CATHERINE CORTEZ MASTO
Attorney General
WILLIAM J. GEDDES
Deputy Attorney General
Nevada Bar No. 6984
Bureau of Public Affairs
Division of Public Safety
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1256
Fax: (775) 684-1275
E-Mail: WGeddes@ag.nv.gov

Attorneys for Defendants Glen Whorton, Jackie Crawford, Greg Cox, Jack Palmer, Lenard Vare, Robert LeGrand, Cami Perino, Ceilia Chacon, Pamela Feil, Diana Carey, Kristina Tupa, Joe Gutierrez

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JULIE SIKORSKI, et al.,

Plaintiff,

vs.

GLEN WHORTON, *et al.*,

Defendants.

Case No. 03:06-cv-0696-LRH (VPC)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Glen Whorton, Jackie Crawford, Greg Cox, Jack Palmer, Lenard Vare, Robert LeGrand, Cami Perino, Ceilia Chacon, Pamela Feil, Diana Carey, Kristina Tupa, Joe Gutierrez (collectively, "Defendants") by and through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, and William J. Geddes, Deputy Attorney General, hereby file *Defendants' Motion for Summary Judgment*. This motion ("Motion") is made pursuant to the following Points and Authorities, the Declarations and Exhibits[1] filed in support of this Motion, including deposition transcripts and documents referred to therein[2], the

[1] For ease of reference, and to reduce the number of duplicate documents presented to the Court, the Declarations appear in Appendix 1, without the evidentiary Exhibits to which they refer. Instead, all evidentiary Exhibits, whether referred to in the Declarations or the Motion—or both—are attached in Appendix 2, and arranged in sequential order, with the "bates stamp" prefix of "D-MSJ."

[2] In effort to reduce the number of unnecessary or duplicate documents presented to the Court, Defendants herein produce excerpts of relevant documents referred to in the deposition transcripts, which are identified herein according to a "D-MSJ" number, rather than the original "DEF" number referred to in the transcripts. The documents presented here are the same as the documents presented in the depositions, as can be confirmed by checking the "DEF" number appearing slightly above the "D-MSJ" number on each page.

pleadings and papers on file in this action, and any oral arguments the Court may entertain at any hearing set for this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. NATURE OF CASE

This case is an inmate-civil-rights litigation, wherein Plaintiff John Witherow ("Witherow") has challenged the conditions of his confinement as violative of the U.S. Constitution, pertaining to the alleged mishandling of his mail at Lovelock Correctional Center ("LCC"). (*See generally* Amended Complaint ("Complaint"), Docket No. 061.) Witherow's Mother, Julie Sikorski ("Sikorski"), and Witherow's sister, Linda Dittmer ("Dittmer") are co-Plaintiffs in this case, for allegations involving their returned mail that was addressed to Witherow. (*See Id.*) The claims of this case are brought pursuant to 42 U.S.C. § 1983 (civil action for deprivation of rights), based upon alleged violations of the First and Fourteenth Amendments to the U.S. Constitution. Plaintiffs seek relief in the form of declaratory relief, injunctive relief, nominal damages, compensatory damages, punitive damages, costs, and attorney's fees. (*See Id.*, p. 16, ll. 10-20.) Defendants have denied engaging in any culpable conduct. (*See generally* Defendants' Answer ("Answer"), Docket No. 069.)

II. CONCISE STATEMENT OF FACTS NOT GENUINELY IN ISSUE

Pursuant to Nevada District Court Rule ("Local Rule" and "LR") 56-1, Defendants herein provide a concise statement setting forth each fact ("Fact No.") *material* to the disposition of this Motion, which Defendants claim is not *genuinely* in issue in this case. A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

1. From August of 2003 to May 26, 2006, Witherow was confined at Lovelock Correctional Center ("LCC"), in Lovelock, Nevada, but since May 26, 2006, Witherow has been confined at Nevada State Prison ("NSP") (John Witherow Deposition Transcript, D-MSJ 005, p. 14, ll. 3-9);

2. Sikorski is Witherow's mother, and Dittmer is his sister. (Docket No. 61, ¶¶ 3-4);

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3. At times relevant to the claims of the Complaint, Defendants Glen Whorton ("Whorton") and Jackie Crawford ("Crawford") were the Directors of the Nevada Department of Corrections ("NDOC"), Greg Cox was an NDOC Assistant Director of Operations ("ADO"), Jack Palmer was the LCC Warden (from approximately February of 2004 to the present), Lenard Vare was the LCC Warden (from approximately November of 2004 through February of 2006), Robert LeGrand was the LCC Associate Warden of Programs ("AWP"), Cami Perino and Celia Chacon were LCC Correctional Caseworker Specialists ("Caseworkers"), Pamela Feil, Diana Carey, and Kristina Tupa were LCC correctional officers; and Joe Gutierrez was an NDOC training officer, from July 1980 to August 2006. (Docket No. 69, ¶¶ 6-17; Jack Palmer Declaration, D-DEC 033, ll. 20-22; Lenard Vare Declaration, D-DEC 022, ll. 20-23; and Joe Gutierrez Deposition Transcript, D-MSJ 305, p. 6, ll. 10-17 and p. 8, 18-19);

4. On December 28, 2004, Feil received, opened, and visually scanned an article of incoming general mail in the LCC mailroom that was addressed to Witherow, which Feil described as a "petition for recommendations regarding parole & sentencing procedures" ("Petition"), and for which article of mail, Feil issued to Witherow an "unauthorized mail" notification, due to prison security and public-safety concerns and policies, below discussed more fully. (D-MSJ 916; and D-MSJ 270, p. 39, l. 24 to p. 40, l. 17);

5. Witherow appealed the "unauthorized mail" notification from December 28, 2004 through January 31, 2005 (Grievance No. 2004-19-8297) and demanded production of the Petition, claiming that: (a) his receiving the Petition would not violate prison rules; and (c) his rights were being violated. (D-MSJ 916-18, 920-22, and 924-25);

6. From January 10, 2005 through February 22, 2005, Perino, Vare, and Cox denied Witherow's appeals, explaining that: (a) the Petition contained the names and addresses of citizens of the State of Nevada; (b) the citizens gave no indication, when signing the Petition, that they intended to have their name and address information sent to a prison for review and use by Witherow, an inmate; (c) it appeared that the citizens intended to have their information reviewed by the parole board or other governing body in connection with rewriting the law; and (d) it was within the guidelines of NDOC Administrative Regulation ("AR") 750

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and NRS 209.365, for prison officials to protect Nevada citizens from the risk of having their names and addresses used in an inappropriate manner (D-MSJ 919, 923, and 926-27);

7. In or about early April, 2005, after having lost his appeal regarding the Petition, Witherow solicited and received some assistance of Caseworker Carey in having the Petition mailed out from LCC to then-Governor Kenny Guinn, which Petition was mailed out from LCC on or about April 4, 2005, but not by Carey[3] (D-MSJ 289, p. 22, l. 4 to p. 23, l. 11; D-MSJ 290, p. 28, ll. 9-21; D-MSJ 018, p. 68, l. 11 to D-MSJ 019, p. 70, l. 6; Declaration of Jeffrey Kintop, D-DEC 001-007; D-MSJ 712-718, Carey Deposition, D-MSJ 293, p. 38, ll. 3-20);

8. The envelope containing the Petition that Witherow mailed to then-Governor Guinn contained *only* the following documents: (a) a two (2)-page document, entitled, "TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF NEVADA RECOMMENDATIONS REGARDING PAROLE AND SENTENCING PROCEDURES" (upper case and underscoring in original); and (b) three (3) pages containing the signatures and addresses of forty-eight (48) citizens (non-NDOC inmates) residing in the Nevada cities of Fernley, Reno, Sparks, Wadsworth, and Sun Valley. (D-DEC 001-007; and D-MSJ 712-718);

9. Although Witherow later filed a grievance against Feil, claiming that Feil's issuance of the "unauthorized notification" constituted unlawful retaliation, Witherow did not file that grievance until October 24, 2005, which was later than ten (10) days or six (6) months[4] from the date on which Feil issued her "unauthorized mail" notification on December 28, 2004. (Declaration of Robert LeGrand, D-Dec 0008-0011; D-MSJ 871-873 (Witherow filed grievance for retaliation against Feil for many issues, including the Petition issue); and D-MSJ 036, p. 141, l. 22 to p. 144, l. 22 (Witherow acknowledged that he filed his informal grievance on the Petition issue later than six (6) months, but argued he had a right to do so));

10. On June 2, 2005, a separate litigation ("*Evans-Witherow*") involving matters unrelated

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[3] (*See* D-MSJ 718 (postal mark "APR-4'05" imprinted on the front side of the envelope addressed from Witherow to Governor Guinn); see also D-MSJ 718 (LCC mailroom stamp imprinted on the reverse side of the same envelope bearing the words, "MAILED APR 04 2005").)

