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KATHLEEN JONES, et al., on behalf of
themselves and all individuals similarly
situated,

Plaintiffs,

v.

GEORGE W. HAYMAN, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – GENERAL
EQUITY
MERCER COUNTY

Docket No. C-123-07

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR SANCTIONS**

Plaintiffs respectfully submit these points and authorities in support of their
concurrently filed Notice of Motion and Motion for Sanctions.

PRELIMINARY STATEMENT

Significant evidence that has come to the attention of plaintiffs' counsel indicates
that, over the course of this lawsuit, defendants have engaged in a pattern of improper
conduct. This misconduct takes the form of conducting psychological examinations of
plaintiffs—without notice to counsel and in direct violation of court rules—specifically to

obtain evidence to use against plaintiffs in this case; inducing potential witnesses to provide or adopt false or misleading testimony; retaliatory assault against a witness; and a sustained invasion of the attorney-client privilege. The unifying feature of this conduct is the abuse of the authority and control defendants and their agents wield over plaintiffs and other women prisoners. The blatant and persistent nature of the defendants' misconduct and defendants' tendering to this Court of the fruit of their wrongdoing for consideration on the pending motions compel plaintiffs to request the immediate intervention of this Court to rectify the effects of defendants' conduct, to protect the women prisoners from further harm, and to discourage further such actions.

LEGAL STANDARD

Courts have the inherent power to ensure the orderly and efficient administration of justice within the scope of their jurisdiction, including the authority to sanction wrongful conduct. *Dziubek v. Schumann*, 275 N.J. Super. 428, 497-98 (App. Div. 1995). Discovery rules are designed "to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." *Zaccardi v. Becker*, 88 N.J. 245, 252 (1982); *Aujero v. Cirelli*, 110 N.J. 566, 573, 580-81(1988); *Cunningham v. Rummel*, 223 N.J. Super. 15, 18 (App. Div. 1988). Courts have the inherent power to impose appropriate sanctions to enforce discovery rules. *Abtrax Pharms. v. Elkins-Sinn*, 139 N.J. 499, 512-13 (1995); *Lang v. Morgan's Home Equip. Corp.*, 6 N.J. 333, 338 (1951) (construing predecessor to R. 4:23-2(b)).

The conduct of members of the bar is governed by the Rules of Professional Conduct. R. 1:14. Attorneys are bound by a duty of candor toward the tribunal, and a duty of fairness to the opposing party and counsel. *Rules of Prof'l Conduct*, R. 3.3, 3.4.

Counsel may not knowingly disobey any rule of court, except when making an open refusal based on an assertion that no valid obligation exists. *Id.* at R. 3.4(c). Counsel may not participate in the procurement of evidence that is false or that is procured through improper inducements. *Id.* at R. 3.4(b). The circumvention of these rules, whether accomplished personally or through the acts of others, and conduct prejudicial to the administration of justice, constitute misconduct. *Id.* at R. 8.4(a), (d). Courts are responsible for assuring that the Rules of Professional Conduct are observed during court proceedings. R. 1:18.

ARGUMENT

A. Defendants Have Presented to This Court Evidence Obtained Through Unethical and Unlawful Means

Among defendants' submissions to this Court in support of their motion for summary judgment, defendants include purported evidence that was in fact obtained through unethical and unlawful means. Some of the evidence was procured through the conduct of unnoticed psychiatric and medical examinations, and through interrogation of the named plaintiffs in this action during those psychiatric examinations. Other evidence was obtained through the improper offering of inducements to witnesses, one of whom appears subsequently to have been subjected to retaliation.

1. Defendants subjected plaintiffs to physical and psychiatric examinations in violation of court rules and questioned plaintiffs about this case under the guise of psychiatric examinations.

As detailed by plaintiffs in their briefs opposing summary judgment and the introduction of certain evidence, defendants violated the rules of this Court by conducting inappropriate and unnoticed psychiatric and medical examinations on the four named plaintiffs in this action, and in addition questioning plaintiffs about this action under the

guise of psychiatric examinations. *Plfs. ' Oppo. Summ. J.*, 10-13; *Plfs. ' Oppo. Intro. Ev.*, 3-6. Both actions constitute serious violations of court rules and warrant the imposition of sanctions.

