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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
EUGENE DIVISION

PAUL MANEY; GARY CLIFT; GEORGE  
NULPH; THERON HALL; DAVID HART;  
MICAH RHODES; and SHERYL LYNN  
SUBLET, *individually, on behalf of a class of  
other similarly situated,*

Plaintiffs,

v.

KATE BROWN, COLETTE PETERS; HEIDI  
STEWART; MIKE GOWER; MARK  
NOOTH; ROB PERSSON; and KEN JESKE,

Defendants.

Case No. 6:20-cv-00570-SB

DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES

Defendants Brown, Peters, Kelly, Steward, Gower, Nooth, Corey, Persson, and Jeske (collectively referred to as “Defendants”) hereby answer plaintiffs’ complaint and admit, deny, and allege as follows:

1.

Except as expressly admitted herein, defendants deny the allegations in the introduction of plaintiffs’ complaint.

2.

Defendants admit paragraphs 1, 19, 45-51, 62, 64-65, 69, 71-73, 94-95, 121 and 123

3.

Defendants deny the allegations in paragraph 52, 54, 66, 68, 76-81, 83, 90-91, 93, 96-97, 104-120, 122, 134-42, and 144-146.

4.

Defendants admit paragraph 2 except to deny that the acts alleged in the complaint actually occurred and to deny that any of the acts pertaining to plaintiffs occurred in Umatilla County.

5.

With respect to paragraphs 3-9, 85-89, 98-103, and 124-128, defendants admit that plaintiffs are Adults in Custody (“AICs”) in the custody of the Oregon Department of Corrections (“ODOC”) housed at the institutions alleged therein and admit the ages of the plaintiffs. Because undersigned counsel lack access to plaintiffs’ medical records, defendants lack sufficient information to form a belief as to the truth of the allegations regarding plaintiffs’ medical conditions and treatment in these paragraphs and therefore denies them. Defendant denies the remainder of the allegations in paragraphs 3-9, 85-89, 98-103, and 124-128.

6.

Defendants admit the allegations in paragraphs 10-16 except to deny that any of the defendants were “directly” responsible as alleged in the complaint.

7.

With respect to paragraphs 17-18 and 26-35, defendants admit that plaintiffs are seeking class certification as alleged in the complaint. Defendants deny that class certification is appropriate and deny the remainder of paragraphs 17-18 and 26-35.

8.

With respect to allegations in paragraphs 20-24, 36-44, 55-61, 67, 74-75, 129-33, which contain general allegations regarding prisons and COVID-19 and reference specific publications and reference materials, defendants admit that the contents of the publications speak for themselves, and defendants neither admit nor deny the accuracy of those publications.

9.

With respect to the allegations in paragraph 63, defendants admit that ODOC relies on outside facilities to provide intensive medical care not available in prison. Defendants deny the remainder of paragraphs 63.

10.

With respect to the allegations in paragraph 70, defendants deny that the information regarding testing is currently accurate. Defendants admit that they have taken multiple measures, including but not limited to those described in paragraph 70, to address the spread of COVID-19. Defendants deny the remainder of paragraph 70.

11.

With respect to the allegations in paragraph 82 and 92, defendants admit that some meals, recreational activities, clothing exchanges, showering, and line movements continue in groups and within and within spaces that require less than six feet of interaction with other inmates and staff. Defendants deny the remainder of paragraphs 82 and 92.

12.

With respect to the allegations in paragraph 84, defendants admit that Unit 13 is a dormitory style unit at the Oregon State Correctional Institution that houses many AICs with medical needs. Defendants deny the remainder of paragraph 84.

13.

Defendants deny that plaintiffs are entitled to the relief sought.

14.

To the extent not admitted above, defendants deny each and every allegation of plaintiffs' complaint.

15.

The affirmative defenses below each incorporate the admissions, denials, and allegations set forth above.

16.

Defendants reserve the right to assert additional defenses as may become known to them through investigation and discovery.

**FIRST AFFIRMATIVE DEFENSE:**

(PLRA Failure to Exhaust: Section 1983 claim)

17.

Defendants assert all provisions of the Prison Litigation Reform Act ("PLRA") to plaintiffs' claims, including the provisions regarding exhaustion of administrative remedies as set forth at 42 U.S.C. § 1997e.

18.

Each of the plaintiffs had available administrative remedies to address some or all of the conditions challenged in the complaint through ODOC's administrative review process.

19.

None of the plaintiffs completed the administrative review process prior to initiating this action. Any claims under § 1983 should be dismissed without prejudice.

**SECOND AFFIRMATIVE DEFENSE:**

(PLRA Prisoner Release Order / Three Judge Panel: Section 1983 claim)

20.

Under 18 U.S.C. § 3626, a court may not enter a prisoner release order unless 1) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the federal right sought to be remedied through the prisoner release order; and 2) the defendants have had a reasonable amount of time to comply with the previous court orders.

21.

Additionally, in a civil action in federal court regarding prison conditions, such as this action, a prisoner release order may be entered only by a three-judge court that makes certain specific findings by clear and convincing evidence, as set forth in statute.