[4] AR 740.02 § 1.4.1.1 requires informal grievances concerning disciplinary matters and mail or correspondence issues to be filed by an inmate within ten (10) days of the incident being grieved and further requires informal grievances concerning tort claims, including civil rights claims to be filed by an inmate with six (6) calendar months from the incident being grieved. (*See* D-MSJ 952-971.)

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to the particular claims of this case was commenced in Federal Court, entitled *Donald York Evans and John Witherow v. Lenard Vare, Rosemary Seals, Kelly Balenger, and Does I-X,* proceeded as Case No. 3:05-cv-00327-ECR-RAM in the United States District Court for the District of Nevada (D-DEC 045-046; and complaint in *Evans-Witherow*, D-MSJ 1065-1075);

11. As for the timing of procedural events in *Evans-Witherow*: (a) the complaint and motion for preliminary injunction were filed on June 2, 2005; (b) the defendants filed their response in opposition to the motion for preliminary injunction on July 18, 2005; and (c) the defendants filed their answer to the complaint on August 15, 2005. (Court's docket sheet in *Evans-Witherow*, D-MSJ 1081-82, at Docket Entries 2-3, 14, and 17);

12. Feil was not a defendant in the *Evans-Witherow* litigation, nor did Feil know any details about the *Evans-Witherow* lawsuit, which did not affect her or cause her concern, and for which case she never saw a copy of the injunction, and Witherow was not aware that Witherow had filed any lawsuits against the NDOC, prior to this litigation. (D-MSJ 267, p. 29, l. 22 to D-MSJ 268, p. 30, l. 25; and D-MSJ 279, p. 75, l. 24 to p. 76, l. 3);

13. On July 7, 2005, Feil received, opened, and visually scanned an article of incoming general mail in the LCC mailroom that was addressed to Witherow, which Feil described as a letter ("Lader Letter") that contained legal paperwork of another inmate named Lader, NDOC ID No. 64675, who was confined at a different correctional facility at Northern Nevada Correctional Center ("NNCC"). (Declaration of James Baca, D-DEC 012-014; and D-MSJ 719);

14. On the following day, July 8, 2005, Feil issued to Witherow a "Notice of Charges" because the Lader Letter, contained Lader's legal paper work and solicited legal help from Witherow, in violation of AR 700, 722, and 724. (D-MSJ 732; D-MSJ 270, p. 39, l. 24 to p. 40, l. 17; and Feil Deposition, D-MSJ 273, p. 51, l. 1 to p. 52, l. 5);

15. The Lader Letter, collected as evidence: (a) was contained in an envelope that had a return-address of a third party named "Rebecca Lammers P.O. Box 234 Litchfield, CA 96117"; (b) contained an enclosed letter from Lader's attorney Charles C. Diaz to Inmate Philip Scott Lader, dated June 16, 2005; (c) contained a Nevada Supreme Court order that

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remanded Inmate Lader's case to the district court for an evidentiary hearing on the issue of whether his trial lawyer was ineffective in preparing and presenting Lader's defense at his trial; and (d) requested legal advice from Witherow as to "how he should behave" at the upcoming evidentiary hearing, and further sought the following specific advice from Witherow:

> (#1) should he maneuver for new for new trial? OR, should he (#2) pretend to maneuver for [a] new trial"? (#3) if new 'plea bargain' is offered, should he accept? Also, why should he accept? Also, what guarantee is available to bind judge to new plea of perhaps 'time served'? How should he speak? (#4) How does he know that D.A. doesn't have something else in store for him? (Last time he spoke with DIAZ, he to[ld] Phil that D.A. was considering some kind of "amended" somethin[g] or other, DIAZ says he's got 30 days, friend NOLAN says he's got 18 da[ys] which? D.A. doesn't think he had I.A.C. any where, might ac[t] accordingly. (#5) What about change of venue? (#6) or fire Dia[z]. (#7) Can you please think this through and forwar[d] reply to loose cannon and ALSO to Chas. Diaz (443 Marsh Ave., Reno, NV 89509[)] (#8) forward reply to loose cannon however is most expedient; (#9) does loose cannon need to be on his best behavior or is it ok to accuse Nevada Judicial System of being in fecal frenzy? (#10) Need Coaching. [D-MSJ 719-730.]

16. On August 7, 2005, Hearing Officer Cherie Scott dismissed all charges asserted against Witherow pertaining to the Lader Letter, after considering the nature of the incident, the officer's report, and Witherow's defense that he: (a) was not doing any legal work for Lader; (b) had no communication with Lader; and (c) had no control over what somebody sends him in the mail to him. (D-MSJ 733-734);

17. On or about August 29, 2005, an unknown LCC mail worker ("Unknown Employee"), but not Feil, received, opened, and visually scanned an article of incoming general mail ("Scarborough Mail") in the LCC mailroom that was addressed to Witherow, which the Unknown Employee described as "a letter from inmate to inmate from Scarborough," and for which article of mail, the Unknown Employee issued to Witherow an "unauthorized mail" notification because it was "inmate-to-inmate piggy-backed mail". (Feil Declaration, D-DEC 018-019, ¶ 16; D-MSJ 885; and D-MSJ 032, p. 124-ll. 4-5);

18. The Scarborough Mail: (a) was contained in an envelope that had the return-address of "Scarborough 18 Desota St. Saugus, MA 01906"; (b) contained an enclosed letter from an NDOC inmate, named "Chris," whose mother sent the Scarborough Mail from Massachusetts

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(D-MSJ 883, ¶ 4); (c) acknowledged that John Witherow had previously sent legal work to Chris at a different correctional institution (D-MSJ 881, ll. 2-3 ("I wrote her about the opposition you sent me through RJ, but her legal aide (who isn't working there anymore) intercepted it"); and (d) requested legal representation from John Witherow for a disciplinary matter, as follows:

> I've written 3 letters seeking legal help—one to a private attorney, one to the ACLU (which I got back denied), and one to the William F. Boyd School of Law at UNLV in hopes of a soon-to-graduate attorney may be interested in suing NDOC. I never got an answer back from the private attorney, and I don't know about UNLV, so I'm asking you if you'd be interested. I know you enjoy challenges, especially when it involves NDOC. If you need documentation on paruresis, have your attorney friend look up www. Paruresis.org.)

(D-MSJ 883, ¶ 3; *see also* entire Scarborough Mail, D-MSJ 880-884)

19. Feil had no personal involvement in, nor did she have any contemporaneous knowledge of: (a) the Unknown Employee's receipt or processing of the Scarborough Mail; (b) the Unknown Employee's interception and non-delivery of the Scarborough Mail to Witherow; and (c) the Unknown Employee's issuance of the "unauthorized mail" notification to Witherow for the Scarborough Mail. (D-DEC 019, ¶ (e), (i), (j), (k), and (l));

20. Feil's only personal involvement in connection with the Scarborough Mail, came *after the fact* and after the "unauthorized mail" notification was issued, when she responded to Witherow's request for information about the Scarborough Mail; (D-DEC 019, l. 27 to D-DEC 021, l. 1; and D-MSJ 886-87);

21. Initially, Feil provided to Witherow the return-address information for the Scarborough Mail, but thereafter realized she did so in error and should not have given him that information, and thereafter, Feil refused to give Witherow other information about the Scarborough Mail, nor would she allow him to forward it to a third party, due to prison-security concerns. (D-DEC 019, l. 27 to D-DEC 021, l. 1; and D-MSJ 886-87);

22. Witherow was not issued disciplinary charges in connection with the Scarborough Mail, nor did Witherow did file a prison-administrative grievance against Feil or anyone, with respect to the withholding or confiscation of the Scarborough Mail. (D-MSJ 032, p. 125, ll. 3-

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4; and Docket 061, p. 5, ll. 22-24);

23. On September 19, 2005, Feil received, opened, and visually scanned an article of incoming general mail ("Returned Mail") in the LCC mailroom that was returned by the U.S. Postal Service as undeliverable, for which article of mail Witherow was the sender, and for which mailing Feil believed violated AR 750, concerning "piggy-backed" mail, where Witherow asked the addressee (undisclosed) to relay an article to NSP Inmate Joseph Maresca, NDOC ID No. 23245. (D-MSJ 735; D-MSJ 274, p. 57, ll. 12-24; and D-MSJ 279, p. 77, l. 24 to D-MSJ 80, p. 78, l. 11);

24. On the following day, September 20, 2005, Feil issued to Witherow a "Notice of Charges" for piggy-backing mail in connection with the Returned Mail, and in his defense in a subsequent disciplinary inquiry, Witherow admitted "I wrote a letter to Jackie Varnum [addressee] requesting her to inform another inmate information that might be pertinent to his case." (D-MSJ 735; D-MSJ 274, p. 57, ll. 12-24; and D-MSJ 035, p. 137, l. 7 to D-MSJ 036, p. 138, l. 5);

