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

SEAN SWAIN,	**:**	**CASE NO. 4:14-cv-2074**
Plaintiff,	**:**	**JUDGE BENITA Y. PEARSON**
vs.	**:**	
GARY MOHR, *ET AL.*,	**:**	
Defendants.	**:**	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S "MOTION FOR TEMPORARY RESTRAINING ORDER" (DOC. # 19), AND PLAINTIFF'S "SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER" (DOC. # 20)

Defendants respond in opposition to Plaintiff's "Motion for Temporary Restraining Order" (Motion for TRO) filed on February 18, 2015 (Doc. # 19), and thereafter, Plaintiff's "Supplemental Brief in Support" (Supp. Brief) filed February 23, 2015 (Doc. # 20). Plaintiff's original Complaint, filed September 17, 2014, includes requests for specific injunctive relief relative to alleged incidents that occurred prior to the date of the Complaint's filing. Doc. # 1, p. 12. Therefore, although not specifically stated in Plaintiff's Motion for TRO, or its Supp. Brief, Plaintiff seeks a temporary restraining order presumably pursuant to Fed. R. Civ. P. 65(b). Alternatively, the Court may construe the relief sought as in the nature of preliminary injunctive relief pursuant to Fed. R. Civ. P. 65(a). Under either construction, Plaintiff's request must be denied. The attached Memorandum supports Defendants' opposition.

Respectfully submitted,

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MEMORANDUM

I. BACKGROUND/COURSE OF PROCEEDINGS

Plaintiff, Sean Swain (#243-205), is a prison inmate under the custody and control of the Ohio Department of Rehabilitation and Correction (ODRC) and is currently housed at the Southern Ohio Correctional Facility (SOCF) in Lucasville, Scioto County, Ohio. http://www.drc.state.oh.us/OffenderSearch.[1] Inmate Swain was admitted to the custody and control of the ODRC on February 15, 1995. Inmate Swain is serving an indefinite sentence of twenty (20) years to Life for Aggravated Murder. *Id.*; Doc. # 1, p. 3, ¶ 1. Inmate Swain is eligible for consideration for suitability for release and will next appear before the Ohio Parole Board some time prior to July 2016. *Id*.

On September 17, 2014, Inmate Swain, while then incarcerated at the Ohio State Penitentiary (OSP), filed his Complaint in this Court pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. *Id*. p. 1, 3. Inmate Swain's Complaint alleges background facts beginning

[1] On an unknown date between February 16, 2015 and February 20, 2015, Inmate Swain was transferred to SOCF from the Ohio State Penitentiary (OSP) as a part of a mass movement of Security Level 4A inmates. *See* Exhibit 1, Affidavit of Brian Wittrup, p. 2, ¶ 10-11; Doc. # 20, p. 1, ¶ 1 (referring to "Friday afternoon," [presumably February 20, 2015).

in 2008 (*Id*., p. 4, ¶ 3) while he was confined at the Toledo Correctional Institution (ToCI), up through and including allegations occurring as late as September 12, 2012 (*Id*., p. 5, ¶ 8). To the extent that Inmate Swain intends to impose liability upon any Defendant named herein for any of these factual allegations, such allegations, and any associated claims connected thereto are clearly barred by the two (2) year statute of limitations for claims brought pursuant to 42 U.S.C. § 1983. *See* Defendants' Answer, Doc. # 10, p. 2-3, ¶¶ 3-8, p. 6, ¶ 27, p. 8, ¶ 48.

Occurring within the two (2) year statute of limitations, Inmate Swain's Complaint specifically alleges that, presumably after his transfer to the Mansfield Correctional Institution (ManCI) (Doc. # 1, p. 6, ¶ 11), on September 19, 2012, a surprise search was conducted in his cell by members of the ManCI Security Threat Group (STG officers). *Id*., p. 5-6, ¶ 9. Although not specifically included in either "Count I," or "Count II" of Inmate Swain's Complaint (*See Id*., p. 11, ¶¶ 27-28, and p. 11, ¶¶ 29-30, respectively), presumably this claim is brought pursuant to the Fourth Amendment to the United States Constitution.

Next, Inmate Swain's Complaint brings a conditions of confinement claim under the Eighth Amendment to the United States Constitution, and/or a retaliation claim under the First Amendment to the United States Constitution, alleging that after the search he was confined in "a row of cells behind the medical clinic known as 'torture cell row,'" for forty-eight (48) hours where he was allegedly subjected to "freezing temperatures without a bed, toothbrush and only a small amount of clothing and bedding." *Id*., p. 6, ¶ 10. The Complaint alleges that during this time he was denied the ability to shower or recreate, and received only "half portions of food." *Id*.

Again, Inmate Swain alleges similar facts and claims occurring between September 21, 2012 and August 29, 2013. Inmate Swain alleges during this time period he was "transferred to

the Special Management Unit" (SMU). *Id*., ¶ 11, p. While in the SMU Inmate Swain was allegedly subjected to "dirty toilet water rain[ing] down from the ceiling for hours a day," was "housed next to a large steel door that slammed open and closed every 30 minutes," was served his food "under a rusty steel door rather than the food slot," was "being fed reduced rations and was housed in freezing conditions." Inmate Swain's Complaint alleges without any factual support of any kind, that during these eleven (11+) plus months he "had lost 55 pounds." Finally, Inmate Swain also alleges that his picture was posted "in a training program which labeled him as an inmate terrorist." *Id*.

