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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

COLUMBIA COUNTY; COLUMBIA COUNTY SHERIFF'S OFFICE; JEFF DICKERSON, individually and in his capacity as Columbia County Sheriff,

Defendants.

No. 3:12-CV-71-SI

PLAINTIFF'S POST-TRIAL MEMORANDUM ON INJUNCTIVE RELIEF

I. INTRODUCTION

This is an important free speech case about the government's decision to prohibit mail that was not a postcard, about its longstanding ban on magazines, and about its repeated failure to require and provide due process notice of the reason for censorship and an opportunity to be heard. Plaintiff has asked the Court to declare that Defendants' policies and practices violated the First and Fourteenth Amendments of the United States Constitution and to permanently enjoin them. On May 29, 2012, the Court entered a preliminary injunction enjoining Defendants' enforcement of its Postcard-Only Mail policy.

On February 8, 2013, after a bench trial, the Court asked the parties to submit post-trial briefing on several issues relating to Plaintiff's request for injunctive relief, including: the legal criteria for a permanent injunction; the application of the trial evidence to the legal standard; whether the Sheriff's credibility and limited political term impact the Court's analysis; and whether the injunction should be permanent or a limited term. Plaintiff addresses the Court's questions below.[1]

II. INJUNCTIVE RELIEF

A. Standard

The parties agree that the Supreme Court set forth the standard for permanent injunctive relief in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). *See* Dkt. 98 at 26 (Plaintiff's Motion for Summary Judgment); Dkt. 114 at 19 (Defendants' Response). The Court has also recognized that the criteria set forth in *eBay*, and later in *Monsanto v. Geertson Seed Farms*, 130 S.Ct. 2743, 2756 (2010), establish the criteria for granting a permanent injunction. *See* Appx. A (November 16, 2012, Transcript of Summary Judgment Hearing, at 62:22-63:5). The Ninth Circuit likewise has held this is the standard. *See, e.g., Northern Cheyenne Tribe v.* Norton, 503 F.3d 836, 843 (9th Cir. 2007) (quoting *eBay* as setting standard for injunctive

[1] Plaintiff does not address the Court's questions regarding damages in this post-trial memorandum. Pursuant to agreement with defense counsel and communications with the Court, Plaintiff will submit a second brief regarding damages, if necessary.

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relief); *see also Idearc Media Corp. v. Northwest Directories, Inc.*, 623 F.Supp.2d 1223, 1234 (D. Or. 2008) (same). In *eBay*, the Supreme Court instructed:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391(2006) (holding that four-factor test historically applied in courts of equity applies equally to patent disputes as it does to other cases). The standard for a permanent injunction is the same as for a preliminary injunction, except that the plaintiff must show actual success on the merits rather than a likelihood of success. *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 (1987).

The Ninth Circuit and its district courts have repeatedly issued and affirmed permanent injunctive relief where prisons and jails have violated the First and Fourteenth Amendments when censoring mail. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005), *Clement* v. *California Dept. of Corr.,* 364 F.3d 1148 (9th Cir. 2004); *Ashker v. California Dept. of Corr.*, 350 F.3d 917 (9th Cir. 2003); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001); *Crofton v. Roe*, 170 F.3d 957, 958 (9th Cir. 1999); *Prison Legal News v. Chelan County*, No. CV-11-337-EFS (E.D. Wa. 2011) (Trial Exhibit 158); *PLN v. Spokane County*, Case No. 2:11-cv-00029 (E.D. Wa. 2011) (Trial Exhibit 159).

B. The Facts Presented at Trial Confirm that the Court Should Enter a Permanent Injunction

1. Postcard-Only Policy

a. Success on the Merits

In the Court's Opinion and Order granting Plaintiff's Motion for Preliminary Injunction, the Court applied the standard enunciated in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), and determined that Plaintiff was likely to succeed on the merits of its claim that Defendants'

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Postcard-Only Mail Policy violated the First Amendment of the United States Constitution. Dkt. 64 at pgs. 15-22.

