UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CRIME, JUSTICE & AMERICA, INC., a California Corporation; and RAY HRDLICKA, an individual,

Plaintiffs,

v.

JERRY W. SMITH, in his official capacity as Sheriff of the County of Butte, California,

Defendant.

No. 2:08-cv-00343-TLN-EFB

ORDER

This matter is before the Court on Plaintiffs' Motion for Entry of Judgment on Remand (ECF No. 67) and Second Motion for Partial Summary Judgment (ECF No. 68). Defendant opposes both motions, requests a continuance to pursue discovery, and countermoves for partial summary judgment. (ECF Nos. 70, 71.) For the reasons set forth below, Defendant's request for a continuance is DENIED, Plaintiffs' motion for partial summary judgment is GRANTED IN PART and DENIED IN PART, Plaintiffs' motion for judgment on remand is DENIED, and Defendant's countermotion is DENIED.

BACKGROUND

This case and the pending motions are before the Court on remand from the Ninth Circuit.

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Hrdlicka v. Reniff, 631 F.3d 1044, 1046 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1544, (2012).[1] In that opinion, the Ninth Circuit set out in detail the factual background of this case. *Id.* at 1046–48. Thus, to avoid repetition, only the facts and procedural history most pertinent to decision of the motions are set out below, and those facts were drawn from the parties' undisputed statements of material fact.

A. Factual Background

Crime Justice & America ("CJA") magazine is a quarterly publication primarily intended for inmates awaiting trial. The content—written by attorneys, reformed offenders, and law-enforcement personnel—addresses mostly issues germane to these inmates, such as constitutional rights and criminal procedure. CJA also includes advertisements for bail bondsmen and criminal-defense attorneys—representing about 25% of the content. CJA is distributed in one of two ways: (1) Plaintiffs obtain a list of current inmates and mail the magazine unsolicited to about 10% of inmates, or (2) Plaintiffs deliver a bulk mailing to the jail for officials to distribute to inmates.

Plaintiffs contacted Butte County Jail and requested to distribute CJA magazine to the inmates there. After Plaintiffs' request, Butte County Jail adopted a new mail-distribution policy prohibiting the distribution of all unsolicited commercial mail. Citing its recently adopted policy, the Jail refused to allow Plaintiffs to distribute CJA. Plaintiffs sue, *inter alia*, to enjoin enforcement of the mail-distribution policy, arguing the policy is unconstitutional as applied because it violates the First Amendment.

B. Legal Background

In the landmark case *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court held that intermediate scrutiny applies to determine the constitutionality of prison rules. Under the *Turner* test, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. "[S]everal factors are relevant in determining the reasonableness of the regulation at issue. First, there must be a

[1] Sheriff Reniff has since been replaced by Sheriff Smith, and the Court changed the name of the Defendant in the caption in a prior order under Fed. R. Civ. P. 25(d), which automatically substitutes the successor public officer when a public officer sued in his official capacity ceases to hold office. (Order 1 n.*, ECF No. 64.)

'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* "A second factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Finally, the Court must consider "evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

C. Procedural Background

In a prior order, this Court granted summary judgment for Defendant, holding that, "all four *Turner* factors weigh in favor of Defendant" as a matter of law, such that "Defendant's refusal to . . . distribute unsolicited copies of *CJA* is 'reasonably related to legitimate penological interests.'" (Order 7:17–21, ECF No. 45 (citing *Turner*, 482, U.S. at 89).) The Ninth Circuit reversed, concluding that on the record before it, "questions of material fact preclude summary judgment" because the court could not "hold as a matter of law under *Turner* that defendant[] . . . sufficiently justified [its] refusal to distribute unsolicited copies of CJA to jail inmates." *Hrdlicka*, 631 F.3d at 1046. The appeals court remanded the case to this Court "for further proceedings." *Id.* at 1055.[2]

In reversing the decision, the Ninth Circuit decided several issues, and reserved one issue, that concern decision of the motions presently before this Court. First, the court rejected the defendants' argument that "the First Amendment [categorically] does not protect distribution of a publication to inmates who have not requested it," *Hrdlicka*, 631 F.3d at 1048, and held that "a publisher has a First Amendment interest in distributing, and inmates in receiving, unsolicited publication." *Id.* at 1049. Thus, the court held that *Turner*'s four-factor test applies to determine the constitutionality of Plaintiffs' challenge to Defendant's jail regulation, and rejected Defendant's argument to the contrary, and the dissent's argument, that "because a prison is a non-public forum, a publisher has no First Amendment interest in distributing . . . unsolicited

[2] The Ninth Circuit in *Hrdlicka* considered and decided together the related appeals of this case and another separate action, *Hrdlicka v. McGiness*, No. 2:08-cv-00394. 631 F.3d at 1046.

publications." *Id.* at 1049–50 (citing *id.* at 1055–58 (Smith, J., dissenting)).

