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Of Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

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. CV12-0071-SI

RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Request for Oral Argument

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I. INTRODUCTION

Plaintiff Prison Legal News (PLN) has filed a lawsuit against defendants alleging that the inmate mail policy of the Columbia County Jail (the Jail) violates plaintiff's First Amendment free speech rights and Fourteenth Amendment due process rights, as well as the same constitutional rights of "other correspondents" and prisoners. (Compl., ¶¶ 5.1 – 5.8.) Plaintiff's

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Complaint prays for preliminary and permanent injunctive relief as well as nominal, compensatory and punitive damages. (*Id.*, § VII.)

Defendants here respond to plaintiff's Motion for Preliminary Injunction. This response is supported by the Declarations of Jeffrey M. Dickerson, Sergeant Bryan Cutright, and Gregory R. Roberson, together with supporting exhibits, and the facts and argument set forth below.

As will be seen from the recitals below, defendants have changed the inmate mail policy in a fashion that moots plaintiff's motion for preliminary relief, and even if plaintiff's motion is not moot, plaintiff does not have standing and has not demonstrated that preliminary relief is necessary or appropriate in the facts of this case.

II. RELEVANT FACTS

For purposes of this response, defendants accept as true plaintiff's fact section regarding the parties. (Pl. Mem., pp. 2-3.)

Defendants acknowledge that prior to January 26, 2012, the Jail's policy regarding whether inmates could receive catalogs and other correspondence was unclear. The Jail's policies, however, have always allowed inmates to receive magazines as long as they were new and sent directly from the publisher. (Dickerson Decl., ¶¶ 4-7, Ex. A, ¶ I.10; Ex. B, ¶ I.10; Ex. C, ¶ I.10; Ex. D, ¶ I.11. Defendants acknowledge that due to inconsistent practices on the part of jail staff, some mailings, including magazines, from plaintiff were not distributed to inmates up to and through January 26, 2012.[1] Thus, prior to January 26, 2012, the Jail accepted PLN's monthly magazine and other mailings on an inconsistent basis, with some copies being rejected

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[1] For reasons that are not clear, mailing procedures were posted on the Columbia County Sheriff's Office website that were not consistent with its mail policy. (Dickerson Decl., ¶ 7). These procedures included a ban on magazines. (Chamberlain Decl., ¶ 1, Ex. 1.) Defendants are still investigating how the purported mail procedures were created, but it appears that some staff may have misunderstood the mail policy and were rejecting non-postcard size mailings addressed to inmates, instead of having the corrections staff process the inmate mail. (Dickerson Decl., ¶¶ 7-10.) Because the office staff typically forwards to the corrections deputies all mail addressed to inmates for processing, only some magazines and similar mail were rejected. (*Id.*, ¶¶ 8-10.)

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as set forth in plaintiff's statement of facts. Other inmates, however, did receive mail from plaintiff. For instance, inmates Troy McCarter, Martin Key, and Ezra St. Helen received plaintiff's paperback book entitled *Protecting Your Health & Safety*, as well as several issues of plaintiff's monthly magazine. (Pl Mot., McCarter Decl. ¶¶ 5-6; Kay Decl. ¶ 6, St. Helen Decl., ¶¶ 5-6.)

The Jail has a capacity for 255 inmates. Due to budget constraints that came about in 2010, however, the current funded capacity of the Jail is up to 150 inmates. (Dickerson Decl., ¶ 24.) Each day, the Jail receives about fifty incoming pieces of mail addressed to inmates and about forty pieces of mail from inmates to be sent out. (Cutright Decl., ¶ 2.) Out of the fifty pieces of incoming inmate mail, about thirty-five to forty pieces are personal mail; the rest is legal mail. (*Id.*, ¶ 2.) A typical shift has four corrections deputies. (Dickerson Decl., ¶ 21.) The booking deputy is responsible for inspecting incoming and outgoing non-legal mail, in addition to other responsibilities such as communicating with intake officers, booking arrestees into the Jail, and monitoring inmates in the cells in booking area. (*Id.*) The control room deputy manages all movements in the Jail, which are remotely controlled. (*Id.* ¶ 22.) The remaining two corrections deputies are roving deputies who must check on inmates every forty-five minutes, distribute food and mail, and monitor them during common and recreation periods. (*Id.*, ¶ 23.)

Plaintiff recites "facts" regarding three mail policies. (Pl Mem., pp. 7-13.) For purposes of determining whether plaintiff is entitled to a preliminary injunction, however, only the current policy, effective February 10, 2012 (current policy) is relevant.[2] To the extent that prior policies were constitutionally deficient, injunctive relief will not remedy these past violations.

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[2] The Jail amended its January 26, 2012 Inmate Mail Policy on February 10, 2012. (Dickerson Decl., ¶ 10, Ex. F.) The February 10, 2012 Inmate Mail Policy did not make any substantive change in mail procedures. (*Id.*)

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The current policy, which was drafted within days of the filing of plaintiff's lawsuit,[3] provides that jail staff will accept:

> "written correspondence, notes, parcels, or documents for inmates that have been delivered by the U.S. Postal Service and distributed by Columbia County Jail Staff."

(Dickerson Decl., ¶ 10, Ex. F, p. 3, ¶ 2.)