Next, Inmate Swain's Complaint alleges that on January 16, 2013, he was "moved from SMU3 to SMU1, a cell in which the outer window was not affixed to the frame," causing the cell "to be unusually cold," and that he was provided only "t-shirts, socks, underwear, two blankets, two sheets, shower shoes, and a pair of orange pajamas." *Id*., p. 7, ¶ 12.

During these time periods Inmate Swain's Complaint also alleges that he was subjected to "lost laundry," "smaller bars of soap," and that as a result, he "remained dirty for the better part of a year" (*Id*., p. 7, ¶ 13), that he "was only offered recreation at 6:30 a.m., making it *impossible* for him to get recreation and receive direct sunlight," (*Id*., ¶ 14 (emphasis added)), that he was "subjected to selective mail screening," and had a book taken from him. *Id*., ¶ 15.

Inmate Swain alleges that he received a copy of Defendant Hunsinger's Investigation Report (concerning the September 19, 2012 search) on or about October 19, 2012 that was "nine pages long and replete with errors." Inmate Swain alleges that "virtually everything the investigator complained about dealt with public speech in a public forum and all of it was provably untrue." *Id*., p. 7-8, ¶ 16.

Thereafter, Inmate Swain alleges that "[O]n October 24, 2012 a Rules Infraction Board (RIB) hearing was held and Inmate Swain was found guilty" by "Defendant Dalby" of certain institutional rule violations with which he had been charged. *Id.*, p. 8, ¶ 17. Inmate Swain alleges that he filed an appeal to Defendant Warden Tibbals who affirmed the finding, and he then appealed to Defendant Director Mohr who also affirmed the RIB decision. *Id.*

Inmate Swain then alleges that after he had obtained counsel, who had written Defendant Director Mohr, on March 27, 2013, Defendant Clark met with Inmate Swain and told him that at least allegedly according to Defendant Clark, "plaintiff [Swain] had a tendency to violence and property damage." *Id.*, ¶ 18. Defendant Clark then sent Inmate Swain a letter on April 30, 2013 "indicating that plaintiff's [Swain's] previous disciplinary classifications hearings were being reversed and the charges overturned," but that "a 'new ticket' has been written and 'new disciplinary procedure will be commenced to address behavior as opposed to beliefs and ideals.'" *Id.*, ¶ 19. Inmate Swain alleges that the outcome of the "new hearing" was known "before it [the hearing] began." *Id.*, p. 9, ¶ 20.

Inmate Swain's Complaint alleges that the "new hearing" was held on May 19, 2013, and the report relied upon to find Inmate Swain guilty at that hearing was "fraught with errors and misstatements." *Id.*, ¶ 21. Inmate Swain alleges that this "new hearing" was digitally recorded, but that before the "new hearing," a "secret hearing" was held with Defendants Clark and Hunsinger present and some evidence from this "secret hearing" was relied upon to find Inmate Swain guilty of the amended institutional rule violation(s) and this evidence was never disclosed to him in advance of the "new hearing." *Id.*, ¶ 21.

Inmate Swain next alleges that evidence relied upon to find him guilty of the amended rule violation(s) was never "admitted" at the RIB hearing. *Id.*, ¶ 22. The Complaint alleges that

Defendant Barlow "served as the hearing officer [RIB Chairperson] and "John Doe Maintenance Man served as secretary." *Id*. Inmate Swain implies that he appealed the revised RIB finding to both Warden Tibbals and Director Mohr, and both affirmed the RIB decision. *Id*.

Next, Inmate Swain's Complaint alleges that some time prior to April 30, 2013, he was issued a Conduct Report by Defendant Melton. *Id*., ¶ 23. Sergeant Van Biber, not a named defendant in this case, allegedly held a hearing on the Conduct Report on April 30, 2013 and dismissed the Conduct Report. Thereafter, on May 13, 2013, an RIB hearing was held by Defendants Dahlby and Defendant Gossler. Inmate Swain alleges that Defendant Dahlby "appeared to be intoxicated and conducted the hearing in a way that was clearly inappropriate." *Id*. Inmate Swain alleges he was found guilty of the institutional rule violation with which he was charged despite Sergeant Van Biber's earlier dismissal. *Id*., p. 9-10, ¶ 23. Inmate Swain again alleges he appealed the finding to both Warden Tibbals and Director Mohr and both affirmed the RIB decision. *Id*.

Next, Inmate Swain's Complaint alleges that Defendant, Unit Manager King "initiated a review and overruled the instrument." *Id*., p. 10, ¶ 24. Defendant Tibbals allegedly then "submitted a Level 4 custody recommendation, basing it upon the article concerning 'JPay, Sock Puppets and Our Reduction to Slavery.'" *Id*. Alleging that Warden Tibbals relied upon this as proof "that plaintiff [Inmate Swain] was one of the creators of the 12 Monkeys, Inmate Swain's security classification was recommended to be increased to Level 4. *Id*. Inmate Swain alleges that the same day his classification was approved for increase to Level 4, Defendant Jeffreys notified Inmate Swain that he would remain at Level 3. However, upon his arrival at OSP, Inmate Swain alleges he was told he was classified as Level 4B, "meaning that he would remain in isolation." *Id*.

