IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| DONALD BOYER, AMIR FATIR, and WARREN WYANT, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 06-694-GMS |
| COMMISSIONER STANLEY TAYLOR, PAUL HOWARD, RONALD HOSTERMAN, WARDEN THOMAS CARROLL, MAUREEN WHALEN, DEPUTY WARDEN DAVID PIERCE, JENNY HAVEL, JANET HENRY, CPL. ONEY, MICHAEL LITTLE, FLOYD DIXON, CORRECTIONAL MEDICAL SERVICES, MARVIN CREASY, JAMES P. SATTERFIELD, INSPECTOR LT. PALOWSKI, SGT. BAILEY, DAVID HALL, CPL. VARGAS, and FIRST CORRECTIONAL MEDICAL, | ) | |
| Defendants. | ) | |

**MEMORANDUM**

The plaintiffs, Donald Boyer ("Boyer"), Amir Fatir ("Fatir"), and Warren Wyant ("Wyant) (collectively "the plaintiffs") are inmates at the James T. Vaughn Correctional Center ("VCC"), formerly the Delaware Correctional Center. The plaintiffs appear *pro se* and were granted permission to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (D.I. 26.)

## I. BACKGROUND

The plaintiffs filed a complaint and two amendments, all screened by the court. (D.I. 10, 18, 43.) The court allowed the plaintiffs to proceed on the following claims: counts 1, 2, 3, 4, 5, 6, 9, 12, 13, and 15, conditions of confinement; count 50, medical needs; counts 20, 21, 23 and a portion of count 36, First Amendment; counts 31 and 42, equal protection; and counts 32 and 39,

inmate accounts. (*See* D.I. 39, 65.) Named as the defendants are former Delaware Department of Correction ("DOC") Commissioner Stanley Taylor ("Taylor")[1], former Bureau of Prisons Chief Paul Howard ("Howard")[2], Ronald Hosterman ("Hosterman"), former Warden Thomas Carroll ("Warden Carroll")[3], Maureen Whalen ("Whalen"), Deputy Warden David Pierce ("Pierce"), Jenny Havel ("Havel"), Janet Henry ("Henry"), Cpl. Oney ("Oney")[4], Michael Little ("Little"), Floyd Dixon ("Dixon"), Correctional Medical Services ("CMS"), Sgt. Marvin Creasy ("Creasy"), James P. Satterfield ("Satterfield"), Inspector Lt. Palowski ("Palowski")[5], Sgt. Bailey ("Bailey"), Cpl. Vargas ("Vargas")[6], First Correctional Medical ("FCM")[7], and David Hall ("Hall").

The plaintiffs have been prolific in their filings and there are currently pending before the court several motions filed by them including a motion for hearing on temporary restraining order (D.I. 113); motion for temporary restraining order (D.I. 115); motion for reconsideration (D.I. 117); motion for temporary restraining order (D.I. 118); motion to amend/correct (D.I. 120); request for entry of default (D.I. 127); motion for temporary restraining order (D.I. 136); motion

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[1]Taylor is no longer the Commissioner for the DOC. The current Commissioner is Carl C. Danberg. To date, Taylor has not been served. (*See* D.I. 77.)

[2]Howard is no longer the Bureau Chief for the Bureau of Prisons. The current Bureau Chief is Rick Kearney. To date, Howard has not been served. (*See* D.I. 78.)

[3]Carroll is no longer the Warden at the VCC. The current warden is Perry Phelps.

[4]To date, Oney has not been served. (*See* D.I. 79.)

[5]To date, Palowksi has not been served. (*See* D.I. 80.)

[6]To date, Vargas has not been served. (*See* D.I. 88.)

[7]To date, FCM has not been served.

for leave to file an amended complaint (D.I. 137); motion for partial summary judgment (D.I. 140); motion to compel (D.I. 171); and motion for extension of time (D.I. 198). Also pending before the court are a motion for protective order and motion for summary judgment filed by the defendants Bailey, Carroll, Creasy, Dixon, Hall, Havel, Henry, Hosterman, Little, Pierce, Satterfield, and Whalen (collectively "State defendants"). (D.I. 134, 191.)

## II. MOTIONS TO AMEND

The plaintiffs have filed two motions to amend the complaint. (D.I. 120, 137.) Both motions propose individual claims for the plaintiff, Fatir, with the alleged constitutional violations occurring over a year after the complaint was filed. The State defendants object to both motions. (D.I. 122, 145.)

