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Attorneys for Defendants
COUNTY OF SAN MATEO and
CHRISTINA CORPUS

Electronically
FILED
by Superior Court of California, County of San Mateo
ON 11/8/2023
By /s/ Ashlee Nelson
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

A.B.O. COMIX, KENNETH ROBERTS, ZACHARY GREENBERG, RUBEN GONZALEZ-MAGALLANES, DOMINGO AGUILAR, KEVIN PRASAD, MALTI PRASAD, and WUMI OLADIPO,

Plaintiffs,

v.

COUNTY OF SAN MATEO and CHRISTINA CORPUS, in her official capacity as Sheriff of San Mateo County

Defendants.

(Exempt from Filing Fees pursuant to Government Code §6103)

Case No. 23-CIV-01075

Assigned for All Purposes to:
Hon. V. Raymond Swope, Dept. 23

DECLARATION OF CHAD E. DEVEAUX IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO FILE A SUR-REPLY RESPONDING TO PLAINTIFFS' SUR-OPPOSITION

Date: ~~December 4, 2023~~ 3/4/2024
Time: 2:00 PM
Dept.: 23

I, Chad E. DeVeaux, declare as follows:

1. I am a principal with Bartko Zankel Bunzel & Miller ("Bartko"), attorneys of record for Defendants the County of San Mateo (the "County") and Christina Corpus (collectively, "Defendants" or the "County"), in *A.B.O. Comix, et al. v. Cnty. of San Mateo*, Case No. 23-CIV-01075. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify thereto. I make this declaration in relation to Defendants' Motion for Judgment on the Pleadings.

2. Defendants' September 1, 2023 Motion for Judgment on the Pleadings (the "Motion") argued, inter alia, that the inmate Plaintiffs' claims fail as a matter of law under California's exhaustion of administrative remedies doctrine. This is because: "To bring a claim under California law regarding the terms of confinement, a prisoner 'must exhaust available administrative remedies before filing a lawsuit.' (*Parthemore*, 221 Cal.App.4th at 1380.)" (*See* Motion at 14:4-10.) Further: "'[F]ailure to exhaust administrative remedies" is *not* merely "an affirmative defense.' (*Westinghouse*, 42 Cal.App.3d at 37.) When a plaintiff sues a state agency that provides a grievance procedure, exhaustion of all avenues of review under that procedure is an element of the plaintiff's case in chief. (*Id.*) In such cases, 'it is [the plaintiffs'] burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy' in order to state a prima facie case. (*Id.*)" (*See* Motion at 14:11-19.)

3. In their Opposition to the Motion, Plaintiffs argued, inter alia, that Mr. Greenberg satisfied his duty to exhaust his administrative remedies—a Plaintiffs had not previously pleaded or acknowledged—because he purportedly filed "grievances protesting the mail policy" that "were never acknowledged." (*See* Plaintiffs' Opposition to the Motion ("Opp.") at 10:18-19.)

4. In support of their Reply, filed October 13, 2023, Defendants requested the Court take judicial notice of all the inmate grievances in the County's file that were filed by Mr. Greenberg. Defendants' Reply explained that none of the grievances in jail's file filed by Mr. Greenberg addressed the County's mail policy, at issue in this lawsuit and all the grievances in the file were "acknowledged" with a "Supervisor's response." (*See* Defendants' Reply in Support of the Motion at 15:22-25.)

5. On October 18, 2023, Plaintiffs' counsel, Cara Gagliano, emailed me a black and white copy of a purported inmate grievance. Ms. Gagliano represented that Mr. Greenberg filed this purported grievance on October 20, 2022. She contended that this disproves the contention in Defendants' Reply that "Mr. Greenberg never filed a grievance protesting the County's mail policy." On October 24, 2023, Ms. Gagliano emailed me a color photograph of the purported grievance.

6. A true and correct copy of the black and white copy of the purported grievance that Ms. Gagliano emailed me on October 18, 2023 is attached hereto as **Exhibit A**.

7. A true and correct copy of the color photograph of the purported grievance that Ms. Gagliano emailed me on October 24, 2023 is attached hereto as **Exhibit B**.

8. A true and correct copy of my email correspondence with Mr. Gagliano regarding the purported grievance is attached hereto as **Exhibit C**.

9. I provided copies of Exhibits A and B to Deputy County Counsel Tara Heumann and asked her to provide copies to the appropriate officials charged with the filing and retention of inmate grievances at the jail to determine this was an authentic grievance that was filed with the jail and whether the jail had any copies of this purported grievance in its files.