Subsequently, in discovery, Plaintiff obtained additional evidence establishing that Defendants' Postcard-Only Mail Policy was not rationally related to a legitimate penological interest, as the Court held the evidence would likely show. Plaintiff also obtained additional evidence on the other *Turner* factors—alternate avenues, impact of accommodating right, and easy and obvious alternatives—all of which support a finding that Defendants' policy was unconstitutional. This evidence was submitted with Plaintiff's Memorandum in Support of Its Motion for Summary Judgment. *See* Dkt. 98 at pgs. 8 through 19. At the hearing on Plaintiff's Motion for Summary Judgment, the Court denied Plaintiff's motion, preferring to rule on Plaintiff's claims for declaratory and permanent injunctive relief under a preponderance of the evidence standard after a trial on the merits.

At trial, Plaintiff presented the testimony and documentary evidence that it had filed in support of its summary judgment motion. *See* trial testimony and Trial Exhibits 95, 120, 130-141, 144-146, 148-156, 159, 196. This included the mail policies of other well-run correctional institutions including Multnomah and Lane County Jails, the Oregon and Washington Department of Corrections, and the Federal Bureau of Prisons—which do not restrict mail to postcards. *See* Trial Exhibits 148-151.[2]

In addition, new and uncontroverted testimony at trial established that the other avenues for prisoners to communicate and receive information—by postcard, telephone, and in-person visits—are even more restrictive than previously described by Plaintiff in its pretrial briefing. *See* trial testimony of Commander Carpenter, Sergeant Cutright, Bradley Berg, Nataliya

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[2] *See also*, ICE Policy 5.1: Correspondence and Other Mail, Section V.A., located at http://www.ice.gov/doclib/detention-standards/2011/correspondence_and_other_mail.pdf ("Facilities shall not limit detainees to postcards and shall allow envelope mailings.") Plaintiff was not aware of this policy in time to introduce it at trial, but the testimony at trial was that Columbia County Jail is an ICE facility, so Plaintiff provides the ICE policy to the Court now so that it is fully informed.

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Mikhaylova, and Patricia Mendoza; and Trial Exhibits 128, 129, 134, 139. In-person visits are not private; prisoners must meet with friends and family while sitting next to other prisoners, and their visitors are required to sit in a room lined with other visitors—all of which forecloses the possibility of private or confidential communications protected from strangers. Prisoner phone calls are substantially more expensive than sending a letter, the calls are recorded, and the phones are located in a room where more than a dozen other prisoners could be present and listen to their calls. While the Columbia County Jail once had multiple educational programs available to prisoners, those programs no longer exist. The Jail's law "library"—a cart—includes very few legal resources for prisoners. Also, the practical and cost hurdles presented by the Postcard-Only Policy prevented or deterred prisoners, and their friends and family, from fully exercising their free speech rights. These conditions make the right to communication by letter even more important.

b. Monetary Damages are Inadequate

This element and the showing of irreparable harm "are often merged because they involve the same analysis." *N & N Catering Co., Inc. v. City of Chicago*, 26 F. Supp. 2d 1067, 1079 (N.D. Ill. 1998). Since Plaintiff has already shown irreparable harm, it has established this element.

"'Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citation omitted).

This is particularly true of violations of the First Amendment. The Ninth Circuit "and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, (1976), and citing *Sammartano v. First Judicial Dist. Court, in & for County of Carson City*, 303 F.3d 959, 973-74 (9th Cir. 2002); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148, amended, 160 F.3d 541 (9th Cir. 1998); *Jacobsen v. U.S. Postal Service*, 812 F.2d 1151, 1154

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(9th Cir. 1987)). *See also* Appx. A (November 16, 2012, Transcript of Summary Judgment Hearing at 63:18-24: "MR. ROBERSON: It is irreparable damage that cannot be remedied with a monetary award. That's the key part. THE COURT: Right. But aren't there plenty of cases that talk about the fact that monetary awards are insufficient to remedy First Amendment violations? MR. ROBERSON: There are cases that state that, Your Honor.")

