those communications have a high probability of success. *See Cody v. Weber*, 256 F.3d 764 (8th Cir. 2002) (recognizing that “[t]he taking of legal papers will often (though perhaps not always) interfere with an inmate’s right of access to the courts).

4. The Public Interest

The public interest weighs heavily in favor of granting the preliminary injunction. As recognized by the Supreme Court in *Mohawk*, “[b]y assuring confidentiality, the

² If legal documents are allowed to be kept in a separate tote, then Plaintiffs would request that the Defendants search that tote or storage bin in the presence of the Plaintiff.

privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation ... [t]his, in turn, serves ‘broader public interests in the observance of law and administration of justice.’” *Mohawk Industries*, 130 S. Ct. at 606.

CONCLUSION

Given the irreparable harm that Plaintiffs will suffer if they cannot effectively litigate their case and if their attorney client communications are breached as weighed against the minor inconvenience to Defendants to allow the Plaintiffs to have extra storage space for legal papers and to be present during these searches, the Court should grant Plaintiffs’ motion and order that Defendants allow the Plaintiffs to have additional legal storage space and to be present during any search of their room while this litigation is pending.

Dated: June 28, 2012

Respectfully Submitted,

s/Daniel E. Gustafson

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