10. As explained in the accompanying Declaration of Sergeant Cristofer Serrano, the custodian of records for Sheriff's Corrections, the County has no record that this purported grievance was ever filed. Sergeant Serrano's declaration further explains that pursuant to the jail's grievance policy, if the alleged grievance had been filed, regardless of the outcome of the grievance, a copy should reside in the jails records and a Supervisor's Response should have been provided. Because the jail has no record of the alleged grievance, Sergeant Serrano can neither confirm that the grievance was authentic, nor can he confirm that it was a forgery.

11. I communicated these findings to Plaintiffs' counsel during an October 24, 2023 telephone call where we met and conferred regarding the upcoming case management conference.

12. During that call and in the email chain attached as Exhibit C, Plaintiffs' counsel demanded that Defendants file an errata withdrawing the contention that there is no evidence that Mr. Greenberg filed a grievance raising the claims at issue in Plaintiffs' Amended Complaint.

13. In response, I told Plaintiffs' counsel:

> [W]e intend to file a custodian of records declaration explaining that we have investigated the alleged grievance form you provided and that the jail has no record of it ever being filed and that we can neither confirm the authenticity of the purported grievance, nor can conclude that it is a forgery. I also plan to file my own declaration that explains how I received the alleged grievance from you and provided it to my clients for analysis, in order to establish the chain of custody necessary for the custodian's declaration. These declarations will affirmatively advise the Court that: (1) Plaintiffs'

> counsel have represented that the grievance is authentic, (2) that the County can neither confirm nor affirmatively disprove whether that's true and has no record of the grievance, and (3) that there is now a dispute of fact regarding whether Mr. Greenberg filed any grievances pertaining to the mail policy.

14. I further explained:

> We think this will be sufficient to fully put the Court on notice of the issue. If you believe that a sur-opposition brief is necessary and justified, we will not oppose your right to file it procedurally. But we reserve the right to file our own sur-reply brief explaining what has transpired from our point of view and why, as a matter of law, the purported grievance is irrelevant in any event.

15. And in response to Plaintiffs' threat to file a sur-opposition, I explained that I did not think such briefing was necessary, but I offered to file a joint stipulation asking for permission from the Court for the parties to file a sur-opposition and a sur-reply brief if Plaintiffs insisted:

> [I]f you are set on filing a sur-opposition brief, we suggest that the parties execute a stipulation requesting that the plaintiffs may file a sur-opposition brief and that defendants may file a sur-reply and that both briefs be limited to issues related to Mr. Greenberg's purported grievance. If you intend to file a sur-opposition, please let us know whether if this option is agreeable to you.

16. Plaintiffs' counsel responded by asking whether Defendants' proposed declarations would "tell the Court that [they] therefore no longer assert a failure to grieve by Mr. Greenberg as a basis for your motion?"

17. I responded by stating:

> We will tell the Court that there is a dispute of fact regarding whether Mr. Greenberg filed a grievance addressing the mail policy because we cannot confirm either that the alleged grievance is authentic or that it is a forgery. But we would still contend that even if the grievance is authentic, Mr. Greenberg did not exhaust his remedies because the alleged grievance raises Eighth Amendment cruel and unusual punishment allegations, not the California law free speech and invasion of privacy claims raised by the Amended Complaint.

18. Plaintiffs' counsel did not respond to this email. They then filed their Sur-Reply and the related papers just over three hours later, which necessitated Defendants' filings.

/ / /

/ / /

/ / /

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed on this 6th day of November, 2023 in San Francisco, California.



CHAD E. DEVEAUX

EXHIBIT A

San Mateo County Jail Facilities
Inmate Grievance Form

Routing: Staff Only
- ☒ Administration
- ☐ Other _____
- ☐ Classification _____
- ☐ Medical _____
- ☐ Food Service _____

Received: Staff Only
Date 10/20/22
Time 02[illegible]
Facility MSDC
Deputy KEMMING

To: (Shift Sergeant) ~~Lodal (or shift sergeant)~~ Lathright **Date** 10/20/22

From: (Inmate's Name) Zachary Greenberg **Id#** [illegible]4207 **Cell** [illegible]M2