In analyzing de novo this Court's grant of summary judgment under Turner, the Ninth Circuit held that several fact issues precluded summary judgment for Defendant. Regarding the first Turner factor—whether the regulation is "rationally related to a legitimate penological objective"—the Ninth Circuit addressed Defendant's asserted penological objectives separately. The court first addressed Defendant's assertion "that refusing to allow distribution of unsolicited copies of CJA promotes" jail security "by reducing the likelihood of contraband . . . , and by reducing the amount of clutter in each inmate's cell thereby reducing the risk of fires and enabling efficient cell searches." *Id.* at 1051. Defendant supported his assertion arguing that "unsolicited publications are more likely . . . to be used for 'nefarious purposes' such as blocking lights or clogging toilets." *Id.* The Ninth Circuit held there was a fact question on this issue, citing the jail's separate policy already "regulating inmates' possession of property, including paper, in their cells," because it was "unclear the degree to which allowing distribution of CJA in the jails would . . . adversely affect jail security" in light of the policy that already regulated property. *Id.* at 1052.

Next, the Ninth Circuit evaluated Defendant's "concern that allowing delivery of unsolicited copies of CJA would require additional staff time." *Id.* Because the officers at Defendant's jail "provided no information quantifying the additional resources that would be required to distribute CJA," nor suggested that "unsolicited publications are more difficult to inspect and deliver than solicited publications," the court held a fact issue precluded summary judgment. *Id.* at 1052–53. Moreover, regarding Defendant's slippery slope assertion—that to accept publication from one publisher would obligate the jail to accept other publications—the court held that, because "Butte County jail officers did not present any evidence about other requests to distribute unsolicited mail," a fact issue precluded summary judgment on this issue as well. *Id.* at 1053.

Next, the Ninth Circuit addressed Defendant's argument that distributing CJA may violate the terms of an existing advertising agreement. Butte County Jail had an exclusive contract with Partners for a Safer America, an advertising company that operates jail bulletin boards on which

bail bondsmen post advertisements for a fee. The court held a jail has no "legitimate penological interest, for purposes of *Turner*, in protecting a profit made by impinging on inmates' First Amendment rights." *Id.*

On the second and third *Turner* factors—alternative avenues and impact of accommodation—the Ninth Circuit held material questions of fact remain, precluding summary judgment. Specifically, the court held "there is a material question of fact whether, as a practical matter, Plaintiffs can effectively reach county jail inmates if they can deliver CJA only upon request." *Id.* at 1054. Moreover, because officers at the jail "have not explained how mail inspectors will distinguish between a copy of CJA [that is requested] and one that is not," "there are material questions of fact as to whether, and to what degree, the jail[] would be forced to expend significant additional resources if CJA is delivered . . . ." *Id.* Further, the court observed that the "undisputed fact that CJA is currently distributed in more than 60 counties throughout 13 states, including in 32 California county jails, suggests that the response . . . in this case may be exaggerated," the fourth and final *Turner* factor. *Id.* at 1055.

Finally, in concluding that Defendant was not entitled to summary judgment, the Ninth Circuit declined to decide the validity of Defendant's separate justification: Defendant's concern that distribution of CJA violates California's law regulating bail advertising. *Id.* Defendant again raises this issue here in his opposition to Plaintiffs' motion for partial summary judgment, which this Court decides below.

STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In essence," the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317,

327 (1986) (quoting Fed. R. Civ. P. 1).

The moving party bears the initial burden of showing the Court either "that there is an absence of evidence to support the nonmoving party's case," *Celotex*, 477 U.S. at 325, or by submitting affirmative "evidence negating an essential element of the nonmoving party's claim or defense." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the nonmoving party, which "must establish that there is a genuine [dispute] of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986).

To carry this burden, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson*, 477 U.S. at 252. The parties must cite "to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1).

Further, Local Rule 260(b) prescribes:

> Any party opposing a motion for summary judgment or summary adjudication [must] reproduce the itemized facts in the [moving party's] Statement of Undisputed Facts and admit those facts that are undisputed and deny those that are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon in support of that denial.

If the nonmovant does not "specifically" controvert duly supported "facts identified in the [movant's] statement of undisputed facts," the nonmovant "is deemed to have admitted the validity of the facts contained in the [movant's] statement." *Beard v. Banks*, 548 U.S. 521, 527 (2006).

In deciding summary judgment, the Court views "the evidence in the light most favorable" to the nonmoving party. *McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th

Cir. 2009). "All justifiable inferences are to be drawn" the nonmovant's favor, and the nonmovant's "evidence is to be believed." *Id.* "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment . . . ." *Anderson*, 477 U.S. at 252.