The current policy limits inmates' personal mail to:

> "postcards in any size that is delivered by the U.S. Postal Service up to a maximum size of 5-1/2" tall X 8-1/2" wide. The jail does not permit any other form of personal mail for inmates. Inmates are not limited to a specific number of postcards that they may receive or send."

(*Id.*, p. 3, ¶ 3.)

"Personal mail" is defined as:

> "Postcards mailed to and from family, friends, organizations, businesses, or other unofficial entities."

(*Id.*, p. 2.)

The current policy further provides that:

> "Jail staff will accept solicited or unsolicited junk mail or bulk mail for inmates, unless it violates other mail restrictions (such as containing sexually explicit content)."

(*Id.*, p. 4, ¶ 10.)

"Junk mail" is defined as:

> "Printed materials, often sent as mass mailings, such as catalogs, advertisements, brochures, circulars, and pamphlets whose primary purpose is to sell, promote or solicit for, a product or service, and when taken as a whole, lacks serious literary, artistic, political, educational, religious, or scientific value. Junk mail may come using a variety of postal rates."

(*Id.*, p. 1).

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[3] Defendants were not notified that plaintiff had concerns about the Jail's handling of inmate mail until after the lawsuit was filed, despite plaintiff receiving rejected mailings from the Jail for over a year. (Chamberlain Decl. ¶ 16, Ex. 14 (letter to county counsel and proposed preliminary injunction); Compl. ¶¶ 4.7, 4.24 (earliest rejected mail was sent on or about December 8, 2010).)

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The current policy allows inmates to receive publications that are prepaid by persons outside the jail. (*Id.*, p. 6, ¶ 18.) With permission of the jail supervisor, an inmate can conduct personal business such as "the use of a business reply envelope to send a document back to the originating firm." (*Id.*, p. 7, ¶ 11; *id.* ¶ 26.) Specifically, inmates are permitted to receive up to three new or used books a day, as long as the books come directly from the publisher, a book club, or a bookstore. (*Id.* p. 7, ¶ 19.) With regard to periodicals:

> "An inmate may receive up to two periodicals on a single mail delivery day. Periodicals must be new and delivered directly from the publisher or bookstore. Periodicals include magazines."

(*Id.*, p. 7, ¶ 20.)

A "periodical" is defined as:

> "A magazine, newspaper, or other publication formed of printed sheets that are issued at least four times a year at regular, specified intervals from a known office of publication. Periodicals usually must have a legitimate list of subscribers and requesters."

(*Id.*, p. 2.)

The current policy has this to say about prohibited publications:

> "The jail must determine whether a specific publication, book or periodical violates jail rules. This determination must be made on an issue-by-issue basis, and it is unacceptable to put a blanket prohibition on all issues of a certain publication or periodical. <u>If an issue of a publication, book or periodical is determined to violate jail rules, it should be returned to the sender and notification to the sender and the inmate should be made pursuant to paragraph 31</u>.

(*Id.*, p. 7, ¶ 21) (emphasis added).

With regard to confiscating prohibited mail, current policy provides:

> "Normally, mail handlers confiscate prohibited items. <u>The sender of confiscated mail must be notified pursuant to paragraph 31</u>. Staff may return prohibited mail to a sender if it is in the best interest of the jail not to store it, such as perishables.
>
> "* * * * *
>
> "b. Mail handlers will use a <u>Prohibited Mail Slip to inform the inmate</u> of the confiscation and use a copy as a tag for the items. They will place confiscated items in the inmate's property storage, unless it is evidence in a jail disciplinary action or a crime. They will handle evidence according to the applicable policy: Staff will not notify the inmate or sender if they confiscate items that are part of a criminal investigation.

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> "c. Mail handlers must notify the sender in writing that mail they sent was confiscated or not delivered to the inmate, unless the inmate is no longer in custody. They should use a Prohibited Mail Slip for the notification. Any notice will give the reason and explain how the sender can informally appeal the action.
>
> "d. A mail handler may destroy any item in mail that presents a health or safety risk if it were to be stored in the jail or returned to the sender, and notify the sender by sending a Prohibited Mail Slip."

(*Id.* p. 9, ¶ 30) (emphasis added).

The Prohibited Mail Notice advises the sender that a piece of mail is being returned or confiscated and gives the reason for the denial. Under the heading "APPEALS," it states:

> "If you believe that your correspondence/publication was improperly denied, you may appeal the decision by sending in a written letter stating the reasons you believe that the decision was wrong within 15 days from the date of this letter. Your appeal should identify specifically why you believe our decision to deny the mail was wrong and include your name and return address. You are not required to provide a phone number, but it may be useful if we need further clarification. We will send you a decision on your appeal within 15 days of receiving it. Please direct your written appeal to: [address for the jail commander]."

(Dickerson Decl., ¶ 29, Ex. H) (emphasis added).

Paragraph 31 of the current policy provides for the mail handler to return rejected mail to the sender or to the United States Postal Service and to:

> "b. Send a notice of right to reconsideration with return mail. Send a notice of right to reconsideration to senders of confiscated mail. Complaints and requests for reconsideration shall be forwarded to the Jail Commander for a determination of compliance with the Mail Policy and applicable legal requirements."

(Dickerson Decl., ¶ 10, Ex. F, p. 10, ¶ 31.)