25. At the ensuing disciplinary hearing held on or about October 26, 2005, Disciplinary Hearing Officer William Sandie heard the prison's presentation that Witherow asked the addressee to mail newspaper clippings to another inmate at NSP, and that such a relay of information did not meet requirement for inmate-to-inmate correspondence; accordingly, the hearing officer dismissed all charges asserted against Witherow, having relied on the officer's report and the letter in question (D-MSJ 736-37);

26. Although Witherow claims that he filed a grievance against Feil for her issuance of these disciplinary charges, referring to Grievance No. 2005-19-12643 commenced on October 24, 2005, he did not specifically grieve that Feil "retaliated" against him for the particular instance of issuing a Notice of Charges for the Returned Mail incident, but, instead, generally grieved multiple issues of "unwarranted and unfounded disciplinary reports in matters related to my mail," referring generally to "3 major and 1 general disciplinary charges against me," and he did not cure that defect, but argued that he did not need to be more specific (D-MSJ 036, p. 140, l. 15 to p. 141, l. 21; and D-MSJ 871-79);

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27. From October 27, 2005 through December 21, 2005, Chacon, Vare, and Cox denied Grievance No. 2005-19-12643 on procedural and substantive grounds, where: (a) Witherow failed to attach the notices of charges to which he referred in his grievance, as required by AR 740.02 § 1.4.1.5 (which required that Witherow provide "all documentation and factual allegations available to the inmate at [the informal] level") (*see* D-DEC 047-049; and AR 740.02, § 1.4.1.5 at D-MSJ 1040); and (b) there was no evidence of retaliation by Feil, notwithstanding the dismissal of disciplinary charges she issued against him, and further defending Feil's actions, where it was her opinion that Witherow had violated the NDOC Regulations. (D-MSJ 874, 876, and 878-79);

28. The LCC operations budget allowed for the allocation of one full-time correctional officer to work in the LCC mailroom, and that mailroom officer's position was a forty (40)-hour-per-week position, generally scheduled for eight (8) hours per day, from Monday through Friday. (Vare Declaration, D-DEC 024, ¶ 12; and Palmer Declaration, D-DEC 035, ¶ 12.)

29. Currently, the LCC mailroom officer receives and processes on average: (a) over seven hundred (700) pieces of incoming mail per day during the non-holiday season of March through October; and (b) over twelve hundred (1,200) pieces of incoming mail per day during the holiday season of November through February. (D-DEC 016, l. 19 to D-DEC 017, l. 15.)

30. Extrapolating back to the years 2005-2006, based on an inmate population of eighty-four percent (84%) of its current population, it is conservatively estimated that, in 2005-2006, the LCC mailroom officer received and processed on average: on average: (a) over five hundred and eighty (580) pieces of incoming mail per day during the non-holiday season of March through October; and (b) over one thousand (1,000) pieces of incoming mail per day during the holiday season of November through February. (D-DEC 017, ll. 17-21);

31. The duties of the mailroom officer including processing incoming and outgoing mail, and are quite time-consuming and laborious. (*See* D-DEC 017, l. 22 to D-DEC 018, l. 15);

32. At all times relevant to the claims of Witherow's Complaint, due to prison-security and allocation-of-resource concerns at LCC, certain mail-handling practices and policies were in effect for incoming, general mail (not legal mail/privileged correspondence) that: (a) deemed

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tape affixed to an envelope of such mail to be "adulterated mail," within the definition supplied by AR 750, because tape could obscure or mask contraband that might exist beneath tape, including that which might appear to be transparent-tape adhesive, including illegal drugs in a chemical form; (b) allowed the mailroom officer to exercise discretion, based on an inspection of the envelope, when determining whether an address-label-sticker on such mail contained, obscured or masked contraband or some unauthorized substances on the label sticker or envelope, including illegal drugs in chemical form; and (c) allowed the mailroom officer to return to the sender any such mail that appeared to be tampered or adulterated, without issuing any notice to the inmate-addressee that the mail was received or being returned to the sender, provided that the envelope of such mail was not opened ("Unopened Mail Policy").[5] (D-DEC 024, l. 21 to DEC 028, l. 27; and D-DEC 035, l. 25 to D-DEC 039, l. 10);

33. From December 18, 2005 through January 21, 2006, Witherow filed and pursued Grievance No. 2005-19-15552, claiming that: (a) certain mail ("Sikorski and Dittmer Mail") that was sent by Sikorski and Dittmer to Witherow in November of 2005 was returned to Sikorski and Dittmer with the handwritten explanation on the envelopes that tape on the envelopes was not authorized; (b) that Witherow was not provided notice or an opportunity to appeal the return of Sikorski and Dittmer mail to the senders; (c) that the "mail room" office was not trained in mail-handling procedures and/or was "continuing to retaliate" against Witherow; and (d) Witherow requested an investigation of the matter and that the person responsible for mishandling his mail be removed from the mail room, disciplined, and required to attend training in the proper handling of mail. (D-MSJ 897-908; D-MSJ 275, p. 58, l. 16 to p. 60, l. 13; and D-MSJ 280, p. 78, l. 12 to p. 79, l. 8);

34. Feil returned the Sikorski and Dittmer Mail to the senders because the envelopes contained tape, and, thus, were "adulterated mail," and she didn't issue an "unauthorized mail" notice to Witherow, in reliance on the Unopened Mail Policy. (Feil's Interrogatory Response Nos. 1 and 2, D-MSJ 352, l. 22 to D-MSJ 353, l. 18; D-MSJ 897-908; D-MSJ 275, p. 58, l. 16 to p. 60, l. 13; D-MSJ 280, p. 78, l. 12 to p. 79, l. 8; and D-MSJ 275, p. 61, l. 25 to

[5] The Unopened Mail Policy is now codified as LCC Operational Procedure ("OP") 750.01 § 7. (D-DEC 036, n. 1).

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D-MSJ 276, p. 62, l. 20.)

35. From December 28, 2005 through January 23, 2006, Chacon, Palmer, and Cox: (a) denied Witherow's grievance, defending the policy of deeming tape on an envelope as adulterated, "unauthorized mail"; and (b) stated, or accepted the statement of others, that: (i) Witherow should have received an "unauthorized mail" notice for the Sikorski and Dittmer Mail; and (ii) did not know why Witherow did not receive such a notice, but that the appropriate measures would be taken, or were taken, to correct the problem. (D-MSJ 899, 902, and 904-905);

36. However, in hindsight, Vare and Palmer now reject the notion that Witherow should have received and "unauthorized mail" notice for the Sikorski and Dittmer Mail, and concluded that statements by Chacon, Palmer, and Cox to the contrary, made in D-MSJ 899, 902, and 904-905, were mistakenly given in error because the Unopened Mail Policy would have allowed for the return of the Sikorski and Dittmer Mail without issuing an "unauthorized mail" notice to Witherow. (D-DEC 029, l. 2 to D-DEC 030, l. 7; and D-DEC 039, l. 11 to D-DEC 040, l. 17);

37. On April 18, 2006, Witherow filed, at the informal level only, Grievance No. 2006-19-6032, claiming that: (a) certain mail ("Hines Mail") that was sent by Pat Hines to Witherow in February of 2006 was returned to Pat Hines because the envelope had a mailing address label on it; (b) that Witherow was not provided notice or an opportunity to appeal the refusal to deliver the Hines Mail to Witherow; (c) that the "mail room" office was not appropriately trained in mail-handling procedures and their trainers were deliberately indifferent to Witherow's constitutional rights, in failing to properly train the mailroom employees; and (d) Witherow requested to know who worked in the mailroom from February 13, 2006 to February 25, 2006. (D-MSJ 909-910, 913-915; D-MSJ 047, p. 159, 13 to p. 160, l. 23; and D-DEC 011, ll. 11-16);

38. Feil was not working in the LCC mailroom in 2006, and, she had had no personal involvement in, nor did she have any personal knowledge of: (a) the receipt or processing of the Hines Mail; (b) the interception and non-delivery of the Hines Mail to Witherow. (D-MSJ

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353, ll. 27; and D-MSJ 276, p. 64, l. 21 to p. 65, l. 14);

39. Tupa returned the Hines Mail to the sender because the envelopes contained an address-label sticker on the envelope, and, thus, was "adulterated mail," and she didn't issue an "unauthorized mail" notice to Witherow, in reliance on the Unopened Mail Policy. (Tupa's Deposition Transcript, D-MSJ 296, p. 5, l. 19 to D-MSJ 297, p. 8, l. 6; D-MSJ 298, p. 11, ll. 11-12; *and see* D-MSJ 298, p. 13, l. 20 to p. 13, l. 24; and D-MSJ 299, ll. 9-10[6]);