Inmate Swain's Complaint alleges, without any factual support of any kind, that as a result of isolation, his regular mail was delayed as long as two weeks, "and friends began using the JPay email system to communicate with him [Inmate Swain]." *Id*., ¶ 25. Inmate Swain alleges he was held is isolation for a year at the OSP "until legal counsel appeared and conditions improved." *Id*. Inmate Swain's Complaint concludes with the allegation that at the time of filing his Complaint, September 17, 2014, had been released from isolation and was in "general population, although at a security level higher than he should be which will continue for at least a year," thus resulting in restricted privileges and which affects his ability to achieve appropriate parole consideration." *Id*., p. 10-11, ¶ 26.

In Count I of Inmate Swain's Complaint he alleges retaliation and/or unlawful infringement of his right to free speech, in violation of the First Amendment to the United States Constitution, all actions taken by all Defendants as punishment for his "expressing his reasonable and appropriate personal views on prison policy in an effort to comment to others to change the policies." *Id*., p. 11, ¶¶ 27-28. In Count II, Inmate Swain alleges a civil and criminal conspiracy among some or all of the Defendants, "intended to punish [Inmate Swain] for his religious beliefs and his expression of protected views of policies enacted by the prison," and that the Defendants' individual and/or collective conduct "was expressly intended to punish [Inmate Swain] and to chill [Inmate Swain] and others in their expression of constitutionally protected views on prison policies." *Id*.

Plaintiff's Complaint names thirteen (13) Defendants, eleven (11) of whom have been properly served and are presently before the Court, all Defendants having filed their Answer on December 9, 2015 (Doc. # 10); Gary C. Mohr, Director of the Ohio Department of Rehabilitation and Correction (ODRC); Terry Tibbals, former Warden at ManCI, and current Warden at

London Correctional Institution (LoCI); Rob Jeffreys, former Chief of the ODRC Bureau of Classification, and present Regional Director for ODRC; Angela Hunsigner, former Investigator at ManCI, and present Deputy Warden of Administration at ManCI; Trevor Clark, Staff Counsel for ODRC Legal Services Division; Uriah Melton, Institutional Inspector at ManCI; Kent Dahlby, Corrections Lieutenant at ManCI; PennyGossler, Administrative Professional at ManCI; Richard Barlow, Corrections Lieutenant at ManCI; Thomas King, Unit Manager at ManCI; and Jay Forshey, Warden at the Ohio State Penitentiary (OSP). Each Defendant is sued in his or her respective individual and official capacities. Doc. # 1, p. 1-3.

Inmate Swain's Complaint seeks retroactive injunctive relief requiring the removal from his institutional records any and all references to any Conduct Reports issued him and for which he was found guilty between 2012 and August, 2014; prospective injunctive relief prohibiting any and all Defendants from acting in concert with one another to deprive Inmate Swain of his constitutional rights; retroactive injunctive relief requiring Inmate Swain to be reduced from security classification he is presently at to Level 2 so that he will be eligible for programs that would enhance his opportunity for suitability for release determinations in the future by the Ohio Parole Board, and an award of reasonable attorney fees and such other appropriate relief as the Court might order. *Id*., p. 12.

II. PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Inmate Swain's present Motion for a Temporary Restraining Order seeks this Court's 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." Doc. # 19, p. 1, ¶ 1. Obviously, none of these

allegations, or any related factual allegations appear in Inmate Swain's Complaint. Doc. # 1, *passim*.

In support of these allegations, Inmate Swain's Motion refers only vaguely to his Complaint filed September 17, 2014 by alleging, "The harassment continues." *Id*., p. 2. Inmate Swain alleges in his Motion that this continued "harassment," or further acts of retaliation are in response to Inmate Swain's engaging in protected activity, his right to free speech.

Specifically, Inmate Swain's Motion alleges that his ability to participate in a series of video visits scheduled and paid for by a friend, Ben Turk, and scheduled for the weekend of January 31, - February 1, 2015, were cancelled by certain unnamed Defendants (i.e., "an officer," *Id*., p. 2-4, Doc. # 19-2, p. 1, ¶¶ 1-4), in response to prison officials having learned of the content and subsequent internet reposting of information conveyed by Inmate Swain to Ben Turk through a phone call. The JPay email included the description of, and Ohio vehicle registration number for Defendant, Warden Terry Tibbals' personal vehicle, and a later posting on the website "SeanSwain.org" made reference to "*a bonfire* at or … *of the state capital* (sic) building." Doc. # 1, p. 2-4; Exhibit 5, p. 2, ¶ 6; Exhibits 5(A) & 5(D) (emphasis added); Doc. # 19-3, p. 1-2, ¶¶ 2-5; *Id*., p. 2-3, ¶¶ 6-7; Doc. # 19-4, p. 1-2, ¶¶ 2-4.

Inmate Swain's Motion alleges that the cancellation of these visits with Mr. Turk "violates his [Inmate Swain's] rights and is contrary to the rules laid down by the United States Supreme Court. *Turner v. Safley*, 42 U.S. 78 (1987) and *Procunier v. Martinez*, 416 U.S. 396 (1974)." Doc. # 19, p. 5. Essentially, Inmate Swain argues that the cancellation and temporary denial of access to certain features of the JPay System was not in response to valid penological interests but was instead a form of harassment, retaliation, and/or punishment. It is undisputed that during this weekend suspension of JPay privileges, Inmate Swain could place and receive

phone calls, receive in-person visits, and send and receive regular U.S. mail. Doc. # 19-2, p. 2, ¶ 6.

