

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PRISON LEGAL NEWS, a non-profit, §
Washington corporation, §
§
Plaintiff §
v. §
§
BRAD LIVINGSTON, in his official §
capacity as the executive director of the §
Texas Department of Criminal Justice, §
and JENNIFER SMITH, SUE WEEKS, §
and RAMONA CREEK, in their §
individual capacities §
§
Defendants. §

CAUSE NO.
2:09-cv-00296

SECOND AMENDED COMPLAINT

Plaintiff Prison Legal News respectfully files this Amended Complaint and will show:

STATEMENT OF CLAIM

1. Plaintiff Prison Legal News brings this civil rights action for redress of violations of its rights to free speech and due process under the law, seeking injunctive and declaratory relief, as well as nominal, compensatory and punitive damages against Defendants, as appropriate.

2. Plaintiff complains Defendants have violated and continue to violate its constitutional rights under color of law and in violation of the First and Fourteenth Amendments of the United States Constitution.

JURISDICTION AND VENUE

3. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988. Jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and the aforementioned federal statutory and constitutional provisions.

4. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because the events complained of occurred within this district.

PARTIES

5. Plaintiff Prison Legal News (PLN) is a project of the Human Rights Defense Center, a Washington non-profit IRS section 501(c)(3) corporation. It has offices in Seattle, Washington and Brattleboro, Vermont.

6. Defendant Brad Livingston is the executive director of the Texas Department of Criminal Justice (TDCJ). As such, Livingston is the commanding officer of all TDCJ correctional officers, guards, and TDCJ employees and contractors, and is responsible for their training, supervision, and conduct. By law, he is responsible for protecting the constitutional rights of all persons and entities interacting with TDCJ, including PLN. At all relevant times, Livingston was acting under color of law and as the agent, and, as a matter of law, the official representative of TDCJ. He is sued in his official capacity for prospective injunctive and declaratory relief. Livingston has been served and appeared in this action.

7. Defendant Jennifer Smith is the program specialist for TDCJ's Mail System Coordinators Panel (MSCP). As such, Smith is responsible for review of publications censored by TDCJ mailroom staff, as well as training and supervising all TDCJ mailroom staff (as relates to TDCJ's book censorship program). At all relevant times, Smith was acting under color of law and as the agent, and, as a matter of law, the official representative of TDCJ. She is sued in her individual capacity for nominal, punitive, declaratory, injunctive, and compensatory relief. Jennifer Smith has been served and appeared in this action.

8. Defendant Ramona Creek is a mailroom clerk at TDCJ's Garza East Unit in Beeville, Texas. Creek is responsible for censoring publications as they arrive at the Garza East mailroom before they are distributed to prisoners. At all relevant times, Creek was acting under

color of law and as the agent, and, as a matter of law, the official representative of TDCJ. She is sued in her individual capacity for nominal, punitive, declaratory, injunctive, and compensatory relief. She can be served at the Garza East Unit, 4304 Highway 202, Beeville, Texas 78102. *Service is requested.*

9. Defendant Weeks is a mailroom representative at TDCJ's Hilltop Unit in Gatesville, Texas. Weeks is responsible for censoring publications as they arrive at the Hilltop mailroom before they are distributed to prisoners. At all relevant times, Weeks was acting under color of law and as the agent, and, as a matter of law, the official representative of TDCJ. She is sued in her individual capacity for nominal, punitive, declaratory, injunctive, and compensatory relief. She can be served at the Hilltop Unit, 1500 State School Road, Gatesville, TX 76598-2996. *Service is requested.*

STATEMENT OF FACTS

10. Prison Legal News ("PLN") publishes a monthly, 56-page legal information magazine and distributes over fifty books dealing with the rights of incarcerated people. PLN's publications provide information about, *e.g.*, court access, disciplinary hearings, prison conditions, excessive force, mail censorship, jail litigation, visitation, telephones, religious freedom, prison rape, and the death penalty. PLN has published the magazine continuously since 1990. PLN's publications are core protected speech, which is not objectionable on security or other grounds.

11. PLN is a distributor for *Women Behind Bars: The Crisis of Women in the U.S. Prison System*, by Silja J.A. Talvi. Ms. Talvi is an investigative journalist whose work has appeared in publications like *The Nation*, *Salon*, *The Utne Reader*, and *The Christian Science Monitor*. She has won awards from the Society of Professional Journalists of Western Washington, New American Media, and the National Council on Crime and Delinquency.