Here, PLN suffered irreparable harm because Defendants' repeatedly interfered with the organization's communications of protected speech to prisoners in the Columbia County Jail. The suppression of PLN's speech prevented it from achieving its expressive purposes and permanently deprived it of the opportunity to reach individual prisoners in a timely manner. The testimony of prisoner Brad Berg about how important receiving *Prison Legal News* is and how it is shared among the prisoners in the Jail illustrates the harm that cannot be remedied with money when PLN's speech is stifled. *See also*, Trial Exhibit 173. In the absence of a permanent injunction, nothing would prevent Defendants from reinstating their policy causing irreparable harm to PLN again.

c. The Court has Already Determined that Plaintiff Established the Harm, Hardships, and Public Interest Factors

The Court has already determined that PLN suffered irreparable harm, that the balance of hardships warrants an equitable remedy, and that the public interest would not be disserved by a permanent injunction. Dkt. 64 at 23 ("PLN has established that the IMP's postcard-only mail policy causes irreparable harm. . . The balance of equities tips in PLN's favor. PLN has established that the IMP's postcard-only mail policy burdens its First Amendment rights, as well as the First Amendment rights of inmates and their correspondents. . . The constitutional hardship is far greater than the modest impact on Defendants' time and resources."), and 24 (concluding that that public interest factor is "largely neutral" and to the extent it affects the court's analysis, "it favors PLN."). The evidence that PLN presented at trial strengthened the Court's previous findings.

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On the public interest prong of an injunction, the Ninth Circuit has explained: "We have also consistently recognized the 'significant public interest' in upholding free speech principles" where the government's policies "infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (citation omitted). Here, Defendants' restrictions harmed many third parties, whose interests PLN seeks to protect. In the context of a preliminary injunction to protect such First Amendment rights, the Ninth Circuit has held that "The balance of equities and the public interest thus tip sharply in favor of enjoining" the unconstitutional behavior. *Id.* They apply equally in favor of a permanent injunction. This is particularly true where, as here, at trial Defendants failed to articulate any way in which the Court's preliminary injunction has caused them any hardship whatsoever.

2. Postcard-Only Policy Regarding *Outgoing* Mail

PLN's prior briefing explains why *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), *overruled in part on other grounds by Thornburgh v. Abbott,* 490 U.S. 401, 413-14 (1989), not *Turner*, governs outgoing mail. And that briefing provides compelling argument and evidence establishing that the Sheriff's Postcard-Only Policy for *outgoing* mail does not meet the *Procunier* standard because it does not further an important or substantial governmental interest and is greater than necessary or essential to protect the governmental interest involved. Therefore, Defendants' policy fails under *Procunier*. *See* Dkt. 15 at 21-22; Dkt. 46 at 38-39; Dkt. 71; Dkt. 98 at 18-19; and Dkt. 138 at ¶¶87-91.

At trial, Sergeant Cutright and Sheriff Dickerson affirmed their deposition testimony—establishing that Defendants never considered whether there was any reason, let alone an important or substantial reason, to adopt a postcard policy for outgoing mail. The evidence is that outgoing mail is less likely to contain contraband and that the Jail had never had a problem with contraband leaving the Jail through the outgoing mail. This evidence was undisputed. Thus, Plaintiff has met its burden of proving by a preponderance of the evidence that Defendants failed to meet the *Procunier* standard.

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And, since Defendants did not meet the lower *Turner* standard for its Postcard-Only Policy which Defendants applied to all incoming and outgoing mail, they also fail to meet the higher *Procunier* standard for *outgoing* mail.

3. Magazine Ban

a. Success on the Merits

Prison policies that effectively ban magazines are unconstitutional. *See Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149-51 (9th Cir. 2001). At issue in this case was whether Defendants had a magazine ban and whether they censored or deterred prisoners from receiving magazines while incarcerated at the Columbia County Jail.

At the time the Court considered PLN's Motion for Preliminary Injunction, the only evidence before the Court was the Columbia County Sheriff's Office's website, which stated that magazines are "not allowed" (and which the Sheriff claimed was incorrect), and the Jail's claimed mail "policy" that stated that "periodicals may be procured[.]" The Court concluded that "[b]ecause the IMP permits inmates to receive PLN's journal, the court limits its consideration of PLN's free speech claim to the IMP's postcard-only mail policy for both incoming and outgoing personal mail." Dkt. 64 at 15.