Additionally, Inmate Swain's Motion alleges that in response to the suspension of JPay privileges, Inmate Swain embarked on a "hunger strike" and had refused to take his prescribed "blood pressure medication." *Id*., p. 6, ¶¶ 2-3. The Motion alleges that after a few days, without medical need, Inmate Swain was admitted to the OSP Infirmary, which in effect constituted, "isolation." *Id*. While admitted to the Infirmary, Inmate Swain alleges he "has no telephone, no mail, no email and was told that he would remain there indefinitely until he took his medications," that he had "nothing but a mattress and a roll of toilet paper and the clothes on his back for 24 hours." *Id*. Finally, Inmate Swain alleges that "[T]here is a video camera in his cell and he began doing sign language into the camera in case something happened to him. The 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." *Id*., p. 6, ¶ 2; Doc. # 19-3, p. 3-4, ¶¶ 8-10. Inmate Swain alleges that these purported events constitute the use of "supposed medical treatment as punishment." *Id*., p., 7, ¶ 1; Doc. 19-3, p. 3-4, ¶¶ 8-10.

Lastly, Inmate Swain's Supp. Brief in Support of his Motion for a TRO alleges that Inmate Swain's recent transfer from the OSP to the SOCF, "could be viewed as an effort to move him [Inmate Swain] from the jurisdiction of this Court in view of their [Defendants'] concerns about the Temporary Restraining Order," (Doc. # 20, p. 1), and that Inmate Swain was transferred "without his blood pressure medications." *Id*., p. 2.

III. STATEMENT OF FACTS

JPay Systems are kiosks located at ODRC institutions around the State. JPay was implemented state wide on February 12, 2012. Affidavit of Amanda Moon-Thomas, Exhibit 3, p. 2, ¶¶ 6, 13. JPay has a built-in feature that captures screens in order to detect attempted use of the JPay Systems contrary to security concerns, and for institutional rule violations. *Id.*, ¶ 12.

JPay offers inmates the use of three (3) separate features, including the use of email, Video Visitation, and VideoGrams. Video Visitation allows an inmate to hold a video visit with an approved visitor via live video conferencing, typically anywhere from 30-60 minutes duration. *Id.*, ¶ 7; Exhibit 3(A). This feature is available on an individual, case by case basis at the discretion of prison officials. *Id.*, ¶ 8. VideoGrams permit a family member and/or friend of an inmate to create a 30 second video clip and send it to an inmate. Conversely, an inmate may create a 30 second video clip and send it to a family member and/or friends. *Id.*, ¶ 10; Exhibit 3(B). JPay email permits inmates to send and receive emails to and from family members and/or friends. There has been no system wide interruption of JPay Video Visitation or its email services. *Id.*, ¶ 9. However, VideoGrams was suspended due to institutional safety concerns until such time as security screening was in place at each institution. *Id.*, p. 2-3, ¶ 13. Inmate Swain is a frequent user of the email and other JPay systems. Exhibit 5; Exhibits 5(A), 5(E) - 5(K).

As a function of JPay's security screening processes for JPay emails, on January 29, 2015, JPay alerted ODRC officials of a possible security violation involving the use of their services. Affidavit of Paul Shoemaker, Exhibit 5, p. 2, ¶ 6. The email in question that was captured by JPay had been sent by Inmate Swain to a friend named Ben Turk on January 25, 2015. *Id.*; Exhibit 5(A). In that email, Inmate Swain disclosed information to Mr. Turk of the

license plate number and description of the personal vehicle of former ManCI Warden, and current Warden at London Correctional Institution (LoCI) Terry Tibbals, a named Defendant in Inmate Swain's September 17, 2014 Complaint. *Id.* Four (4) days later, the same text and content from Inmate Swain's email to Mr. Turk was posted on a publicly accessible website, titled "SeanSwain.org." Exhibit 5(B).

Later, JPay also alerted ODRC officials that Inmate Swain had scheduled Video Visitations with Ben Turk for the upcoming weekend, one on Saturday, January 31, 2015, and one on Sunday, February 1, 2015. The purpose of the Video Visitations was for Ben Turk to record Inmate Swain, and thereafter, post the videos on Inmate Swain's website. *Id.*, p. 2, ¶ 7.

Inmate Swain states that he learned of the information about Warden Tibbals' vehicle description and license plate number from Warden Tibbals himself at a function being held at Marion Correctional Institution (MCI). Doc. # 19, p. 2-3; Doc. # 19-3, p. 1-2, ¶ 2. Warden Tibbals denies that he has ever discussed with any inmate, including Inmate Swain, any details or particulars about his personal vehicle. Affidavit of Terry Tibbals, Exhibit 4, p. 2, ¶ 6. Moreover, Warden Tibbals avers that he did not even attend an art show at MCI, and ODRC records do not indicate that Inmate Swain was ever confined at MCI. *Id.*, ¶¶ 7-8.

Mr. Shoemaker was directed to contact JPay and cancel the Video Visitations scheduled between Inmate Swain and Mr. Turk for January 31, 2015 and February 1, 2015. Exhibit 5, p. 2, ¶ 8. Deputy Inspector Shoemaker did so that same day. *Id.*

Upset about the cancellation of his Video Visitations with Ben Turk, Inmate Swain called Ben Turk on Saturday morning, January 31, 2015 and told Ben Turk that he [Inmate Swain] was planning on starting a hunger strike on Monday, February 2, 2015. This information was posted to "SeanSwain.org" on January 31, 2015. Exhibit 5(C).