40. A careful examination of the sticker on the envelope reveals that the address information was written on the label *after* it was applied to the envelope, suggesting that it was not a pre-printed label, because the top of the lettering of Witherow's name spills over onto the envelope, from the label affixed to the envelope, and this suggests that there was no need for a sticker-label because his address information could more easily have been written directly on the envelope, without a sticker-label. (*See* D-MSJ 913 (the line above John Witherow's name is the demarcation of the edge of the label); *see also* D-MSJ 297, p. 6, l. 11 to p. 7, l. 3 (confirming that the line of the envelope is the edge of the sticker); *but see* D-MSJ 297, p. 7, ll. 4-6 (confusing the issue of when the address was written on the label, in relation to when the label was placed on the envelope);

41. On May 3, 2006, Caseworker Carla Van Pelt ("Van Pelt"): (a) denied Witherow's grievance, stating that the mail room officer returned the Hines Mail to the sender because it had a sticker on the envelope, which was disallowed, due to safety and security issues; (b) stated that: (i) Witherow should have received an "unauthorized mail" notice for the Hines Mail; (ii) the mailroom was trying to help inmates out by removing the unauthorized portions of the letters[7]; and (iii) Van Pelt did not know why Witherow did not receive such a notice, but that the appropriate measures would be taken, or were taken, to correct the problem. (D-MSJ

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[6] While Tupa could not succinctly testify as to the underlying policies of the Unopened Mail Policy, and although she misapplied the notion of censorship to unopened mail, she clearly testified that unopened mail that was returned to the sender does not require a notice to the inmate. (*See* D-DEC 025, l. 25 to D-DEC 026, l. 6 (Vare declaration that states that the returning mail under the Unopened Mail Policy is not censorship under AR 750 because the content of material inside the envelope is not examined upon opening, nor is it censored or deleted).)

[7] This statement likely refers to the historic practice of the LCC mailroom officer trying to accommodate inmates' unauthorized mail, without returning it to the sender, by tearing out the offending portion of the envelope, which ultimately proved to be unworkable, as explained in Vare's Declaration (*See* D-DEC 030, l. 23 to D-DEC 031, l. 4 and D-DEC 026, l. 21 to D-DEC 027, l. 10.)

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899, 902, and 904-905);

42. Vare and Palmer reject the notion that Witherow should have received and "unauthorized mail" notice for the Hines Mail, and concluded that, in hindsight, statements by Van Pelt to the contrary, made in D-MSJ 912, were mistakenly given in error because the Unopened Mail Policy would have allowed for the return of the Hines Mail without issuing an "unauthorized mail" notice to Witherow. (D-DEC 030, l. 8 to D-DEC 031, l. 4; and D-DEC 040, l. 18 to D-DEC 041, l. 6);

43. On February 27, 2006, Carey received, opened, and visually scanned an article of incoming legal mail ("Sager Mail") that was not marked as "privileged correspondence" (legal mail), from C. Sager to Witherow, containing the legal mail of another NDOC inmate, Dickinson, Inmate No. 21263 with sensitive information about another inmate's crime, which was prohibited by AR 722, and although some names of persons were partially redacted, upon close inspection of the documents, the names could still be read. (D-MSJ 888, 891, D-MSJ 292, p. 34, l. 23 to p. 37, l. 24);

44. Acting on the instructions of AWP LeGrand, Carey returned the Sage Mail to its sender, due to public-safety concerns. (D-MSJ 292, p. 34, l. 23 to p. 37, l. 24);

45. From February 28, 2006 through March 27, 2006, Witherow filed and pursued Grievance No. 2006-19-3251, claiming that: (a) Carey censored and refused to deliver to him the Sager Mail; (b) the Sager Mail contained legal documents pertaining to another person whose name was blacked out in the documents; (c) that Sager wanted Witherow to read the enclosed documents and advise Sager of his opinion; (d) that AWP LeGrand, acting on instructions from Palmer and then-Deputy Attorney General Kelly Werth, refused to deliver the Sager Mail to Witherow because the enclosed documents pertained to a federal prisoner; and (e) that such refusal to deliver his mail constituted a violation of his constitutional rights;

46. From March 1, 2006 through May 2, 2006, LeGrand, Palmer, and Cox denied Witherow's grievance, defending the withholding of the Sager Mail from Witherow because: (a) Witherow had no court order to receive the Sager Mail that were legal documents for inmate Dickerson, NDOC Inmate No. 21263, which contained sensitive information about

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another inmate's crime, which documents were considered contraband and prohibited by AR 722; (b) warning Witherow that if he knowingly attempted to violate AR 722 again, he might receive a Notice of Charges; (c) AR 722 does not allow one inmate to possess another inmate's legal documents or information about their crime, except where authorized by AR 722 or a court order.

III. SUMMARY JUDGMENT LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (citations omitted). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). The moving party bears the initial burden of informing the district Court of the basis for its motion for summary judgment, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which the moving party believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party meets its initial burden here, the burden then *shifts* to the opposing party to establish that a genuine issue as to any material fact does, indeed, exist. *Matsushita*, 475 U.S. at 586. When attempting to establish the existence of such a factual dispute, the opposing party is not permitted merely to rely upon on its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of his or her contention that the dispute does exist. Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n. 11. Here, the opposing party is not required to establish a material issue of fact *conclusively* in its favor. Rather, it is enough that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv*., 809 F.2d at 631. The evidence of the non-moving party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that

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may be drawn from the facts placed before the Court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citations omitted). That having been said, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines, 602 F.Supp*. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Here, the Court is concerned with establishing the existence of "genuine" issues, and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id*. at 587 (citations omitted)).

IV. SUMMARY JUDGMENT ON "DOE" AMENDMENT CLAIMS

Generally, "Doe" pleading is improper in federal court. *McMillan v. Department of Interior*, 907 F.Supp. 322, 328-329 (D.Nev. 1995) (citing *Bogan v. Keene Corp.,* 852 F.2d 1238, 1239 (9th Cir.1988)). "There is no provision in the Federal rules permitting the use of fictitious defendants." *Id.* (citing *Fifty Associates v. Prudential Ins. Co.,* 446 F.2d 1187, 1191 (9th Cir.1970).) The use of "doe" pleadings is "dangerous at any time. It is inviting disaster to allow fictitious persons to remain defendants if the complaint is still of record." *McKellip v. Las Vegas Metropolitan Police Dept.*, 2007 WL 173857 (D.Nev. 2007) (not reported in F.Supp.2d) (quoting *Sigurdson v. Del Guercio,* 214 F.2d 480, 482 (9th Cir.1956).) Fed. R. Civ. P. 15 (c) governs the "relation back" of amended pleadings to the date of the original pleading, but not for "fictitious defendants." *Williams v. Avis Transport of Canada, Ltd.*, 57 F.R.D. 53, 56, (D. Nev. 1972). This issue is of critical concern to parties, where a challenging party claims that the opposing party's amended claim is time-barred by the statute of limitations, and the challenging party seeks to prevent the opposing party from curing that defect by "relating it back" to the filing date of the original complaint. When such a dispute arises, federal procedural law usually supplies the rule of resolution, not state law. In particular, whether an amended pleading may "relate back" to the time of the original pleading is a procedural matter, not a substantive one, and federal courts should apply federal procedural law, not

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state procedural law, to this issue. *Carmouche v. Bethlehem Steel Corp.*, 450 F.Supp. 1361, 1362 (D.Nev. 1978) (citing *Williams*, 57 F.R.D., 53, 56 (D.Nev. 1972) (court granted motion to dismiss a car manufacturer, which corporation had been substituted as a "Doe" defendant after the running of the statute of limitations). In federal practice, amended "Doe" pleadings do not "relate back" to the time of the original Complaint under Fed. R. Civ. P. 15 (c). *Williams,* 57 F.R.D. at 56. The Nevada Federal District Court has explained:

> In *Craig v. United States*, 413 F.2d 854 (9th Cir. 1959), an admiralty action, the Court had occasion to discuss the fictitious party practice in the federal courts and said:
>
> 'The only purpose the naming of fictitious defendants could possibly serve is to make it possible to substitute named defendants after the statute of limitations has run. But Rule 15(c), Federal Rules of Civil Procedure, provides the only way in which defendants, not accurately named in a pleading before the limitation period has run, may be accurately named afterwards. That rule, which pertains to the relation back of the pleadings, makes no mention of the pleading of fictitious parties. It is therefore wholly immaterial, insofar as the application of that rule is concerned, whether fictitious defendants were named prior to the running of the statute.' [*Williams*, 57 F.R.D. at 56.]