22.

None of these requirements have been or can be met. Therefore, plaintiffs' request for a prisoner release order under § 1983 and the PLRA must fail.

**THIRD AFFIRMATIVE DEFENSE:**

(Standing / Facts not Particularized to Individual Plaintiffs: All Claims)

23.

Plaintiffs lack standing to bring some or all of these claims.

24.

The allegations of the complaint concern conditions in prisons other than the ones in which each AIC plaintiff is incarcerated.

25.

Additionally, the complaint makes allegations regarding health conditions, vulnerabilities, and living situations that are not applicable to each and every plaintiff.

26.

Each plaintiff lacks standing to bring allegations or raise issues that do not apply to that plaintiff's particular circumstances.

**FOURTH AFFIRMATIVE DEFENSE:**

(Standing: Failure to Seek Commutation or Early Release)

27.

Plaintiffs have failed to request commutation of their sentences from the governor.

28.

Plaintiffs have failed to seek early release from the Oregon Board of Parole and Post-Prison Supervision.

29.

These failures, taken individually or together, deprive the plaintiffs of standing to seek release.

**FIFTH AFFIRMATIVE DEFENSE**

(*Heck v. Humphrey*: Section 1983 claim)

30.

Section 1983 claims cannot be brought for claims challenging the fact or duration of a prisoner's sentence. Rather, such claims must be brought as federal habeas corpus claims.

31.

To the extent this action seeks release from prison, and to the extent that those allegations implicate the invalidity of the conviction or sentence, those claims fails to state a claim.

**SIXTH AFFIRMATIVE DEFENSE**

(No Private Right of Action: Claims under Oregon Constitution)

32.

There is no private right to bring a civil claim other than a claim for habeas corpus based on the alleged provisions of the Oregon Constitution.

33.

Because this is not a claim for habeas corpus, the Second Claim, which alleges violations of Article 1 §§ 13, 15, and 16 of the Oregon Constitution, fails to state a claim.

**SEVENTH AFFIRMATIVE DEFENSE**

(Failure to State a Claim: Claim under Art. I § 13 of Oregon Constitution)

34.

Article 1 § 13 of the Oregon Constitution applies only to persons in jail. It does not apply to prisons.

35.

Plaintiffs' complaint alleges they are confined in prison and addresses issues allegedly arising in prison.

36.

Therefore, to the extent the Second Claim is based on Article 1 § 13 of the Oregon Constitution, it fails to state a claim.

**EIGHTH AFFIRMATIVE DEFENSE**

(Failure to State a Claim: Claim under Art. I § 15 of Oregon Constitution)

37.

Article 1 § 15 of the Oregon Constitution does not provide a private right of relief other than for claims alleging sentences in excess of statutory limitations.

38.

Therefore, to the extent the Second Claim is based on Article 1 § 15 of the Oregon Constitution and does not allege a sentence in excess of statutory limitations, it fails to state a claim.

**NINTH AFFIRMATIVE DEFENSE**

(Sovereign Immunity: Claim under Oregon Constitution)

39.

Under the Oregon Tort Claims Act, the claims against the individual defendants must be brought against the State of Oregon, and the State of Oregon must be substituted for the named defendants.

40.

However, the State of Oregon has not waived its sovereign immunity for civil claims based on the alleged provisions of the Oregon Constitution, other than claims for habeas corpus.

41.

Because this is not a claim for habeas corpus, the Second Claim, which alleges violations of Article 1 §§ 13, 15, and 16 of the Oregon Constitution, is barred by sovereign immunity.

**TENTH AFFIRMATIVE DEFENSE**

(Apparent Authority Immunity: Claim under Oregon Constitution)

42.

At all times, defendants were acting or omitting to under apparent authority of a law, resolution, rule or regulation, and such actions or omissions to act were not done or omitted in bad faith or with malice.

43.

Therefore, the Second Claim, which alleges violations of Article 1 §§ 13, 15, and 16 of the Oregon Constitution, is barred by apparent authority immunity.



**ELEVENTH AFFIRMATIVE DEFENSE**

(Eleventh Amendment Immunity: All Claims)

44.

The complaint alleges that each defendant is being sued in his or her official capacity

45.

To the extent the complaint could be interpreted as seeking retrospective injunctive relief against defendants in their official capacity, the claims are barred by the Eleventh Amendment.

**TWELTH AFFIRMATIVE DEFENSE**

(Discretionary Immunity--Claim under Oregon Constitution)

46.

The claims are based on defendants' alleged performance of or the failure to exercise or perform a discretionary function or duty.

47.

Therefore, the Second Claim, which alleges violations of Article 1 §§ 13, 15, and 16 of the Oregon Constitution, is barred by discretionary immunity.

**WHEREFORE**, defendants ask for judgment denying plaintiffs relief and granting defendants their costs and disbursements.

DATED May 1, 2020.

Respectfully submitted,

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*s/ Tracy Ickes White*

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