ANALYSIS

A. Defendant's Rule 56(d) Motion for Continuance

In his opposition to Plaintiffs' motion for partial summary judgment, Defendant moves for a continuance to conduct discovery. (Def.'s Opp'n to Mot. Summ. J./Mot. Pursuant Rule 56(f); Countermot. Summ. Adjudication Pursuant Local R. 230(e) ("Opp'n") 2:7–8, ECF No. 71.) The Court cannot consider Plaintiffs' motion for summary judgment until it first determines the merits of Defendant's motion for a continuance to conduct discovery under Rule 56(d). *Garrett v. City & Cnty. of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987). Rule 56(d) prescribes: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . defer considering the motion or deny it." "To prevail under . . . Rule [56(d)], [a] part[y] opposing a motion for summary judgment must make (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists." *Emp'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1129 (9th Cir. 2004). "The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 (9th Cir. 2009). Further, a court may deny "further discovery if the movant has failed diligently to pursue discovery in the past." *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).

Here, Defendant contends that he needs more discovery "in analyzing the fourth Turner factor 'whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response . . . .'" (Opp'n 3:1–6.) Specifically, Defendant asserts in a conclusory manner that he "has not had an opportunity to explore" Plaintiffs' claims that CJA is distributed widely. (*Id.* at 3:9–11.) Defendant does not, however, support these assertions of prejudice with

an affidavit or declaration identifying the specific facts necessary to his opposition, as required by Rule 56(d). Further, Defendant has not shown that additional facts concerning one factor in a four-factor test is "essential to justify its opposition" to Plaintiffs' motion. Fed. R. Civ. P. 56(d). Moreover, the Court finds that Defendant has had adequate opportunity to discover these facts in the five years of litigation. *See Chance*, 242 F.3d at 1161 n.6 (noting a court may deny "further discovery if the movant has failed diligently to pursue discovery in the past.").

Therefore, Defendant's motion for a continuance is DENIED.

B. Plaintiffs' Motion for Partial Summary Judgment[3]

Plaintiffs move for partial summary judgment on their first claim that Defendant has violated Plaintiffs' First Amendment rights by refusing to distribute CJA in the Butte County Jail. The Ninth Circuit has previously held in this case that Plaintiffs' First Amendment rights were impinged by Defendant's regulation. *Hrdlicka*, 631 F.3d at 1049–50. Thus, the issue that must be decided is whether Plaintiffs have shown Defendant's regulation prohibiting distribution of unsolicited commercial publications is not "reasonably related to legitimate penological interests" as a matter of law. Accordingly, the Ninth Circuit held that Defendant's policy is to be reviewed "under the four-factor *Turner* test." *Id.* at 1050–51.

Before turning to the *Turner* factors, the Court notes that it does not write on a blank slate in this case. The Ninth Circuit has applied the *Turner* test in a series of cases concerning the distribution of publications to prisoners, striking down the regulations as unconstitutional in each case. In *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999), the court struck down a regulation that prohibited a prisoner from receiving a gift book from his stepfather. *Id.* at 960–61. In *Prison Legal News v. Cook* (*PLN I*), 238 F.3d 1145 (9th Cir. 2001), the court struck down a regulation that prohibited bulk-rate nonprofit subscription publications as unconstitutional as applied to *Prison Legal News*, a nonprofit organization that circulates newsletters addressing prison-related issues. *Id.* at 1148. The court reasoned that "the receipt of such unobjectionable mail [does not]

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[3] Defendant argues that Plaintiffs are judicially estopped from moving for summary judgment because, in their opposition to Defendant's prior motion for summary judgment, Plaintiffs argued fact issues precluded summary judgment. (Opp'n 2:8–11.) Since Rule 56(b) provides that "a party may file a motion for summary judgment at any time" before trial and Defendant provides no authority in support of this position, Defendant's argument lacks merit.

implicate penological interests," *Id.* at 1149, and held the jail "failed to show the ban on standard [bulk-rate] mail [was] rationally related to a legitimate penological interest." *Id.* at 1151. The Ninth Circuit extended the reasoning of *PLN I* to strike down a policy banning "for-profit, subscription publications," specifically *Montana Outdoors* magazine, in *Morrison v. Hall*, 261 F.3d 896, 903 (9th Cir. 2001).

This reasoning was extended to non-subscription bulk mail in *Prison Legal News v. Lehman* (*PLN II*), 397 F.3d 692 (9th Cir. 2005). Prison Legal News began to distribute a magazine about prison-related issues for free to inmates who had requested it. In *PLN II*, the Department of Corrections asserted four penological interests to justify its ban on non-subscription bulk mail and catalogs:

> (1) reducing the volume of mail to be searched in order to increase the likelihood of mailroom staff preventing contraband from entering the facility;
>
> (2) reducing the amount of mail coming into the jail generally in order to reduce the amount of work required to sort the mail and deliver it to inmates;
>
> (3) reducing the amount of clutter in each inmate's cell to reduce the risk of fires; and
>
> (4) reducing the amount of clutter in each inmate's cell to make searching the cell and enforcing limitations on personal property more efficient and effective.