Because § 1983 does not contain a statute of limitations, state law determines the length of the period during which a § 1983 claim may be filed. *Bagley v. CMC Real Estate Corp.,* 923 F.2d 758, 760 (9th Cir.1991). Claims brought pursuant to § 1983 "are best characterized as personal injury actions" for purposes of a state's statute of limitations. *Wilson v. Garcia,* 471 U.S. 261, 276 (1985), overruled on other grounds, as recognized in *Merrigan v. Affiliated Bankshares of Colorado, Inc.*, 775 F.Supp. 1408 (D.Colo. 1991). In Nevada, the applicable statute is Nevada Revised Statute 11.190(4) (e), which allows two years for the filing of personal injury claims. *Perez v. Seevers,* 869 F.2d 425, 426 (9th Cir.1989). Untimely § 1983 claims are barred by the statute of limitations. *Id.*

Here, summary judgment should be granted in favor of Tupa and Gutierrez, as a matter of law. Tupa and Gutierrez were first named as Defendants in the Amended Complaint, filed on June 26, 2008. In their Answer to the Amended Complaint, Tupa and Gutierrez objected to having their claims "relate back" to the time of the filing of the original Complaint in Affirmative Defense No. 30. (Defendants' Answer to Amended Complaint,

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Docket No. 069, p. 12, l. 11-16). The claims of this case allegedly occurred from the Summer of 2004 to February 27, 2006. (*See generally* Docket 061.) The statute of limitations for constitutional torts is two (2) years. Therefore, unless the claims of the Amended Complaint can properly "relate back" to the claims of the original complaint, the claims asserted against Tupa and Gutierrez are untimely. Absent such "relation back," the claims against Tupa and Gutierrez should have been filed no later than February 26, 2008. *Williams,* 57 F.R.D. at 56. Thus, all claims against Tupa and Gutierrez fail to state a claim upon which relief can be granted because they are barred by the statute of limitations. *Craig*, 413 F.2d at 854; *McMillan*, 907 F.Supp. at 328-329; *Bogan,* 852 F.2d at 1239; *Fifty Associates,* 446 F.2d at 1191; *McKellip*, 2007 WL 173857; *Sigurdson,* 214 F.2d at 482; *Williams*, 57 F.R.D. at 56; *Carmouche*, 450 F.Supp. at 1362; *Bagley,* 923 at 760; *Wilson,* 471 U.S. at 276; NRS 11.190(4) (e); and *Perez,* 869 F.2d at 426

V. SUMMARY JUDGMENT ON THIRD CAUSE OF ACTION

The First Amendment protects the flow of information to prisoners, and any limitation must reasonably relate to a legitimate penological interest. *Crofton v.* Roe, 170 F.3d 957, 959 (9th Cir. 1999) (citations omitted). The persons protected by the withholding of the Petition from Witherow are the forty-eight (48) signatories ("Signatories") to the Petition. By signing a petition, the Signatories did not ostensibly signal their intent to communicate with Witherow, a convicted prisoner. Moreover, there was no indication on the Petition or the cover sheet to the same that their signatures would be sent to Witherow, an NDOC inmate.[8] Therefore, the free-flow of information from the Signatories to Witherow is not implicated by the Signatories' mere signing of the Petition, because the Signatories did not "seek out" communication with Witherow; rather, the Petition was merely forwarded to Witherow by a third-party. *Cf. Thornburgh v.* Abbott, 490 U.S. 401, 408 (1989) (publishers who *wish to communicate* with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners); *cf*. *Prison Legal New v.* Lehman, 397 F.3d 692

[8] See actual Signatory Pages to the Petition, which Witherow sent to Governor Guinn and were recovered from State Archives; the documents comprising the Petition make no mention of anyone's intent to forward the signatures onto an NDOC inmate or Witherow. (D-MSJ 712-718).

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(9th Cir. 2005) (publishers have a First Amendment *right to communicate* with prisoners by mail). Again, here, the senders manifested no objective intent to have their names and home addresses. Assuming *arguendo* that Witherow had a general First Amendment right to receive the unintended communications of the Signatories to a petition, Defendants had the right to encroach upon such a right, where doing so was rationally related to a legitimate penological interest. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). In determining the constitutionality of a prison regulation or policy, courts consider: (1) whether there is a valid, rational connection between the regulation and the legitimate governmental interest put forward to justify it, such that the connection should not be "so remote as to render the policy arbitrary or irrational"; (2) whether there are alternative means of exercising the prisoner's asserted right that remain open to prison inmates, with "a measure of judicial deference owed to corrections officials in gauging the validity of the regulation"; (3) the impact that accommodating the asserted right would have on correctional staff, other inmates, and prison resources in general, such that, if the accommodation would have a significant "ripple effect" on fellow inmates or in prison staff, for which factor courts should be particularly deferential to the informed discretion of prison officials; and (4) whether there are obvious, easy alternatives to the regulation or policy in question, the absence of which is evidence of the reasonableness of the prison rule, and for which factor a "least-restrictive alternative" test is not required. *Turner v. Safely*, 482 U.S. 78, 89-90 (1987). Under the first prong of the Turner analysis, Defendants had a legitimate penological interest in withholding the Petition from Witherow. As Defendants told Witherow in their responses to his appeal-grievances that the Petition was being withheld to prevent the Signatories' names and addresses from being used in an inappropriate manner by inmates, where the Signatories did not consent to such a risk. The government has a legitimate interest in protecting citizens from potential harassment from prisoners. *Wilkerson v. Marshall*, 1993 WL 303716 (N.D. Cal. 1993) (prison regulation barring pen-pal operations was not unconstitutional in that it was reasonably related to legitimate penological objectives, on risk that pen-pal advertisements did not clearly state they had been placed by inmates). The case at bar is analogous to the *Wilkerson* case because,

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based on the evidence recovered from State Archives, the Petition did not clearly state that the names and addresses of the Signatories on the Petition would be forwarded to convicted prisoners, the effect of which denied the Signatories an ability to assess the risk of disclosing their name and home addresses to inmates. The risk of being on an inmate list can invite acts of harassment or harm. *See Garrison v. Davis*, 2008 WL 4155422, 3 (E.D. Mich. 2008) (slip copy) (public telephone books properly construed by prison officials to be a threat to the security and good order of the facility in preventing harassment against prison employees). Accordingly, there is a rational relationship between: (1) the government's legitimate policy of protecting the public from potential harassment and harm at the hand of inmates who obtained the names and home addresses of such citizens without their confirmed consent; and (2) the withholding of the Petition from Witherow. This connection is not so remote as to render the restriction arbitrary or irrational. As for the second prong of the *Turner* test, the withholding of the names and addresses of unsuspecting citizens does not impede an inmate's right to correspond or to seek the names and addresses of those sympathetic to an inmate's ideas for political reform. Rather, there are alternative means for an inmate to receive the names and addresses of citizens who sign petitions relating to conditions of confinement, such means being *disclosure* of the fact that the names and addresses on such petitions will be given to convicted prisoners. Informed consent is the issue at stake here. *See Wilkerson*, 1993 WL 303716 at 2 (alternatives to restriction would include inmates identifying themselves as criminals, so that informed consent by would-be pen pal could be freely given). As for the third prong of the *Turner* test, accommodating an inmate's right to solicit the names and home addresses of unsuspecting citizens would have a significant "ripple" effect on the operations of the prison. This is true because doing so would increase the risk of harm or harassment of such citizens by inmates, which would put a strain on prison resources in rooting out and stopping such harm, and such a strain would undermine good security, order, and discipline of a prison. *See Id.* (potential harm included inmates' use of pen-pal operations to solicit money and making money by selling correspondents' names to other inmates, for which policing such practices could put an enormous strain on prison staff

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and resources.) Finally, as to the fourth prong of the *Turner* test, there are no ready, easy alternatives to preventing an inmate from surreptitiously obtaining the names and home addresses of citizens, short of requiring disclosure to the citizen before the information is divulged to an inmate. Thus, this is evidence of the reasonableness of the restriction. The petition was permitted to be forwarded to the governor, to have its intended effect. As well, Defendants are entitled to qualified immunity on this cause of action because: (a) withholding the names and home addresses of unsuspecting citizens from inmates for security purposes is not unconstitutional; and (b) even if it were, its unconstitutionality was not clearly established or sufficiently defined in this context at the time of the acts. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilkerson, 1993 WL 303716*. Accordingly, the Court should grant summary judgment on this cause of action.