"After amending once or after an answer has been filed, the plaintiff may amend only with leave of the court or the written consent of the opposing party, but 'leave shall be freely given when justice so requires.'" *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (quoting Fed. R. Civ. P. 15(a)). The Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 486-87 (3d Cir. 1990) (citations omitted). Amendment, however, is not automatic. *See Dover Steel Co., Inc. v. Hartford Accident and Indem.*, 151 F.R.D. 570, 574 (E. D. Pa. 1993). Leave to amend should be granted absent a showing of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *See also Oran v. Stafford*, 226 F.3d 275, 291 (3d Cir. 2000). Futility of

amendment occurs when the complaint, as amended, does not state a claim upon which relief can be granted. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). If the proposed amendment "is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend." *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J. 1990).

In the first proposed amendment Fatir seeks to add counts 57 and 58 and new defendants Michael Grossman ("Grossman") and John Doe #1 ("Doe'). Fatir alleges that Grossman and Doe retaliated against him when they became aware of this lawsuit that named as a defendant, Whalen, Grossman's supervisor. Fatir alleges the retaliation occurred when he was not hired for a prison job, but four other inmates were hired on March 12, 2008. (D.I. 120, D.I. 122, ex.) Whalen was served on January 18, 2008. (D.I. 93.) The State defendants respond that the amendment is futile on the grounds that Fatir cannot show that his failure to receive the position was due to filing this lawsuit.

"Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution actionable under § 1983." *White v. Napoleon,* 897 F.2d 103, 111-12 (3d Cir. 1990). It has long been established that the First Amendment bars retaliation for protected speech. *See Crawford-El v. Britton,* 523 U.S. 574, 592 (1998); *Milhouse v. Carlson,* 652 F.2d 371, 373-74 (3d Cir. 1981). Proof of a retaliation claim requires that Fatir demonstrate (1) he engaged in protected activity; (2) he was subjected to adverse actions by a state actor; and (3) the protected activity was a substantial motivating factor in the state actor's decision to take adverse action. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001) (quoting *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also Allah v. Seiverling*, 229 F.3d 220 (3d Cir.

2000) (a fact finder could conclude that retaliatory placement in administrative confinement would "deter a person of ordinary firmness from exercising his First Amendment rights" (citations omitted)). "[O]nce a prisoner demonstrates that his exercise of a constitutional right was a substantial or motivating factor in the challenged decision, the prison officials may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." *Id.* at 334.

The State defendants submitted the affidavit of Grossman in their opposition to the amendment. (D.I. 122, ex. A.) Grossman states that Fatir was interviewed for a position, the interview team recommended Fatir to Grossman for the position, and Grossman sent Fatir's name, along with other recommended individuals names, to the classification board for clearance to work. (*Id.*) The classification board did not contact Grossman and advise him that Fatir was cleared to work and, as a result, he was not considered for hiring to the position. (*Id.*)

Based upon the State defendants' undisputed evidence, the court finds that the filing of this lawsuit was not a substantial motivating factor in the decision not to hire Grossman. Rather, Fatir was not hired because he was not cleared by the classification board. Moreover, Grossman did not take adverse action against Fatir; but submitted his name as a candidate for the position.

Fatir's claim against Doe fares no better. Fatir alleges under a number of alternative theories that Doe prevented Fatir's classification that would have allowed his hiring for the prison job. The claims against Doe are speculative and nothing more than a guessing game as to what might have occurred. A plaintiff must allege facts that raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact)." *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007)(citing *Bell Atlantic Corp. v.*

*Twombly*, 550 U.S. 544, 556 (2007). The amendment fails to rise above the speculative level. There is futility of amendment and, therefore, the court will deny Fatir's motion to amend to add counts 57 and 58. (D.I. 120.)

In the second proposed amendment Fatir seeks to add count 59 and a new defendant, Carol Powell ("Powell"). (D.I. 137.) Fatir alleges that on December 19, 2007, he received a book that included a deck of Tarot cards, but the cards were not given to him. Additionally, he was not provided with notice of a new rule that Tarot cards were prohibited in violation of his right to due process and First Amendment rights. (*Id.*) The State defendants respond that amendment is futile because the amendment fails to allege the requisite personal involvement by Powell, Fatir failed to exhaust his administrative remedies prior to seeking leave to amend, and he unduly delayed the filing of the motion to amend, waiting for six months after the alleged occurrence to file the motion. (D.I. 145.)

While the original complaint and its amendments raise claims under the First Amendment, proposed count 59 is essentially a new action, against a new defendant with the new claim arising out of a set of operate facts that are unrelated to the factual claims in the original or amended complaint. *See Nicholas v. Heffner*, 228 F. App'x 139, 141 (3d Cir. 2007). The court will not allow Fatir to add claims, ad infinitum, unrelated in time and facts to the allegations in the original complaint and its amendments. The remedy available to Fatir is to file a new lawsuit. His claims are limited to the remaining viable claims in the complaint and amended complaint. (D.I. 10, 18, 43.) Accordingly, the court will deny the motion to amend to add count 59. (D.I. 137.)