12. *Women Behind Bars* was described as a “comprehensive and passionately argued indictment of the inhuman treatment of female prisoners ... the sort of shocking expose too seldom seen in these media days of so much celebrity fluff” by the *Seattle Post-Intelligencer*. *Ms. Magazine* said, “Like mirrors in a house of horrors, the women in Talvi's book reflect the distorted collective flaws of our society: violence, addiction, poverty, pervasive low self-esteem, and families trapped in chronic financial and emotional crises.” A former police chief said, “I've read few accounts of social injustice that have aroused in me such intense feelings of sadness, shame, and rage. As a cop for thirty-four years, I confess to having given only passing thought to what happened to women after they're arrested and ultimately sentenced to prison. I have been stripped of my ignorance by *Women Behind Bars*. The agonizing experiences of many of these women, described so eloquently by [Ms.] Talvi, will haunt me for the rest of my days.”

13. In December 2008, a prisoner at TDCJ's Hilltop Unit ordered a copy of *Women Behind Bars* from PLN. PLN placed the book in the mail, and it arrived at the Hilltop Unit mailroom.

14. At the Hilltop Unit mailroom, Weeks refused to deliver the book to the prisoner. Weeks completed a TDCJ “Publication Review/Denial Notification” form informing the prisoner she could not receive *Women Behind Bars* because “a specific determination has been made that the publication is detrimental to offenders' rehabilitation, because it would encourage homosexual or deviant criminal behavior.” The notification suggested the book was censored by the mailroom because page 38 depicted “sex with a minor.” PLN did not receive a copy of the notice, or directions on how to appeal the mailroom's decision. TDCJ policy does not require providing book distributors, like PLN, instructions on how to use the publication rejection appeal process.

15. Page 38 of *Women Behind Bars* reads:

What is even more remarkable about [Tina] Thomas [a medical doctor incarcerated in Oklahoma] is that she had overcome the kind of childhood trauma that might have completely derailed her adult life. It might have been precisely that background that first propelled her to become an overachiever and attain a high level of professional success, but then came back to haunt her just as she had gotten to where she wanted to go. The dark secret of her life was that she had been forced to perform fellatio on her uncle when she was just four years old. Thomas explains that this unresolved trauma became “the template for a lifetime of distrust, fear, uncertainty, and a spirit of self-negation.”

The remainder of the page discusses how this trauma caused Thomas to develop the drug addiction that resulted in her incarceration. The page contains no further discussion of “sex with a minor.”

16. Weeks’ decision to censor *Women Behind Bars* was reviewed by Jennifer Smith when the prisoner appealed. Smith, acting as the delegate of the Directors Review Committee (DRC) which reviews censorship decisions, upheld Weeks’ decision, and the prisoner was not allowed to receive *Women Behind Bars*. PLN was not informed of this decision, or given directions on how to present information to the DRC during the review process.

17. After Smith and the DRC censor a book, the book’s title is placed on a list of “denied” books that is circulated to other TDCJ mailrooms. When a book has been “denied” by the DRC it will never be reviewed again.

18. PLN sent two more copies of *Women Behind Bars* to prisoners in TDCJ’s Garza East Unit, in Beeville, Texas in September 2009. Defendant Creek censored the books, again relying on the “sex with a minor” passage on page 38. Creek failed to provide PLN with a copy of the “Publication Review/Denial Notification” or any information about how to contest the decision.

19. At Smith’s direction, TDCJ mailroom clerks like Weeks and Creek routinely fail to provide notice books are being censored to the people who send those books.

20. In March 2009, PLN sent a copy of another book, *Perpetual Prisoner Machine: How America Profits from Crime* by Joel Dyer to a prisoner incarcerated at TDCJ's Allred Unit in Iowa Park, Texas.

21. *Perpetual Prisoner Machine* is a critique of the for-profit prison industry. The *Rocky Mountain News* called it "enlightening and frightening ... a moving and gripping social commentary." The *San Diego Union Tribune* said it was "a good assault on destructive social policy." Professor Howard Zinn described it as "a bold and deep-probing analysis of our criminal justice system. It raises serious questions about crime and punishment which reflect not just on prisons, but on our for-profit driven society."

22. TDCJ, through the DRC, "disapproves" of *Perpetual Prisoner Machine* because page 45 discusses "rape." Page 45, in fact, quotes from a 1968 Philadelphia District Attorney's Office investigation into sexual assault in prison, and describes crimes committed against prisoners.

23. TDCJ, through Smith and the DRC, did not provide PLN with any information about how to contest the decision to censor *Perpetual Prisoner Machine* or any opportunity to do so.

24. TDCJ and Smith also censor three other books PLN distributes: *Soledad Brother: The Prison Letters of George Jackson*, by George Jackson; *Lockdown America: Police and Prisons in the Age of Crisis*, by Christian Parenti; and *Prison Masculinities*, by Don Sabo, Dr. Terry Kupers, and Willie London. These books are all on TDCJ's permanent "disallowed" list.

