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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' PROPOSED JURY
INSTRUCTIONS

Defendants respectfully request the Court give the following instructions to the jury. Defendants reserve the right to modify, supplement, or withdraw these instructions based upon the evidence at trial. Pursuant to LR 51.1 and the Court's Civil Trial Management Order, the following is an index of proposed jury instructions, followed by a complete version of each proposed instruction.

Respectfully submitted this 7th day of January, 2013.

HART WAGNER LLP

By: /s/ Steven A. Kraemer

Steven A. Kraemer, OSB No. 882476
Of Attorneys for Defendants

DEFENDANTS' REQUESTED JURY INSTRUCTIONS

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v. Lutz, 329 F.3d 692, 697-98 (9th Cir. 2003); *Prison Legal News v. Cook*, 238
F.3d 1145, 1152 (9th Cir. 2001).
11. **First Amendment**
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12. **Damages – Causation**
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13. **Damages – Proof**
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14. **Damages – Mitigation**
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15. **Damages – Avoidance of Double Recovery**
Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963); *Bender v. City of New York*, 78 F.3d 787, 793 (2d Cir. 1996); *Greenwood Ranches, Inc. v. Skie Const. Co., Inc.*, 629 F.2d 518, 522 (9th Cir. 1980); *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 462 (5th Cir. 1995); *MidAmerica Fed. Sav. & Loan Assoc. v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1473 (10th Cir. 1992).
16. **Damages – Nominal Damages**
Ninth Circuit Model Civil Jury Instruction No. 5.6 (2007) (modified)

ALTERNATIVE INSTRUCTION

Should the Court determine that plaintiff has met its burden in proving that Sheriff Jeff Dickerson’s conduct was malicious, oppressive or in reckless disregard of plaintiff’s First and/or Fourteenth rights, defendants request the following additional instruction:

17. **Damages – Punitive Damages**
Ninth Circuit Model Civil Jury Instruction No. 5.5 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 1

Summary of Claims and Defenses

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

Plaintiff is Prison Legal News, a project of the Human Rights Defense Center, a Washington Non-Profit Corporation. Plaintiff publishes and distributes a monthly magazine and certain books about the criminal justice system and legal issues affecting prisoners.

Defendants are Columbia County Sheriff's Office (CCSO) and Sheriff Jeff Dickerson. Sheriff Dickerson became the elected sheriff of CCSO on January 1, 2009, and he was re-elected on November 6, 2012. Defendant CCSO manages the Columbia County Jail.

Beginning in December, 2010, Plaintiff mailed its monthly magazine, informational brochures, fundraising letters, and advertising material (subscription forms, book catalogs, book offers) to inmates at the Columbia County Jail in envelopes addressed to individual inmates. Plaintiff and Defendants agree that CCSO staff rejected many of the pieces of mail and did not provide Plaintiff or inmates notice of their appeal rights.

Plaintiff claims that Defendants' rejection of the mail and lack of notice of their appeal rights violated the United States Constitution's free speech clause in the First Amendment and the due process clause in the Fourteenth Amendment. Defendants have admitted in the Answer they filed in this case the rejection of the mail and lack of notice of their appeal rights did violate the United States Constitution as claimed by Plaintiff and defendants changed their practices and policies immediately after receiving a copy of Plaintiff's Complaint.

Plaintiff claims that it suffered damages as a result of the constitutional violations. Defendants deny Plaintiff suffered any damages, but also contend that if Plaintiff did suffer any damages, it was caused by Plaintiff's own actions in continuing to send material to the jail after Plaintiff knew the material would be rejected and in not notifying Jail administrative staff or

other County officials of Plaintiff's concerns about the constitutional violations or by not filing this lawsuit sooner. Plaintiff has the burden of proving damages, if any.

Defendants assert an affirmative defense to Plaintiff's claim for damages on the basis that Plaintiff failed to mitigate any damages. Plaintiff denies that it failed to mitigate its damages. Defendants have the burden of proof of on their affirmative defense.

Ninth Circuit Model Civil Jury Instruction No. 1.2 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 2

Burden of Proof – Preponderance of the Evidence

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Ninth Circuit Model Civil Jury Instruction No. 1.3 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 3

Two or More Parties – Different Legal Rights

You should decide the case as to each party separately. Unless otherwise stated, the instructions apply to all parties.

