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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' RESPONSE TO PLAINTIFF'S POST-TRIAL MEMORANDUM ON INJUNCTIVE RELIEF

Defendants submit the following memorandum of authorities in response Plaintiff's Post-Trial Memorandum on Injunctive Relief.

**A. Standing**

At the outset, defendants request that the court consider the recent decision of the United States Supreme Court in *Clapper v. Amnesty International*, 2013 W.L. 673253, ___ S.Ct. ___ (Feb. 26 2013). In *Clapper*, the court further reviewed the principle of organizational standing. The *Clapper* case rejected a claim by the plaintiff when the court found that the plaintiff had failed to establish that there was a reasonable likelihood



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of a harm to occur in the future. The court stated that a "speculative chain of possibilities does not establish that injury … is certainly pending." *Id.* While that case involved a review of the federal FISA surveillance statute and not the constitutional claims at issue in this case, the reasoning of the court's analysis of the standing issue is of particular importance to the case at hand. In this case where the challenged mail policies are no longer in force at the jail, the plaintiff similarly offers only a "speculative chain of possibilities" that it could be subjected to the violations alleged in this case.

The ruling in *Clapper* is consistent with the decisions cited in Defendant's Post-Trial Brief which demonstrate that there must be a current ongoing threat of injury at the time the court examines whether to award equitable relief, such as a declaratory judgment or permanent injunction which are requested in this case.[1]

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[1] *See Friends of Earth v. Laidlaw Environmental Servs.* 528 U.S. 167, 170 (2000) (case may be found "moot if subsequent events made it absolutely clear that the allegedly wrongful behaviour could not reasonably be expected to recur"); *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); *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); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167 (9th Cir. 2011) (when a statute is amended or repealed "the case is moot, there is no exception for declaratory relief"); *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 re-enact the statute after the lawsuit is dismissed); *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).



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**B. Standard for Equitable Relief**

Defendants agree with plaintiff that the case of *eBay v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) sets forth the standard for a preliminary injunction. However, plaintiff neglects other considerations that the courts have held to be necessary for a preliminary injunction.

First and foremost, a plaintiff must demonstrate the likelihood of success on the merits. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979-80 (9th Cir. 2011). As set forth in Defendants' Post-Trial Brief and below, defendants submit that plaintiff has not established success on the merits as to the postcard policy in that the evidence at trial satisfied the standards set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See* Defs' Post Trial Brief, pp. 6-11.

Secondly, plaintiff appears to presume it meets the standards for equitable relief because it prevailed at the preliminary injunction stage. However, plaintiff has not demonstrated the need for equitable relief. The evidence at trial supports a finding that the postcard policy is constitutional. Additionally, plaintiff failed to show it suffered "irreparable harm" when it continued to send mail to the jail, anticipating and knowing it would be rejected. A remedy in equity is also not warranted because the jail voluntarily implemented a practice to ensure that the written policy permitting magazines was followed and changed its procedures to provide for due process notices. As well, the postcard policy was changed after this court's ruling and the evidence at trial established that there is no intention to return to the policy if it is disfavored by the court. Finally, a permanent injunction is not in the public interest given the hesitancy of the federal courts to enjoin local governments and, in particular local law enforcement, from conducting business in a particular way. *See, e.g., Rizzo v.Goode*, 423 US. 362, 380-81 (1976); Defs' Post-Trial Brief, p. 13.



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Third, plaintiff's argument that the "courts have repeatedly issued and affirmed permanent injunctive relief" in such situations is not persuasive. Many of the examples cited by plaintiff pertain to consent decrees with terms agreed upon by the parties. The other cases involve no analysis as to *why* a permanent injunction should be issued or how the plaintiff had satisfied the criteria for obtaining an injunction. Rather, the courts in those cases simply referenced or mentioned that a permanent injunction was issued. None of these cases conducted an analysis of the criteria for issuing an injunction that the United States Supreme Court has required in cases in which the challenged conduct is no longer occurring or is unlikely to reoccur. *See Lewis v. Casey*, 518 U.S. 343 (1996); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo*, 423 U.S. at 380-381; *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983).