On February 4, 2015, Inmate Swain sent two (2) JPay emails to Ben Turk threatening to refuse to take his blood pressure medication when provided. Exhibit 5(E) & (F). Two (2) additional JPay emails were sent by Inmate Swain to Ben Turk on February 12, 2015, Exhibit 5(G), and 5(H), and three (3) on February 16, 2015, Exhibit 5(I), (J), and (K).

Having gotten word that Inmate Swain had refused to take his blood pressure medications, OSP Chief Medical Officer Dr. James Kline offered Inmate Swain admittance into the OSP Infirmary. Exhibit 2, p. 2, ¶ 8-9. Inmate Swain came to the Infirmary as offered of his own free will in the late afternoon of February 13, 2015. *Id*., ¶¶ 9, 13. After a few days in the Infirmary, Inmate Swain agreed to resume taking his blood pressure medication. *Id*., ¶ 15. After Inmate Swain's vital signs returned to normal ranges, he was released back to his cell in general population. *Id*., p. 2-3, ¶ 15.

Inmate Swain was transferred from OSP to the Southern Ohio Correctional Facility (SOCF) sometime between February 16, and February 20, 2015. Affidavit of Brian Wittrup, Exhibit 1, p. 1-2, ¶¶ 6-7. Inmate Swain's transfer was a mass transfer of thirty-nine (39) inmates made necessary by incoming Level 4B inmates to OSP. *Id*., p. 2, ¶¶ 9-10, 12. Inmate Swain's transfer was solely due to his being classified as a Level 4A inmate who was approved to be confined at some institution other than OSP. *Id*., ¶ 11. The mass transfer of the 39 Level 4A inmates had been discussed as early as November 2014 in anticipation of additional Level 4B inmates being transferred to OSP. *Id*., ¶¶ 14.

III. LAW AND ARGUMENT

A. INMATE SWAIN'S REQUEST FOR A TEMPORARY RESTRAINING ORDER MUST BE DENIED.

In pertinent part to temporary restraining orders, Fed. R. Civ. P. 65(b) provides as

follows:

> (b) Temporary Restraining Order.
> (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney *only if*:
> (A) *specific facts in an affidavit or a verified complaint* clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

First, under division (b)(1)(A), as explained above, no specific facts are alleged in Inmate Swain's Complaint that in any way touch upon the allegations brought in Inmate Swain's Motion for a Temporary Restraining Order, or his Supplemental Brief in support. Obviously this is because the events of which Inmate Swain now complains in his Motion had not yet occurred. An amended complaint has not been filed as of this date. Second, Inmate Swain's Motion for a Temporary Restraining Order and his Supplemental Brief contain no specific facts alleged in any *affidavits*. While there are Declarations attached to the Motion (See Docs. # 19-2, 19-3, and 19-4), none of these are signed in the presence of a notary or otherwise bear any indication that they can be construed as *affidavits*. Indeed, Doc. # 19-3, the Declaration of Plaintiff Sean Swain is not even signed. (*See* Doc. # 19, p. 3). Inmate Swain has not filed an Amended Complaint to properly bring these matters before the Court. Third, even considering the Motion and its Declarations, there are no verified facts that even allege, much less prove any irreparable injury, loss, or damage that has resulted, or that will result to Inmate Swain if the temporary restraining order is not issued. The most that can be said is Inmate Swain's allegation that such conduct on the part of certain ODRC officials, significantly neither of whom (Dr. Kline, Doc. # 19, p. 6 and/or Deputy Chief Inspector Paul Shoemaker, Doc. # 19-2, p. 1, ¶ 4) are even named and served Defendants in Inmate Swain's Complaint, constitutes "harassment." Doc. # 19, p. 2, 5,

But "harassment" is not the same as irreparable injury, loss or damage. This is particularly true since at all times it is undisputed that Inmate Swain has had unfettered access to alternative means of exercising his right to free speech through telephone privileges, in person visits, regular U.S. Mail, and JPay email. Doc. # 19-2, p. 2, ¶ 6; Exhibits 5(AE),and Exhibits 5(E) through 5(K). The only alleged exception to this was during the 24 hours when Inmate Swain was admitted to the Infirmary. Doc. # 19, p. 6, ¶ 2. But again, the only result attributed to this was that Inmate Swain was "exhausted by the experience." Doc. # 19, p. 6.

Even though Inmate Swain's Motion for a Temporary Restraining Order was not sought to be issued without prior notice to the Defendants and an opportunity to respond, nevertheless, even seeking a TRO *with* prior notice and an opportunity to be heard, it would appear to be necessary to meet these minimum requirements as established by the Rule.

Division (d)(1) of the Rule provides,

> (d) Contents and Scope of Every Injunction and Restraining Order.
> (1) Contents. Every order granting an injunction and every restraining order must:
> (A) state the reasons why it issued;
> (B) state its terms specifically; and
> (C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

Here, Inmate Swain has not set forth sufficient allegations, other than conclusory statements to demonstrate the reasons why he believes the conduct of certain ODRC officials in admitting him to the OSP Infirmary and cancelling two (2) scheduled JPay Video Visits constitutes irreparable injury loss, or damage. Furthermore, an inmate's "placement in the infirmary cannot be characterized as a 'transfer' in light of its duration. Courts have repeatedly held that the Constitution's protections are not frustrated by temporary reassignments in prison." *See e.g., Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (one week job reassignment

from commissary to kitchen was not sufficiently adverse for actionable claim of retaliation since it was only a 'few days of discomfort'); *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996) (prisoner being forced to sleep on the floor for one night because of overcrowding was a 'temporary situation' and therefore not actionable); *Lamb v. Crites*, No. CV-11-027, 2012 WL 130371, at *10-11 (S.D. Texas Jan. 14, 2012).