## III. MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs move for partial summary judgment on count 1 of the complaint on the grounds that the State defendants have admitted the veracity of the plaintiffs' allegations. (D.I. 140, 141.) The State defendants move for summary judgment under several theories.

While responding to the motions, all parties contend that the opposing motions for summary judgment are premature as discovery is not complete. (D.I. 143, 199.) The court docket indicates that a scheduling order has not been entered. Hence, the court will enter a scheduling order concurrent with this memorandum. Accordingly, the motions for summary judgment will be denied without prejudice as premature. (D.I. 140, 191.) The plaintiffs' second motion for an extension of time to file an answering brief will be denied as moot. (D.I. 198.)

## IV. MOTION FOR RECONSIDERATION

On March 28, 2008, the court denied the plaintiffs' motion for a temporary restraining order and a preliminary injunction. The motion sought to eliminate perceived racial discriminatory hiring practices for inmate jobs. (*See* D.I. 112.) The order noted that there was no mention of Fatir's race and the plaintiffs did not indicate that any of the State defendants had involvement in the alleged discriminatory hiring practices. Fatir moves to alter or amend the order pursuant to Fed. R. Civ. P. 59. (D.I. 117.) Fatir contends that it is "known via other filings" that he is African-American and that it "should have been quite obvious" that he was denied employment because of his race. He further contends that the court should have construed the motion for injunctive relief to mean the plaintiffs were making a claim that they were being denied jobs due to their race and further should have held the plaintiffs to a less stringent stand than that for attorneys.

The standard for obtaining relief under Rule 59(e) is difficult to meet. The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available previously; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Dasilva v. Esmor Corr. Services, Inc.*, 167 F. App'x 303, 308 (3d Cir. Jan. 27, 2006) (citing *Max's Seafood Café*, 176 F.3d at 677. Rule 59 does not specifically mention a motion for reconsideration; however, such a motion is regarded as 'the functional equivalent of a Rule 59 motion." *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986)). "[A] motion for [reconsideration]is not intended merely to be an opportunity to "accomplish [the] repetition of arguments that were or should have been presented to the court previously." *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991).

Fatir reargues the motion and injects information that appears to have been available to him at the time the motion for injunctive relief was filed. Fatir has failed to demonstrate any of the required grounds to warrant a reconsideration of the court's March 28, 2008 order. Accordingly, the court will deny the motion to alter or amend a judgment. (D.I. 117.)

## V. MOTIONS FOR TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

The plaintiffs seek injunctive relief to: (1) place the commissary trust fund account into receivership for an accounting; (2) permit Fatir to receive rejected books; and (3) prohibit the

two-book restriction.[8] (D.I. 115, 118, 136.) The State defendants oppose the motions. (D.I. 125, 128, 146.)

**A. Standard of Review**

When considering a motion for a temporary restraining order or preliminary injunction, the court determines: (1) the likelihood of success on the merits; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the balancing of the hardships to the respective parties; and (4) the public interest. *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)(citation omitted). "Preliminary injunctive relief is 'an extraordinary remedy' and 'should be granted only in limited circumstances.'" *Id.* (citations omitted). It is the plaintiff's burden, in seeking injunctive relief, to show a likelihood of success on the merits. *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 90 (3d Cir. 1992).

**B. Receivership (D.I. 115)**

The plaintiffs seek to place the commissary trust fund account into receivership. They contend that the State defendants are seizing and misappropriating the monies contained in the account and argue they will suffer irreparable harm without an injunction. (D.I. 116.) When the State defendants did not respond to the motion, the plaintiffs requested an entry of default. (D.I. 127.) In response to the request for entry of default, the State defendants advised the court that they considered the receivership motion nonsensical and, therefore, were unable to formulate an adequate response to the motion. (D.I. 128.)

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[8]The plaintiffs also filed a motion for a hearing on their TRO/preliminary injunction motions. (D.I. 113.) The court has ruled on the motions and therefore, the motion will be denied as moot. (*See* D.I. 112.)

Under the Fourteenth Amendment, individuals are entitled to due process if the state deprives them of a property interest that is protected by the constitution. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Hence, it must first be determined whether the alleged deprivation impacts a protected interest in the property at issue. If there is a valid property interest, then the plaintiffs cannot be deprived of it without due process. *Gillihan v. Shillinger*, 872 F.2d 935, 939 (10th Cir. 1989).

The United States Constitution does not create a protected interest in property but, rather, protected property interests "stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "Inmates have a property interest in funds held in prison accounts." *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir. 1997) (citations omitted). Therefore, inmates are entitled to due process with respect to any deprivation of that money. *Id.* (citations omitted). Apparently interest accrues on prison trust accounts, and taking the interest from an inmate's account can be considered a violation of the Takings Clause. *See Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998); *but see Washlefske v. Winston*, 234 F.3d 179, 196 (4th Cir. 2000) (a prisoner has no property interest in interest income on his inmate account); *Hatfield v. Scott*, 306 F.3d 223 (5th Cir. 2002).