The New Jersey Court Rules permit discovery to be conducted during the discovery period, and set out specific prerequisites for medical and psychiatric examinations of a party. *R. 4:19, 4:24-1*. When one party seeks to conduct an examination of the other, the party must provide prior notice, “stating with specificity when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests.” *R. 4:19*. The party to be examined may seek a protective order against such examinations. *Ibid*.

The discovery period in this case has not yet begun. It is therefore completely inappropriate for defendants to conduct any discovery whatsoever. Defendants provided no notice to plaintiffs’ counsel of their intent to conduct physical and mental examinations of the four named plaintiffs. Yet on January 22, 2008, defendants performed psychiatric examinations on all four named plaintiffs in this action and on no other women prisoners. *K. Jones Cert. Summ. J.* ¶¶ 22-29; *L. Jones Cert. Summ. J.* ¶¶ 24-28; *Flynn Cert. Summ. J.* ¶¶ 15-16; *Ewell Cert. Summ. J.* ¶¶ 3-7.¹ The examinations were not requested by the women and were unconnected to any treatment. Instead, the psychologist who performed the examinations specifically admitted to each plaintiff that the examination was carried out for the purposes of this action. *K. Jones Cert. Summ. J.* ¶ 25; *L. Jones Cert. Summ. J.* ¶ 25; *Flynn Cert. Summ. J.* ¶ 16; *Ewell Cert. Summ. J.* ¶ 5.

¹ Certifications submitted in connection with plaintiffs’ opposition to summary judgment are indicated with the notation “Summ. J.” Certifications submitted concurrently with the instant motion bear no additional notation.

She further admitted that she had been instructed to carry out the examinations by defendant Michelle Ricci. *Flynn Cert. Summ. J.* ¶ 16.

During the unnoticed psychiatric examinations, defendants questioned plaintiffs directly about this action. The New Jersey Court Rules require that any oral examination of a party be noticed. *R. 4:14-2*. Of course, no oral examination of any kind may be carried out on a represented party by agents of the opposing party outside the presence of the examinee's attorney. Needless to say, plaintiffs' counsel were not present during the questioning and had no opportunity to protect the plaintiffs' interests. Yet during the unnoticed examinations, plaintiffs were specifically questioned about the subject of this action. *K. Jones Cert. Summ. J.* ¶¶ 26-27; *L. Jones Cert. Summ. J.* ¶ 28; *Ewell Cert. Summ. J.* ¶ 7. In particular, they were questioned about their transfer from the women's prison to NJSP, their adjustment to NJSP, whether they had received specific services while confined in NJSP, what they found problematic about NJSP, and their wish to return to the women's prison. *Ibid.* Yet more alarmingly, the psychologist's introduction to plaintiff Lakesha Jones was phrased in such a way as to lead Jones to believe that the examination was being carried out at the behest of her own lawyers. *L. Jones Cert. Summ. J.* ¶ 25. The psychologist further assured Jones that the information she provided would remain confidential. *Id.* at ¶ 27.

Defendants also subjected plaintiffs to physical examinations without prior notice to plaintiffs or their counsel. During a series of three days, the plaintiffs, and no others, were weighed by a prison nurse without prior notice to plaintiffs or their counsel. *K. Jones Cert. Summ. J.* ¶¶ 30-35; *L. Jones Cert. Summ. J.* ¶¶ 29-32; *Flynn Cert. Summ. J.* ¶ 14; *Ewell Cert. Summ. J.* ¶ 8. When plaintiffs inquired, prison medical staff refused to tell them the purpose of the examination. *K. Jones Cert. Summ. J.* ¶ 32. Yet it is clear

from the statement of Deputy Attorney General Dianne M. Moratti that plaintiffs were weighed precisely for the purposes of this action and for no other reason. Ms. Moratti has stated that she wishes to submit plaintiffs' medical records in part to refute plaintiffs' allegations regarding weight gain due to inactivity. *Moratti Cert.* ¶ 11.