Id. at 699. The court rejected each one, holding there was "no rational relation between this regulation and the penological objective of reducing the amount of mail that may contain contraband." *Id.* at 700. However, the court noted that "PLN was not sending mail to . . . correctional facilities to be distributed to all inmates, *regardless of whether they had expressed interest in receiving it*." *Id.* (emphasis added). Thus, the court held, the case was "distinguishable from *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), in which the Supreme Court upheld a ban on junk mail sent indiscriminately to all inmates." *Id.*

To summarize, the Ninth Circuit has held prison regulations unconstitutional under *Turner* that prohibit the distribution of: (1) gift publications, (2) bulk-rate-mail nonprofit subscription

publications, (3) prepaid for-profit subscription publications, and (4) nonprofit non-subscription publications (publications that inmates request but do not pay for). The issue to be decided in this case is whether Defendant can constitutionally prohibit the distribution of CJA, a for-profit non-subscription publication indiscriminately sent to some (about ten percent) but not all inmates.

Whether a regulation "impermissibly restricts" First Amendment rights under *Turner* "is a mixed question of law and fact." *Henderson v. Terhune*, 379 F.3d 709, 712 (9th Cir. 2004). The "legitimacy of prison officials' asserted penological interests are findings of fact," and the ultimate constitutional question is a question of law. *Id.* The ultimate burden of persuasion is not on the Defendant "to prove the validity of prison regulations but on" the Plaintiffs "to disprove it." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *see also S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (per curiam) ("[T]he party with the burden of persuasion at trial . . . must establish 'beyond controversy every essential element of its' . . . claim [to obtain summary judgment].").

1. First **Turner** *Factor—Rational Connection*

"The first factor [the Court] must consider is whether there is a rational connection between the challenged policy and a legitimate governmental interest." *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999). At the summary judgment phase, the initial burden is on the plaintiff to present "evidence sufficient to refute a common-sense connection between the regulation and the government objective." *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922–23 (9th Cir. 2003). The burden then shifts to the prison official to "present enough counter-evidence to show that the connection is not so 'remote as to render the policy arbitrary or irrational.'" *Id.* at 922 (quoting *Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999)). Here, the Ninth Circuit has already held that Plaintiffs met their initial burden to refute a common-sense connection. *See Hrdlicka*, 631 F.3d at 1055. Therefore, the issue is whether Defendant presents sufficient counter-evidence supporting a rational connection between the policy and a legitimate objective to survive summary judgment.

In deciding this question, the Court must "(1) determine whether the regulation is legitimate and neutral, and (2) assess whether there is a rational relationship between the

governmental objective and the regulation." *Ashker*, 350 F.3d at 922. Defendant must "demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. *An evidentiary showing is required as to each point*." *Casey v. Lewis*, 4 F.3d 1516, 1528 (9th Cir. 1993) (alteration in original) (quoting *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990)).

"The first *Turner* factor is a *sine qua non*: 'If the prison fails to show that the regulation is rationally related to a legitimate penological objective, [the Court does] not consider the other factors.'" *Hrdlicka*, 631 F.3d at 1051 (internal alteration omitted) (quoting *Ashker*, 350 F.3d at 922). Defendants assert five justifications for their policy, which are discussed separately below. Ultimately, the Court concludes Defendant does not meet his burden on three of his five justifications, and the Court grants Plaintiffs partial summary judgment on these three issues. See Fed. R. Civ. P. 56(a) (stating a court may grant partial summary judgment on a "part of each claim or defense").

a. Complying with California Law

Defendant asserts the policy prohibiting unsolicited and unrequested commercial mail is rationally related to its legitimate interest in complying with California law. (Opp'n 12:14–21.) Compliance with state law is, beyond question, a legitimate and neutral interest. Therefore, the issue is whether the jail's policy prohibiting distribution unsolicited and unrequested commercial mail, as applied to CJA, is rationally related to that interest.

Defendant argues that his jail reasonably believed that "CJA's practice of mailing unsolicited copies of CJA directly or in bulk to inmates would violate Sections 2074 and 2076 of Title 10 of California's Code of Regulations, [and therefore] any ban of unsolicited publication based thereon is clearly rationally related to the jail's (and arguably Plaintiffs') interest." (Opp'n 12:14–21.) Plaintiffs counter, arguing distribution of CJA would not violate California law because California Code of Regulations §§ 2074 and 2076 "are simply inapplicable to the facts of this case" since the laws Defendant cites prohibit "attorneys and bail licensees from soliciting business within correctional or penal facilities," and CJA is neither "designed for distribution *solely* to inmate populations," nor "*one hundred (100) percent* advertising." (Pls.' Reply to

Def.'s Opp'n ("Reply") 19:17–22, ECF No. 73.)