It is not impossible to assume that prison authorities control the inmate commissary trust fund which could be considered a form of taking. The plaintiffs, however, have provided nothing to the court to support the proposition that they have a valid property interest in the prison commissary trust fund. That being the case, they have not met their burden to demonstrate the likelihood of success on the merits. Further, even if the plaintiffs had demonstrated the

likelihood of success on the merits, there is no showing of irreparable harm. If it is ultimately determined that the defendants violated the plaintiffs' constitutional rights, any actionable harm suffered can be remedied by an award of money damages. *Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994). For the above reasons, the court will deny the motion for injunctive relief to place the commissary trust fund account into receivership. (D.I. 115.) The court will deny as frivolous the request for entry of default. (D.I. 127.)

**C. Rejected Books (D.I. 118)**

Fatir seeks injunctive relief to require the defendants to permit him to receive rejected books. (D.I. 118.) Fatir contends that, in violation of the First Amendment and the VCC's policies, he was prevented from receiving (1) "The Catcher in the Rye"; (2) "Natural Cures 'They' Don't Want You to Know About"; (3) "Ishmael"; (4) "The Multi-Orgasmic Woman" referred to at times as "the Story of O" and (5) "Shakti: the Feminine Power of Yoga". Fatir claims that Carroll and/or his designees prevented him from receiving the books. He claims that he was not notified that "The Catcher in the Rye" and "Natural Cures" had arrived. Fatir contends that around 2001 the VCC began to mix religion with the State by imposing Christian fundamentalist values upon the prison population. He argues that the State defendants have no reasonable explanation for banning the listed publications nor is any legitimate penological interest served by forcing non-Christians to comply with right-wing fundamentalist Southern Christian reading restrictions. Finally, he argues that the State defendants cannot show that allowing inmates to read books which contain nude illustrations leads to violence, rape, murder, refusal to work or refusal to undergo treatment programming.

The State defendants respond that Fatir cannot show the likelihood of success on the merits and cannot show that he will suffer irreparable harm if he does not receive the rejected books. (D.I. 125.) More particularly, the State defendants argue that Fatir did not exhaust his administrative remedies as required under 42 U.S.C. § 1997e and that Fatir cannot satisfy the factors under *Turner v. Safley*, 482 U.S. 78, 89 (1987).[9] The State defendants' argument addresses "Shakti," but does not address the other publications other than to state that Fatir has no proof that the remaining books were ordered or denied. To the contrary, Fatir, submitted invoices showing shipment of three books to the prison: "Natural Cures," "The Multi-Orgasmic Woman," and "The Catcher in the Rye." (D.I. 126, exs. G, H, I.) While Fatir did not submit shipping documents for "Shakti" or "Ishmael," Warden Carroll specifically referred to Shakti in rejecting the book. Thus, it is evident that the book was received at the VCC.

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[9]Fatir refuted the exhaustion issue and filed exhibits of grievances he submitted regarding the withheld books. On December 28, 2005, Fatir submitted a grievance on "Natural Cures." (D.I. 126, ex. B.) The book was shipped to Fatir on October 31, 2005. (*Id.* at ex. G.) The grievance indicates that it was received by the inmate grievance office on January 4, 2006. On January 6, 2006, the grievance was returned as unprocessed under the heading "expired filing period. (*Id.* at ex. B.) On January 4, 2006, Fatir submitted a second grievance regarding "Natural Cures" and "The Story of O" (i.e., "The Multi-Orgasmic Woman"), and it was received by the inmate grievance office on January 10, 2006. (*Id.* at ex. C.) "The Multi-Orgasmic Woman" was shipped to Fatir on December 6, 2005. (*Id.* at ex. H.) On August 30, 2006, Fatir submitted a third grievance complaining generally about censorship of magazines, pictures and books. (*Id.* at ex. D.) It was received by the inmate grievance office on September 5, 2006. On September 20, 2006, the grievance was returned as unprocessed under the heading "expired filing period. (*Id.*) On May 29, 2007, Fatir submitted a fourth grievance regarding "Shakti", and it was received by the inmate grievance office on June 6, 2007. (*Id.* at ex. E.) There are no other documents indicating that Fatir exhausted his administrative remedies as is required under the Prison Litigation Reform Act ("PLRA"). The court finds that Fatir has exhausted, at least in part, available administrative remedies with respect to some of his claims relative to the censorship of reading materials.