Additionally, it is altogether unclear, based upon Inmate Swain's Motion and Supplemental Brief, how a specifically tailored order can be crafted with specific terms described in reasonable detail to ensure that Inmate Swain does not suffer such future alleged irreparable injury, loss or damage, should such be able to be proven. Therefore, under the strict language of Fed. R. Civ. P. 65(b), the Court should deny Inmate Swain's Request for a Temporary Restraining Order as it utterly fails to meet the requirements for such extraordinary relief.

In addition, the purpose of a temporary restraining order is simply to preserve the status quo of the parties "until a trial on the merits can be held." *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991), citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Here, the status quo at present is that Inmate Swain is not presently deprived of the use of JPay available systems, nor any other available means of expressing his First Amendment right to free speech, and as far as it can be determined he is being housed in general population at the SOCF. Thus, Inmate Swain is requesting an order to "correct constitutional deficiencies yet to be proven." *Gooden v. Bradshaw*, No. C-1-08-115, 2009 WL 1929078 (S.D. Ohio July 2, 2009). The *Gooden* court (Weber, J.) determined that such relief is generally outside the scope, and purpose of preliminary injunctive relief. *Id*. *4.

B. INMATE SWAIN'S REQUEST FOR IMMEDIATE, PRELIMINARY INJUNCTIVE RELIEF FAILS TO MEET THE REQUIREMENTS FOR SUCH EXTRAORDINARY RELIEF.

Even if the Court should construe Inmate Swain's Motion for a TRO as constituting a request for immediate, preliminary injunctive relief, his request must still fail. In entertaining a request for immediate, preliminary injunctive relief a court is required to consider certain factors before granting such an extraordinary remedy. And, "[A] party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Colvin v. Caruso*, 605 F.3d 282, 300 (6th Cir. 2010) (quoting *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). "This is because '[t]he purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends [he] was or will be harmed through the illegality alleged in the *complaint*.'" *Colvin, supra*, at 300 (emphasis added), (quoting *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997). *See also, Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991), citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

In determining whether to issue preliminary injunctive relief or a temporary restraining order under Fed. R. Civ. P. 65, a court is to consider (1) whether the movant has shown a strong likelihood of success on the merits of his claims; (2) whether irreparable harm will result without the extraordinary relief requested; (3) whether issuance of a preliminary injunction will result in substantial harm to others; and (4) whether the public interest is advanced by issuance of the injunction. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). "these factors are not prerequisites, but are factors that are to be balanced against each other." *Id.* "Although no factor is controlling, a finding that there is simply no likelihood of success on the

merits is usually fatal." *Gonzalez v. National Board of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) (citation omitted); *See also Michigan State AFL-CIO, supra* ("While, as a general matter, none of these four factors are given controlling weight, a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed.").

1. There is not a substantial likelihood of success on the merits of Inmate's Swain's claims.

Inmate Swain's allegations fail to demonstrate that there is a substantial likelihood that he will prevail on the merits of his claims. Notwithstanding Inmate Swain's argument, there simply is no constitutional right to unfettered access to JPay forms of communications. In a somewhat similar case the United States District Court for the Southern District of Ohio dismissed a claim brought by a prison inmate not for being deprived of video visits, but rather for JPay's delayed delivery of emails. The Court recommended dismissal of the Complaint on an initial screen pursuant to 28 U.S.C. 1915e(2)(b). *Bristow v. Amber*, No. 2:12-cv-412, 2012 WL 1758570 (S.D. Ohio May 16, 2012). The Plaintiff in that case, Inmate Lonny Bristow's Complaint "asserts that Defendants conspired to refuse to forward his emails to [Inmate] Greathouse in violation of his First Amendment rights. He further asserts that Defendants retaliated against him for complaining of the delivery delays." *Id.*, *1. The Court held,

> The undersigned recommends dismissal of Plaintiff's action for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B) (ii). Plaintiff's contention that Defendants' five-day delay in forwarding his emails impinged upon his First Amendment rights is unpersuasive. The Court is unable to find any authority that requires a prison to permit an individual outside the prison to communicate with inmates via email, let alone any authority that requires instantaneous forwarding and delivery of email communications. Indeed, courts considering whether inmates have a First Amendment right to access email have consistently concluded that they do not. *See, e.g., Grayson v. Fed. Bur. of Prisons*, No. 5:11cv2, 2012 WL 380426, at *3 (N.D.W.Va. Feb.6, 2012) ("[P]risoners have no First Amendment constitutional right to access email."); *Rueb v. Zavaras*, No. 09–cv–02817, 2011 WL 839320, at *6 (D.Colo. Mar.7, 2011) ("[I]nmates have no established First Amendment right to access email."); *Holloway v. Magness*, No. 5:07cv88, 2011 WL

> 204891, at *7 (E.D.Ark. Jan.21, 2011) *("[A]ssuming that the free speech clause of the First Amendment requires prisons to permit communication between prisoners and persons outside the prison, ... the First Amendment [does not require] that the government provide telephones, videoconferencing, email, or any of the other marvelous forms of technology that allow instantaneous communication across geographical distances; the First Amendment is a limit on the exercise of governmental power, not a source of positive obligation...."). Notably, Plaintiff does not assert that he was unable to communicate with Greathouse via telephone or United States Mail. Finally, because Plaintiff has not alleged facts demonstrating that he engaged in an activity protected under the First Amendment, *the undersigned likewise concludes that he has failed to state a valid retaliation claim*.