Ms. Moratti's statement underlines a yet more disturbing facet of these actions, namely, that the examinations were not just carried out by defendants acting alone, but occurred with the acquiescence of, and perhaps even at the direction of, the attorneys of the New Jersey Attorney General's Office who are counsel for the defendants in this action. Ms. Moratti's certification strongly suggests her knowledge of the examinations. In addition, on February 7, 2008, Ms. Moratti contacted plaintiffs' counsel by telephone and requested permission to file plaintiffs' medical and psychiatric records in support of defendants' motion for summary judgment. *Moratti Cert.* ¶ 8. The records of the improperly conducted examinations are among those Ms. Moratti sought to have admitted. Indeed, in her certification to this court, Ms. Moratti describes the certifications based on those records as "provid[ing] factual, medical and mental health data to directly refute the allegations of the plaintiffs." *Id.* at ¶ 1.

Obviously, defendants' actions were grossly improper. As set out in plaintiffs' briefs opposing summary judgment and the introduction of the unethically procured medical and psychiatric information, plaintiffs requested that this Court exclude the improperly obtained evidence. Plaintiffs hereby request leave to conduct discovery regarding the nature and extent of individual defendants' involvement in the violations for the purpose of determining the appropriateness of further requests for sanctions. Such discovery would include depositions of the psychologist, nurse, and any others involved

in the examinations. It would also include depositions of defendants Michelle Ricci and James Drumm, who have direct custodial authority over plaintiffs.

2. Defendants have obtained false evidence by means of improper inducements and have presented such evidence to this Court.

The plaintiffs in this action, who are approximately forty general population women prisoners confined in a unit of New Jersey State Prison called “1EE,” are not the only women held in NJSP. In addition, at any given time, approximately thirty women subject to disciplinary confinement are held in a separate unit called “1FF,” also referred to as “administrative segregation,” or “ad seg.” N.J.A.C. § 10A:5-1.3. Unlike the plaintiffs, the women confined in unit 1FF did not undergo mass transfers and are not held in NJSP indefinitely. Rather, they committed disciplinary infractions while at EMCF, received individualized hearings in accordance with New Jersey law, and are confined in unit 1FF for a limited period of time. N.J.A.C. §§ 10A:5-3.1, 3.2. The women held in unit 1FF are not “general population” prisoners, and are therefore not members of the proposed plaintiff class in this case. *Compare Pls.’ Mot. for Class Cert. 2* (“all general population women prisoners who are now or in the future will be confined in New Jersey State Prison”) *with* N.J.A.C. § 10A:5-1.3 (“Administrative segregation’ means removal of an inmate from the general population of a correctional facility to a close custody unit because of one or more disciplinary infractions.”).

Units 1EE and 1FF are physically separated from one another, and women confined in unit 1FF cannot see unit 1EE. *K. Jones Cert. ¶ 3; Minittee Cert. ¶ 5; Arce Cert. ¶ 2*. Women held in unit 1FF are not intermingled with those in 1EE. *Arce Cert. ¶ 2; Minittee Cert. ¶ 5; Velez Cert. ¶ 3*. Such separation is in accordance with prison regulations. N.J.A.C. § 10A:5-3.3 (“Whenever possible, areas utilized for Administrative

Segregation Units shall be physically separate from other programs in the correctional facility.”). As a consequence, women transferred from the women’s prison directly to unit 1FF have no way of personally ascertaining conditions in 1EE. Only those women originally held in unit 1EE who are transferred to unit 1FF for disciplinary infractions could have such knowledge. Defendants are well aware that 1EE and 1FF are completely separate from one another. *K. Jones Cert.* ¶ 3. Defendants are aware of whether any particular woman prisoner is a “general population” (1EE) prisoner, or an “administrative segregation” (1FF) prisoner. *Mintee Cert.* ¶ 5.