The current policy provides for supervision and training of mail handlers and requires jail personnel to "[d]eliver the mail as soon as practical upon receipt." (*Id.*, p. 11, ¶ f; p. 13, ¶ 41.)

Finally, the current policy provides procedures for returning mail to a sender as follows:

> "To return postcards, a mail handler will use a sticker or stamp marked 'return to sender,' note the reason for refusal on the stamp, obliterate any mail-sorting bar code, and return it to the post office. To return unopened mail (other than postcards), a mail handler will use the 'return to sender' stamp in place of the sticker.

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> "To return mail that was opened, a mail handler must repackage it and send it at the expense of the jail to the sender. The mail handler will include a copy of the Returned Mail form letter and the inmate Mail Guide if he or she repackages the mail.
>
> "Mail handlers will use a Prohibited Mail Slip to inform the inmate and the sender when mail is returned to sender. The Prohibited Mail Slip will conform to the model shown below[on pages 16 and 17 of the policy]."

(*Id.*, p. 15, ¶ 45; *see also id.*, p. 15, ¶ 46 (inmates must follow the grievance procedure set forth in the inmate manual to appeal a decision to deny delivery of mail and a sender of mail must send a written letter within fifteen days addressed to the jail commander identifying why the decision was wrong.)

All corrections deputies and all non-corrections staff who handle incoming mail have been formally trained on the new mail policy. (Dickerson Decl., ¶¶ 28-29.) Plaintiff has not had a magazine, catalog, or brochure rejected by the Jail since July 20, 2011, several months before the implementation of the current policy.

Plaintiff's statement of facts, which includes arguments that do not belong in a statement of facts, mischaracterizes the current policy in several regards. Defendants address these arguments and mischaracterizations here because they form the false basis for all of plaintiff's arguments.

Plaintiff asserts that the current policy retains the postcard-only policy. (Pl. Mem., p. 9.) In fact, as set forth above, the current policy also allows delivery of bulk mail, junk mail, periodicals, catalogs, brochures, fundraising letters and books.

Plaintiff further asserts that the postcard-only restriction on outgoing mail prohibits inmates from sending letters to PLN or from returning subscription and book order forms. (*Id.*) Inmates, however, may send as many postcards as they like to PLN. They are not, therefore, deprived of the opportunity to write to PLN. With regard to subscription and book orders, these are permitted as long as they originate and are paid for outside the jail. (Dickerson Decl., ¶ 10, Ex. F, p. 7, ¶ 20.) Further, although the Jail has limited resources to assist inmates in conduction personal business, an inmate may do so with approval by a jail supervisor. (*Id.*, ¶ 26.) In

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addition, an inmate may, with approval, conduct personal business such as "the use of a business reply envelope to send a document back to the originating firm." (*Id.*, ¶ 10, Ex. F, p. 4, ¶ 11.) These policies clearly allow an inmate to renew subscriptions or donate money to organizations such as plaintiff. In any event, prior to filing its motion, plaintiff never conferred with defendants regarding an inmate's ability to send money, directly or indirectly, to plaintiff.

Plaintiff also argues that the current policy "permits delivery of junk mail, but only in the form of a postcard." (Pl. Mem., p. 10.) This is patently false. The postcard requirement is restricted to "personal mail." (Dickerson Decl., ¶ 11, Ex. F, p. 2.) "Junk mail" is defined as including "catalogs, advertisements, brochures, circulars, and pamphlets." (*Id.*, p. 1.) Thus, it cannot be restricted to postcards.

Plaintiff's argument that it may not send its catalogs under the current policy is equally without merit. (Pl. Mem., p. 10.) The current policy states that "solicited and unsolicited" junk mail and bulk mail is distributed to inmates, unless it violates other mail restrictions. (Dickerson Decl., ¶ 11, Ex. F, p. 4, ¶ 10.) A catalog is either junk mail or bulk mail, and neither is required to be on a postcard because the postcard restriction is limited to personal mail. (*Id.*, ¶ 11, Ex. F, p. 2.)

Plaintiff's assertion that the due process provisions in the current policy are confusing is also without merit. (Pl. Mem., p. 12.) All of the information that plaintiff argues is not provided by the policy is, in fact, provided. As set forth above, paragraph 30 of the current policy clearly sets forth the procedure for returning mail, and includes the requirement that notice be given to both the inmate and the sender. Further, the Prohibited Mail Notice required by paragraph 30 clearly describes the time for filing an appeal, the necessary contents of an appeal, and the address to which the appeal should be sent. (Dickerson Decl., ¶ 29, Ex. H.)

III. ARGUMENT

A. Plaintiff's Motion for a Preliminary Injunction is Moot.

Voluntary cessation of a challenged practice moots a request for injunctive relief "if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not

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reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 188 (2000). The party asserting mootness bears the burden to persuade the court that the challenged conduct will not reasonably be expected to recur. *Id.*

Here, that burden has been met. As soon as plaintiff filed its lawsuit, which was the first notice defendants had of plaintiff's concerns about the Jail's handling of inmate mail, defendants moved quickly and decisively to address plaintiff's concerns. As set forth in detail above, the current inmate mail policy allows inmates to receive postcards, junk mail, periodicals and books. Further, there is no reason to believe that there will be future incidents of returns of plaintiff's mailings because they are not "postcards." Except for two fundraising letters returned in November, 2011, plaintiff has not had a piece of mail returned since July 20, 2011, and all staff who handle inmate mail have been trained in the current policy. Further, a process is in place for plaintiff to appeal the return of mail should such a return occur. Defendants have met their burden on mootness and respectfully ask the Court to deny plaintiff's motion for a preliminary injunction.