In determining whether a policy is rationally related to its asserted objective, it "does not matter . . . whether the policy 'in fact advances' the jail's legitimate interests. The only question . . . is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests." *Mauro*, 188 F.3d at 1060; *accord PLN I*, 238 F.3d at 1150 ("The only question is whether prison administrators reasonably could have thought the regulation would advance legitimate penological interests.").

Here, California law prohibits the solicitation of "business for any attorneys in and about . . . county jails," Cal. Bus. & Prof. Code § 6152, and prohibits bail licensees from soliciting "any person for bail in any prison, jail or other place of detention." Cal. Code Regs. tit. 10, § 2074; *accord* Cal. Code Regs. tit. 10, § 2076. CJA includes advertisements by bail bondsmen and criminal-defense lawyers. In fact, Butte County Counsel, Bruce Alpert, in his letter refusing to distribute CJA stated: "[T]he magazine consists primarily of advertisements for criminal attorneys and bail bondsmen. It is clear that your attempt to have the magazine distributed solely to pre-trial detainees being housed in the Butte County Jail . . . is really an attempt to solicit business. . . ." (Decl. Brad Stephens, Ex. E., at 1– 2, ECF No. 29-6.) "Moreover, I find the advertising in your magazine to be possibly illegal" under "California Code of Regulations Title 10, Section 2074" and under "California Code of Business and Professions Section 6152(a)(1)" which "provides that it is unlawful for any person to solicit business for an attorney in a county jail." (*Id.* at 2.) Moreover, Defendant's proffered evidence shows that the then-Chief Counsel for the California Department of Insurance opined in a declaration: "CJA's distribution process represents an attempt to circumvent the prohibitions against locating possible bail clients in jail and directly soliciting them for bail, and therefore violates both Section 2074 and 2076." (Decl. Gary M. Cohen ¶ 12, ECF No. 29-3.) Thus, there is some evidence from which a reasonable trier of fact could find Defendant rationally believed distributing CJA might violate California law, "and that the polic[y] [was] reasonably related to the furtherance of the identified interests." *Casey*, 4 F.3d at 1528.

Moreover Plaintiffs' contention that CJA does not in fact violate California law is largely

irrelevant. The question, particularly on summary judgment, is not whether distribution would in fact be illegal; instead, the question is whether the jail "reasonably could have thought" it was illegal—a question that Plaintiffs' motion and reply, fatally, do not address. *PLN I*, 238 F.3d at 1150. Defendant has shown that Sheriff Reniff "might reasonably have thought" prohibiting the distribution of unsolicited copies of CJA "would advance its interests" in complying with California law. *Mauro*, 188 F.3d at 1060. Therefore, the first *Turner* factor favors denying Plaintiffs' motion for partial summary judgment.

b. Complying with Contract Obligations

Defendant asserts the policy is rationally related to the jail's legitimate interest in complying with the terms of its contractual obligation. Butte County Jail has an exclusive contract with an advertising company that pays the jail a percentage of its profits from the sale of ad space on bulletin boards in the jail. Defendant argues distributing CJA would interfere with this existing contract. (Opp'n 12:22–26; Def.'s Mot. Summ. J; Mem. P. & A. in Supp. Thereof ("Def.'s Prior Mot. Summ. J.") 18:5–20, ECF No. 29-1.)[4] However, the Ninth Circuit previously rejected this argument and held in this case, as a matter of law, "a jail has [no] legitimate penological interest, for purposes of *Turner*, in protecting a profit made by impinging on inmates' First Amendment rights." *Hrdlicka*, 634 F.3d at 1053. Therefore, Defendant's asserted interest in complying with existing contracts is not a legitimate penological interest, and partial summary judgment is GRANTED for Plaintiffs on this issue. *See Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 & n.3 (9th Cir. 1981) ("The partial summary judgment . . . . procedure was intended to avoid a useless trial of facts and issues over which there was really never any controversy and which would tend to confuse and complicate a lawsuit." (quoting 6 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 56.20(3-2) (2d ed. 1976))).

c. Jail Security

Defendant asserts the policy is rationally related to the jail's legitimate interest in security. Jail security, is beyond question, a legitimate and neutral interest. *See Turner*, 482 U.S. at 86 ("[J]udgments regarding prison security 'are peculiarly within the province and professional

[4] Defendant incorporated by reference his prior motion for summary judgment in his opposition. (Opp'n 12:6.)

expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters.'" (quoting *Pell v. Procunier*, 417 U.S., 827 (1974))). Thus, the issue is whether the jail's policy prohibiting unsolicited, unrequested commercial mail is rationally related to that interest.

