IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

PRISON LEGAL NEWS,

Plaintiff,

v. **CASE NO. 4:12cv239-MW/CAS**

MICHAEL D. CREWS,

Defendant.

_____/

ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case involves an as-applied First Amendment challenge to *Florida Administrative Code* Rule 33-501.401(3)(l) and (m), as well as a procedural due process claim brought under 42 U.S.C. § 1983. Before this Court are cross-motions for summary judgment filed by plaintiff Prison Legal News ("PLN"), ECF No. 139, and by defendant, Michael D. Crews, on behalf of the Florida Department of Corrections ("FDOC"), ECF No. 135.[1] For the reasons set forth below, both motions are denied.

I. BACKGROUND

This case involves the FDOC's impoundment and rejection of PLN's magazine, *Prison Legal News*, a 64-page monthly publication comprised of writings from legal scholars, attorneys,

[1] The sole remaining defendant in this action, Michael D. Crews, is the current Secretary of the FDOC. Defendant Crews is responsible for the overall management of the Florida prison system and has ultimate responsibility for the promulgation and enforcement of all FDOC rules, policies and procedures, and administrative code provisions. *See* Complaint at ¶ 15. For simplicity, this Court will refer to defendant Michael D. Crews as the FDOC.

inmates, and news wire services. ECF No. 14, ¶¶ 10, 17, 20. As of February 2012, *Prison Legal News* had approximately 7,000 paying subscribers encompassing prisoners in all 50 states. Dep. of Paul Wright, ECF No. 135, Ex. 1, at 169-70 ("Wright Dep."). At one time, *Prison Legal News* had 300 inmate subscribers in the FDOC. *Id*. at 170. However, by March 2013, that number had declined to 70. *Id*.

The FDOC regulates inmate mail pursuant to Rule 33-501.401(3) of the *Florida Administrative Code*, referred to as Florida's "Admissible Reading Rule." Rule 33-501.401 permits the screening of all mail entering FDOC facilities, and contains a detailed process by which mail may be impounded.

Rule 33-501.401(3) contains thirteen subsections, labeled (a) through (m), each providing distinct criteria by which incoming publications "shall be rejected" from the prison population. PLN has confined its First Amendment challenge to subsections (l) and (m), which provide:

> [A] [p]ublication[] shall be rejected when . . .
>
> (l) It contains an advertisement promoting any of the following where the advertisement is the focus of, rather than being incidental to, the publication or the advertising is prominent or prevalent throughout the publication.
>
> 1. Three-way calling services;
> 2. Pen pal services;
> 3. The purchase of products or services with postage stamps; or
> 4. Conducting a business or profession while incarcerated.
>
> [or]
>
> (m) It otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person.

Fla. Admin. Code R. 33-501.401(3)(l) & (m) (2009).

In the instant action, PLN seeks a declaratory judgment that Rule 33-501.401(3) is unconstitutional as applied to PLN. ECF No. 14, ¶ 1. PLN also seeks an injunction that both

prohibits the FDOC from rejecting and impounding *Prison Legal News*, and that requires notice and an opportunity to be heard each time an issue of the magazine is rejected. *Id*.

II. PROCEDURAL HISTORY

A. First Suit

This is not the first round of litigation between the parties. The first dispute arose when the FDOC began censoring *Prison Legal News* in February 2003 due to advertisements regarding three-way calling services, pen pal services, and offers to purchase postage stamps and inmate artwork. PLN brought suit against the FDOC in January 2004 challenging that censorship under the First Amendment. *See Prison Legal News v. Crosby*, No. 3:04-cv-14, at 7 (M.D. Fla. July 28, 2005) (Order, Findings of Fact and Conclusions of Law) (contained in the present record at ECF No. 120, Ex. 1) (hereinafter referred to as "Moore Order").

In March 2005, while this suit was still pending, the FDOC amended the Admissible Reading Rule. Relaxing the rule's requirements, the March 2005 amendments clarified that publications would not be rejected for containing prohibited ads if those ads are "merely incidental to, rather than being the focus of, the publication,"[2] a standard the FDOC claims is no different than the current standard governing the instant dispute.[3]

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[2] Florida's Admissible Reading Rule has been revised on a number of occasions. The March 2005 version of the rule, which became effective March 16, 2005, and governed until June 15, 2009, provided that "A publication will not be rejected based upon inclusion of an advertisement promoting any of the following if the publication is otherwise admissible and the advertisement is merely incidental to, rather than being the focus of, the publication: (a) Three-way calling services; (b) Pen pal services; (c) The purchase of products or services with postage stamps; or (d) Conducting a business while incarcerated."