For example, the cases cited by plaintiff reflect the following:

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|---|---|---|
| 2011 | *PLN v. Chelan County*, Case No. CV-11-337 (E.D. Wa. 2011) | Consent Decree. |
| 2011 | *PLN v. Spokane County*, Case No. 2:11-cv-00029 (E.D. Wa. 2011) | Consent Decree. |
| 2005 | *PLN v. Lehman*, 397 F.3d 692 (9th Cir. 2005) | Ninth Circuit Court of Appeals did not examine or address lower court's decision to grant permanent injunction.[2] |
| 2004 | *Clement v. California Dept. of Corr.*, 364 F. 3d 1148 (9th Cir. 2004) | Ninth Circuit Court of Appeals examined the breadth and scope of an injunction, but not whether the standard for an injunction had been met. |
| 2001 | *Prison Legal News v. Cook*, 238 F. 3d 1145 (9th Cir. 2001) | Opinion has no mention of a permanent injunction. Ninth Circuit Court of Appeals reversed the district court's decision to grant summary judgment in favor of the Department of Corrections and its officials. |
| 1999 | *Crofton v. Roe*, 170 F.3d 957, 958 (9th Cir. 1999) | Ninth Circuit Court of Appeals did not examine or address lower court's decision to grant permanent injunction |

[2] The decision from the district court also did not analyze the criteria for issuing an injunction, but simply ruled that a permanent injunction should be issued after making a finding of liability. 272 F. Supp. 2d. 1151 (W.D. Wash. 2011).



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Moreover, the fact that such injunctions were issued in other cases does not relieve plaintiff from its burden in establishing the need for a permanent injunction in this case. *Olagues v. Rossoniello*, 770 F.2d 791, 799, 803 (9th Cir. 1985) (noting that plaintiff bears the burden of proof on each of the elements of a permanent injunction).

**C. The Facts Presented at Trial Do Not Support an Award of a Permanent Injunction**

1. Postcard Policy

*a. Lack of Success on the Merits*

Defendants have explained in their post-trial brief that this claim should not succeed on its merits. In addition and in response to plaintiff's assertions, defendants point out that Sheriff Dickerson testified that there were approximately 8-10 other facilities using the postcard policy. The fact that some other jurisdictions have not implemented a postcard policy has no bearing on its constitutionality.

Furthermore, plaintiff's assertion that a letter is a more private method of communication is also without merit. There is no evidence that a letter is treated more confidentially during handling by corrections officers than a postcard, or that this even matters. The evidence was that the letters, just like the postcards, are scanned by mail handlers for illegal content.

The reference to the law library cart further fails to advance plaintiff's argument and has no relevance on this case.

*b. No Showing of Irreparable Harm*

Plaintiff states that it has shown irreparable harm, but fails to explain how it has suffered this harm. Rather, it argues that, as to the First Amendment allegations, the court should automatically find irreparable harm. However, as previously stated with respect to the postcard policy, the court will first need to determine whether the First Amendment was actually violated. But even when a court determines that a constitutional violation exists, that does not automatically mean that a plaintiff has



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suffered irreparable harm. Plaintiff is correct that there is authority which indicates that the loss of First Amendment freedoms constitutes irreparable injury. However, the cases dealt with an actual threat to free speech due to a policy currently in place, as opposed to the instant case where the policy was changed. *See*, *e.g.*, *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (plaintiff received *preliminary* injunction against enforcement of currently existing ordinance prohibiting the placement of leaflets on parked vehicles; opinion did not address the higher *permanent* injunction standard).

Moreover, plaintiff's argument that defendants "repeatedly interfered" with plaintiff's communications is disingenuous in that plaintiff was a primary cause of alleged "repeat" violations. After plaintiff knew of defendants' practices, it failed to notify anyone at the jail of any unconstitutional policies, it intended to take financial advantage of the repeated violations and continued to send mail knowing and expecting it would be rejected.

*c. Plaintiff has not argued that a remedy in equity is warranted.*

It appears that plaintiff has not addressed the third *eBay* factor to demonstrate that a remedy in equity is warranted. As stated in defendant's post-trial brief, the evidence does not support this requirement for a permanent injunction.

*d. An injunction is not in the public interest.*

Once again, plaintiff appears to assume that it should prevail in its request for a permanent injunction because it prevailed in its pre-trial request for a preliminary injunction. However, when there is no immediate threat of harm, the federal courts are hesitant to enjoin a local government to conducts its business in a particular way. *See Rizzo*, 423 US. at 380-81; Defs' Post-Trial Brief, p. 13.



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2. Postcard Policy as to Outgoing Mail

Plaintiff has made a separate argument as to the application of the postcard policy to outgoing mail. Plaintiff asserts that the court should treat this differently than the incoming policy which defendants indicate was justified by security concerns, citing the case of *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), overruled in part by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). However, the *Procunier* decision discussed the censorship of mail based on content[3]. The case at hand is not about regulating particular categories of mail content, but rather concerns mail in the form of a postcard. As well, for purposes of the equitable relief sought by plaintiff with the claims for declaratory judgment and permanent injunction, the postcard policy is no longer in use and, thus, there is no evidence of a potential harm to plaintiff.