Grievance (Please be specific: time, date, etc.) I have been denied personal Mail addressed to me while incarcerated at Maple St. facility San Mateo County Jail from family, loved ones and other personal correspondants for the past 18 months in violation of my Constitutional rights under the 8th Amendment not to be subject to cruel and unusual punishment, and under the 14th Amendment not to be deprived of property. As of April 1st 2021 Myself and other inmates were forced to accept personal mail being sent to "Smart Jail Mail" and Scanned, then Shredded. Inmates were told via tablet and Kiosk login that "This facility will no longer act as a mail receiving agent for regular Mail and not providing acknowledgement may result in this mail being returned to Senders. Inmates are forced under this policy to accept letters from loved ones bring sent to Florida, and then Shredded, or face not having any access (digital only) to such mail/property sent via U.S. Postal Service. This is cruel and unusual punishment. The facility in the same time period began rejecting all books from Amazon in violation of SC 2601. I hereby withdraw consent to the Policy and Request to directly receive all Mail. **Inmate's Signature:**

Note: Upon signing this form take GOLD copy. It contains the grievance procedures.

Supervisor's response:

Signature: **Date:**

White: *Administration* Yellow: *Response to Inmate* Pink: *Staff* Gold: *To Inmate*

Revised 6/15/17

EXHIBIT B

San Mateo County Jail Facilities
Inmate Grievance Form

Routing: Staff Only
- [x] Administration
- [ ] Other
- [ ] Classification
- [ ] Medical
- [ ] Food Service

Received: Staff Only
Date 10/20/22
Time 02
Facility MSFC
Deputy KEMMING

To: (Shift Sergeant) ~~Loobat (or next duty Commander)~~ Cathright **Date** 10/20/22

From: (Inmate's Name) Zachary Overberg **Id#** 1234307 **Cell** 1M3

Grievance (Please be specific: time, date, etc.) I have been denied personal Mail addressed to me while incarcerated at this facility San Mateo County Jail from family, loved ones and other personal correspondents for the past 18 Months in violation of my Constitutional Rights under the 8th Amendment not to be subject to cruel and unusual punishment, and under the 14th Amendment not to be deprived of property. As of April 6, 2022 Myself and other inmates were forced to accept personal mail being sent to "Smart Jail Mail" and Scanned, then Shredded. Inmates were told via tablet and Kiosk login that, "This facility will no longer act as a mail receiving agent for regular Mail and not providing acknowledgement may result in this mail being returned to Senders. Inmates were forced under this policy to accept letters from loved ones being sent to Florida, and then Shredded, or face not having any access (digital only) to such mail/Property sent via U.S. Postal Service. This is cruel and unusual punishment. The facility in the Smart Jail period began rejecting all books from Amazon.com in violation of PC 2601. I hereby withdraw Consent to the Policy and Request to directly receive all Mail. **Inmate's Signature:** Zachary Overberg

Note: Upon signing this form take GOLD copy. It contains the grievance procedures.

Supervisor's response:

Signature: **Date:**

White: *Administration* Yellow: *Response to Inmate* Pink: *Staff* Gold: *To Inmate*

Revised 6/15/17

EXHIBIT C

From: Chad E. DeVeaux
To: Cara Gagliano; Jennifer Jones; Sara Haji
Cc: Patrick M. Ryan; Taylor Yamahata
Subject: RE: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)
Date: Tuesday, October 31, 2023 2:57:13 PM

Cara,

We will tell the Court that there is a dispute of fact regarding whether Mr. Greenberg filed a grievance addressing the mail policy because we cannot confirm either that the alleged grievance is authentic or that it is a forgery. But we would still contend that even if the grievance is authentic, Mr. Greenberg did not exhaust his remedies because the alleged grievance raises Eighth Amendment cruel and unusual punishment allegations, not the California law free speech and invasion of privacy claims raised by the Amended Complaint.

Best, Chad

Chad DeVeaux
Principal
BARTKO ZANKEL BUNZEL MILLER
One Embarcadero Center, Suite 800
San Francisco, CA 94111
Main: (415) 956-1900
Direct: (415) 291-4536
Fax: (415) 956-1152
cdeveaux@bzbm.com
www.bzbm.com

From: Cara Gagliano <cara@eff.org>
Sent: Tuesday, October 31, 2023 11:47 AM
To: Chad E. DeVeaux <cdeveaux@BZBM.com>; Jennifer Jones <jennifer.jones@knightcolumbia.org>; Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>; Taylor Yamahata <tyamahata@BZBM.com>
Subject: Re: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Chad,

When you say that you intend to advise the Court that Defendants can neither confirm nor deny that Mr. Greenberg filed a grievance challenging the mail policy, and that there is at least a dispute of fact on this issue, will you also tell the Court that you therefore no longer assert a failure to grieve by Mr. Greenberg as a basis for your motion? (That is, not because you accept the grievance's authenticity, but because disputed factual issues are not a basis for judgment on the pleadings.) If you will commit to do so and to a timeframe, we can likely avoid the need for a sur-reply. If not, however, we will need to respond to that argument in our own submission to preserve our objections for the record. Likewise, if you will not agree to amending your Supplemental Request for Judicial Notice to omit the grievance exhibits, we will file an opposition to that request on the grounds that they are not a proper subject for judicial notice.