[3] According to the FDOC, "the terms 'prominent' and 'prevalent' [in the current rule] are antonyms for the word 'incidental' and assist staff in application of the rule." *See* Defendant Crews' Objections to Plaintiff's First Set of Interrogatories to Defendant Crews, ECF No. 139, Ex. 16, at ¶¶ 2, 5 (hereinafter referred to as "FDOC's Interrogatory Responses").

As the case progressed towards a bench trial before Judge John H. Moore II of the United States District Court for the Middle District of Florida, the FDOC promised to no longer impound *Prison Legal News* due to ads for both three-way calling and pen pal services, arguing as a result that PLN's First Amendment claims were moot. Defendants presented an array of affidavits and supporting evidence to bolster this claim. For example, defendants presented the Affidavit of Allen J. Overstreet, then Chair of the FDOC's Literature Review Committee, which declares: "[T]he Department's inmate telephone services provider [MCI] ha[s] found a way to address the agency's security concerns relating to the detection and blocking of all 3-way telephone calls, and, therefore, [has determined] that receipt of publications that included such advertising was no longer a security concern. As a result, the Department undertook [to reverse its decision to impound *Prison Legal News*]." *See* Defendants' Motion for Summary Judgment, at 4, *Prison Legal News v. Crosby*, No. 3:04-cv-14 (M.D. Fla. Apr. 22, 2004), ECF No. 14 (contained in the present record at ECF No. 120, Ex. 3, at 3).[4]

In March 2005, the FDOC implemented its promise and thereafter refused to impound or reject *Prison Legal News*. Four months later, Judge Moore rejected PLN's First Amendment argument as moot, noting that the FDOC "stated unequivocally that it will no longer ban publications like PLN simply because they contain advertisements for three-way calling services

[4] Among other evidence, defendants also presented the Affidavit of Hieteenthia Hayes, Assistant Secretary of Institutions for the FDOC. According to Ms. Hayes, "Due to [MCI's] new arrangement that forecloses the use of 3-way calling services by eliminating the ability to add such numbers to the authorized phone list, the department rescinded its prior policies that prompted rejection of publications like *Prison Legal News*, even where the advertisements were incidental." ECF No. 120, Ex. 3, at 4-5.

[and pen pals]," a promise the FDOC had already implemented. *See* Moore Order, at 9 & 13-14.[5]

These sentiments were reiterated by the Eleventh Circuit on appeal. In rejecting PLN's argument that an injunction was required to prevent further censorship, that court reasoned:

> We agree with the district court's finding that [the FDOC] presented sufficient evidence to show that it has "no intent to ban PLN based solely on the advertising content at issue in this case" in the future. The FDOC demonstrated that its current impoundment rule does allow for distribution of PLN in its current format and that the magazine will not be rejected based on its advertising content. . . . We have no expectation that FDOC will resume the practice of impounding publications based on incidental advertisements.

Prison Legal News v. McDonough, 200 F. App'x 873, 878 (11th Cir. 2006) (per curiam) (unreported). Given the Eleventh Circuit's disposition of the case on mootness grounds, the court further declared that, "[a]s to the current rule, we offer no opinion on its constitutionality." *Id*. That issue is now presently before this Court.

B. Present Suit

The present dispute arose in June 2009 when, less than three years after the Eleventh Circuit's ruling in *McDonough*, the FDOC again revised the Admissible Reading Rule to clarify that a publication will be rejected when one of the four types of prohibited ads in subsection (l) is "prominent or prevalent throughout the publication." *See* ECF No. 139, Ex. 16, ¶ 2 (describing the June 2009 rule revisions).

[5] While Judge Moore's order also noted that penological interests existed for regulating the advertisements at issue, *see* Moore Order at 13, 16, 21, these findings were not necessary to the court's holding. Judge Moore also found, again without explicitly holding as such, that "the FDOC has plenty of ways at its disposal to prevent [its] inmates from taking advantage of any illicit services offered in advertisements," and that "none of the prohibited services contained within the PLN advertisements at issue could in any event ever be used by inmates within the FDOC." *See id*. at 13-15.