25. *Soledad Brother* is a collection of letters by George Jackson, a member of the Black Panthers, who was imprisoned in California's Soledad prison in the 1960s. The *New York Times* called Jackson "a talented writer, a sensitive man, a potential leader and political thinker

of great persuasiveness.” *Ebony* called the book a “penetrating and scathing” criticism of American life.

26. TDCJ did not provide PLN notice TDCJ was censoring *Soledad Brother* before the filing of this litigation.

27. TDCJ censors *Soledad Brother* because page xxiii is “racial.” Page xxiii is part of an introduction written by George Jackson’s nephew, Jonathan Jackson, Jr. The offending passage reads:

Race is more times than not the easy answer to a problem. Among people of color in the United States, the quick fix, “blame it on whitey” mentality has become so prevalent that it shortcuts thinking. Conversely, stereotypes of minorities act as simple-minded tools of divisiveness and oppression. George addressed these issues in prison, setting a model for the outside as well: “I’m always telling the brothers some of those whites are willing to work with us against the pigs. All they got to do is stop talking honky. When the races start fighting, all you have is one maniac group against another.

Nothing on this page encourages racial hatred or division, and, in fact, the page promotes racial harmony.

28. *Lockdown America* is a history of the prison expansion that began in America in the 1970s. The *Washington Post* praised it as “exhaustively documented” and “deserv[ing] [of] a full hearing from anyone serious about ending the often horrific realities of the criminal justice system.” The *Christian Science Monitor* described it as an “unflinching look at what our nation has become” and noted it “cannot fail to generate serious thought about issues we prefer to lock away in darkness.”

29. TDCJ did not provide PLN notice TDCJ was censoring *Lockdown America* before filing this litigation.

30. TDCJ censors *Lockdown America* because page 206 is “racial.” The page describes how some prison guards in California belong to racist prison gangs: “Another group of screws at the California Institution for Men at Chino called itself SPONGE, a disgusting

acronym for the equally disgusting name, ‘Society for the Prevention of Niggers Getting Everything.’” Nothing on this page encourages racial hatred or division, and, in fact, the page promotes racial harmony.

31. *Prison Masculinities* is a collection of essays about prison conditions by distinguished authors. One of the editors, Dr. Terry Kupers, is a psychiatrist and has been recognized as an expert witness in over a dozen federal prison conditions cases, and is a consultant to the U.S. Department of Justice, Human Rights Watch, and Amnesty International. Other contributors to the book include the former directors of noted prison-reform non-profits, Stop Prisoner Rape, the Prison Law Office, and the Sentencing Project; and professors at the University of Southern California, Bowling Green State University, and the University of Missouri – Kansas City.

32. *Prison Masculinities* was censored at TDCJ’s Powledge Unit in 2009 because “pages: 128-131 – contain rape” and “pages 194 + 222 – contain racial material.” Passages on pages 128-131 do discuss prisoner rape. A prisoner describes how he was “humiliated telling anyone about” being sexually assaulted, and how he underwent “torture scenes” at the hands of fellow prisoners. Page 194 is from an essay by Dr. Kupers where he discusses a guard calling a prisoner a “damn nigger” before assaulting the inmate. Page 222 is from an essay about support groups in prison, and discusses a conversation prisoners had about personal responsibility. “James Jackson, forty-five, who has already done seventeen and a half years of a twenty-year-to-life sentence, nods his head in agreement. Jackson continues, ‘Black people can get on the radio and use the words ‘niggers’ and ‘bitch.’ To me, that’s serious. If you think white people are going to stop us from calling us niggers and bitches, you’re crazy. We’ve got to stop degrading ourselves.”

33. TDCJ did not notify PLN *Prison Masculinities* was being censored. PLN learned of the censorship when the prisoner instructed TDCJ to send the book and censorship notice to PLN's counsel.

34. Defendants' censorship regime, as authorized and supervised by Smith, is arbitrary, serves no legitimate penological purpose as applied to PLN's publications, and violates the constitutional rights of book distributors like PLN. Smith and TDCJ moreover fails to ensure the regime provides distributors, like PLN, constitutionally-required due process to contest decisions to permanently ban their publications. TDCJ's written policies do not permit censoring publications like *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America*, or *Prison Masculinities* for the reasons identified by Defendants.

35. Smith's deliberately indifferent failure to supervise or train her subordinates results in violations of PLN's constitutional rights. The practices of Smith's subordinates, of which she is aware and deliberately indifferent to, are contrary to clearly established free speech and due process protections.