The DOC implemented a policy regarding incoming publication, No. 4.5. (D.I. 125, ex. E.) Publications may be rejected if they depict, describe or activities that may lead to physical violence or group disruption; encouragement or instruction of commission in criminal activity; and sexually explicit material (e.g., sado-masochism, bestiality, involving children). *Id.* Policy No. 4.5 provides that publications may not be rejected solely because they contain offensive, controversial or repugnant content; deal with sexual, health, or reproductive topics; or cover issues of concern to the lesbian, gay, bisexual and transgender communities. (*Id.*)

"The Catcher in the Rye" was shipped to Fatir on January 22, 2005, but he did not receive the book, and no explanation was provided to him. (D.I. 126, ex. I.) Fatir was advised on June 25, 2006, that "Natural Cures" was never received "per the mailroom," but he was also told that the book had been received and destroyed because he failed to contact the mailroom in a timely manner. (D.I. 119, ex.; D.I. 125, ex. C.) Fatir was advised that "The Story of O" (i.e., "The Multi-Orgasmic Woman") was deemed obscene and disposed of on January 3, 2006. (D.I. 126, ex. C.) Warden Carroll advised Fatir on June 1, 2007, that "Shakti" was rejected due to its sexually explicit and/or obscene material and that the book was not conducive to the goal of rehabilitation. (D.I. 119, ex. D2.) Warden Carroll further stated that the materials presented risks to institutional safety and security. (*Id.*) The court was not provided with any information for "Ishmael."

A prison policy imposing on an inmate's First Amendment rights is valid if it is reasonably related to a penological interest. *Turner v. Safley,* 482 U.S. 78, 89 (1987). A four-part analysis is used to determine whether a prison policy imposes permissible limitations on inmates' First Amendment rights. First, the court must "assess whether there is a 'valid, rational

connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Wolf v. Ashcroft*, 297 F.3d 305, 307 (3d Cir. 2002) (citing *Turner*, 482 U.S. at 89). If the court finds a legitimate and neutral interest, and a valid and rational connection, then the analysis turns to the succeeding three prongs: whether "alternative means of exercising the right . . . remain open to prison inmates, the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally, and, finally, whether there are 'ready alternatives' to the rule that would accommodate prisoners' rights at [a] *de minimus* cost to penological interests." *Id.* (citation omitted).

It is unknown why Fatir did not receive "Catcher in the Rye," "Natural Cures," or "Ishmael." However, at least as to "The Multi-Orgasmic Woman" and "Shakti," they were denied because the State concluded the content of the books was sexually explicit and, therefore, posed a threat to the safety and security to the institution. Courts have held that security and rehabilitation concerns are legitimate penological interests. *See Thornburgh v. Abbott,* 490 U.S. 401, 415 (1989); *Turner*, 482 U.S. at 91-92. The court concludes, therefore, that the security and rehabilitative goals advanced by the State defendants are legitimate penological interests. While censorship of materials containing sexually explicit content is certainly not content-neutral in a First Amendment sense, it appears neutral and for the legitimate purpose of security and rehabilitation.

The second prong of the *Turner* test is whether the prisoners have alternative means of expression. *See* Turner, 482 U.S. at 92. Whether there are other means of expression should be viewed "sensibly and expansively." *See* Thornburgh, 490 U.S. at 417. There are no allegations

that Fatir has been denied access to all publications. Therefore, the court concludes that the policy satisfies the second prong of the *Turner* test.

The court must also consider possible "ripple effect[s]" when analyzing the impact that accommodation of the right would have on third parties such as prison guards and other inmates, *Turner,* 482 U.S. at 92. The State defendants indicate that the purpose of the ban on sexually explicit materials is for the safety and security of the institution. The censored materials may contribute to unacceptable and dangerous behaviors amongst the inmate population. Authorizing receipt of materials by some prisoners yet prohibiting receipt by others on an individualized basis would not solve the "ripple effect" problem and would come at the high cost of significantly less liberty and safety for prison guards and other prisoners. *See id.* Accordingly, the court concludes that the policy satisfies the third prong of the *Turner* test. The last prong requires Fatir meet his burden to prove that no adequate alternative exists for reaching his objective. If the plaintiff "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 90. This he has failed to do.

It is Fatir's burden to prove that he is entitled to injunctive relief, and the court finds that when considering the four-prong *Turner* test, he has not met that burden. In view of the facts adduced and the applicable legal standard, the court finds that Fatir has failed to demonstrate he will likely succeed on the merits of his claim. Nor has he demonstrated irreparable harm.[10]

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[10]The court recognizes that the *Turner* analysis is typically fact specific. A summary judgment motion may produce a different outcome due to factual disputes.

Accordingly, the court will deny Fatir's motion to order the State defendants to permit him to receive the rejected books. (D.I. 118.)