Since then, discovery revealed that for many years Defendants told staff, prisoners, and the public that it banned magazines, and few, if any, of Defendants' agents and staff were aware of the document titled "Inmate Mail Policy" that said otherwise. *Compare* Trial Exhibits 98 (March 23, 2010 Memorandum), 107-112 (Inmate Manuals), 101 (CCSO websites), 143 and 194 (Inmate Request Forms), *with* 113 (document titled "Inmate Mail Policies"). And Defendants' practice was to not accept magazines. *See* Trial Exhibits 118 and 119 (mail rejection forms), and 28-55 (rejected PLN magazines); and trial testimony of Sergeant Cutright, Commander Carpenter, Sergeant Rigdon, and Bradley Berg. The evidence establishing Defendants' magazine ban and near-absolute chill of speech is summarized in Plaintiff's Memorandum in

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Support of its Motion for Summary Judgment at pgs. 19-22. The testimony and exhibits admitted at trial confirmed that Defendants had a long-standing culture that banned magazines.

The undisputed evidence admitted at trial included the following:

- From at least 2009 until May 2012, every time a prisoner was booked at the Columbia County Jail, Defendants provided the prisoner with an Inmate Manual that stated either "We do not accept magazines" or "We do not accept any periodicals." *See* Exhibits 107 through 112.
- On March 23, 2010, the Sheriff's Office issued a Memorandum titled "Mail Procedure Changes" to the Corrections Division and all inmates, which stated "Magazines are not allowed inside the facility." *See* Exhibit 98. Defendants kept this Memorandum in the Jail's inmate holding cells until May 2012. *See* testimony of Bradley Berg; Trial Exhibit 126, 127; testimony of Undersheriff Moyer.
- From at least August 2010 through January 19, 2012, Defendants' website stated "We do not accept magazines" and "Magazines: Are not allowed inside the facility." *See* Exhibit 101.
- Defendants' mail rejection form included the pre-printed words "Do not accept periodicals." *See* Trial Exhibits 118, 119.
- When prisoners inquired, Defendants told prisoners that the Jail does not accept magazines. *See* Trial Exhibits 143, 194.
- Defendants' communications about their magazine ban and practice of banning magazines deterred prisoners from obtaining magazines while incarcerated at the Columbia County Jail. Sergeant Bryan Cutright "never" saw a magazine arrive at the Jail during his 17-year tenure. Jail Commander Jim Carpenter saw one magazine arrive at the Jail during his 22 years of employment, and it was rejected. *See* trial testimony of Jail Commander Carpenter, Sergeant Cutright, and Bradley Berg.

In sum, at trial, Plaintiff established by a preponderance of the evidence that for years Defendants told jail staff, prisoners, and the public, that the Jail did not allow magazines, and acted accordingly by censoring magazines that arrived at the Jail.

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Despite all this Defendants have argued that their actual "policy" was found elsewhere in a document titled "Inmate Mail Policy." But they failed to present any testimony at trial that employees ever knew of that document, read or relied upon it, let alone enforced it. In fact, all evidence is to the contrary. Accordingly, the Defendants' actual "policy" was their widely-publicized and regularly enforced magazine ban. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) ("Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced."); . *Redman v. County of San Diego*, 942 F.2d 1435, 1445 (9th Cir. 1991) ("[T]he routine failure (or claimed inability) to follow the general policy… constitutes a custom or policy which overrides, for *Monell* purposes, the general policy."); *Ware v Jackson County, MO,* 150 F.3d 873, 882 (8th Cir. 1998) ("[T]he existence of written policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced.").

b. Monetary Damages are Inadequate

Plaintiff incorporates the discussion from the Postcard-Only Policy section above, which is equally applicable to the magazine ban.

c. Irreparable Harm, Balance of Hardships, and Public Interest Factors

PLN suffered irreparable harm when Defendants censored its magazines, preventing PLN from reaching its intended audience, in violation of its First Amendment rights. *See* Trial Exhibits 28-55; and Dkt. 203 (Stipulation); trial testimony of Paul Wright.

As the Court has already recognized, Dkt. 64 at 23, the Ninth Circuit and Supreme Court have repeatedly held that "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

For the same reasons articulated by the Court regarding Defendants' Postcard-Only Policy, the balance of hardships weighs in PLN's favor and the public interest factor supports a decision by this Court to enjoin Defendants' ban on magazines

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4. Lack of Due Process

a. Success on the Merits

With its motion for summary judgment, PLN submitted the evidence establishing that at the time this litigation commenced Defendants' due process policies and practices failed to provide constitutionally adequate due process when they censored mail. *See* Dkt. 98 at pgs. 22-24. At trial, Plaintiff presented the testimony and exhibits cited in its motion, and Defendants admitted that it failed to provide due process notice and an opportunity to be heard to PLN, Ms. Lennox, and the prisoner-addressees, when Defendants censored their mail. *See* trial testimony of Sergeant Cutright, Jail Commander Carpenter, Sheriff Dickerson, Bradley Berg, and Nataliya Mikhaylova; Dkt. 203 (Stipulation); and Trial Exhibits 1-65, 71-90, 98, 100, 101, 113, 114, 115, 142.