According to the FDOC, "the terms 'prominent' and 'prevalent' are antonyms for the word 'incidental' . . . ." FDOC's Interrogatory Responses, at ¶¶ 2, 5. According to department personnel, the purpose of this change was to clarify the meaning of the term "incidental," which "FDOC personnel had difficulty in interpreting and applying." *See* Dep. of James R. Upchurch, ECF No. 135, Ex. 2, at 20-21.

The 2009 amendments became effective on June 16, 2009. Under the revised rule, the FDOC has impounded every issue of *Prison Legal News* since September 2009 on the basis that the magazine's number of offending ads, as well as their prominence, had increased since the first suit.[6]

PLN initiated the instant suit on November 17, 2011. ECF No. 1. On December 16, 2011, PLN submitted its First Amended Complaint (hereinafter referred to as "Complaint"). ECF No. 14. PLN's Complaint includes six counts against three defendants; however, only two counts against one defendant, the FDOC, remain. *See* ECF No. 117 (confirming the dismissal of the other two original defendants pursuant to a settlement agreement).

Count III sets forth a First Amendment as-applied challenge. In Count III, PLN contends that the FDOC's actions "in refusing to deliver or allow delivery of Plaintiff's publications to Florida inmates in its custody, solely because of the presence of certain advertisements within these publications, violate Plaintiff's rights to free speech, press and association as protected by the First and Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983." *Id*. at ¶ 43.

[6] *See* FDOC's Interrogatory Responses, ECF No. 139, Ex. 16, at ¶ 2 ("Because prohibited advertisements in *Prison Legal News* as of 2009 had increased considerably in number and size (half-page and full-page ads) when compared to those that existed in 2005 and earlier . . ., the Department concluded that . . . the offending ads in fact have become 'prominent' and 'prevalent'. . . ."); *see also* Unsworn Decl. of Paul Wright, ECF No. 139, Ex. 1, ¶ 16.

Count VI alleges a procedural due process violation, and avers that the FDOC's "failure and refusal to provide Plaintiff with constitutionally required notice and an opportunity to be heard and/or protest the decision each time Plaintiff's publications are censored . . . violates Plaintiff's rights to due process of law protected by the Fifth and Fourteenth Amendments . . . and by 42 U.S.C. § 1983." *Id*. at ¶ 55.

On December 17, 2012, the FDOC moved for partial summary judgment as to Counts III and VI on the basis of res judicata and collateral estoppel. ECF No. 93. This Court denied the FDOC's motion on February 6, 2013. ECF No. 122. Thereafter, this Court issued an order denying PLN's Motion for Leave to File a Second Amended Complaint, ECF No. 119, effectively rejecting PLN's attempt to add a void for vagueness claim under the Due Process Clause as a result of having been filed nearly ten months after the deadline for amending pleadings. *See* ECF No. 127.

During the past several months, a flurry of summary judgment motions, responses, and replies ensued. First, the FDOC filed its Second Motion for Summary Judgment, ECF No. 135. This was followed by PLN's Response, ECF No. 153, and the FDOC's Reply, ECF No. 155. PLN also filed its own Motion for Summary Judgment, ECF No. 139, which was followed by the FDOC's Response, ECF No. 152, and PLN's Reply, ECF No. 154.[7]

For the reasons set forth below, this Court now denies both the FDOC's Second Motion for Summary Judgment, ECF No. 135, and PLN's Motion for Summary Judgment, ECF No. 139.

[7] This Court has also considered the Amicus Curiae Brief of The Florida Press Association, The First Amendment Foundation, The Reporters' Committee for Freedom of the Press, the Society of Professional Journalists and Allied Daily Newspapers of Washington re Summary Judgment, ECF No. 138, as well as the FDOC's Response to Amicus Brief, ECF No. 145.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." *Rice-Lamar v. City of Ft. Lauderdale*, 232 F.3d 836, 840 (11th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A fact is "material" if it might affect the outcome of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Id*.

In deciding whether the movant has met its burden, all the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once a party demonstrates the absence of a genuine issue of material fact, the nonmoving party must designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24. "[T]he nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 998 (11th Cir. 1992)).

"The inquiry performed [under Rule 56] is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial,

and summary judgment should be entered. *Allen*, 121 F.3d at 646. Alternatively, if there is a genuine dispute as to a material fact or "'[i]f reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment.'" *Id.* (quoting *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992)).