Id. *2 (emphasis added).

Here, like Inmate Bristow, Inmate Swain has no constitutional right to videoconferencing, particularly under circumstances like Inmate Bristow, where Inmate Swain has had unfettered access to alternative forms of communications. Indeed, numerous emails have been submitted as Exhibits herein demonstrating that uncontestable fact. Further, like Inmate Bristow's participation in sending emails that were not delivered, Inmate Swain's desire to participate in the JPay Video Visitation similarly does not constitute protected conduct. Permissible conduct, to be sure, assuming Inmate Swain obeys reasonable rules and regulations, but not constitutionally protected conduct, and certainly not when Inmate Swain misuses the JPay features for what appears to be security threats.

Research has failed to discover any cases in this Circuit dealing with the precise issue presented here, the authority of prison officials to temporarily interrupt a prison inmate's access to the privilege of using videoconferencing based upon reasonable suspicions that use of the privilege has been misused or abused by the prison inmate, resulting in reasonable security concerns. And, particularly like here, where alternative forms of communications and exercise of free speech rights has been unabridged in any way.

However, several cases are instructive as to the issue of free speech rights under the First Amendment and whether any privileges that are extended that enhance such rights may be interrupted in response to legitimate security interests of the institution. For example, in *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994), the Court held, an inmate "has no right to unlimited telephone use." *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir.), *cert. denied*, 493 U.S. 895, 110 S.Ct. 244, 107 L.Ed.2d 194 (1989), *citing Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir.1982). Instead, a prisoner's right to telephone access is 'subject to rational limitations in the face of legitimate security interests of the penal institution.' *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir.1986). 'The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.' *Fillmore v. Ordonez*, 829 F.Supp. 1544, 1563–64 (D.Kan.1993), *aff'd*, 17 F.3d 1436 (10th Cir.1994), and *citing Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir.1978), and *Jeffries v. Reed*, 631 F.Supp. 1212, 1219 (E.D.Wash.1986)." Here, the cancellation of two (2) to four (4) Video Visitations was prompted by Defendants' need to investigate serious security concerns as to how Inmate Swain came into possession of the description and license plate of Warden Tibbals' vehicle, only to be exacerbated upon learning that in turn, the other party to the Video Visitation, Ben Turk, or perhaps someone else, actually posted this information on a publicly accessible website. Once inquiries were made and an investigation completed, Inmate Swain's ability to utilize JPay Video Visitation was restored.

Similarly, in an earlier case before the technological advancements at issue here had been developed, the United States Supreme Court held that prison regulations that prohibited an inmate having a face to face interview with members of the press was not an unconstitutional restriction on free speech. *Pell v. Procunier*, 417 U.S. 817 (1974). There, the Court held,

"Accordingly, in light of the alternative channels of communication that are open to prison inmates, we cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional. So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the 'appropriate rules and regulations' to which 'prisoners necessarily are subject,' *Cruz v. Beto*, *supra*, 405 U.S., at 321, 92 S.Ct., at 1081, and does not abridge any First Amendment freedoms retained by prison inmates." *Id*., 827-28.

Particularly with regard to prison security concerns, the Court stated, "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of *substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters*. Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation." *Id*., 827.

Here, there is nothing to suggest that the temporary cancellation of Inmate Swain's Video Visitations was prompted by anything other than the knowledge that Inmate Swain had disclosed personal identifying information about a high ranking prison official, one whom Inmate Swain had previously named as a Defendant in a lawsuit. How Inmate Swain obtained that information and his motive for disclosing it to Ben Turk, together with the fact that it was then promptly displayed on a publicly accessible website clearly constitutes a sufficient basis for conducting an

inquiry, and cancelling Video Visitations that might further disclose other more sensitive personal information, arguably even to those without expansive correctional knowledge and expertise.

Other than the differences between telephone use and JPay Video Visitations, the facts of this case are remarkably similar to those in *Almadhi v. Ashcroft*, 310 Fed. Appx. 519 (3rd Cir. 2009). In that case the inmate's telephone access was restricted for three (3) months to only a phone call per month. The first restriction was enacted because the plaintiff's "prior criminal conduct by use of a communication device warrant[ed] monitoring of [his] telephone privileges." *Id*., 520-21. The second and third restrictions arose from an investigation into potential telephone abuse. The Plaintiff filed a claim under the First Amendment. The Third Circuit held in favor of the defendants, ruling that "regulations limiting telephone use by inmates have been routinely sustained as reasonable. *See e.g. Pope v. Hightower*, 101 F.3d 1382, 1384-85 (11th Cir. 1996)" *Almahdi, supra* at 522. Further, "prisoners ha[ve] no right to unlimited telephone use, and reasonable restrictions on telephone privileges do not violate their First Amendment rights." *Id*. (internal citations omitted).