Please let us know by 3pm Pacific if you agree to these two requests, as we intend to file any

necessary papers today.

Thank you,

Cara Gagliano
Senior Staff Attorney
Electronic Frontier Foundation
815 Eddy St, SF, CA 94109

From: Chad E. DeVeaux <cdeveaux@BZBM.com>
Date: Monday, October 30, 2023 at 7:57 PM
To: Cara Gagliano <cara@eff.org>, Jennifer Jones <jennifer.jones@knightcolumbia.org>, Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>, Taylor Yamahata <tyamahata@BZBM.com>
Subject: RE: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Cara,

As I explained during our meet-and-confer session on Friday, we intend to file a custodian of records declaration explaining that we have investigated the alleged grievance form you provided and that the jail has no record of it ever being filed and that we can neither confirm the authenticity of the purported grievance, nor can conclude that it is a forgery. I also plan to file my own declaration that explains how I received the alleged grievance from you and provided it to my clients for analysis, in order to establish the chain of custody necessary for the custodian's declaration. These declarations will affirmatively advise the Court that: (1) Plaintiffs' counsel have represented that the grievance is authentic, (2) that the County can neither confirm nor affirmatively disprove whether that's true and has no record of the grievance, and (3) that there is now a dispute of fact regarding whether Mr. Greenberg filed any grievances pertaining to the mail policy.

We think this will be sufficient to fully put the Court on notice of the issue. If you believe that a sur-opposition brief is necessary and justified, we will not oppose your right to file it procedurally. But we reserve the right to file our own sur-reply brief explaining what has transpired from our point of view and why, as a matter of law, the purported grievance is irrelevant in any event.

Indeed, if you are set on filing a sur-opposition brief, we suggest that the parties execute a stipulation requesting that the plaintiffs may file a sur-opposition brief and that defendants may file a sur-reply and that both briefs be limited to issues related to Mr. Greenberg's purported grievance. If you intend to file a sur-opposition, please let us know whether if this option is agreeable to you.

Best, Chad

Chad DeVeaux
Principal
BARTKO ZANKEL BUNZEL MILLER

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San Francisco, CA 94111
Main: (415) 956-1900
Direct: (415) 291-4536
Fax: (415) 956-1152
cdeveaux@bzbm.com
www.bzbm.com

From: Cara Gagliano <cara@eff.org>
Sent: Monday, October 30, 2023 1:42 PM
To: Chad E. DeVeaux <cdeveaux@BZBM.com>; Jennifer Jones <jennifer.jones@knightcolumbia.org>; Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>; Taylor Yamahata <tyamahata@BZBM.com>
Subject: Re: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Chad,

Based on our call this past Friday, our understanding is that the County does not intend to withdraw either its argument that Zachary Greenberg failed to grieve the mail policy or its request for judicial notice of unrelated grievances that he filed. We therefore intend to seek leave to file a sur-reply responding to your new argument and evidence. Please let us know by 5:00pm Pacific today whether the County will oppose our motion for leave so that we can provide your position to the Court.

Thank you,

Cara Gagliano
Senior Staff Attorney
Electronic Frontier Foundation
815 Eddy St, SF, CA 94109

From: Cara Gagliano <cara@eff.org>
Date: Tuesday, October 24, 2023 at 9:26 PM
To: Chad E. DeVeaux <cdeveaux@BZBM.com>, Jennifer Jones <jennifer.jones@knightcolumbia.org>, Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>, Taylor Yamahata <tyamahata@BZBM.com>
Subject: Re: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Yes, a full-color scan is attached here.

Cara Gagliano
Senior Staff Attorney

Electronic Frontier Foundation
815 Eddy St, SF, CA 94109

From: Chad E. DeVeaux <cdeveaux@BZBM.com>
Date: Tuesday, October 24, 2023 at 9:23 PM
To: Cara Gagliano <cara@eff.org>, Jennifer Jones <jennifer.jones@knightcolumbia.org>, Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>, Taylor Yamahata <tyamahata@BZBM.com>
Subject: RE: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Cara,

Can you send us an image of the original color copy of this document?