36. It is likely Defendants will continue to censor the books PLN distributes, including *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America* and *Prison Masculinities*, in the future without providing PLN due process.

37. Allowing PLN to distribute *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America* and *Prison Masculinities* to TDCJ prisoners will not have any significant impact on TDCJ facilities or programs.

38. Readily available alternatives to censoring *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America* and *Prison Masculinities* could, at *de minimis* cost, easily satisfy any legitimate or significant interests of TDCJ without sacrificing the free speech and expression rights of PLN and the prisoners in TDCJ custody.

39. The violations of PLN's constitutional rights have resulted in lost revenue from book sales, and loss of business reputation, in addition to the loss of its valuable constitutionally protected free speech and due process rights.

CAUSE OF ACTION I: FREEDOM OF SPEECH AND EXPRESSION

40. Defendants' censorship of *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America* and *Prison Masculinities* violates the free speech and expression rights of Prison Legal News secured by the First and Fourteenth Amendments to the United States Constitution.

41. Prison Legal News has a constitutionally-protected liberty interest in communicating with incarcerated individuals. This right is clearly established under existing case law.

42. Defendants' policy does not further any legitimate penological interest. Defendants Smith, Weeks and Creek acted wantonly, willfully and/or maliciously in violating PLN's constitutional rights.

CAUSE OF ACTION II: DUE PROCESS OF LAW

43. Defendants' actions banning *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America* and *Prison Masculinities* did not provide Prison Legal News with individualized notice that its free speech and expression rights are being violated. Defendants gave PLN no notice of the decisions to deny copies of *Women Behind Bars*, *Perpetual Prisoner Machine*, *Soledad Brother*, *Lockdown America* and *Prison Masculinities* to prisoners, or information about how to contest the decisions.

44. Prison Legal News has a right under the Fourteenth Amendment to receive notice and the opportunity to object when Defendants prevent its books from reaching prisoners. This right is clearly established under existing case law.

45. Defendants' failure to provide notice to Prison Legal News that its books were being censored does not further any legitimate penological interest. Defendant Smith acted wantonly, willfully and/or maliciously in violating PLN's constitutional rights.

DAMAGES

46. Plaintiff seeks compensatory, punitive, and nominal damages for violations of its constitutional free speech and due process rights under the First and Fourteenth Amendments; injuries to its business reputation; and loss of revenue.

DECLARATORY RELIEF

47. Plaintiff requests all appropriate declaratory relief to which it is entitled.

INJUNCTIVE RELIEF

48. Plaintiff requests the Court grant appropriate relief enjoining Defendants from continuing to violate its free speech and due process rights. Plaintiff seeks permanent injunctive relief requiring Defendants to provide written notice to senders and an opportunity to respond before censoring their publications, and requiring the adoption of specific guidelines delineating what materials may be delivered to prisoners through the mail, as well as any other appropriate injunctive relief.

ATTORNEYS' FEES AND COSTS

49. Pursuant to 42 U.S.C. § 1988, Plaintiff is entitled to recover attorneys' fees and costs.

PRAYER FOR RELIEF

THEREFORE, Plaintiff requests the Court:

- A. Award punitive damages against all individual Defendants sued in their individual capacities, as appropriate and allowed by law;

- B. Award compensatory damages, including damages for lost revenues and damage to business reputation, against all Defendants sued in their individual capacities, jointly and severally;
- C. Award nominal damages against all Defendants sued in their individual capacities, jointly and severally;
- D. Grant declaratory and injunctive relief under federal law against all Defendants, as set out in this Complaint;
- E. Grant reasonable attorneys' fees, litigation expenses and court costs; and,
- F. Grant all such other and further relief as appears reasonable and just, to which Plaintiff may be entitled.

Dated: July 28, 2010.

Respectfully Submitted:

/s/ Scott Medlock
Scott Medlock
Texas Bar No. 24044783
S. Dist. No. 608457
Attorney-in-charge
Lauren Izzo
State Bar No. 24065482
S. Dist. No. 1002172
James C. Harrington
Texas Bar No. 09048500
S. Dist. No. 4025

TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Dr.
Austin, TX 78741
(512) 474-5073
(512) 474-0726 (Fax)

Adam Cook
Massachusetts Bar No. 659575
Pro Hac Vice

Human Rights Defense Center
PO Box 2420
1037 Western Ave.
West Brattleborough, VT 05303

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

A true copy of this document was sent to Assistant Attorney General of Texas, Cynthia Alexander, P.O. Box 12548, Capitol Station, Austin, TX, 78711, via the Court's electronic filing system pursuant to Local Rule LR5.1.

/s/ Scott Medlock
Scott Medlock