Nevertheless, defendants have submitted as evidence in support of their motion for summary judgment a letter written by 1FF prisoner Kareema Thomas, and documents signed by two other 1FF prisoners, Deborah Phillips and Monique Kendall. *Ricci Cert., Exs. A, B.* In their briefing, defendants specifically reference Thomas’s belief that NJSP is “a safe environment, offering resource and program advantages” to support the proposition that “the female 1EE inmates have adjusted well to their new environment.” *Defs.’ Brief* 5. Defendants again employ the statement of Kareema Thomas when they state:

Female inmates on 1EE have orally expressed their desire to remain at NJSP. Three inmates have expressed this in writing. One of these women, Kareena [sic] Thomas, writes that she believes NJSP to be a safe environment and [sic] offers resource and program advantages.

Defs.’ Brief 58; see also *Defs.’ Statement of Facts* ¶ 12; *Ricci Cert.* ¶ 14. Defendants go on to characterize such statements as representing “the clearly stated desires of women seeking to remain” in NJSP. *Id.* at 59.

In reality, Kareema Thomas has never even seen unit 1EE, let alone experienced any “resource[s] and program advantages” there. *Thomas Cert.* ¶ 11. Instead, like other

women in administrative segregation, Thomas was and is desperate to leave unit 1FF and return to general population status. *Thomas Cert.* ¶¶ 2-5; *Velez Cert.* ¶ 2.

As Thomas and another 1FF prisoner, Tatiana Velez, state in their certifications, on more than one occasion, defendant James Drumm described unit 1EE to the women held in unit 1FF in glowing terms, including bald misrepresentations of conditions on unit 1EE. *Thomas Cert.* ¶ 6 (“He made it seem like the girls in 1EE got a lot of movement.”); *Velez Cert.* ¶¶ 4-5 (“inmates in 1EE would get a lot of educational programming, just like in EMCF,” “we were going to get all types of rehabilitation, and jobs, just like the men in NJSP,” “women were going to have movement around the prison.”). Drumm represented to Thomas that “if I wrote him a letter saying certain things, my time in ad seg would be cut.” *Thomas Cert.* ¶ 9. He made the same representation to Velez and other 1FF prisoners by answering their pleas to reduce their disciplinary sentences by directing them to write letters requesting placement in 1EE. *Velez Cert.* ¶ 7.

Although Thomas had never seen 1EE, a fact of which defendant Drumm is indisputably aware, Thomas was directed to make positive statements about conditions in unit 1EE as if she had such knowledge. *Thomas Cert.* ¶¶ 10-11. She did so based on Drumm’s untruthful representations. *Ibid.* The sole reason why Thomas wrote the letter submitted by defendants to this Court, is that defendant James Drumm led her to believe that if she did, the term of her disciplinary segregation would be shortened, and she would more quickly be returned to the women’s prison and in turn more quickly released from custody altogether. *Id.* ¶ 9. Drumm offered the same inducement to at least one other, and possibly more, 1FF women prisoners, despite knowing that they lacked any direct knowledge of conditions in unit 1EE. *Id.* ¶¶ 12-13; *Velez Cert.* ¶¶ 6-7. Other

women, suspicious of Drumm's representations, refused to write such letters. *Thomas Cert.* ¶ 14; *Velez Cert.* ¶ 8.

Other evidence supports the women prisoners' account of the inducements offered by Drumm. Defendants introduced into evidence two signed copies of a form given to 1FF prisoners by Drumm. *See Ricci Cert., Ex. A.* The forms are not in fact official Department of Corrections forms. Official forms bear the Department of Corrections title, a form number, a reference to the regulation pursuant to which they are issued, and a revision date. *See, e.g., Ricci Cert., Ex. C* (administrative remedy form). The forms on which defendants obtained the signatures of 1FF prisoners bear no such official markings. *Ricci Cert., Ex. A.* Instead, they appear to have been created by defendants specifically as a vehicle for defendants' assertion to this Court that women prisoners wish to be confined in unit 1EE. The forms contain only a single, typewritten sentence to this effect. *Ibid.* When Drumm solicited signatures from prisoners on the forms, he never explained to them the purpose of the forms, and answered the women's questions with evasions. *Phillips Cert.* ¶¶ 4-5. One woman who signed the form was released from 1FF the following week, having served only half of her six month disciplinary sentence. *Id.* ¶¶ 2, 7.