VI. SUMMARY JUDGMENT ON FOURTH AND FIFTH CAUSES OF ACTION

Defendants are entitled to summary judgment on the Fourth and Fifth causes of action, as a matter of law. As to the First Amendment Claim for the return of the Sikorski and Dittmer Mail, Defendants actions were based on the Unopened Mail Policy. Witherow is attacking an LCC policy, now codified at OP 750. At the summary judgment stage, courts should distinguish between the plaintiff's evidence of disputed facts and disputed matters of *professional judgment*, such that, with respect to the latter, the court's inferences must accord deference to the views of *prison authorities*, and unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow the inmate to prevail on the merits, he cannot prevail at the summary judgment stage. *Beard v. Banks*, 126 S.Ct. 2572, 2578 (2006). As above established, the Sikorski and Dittmer Mail was returned unopened because their envelopes contained tape, which presented security concerns to the prison. (*See* Fact No. 32.) Witherow has no state-created liberty interest to any perceived procedural protections under AR 750. *Witherow v. Crawford*, 468 F.Supp.2d 1253, 1266 (inmates have no liberty interest in AR 750, which governs inmate general correspondence, and they are not owed any of its protections). Under the first prong of the *Turner* analysis, the detention, inspection, and censorship of mail by prison officials, in order to uncover secreted

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contraband, furthers a legitimate penological interest. *Allen v. McGee*, 1996 WL 50981 (D. Or. 1996) (citing *Mann v. Adams*, 846 F.2d 589, 591 (9th Cir. 1988), *cert. denied*, 488 U.S. 898 (1988)). Returning incoming, unopened mail that contained that tape on an envelope can advance a legitimate penological interest because tape on an envelope can present a security threat to a prison. *See Allen v. McGee*, 1996 WL 50981 (D. Or. 1996) (incoming prison mail-envelope to which tape affixed was properly returned to its sender under prison contraband policy). Here, the Sikorski and Dittmer Mail was returned, based on the risk that the tape might conceal contraband, such as chemical drugs, and Witherow, Vare, and Palmer all recall an event where drugs were concealed on the envelope of prison mail. (D-MSJ 030, p. 116, ll. 3-6 (Witherow testified, "I've seen guys written up for mail violations when they discovered heroin under a stamp or methamphetamine soaked in the paper…"); D-DEC 026, l. 13-15 (Vare recalled an instance where an illegal drug was concealed under a stamp or sticker on the envelope of a piece of incoming prison mail); and D-DEC 035, ll. 4-8 (Palmer recalled an instance where LSD or the like was hidden under a postage stamp on prison mail). Thus, there is a valid, rational connection between: (1) returning incoming general prison mail to the sender where tape is affixed to the envelope; and (2) reducing the risk of the introduction of drugs into prison. As for the second prong of the *Turner* test, there are certainly alternative means of exercising the Plaintiffs' First Amendment right to communicate with each other: they simply should send mail without tape affixed to the envelope, and here deference on this policy is owed to LCC. As to the third prong of the test, the impact that accommodating the receipt of incoming general mail with tape on it is readily apparent. Prisons would have to engage in costly chemical analysis of the mail, or tear out the offensive portions of the envelope, with the attendant adverse effects of prison resources. (*See* D-DEC 026, l. 26 to D-DEC 027, l. 10; *see also* accounting of the limited prison resources for the LCC mailroom and the workload facing the mailroom officer, Fact Nos. 28-31; *see* also mailroom duties listed in IP 4.66, OP 7.50-1, AR 750, at D-MSJ 928-971; and *see* D-MSJ 280, p. 79, ll. 16-18 (it is not Feil's job to test envelopes for foreign substances). As to the fourth prong, there are no obvious easy alternatives in reducing the threat of drugs laced on the envelopes of

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incoming general mail, which can be difficult to detect and more so given the limited resources of the prison. It would certainly not be reasonable to allow *all* such general mail in the prison, for doing so would increase the risk of the introduction of contraband and drugs in prison. In light of these considerations, Defendants were privileged, under Turner, to return the Sikorski and Dittmer mail as they did. As to the "due process" claim here, only one party did not get timely notice that the mail was being returned, Witherow. Sikorski and Dittmer got speedy notice that their mail did not comply with regulations, in that the mail was returned to them. As for Witherow's lack of notice, "it is it is questionable whether an inmate even has a First Amendment right to be given notice when his mail is rejected for such violations." *Jeffries v. Snake River Corrections –Oregon,* 2008 WL 3200802, 5 (D.Or., 2008); *see also Witherow*, 468 F.Supp.2d at 1266 (inmates have no liberty interest arising from AR 750). Such a "practice of returning mail to the sender without notice to the intended recipient is almost identical to the widely accepted U.S. Postal Service practice of not providing notice to intended recipients when ordinary mail is returned for lack of postage or some other technical deficiency. *Jeffries,* 2008 WL 3200802, 5. Thus, no Due Process violation occurred because Witherow did not have a constitutional right of being notified that unopened mail was being returned to the sender. (*See also* analogous practice for not providing notice regarding third-class mail, D-DEC 027, ll. 11-20.) Nevertheless, assuming for the sake of argument that such a right-of-notification does exist, Defendants prevail under the *Turner analysis*. Under the first factor, there is a compelling governmental interest in permitting LCC to forego providing such notice to an inmate, in that prison resources are tightly constrained, and the volume of mail that the lone mailroom officer has to receive, process, and send out does not permit preparing a notice to an inmate for every piece of mail containing tape on the envelope. Thus, there is a valid, rational connection between the conservation of prison resources and not providing notice. Alternative means of notification are available to the inmate, which occurred in this case: the sender told the inmate that the mail was returned, and the mail was re-sent to the inmate, without further incident. As well, an inmate is on constructive notice that any mail with tape will be returned. As for the third factor, the impact of accommodating the asserted right

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to notice, every time mail containing tape is returned, is quite significant, as above discussed. Finally, there are no easy alternatives to providing notice each time, based on the lack of resources. Accordingly, no Due Process violation occurred. As well, given that there is no constitutional violation here, Defendants are entitled to qualified immunity. Assuming that a constitutional violation occurred, the state of law concerning either the First or Fourteenth amendment issues was not sufficiently established so as to provide notice to a reasonable correctional official that such conduct in returning the mail to the sender and not providing notice was unconstitutional. *See Saucier*, 533 U.S. at 201; *Allen*, 1996 WL 50981; *Mann v. Adams*, 846 F.2d at 591; and *Jeffries,* 2008 WL 3200802 at 5.

VII. SUMMARY JUDGMENT ON SIXTH CAUSE OF ACTION

Defendants are entitled to summary judgment on the Sixth Cause of Action. Prison officials may entirely prohibit correspondence between inmates on security concerns. *Turner,* 482 U.S. 78, 92-93. As well, Witherow has no liberty interest in AR 750, and is not owed any of its protections. *Witherow*, 468 F.Supp.2d at 1266. Here, the Sager Mail was returned because it contained confidential information about another NDOC inmate and also contained sensitive information about the crime committed by an inmate. (Fact No. 46.) As for the first prong of the *Turner* test, prison officials have a legitimate penological interest in preventing the perils that can occur with inmate-to-inmate mail. *See Turner,* 468 U.S. at 91-92 ("undoubtedly, communication with other felons is a potential spur to criminal behavior; this sort of contact is prohibited even after an inmate has been released on parole"); and *Schenck v. Wood*, 1996 WL 190814, 11 (E.D. Wash. 1996) (correspondence between inmates presents special dangers which are not as readily apparent in correspondence between an inmate and attorneys, courts, legal organizations, and governmental agencies and officials). Here, Defendants returned the mail to the sender based on security concerns. Thus, there was a rational relationship between withholding the mail from Witherow and promoting prison security because under AR 569, inmates are not allowed to possess information that would endanger the health or safety of the subject or other persons, endanger the security of any departmental facility, disclose personal information pertaining to a person other than the

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inmate when the information would not reasonably be part of the inmate's knowledge or experience. Under the second Turner prong, there are no realistic alternative means of the prisoner learning information about other inmates that present security risks, without violating the prison rules. Under the third prong of *Turner*, there would be a tremendous adverse impact to prison security and the safety of inmates, if the asserted right to have unrestrained access to private records and information about other inmates were accommodated. Increased security costs, and actual harm to inmates and correctional officers could occur. Finally, under the Fourth *Turner* factor, there are no ready or obvious alternatives to keeping information private from disclosure, based on security concerns. Knowing private or sensitive information about another inmate, including medical conditions, unpopular crimes, or "informant" activities committed can lead to violence in the prison. *See Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005) (prison officials have a duty to protect prisoners from violence at the hands of other prisoners). Here, the policy of AR 569 centers not on what violence actually happened, or even what was known to be imminent, it centers on what *might* happen, based on security considerations. As type of example, if the records in question concerned an inmate's medical records, then great harm could befall that inmate if such records were disclosed to another inmate. *(See Declaration of Greg Cox*, D-DEC 048, l. 15 to D-DEC 049, l. 13). Thus, Defendants did not violate Witherow's rights with respect to the Sager mail, and Defendants are entitled to qualified immunity because no constitutional right was violated, and if one were, under the circumstances of prison security and the state of the law allowing prisons to prohibit correspondence between inmates, law to the contrary was not sufficiently established to reasonably put Defendants on notice that their conduct was unconstitutional. *See Saucier*, 533 U.S. at 201; *Turner,* 468 U.S. at 91-92*;* and *Schenck v. Wood*, 1996 WL 190814 at 11; and *Hearns*, 413 F.3d at 1040.