IV. DISCUSSION

Across their various briefs, the parties have addressed four primary issues: (i) whether Rule 33-501.401(3) of the *Florida Administrative Code* is void for vagueness in violation of the Due Process Clause; (ii) whether the doctrine of judicial estoppel prohibits the FDOC from arguing that it must again impound *Prison Legal News* due to alleged security concerns; (iii) whether Rule 33-501.401(3), as applied to PLN, satisfies the requirements of *Turner v. Safley*, 482 U.S. 78 (1987); and (iv) whether the FDOC's failure to provide PLN with notice and an opportunity to be heard each time an issue of *Prison Legal News* is censored constitutes a procedural due process violation.

Because the first issue has been waived, and because there are disputed issues of material fact as to the remaining three issues, summary judgment is denied for each party. This Court will address each argument in turn.

A. Void for Vagueness

First, PLN argues that Rule 33-501.401(3) of the *Florida Administrative Code* is unconstitutionally void for vagueness.

As noted, subsection (l) of the current Admissible Reading Rule provides that a publication will be rejected when one of the four types of prohibited ads is deemed "prominent or prevalent throughout the publication," rather than "incidental." Fla. Admin. Code R. 33-501.401(3)(l) (2014). According to PLN, the terms "incidental to," "prevalent," and

"prominent" lack any discernible guideposts, as "[t]he [prohibited] ads are not measured or counted, and there is no maximum number of offending ads that a publication can have before being rejected." ECF No. 139, at 11 (citing Dep. of Susan L. Hughes, ECF No. 139, Ex. 22, at 14-15). Given the lack of discernible standards, PLN contends that due process is violated because no reasonable person can tell how much offending ad content is "prevalent" or "prominent," and such determinations are "left to the subjective judgment of the committee members." *Id*. (citing Hughes Dep., at 14; Dep. of Jeannine Moore, ECF No. 139, Ex. 23, at 19).

Amici curiae present a similar argument. According to amici, Rule 33-501.401(3) does not provide clear standards and is so flexible that it can be used to punish criticism of the prison system. ECF No. 138, at 3. These concerns are particularly strong in this case, where PLN has been a critic of prison practices since its inception. *Id*. at 20.

While this Court is troubled by the rule's potential for unbridled discretion, this particular argument has been waived, as PLN's present void for vagueness argument is identical to the claim PLN sought to add to its complaint through an untimely motion to amend. ECF No. 119. In that motion, just as in its present filings, PLN argued that "other than the [Admissible Reading Rule] itself, the Department provides no guidelines on how to determine whether an ad is 'prominent or prevalent' or whether it is the 'focus of, rather than incidental to' a publication;" and that "such a determination is based on the LRC members' subjective judgment." ECF No. 119, at 3. This Court denied PLN's motion to amend. ECF No. 127. Accordingly, PLN's attempt to invoke an identical void for vagueness claim cannot stand. For these reasons, this

Court rejects PLN's summary judgment motion insofar as it rests upon void for vagueness grounds.[8]

B. Judicial Estoppel

Next, PLN argues that the doctrine of judicial estoppel prohibits the FDOC from again asserting the need to impound *Prison Legal News*, despite its promises not to do so in the first suit between the parties, based upon ad content that has not changed.

"[J]udicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citations omitted). Judicial estoppel is designed to protect the integrity of the judicial process. *See Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (discussing the primary purposes of judicial estoppel)*; see also Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037-38 (2d Cir. 1993) (same).

While courts have applied judicial estoppel in a variety of ways, the doctrine is often invoked to "prevent[] a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding," the particular variation that arguably applies here. *New Hampshire*, 532 U.S. at 749. *See also Bates*, 997 F.2d at 1038 (noting that "judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding").

[8] PLN's void for vagueness claim is entirely distinct from its First Amendment claim. *See Harrell v. The Fla. Bar*, 608 F.3d 1241, 1259 (11th Cir. 2010) (noting that an "as-applied challenge on First Amendment grounds embodies a constitutional theory that is markedly different from [a] void-for-vagueness challenge" brought under the due process clause). *See also Rios v. Lane*, 812 F.2d 1032, 1039 (7th Cir. 1987) (noting that First Amendment claims and void-for-vagueness due process claims are "completely distinguishable from [one another] and not dependent upon" the same considerations).