Other aspects of these documents are suspicious. If the three women had wished to provide testimony in this action, defendants could have obtained properly verified certifications from them, as they have from two prison guards. Instead, defendants proffer unverified statements not bearing the caption of this lawsuit nor any other indication that the women who signed them intended or even knew that the forms would be used by defendants in this action. Indeed, the women were never informed that the documents would be used for such a purpose. *Phillips Cert.* ¶ 8. Defendants imply that the

statements represent spontaneous expressions of approval for prison conditions, yet the identical printed forms, obviously not the work of the prisoners themselves, bear the same date. *Ricci Cert., Ex. A.*

The documents are also highly suspicious because they seem to serve no legitimate purpose. Defendants represent the forms as evidence of prisoners' preference for confinement in unit 1EE over the women's prison, yet defendants have repeatedly insisted that women prisoners have no right to be confined in any particular prison, and that the decision as to their placement lies exclusively with prison officials. *Defs. ' Brief 1, 45-48.* Indeed, this is defendants' principal response to plaintiffs' challenge to the mass transfers of women prisoners. In light of defendants' position, the provision of a form by defendants to women prisoners in which the women are directed to express their desire to be sent to unit 1EE is exceedingly strange. Drumm provided the women with no form allowing women prisoners to express the opposite view, that they wished to be transferred back to the women's prison rather than be sent to unit 1EE. *Phillips Cert. ¶ 4.* Defendants reference no official procedure by which such forms would be considered, and it is unlikely that any such procedure exists.

In short, the forms evidence defendants' successful efforts to capitalize on the desperation of women in disciplinary segregation by inducing them to provide false statements for submission to this Court regarding matters of which at least two of the women, Kareema Thomas and Tatiana Velez, could not possibly have personal knowledge. It is unlawful to knowingly attempt to induce or otherwise cause a witness or informant to testify falsely. N.J.S.A. § 2C:28-5(a)(1) (Tampering with Witnesses and Informants); *State v. Speth*, 323 N.J. Super. 67, 82-83 (App. Div. 1999) (Witness tampering found in absence of direct request to testify falsely, when context of

communication demonstrated official had “suggested” to a potential witness that cooperation in ending an investigation would be rewarded.) By suggesting that positive statements regarding unit 1EE could result in reduced disciplinary terms, Drumm knowingly induced or attempted to induce prisoners to provide false and misleading testimony in the form of their written and signed statements.

It is also unlawful for public officials to act in a manner related to their public offices but constituting an unauthorized exercise of their official functions, with the purpose of benefiting themselves or others. N.J.S.A. § 2C:30-2(a) (Official Misconduct); *State v. Parker*, 124 N.J. 628, 640-41 (1991) (underlying act supporting showing of official misconduct need not be criminal in nature); *State v. Stevens*, 115 N.J. 289, 305 (1989) (resulting benefit need not be pecuniary). Given the deprivations to which prisoners in disciplinary segregation are, by design, subjected, the inducement of a reduced sentence offered by Drumm constitutes both a bribe, in the form of swifter return to the general population, and a threat that if the prisoner refused to make the false statement, the full disciplinary sentence would be imposed. Drumm abused his power as a prison administrator to gain advantage for himself and his codefendants in this action, thereby committing official misconduct.

Finally, it is unlawful to purposely obstruct, impair or pervert the administration of law by means of an independently unlawful act. N.J.S.A. § 2C:29-1(a) (Obstructing Administration of Law or Other Governmental Function); *State v. Perlstein*, 206 N.J. Super 246, 253-54 (App. Div. 1985) (required level of intent is purposeful carrying out of the underlying conduct, not intent to obstruct the administration of law). Drumm gathered false evidence obtained by improper means, thereby committing the independently unlawful acts of witness tampering and official misconduct. Defendant Michelle Ricci

submitted the evidence in connection with her sworn certification. *Ricci Cert., Exs. A, B.* In their arguments, defendants repeatedly ask this Court to rely on the documents in its assessment of conditions in unit 1EE, and to dismiss this case based on that assessment.