B. Plaintiff Lacks Standing to Seek a Preliminary Injunction.

For a plaintiff to have standing under Article III of the United States Constitution, it must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). "[A]t the preliminary injunction stage, a plaintiff must make a 'clear showing' of his injury in fact." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 376 (2008)). Plaintiff bears the burden of satisfying these elements, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and each element must be supported in the same way as any other matter in which the plaintiff bears the burden of proof and the evidence relevant to the standing inquiry consists of the facts as they existed at the time

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the plaintiff filed the complaint. *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008), *cert. den.*, 2009 WL 273213 (2009). Whether a party has standing is a question of law. *Id.* at 1035.

Plaintiff brings this lawsuit on behalf of itself, "other correspondents," and inmates. For the reasons set forth below, plaintiff does not have standing to seek a preliminary injunction on its own behalf or on behalf of the other two groups that it purports to represent.

1. Plaintiff Lacks Standing to Seek a Preliminary Injunction on Its Own Behalf.

Because defendants have changed the Jail's inmate mail policy in a manner that allows plaintiff to send mail to, and receive mail from, the Jail, and provides for notice to senders of the reasons for the rejection of mail along with an opportunity to appeal the rejection, a preliminary injunction will not address or redress any injury in fact. To the extent that plaintiff is able to demonstrate past injuries, these injuries can only be compensated monetarily. Thus, plaintiff lacks standing to seek a preliminary injunction.

2. Plaintiff Lacks Standing to Seek a Preliminary Injunction on Behalf of Inmates.

A party may only assert the rights of third parties if three criteria are met:

> "The litigant must have suffered an "injury in fact," thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her interests."

Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1163 (9th Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991)). Plaintiff cannot meet these requirements. Again, plaintiff has not suffered an injury that can be redressed by a preliminary injunction. Further, plaintiff is a non-profit business enterprise that can claim no close relationship with inmates, their families or friends. Finally, plaintiff has not shown that inmates, or the friends or family of inmates, cannot protect their own interests. In fact, inmates frequently file lawsuits to assert their constitutional rights.

Further, although courts may relax the above prudential considerations where there is a substantial abridgement of a third party's speech rights, *Secretary of State of Maryland v. Joseph*

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H. Munson Co., Inc., 467 U.S. 947, 956-57 (1984), there is no such substantial abridgement here that could be addressed by a preliminary injunction. Under the current policy, inmates are entitled to receive books, junk mail, bulk mail and magazines; they may send and receive unlimited postcards; and they are entitled to notice when mail has been returned.

In *The Pitt News v. Fisher*, 215 F.3d 354, 364 (3d Cir. 2000), *cert. den.* 531 U.S. 1113 (2001), a Pennsylvania statute provided for criminal sanctions against businesses that advertised alcoholic beverages in educational institution-funded newspapers. Plaintiff, a student newspaper, challenged the statute on First Amendment grounds. The Third Circuit found that the relaxed prudential standing requirement in the First Amendment context did not apply to the plaintiff because it could not show that the rights of the third parties it sought to protect (its actual and potential advertisers) were "forced to forego their rights entirely, or else face criminal prosecution to vindicate them." *Id.* Similarly here, inmates and their family and friends are not forced to forego their First Amendment rights, nor do they face prosecution should they seek to vindicate their rights.

The Supreme Court has stated that "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). The Court explained that the holders of those rights may not wish to assert them or may not be able to enjoy those rights regardless of the in-court litigant's success, and "usually will be the best proponents of their own rights." *Id.* at 114. In light of this caution, the Court should not recognize plaintiff as having standing to seek a preliminary injunction on behalf of inmates.

3. Plaintiff Lacks Standing to Seek a Preliminary Injunction on Behalf of "Other Correspondents."

For the reasons set forth in section 2 above, the court should also decline to recognize plaintiff as having standing to bring claims on behalf of "other correspondents." Plaintiff apparently bases this claim upon the rejection of letters containing a PLN article printed from plaintiff's website sent by one Lucy Lennox to Jail inmates. (Compl., ¶¶ 4.65 – 4.71; Lennox

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Decl.) Plaintiff has presented no evidence of a close relationship with Ms. Lennox or that she requires plaintiff's assistance in vindicating her rights. Further, plaintiff has presented no evidence of a concrete and particularized injury in fact stemming from the rejection of mail from other correspondents. *See Lopez*, 630 F.3d at 785.

IV. EVEN IF PLAINTIFF HAS STANDING TO BRING ALL OR SOME OF ITS CLAIMS, IT HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THE NEED FOR EXTRAORDINARY RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION.

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Green*, 553 U.S. 674, 689-90 (2008). As correctly recited by plaintiff, a plaintiff seeking a preliminary injunction in a case in which the public interest is involved must establish (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009). Here, plaintiff has failed to demonstrate that any of these factors weigh in its favor.