VIII. SUMMARY JUDGMENT ON SEVENTH CAUSE OF ACTION

Defendants are entitled to summary judgment on the Seventh Cause of Action. As above detailed, Tupa returned the mail from Pat Hines without notice to Witherow because it contained a sticker on the envelope, as prohibited by AR 750, according to the Unopened

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Mail Policy. Witherow has no liberty interest in AR 750 or the protections of that regulation. *Witherow*, 468 F.Supp.2d at 1266. Moreover, such envelopes presenting security concerns may be returned to the sender without issuing any notice to the inmate, based on the Unopened Mail Policy. As noted above, the label served no apparent purpose, given that it seemed to be placed on the envelope, *after which time*, the addressee's name was handwritten. It would have required less effort to simply write the addressee's name on the envelope, without applying a label. Under the Unopened Mail Policy, mailroom officers have discretion to reject general mail containing address-label stickers. Therefore, based on security concerns, the mail was properly rejected and returned, unopened, to the sender. For the same reasons as above argued for the returned Sikorski-Dittmer mail, Witherow was not entitled to notice of the returned mail under AR 750, the Unopened Mail Policy, or any other basis, and if such a right did exist, Defendants were free to forego providing such notice, given the *Turner* analysis above provided for the same issues, regarding considerations of the allocation and lack of sufficient prison resources. As well, for the same reasons as above argued, in the Sikorski-Dittmer mail, involving the same issues, Defendants are entitled to qualified immunity on the First and Fourteenth Amendment claims.

Additionally, this claim is procedurally barred because Witherow did not proceed beyond the informal grievance level, and, thus, did not exhaust his administrative remedies. The Prison Litigation Reform Act of 1995 ("PLRA") provides that a prisoner cannot challenge any conditions of his or her confinement in federal court, including suits commenced under 42 U.S.C. § 1983, unless he or she has exhausted all available administrative remedies. *Woodford v. Ngo*, 126 S.Ct. 2378, 2383 (2006) (citations omitted). Exhaustion is not left to the discretion of the district court, but is "mandatory." *Id.,* 126 S.Ct. at 2382 (citations omitted). A prisoner must exhaust administrative remedies, even where the relief sought is monetary damages, which damages cannot be granted by the administrative process. *Id.* at 2382-2383 (citations omitted). When exhausting such administrative remedies, the inmate must comply with the procedures governing the administrative grievance process, including by filing grievances in a timely manner. *Id.* at 2388. If an inmate fails to comply with those

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procedures, he or she cannot bypass those procedures and proceed to the forum of Federal Court. *Id.* This is true, even if it is too late for the inmate to comply with those procedures, after the fact. *Id*. AR 740 requires that an inmate file an informal grievance, a first-level formal grievance, and a second-level formal grievance, in order to have the grievance be deemed exhausted. (*See* AR 740.02, § 1.1.1, D-MSJ 1036-1037.) Here, Witherow did not proceed beyond the informal grievance level. (Fact No. 37.) Accordingly, this claim is barred by the PLRA.

IX. SUMMARY JUDGMENT ON EIGHTH CAUSE OF ACTION

Defendants are entitled to summary judgment on all Claims presented in the Eighth Cause of Action, which are based on the allegations that: (1) Feil engaged in retaliatory actions against Witherow; and (2) Chacon, Vare, and Cox denied him relief in the grievance process. The Ninth Circuit Court of Appeals has held:

> Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

Rhodes v. Robinson, 408 F.3d 559, 567-568 (9th Cir. 2005) (footnote omitted) (citing: *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir.2000); and *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir.1994)). Here, it must be remembered that Element No. One, in the *Rhodes v. Robinson* test, is a separate element from Element No. Four, and the two should not be conflated into one, nor should one be mistaken as a substitute for the other. For instance, if Witherow cannot satisfy Element No. One, by demonstrating that he suffered some "adverse action," we will never get to Element No. Four, which inquires as to whether the adverse action "chilled the inmate's exercise of his First Amendment rights." See *Id*. Stated more plainly, Witherow cannot be permitted to dispense with proving up the "adverse action" requirement by stating that the adverse action, itself, was his chilled first amendment rights. If that were permissible, then the Ninth Circuit Court of Appeals would have eliminated Element No. One's "adverse action" requirement, altogether. Here, the Court must construe Element No. One as

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essential, and not mere surplusage. *Cf. Walter v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 209 (1997) ("statutes must be interpreted, if possible, to give each word some operative effect") (citations omitted) and *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("we have long followed the principle that statutes should not be construed to make a surplusage of any provision") (internal brackets omitted) (citations omitted). With respect to the Element No. Five, "[t]he plaintiff bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct of which he complains." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Prisoners have a First Amendment right to file prison grievances. *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). Prisoners have a First Amendment right to pursue civil rights litigation in the courts. *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995). "Purely retaliatory actions" may not be taken against a prisoner for having exercised these First Amendment rights. *Rhodes v. Robinson*, 408 F.3d at 567 (footnote omitted).

As above discussed, Feil was within her legal rights to withhold the Petition from Witherow, and Perino, Vare, and Cox properly denied Witherow's appeals, on security concerns. Therefore, Witherow cannot prove that Feil's actions here did not promote a legitimate correctional goal. Moreover, it cannot be said that Witherow suffered any adverse action, with respect to the Petition, because it was forwarded to the Governor, as Witherow desired. Witherow cannot show that Feil retaliated against Witherow, in response to Witherow mailing Feil's "unauthorized notice" for the Petition to former Governor Guinn because Witherow did not actually send the "unauthorized notice" to the governor, as he claimed. His apparent fabrication here is laid bare for what it is, an afterthought or pretext to make Feil seem angry at Witherow. (*See* Fact No. 8.) Moreover, Witherow's filing of his retaliation grievance against Feil, which cited the issuance of the "unauthorized notification" for the Petition was untimely filed, later than ten (10) days or six (6) months from the date on which Feil issued the "unauthorized notification." (*See* Fact No. 9.) Thus, he did not timely file a grievance, as required by *Woodford* and the PLRA. As well he did not comply with grievance rules by specifying the events in question and supplying documents in support

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thereof. Thus, such a retaliation claim is barred by the PLRA and *Woodford*. Witherow cannot show that Feil retaliated against him based on his litigious filings, including the *Evans-Witherow* litigation, because the evidence shows that she did not know that he filed such a suit, nor did it concern her, nor was she aware that he was litigious, for that matter. (*See* Fact Nos. 11-12.) Feil's actions in issuing a "notice of charges" for the Lader Letter incident advanced a legitimate penological interest because Feil had a valid basis for believing that Witherow improperly solicited legal paperwork and piggy-backed correspondence from Lader, who clearly sought legal advice from Witherow, and used inside colloquialisms, such as "Loose Cannon Lader" and other informal language suggesting that Witherow had knowledge of the persons involved, including the sender. *See* Fact Nos. 14-15. That the charges were dismissed does not undermine the legitimate basis upon which Feil could have believed an infraction occurred. As well, since the charges were dismissed, Witherow suffered no "adverse action," which is required. Witherow cannot show retaliation against Feil for the Scarborough Mail incident because Feil was not involved in the decision to withhold that mail. Feil was not at liberty to disclose more information than she did, or to allow the mail to be forwarded because of security concerns about the contraband. Moreover, Witherow suffered no adverse action because he was not issued a "notice of charges" for that incident. Finally, such a claim would be barred because Witherow never filed a grievance for the withholding and non-delivery of the Scarborough Mail. (*See* Fact Nos. 22.) Witherow cannot prevail on a retaliation claim for the "Returned Mail" involving NSP Inmate Maresca because Witherow admitted that he sent newspaper clippings to another inmate, and Feil honestly believed that doing so violated the rules. A good faith belief motivated Feil's actions, and she never retaliated against Witherow for any reason. (*See* Fact Nos. 23-34; and D-DEC 021, ¶¶ 17-18.) As well, Witherow did not suffer any adverse action because the charges were dismissed. Witherow cannot prevail on a retaliation claim against Feil for the returned Sikorski-Dittmer letters because she advanced a legitimate penological interest in returning the mail, which contained tape on the envelopes, for security concerns, even without providing notice to Witherow, under the Unopened Mail Policy. Here, Witherow did not suffer

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any adverse action because the Sikorski-Dittmer mail was ultimately returned to Witherow. (D-MSJ 240, p. 39, ll. 20-22; D-MSJ 251, p. 24, ll. 5-7; and D-MSJ 040, p. 154, l. 1 to p. 156, l. 14.) Moreover, Witherow was not entitled to Notice of the returned mail, despite what mistakes on the point were made by Chacon, Palmer, and Cox, under the Unopened Mail Policy. (See Fact Nos. 35-37.) Witherow cannot prevail on a retaliation claim for the Hines Mail or the Sager Mail incidents because Feil was not involved in those incidents, and did not work in the LCC mailroom in 2006. Finally, it must be said, that based on the totality of the documents here, including grievances, appeals, and references to other legal activity commenced by Witherow, including the *Evans-Witherow* litigation, no reasonable juror could conclude that as a result of the alleged retaliatory acts, Witherow suffered a "chilling" of his exercise of his First Amendment rights. Indeed, his grievances in question repeatedly threaten litigation, seek monetary relief at the grievance level, and/or proclaim legal analysis supporting his positions. As well, Defendants Chacon, Vare, and Cox were reasonable in their responses to Witherow's grievances, based on the circumstances. Accordingly, summary judgment should be granted in favor of Defendants on all claims in the Eighth Cause of Action.

