IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Sean Swain, Plaintiff, v. Gary C. Mohr, et al., Defendants.	Case No. 4:14-cv-2074 Hon. Benita Y. Pearson **MOTION FOR TEMPORARY RESTRAINING ORDER** Richard M. Kerger (0015864) KERGER & HARTMAN, LLC 33 S. Michigan St., Suite 100 Toledo, OH 43604 Telephone: (419) 255-5990 FAX: (419) 255-5997 rkerger@kergerlaw.com *Counsel for Plaintiff*

Now comes plaintiff, Sean Swain, and moves the Court to enter a Temporary Restraining Order requiring these defendants and others acting in concert with them from barring plaintiff access to the video visit feature of the JPay system utilized in the Ohio prisons and from using unnecessary medical procedures to punish him. A brief in support appears below.

Respectfully submitted,

/s/ Richard M. Kerger
RICHARD M. KERGER (0015864)
Counsel for Plaintiff

BRIEF IN SUPPORT

The harassment continues.

Recently the JPay system utilized in the Ohio prisons to allow prisoners to communicate with those outside the prison offered a video-conferencing feature, much like Skype. As the attached Declaration of Ben Turk establishes, he attempted to utilize that feature for a visit with the plaintiff. When the visit was to take place he was told that it had been cancelled and subsequently it was determined that there was an investigation underway into Mr. Swain's activities. See Declaration of Richard M. Kerger attached.

It was suggested by counsel for the defendants in a phone call with counsel for Mr. Swain that there was indeed an investigation of Mr. Swain underway and it might even involve the Federal Bureau of Investigation. He said the concerns were over statements made by Mr. Swain which had been intercepted by someone at the JPay system and forwarded to the Ohio Department of Rehabilitation and Correction. The statements were, first, that Mr. Swain had communicated to others the make of car and the personalized license plate of Warden Terry Tibbals. The second was that plaintiff had threatened to burn down the Statehouse. See Kerger Declaration.

Subsequent investigation revealed that the Tibbals license plate information was acquired by Mr. Swain from Mr. Tibbals himself.

There was an art show at the Marion prison and Mr. Swain and Warden Tibbals were talking cordially. The Warden made the statement about his car and his license plate in front of his parents as well It should be noted that having a personalized license plate suggests that the person operating the vehicle is not overly concerned about remaining unknown. Moreover, presumably from time to time Warden Tibbals drove this vehicle to the prison where it sat in the Warden's parking place and could easily be identified by anyone driving by. In short, the idea that this action constituted a security threat that in any way imperiled the operation of the prison system is silly. See Declaration of Sean Swain. (Because of his confinement and the distance, his Declaration has not been signed by him but it has been read to him and discussed with him and he will sign this one. When it is received, it will be filed. But events are unfolding so rapidly, delay is not appropriate. Just moments ago, JPay announced that the Ohio video conferencing had been suspended. See announcement attached. To think that this is not directly related to Mr. Swain and this litigation is naïve at best.)

As to the comment about the Statehouse, it appeared in a mock inaugural speech posted by Mr. Swain's supporters after his run for Governor in 2014. In keeping with his anarchist views, and his belief that the State of Ohio is not a lawful entity, the plaintiff made comments about destroying the Statehouse and dancing "naked around the flames." There

was no suggestion whatsoever that anyone should burn down the Statehouse. It was presented as a fact stemming from his election as Governor, an event that also did not occur. It is absurd to think that that kind of comment could in any way involve the security of the Ohio penal system.

As *en banc* panel of the Sixth Circuit held in *Thaddeus-X v. Blatter, et al.,* 175 F.3d 378 (6th Cir. 1999) that a retaliation claim can arise in a number of contexts. The essence of all such claims, however, is that the plaintiff engaged in conduct protected by the Constitution or by a statute, the defendant took an adverse action against the plaintiff and this adverse action was taken because of the protected conduct. Here the action was taken before the protected conduct could even begin. Certainly the utilization of the video conference system permitted by the prison provided for a fee by JPay is a First Amendment Right. So, too, is the right to protest treatment by refusing meals and medications. It is certainly a form of speech and so long as it does not present a risk of harm to the plaintiff, the defendant may not step in to prevent it. *Moore v. Fields*, 420 Fed. Appx. 499 (6th Cir. 2011).

To be sure, prison regulations can restrict prisoners' First Amendment Rights, so long as they are "reasonably related to legitimate penological interests." *Thaddeus X*, at 390.

In this case, the only explanation given by the State's representative for the restriction of plaintiff's right to have video visits are almost silly. Moreover, they are long standing and well known to the defendants over the past several years. The claim for needed medical care is perhaps worse in that it uses what ought to be beneficial treatment for the defendant and turns it into punishment, particularly when he is held in isolation and in the dark for 24 hours.

It is also highly unlikely that JPay caught the particular violations claims. It is far more likely that the one or more of the defendants, exercising their right to review communications, uncovered what they felt was going to be a problem and so sought to find a basis for justifying a restriction on the visits.

Absent legitimate penological interest, the conduct of the defendants here violates his rights and is contrary to the rules laid down by the United States Supreme Court. *Turner v. Safely*, 42 U.S. 78 (1987) and *Porcunier v. Martinez*, 416 U.S. 396 (1974).

This effort to thwart Mr. Swain's ability to have video communication with those outside the prison is harassment because of the defendants' belief that those visits could be recorded and those visits posted on the website by his supporters. But that is not a penological interest. That is simply harassment designed to restrict his free speech, something

that is guaranteed under the First Amendment until it abridges the security of the Ohio prison system.

To compound matters, Mr. Swain had begun a hunger strike to protest the elimination of his right to have video visits since it inhibited his First Amendment Rights. This hunger strike included refusing to take his blood pressure medication. His blood pressure remained within limits and Nurse Practitioner Carter told him that so long as his blood pressure stayed under 160/90, the policy permitted him to remain in population. His blood pressure remained within that limit.

Last Friday afternoon, Dr. Kline called in and ordered to take him to the medical unit. This is in effect isolation. He has no telephone, no mail, no email and was told that he would remain there indefinitely until he took his medications. He had nothing but a mattress and a roll of toilet paper and the clothes on his back for 24 hours. There is a video camera in his cell and he began doing sign language into the camera in case something happened to him. This record would be available for others to review. Apparently someone saw him gesturing into the camera and they turned off the lights. He remained in the dark for 24 hours. This was when he was under observation for his medical condition. Finally on early Sunday, he succumbed and ended his hunger strike and began taking his medications. He was then returned to his regular cell, exhausted by the experience. See Declaration of Mr. Swain.

The use of a medical diagnosis to isolate the plaintiff and place him under conditions under which he was forced to take medications and begin his regular diet is simply improper. There can be no debate about it. It is harassment. There is no reason to believe that it will not continue in the future unless the defendants are enjoined. The supposed comments do not warrant any sanctions and the Court should act to issue a temporary restraining order to remove these restrictions from Mr. Swain and prohibit defendants from using supposed medical treatment as punishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been filed electronically with the Court's ECF system this 18th day of February, 2015. Parties will receive notice by email notification through the Court's ECF notification system.

/s/ Richard M. Kerger