Ninth Circuit Model Civil Jury Instruction No. 1.5 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 4

Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using any other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the

entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Ninth Circuit Model Civil Jury Instruction No. 1.12 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 5

Impeachment Evidence -- Witness

The evidence that a witness has been convicted of a crime on a prior occasion may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

Ninth Circuit Model Civil Jury Instruction No. 2.8 (2007) (modified).

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 6

Expert Opinion

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Model Civil Jury Instruction No. 2.11 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 7

Equal Treatment of Parties – Municipal Entities

The fact that a defendant is a municipal entity should not affect your decision. All persons are equal before the law and municipal entities such as Columbia County and the Columbia County Sheriff's Office are entitled to the same fair and conscientious consideration by you as any party.

Ninth Circuit Model Civil Jury Instruction No. 4.1 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 8

**Section 1983 Claim Against Defendant Sheriff Jeff Dickerson
in Individual Capacity – Elements and Burden of Proof**

In order to prevail on Plaintiff's Section 1983 claim against Defendant Sheriff Jeff Dickerson, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. Defendant Sheriff Jeff Dickerson acted under color of law; and
2. Defendant Sheriff Jeff Dickerson's acts or failures to act deprived Plaintiff of its particular rights under the United States Constitution as explained in Instruction Nos. 10 and 11.

A person acts "under color of law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. I instruct you that the Defendant Sheriff Jeff Dickerson acted under color of law.

Ninth Circuit Model Civil Jury Instruction No. 9.2 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 9

**Section 1983 Claim Against Local Governing Body Defendants
Based on Act of Final Policymaker – Elements and Burden of Proof**

In order to prevail on Plaintiff's Section 1983 claim against Defendant Columbia County Sheriff's Office alleging liability based on the act of a final policymaker, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. Defendant Sheriff Jeff Dickerson acted under color of law;
2. The acts of Defendant Sheriff Jeff Dickerson deprived Plaintiff of its particular rights under the United States Constitution as explained in Instruction Nos. 10 and 11.
3. Defendant Sheriff Jeff Dickerson had final policymaking authority from Defendant Columbia County Sheriff's Office concerning these acts; and
4. When Defendant Sheriff Jeff Dickerson engaged in these acts, he was acting as a final policymaker for Defendant Columbia County Sheriff's Office.

A person acts "under color of law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. I instruct you that Defendant Sheriff Jeff Dickerson acted under color of law.

I instruct you that Defendant Sheriff Jeff Dickerson had final policymaking authority from Defendant Columbia County Sheriff's Office concerning the acts at issue and, therefore, the third and fourth elements require no proof.

Ninth Circuit Model Civil Jury Instruction No. 9.5 (2007) modified.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 10

Fourteenth Amendment – Procedural Due Process – Inmate Mail

Plaintiff alleges that the Defendants deprived it of its right to Procedural Due Process under the Fourteenth Amendment.

The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. In this case, Plaintiff alleges Defendants deprived it of its rights to procedural due process under the Fourteenth Amendment when Defendants did not give notice to Plaintiff of the reason for the rejection of its mail and an option to request an appeal of Defendants' decision to reject the mail. In their Answer Defendants have admitted to depriving Plaintiff of its Procedural Due Process rights.

U.S. Const. Am. XIV; *Procunier v. Martinez*, 416 U.S. 396, 417-19 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Krug v. Lutz*, 329 F.3d 692, 697-98 (9th Cir. 2003); *Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (9th Cir. 2001).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 11

First Amendment

Plaintiff alleges that the defendants deprived it of its First Amendment rights. Under the First Amendment a publisher has the right to communicate with inmates. In this case, plaintiff alleges defendants deprived it of that right when it rejected the magazines and other material described to you previously. In their Answer, defendants have admitted to depriving plaintiff of its First Amendment rights.