In light of the extremely serious nature of defendants' actions, plaintiffs request that this Court impose the following sanctions:

- Strike from the record the unethically obtained evidence, namely the statement of Kareema Thomas and the signed forms of the other two prisoners.
- Enjoin James Drumm from gathering evidence in connection with this action, whether to be submitted by himself or to others. Defendants would not be prejudiced by this because other defendants and their agents can collect evidence on defendants' behalf.
- Enjoin all defendants and their agents from communicating with the women prisoners held in New Jersey State Prison regarding this action. Such an injunction would prevent further malfeasance of this kind.
- Grant plaintiffs leave to conduct discovery regarding the nature and extent of individual defendants' involvement in the violations for the purpose of determining the appropriateness of further requests for sanctions. Such discovery would include depositions of James Drumm and Michelle Ricci, as well as discovery of letters, forms, memoranda, and other documents used by defendants in connection with their improper actions.

3. Following contact with plaintiffs' attorneys regarding the collection of evidence by defendants, a prisoner was beaten under circumstances strongly suggestive of retaliation.

Evidence has emerged linking the improper actions of James Drumm to a yet more serious occurrence. For several months, prisoner Kareema Thomas has suffered

harassment from Sergeant Gaughan, a prison guard assigned to unit 1FF. *Sec. Thomas Cert.* ¶ 2. On February 29, 2008, Thomas spoke to plaintiffs' counsel regarding the means employed by defendant Drumm to extract the statements from women in administrative segregation as described above. *Id.* ¶ 3. The following day, Sergeant Gaughan took Thomas from her cell to an isolated area of the prison, beat her, and touched her inappropriately while saying "You have a big mouth," and making racially discriminatory statements. *Id.* ¶ 4; *Arce Cert.* ¶¶ 5-11; *Velez Cert.* ¶ 9; *Gomez Cert.* ¶ 2. At the same time, another officer present when Thomas was taken to be beaten stated to a prisoner that Thomas "has too much mouth." *Arce Cert.* ¶ 9. As a result of the beating, Thomas suffered injuries including bruising on her face witnessed by at least three other prisoners. *Arce Cert.* ¶ 11; *Velez Cert.* ¶ 9; *Gomez Cert.* ¶ 2. Thomas begged repeatedly for medical care for her injuries but was ignored by prison guards. *Arce Cert.* ¶ 12; *Velez Cert.* ¶ 10. Days after the beating, Drumm told Thomas that she was "causing problems in my institution." *Sec. Thomas Cert.* ¶ 5. Although Thomas and other women prisoners reported the beating, the witnesses who saw Thomas taken from her cell and returned shortly thereafter with unmistakable injuries were never questioned by prison officials or law enforcement agents regarding the incident. *Arce Cert.* ¶ 14; *Gomez Cert.* ¶ 4.

Physical force applied to prisoners in the absence of a good faith assessment that such force is needed constitutes cruel and unusual punishment. *Hudson v. McMillian*, 503 U.S. 1 (1992); *Davidson v. Flynn*, 32 F.3d 27 (2d Cir. 1994). Applicable regulations permit the use of non-deadly force only in emergency situations such as the defense of self or others and the prevention of escapes and riots. N.J.A.C. § 10A:3-3.3. New Jersey law prohibits retaliation against those serving as witnesses or informants. N.J.S.A. § 2C:28-5(b). Department of Corrections regulations require emergency requests for

medical attention to be attended to immediately. N.J.A.C. § 10A:5-3.7. The circumstances here strongly suggest that the violence committed against Thomas was retaliatory, and there is no evidence of any legitimate need for such application of force.