b. Monetary Damages are Inadequate

Plaintiff incorporates the discussion from the Postcard-Only Policy section above explaining the constitutional violations are irremediable with money. That is equally applicable here. And since due process is intended to provide notice and an opportunity to be heard in order to allow timely correction of constitutional violations then Defendants' denial of due process leads directly to the deprivation of First Amendment rights, which cannot be adequately remedied financially.

c. Irreparable Harm, Balance of Hardships, and Public Interest Factors

Plaintiff suffered irreparable harm when Defendants failed to provide Plaintiff and the prisoner-addressees adequate due process notice of the reason for censorship of its mail and failed to provide an opportunity to be heard to challenge the censorship decisions. Defendants often marked "contraband" or "violates security" and the reasons for censoring and returning Plaintiff's mail—providing no effective notice of the actual reason the mail was censored. Defendants wholly failed to provide any information about appeal rights or procedures to Plaintiff. And they did not provide any notice, or opportunity to be heard, to the prisoner-addressees that Plaintiff had sent them mail that was rejected. *See* Dkt. 203 (Stipulation). As a

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result of Defendants inadequate due process procedures, and practices, Plaintiff was unable to reach its intended audience—the prisoners it sent mail to at the Columbia County Jail. It was unable to share its monthly journal articles, book catalog, and other materials, and was unable to further its core mission of educating prisoners about their rights and provide self-help information to help them while incarcerated and to prepare for life after incarceration. *See* trial testimony of Paul Wright and Trial Exhibits 1-65.

At trial, Defendants failed to articulate any hardship should the Court enter a permanent order requiring them to provide constitutionally adequate due process notice and an opportunity to be heard to the senders and intended recipients of incoming and outgoing mail.

The public interest would be served, not disserved, if the Court enters a permanent injunction requiring due process. A court order that requires Defendants to provide notice and an opportunity to be heard when they censor mail will help to ensure that Defendants do not return to their old ways—when providing notice was rare and when it was given it was severely inadequate, and notice of an opportunity to be heard was not provided at all. A court order requiring due process will assist prisoners and the public to understand why their mail is censored, correct their mail so that it will be delivered or challenge the Jail's censorship decision. Ultimately, providing due process will help facilitate prisoners' communications to and from the outside world, and will promote rehabilitation and recidivism—which is an incredibly important public and penological interest. *See* Trial Exhibit 156 (BOP Report titled "Prison Education Program Participation and Recidivism"), 173 (letter from CCJ prisoner to PLN).

C. Credibility Is Not Relevant

As the Court has already recognized, the credibility of the policy-maker is not part of the four-part test for permanent injunctive relief. *See* Appx. A (November 16, 2012, Transcript of Summary Judgment Hearing, at 64:3-65:20: "Let us assume that this sheriff had total credibility, was completely credible, and you were absolutely convinced that this sheriff would never reinstitute that policy. Fine. So what? . . . So four years from now what if he is not re-elected? I don't think the credibility of the sheriff is relevant.

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. . . I just don't see how it is relevant in light of what *Monsanto* and *eBay* tell us. . . . There is plenty of other equitable relief that I need to balance, but I don't think part of that equation entails any credibility analysis of the sheriff.").

PLN is not aware of any caselaw that says otherwise.

D. Defendants Failed to Show Voluntary Cessation

At the close of trial, the Court asked the parties the following question:

> [I]f the Court were to conclude as a factual finding as a result of this trial that Sheriff Dickerson is "an honorable and conscientious public servant who in the Court's opinion will follow a Court's declaratory ruling unless binding or applicable precedent change it or require it to be changed, basically he will follow the law, how should, if at all, the Court deal with the reality that this lawsuit is also against Columbia County and the Columbia County Sheriff's Office and that Sheriff Dickerson will not be the sheriff forever and cannot bind his successors?

Plaintiff believes voluntary cessation caselaw simply does not apply, but addresses it to the extent the Court's question calls for such analysis.