**D. Two Book Restriction (D.I. 136)**

The plaintiffs seek injunctive relief to prohibit the two-book restriction at the VCC. (D.I. 136.) The plaintiffs contend that the limitation is arbitrary and serves no legitimate penological interest. More particularly, the plaintiffs argue that Fatir was sent three books, and the prison mailroom withheld one of them. Fatir received a letter from non-party Powell in response to his appeal of the two-book restriction. (D.I. 139, ex.) The plaintiffs argue that the VCC Inmate Housing Rules allow inmates to have three books and that because a new policy was placed into effect on June 9, 2005, the two-book rule is based upon a defunct policy. (D.I. 139.)

The State defendants oppose the motion on the grounds that the motion is moot and that the plaintiffs cannot show the likelihood of success on the merits or that they will suffer irreparable harm if the motion is denied. (D.I. 146.) The State defendants advise that four days after the plaintiffs filed their motion for injunctive relief, personnel at the VCC realized there was an error regarding the notice to Fatir regarding his third book and that Fatir received the book as evidenced by the receipt he signed on June 27, 2008. (*Id.* at ex. A.) The State defendants further contend that the VCC regulation meets the four prongs of the *Turner* test.

Despite the fact that Fatir received the third book, the plaintiffs contend the motion is not moot because the issue is capable of repetition but evading review. Additionally, the plaintiffs argue that they have met all factors favoring injunctive relief and that the restriction fails to meet the *Turner* four prong test. (D.I. 154.)

The Delaware State Fire Marshal advised the VCC to limit combustibles in inmate cells to protect the safety of the institution. (D.I. 146, ex. D.) Hence, the purpose of the limitation on the number of books and magazines is to prevent a fire and safety hazard and to protect the well-being of inmates. (*Id.*) Second, while the plaintiffs are limited in the number of publications allowed in their cells, once they have read their publications, they are allowed to donate the books and receive new books to replace the donated or discarded books. Third, permitting some prisoners to have more than the requisite number of publications, yet prohibiting others would not solve the "ripple effect" problem and could lead to a potential fire and safety hazard was warned by the State Fire Marshal. Finally, the last prong requires the plaintiffs to meet their burden to prove that an adequate alternative of reaching the prison's objective exists. The plaintiffs contend there exist no alternative means to reach their goals and, moreover, it is not their burden to identify such means.

It is, however, the plaintiffs' burden to prove that they are entitled to injunctive relief. The court finds that when considering the four-prong *Turner* test the plaintiffs have not met that burden as they have not demonstrated they will likely succeed on the merits of their claim.[11] Therefore, the court will deny the plaintiffs' motion to prohibit the two-book restriction at the VCC. (D.I. 136.)

**VI. DISCOVERY**

The State defendants move for protective order pursuant to Fed. R. Civ. P. 26(c). (D.I. 134.) The plaintiffs served upon the State defendants a request for production of documents

[11]*See* n. 10, *supra; see also e.g., Warren v. Pennsylvania*, 316 F. App'x 109 (3d Cir. 2008) (dismissal reversed because the DOC has failed to demonstrate that its ten book per prison cell policy was the least restrictive means to further its interest in safety and security).

containing 150 separate requests. (*Id.* at ex. A.) The State defendants contend that the number of documents is excessive and burdensome, many of the requests are statutorily protected from disclosure, the majority of the requests are irrelevant, and some of the requested information is barred by the applicable limitations period.

The plaintiffs respond that the State defendants are trying to obstruct the discovery process. (D.I. 135.) The plaintiffs filed a motion to compel subsequent to the filing of the motion for a protective order. (D.I. 171.) The State defendants did not respond to the motion.

Pursuant to Fed. R. Civ. P. 26(c) "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . ."[12] Fed. R. Civ. P. 26(c)(1). A court may, for good cause, issue a protective order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Id.* Good cause is shown "by demonstrating a particular need for protection." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). The party seeking a protective order bears the burden of persuasion and "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not satisfy the Rule 26(c) test." *Id.*

If a court finds good cause on any of these stated grounds, the court has several remedies at its disposal, including: (A) forbidding the disclosure or discovery; (B) specifying terms, including time and place, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain

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[12]The Rule provides that the motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. Fed. R. Civ. P. 26(c)(1). The Local Rules for this court, however, provide an exception to the "good faith effort to reach an agreement" in civil cases involving *pro se* parties. *See* L.R. 7.1.1.

matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted;(F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. *Id.* The court is also required, pursuant to Rule 26(b), to limit the scope of discovery, either on motion or on its own, where any one of three circumstances is attendant: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Fed. R. Civ. P. 26(b)(2)(C).

The court has reviewed the request for production of documents and concludes that a protective order is warranted inasmuch as the request is unduly burdensome and the requests are excessive. The court will not, however, award the State defendants the requested attorneys fees. Accordingly, the motion will be granted in part and denied in part.