1. Multi-Factor Judicial Estoppel Test

According to Supreme Court and Eleventh Circuit precedent, "[t]hree factors typically inform the decision whether to invoke judicial estoppel: (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was mislead; and (3) whether the party advancing the inconsistent position would derive an unfair advantage." *Jaffe v. Bank of Am., N.A.*, 395 F. App'x 583, 587 (11th Cir. 2010) (per curiam) (unreported) (citing *New Hampshire*, 532 U.S. at 750-51).

According to the Supreme Court, "these [three] factors . . . do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel;" rather, "[a]dditional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire*, 532 U.S. at 751. In the Eleventh Circuit, two additional factors have been employed when analyzing a judicial estoppel claim. First, "the allegedly inconsistent positions must have been taken 'under oath in a prior proceeding.'" *Palmer & Cay, Inc. v. Marsh & McLennan, Cos.*, 404 F.3d 1297, 1307 n.16 (11th Cir. 2005) (quoting *Burnes*, 291 F.3d at 1285). Second, such inconsistent positions "must have been 'calculated to make a mockery of the judicial system.'" *Id*.

Turning to the parties' arguments, PLN broadly contends that judicial estoppel bars the FDOC from arguing that it must censor *Prison Legal News* due to the magazine's inclusion of three-way calling and pen pal ads. More specifically, PLN argues that the FDOC cannot now claim that it must censor the magazine because of "grave security concerns" when it previously assured the court that those very concerns were no longer an issue.

While PLN does not present a detailed argument under the three primary judicial estoppel factors, PLN's argument is essentially that judicial estoppel applies because (1) the FDOC's present position that it must now ban issues of *Prison Legal News* containing essentially the same three-way calling and pen pal ads as before due to safety concerns is inconsistent with its earlier, stated position that it need not do so because those ads no longer constituted a safety threat; (2) the FDOC succeeded in persuading Judge Moore to accept its earlier position by persuading Judge Moore to deem PLN's First Amendment claims moot, thereby permitting the FDOC to avoid a ruling on the issue of whether the Admissible Reading Rule is unconstitutional as applied to PLN, so that this Court's acceptance of the inconsistent position in the instant case would create the perception that Judge Moore had been misled; and (3) the FDOC would derive an unfair advantage by being permitted to argue that the magazine's three-way calling and pen pal ads are now, in fact, so dangerous as to justify its renewed censorship.

While there is some merit to PLN's claim, this Court cannot grant summary judgment to PLN due to disputed issues of fact as to several of the judicial estoppel factors. *See, e.g., Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1343-46 (11th Cir. 2006) (reversing trial court's grant of summary judgment on judicial estoppel grounds due to disputed issues of fact as to the Eleventh Circuit's intent requirement).

The first judicial estoppel factor requires this Court to examine whether the FDOC's present position is clearly inconsistent with its earlier one. Based upon the evidence before this Court, it is not clear which way this factor cuts. Judge Moore's order, in particular, contains conflicting evidence on this point, and does not clearly indicate whether the FDOC's promises pertained broadly to the general types of ads at issue (e.g., all pen pal ads), or instead whether those promises were limited to the particular ad content of *Prison Legal News* at that time.

On the one hand, Judge Moore's order notes that defendants "presented sufficient evidence at trial to show that they have no intent to ban PLN *based solely on the advertising content at issue in this case*." Moore Order, at 15 (emphasis added). This statement suggests that the FDOC's promises were fairly specific, and pertained only to the ad content at issue prior to 2005. On the other hand, Judge Moore's order indicates that the FDOC, in particular, "stated unequivocally that it will no longer ban publications like PLN simply because they contain advertisements for three-way calling services [and pen pals]." *Id*. at 14. This particular statement, unlike the last, suggests that the FDOC's promises were painted with a much broader brush, one that is more likely to estop the FDOC from now asserting a contrary position. If it is determined that the FDOC's promises truly were fact-specific, this could undercut PLN's ability to establish the first judicial estoppel factor, which requires proof of a materially inconsistent position on the part of the FDOC. *See Scott v. Land Span Motor, Inc.*, 781 F.Supp. 1115, 1120 (D.S.C. 1991) (discussing the concept of material inconsistency).