1. Voluntary Cessation Standard

To render Plaintiff's claim for injunctive relief moot, Defendants have the "heavy burden" of persuading the Court that their "voluntary conduct" make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). *See also Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999) (standard is "whether the defendant is free to return to its illegal action at any time."); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) ("heavy burden" to show that wrongful behavior cannot be reasonably expected to recur). This doctrine protects against defendants who "seek to evade sanction by predictable protestations of repentance and reform." *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284, n.1 (2001) (internal quotation marks omitted). Plaintiff has previously explained, in detail, why Defendants cannot meet their heavy burden to prove voluntary cessation as to any of PLN's claims. *See* Dkt. 119 at pgs. 12-21; Dkt. 46 at pgs. 7-20. And at trial, Defendants failed to advance their position.

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2. Sheriff Dickerson's Behavior Was Not Voluntary

At trial, Sheriff Dickerson admitted that he continued to enforce his Postcard-Only Mail Policy until the Court entered its preliminary injunction. *See* testimony of Sheriff Dickerson, and Trial Exhibits 104, 116, 272, 273, 274. Thus, there was nothing voluntary about the sheriff's decision to stop banning non-postcard mail. It was court ordered.

Also, the sheriff decided to amend his mail "policy" to permit delivery of "magazines" and improve his due process policies only *after* this litigation commenced. And he did not inform the prisoners or the public that the Jail permits the delivery of magazines or provides due process and an opportunity to be heard, until *after* he was questioned about failing to do so in his deposition in May 2012—four months after PLN filed suit. Thus, the evidence reveals that the Sheriff only changed these aspects of his policy due to the prodding effect of litigation. So, these changes were not voluntary at all. *See United States v. Government of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004); *Smith v. Univ. of Washington*, 233 F.3d 1188, 1194 (9th Cir. 2000); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998), and discussion in Dkt. 119 at pg. 13.

To fully respond to the Court's question, and in case the court determines that it should apply a voluntarily cessation analysis to some aspect of this case, Plaintiff explains below why Defendants fail to meet their heavy burden.

3. Sheriff Dickerson Did Not Make It "Absolutely Clear" that His Unconstitutional Behavior Could Not Reasonably Be Expected to Recur

a. Postcard-Only Policy

Sheriff Dickerson's adoption of a new mail policy that permits the delivery of non-postcard mail did not moot Plaintiff's claim for permanent injunctive relief. As stated above, the Sheriff adopted a new mail policy that permits non-postcard mail only in response to the Court's directive that he halt his existing policy. Adherence to the terms of a preliminary injunction does not render a claim for permanent relief moot; it merely shows that that an injunction is effective. "An enjoined party ought not to be rewarded merely for doing what the court has directed." 11A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure, § 2961 at

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405 (1995). If adhering to the Court's order were enough, then a plaintiff who successfully obtained preliminary relief could only later obtain a permanent injunction by showing that the defendant was in contempt of the court's preliminary order. That is not the standard. *See Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957) (denying defendant's motion to vacate permanent injunction solely on basis that its compliance for 12 years rendered the prospective application of the injunction inequitable; holding "We would not approve trading [defendant's] sustained obedience for a dissolution of the injunction. Compliance is just what the law expects.").

Similarly, the Sheriff's testimony that he does not intend to return to his Postcard-Only Policy because it would be administratively cumbersome is a weak and tenuous rationale that does not satisfy his heavy burden to show voluntary cessation. A promise to refrain from future violations of the law is not sufficient to establish mootness. *See U. S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203-204 (1968) (holding that "appellees' own statement that it would be uneconomical for them to engage in any further joint operations"—the challenged conduct in that case—"cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes."). What is seen as cumbersome or not economical today—or to this Sheriff—could readily change when the economy, the budget, or the person in charge is different tomorrow.

Also, the Sheriff's continued defense of his Postcard-Only Policy as constitutional prevents Plaintiff's request for injunctive relief from being moot. *See Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944) (reversing district court's decision to deny injunction where defendant discontinued challenged practice two months after litigation commenced, holding "Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made."); *Donovan v. Cunningham*, 716 F.2d 1455, 1461 -1462 (5th Cir. 1983) (holding that defendants' "assurances that they do not intend to serve as ERISA fiduciaries in the future are clearly insufficient to meet their burden of persuasion . . . This is particularly true in the face of appellees' continuing

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insistence that their discontinued activities were legal and their continued occupation of positions that would enable resumption of" the challenged activities).