Ninth Circuit Model Jury Instruction No. 9.10 (2007) (modified)

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 12

Damages – Causation

In order to establish that the acts of the defendants deprived plaintiff of its particular rights under the United States Constitution as explained in later instructions, the plaintiff must prove by a preponderance of the evidence that the acts were so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

Ninth Circuit Model Civil Jury Instruction No. 9.8 (2007) modified.

DEFENDANTS' REQUESTED JURY INSTRUCTION NO.13

Damages - Proof

It is the duty of the Court to instruct you about the measure of damages. In this case, I have instructed you that Defendants are liable to Plaintiff. Accordingly, you must determine Plaintiff's damages, if any.

Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate Plaintiff for any injury you find was caused by Defendants. You should consider the following:

1. The reasonable value of Plaintiff's alleged economic loss, if any.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Ninth Circuit Civil Jury Instruction Nos. 5.1 and 5.2 (2007) (modified)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 14

Damages -- Mitigation

The Plaintiff has a duty to use reasonable efforts to mitigate damages after it first suffers an injury caused by Defendants. To mitigate means to avoid or reduce damages.

Defendants have the burden of proving by a preponderance of the evidence:

1. That Plaintiff failed to use reasonable efforts to mitigate damages; and
2. The amount by which damages would have been mitigated.

Ninth Circuit Civil Jury Instruction No. 5.1 (2007) (modified); *999 v. CIT Corp.*, 776 F.2d 866, 871 (9th Cir. 1985); *Commodity Credit Corp v. Resenberg Bros. & Co.*, 243 F.2d 504, 511 (9th Cir. 1957).

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 15

Damages – Avoidance of Double Recovery

Plaintiff is entitled to be compensated only for the injuries Plaintiff actually suffered. Plaintiff is to be made whole, but not entitled to be put in a better condition than it would be in had the wrong not been committed. In this matter, Plaintiff's First and Fourteenth Amendment rights were violated by Defendants. Plaintiff, however, is not entitled to a separate damage award for the violations of the First and Fourteenth Amendment rights. Rather, only one recovery may be obtained. I instruct you that if you determine Plaintiff is entitled to damages, you must award only one amount.

Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963); *Bender v. City of New York*, 78 F.3d 787, 793 (2d Cir. 1996); *Greenwood Ranches, Inc. v. Skie Const. Co., Inc.*, 629 F.2d 518, 522 (9th Cir. 1980) (plaintiff not entitled to a separate compensatory damage award under each legal theory seeking the same relief); *Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 462 (5th Cir. 1995) (“Even though recovery is premised on two different theories, a plaintiff cannot recover the same damages twice,” so allowing damages for tortious interference on top of damages for breach of contract “would result in a double recovery”); *MidAmerica Fed. Sav. & Loan Assoc. v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1473 (10th Cir. 1992) (“It is well established that double recovery is precluded when alternative theories seeking the same relief are pled and tried together.”).

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 16

Nominal Damages

The law which applies to this case authorizes an award of nominal damages. If you find that Plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Ninth Circuit Civil Jury Instruction No. 5.6 (2007)

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 17 -- ALTERNATIVE

Damages – Punitive Damages

Plaintiff seeks punitive damages against Defendant Sheriff Jeff Dickerson. You may, but are not required, to award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate Plaintiff.

Plaintiff has the burden of proving by a preponderance of the evidence that punitive damages should be awarded, and, if so, the amount of any such damages.

You may award punitive damages only if you find that Defendant Sheriff Jeff Dickerson's conduct that harmed Plaintiff was malicious, oppressive or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights, or if Defendant Sheriff Jeff Dickerson acts in the face of a perceived risk that his actions will violate Plaintiff's rights under the Constitution. An act or omission is oppressive if Defendant Sheriff Jeff Dickerson injures or damages or otherwise violates the rights of Plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of Plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of Defendant Sheriff Jeff Dickerson's conduct, including whether the conduct that harmed Plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish Defendant Sheriff Jeff Dickerson for harm to anyone other than Plaintiff in this case.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on Plaintiff.

Punitive damages may not be awarded against Defendant Columbia County Sheriff's Office. Punitive damages may be awarded even if you award Plaintiff only nominal, and not compensatory damages.

Ninth Circuit Civil Jury Instruction No. 5.5 (2007) (modified)