Second, and on a related point, because Eleventh Circuit precedent requires that the alleged "inconsistent position" have been articulated under oath in the prior proceeding, it is important to identify the specific promises that were made by the FDOC in the first trial. *Compare Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1271 (11th Cir. 2004) (adopting the oath requirement), *with Otis v. Arbella Mut. Ins. Co.*, 824 N.E.2d 23 (Mass. 2005) (rejecting the oath requirement). Here, while the parties have included various trial briefs in the record as exhibits, the trial transcript from the prior proceeding is not presently before this Court. Thus, it is difficult for this Court to determine exactly what the FDOC promised at trial.

Third, even assuming the FDOC's promises pertained broadly to the types of ads at issue in the first suit, there is an additional factual dispute regarding whether the FDOC's security

concerns have resurfaced due to changes in inmate telephone technologies, which represents another potential basis for finding no material inconsistency in the FDOC's stated positions across the two lawsuits. Prior to the first trial, the FDOC's telephone provider, MCI, had found a way to detect and block three-way telephone calls, and for that reason, the FDOC determined that publications including such advertising were no longer a security concern. In the instant suit, however, the FDOC has presented evidence that new technologies now enable inmates to divert their calls to unknown recipients via commercial routing services that advertise in *Prison Legal News*.[9] While PLN disputes these claims by debating the precise manner in which some of these services operate, *e.g.*, ECF No. 154 at 4-5, if the facts ultimately establish that these technologies create security issues that did not exist at the time of Judge Moore's order, a point that is presently unclear, then it would be possible to conclude that the FDOC's present safety concerns are distinct from those at the time of the first lawsuit, thereby undermining PLN's estoppel claim.

[9] According to the FDOC's evidence, telephone companies that advertise in *Prison Legal News* provide the friends and families of inmates' the opportunity to reduce their inmate-communication expenses by offering a telephone number that is local to the inmate's prison. Many of these companies enable a non-inmate accountholder, such as an inmate's loved one, to add additional telephone numbers to their account and to divert calls to people other than the accountholder, thereby undermining the FDOC's ability to identify both the terminating telephone numbers of inmate-initiated calls as well as the identity of the persons with whom the inmate is corresponding. According to the FDOC's current telephone company, Securus Technologies, Inc. ("Securus"), "the threat to public and prison security is obvious: the inmate could be calling anyone, anywhere, and the authorities would have no ability to investigate that called party." *See generally* Securus' FCC Petition for Declaratory Ruling, ECF No. 152, Ex. 5 (declaring that such "[c]all diversion schemes . . . completely neutralize the ability of Securus . . . to ensure a secure calling environment at correctional facilities"). While PLN disputes these claims by debating the precise manner in which some of these services operate, *e.g.*, ECF No. 154 at 4-5, the FDOC has presented sufficient evidence, as set forth above, from which it would be possible to find that the FDOC's stated security concerns are real.

Finally, the question of whether the FDOC had the intent "to make a mockery of the judicial system" is not one that can be determined at the summary judgment stage, as record evidence does not definitively establish the FDOC's intent and contrary inferences may be drawn therefrom.[10] *See generally Stafford v. United States*, 611 F.2d 990, 993 (11th Cir. 1980) ("'Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affiants.'") (quoting *Slavin v. Curry*, 574 F.2d 1256, 1267 (5th Cir. 1978)).

For each of these reasons, summary judgment is not appropriate for PLN under the primary judicial estoppel test.

2. Judicial Estoppel Exceptions

Along with the above multi-factor test, the Supreme Court has noted three primary exceptions to the judicial estoppel rule: the change in policy exception; the state exception; and the change in facts exception. Only the change in facts exception is in dispute.

Under the change in facts exception, judicial estoppel does not apply where "the shift in the government's position is . . . the result of a change in facts essential to the prior judgment."