Lastly, without a permanent injunction, nothing prevents the Sheriff, or his successor, from adopting a Postcard-Only Policy again.

b. Magazine Ban and Lack of Due Process

Although the Sheriff adopted a new mail "policy" in response to this litigation, which permits periodicals (including magazines) and improved his due process procedures, he failed to disseminate the policy to the public and prisoners for at least four months. *See* testimony of Sheriff Dickerson and Bradley Berg, and Trial Exhibits 167 (Sheriff's Answer to Interrogatory No. 7), 101-106 (CCSO website, January through June 2012), 111 (2010 Inmate Manual), 147 (inmate request for new mail policy, denied), 197 (Inmate Mail Guide).[3] So for several months after PLN's lawsuit notified them that their ban and practices violated the Constitution, Defendants continued to lead the public and prisoners to believe that those policies and practices were in force, adversely affecting hundreds of prisoners and their correspondents. And when the Sheriff was asked at trial what stopped him from posting a couple of sentences on his website that stated the Jail allowed magazines and would provide due process to the sender and intended recipient when the Jail censored mail, the Sheriff testified that "nothing" stopped him. This corrective action would have taken only minutes. He also admitted that he could have, but did not, instruct his staff to mark-out the short sentence in the inmate manual that prohibited periodicals. And he acknowledged that nearly a full year elapsed before he updated the Spanish language version of the inmate manual to allow periodicals. Bradley Berg testified that at least one-third of the jail population is Spanish-speaking, revealing that this failure to update likely continued deterring protected speech long after the sheriff was aware that the mail policy, as stated in his manual, was unconstitutional.

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[3] In contrast, when Defendants adopted the Postcard-Only Mail Policy in 2010, they issued a press release, spoke to the local newspaper about the policy, and posted information about the policy on the CCSO website. *See* Trial Exhibit 96, 97, 99, 101.

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Further, the Sheriff claims that he had a purported written "policy" that did not ban magazines and periodicals throughout his tenure as Sheriff. *See* Trial Exhibits 296-300. But the evidence at trial showed that the actual "policy," and the practice and custom at the Columbia County Jail, was to ban them. So, the adoption of a purported policy was, and is, insufficient for Defendants to establish that violations will not occur again.

4. The Sheriff's Office and Columbia County Have Not Shown Voluntary Cessation

At trial, the Columbia County Sheriff's Office and Columbia County failed to offer any evidence to show that they voluntarily halted their unconstitutional policies and practices or that their unconstitutional behavior could not reasonably be expected to recur. In fact, defense witnesses testified that they still believe their adoption of a Postcard-Only Policy was a good idea, and the purported reasons for adopting a Postcard-Only Policy in the first place—to reduce the risk of contraband entering the jail, to save time and resources, and to achieve uniformity with other jails—are still alive. Indeed, Undersheriff Moyer testified that the Court's preliminary injunction has placed the Jail at risk. And the only reason the current Sheriff gave for not returning to his Postcard-Only Policy in the future was because it would be administratively cumbersome to go back. These facts show that the Sheriff's Office and Columbia County stand by their Postcard-Only Policy and the pressures that purportedly caused them to adopt the policy in the first place continue. For these reasons, Defendants have failed to make it "absolutely clear" that their unconstitutional behavior is not likely to recur.

As the Court has already pointed out, the Sheriff does not bind his successors. And without a permanent injunction, nothing stops the County or the Sheriff's Office or the next sheriff from deciding to implement a Postcard-Only Policy, magazine ban, or unconstitutional due process policy or practices again.

E. Term of Injunction

As shown above, Plaintiff has proven by a preponderance of the evidence that it meets the standard for permanent injunctive relief. At trial, Defendants did not offer any evidence that

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the particular circumstances of this case warrant a less-than-permanent injunction and none are apparent.

If circumstances arise in the future, Defendants may obtain relief by establishing that prospective application "is no longer equitable." *See* FRCP 60(b). To modify or vacate the permanent injunctions, they may seek relief when: there has been a significant change in the factual conditions that make compliance substantially more onerous; enforcement would be detrimental to the public interest; the terms are unworkable because of unforeseen obstacles; or the statutory or decisional law has changed to make legal the conduct that has been enjoined. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-385, 388 (1992); *S.E.C. v. Coldicutt,* 258 F.3d 939, 945 (9th Cir. 2001). Defendants have not shown any such basis here.