Best, Chad

Chad DeVeaux
Principal
BARTKO ZANKEL BUNZEL MILLER
One Embarcadero Center, Suite 800
San Francisco, CA 94111
Main: (415) 956-1900
Direct: (415) 291-4536
Fax: (415) 956-1152
cdeveaux@bzbm.com
www.bzbm.com

From: Chad E. DeVeaux
Sent: Friday, October 20, 2023 1:31 PM
To: Cara Gagliano <cara@eff.org>; Jennifer Jones <jennifer.jones@knightcolumbia.org>; Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>; Taylor Yamahata <tyamahata@bzbm.com>
Subject: RE: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

We have every right to investigate the authenticity of the document you provided and are in the process of doing so.

Have a wonderful weekend.

Chad DeVeaux
Principal
BARTKO ZANKEL BUNZEL MILLER
One Embarcadero Center, Suite 800
San Francisco, CA 94111
Main: (415) 956-1900
Direct: (415) 291-4536

Fax: (415) 956-1152
cdeveaux@bzbm.com
www.bzbm.com

From: Cara Gagliano <cara@eff.org>
Sent: Friday, October 20, 2023 1:25 PM
To: Chad E. DeVeaux <cdeveaux@BZBM.com>; Jennifer Jones <jennifer.jones@knightcolumbia.org>; Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>; Taylor Yamahata <tyamahata@BZBM.com>
Subject: Re: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Chad,

You have no basis to dispute the authenticity of the document, which is a scan we created from the carbon-paper copy provided by your client for Mr. Greenberg's records. Assuming you aren't accusing us of manufacturing evidence, we take your email to mean that you are investigating whether and why your client's records did not contain this grievance, or whether you overlooked it in your search. Whatever the answers to those questions may be, they have no bearing on the need for you to correct the misrepresentations in your filings. You have a pending dispositive motion that is premised in part on the misrepresentation and, as far as the Court knows, has been fully briefed; further delaying a notification to the Court is unacceptable. If you do not file a correction immediately, we will have no choice but to notify the Court ourselves—both of the misrepresentation and of your failure to promptly correct it.

Sincerely,

Cara Gagliano
Senior Staff Attorney
Electronic Frontier Foundation
815 Eddy St, SF, CA 94109

From: Chad E. DeVeaux <cdeveaux@BZBM.com>
Date: Thursday, October 19, 2023 at 6:08 PM
To: Cara Gagliano <cara@eff.org>, Jennifer Jones <jennifer.jones@knightcolumbia.org>, Sara Haji <shaji@socialjusticelaw.org>
Cc: Patrick M. Ryan <pryan@BZBM.com>, Taylor Yamahata <tyamahata@BZBM.com>
Subject: RE: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Cara,

We received your email and are investigating the authenticity of the purported grievance you provided. We will take appropriate steps when the investigation is complete based on the findings.

Best,

Chad DeVeaux
Principal
BARTKO ZANKEL BUNZEL MILLER
One Embarcadero Center, Suite 800
San Francisco, CA 94111
Main: (415) 956-1900
Direct: (415) 291-4536
Fax: (415) 956-1152
cdeveaux@bzbm.com
www.bzbm.com

From: Cara Gagliano <cara@eff.org>
Sent: Wednesday, October 18, 2023 12:53 PM
To: Chad E. DeVeaux <cdeveaux@BZBM.com>; Patrick M. Ryan <pryan@BZBM.com>; Taylor Yamahata <tyamahata@BZBM.com>
Cc: Jennifer Jones <jennifer.jones@knightcolumbia.org>; Sara Haji <shaji@socialjusticelaw.org>
Subject: Request for Correction (A.B.O. Comix v. San Mateo County, 23-civ-01075)

Counsel:

We write regarding the claim in your 10/13 reply brief and supplemental request for judicial notice that Zachary Greenberg never filed a grievance protesting the County's mail policy. He did, on October 20, 2022. A scanned copy is attached; you'll see that it was marked as received by jail staff. Although this grievance is or should be in your clients' possession, it was not included among the exhibits attached to your request for judicial notice. Its omission —along with the County's representation that Mr. Greenberg never filed a grievance protesting the County's mail policy—misleads the Court and raises broader concerns about the County's retention of relevant documents.

We ask that you file a notice of errata and correct the record before the Court as soon as possible, and no later than **this Friday, October 20**.

Sincerely,

Cara Gagliano
Senior Staff Attorney
Electronic Frontier Foundation
815 Eddy St, SF, CA 94109