In *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002), a pre-trial detainee was prohibited from using a telephone for four and a half months, other than to call his attorney. The prohibition was implemented due to prosecutors' concerns that the plaintiff would disclose pending indictments to several defendants who had not yet been served with warrants. *Id*., 1039, 1042. After the threat of disclosure passed, the plaintiff was restored to normal phone privileges. Valdez brought a First Amendment claim. The Ninth Circuit ruled in favor of the defendants, holding that a prison regulation that impinges on an inmate's constitutional right "is valid if it is reasonably related to legitimate penological interests." *Id*., 1048, citing *Turner v. Safley*, 482

U.S. 78 (1986). The *Valdez* Court ultimately held that since the plaintiff was able to communicate in other forms, the brief prohibition on the plaintiff's use of the telephone was constitutional.

Here, like *Valdez*, the restriction imposed upon Inmate Swain was during ongoing law enforcement activities and an inquiry, if not an investigation, related to Inmate Swain's prior use of JPay services that reasonably caused institutional concerns. Thus, Inmate Swain's constitutional rights were not violated.

2. No irreparable harm or injury will occur if the injunction is not granted.

Similarly, Inmate Swain cannot demonstrate that he will suffer irreparable injury if the injunction is not granted. In fact, as previously stated, Inmate Swain's Motion for TRO and his Supp. Brief make no allegations of irreparable harm of any kind or description. Inmate Swain simply implies that he prefers and enjoys Video Visitations over other forms of communications which the evidence herein demonstrates that he has consistently taken advantage of, and in conclusory fashion, with no case law support, states that "Certainly the utilization of the video conference system permitted by the prison provided for a fee by JPay is a First Amendment Right." Doc. # 19, p. 4. The case law cited above demonstrates that Inmate Swain is incorrect as to that proposition of law.

3. Defendants will be unjustifiably harmed if the injunction is granted.

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), the United States Supreme Court held,

> the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra*, 433 U.S.,

> at 128, 97 S.Ct., at 2539; *Procunier v. Martinez, supra*, 416 U.S., at 404-405, 94 S.Ct., at 1807-1808; *Cruz v. Beto, supra*, 405 U.S., at 321, 92 S.Ct., at 1081; *see Meachum v. Fano,* 427 U.S., at 228-229, 96 S.Ct., at 2540-2541. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell v. Procunier*, 417 U.S., at 827, 94 S.Ct., at 2806. We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial. *Procunier v. Martinez, supra*, 416 U.S., at 405, 94 S.Ct., at 1807; cf. *Meachum v. Fano, supra*, 427 U.S., at 229, 96 S.Ct., at 2540.

Id., p. 547-48.

Upending the status quo in this case by restraining prison officials' ability to engage in reasonable preventive measures once serious institutional security concerns are identified, would cause substantial institutional security concerns to go unchecked. This places not only institutional security at risk, but also the employees and other inmates. Finally, restraining Defendants' authority to act in accord with their contractual agreement with JPay alters the nature of that contract and may potentially cause termination of the contract according to its terms.

4. The public interest would not be served by granting injunctive relief.

The public has an interest in the orderly operation of the state's correctional facilities and institutions. The public also has an interest in permitting prison inmates to enjoy the benefits of convenient and open communications and visits with friends and family members. This is particularly significant and important for those prison inmates with small children whose ability to visit with their parent without having to endure the rigors of entering a prison environment can be continued, thus contributing to necessary continued bonding between the parent and the

children. It is also of great benefit to those prison inmates who may be incarcerated some distance away from family and friends. The ability to sustain these JPay services is thus important to more than just Inmate Swain's individual purposes. Inmate Swain's problematic behaviors should not be permitted to place these services available to the entire prison inmate population at risk of cancellation. Restraining prison officials' ability to properly supervise the JPay system may contribute to that unfortunate result.

IV. CONCLUSION

For all of the foregoing reasons, Inmate Swain's Motion for a Temporary Restraining Order, or alternatively for immediate and preliminary injunctive relief must be denied. Inmate Swain cannot demonstrate that any of the four (4) factors weigh in favor of such extraordinary relief being granted. And, there is nothing to indicate that the reasonable actions taken in response to Inmate Swain's own behaviors was motivated by a desire to retaliate, harass, or punish Inmate Swain.

Instead, the most that can be said about the actions taken by ODRC officials in cancelling his two (2) to four (4) scheduled JPay Video Visitations and permitting him admittance to the OSP Infirmary, is that these prison officials took Inmate Swain at his word. When Inmate Swain consistently used violent and threatening terms in his JPay emails, and internet postings, together with the disclosure of a high ranking prison official's personal vehicle which was later posted on a publicly accessible internet site bearing his name, prison officials were entitled, indeed, obligated to take such actions seriously. Similarly, when Inmate Swain threatened to embark on a hunger strike and threatened to refuse to take his blood pressure medications, prison officials were duty bound to look out for his health and safety. His admittance to the OSP Infirmary was just that; not punishment or isolation.

Therefore, Defendants request that this Honorable Court deny Inmate Swain's Motion for a Temporary Restraining Order forthwith, cancel the hearing currently set for Friday, March 13, 2015, and return this case to the normal docket progression.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2015, a copy of the foregoing, DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S "MOTION FOR TEMPORARY RESTRAINING ORDER" (DOC. # 19), AND PLAINTIFF'S "SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER" (DOC. # 20) , has been filed with the Clerk of Court's ECF System. Parties as registered users may access this filing through the Court's ECF Notification System.

s/Thomas C. Miller
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