[10] The FDOC claims that its prior position regarding its ability to stop inmates from accessing the services offered in *Prison Legal News* was not "calculated to make a mockery of the judicial system," asserting instead that it was "based upon the facts as FDOC understood them in 2005." ECF No. 152, at 20. However, other record evidence could conceivably support PLN's claim. *See, e.g.*, Dep. of Allen Overstreet, ECF No. 135, Exhibit 5, at 53 (as to three-way calling ads, recalling that the phone company at that time developed solutions to the problem, "[s]o we mooted that issue"). While an inferential step would be required, the statement, "so we mooted that issue," could be read to suggest that the FDOC intentionally positioned the case in such a way that Judge Moore would deem PLN's First Amendment claims moot, but this same statement could fairly be read as suggesting no such intent. *See Burnes*, 291 F.3d at 1287-88 (upholding trial court's decision to apply judicial estoppel upon finding that the record contains sufficient evidence from which to infer intentional manipulation by the party being estopped). This issue thus constitutes another disputed issue of material fact, precluding summary judgment for PLN on judicial estoppel grounds.

New Hampshire, 532 U.S. at 755-56 (citing *Montana v. United States*, 440 U.S. 147, 159 (1979)). Invoking this exception, the FDOC argues that FDOC personnel noticed an increase in the number of offending advertisements in *Prison Legal News* since 2005, which prompted the FDOC to again impound the magazine. According to the FDOC, "[i]n 2005, the monthly issues of PLN had [a total of 12 to 13] offending ads per issue." ECF No. 135, at 4. However, "[f]rom September 2009 through August 2012, PLN had anywhere from [17 to 37] offending ads per issue." ECF No. 135, at 6, ¶ 8. In terms of averages, the FDOC further contends that from January 2003 through March 2005 (when the first amendment to the Admissible Reading Rule became effective), the average number of offending ads per issue was 11.56, and the average number of half-page or larger offending ads per issue was 2.15. However, from September 2009 through August 2012, those numbers climbed to 25.97 and 4.08, respectively.[11] Given this material change in facts, the FDOC contends that it cannot be estopped from asserting, now several years after the first case and pursuant to a revised Admissible Reading Rule, that it is entitled to impound *Prison Legal News*.

PLN concedes that "the [total] number of ads per issue increased" since 2005. ECF No. 153, at 2. However, PLN argues that this is the wrong measure of change, and that under the proper measure, ad content has not changed. *See* ECF No. 139, at 30.

First, PLN argues that the proper measure of change is the percentage of total magazine space occupying offending ads. This is because, according to PLN, if the objective is to reduce the chance of an inmate seeing an ad, then the [best way] to interpret 'prominent or prevalent' is

[11] The FDOC also notes that an average of 4.32 of the 25.97 offending ads observed from September 2009 through August 2012 would otherwise offend Rule 33-501.401(3)(m) of the *Florida Administrative Code*.

to assess them relative to the [length] of the publication [presently 64 pages] – not simply in raw numbers." ECF No. 153, at 8. Next, employing its preferred measure, PLN argues that from January 2002 through August 2009, the time during which *Prison Legal News* was allowed into FDOC facilities, the offending ads averaged 5.90% of the magazine's total usable area, ranging from a low of 3.65% to a high of 8.82%. From September 2009 through January 2013, when *Prison Legal News* was impounded, the offending ads averaged 6.44% of the magazine's total usable area, ranging from a low of 3.59% to a high of 8.85%. These numbers, according to PLN, demonstrate that there has been no material change in facts so as to justify the FDOC's recent censorship.

In rebuttal, the FDOC argues that the percentage of total magazine space occupying ads is not the right measure for measuring change; rather, this Court should apply "a common sense determination of whether inmates are more likely to see offending advertisements if they held a copy of the publication in their hands," which, the FDOC claims, is best determined by total numbers of ads. ECF No. 152, at 23.

The competing data set forth above presents a genuine issue of fact regarding whether there was a material change in ad content from 2005, when the FDOC promised Judge Moore it would no longer impound *Prison Legal News*, to 2009, when the FDOC reversed that decision. Such disputed issues cannot properly be resolved on summary judgment.

Along with this disputed issue of fact, there is an additional disputed issue of fact regarding the FDOC's claimed security concerns, as the record contains conflicting evidence regarding whether the FDOC's current telephone provider, Securus, is able to detect and block three-way calls as effectively as MCI at the time of the first litigation. If Securus is indeed

unable to effectively block such calls, as the FDOC claims, then the FDOC would presumably not be estopped from asserting its need to again impound *Prison Legal News* on this basis.