A. Plaintiff Is Unlikely to Succeed on the Merits.

1. Plaintiff's First Amendment Claim.

A prison regulation does not violate the First Amendment if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The *Turner* Court identified four factors to be considered in making this determination: (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials. *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (citing *Turner*, 482 U.S. at 89-90). The test applies to regulations affecting a publisher's right to communicate to inmates. *Id.*

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Plaintiff has failed to demonstrate that it is likely to succeed on the merits of its First Amendment Claim based upon these four factors.

a. First *Turner* Factor: Rational Relationship to Legitimate and Neutral Governmental Interest.

As explained above, the current mail policy allows plaintiff's magazines, catalogs, brochures, subscription renewal forms, and fundraising letters to be distributed to inmates as long as they are mailed from plaintiff's business address. Inmates may respond by postcard or if they desire to transact business or donate funds to plaintiff, they may have an outside party do so or obtain permission from the jail commander. Defendants have maintained the postcard-only mail policy for incoming and outgoing personal mail only. As argued above, plaintiff does not have standing to challenge this policy. Even if plaintiff did have standing, the postcard-only policy bears a rational relationship to legitimate and neutral interests.

The postcard-only policy is rationally related to the needs of the Jail's limited resources and need for security and safety of inmates and the jail's staff. These goals are legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *see also*, *O'Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996) ("[P]revention of criminal activity and the maintenance of prison security are legitimate penological interests which justify the regulation of both incoming and outgoing prisoner mail"); *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995) ("When a prison regulation affects outgoing mail as opposed to incoming mail, there must be a closer fit between the regulation and the purpose it serves." (internal citation omitted)).

None of the cases relied upon by plaintiff rejects a postcard-only restriction on incoming and outgoing personal inmate mail. There are, however, cases upholding postcard-only policies. In *Covell v. Arpaio*, 662 F. Supp.2d 1146 (D. Az. 2009), the court granted the defendant's motion for summary judgment against the plaintiff's claim that restricted incoming inmate mail to postcard size. The court found that the postcard restriction was a neutral policy that was rationally related to the legitimate purpose of reducing the risk of contraband entering the facility and compromising jail security. *Id.* at 1153; *see also, Rogers v. Maricopa County Sheriff's*

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Office, 2008 WL 898721, No. CV07-00641 (D. Az.) (not reported) (dismissing plaintiff's claim relating to postcard restriction for failure to state a claim); *Jordan v. Arpaio*, 2008 WL 22622401, No. CV08-00856 (D. Az.) (not reported) (dismissing plaintiff's claim relating to a postcard restriction for failure to state a claim); *Medley v. Arpaio*, 2008 WL 3911138, No. CV08-00086 (D. Az.) (not reported) (denying plaintiff's motion for a preliminary injunction for failing to show that legal mail was barred by the postcard restriction); *Gibbons v. Arpaio*, 2008 WL 4447003, No. CV07-1456 (D. Az.) (not reported) (granting jail's motion for summary judgment against plaintiff's claim that postcard restriction violated the First Amendment). Plaintiff seeks extraordinary preliminary injunctive relief, yet cites no authority for its position that a postcard restriction on personal inmate mail is unconstitutional.

The Jail's restriction to postcards for personal mail is rationally related to the legitimate interest in jail security and the safety of inmates and staff. For example, personal mail is more likely to contain contraband than plaintiff's business mail and thus there is a greater security risk to the Jail. (Dickerson Decl., ¶ 18; Cutright Decl., ¶ 4.) Contraband is a constant security and safety risk and it takes many different forms, including bodily fluids, lipstick, perfume, glue, paint, and unidentifiable substances. (Dickerson Decl., ¶ 11.) These substances are bio-hazards or can contain bio-hazards, other hazardous material, or illegal components. (*Id.*) Airborne contaminates that enter the inmate holding areas can also spread quickly. (*Id*) Contraband also includes illegal drugs, needles, blades, similar weapons, and handcuff keys. (*Id.*) Contraband can be hidden in between sheets of paper and under postage stamps. (*Id.*, ¶¶ 13-15.) The Jail has a clear list of factors that allow it to censor mail. (*Id.*, ¶ 10, Ex. F, ¶ 44.) Limiting personal mail to postcards reduces these greater security risks and reduces the time-consuming nature of screening personal mail for contraband.

Also, reviewing personal mail for prohibited content is more time-consuming when the mail comes from an inmate or an inmate's family and friends, as opposed to plaintiff's business mail, because personal mail is more likely to contain prohibited topics. (Dickerson Decl., ¶¶ 12, 18.) Prohibited content includes threats of physical harm, blackmail, extortion, other criminal

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activity, sexually explicit material, gang-related material, plans for escape or other violations of jail rules, and inflammatory material. (*Id.*, ¶ 12.) If inmates were allowed to view mail that contained this information, it would undermine the security and safety of the inmates, staff, and public. (*Id.*) Restricting personal mail to postcards makes it easier and more efficient to review personal mail. (*Id.*, ¶¶ 16, 25; Cutright Decl. ¶ 4.)