Plaintiffs therefore request that this Court:

- Enjoin defendants from continuing to assign Sergeant Gaughan to any assignment in which he has contact with any woman prisoner held in NJSP. Without such protection, Thomas and the other women prisoners who have come forward in this case are subject to further retaliation.
- Enjoin James Drumm from any further contact with any woman prisoner held in NJSP. This measure would also help shield Thomas and the other women prisoners from further tampering.
- Grant plaintiffs leave to conduct limited discovery regarding the nature and extent of individual defendants' knowledge or involvement in the beating of Kareema Thomas for the purpose of determining the appropriateness of further requests for sanctions. Such discovery would include depositions of Sergeant Gaughan, James Drumm, and others with knowledge of the incident.

B. Defendants Have Systematically Violated the Attorney-Client Privilege and Otherwise Interfered with the Prosecution of This Action

The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “[C]ourts long have viewed its central concern as one ‘to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.’” *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn*, 449 U.S. at 289). “The attorney-client

privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice ... as well as an attorney's advice in response to such disclosures." *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). In this case, defendants and their agents have willfully and systematically interfered with the attorney-client privilege by consistently opening clearly marked legal mail to plaintiffs, monitoring legal telephone calls and in-person attorney meetings, and subjecting women in the plaintiff class who require attorney meetings to unique administrative burdens.

Written correspondence from attorneys is privileged and must not be opened outside the presence of the prisoner to whom the correspondence is addressed. Defendants' own regulations provide that incoming legal correspondence "shall be opened and inspected only in the presence of the inmate to whom it is addressed," and that such correspondence "shall not be read or copied." N.J.A.C. § 10A:18-3.4. Defendants were recently reminded of this fundamental rule in *Jones v. Codey*, 461 F.3d 353 (3d Cir. 2006). In *Jones*, the Third Circuit rejected the Department of Corrections' assertion that the possibility of contamination with anthrax necessitated the opening of legal mail, and struck down the department's policy of opening incoming legal mail outside the presence of prisoners as a violation of prisoners' First Amendment Rights. *Id.* at 355, 360-63. In this case, prison officials have repeatedly opened clearly marked legal mail addressed to each of the four named plaintiffs, in blatant violation of settled law. *K. Jones Cert.* ¶ 2; *L. Jones Cert.* ¶ 2; *Flynn Cert.* ¶¶ 3-4; *Ewell Cert.* ¶ 3. This is so despite the fact that all legal mail directed to plaintiffs is clearly marked with numerous red stamps reading "legal correspondence." *Ibid.* In one instance, prison officials admitted that legal mail had been opened, and asserted that legal mail contained in a large envelope rather than a small one could be opened. *K. Jones Cert.*, ¶ 2. Of course, such a

distinction has no basis in law, and the practice of opening legal mail outside the presence of prisoners is a manifest violation of plaintiffs' constitutional rights. Prison officials have also opened clearly marked legal correspondence directed at other members of the putative class who are outspoken about the rights violations to which women prisoners are subjected. *Minitee Cert.* ¶ 3.

Defendants and their agents have also persistently violated the attorney-client privilege by monitoring telephonic and in-person attorney-client communications. Prisoners have a right of privacy in telephone calls with their attorneys. *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991). None of the women prisoners confined in New Jersey State Prison are ever allowed unmonitored legal telephone calls. Instead, they are required to make such calls in the immediate presence of both a prison worker and one of two prisoner paralegals. *L. Jones Cert.* ¶ 3; *Ewell Cert.* ¶ 4; *Minitee Cert.* ¶ 4; *Flynn Cert.* ¶ 5. This overt violation of the attorney-client privilege deters women prisoners from contacting attorneys and renders candid communication impossible. *Ewell Cert.* ¶ 4; *Minitee Cert.* ¶ 4.

Likewise, defendants and their agents have violated the attorney-client privilege by denying plaintiffs and other women prisoners their right to confidential communications with counsel during in-person meetings. *Lewis Cert.* ¶¶ 3-4. Prison guards sit or stand immediately outside the door of the attorney visit room during almost every meeting where they can easily hear the discussions inside, and have continued to do so despite protests by plaintiffs' counsel. *Ibid.* The denial of the right to confidential in-person legal meetings persists even though it has been brought to the attention of prison guards and administrators, including defendant Michelle Ricci. In short,

defendants have willfully invaded every possible means of attorney access available to women prisoners, whether it be written, telephonic, or face-to-face.