The Ninth Circuit held in this case that it was "unclear" on appeal from summary judgment "the degree to which allowing distribution of CJA in the jails would produce additional clutter in inmates cells or otherwise adversely affect jail security." *Hrdlicka*, 631 F.3d at 1052. Plaintiffs move for summary judgment arguing, in essence, the record is clear; no reasonable trier of fact could find there is a rational distinction, for jail-security purposes, between mail that has been requested as opposed to mail indiscriminately sent to some but not all inmates. Viewing "the evidence in the light most favorable" to Defendant, *McSherry*, 584 F.3d at 1135, the Court cannot agree.

Defendant argues the prohibition on unsolicited commercial mail furthers the interest of jail security, because inmates often use paper "to hide contraband, start fires, flood their cells, and cover their lights and windows." (Def.'s Prior Mot. Summ. J. 21:13–14.) Defendant contends inmates are more likely to use unsolicited unrequested publications, like CJA, because "unlike attorney–client mail, personal mail, or commercial publications that inmates request, inmates would have no connection to unsolicited copies of CJA." (*Id.* at 21:21–23.) "[T]herefore," Defendant argues, "inmates would not care if unsolicited copies were damaged, lost, or seized; especially when they learn that the copies will be continuously replenished." (*Id.* at 21:23–24.)

Plaintiffs counter arguing this case is like *PLN II*, in which the Ninth Circuit rejected the Department of Correction's similar argument that its regulation "help[ed] reduce the risk of fire" and "increase[d] the efficiency of cell searches" by reducing the "volume of mail [that] will enter inmates' cells." 397 F.3d at 700. The Ninth Circuit, in rejecting this justification, reasoned: "[I]t is irrational to prohibit prisoners from receiving bulk rate mail and catalogs on the theory that it reduces fire hazards because the DOC already regulates the quantity of possessions that prisoners may have in their cells." *Id.* Plaintiffs point to Butte County Jail's similar regulation that inmates "may only keep a limited amount of written materials in their cells at any given time," (Opp'n

13:23–25), and argue that as in *PLN II*, this regulation refutes the rational connection between the policy and the objective of jail security. (*Id.* at 13:27–14:14.)

However, the court in *PLN II* also noted "PLN was not sending mail to . . . correctional facilities to be distributed to all inmates, *regardless of whether they had expressed interest in receiving it*." 397 F.3d at 700 (emphasis added). "In this case, every piece of mail sent by PLN is sent as a result of a request by the recipient, but the inmates were not allowed to receive it." *Id.* Thus, the court held, the case was "distinguishable from *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), in which the Supreme Court upheld a ban on junk mail sent indiscriminately to all inmates." *Id.*

Here, as in *Jones*, CJA magazines would be sent indiscriminately to some but not all inmates whether they requested it or not—making this case distinguishable from *PLN II*. Moreover, Defendant has submitted evidence of two specific and current examples to support the jail's reasoning that the regulation is rationally related to jail security:

> First, paper back books are donated to the Jail by the local community, and after being searched, the books are placed on a cart that is moved throughout the different housing areas. Inmates are instructed that they may take one book, but before doing so, are asked to return any book they already have in their possession. Notwithstanding these basic rules, inmates are often found hoarding the books, destroying the books, and using torn pages from the books to hide contraband, start fires, plug their toilets, or cover the windows and/or lights in their cells. Both officers believe that unsolicited copies of CJA would be treated in a similar fashion.
>
> Second, by law, the Jail must provide a telephone book in every one of the twenty-four day room areas in the Jail. The inmates constantly tear out the pages of the phone books, and use the pages to hide contraband, start fires, plug their toilets, and cover their lights and windows. On average, every phone book in the Jail has to be replaced once a month. Again, both officers believe that unsolicited copies of CJA would be treated in a similar fashion.

(Def.'s Prior Mot. Summ. J. 21:26–22:10 (citations omitted) (citing UMF Nos. 28–29).) This evidence supports the reasonable inference that inmates may be more likely to destroy CJA than other materials, because they know CJA will be replenished and they did not request CJA; whereas, a publication gifted from a friend or relative may have sentimental value, and inmates may value specifically requested publications, even free ones, more than a publication they

received but did not request. Moreover, even though jail regulations already limit the total quantity of paper in the cells, these regulations do not mollify Defendant's contention that inmates are more likely to destroy the portion of that limited quantity that was obtained without request, than destroy the portion they requested or received by specific gift. Thus, a reasonable trier of fact could find there is a rational distinction between unrequested unsolicited publications sent indiscriminately to some, but not all, inmates, and gift publications sent to a specific inmate or free publications specifically requested by inmates. Therefore, the Court cannot say on the record before it that there is no rational connection between the legitimate interest in jail security and the policy.