The Jail's experience has shown that inspecting personal mail on a postcard reduces by one-third the time the booking deputy must spend on inspecting incoming and outgoing mail. (Cutright Decl. ¶¶ 3-4.) Plaintiff argues that with a postcard restriction, multiple postcards may be necessary to communicate the same information that previously could be communicated in a letter. (Pl. Mem., p. 18.) Plaintiff's argument is speculation. Postcards are quicker to inspect because they are easier to hold, easier to turn over, more durable than regular paper, and easier and quicker to inspect for prohibited content than notepad paper. (Cutright Decl., ¶ 4.) Thus, although the jail-issued postcards are half the size of a standard piece of paper (Dickerson Decl., ¶ 17), they provide real and measurable time-savings. (Cutright Decl., ¶¶ 3-4.) Inspecting two postcards is significantly faster than inspecting one piece of 8.5 inch by 11 inch paper.

i. The Postcard Restriction Is Not Overbroad.

Plaintiff argues that a postcard restriction is overbroad. (Pl. Mem., p. 19.) The Jail's current policy has limited the postcard restriction to personal mail because of the greater risk of contraband and prohibited content that exists in personal mail, and because postcard-mail is easier and quicker to inspect than non-postcard mail. (Dickerson Decl., ¶¶ 16, 18; Cutright Decl., ¶ 4.) The postcard restriction is a legitimate and neutral way of limiting the greater risks associated with personal mail. *Covell*, 662 F. Supp.2d at 1153. The postcard restriction is not overbroad because speech is not limited in any way. (Dickerson Decl., ¶ 19.)

ii. The Postcard Restriction Does Not Impede Inmate Rehabilitation.

Plaintiff has offered no evidence that the Jail's postcard restriction impedes inmate rehabilitation. (Pl. Mem., p. 21.) Inmates are not impeded because they may send as many postcards as they desire. (Dickerson Decl., ¶ 19.) Prohibited content is detailed in the mail

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policy. (*Id.*, ¶ 10, Ex. F, p. 14, ¶ 44.) Because there are no other content restrictions, an inmate may speak freely. Also, an inmate may obtain permission from a sergeant to send and receive letters not on a postcard when the inmate is within thirty days of completing his or her sentence. (*Id.*, ¶ 10, Ex. F, p. 3, ¶ 4.) This policy is rationally related to the legitimate goal of encouraging inmate rehabilitation.

iii. The Postcard Restriction Does Not Chill Speech.

Plaintiff's argument that a postcard restriction on personal mail chills speech is speculation. (Pl. Mem., p. 20.) Postcards are as readily available as notepad paper and envelopes are to persons outside the Jail. Plaintiff quotes Sheriff Dickerson that the postcard restriction cuts down on the time to screen mail and then speculates that the time-saving is due to a reduction in mail because speech is chilled. (*Id.*) The Jail's actual experience, however, is not that the amount of mail was reduced but that inspecting postcard mail is one-third faster than inspecting non-postcard mail. (Cutright Decl., ¶ 4.) Plaintiff has not shown that a postcard restriction on personal mail chills speech in any way.

iv. The Current Policy Does Not Ban Magazines and Catalogs.

Plaintiff's argument that magazines and catalogs are banned under the current policy is equally without merit. (Pl. Mem., pp. 24-25, 26-27.) As set forth Part II above, plaintiff's magazines and catalogs are distributed to inmates under the current policy. (Dickerson Decl., p. 2; *id.* ¶ 10, Ex. F, pp. 4, 7, ¶¶ 10, 20).

v. The Jail Bans Materials Not Directly Sent to an Inmate by the Publisher.

Plaintiff argues that banning materials from the internet is irrational, relying on *Clement v. California Dep't of Corrections*, 364 F.3d 1148 (9th Cir. 2004) and *Clement v. California Dep't of Corrections*, 220 F. Supp.2d 1098 (N.D. Cal. 2002). (Pl. Mem., p. 25.) This argument relates to Ms. Lennox's claims, for which plaintiff lacks standing. In any event, the *Clement* cases do not assist plaintiff here because they involved a prison policy that banned all internet-generated mailings. The courts found such a total ban to be an arbitrary way of reducing mail volume and further found that there would be no increased security concerns if the requirement

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were removed. As explained above, a postcard restriction has nothing to do with reducing the volume of mail; inmates can send and receive as much personal mail as they desire, and if the restriction were lifted, security and safety concerns would greatly increase, along with the time spent reviewing personal mail. (Dickerson Decl., ¶¶ 16, 18, 25; Cutright Decl, ¶ 4.) Thus, the *Clement* cases do not assist plaintiff even if the Court were to reach the merits of Ms. Lennox's claims.

Further, Ms. Lennox's attempts to send a printed article from PLN's website to inmates violated the long-recognized "publisher's rule" that articles sent to inmates must come directly from the publisher. This rule has been upheld as a valid security regulation. *See, e.g., Prison Legal News v. Lehman*, 272 F. Supp.2d 1151, 1160-61 (upholding "publisher's only" rule for publications not mailed directly from publisher); *Bell v. Wolfish*, 441 U.S. 520, 549 (1979) (hardback books); *Ward v. Washtenaw County Sheriff's Dep't*, 881 F.2d 325, 326 (6th Cir. 1989) (softcover publications); *Kines v. Day*, 754 F.2d 28, 29 (1st Cir. 1985); *Hurd v. Williams*, 755 F.2d 603, 309 (3d Cir. 1985) (same); *Cotton v. Lockhart*, 620 F.2d 670, 672 (8th Cir. 1980) (same). If Ms. Lennox were to send PLN's web article today, it would be rejected because it was not sent directly from the publisher and because it was personal mail not on a postcard. (Dickerson Decl., ¶ 10, Ex. F, p. 20, ¶ 20.) Allowing an exception to the "publisher's rule" on the basis that the article was on a website would swallow the rule because many publishers make their articles available on their websites. Also, as the Jail showed above, its postcard restriction on personal mail is rationally related to the legitimate and neutral interest in jail security given the higher risks associated with personal mail.

b. Second *Turner* Factor: Alternative Avenues for Plaintiff.