Defendants have also attempted to obstruct the legal access of plaintiffs and the other women prisoners held in NJSP by imposing additional administrative requirements on these women. Prison officials initially refused attorneys access to the women prisoners, insisting that access was allowed only to the “attorney of record,” and have subsequently required women prisoners wishing to meet with attorneys to submit a form containing their name, inmate number, and signature, and the name, address, and telephone number of the attorney. *Flynn Cert.* ¶ 2; *Ewell Cert.* ¶ 2; *Mintee Cert.* ¶ 2. *Lewis Cert.*, ¶¶ 6-8, Exs. A, B. Women prisoners must give this form to a prison guard. *Flynn Cert.* ¶ 2; *Mintee Cert.* ¶ 2. No such requirement, nor even a requirement of prior written notice of visits, is imposed on male prisoners in NJSP, nor on attorneys other than ACLU attorneys. *Latimer Cert.* ¶¶ 2-7; *Lewis Cert.* ¶¶ 5, 9.

Department of Corrections regulations do not require that prisoners submit forms in advance of attorney meetings, but state instead that such forms “may be used.” N.J.A.C. § 10A:18-6.7(e). Yet it is only the women prisoners, and only ACLU attorneys, upon whom the requirement is imposed. While ordinary administrative procedures consistent with departmental regulations are permitted, the targeted and discriminatory imposition of administrative barriers to attorney access is unlawful. N.J.S.A. §10A:5-1 *et seq*; *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (“Regulations and practices that unjustifiably obstruct the availability of professional representation ... are invalid.”). Such practices also discourage women from participation in this case, especially when the possibility of confidential communication by telephonic and written means has been foreclosed by defendants’ surveillance.

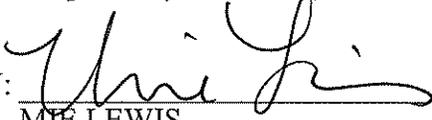
Plaintiffs hereby request the following forms of relief from defendants' persistent violations of the attorney-client privilege:

- Enjoin defendants from opening legal mail addressed to all NJSP prisoners except in the presence of the prisoner.
- Order defendants to provide all women prisoners in NJSP with unmonitored legal telephone calls.
- Enjoin defendants from further surveillance of in-person legal meetings conducted by plaintiffs' counsel. Specifically, order that no correctional officer nor civilian prison employee be stationed within fifteen feet of the entrance to the attorney visit room.
- Order that attorney meetings with general population women prisoners in NJSP be noticed in the same way as attorney meetings with general population male prisoners in NJSP. Specifically, order that such meetings be noticed by means of a telephone call to the prison mailroom, and that women prisoners seeking attorney meeting no longer be required to submit any documentation that is not required of all other prisoners throughout the State of New Jersey.
- Permit plaintiffs to conduct limited discovery to determine the appropriateness of further requests for sanctions. Such discovery would be calculated to uncover the identity of individual defendants and their agents who have opened and or read incoming legal correspondence, or are involved in the monitoring of legal telephone calls and in-person legal meetings, or have directed that any such actions occur.

CONCLUSION

Defendants' conduct throughout this action manifests an attitude of disregard for legal and ethical rules, and the judicial process. Plaintiffs therefore respectfully request that this Court grant plaintiffs' motion and impose the sanctions enumerated in these points and authorities. In addition, plaintiffs request that this Court exclude any and all evidence garnered by defendants by improper means, and enjoin defendants from introducing or relying on any such evidence in this action in the future. Plaintiffs also request that this Court award plaintiffs reasonable attorneys' fees and costs in connection with the investigation of defendants' improper actions and the preparation of these submissions, and impose any additional financial penalties and other sanctions on defendants as appear fitting.

Respectfully submitted,

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Dated: March 25, 2008