Plaintiffs counter Defendant's proffered evidence is "wholly contradicted by the direct evidence that inmates treasure *Crime Justice & America* as being one of the few helpful resources they access to while in jail." (Mot. Summ. J. 16:1–3.) Plaintiffs submit they "have received literally thousands of letters from inmates . . . applauding the publication as their sole access to meaningful material and pertinent information that is so important for them to receive as inmates." (*Id.* at 1:25–2:10.) Plaintiffs contend "the magazine cannot be considered 'junk mail.'" (*Id.* at 2:8–10.)

Here, however, Plaintiffs' contradicting, probative evidence reveals a genuine dispute of material fact whether prohibiting CJA is rationally related to the interest in prison security, but does not establish that Plaintiffs are entitled to judgment as a matter of law. Therefore, the interest in jail security and the first *Turner* factor favor denying Plaintiffs' motion for partial summary judgment on this issue.

d. Staff Resources

Defendant argues the policy is rationally related to preserving staff resources, which is a legitimate and neutral interest. (Opp'n 12:6–9.) Defendant argues the increase in the time required to process unsolicited unrequested commercial mail will drain essential prison resources. However, as the Ninth Circuit previously observed in this case: "Officers at Butte County Jail provided no information quantifying the additional resources that would be required to distribute CJA. Indeed, they did not even provide information about the resources the jail currently devotes

to mail delivery." *Hrdlicka*, 631 F.3d at 1052–53. On remand, Defendant has not provided this Court sufficient additional evidence either. Therefore, Plaintiffs' motion for partial summary judgment is GRANTED on this issue.

e. Maintaining the Jail as a Non-Public Forum

Defendant argues the policy is rationally related to maintaining the jail's status as a non-public forum. (Opp'n 12:6.) However, Defendant offers no authority to support the proposition that a jail or "prison"—"most emphatically not a 'public forum,'" *Jones*, 433 U.S. at 136—may somehow lose its non-public forum status. Defendant cites *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), but that case stands for the contrary proposition. In *Perry*, the Court held that even though the school district permitted one union's newsletter to be distributed to teachers' internal mailboxes, because it was a non-public forum, the school could still nonetheless prohibit another union's newsletter. *Id.* at 55. Applying *Perry* to this case, even if Defendant was required to distribute CJA, the jail could still prohibit other solicitations. *See id.* ("Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction."). Therefore, Plaintiffs' motion for partial summary judgment is GRANTED on this issue as well.

2. Remaining* Turner *Factors

The second *Turner* factor "is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Defendant argues Plaintiffs, as an alternative means of access, may pay to advertise on the bulletin boards in the jail and wait for inmates to subscribe, or place CJA in the library. (Opp'n 13:11–20.) Plaintiffs counter arguing CJA's content addresses issues germane to inmates awaiting trial, such that inmates have an immediate need for the information in CJA. "[T]he only way for an inmate[, CJA's intended audience,] to know about *Crime, Justice & America* is for the magazine to be distributed to the inmates," because "[c]ounty jail populations turn over too quickly for other potential

advertisement campaigns . . . to reach [CJA's] intended audience." (Mot. Summ. J. 18:7–18.) Regarding Defendant's specific proposed alternatives, Plaintiffs reply purchasing advertising is unrealistic: "[CJA] cannot automatically purchase space on the Partners jail [bulletin] board. Rather, there is a periodic lottery to determine who can advertise on the jail board. Thus, Plaintiffs' ability to exercise their First Amendment Rights would be dependent upon a lottery." (Reply 32:1–7.) Plaintiffs argue, in a conclusory manner, the library is not a viable alternative, because: "A jail library is used by a limited number of inmates at any given time, and generally used by long term residents," such that CJA's "intended audience would likely never see the publication." (*Id.* at 32:8–16.)

Here, Plaintiffs are correct that waiting for inmates to request CJA is not a viable alternative, because of the immediacy of inmates' need for the information in CJA, and "many inmates will have left the jail before they can learn about the existence of CJA, request that it be sent to them, and then receive it." *Hrdlicka*, 631 F.3d at 1054. Moreover, the Court finds that merely advertising CJA on the jail bulletin board is an inadequate alternative, because Plaintiffs' First Amendment right would be contingent on the results of a lottery.