III. CONCLUSION

Plaintiff respectfully asks that the Court please enter the requested permanent injunction on all claims. It is essential to ensuring that Defendants abide by the First and Fourteenth Amendments when processing incoming and outgoing prisoner mail. And, an injunction will send a crucial message to other counties in Oregon and elsewhere who have adopted, or who are contemplating adoption of, unconstitutional mail policies that it is not worth taking the risk.

DATED this 22nd day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2013, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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APPENDIX A
TO
PLAINTIFF'S POST-TRIAL MEMORANDUM ON INJUNCTIVE RELIEF

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PRISON LEGAL NEWS,	)	
	)	
Plaintiff,	)	Case No. 3:12-CV-0071-SI
	)	
vs.	)	November 16, 2012
	)	
COLUMBIA COUNTY, et al.,	)	Portland, Oregon
	)	
Defendants.	)	

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

preliminary injunction and point out case law that we think that the Court should consider before deciding this issue.

THE COURT: Okay. That answers my question.

MR. ROBERSON: I think it is important to point out that again that we are only here on the equitable relief claims, not the claim for damages.

PLN -- we haven't discussed the permanent injunction yet, but we could move to that next. I feel like we have been totally discussing declaratory relief so far, Your Honor, and standing.

THE COURT: You are correct, although I'm planning on using a lot of what has already been said in the analysis on the permanent declaration issue.

MR. ROBERSON: I think the most important issue on the permanent injunctive claim, if the Court gets beyond standing and mootness issues, is the irreparable harm aspect. We are only focused here on future imminent harm. PLN has to make a showing of that, and none of their mail has been rejected. They are not even challenging what the current mail policy statement states.

THE COURT: But if you look at the criteria set forth most recently by the Supreme Court in the Monsanto case, which, frankly, quotes the eBay case that you are both relying on, the requirement for a permanent

injunction is not a likelihood of future irreparable injury. It is the establishment of past irreparable injury. Am I right? I think the answer to my question is yes. That's what Monsanto and eBay say. They refer to it in the past tense.

MR. ROBERSON: It is irreparable harm that cannot be remedied with a claim for damages.

THE COURT: Right, agreed. See, Winter tells us for preliminary injunctive relief, I have to look to a likelihood of future injuries. For permanent injunctive relieve, the language of Monsanto, which frankly just quotes eBay, the first element is, has there been irreparable damage? And if there has been, assuming there is a constitutional violation, I think there has been. It occurred before my preliminary injunction order. But why isn't that enough for permanent injunctive relief?

MR. ROBERSON: It is irreparable damage that cannot be remedied with a monetary award. That's the key part.

THE COURT: Right. But aren't there plenty of cases that talk about the fact that monetary awards are insufficient to remedy First Amendment violations?

MR. ROBERSON: There are cases that state that, Your Honor.

Here, PLN's essential argument is that you just

can't believe the sheriff. They spend half of their briefing on that issue.

THE COURT: Fair enough. I don't think I'm going to make a decision, certainly not on summary judgment, that you can't believe the sheriff. That is not summary judgment material. But I don't think that I need to make any conclusions about that. Let us assume that this sheriff had total credibility, was completely credible, and you were absolutely convinced that this sheriff would never reinstitute that policy. Fine. So what? Elections come -- what is the sheriff is elected to? What's the term? Four years?

MR. ROBERSON: I believe so.

THE COURT: I know it is outside the record to ask, but was he re-elected?

MR. KRAEMER: He was.

THE COURT: Fine. So four years from now what if he is not re-elected? I don't think the credibility of the sheriff is relevant. Maybe if he had a history of violating past injunctions, that would be relevant. But there is no evidence from the plaintiff that he does. I'm just looking at the basic test of a permanent injunction that eBay and Monsanto from the Supreme Court tell us, and although I can't remember the last two elements, although it is probably the basic stuff of injunctions, the first

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Dennis W. Apodaca — November 26, 2012
DENNIS W. APODACA, RMR, FCRR, RPR — DATE
Official Court Reporter