Defendants' current mail policy allows plaintiff's correspondence to be distributed to inmates. Thus, although alternative avenues may exist for plaintiff, plaintiff need not engage in them.

To the extent that plaintiff has standing to challenge defendants' personal mail policy, persons who desire to communicate with inmates may visit and call inmates during appropriate

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times. (Dickerson Decl., ¶ 19.) If they choose to communicate by mail, there is no restriction on the number and frequency of postcards that they may send to an inmate. (*Id.*) There is no restriction on what the person and the inmate may say to each other in person or on the phone. The content restrictions on personal mail narrowly relate to ensuring jail security. "Where 'other avenues' remain available for the exercise of the asserted right … courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials … in gauging the validity of the regulation." *Turner*, 482 U.S. at 90 (internal citation omitted). Inmates, their family, and their friends have sufficient alternative avenues of communication.

c. Third Turner Factor: Impact on Inmates, Jail Staff, and Jail Resources.

Again, under defendants' current mail policy, plaintiff's correspondence is distributed to inmates. To the extent that plaintiff has standing to challenge defendants' personal mail policy, the unfettered ability of persons to send inmates materials in any format—postcard, non-postcard, hardcover books, soft cover books, magazines, notepads, post-it pads, etc.—would greatly increase the risks of contraband entering the Jail, along with the time required for screening personal mail. (Dickerson Decl., ¶¶ 16, 18, 25.) "When an accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90.

Plaintiff claims it is not aware of other jails or prisons that limit inmates to postcards for personal mail. (Pl. Mem., p. 23.) A review of case law shows that jails across the country have adopted postcard restrictions on incoming and outgoing inmate mail. *See, e.g.*, *Jamison v. Alachua County Jail*, 2011 U.S. Dist. LEXIS 99225, No. CV10-00250 (N.D. Fla.) (Alachua County Jail); *Price v. Cameron*, 2011 U.S. Dist. LEXIS 121550, No. CV11-00199 (M.D. Fla.) (Charlotte County Jail); *United States v. Kosoko*, 2010 WL 3636276, No. CV08-00332 (D. Nev.) (North Las Vegas Detention Center); *Omar v. Maketa*, 2011 WL 4485955, No. CV 10-08975 (D. Colo.) (Cheyenne Mountain Re-Entry Center).

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d. Fourth *Turner* Factor: Existence of Easy and Obvious Alternatives Suggesting an Exaggerated Response by Prison Officials.

Again, under defendants' current mail policy, plaintiff's correspondence addressed to inmates at the jail is distributed. To the extent plaintiff has standing to challenge defendants' personal mail policy, the burden is on plaintiff to show that there are obvious and easy alternatives to the postcard restriction on personal mail. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987). This test is not a "least restrictive alternative" test:

> [P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate can point to an alternative that fully accommodates the prisoner's right at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90-91. Because of the increased risk of contraband with personal mail and the time-consuming nature of screening personal mail for appropriate mail violations, discarding the postcard restriction would have more than a de minimis cost to the Jail. (Dickerson Decl., ¶¶ 16, 18, 25.) Plaintiff has the burden to show otherwise and has not done so.

For the above reasons, defendants' current mail policy satisfies the *Turner* test in all respects, and plaintiff is not likely to succeed on the merits of its First Amendment claim.

2. Plaintiff's Fourteenth Amendment Claim.

The Fourteenth Amendment requires due process procedures for the sender and the receiver of mail that is rejected by a jail. In *Procunier v. Martinez*, 416 U.S. 396, 417-19 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court upheld the district court's decision to require:

> that an inmate be notified of the rejection of a letter written by him or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence.

Id. at 418-19; *see also Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (same); *Krug v. Lutz*, 329 F.3d 692, 697-98 (due process requires notice of administrative review of decision to withhold correspondence from an inmate). To the extent that plaintiff seeks more than notice of rejection, an opportunity to appeal, and administrative review by an official other than the

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official who rejected the mailing, plaintiff seeks more than is required by the Fourteenth Amendment. *See Cook*, 238 F.3d at 1152.

The Jail's current mail policy provides notice and an opportunity for administrative review to the sender and recipient when mail is rejected. (Dickerson Decl., ¶ 10, Ex. F, ¶¶ 30-31; *id.* ¶ 29, Ex. H.) Paragraphs 30 and 31 are mandatory, not permissive. (*Id.*, ¶ 30 (mail handlers "will" use a Prohibited Mail Slip); *id.*, ¶ 31 (mail handlers "will" process incoming mail "in the following manner")). Plaintiff claims the current policy does not require notice to an inmate of rejected outgoing mail despite the clear language in ¶ 30 that "Mail handlers will confiscate postcards, letters, cards, and publications" and "will use a Prohibited Mail Slip to inform the inmate of the confiscation." (*Id.*, ¶ 10, Ex. F, ¶ 30(a)-(b).) The prohibited mail slip contains clear appeal procedures to the sender and recipient of the mail. (*Id.*, ¶ 29, Ex. H.)