X. SUMMARY JUDGMENT ON NINTH and TENTH CAUSE OF ACTIONS

Defendants are entitled to summary judgment on all Claims presented in the Ninth and Tenth Causes of Action, which are based on the allegations that Plaintiffs' First and Fourteenth Amendment rights, were denied by Defendants' failure to adopt training procedures. Mere negligence is insufficient to state a claim under § 1983. Daniels v. Williams, U.S. 327, 330-33 (1986). As demonstrated herein, Plaintiffs' constitutional rights were not violated. Moreover, Defendants' actions were based in policy, including the "Unopened Mail" policy, not on a failure to be adequately trained. To the degree that mistakes were made, they were mere negligence. To be certain, the NDOC provided sufficient training at the beginning of the employment of Carey, Chacon, Feil, Perino, and Tupa, and ongoing training thereafter. (See training certifications of Carey, Chacon, Feil, Perino, and Tupa, at D-MSJ 739-870.) Accordingly, Defendants were not grossly negligent or

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deliberately indifferent when providing for policies and procedures for the training of NDOC employees pertaining to the constitutional rights of inmates, including mail handling procedures. Finally, to the degree that a failure to train existed and rose to the level of "gross negligence" or "deliberate indifference," Defendants contend that, based on the analyses contained herein, the state of the law was not sufficiently developed, with respect to the Unopened Mail Policy, entitling Defendants to qualified immunity under *Saucier v. Katz*, 533 U.S. 194.

XI. SUMMARY JUDGMENT ON FIRST AND SECOND CAUSES OF ACTION

Defendants are entitled to summary judgment on all Claims presented in the First and Second Causes of Action. Based on the foregoing points and authorities, the Court should not provide declaratory relief or injunctive relief requested by Witherow because he is not entitled to it. Moreover, given the fact that Witherow is no longer a prisoner at LCC, his request for injunctive relief is now moot, and should be denied. *See Dilley v. Gunn*, 64 F.3d 1365, 1368-69 (9th Cir. 1995) (inmate's claims for injunctive relief relating to a particular prison become moot when the inmate is transferred to another prison). Moreover, Plaintiff's request for injunctive relief is overly broad and not narrowly tailored, as required by the PLRA, codified at 18 U.S.C. § 3626 (1) (A). Here, the declaratory relief would lead to injunctive relief with respect to declaring that the names and addresses of citizens are not confidential, and requiring better training seeks vague and overly broad relief, not susceptible to injunctive relief, leading to improper micromanagement of prisons.

FOR ALL THE FOREGOING REASONS, the Court should GRANT summary judgment on all claims in favor of Defendants.

Dated this 27th day of October, 2008.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
William J. Geddes
Deputy Attorney General
Public Safety Division
Attorneys for Defendants

Office of the
Attorney General
100 N. Carson Street
Carson City, NV
89701-4717

CERTIFICATE OF SERVICE

I certify I am an employee of the Office of the Attorney General, State of Nevada, and that on this 27th day of October 2008 I served a copy of the foregoing *Defendants' Motion for Summary Judgment* by Electronic Court Filing via "CM/ECF" to:

Donald York Evans, Esq.
DONALD YORK EVANS, LTD. COUNSELOR AT LAW
P.O. Box 864
Reno, Nevada 89504-0864
Counsel for Plaintiffs Sikorski, Dittmer, and Witherow

Office of the
Attorney General
100 N. Carson Street
Carson City, NV
89701-4717

CATHERINE CORTEZ MASTO
Attorney General
WILLIAM J. GEDDES
Deputy Attorney General
Nevada Bar No. 6984
Bureau of Public Affairs
Division of Public Safety
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1256
Fax: (775) 684-1275
E-Mail: WGeddes@ag.nv.gov

Attorneys for Defendants Glen Whorton, Jackie Crawford, Greg Cox, Jack Palmer, Lenard Vare, Robert LeGrand, Cami Perino, Ceilia Chacon, Pamela Feil, Diana Carey, Kristina Tupa, Joe Gutierrez

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JULIE SIKORSKI, et al.,

Plaintiff,

vs.

GLEN WHORTON, *et al.*,

Defendants.

Case No. 03:06-cv-0696-LRH (VPC)

TABLE OF EXHIBITS TO:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DEFENDANT'S DOCUMENT PRODUCTION LOG					
FILE SIZE (MB)	NO. OF PAGES	BATES RANGE			DESCRIPTION
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APPENDIX 1 - DECLARATIONS					
0.347	7	**D-DEC**	0001	0007	Declaration of Jeffrey Kintop
0.288	4	**D-DEC**	0008	0011	Declaration of Robert Le Grand
0.224	3	**D-DEC**	0012	0014	Declaration of James Baca
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DEFENDANT'S DOCUMENT PRODUCTION LOG					
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APPENDIX 2 - EVIDENTIARY EXHIBITS					
1.571	18	**D-MSJ**	0001	0018	John Witherow Deposition Transcript Part 01
2.111	16	**D-MSJ**	0019	0034	John Witherow Deposition Transcript Part 02
1.896	16	**D-MSJ**	0035	0050	John Witherow Deposition Transcript Part 03
2.195	31	**D-MSJ**	0051	0081	John Witherow Deposition Exhibits 01-04
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2.005	28	**D-MSJ**	0099	0126	John Witherow Deposition Exhibits 09-11
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1.299	23	**D-MSJ**	0173	0195	John Witherow Deposition Exhibit 13 pt. 02
1.907	34	**D-MSJ**	0196	0229	John Witherow Deposition Exhibit 13 pt. 03
1.593	15	**D-MSJ**	0230	0244	Julie Sikorski Deposition Transcript and Exhibit 1
1.378	15	**D-MSJ**	0245	0259	Linda Dittmer Deposition Transcript and Exhibit 1
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0.347	7	**D-MSJ**	0712	0718	NSLA Documents Found, John Witherow Documents to Former Governor Guinn
0.922	16	**D-MSJ**	0719	0734	2005-07-03 Notice of Charges (Disciplinary Forms I-III)
0.222	4	**D-MSJ**	0735	0738	2005-09-24 Notice of Charges (Disciplinary Forms I-III) and Plf's Grievance No. 2005-19-12643 and Evidence Collected In support of same
1.906	25	**D-MSJ**	0739	0763	Defendant Carey's Training Certifications 1997-2006 (Part 1)
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1.703	12	**D-MSJ**	0795	0806	Defendant Chacon's Training Certifications 1995-2006 (Part 2)
1.710	20	**D-MSJ**	0807	0826	Defendant Feil's Training Certifications 2001-2007 (Part 1)
1.453	10	**D-MSJ**	0827	0836	Defendant Feil's Training Certifications 2001-2008 (Part 2)
1.436	19	**D-MSJ**	0837	0855	Defendant Perino's Training Certifications 1997-2003
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0.570	9	**D-MSJ**	0871	0879	Plaintiff's Grievance No. 2005-19-12643 Re Alleged Retaliation by Defendant Feil For issuing the 9-19-05 Notice of Charges
0.654	8	**D-MSJ**	0880	0887	Plaintiff's withheld Mail from "Scarborough" in Saugus, MA, Unauthorized Mail Notice, and Plaintiff's Inmate Request Forms

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0.501	9	**D-MSJ**	0888	0896	Plaintiff's Grievance No. 2006-19-3251 Re Unauthorized Mail Notice Re Withheld Mail from Connie Sager
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0.267	4	**D-MSJ**	0951	0954	LCC Operational Procedure 750 (Effective Date April 15, 2008) re Mail Room Operations
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