Additionally, the plaintiffs are given leave to serve a second request for production of documents within the following parameters: (1) the requests shall be limited in time from 2004 to 2008; (2) the requests shall address only the remaining issues; and (3) should a request seek documents that are objectionable only on the grounds that they are protected from disclosure

pursuant to 11 Del. C. § 4322(d), said documents shall be produced in a redacted document or, if this is not possible, then the State defendants shall prepare for production a synopsis of the requested document. The court will deny the plaintiffs' motion to compel. (D.I. 171.)

**VII. SERVICE**

The plaintiffs have had difficulty effecting service upon the defendants Vargas, Oney, Palowksi, Taylor, Howard, and First Correctional Medical, LLC. The USM-285 forms for Taylor, Howard, and Oney were returned unexecuted with the notation "retired." (D.I. 77, 78, 79.) The USM-285 form for Palowski was returned as unexecuted on January 9, 2008, "per DOC not at this address or employed by DOC".[13] (D.I. 80.) The USM-285 form for Vargas was returned to sender as unexecuted. (D.I. 88.) On June 1, 2009, the U.S. Marshal Service advised the court that it has not served FCM based upon its mistaken belief that FCM was dismissed from the case. The plaintiffs ask the court to direct the U.S. Marshal Service to obtain the addresses of the foregoing defendants from the DOC. (D.I. 161.)

The court is mindful of the security concerns of defendants who are no longer employed by the DOC; that 29 Del. C. § 1002(g)(1) precludes the disclosure of personnel information which would constitute an invasion of personal privacy; and that § 1002(g)(13) precludes the disclosure of any records to inmates in the custody of the DOC. While *in forma pauperis* status confers entitlement to issuance and service of process, *see* 28 U.S.C. § 1915(d); *see* Fed.R.Civ.P.

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[13]The State defendants submitted Pawlowski's affidavit in opposition to the plaintiffs' motion for injunctive relief. (*See* D.I. 109.) Pawlowski's affidavit, dated March 19, 2008, states that he has been employed by the DOC and worked at the Delaware Correctional Center, now known as the VCC, for over nineteen years. Curiously, the USM-285 form was returned unexecuted based upon the DOC's representation that Pawloski was not an employee or at the address contained in the USM-285 form. The USM-285 form spells Pawloski's name as "Palowski." (D.I. 80.)

4(c)(2), a district court has no duty to assist a plaintiff in locating a defendant's address for the purpose of service of process. *Barmes v. Nolan,* 123 F. App'x 238, 249 (7th Cir. 2005). Indeed, it is the plaintiffs' responsibility to provide the proper address of the defendants to complete service. *See King v. Busby*, 162 F. App'x 669, 671 (8th Cir. 2006) (court's failure to complete service of process on prison nurse, for purposes of prisoner's § 1983 complaint, was not an abuse of discretion where prisoner failed to provide proper address); *Ouzts v. Cummins*, 825 F.2d 1276, 1277 (8th Cir. 1987) (where defendants had left the Department of Corrections, and efforts made by plaintiff to locate these defendants for purposes of service were unsuccessful, the district court dismissed without prejudice plaintiff's complaint against them because they had not been served with process within 120 days after the filing of the complaint as required by Fed.R.Civ.P. 4(j)); *Martin v. Serrell*, Civ. No. 03-3130, 2006 WL 488718 at *1 (D. Neb. Feb. 27, 2006) (in dismissing DOC defendants sued in their individual capacity because they could not be located, court held that "[t]he court does everything it can legitimately do, within the court's power, to assist *pro se* prisoner plaintiffs proceeding *in forma pauperis* to accomplish service of process on persons who remain employed by the State or a political subdivision of the State. However, the court cannot become an advocate for, or agent of, either side of a case, and, as a result, tracing defendants who have left their former governmental employment must be left to the devices of a plaintiff and his family, friends or agents.").

The court has provided all the assistance it can to aid the plaintiffs in serving the defendants. Inasmuch as the plaintiffs have been diligent in their efforts to effect service, the court will provide the plaintiffs one final opportunity to effect service on those defendants who

have not yet been served by submitting complete USM-285 forms and copies of the complaint and amended complaints to effect service.

## VIII. CONCLUSION

For the above stated reasons the court will deny as moot the plaintiffs' motion for hearing on TRO/preliminary injunction, deny the plaintiffs' motions for temporary restraining orders and/or preliminary injunctions, deny the plaintiffs' motion to alter or amend a judgment, deny the plaintiffs' motions to amend the complaint, deny the plaintiffs' request for entry of default, grant in part and deny in part the State defendants' motion for protective order, deny without prejudice and as premature the parties' motions for summary judgment, deny the plaintiffs' motion to compel, deny as moot the plaintiff's second motion for an extension of time to file an answering brief, enter a scheduling order, and provide the plaintiffs additional time to effect service upon the unserved defendants.