3. Magazine Ban

*a. Success on the Merits and Lack of Irreparable Harm*

Defendants have admitted that the prior *practice* of excluding magazines was unconstitutional.[4] However, of primary importance for purposes of the request for equitable relief in the form of a declaratory judgment or permanent injunctive relief, upon the first notification to defendants by plaintiff (the filing of the lawsuit), defendants changed their practice so that it was consistent with the written policy allowing magazines. This practice is no longer followed and, thus, plaintiff cannot succeed in its request for injunctive relief at this stage. *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983). *See also* Defs' Post-Trial Brief, pp. 2-4.

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[3] The court has previously recognized that the "parties do not dispute that the [jail mail policy] is neutral." 5/29/12 Opin. & Order (Docket No. 64).

[4] Plaintiff asserts that its knowledge of the practice was "revealed" in discovery. Pl's Post-Trial Memo, p. 8. However, the evidence at trial demonstrated that the practice was reflected on the court's website and, thus, could not have been "revealed" to plaintiff in discovery.



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*b. Plaintiff has not argued that a remedy in equity is warranted.*

As set forth in Section 1.b. above, this requirement for a permanent injunction was not addressed.

*c. A Permanent Injunction Would Not Advance the Public Interest.*

Because the past practice of excluding magazines was changed after notification from plaintiff of an alleged violation, a permanent injunction would be of no benefit to the public. *See O'Shea v. Littleton*, 414 U.S. 488 (1974) (even if plaintiffs were subjected to discriminatory practices in the past, that is not enough for injunctive relief without continuing, present adverse effects).

4. Plaintiff's Due Process Claims

*a. Lack of Success on the Merits*

As with the claim against the exclusion of magazines, defendants admitted in their Answer, that due process was not provided when mail was rejected. However, once defendants were notified of this, the jail changed its procedures. Thus, plaintiff has not shown success on the merits. *Lyons*, 461 U.S. 95 at 108. As set forth above and in Defendant's Post-Trial Brief, there must be an actual threat of harm to receive equitable relief. *See, e.g. Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (noting that equitable relief "is not automatic").

*b. The Public Interest would not be served with an Injunction.*

Once again, the alleged unconstitutional conduct is no longer at issue and a permanent injunction against a law enforcement agency would not be of benefit to the public interest. *O'Shea v. Littleton*, 414 U.S. at 488.

**D. Sheriff Dickerson's Testimony as to Intent Is Relevant**

Plaintiff asserts that the court should not consider the credibility of Sheriff Dickerson in deciding whether to issue an injunction. However, rather than an issue of credibility, the issue as to Sheriff Dickerson's intent is actually about the lack of



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sufficiency of plaintiff's *evidence* in light of plaintiff's burden of proof. For example, if this were a claim to be decided by a jury, the court could resolve the matter against plaintiff and issue judgment as a matter of law because plaintiff does not have a legally sufficient evidentiary basis to demonstrate the threat of irreparable harm. F.R.C.P. 50(a)(1)(A). Even if, for the sake of argument, the standard of F.R.C.P. 50(a)(1)(A) is not met, at the very least, the preponderance of the evidence does not establish a threat of future harm, which is required for the plaintiff to obtain equitable relief. *See Olagues v. Rossoniello*, 770 F.2d at 799, 803. There is no evidence of an ongoing constitutional violation that needs to be remedied by the court through the issuance of declaratory or injunctive relief.

**E. Defendant Demonstrated It Will Comply With the Law**

Plaintiff seeks to argue that defendants did not adequately show they will comply with the law. However, in making this argument, plaintiff cannot point to any evidence to the *contrary*. Upon receiving the first notice of alleged unconstitutionality of the magazine and declined mail notification procedures, those were changed. With respect to the postcard policy, the decision in this case was the first to hold such a policy unconstitutional. After the court's ruling, that policy was also changed. Sheriff Dickerson was clear that he has no desire to go back to it, regardless of this court's ruling. No evidence was offered to the contrary.

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**F. Term of Injunction**

Defendant agrees with plaintiff that the standard for a permanent injunction is "indefinite" and submits that is the very reason why a permanent injunction should not be issued. This extraordinary remedy would place the defendants and their predecessors under the oversight of the court for years to come. Plaintiff has failed to sustain its burden of proof to demonstrate that such a remedy is needed in this case.

Respectfully submitted this 4th day of March, 2013.

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