However, Plaintiffs have not pointed to any evidence in the record that the library is an inadequate alternative, beyond their conclusory assertion that mostly "long-term residents" use the library. On the contrary, Plaintiffs' own evidence suggests that CJA perhaps appropriately belongs in the jail library: California's Principal Librarian stated, "[i]n my professional opinion, I would recommend your magazine as an acceptable donation to the California Department of Corrections Law Libraries." (Decl. Ray Hrdlicka, Ex. A, p. 3, ¶ 15, ECF No. 68-3.)

Therefore, there remains a genuine dispute of material fact whether there are "alternative means of exercising the right that remain open," namely, distributing CJA through the Butte County Jail library. *Turner*, 482 U.S. at 90.

Thus, resolution of two of the four *Turner* factors—the first factor being the most important , *see Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 883 (9th Cir. 2002) ("the first factor is arguably dispositive")—turns on disputes of material fact that preclude summary judgment. Therefore, Plaintiffs cannot meet their burden to show they are entitled to partial

summary judgment on these issues as a matter of law. Thus, in light of the factual disputes on two of the four factors, the Court need not reach the third and fourth factors—"the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *Id.*, and whether the policy is an "'exaggerated response' to prison concerns" *Id.*—to determine that Plaintiffs, the party with the ultimate burden of persuasion, failed to show that a "rational trier of fact" could not find in Defendant's favor. *S. Cal. Gas. Co.*, 336 F.3d at 888.

Therefore, the Court GRANTS Plaintiffs' motion for partial summary judgment in part, finding that Defendant has not met his burden to show his asserted interests in complying with existing contract obligations, staff resources, and maintaining the jail's non-public forum status are "rationally related to a legitimate penological objective." *Hrdlicka*, 631 F.3d at 1051. Moreover, the Court DENIES Plaintiffs' motion for partial summary judgment in part, concluding that genuine disputes of material fact preclude summary judgment concerning Defendant's asserted interests in complying with California law and jail security.

C. Plaintiffs' Motion for Judgment on Remand

Since, for the reasons stated above, genuine disputes of material fact preclude summary judgment in part, Plaintiffs' unprecedented motion for entry of judgment on remand is DENIED.

D. Defendant's Countermotion for Partial Summary Judgment

After the case was remanded from the Ninth Circuit, Plaintiffs amended their complaint—with leave from the Court (ECF No. 64)—to assert a claim for damages against the Butte County Sheriff in his official capacity under 42 U.S.C. § 1983 for constitutional violations under color of state law. (First Amended Compl., ECF No. 65.) Defendant countermoves for partial summary judgment on this claim, arguing "Plaintiffs cannot establish the denial of distribution was 'deliberately indifferent' to Plaintiffs' rights for purposes of *Monell*." (Opp'n 7:15–17.) Plaintiffs counter in their reply that the "issue of 'deliberate indifference'" is irrelevant because it only applies if a plaintiff asserts "the government entity's 'failure to act' or 'failure to train' was the moving force behind the officials' . . . unconstitutional acts." (Reply 9:3–15.) Moreover, Plaintiffs argue that by "denying distribution of [Plaintiffs'] publication, Butte County officials

acted pursuant to a formal, written policy of the county," such that they are liable under *Monell*. (*Id.* at 10:2–6.)

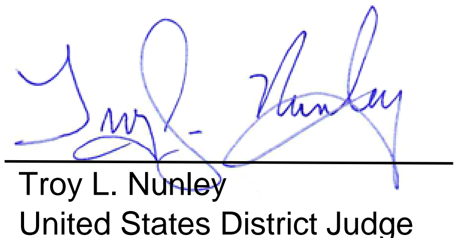
Plaintiffs are correct. Although a municipality cannot be held liable under § 1983 under a respondeat superior theory, unquestionably, municipalities can be found liable if "the execution of the municipalities official policy" itself causes the constitutional injury. *City of Canton v. Harris*, 489 U.S. 378, 385–86 (1989) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). "Deliberate indifference" must be shown only where the plaintiff asserts *Monell* liability based on a "'failure to train' theory." *Id.* at 388. Thus, because the Butte County Jail prohibited distribution of CJA avowedly pursuant to its official policy prohibiting unsolicited commercial mail, Plaintiffs' *Monell* claim can proceed against the Sheriff in his official capacity. Therefore, Defendant's countermotion (ECF No. 71) is DENIED.

CONCLUSION

Based on the foregoing, Defendant's Rule 56(d) motion for a continuance is DENIED. Plaintiffs' motion for partial summary judgment is GRANTED in part on Defendant's asserted interests in complying with existing contract obligations, staff resources, and maintaining the jail's non-public forum status. Plaintiff's motion for partial summary judgment is DENIED regarding Defendant's asserted interests in complying with California law and jail security. Plaintiffs' motion for judgment on remand is DENIED. Defendant's counter-motion for partial summary judgment is DENIED.

IT IS SO ORDERED

DATED: July 12, 2013



Troy L. Nunley
United States District Judge