The plaintiffs have filed an inordinate number of motions for injunctive relief. They are placed on notice that, at this time, the court will not consider further injunctive relief motions. In the future, should the plaintiffs file injunctive relief motions, they will be placed on the docket but the court will neither review the motions nor act upon them, and said motions will not be considered as pending.

An appropriate order will be entered.

CHIEF, UNITED STATES DISTRICT JUDGE

July 30, 2009
Wilmington, Delaware

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| DONALD BOYER, AMIR FATIR, and WARREN WYANT, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 06-694-GMS |
| COMMISSIONER STANLEY TAYLOR, PAUL HOWARD, RONALD HOSTERMAN, WARDEN THOMAS CARROLL, MAUREEN WHALEN, DEPUTY WARDEN DAVID PIERCE, JENNY HAVEL, JANET HENRY, CPL. ONEY, MICHAEL LITTLE, FLOYD DIXON, CORRECTIONAL MEDICAL SERVICES, MARVIN CREASY, JAMES P. SATTERFIELD, INSPECTOR LT. PALOWSKI, SGT. BAILEY, DAVID HALL, CPL. VARGAS, and FIRST CORRECTIONAL MEDICAL, | ) | |
| Defendants. | ) | |

**ORDER**

At Wilmington this 30th day of July, 2009, for the reasons set forth in the Memorandum issued this date;

1. The plaintiffs' motion for hearing on TRO/preliminary injunction is **denied** as moot. (D.I. 113.)

2. The plaintiffs' motion for a temporary restraining order and/or preliminary injunction to bring the commissary trust fund account into receivership for accounting is **denied**. (D.I. 115.)

3. The plaintiffs' motion to alter or amend a judgment is **denied**. (D.I. 117.)

4. The plaintiffs' motion for a temporary restraining order and/or preliminary injunction to permit plaintiff Fatir to receive rejected books is **denied**. (D.I. 118.)

5. The plaintiffs' motion to amend the complaint to add counts 57 and 58 is **denied**. (D. I. 120.)

6. The plaintiffs' request for entry of default is **denied** as frivolous. (D.I. 127.)

7. The State defendants' motion for protective order is **granted** in part and **denied** in part. (D.I. 134.) The plaintiffs are given leave to serve a request for production of documents within the parameters outlined in the memorandum issued this date.

8. The plaintiffs' motion for a temporary restraining order and/or preliminary injunction to prohibit restriction to two books is **denied**. (D.I. 136.)

9. The plaintiffs' motion to amend the complaint to add count 59 is **denied**. (D. I. 137.)

10. The plaintiffs' motion for partial for summary judgment is **denied** without prejudice as premature. (D.I. 140.)

11. The plaintiffs' motion to compel is **denied**. (D.I. 171.)

12. The State defendants' motion for summary judgment is **denied** without prejudice as premature. (D.I. 191.)

13. The plaintiffs' second motion for an extension of time to file an answering brief is **denied** as moot. (D.I. 198.)

14. Pursuant to Fed.R.Civ.P. 16 and D. Del. L.R. 16.2 scheduling is ordered as follows:

A. **Joinder of other Parties and Amendment of Pleadings**. All motions to join other parties and amend the pleadings will be filed on or before September 30, 2009.

B. **Discovery**. All discovery will be initiated so that it will be completed on or before February 1, 2010.

C. **Application by Motion**. Any application to the Court will be by written motion filed with the Clerk.

D. The parties will not send or deliver any correspondence to Chambers. All correspondence and pleadings must be filed directly with the Clerk of the Court. It will be the responsibility of the parties to inform the court of any change of address.

E. **Summary Judgment Motions**. All summary judgment motions, with accompanying briefs and affidavits, if any, will be served and filed on or before April 1, 2010. The answering brief will be filed on or before April 15, 2010, and the reply brief due on or before April 29, 2010.

F. Any requests for extensions of time as set forth in this Scheduling Order must be made no later than twenty-one days prior to the expiration of time.

15. Within **thirty days** from the date of this order the plaintiffs shall submit to the court complete U.S. Marshal-285 forms for those defendants who have not been served, as well copies of the complaint (D.I. 2) and the amended complaints (D.I. 18, 43). The packet will be forwarded to the U.S. Marshal for service. Failure of the plaintiffs to timely provide complete USM-285 forms and copies of the complaint and amended complaints shall result in dismissal without prejudice of the unserved defendants.

16. The plaintiffs are placed on notice that the court will not consider further injunctive

relief motions. Future injunctive relief motions will be placed on the docket but will not be reviewed or acted upon and will not be considered as pending.

CHIEF, UNITED STATES DISTRICT JUDGE