The Jail's current policy has greater due process procedures than that agreed to by plaintiff in *Prison Legal News v. Spokane County*, No. 11-00029 (E.D. Wash.). In the Spokane County case, plaintiff and Spokane County agreed to a consent decree, and plaintiff is monitoring the county's compliance. (Roberson Decl. ¶ 2, Ex. A (Spokane County Sheriff's Office Inmate Policy 204); *id.* ¶ 3, Ex. B (Consent Decree)). Unlike the Columbia County Jail, the Spokane County Jail does not provide a right to appeal if the rejection of mail is not content-based. (*Id.* ¶ 2, Ex. A, p. 6, ¶ 204.7.)

As evidenced by the proposed due process requirements in its proposed preliminary injunction (Chamberlain Decl. ¶ 16, Ex. 14, pp. 5-6), plaintiff seeks due process beyond that required by the Fourteenth Amendment. The proposed preliminary injunction would have required the Jail to notify the publisher of the exact identity of the rejected mailing "described in sufficient detail that the mail can be matched to the mail rejection notices." (*Id.*) This is a vague and untenable condition not required by due process. Plaintiff is a commercial non-profit that sometimes sends multiple mailings in a day to inmates at the Jail. Due Process does not require that defendants ensure that plaintiff can match a rejected mailing with what plaintiff believes it mailed. Plaintiff also sought to require the Jail to notify it of the reason for the rejection

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"described in sufficient detail that the sender can cure or challenge it." (*Id.*) This is another vague condition. Defendants agree that Due Process requires notice to the sender of the reason for the rejection, but a simple reference to the reason is sufficient. Due Process does not require that defendants quote each section of plaintiff's magazine that caused it to be rejected. Plaintiff also sought to require the Jail to reference the "identity and substance" of the mail policy relied upon for justification for the rejection. (*Id.*) This is the same as identifying the reason for the rejection. Defendants' current policy meets Due Process standards.

B. Plaintiff Has Failed to Demonstrate Irreparable Harm.

Plaintiff has failed to show that it will suffer irreparable harm without a preliminary injunction. The Supreme Court recently made it clear that the mere possibility of irreparable harm is not sufficient. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). As extensively argued above, plaintiff is not suffering any ongoing harm under the current policy. The current policy allows plaintiff's magazines, catalogs, brochures, subscription renewal forms, and fundraising letters to be distributed to inmates. Plaintiff's argument that "Defendants cannot be trusted to transparently adopt and apply this purported policy" lacks any merit. (Pl. Mem., p. 30.)

Although the loss of First Amendment freedoms constitutes irreparable harm, "the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989) (citing *Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir. 1983)). "Rather the plaintiffs must show a 'chilling effect on free expression.'" *Id.* at 73 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965)). Plaintiff has not made a showing that the Jail's current mail policy chills speech.

Plaintiff's financial harm can be remedied by an action at law, that is, it is "reparable" harm not "irreparable." *Maxwell-Jolly*, 563 F.3d at 851 ("Typically, monetary harm does not constitute irreparable harm.").

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Plaintiff submitted evidence that subsequent to July 20, 2011, two fundraising letters sent to two inmates were rejected by the Jail. The current policy allows plaintiff's fundraising letters to be distributed to inmates. The only other post-July 20, 2011 alleged constitutional violation relates to inmates who did not receive an article available on PLN's website mailed by Lucy Lennox, a non-party. As argued above, plaintiff lacks standing to assert claims on behalf of Ms. Lennox and, in any event, the rejection of her mailings was proper because the mailings violated the postcard-rule for personal mail and the long-standing "publisher's rule." Since July 20, 2011, no monthly publications, catalogs, or brochures have been rejected by the Jail. Plaintiffs have simply failed to present evidence of irreparable harm.

C. The Balance of Equities Do Not Support Issuing a Preliminary Injunction.

Defendants have made a great effort to conform the Jail's mail policies to constitutional requirements. Plaintiff's familiarity with its constitutional rights is demonstrated by the other lawsuits it has filed raising the same issues raised in this lawsuit. *See e.g., Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001); *Prison Legal News v. Spokane County*, E.D. Wash. CV11-00029-RHW. Plaintiff, nonetheless, did not notify defendants of its claims until filing a lawsuit. (Chamberlain Decl. ¶ 16, Ex. 14 (letter and proposed preliminary injunction).) Had plaintiff notified defendants of its concerns, it could have mitigated the damages it now seeks from defendants. Under these circumstances, the Court cannot say that the balance of equities "tips sharply" in plaintiff's favor.

D. The Public Interest Does Not Support Issuing a Preliminary Injunction.

Although the public interest is always implicated when the First Amendment is at issue, the public interest will not be served by enjoining conduct in which defendants are no longer engaging.

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V. CONCLUSION.

For all of the above reasons, defendants respectfully request that plaintiff's Motion for Preliminary Injunction be denied.

Respectfully submitted this 21st day of February, 2012.

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