As PLN notes, in the first case, Judge Moore found that the telephone security measures in place at that time "make[] it virtually impossible for any significant security issue to arise out of inmates bypassing the phone systems." Moore Order, at 14. According to PLN, nothing has changed since that time since the FDOC's new telephone provider, Securus, is contractually obligated to block attempts at three-way calling and call forwarding, and Securus claims that its call blocking technology works with "near perfect accuracy." *See* ECF No. 139, at 16 (citing ECF No. 139, Ex. 25, at 14); *see also* ECF No. 139, Ex. 26.

In response, the FDOC argues that the effectiveness of Securus' blocking technology is contradicted by record evidence, including, for example, a petition Securus filed with the Federal Communications Commission ("FCC") in 2009, in which the company sought permission to "block attempts to place calls via [such] known call diversion schemes" on the basis that security of correctional facilities has been "severely affected by the intrusion of call diversion schemes."

Despite Securus' stated safety concerns, the FCC rejected Securus' petition, but the FCC did so by distinguishing its prior rulings that Securus had relied upon in its petition, leaving it unclear as to which way the FCC's ruling cuts. *See* ECF No. 193, Ex. 1.[12] Accordingly, the true

[12] According to PLN, the FCC "found that Securus's alleged security concerns were unsupported." ECF No. 193. However, a careful reading of the FCC's ruling does not appear to support PLN's claim. Rather, in that ruling, the FCC found that Securus' petition had to be denied because "the Commission has allowed call blocking 'only under rare and limited circumstances,'" but "Securus has identified no exception to Commission precedent that would permit it to block calls from inmates to subscribers of call routing services." *See* ECF No. 193, Ex. 1, at ¶¶ 9 & 15. The closest the FCC comes to addressing the merits of Securus' claims is in paragraphs 13 and 14 of its ruling, in which the FCC rejects Securus' contention that the call routing services at issue are "dial-around" in another form. *See id*. at ¶ 14 (suggesting that the services at issue do not "compromise the ability of prison officials to monitor inmates' calls" in

nature of the FDOC's present security concerns remains an issue of fact, making summary judgment inappropriate on this basis.

The FDOC has presented no further argument under the other judicial estoppel exceptions.[13] Accordingly, this Court will now consider the third and most important argument advanced by the parties: whether the *Turner* test is satisfied.

C. First Amendment Claim: Application of *Turner* Test

Assuming judicial estoppel does not apply, this Court must address whether the FDOC's censorship of *Prison Legal News* pursuant to *Florida Administrative Code* Rule 33-501.401(3)(l) complies with the First Amendment, an issue undecided in the first round of litigation between the parties.

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the way that other call routing services do). Based upon paragraphs 13 and 14, it is possible to conclude that the FCC indeed rejected Securus' alleged security concerns on the merits; however, there is no explicit statement to that effect. Thus, it is not clear which way the FCC's ruling cuts.

[13] With respect to the change in policy exception, if a shift in the government's position is the result of a change in policy, judicial estoppel will not normally apply. *See New Hampshire*, 532 U.S. at 755. This case does not appear to involve a true change in policy because the FDOC's own stated position is that the terms "prevalent" and "prominent" were added to Rule 33-501.401(3)(l) only to clarify the term "incidental." *See* FDOC's Interrogatory Responses, ECF No. 139, Ex. 16, at ¶¶ 2, 5 ("the terms 'prominent' and 'prevalent' [in the current rule] are antonyms for the word 'incidental'"). Thus, the policy appears to be the same as it was when Judge Moore issued his ruling in 2005 – *i.e.*, to reject only publications containing more than "incidental" ads – making this exception inapplicable. With respect to the state exception, while judicial estoppel is not ordinarily applied against the states, *New Hampshire*, 532 U.S. at 755, courts do not always apply this exception. *See, e.g.*, *State v. Lead Indus. Ass'n*, 69 A.3d 1304 (R.I. 2013) (applying judicial estoppel to prevent the state from circumventing its promise to share certain expenses by arguing, contrary to its earlier position, that it could not be held responsible for those expenses). Here, the parties have not adequately briefed this issue. Accordingly, while not expressing any opinion as to whether this exception ultimately might apply, this Court is unable to address it at this stage.

This issue is governed by *Turner v. Safley*, 482 U.S. 78 (1987). According to *Turner*, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological objectives." *Id*. at 89. *Turner* deemed four factors "relevant in determining the reasonableness of [a prison] regulation." *Id*. The first factor is that "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id*. at 90 (citation omitted). According to the *Turner* Court, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id*. The Court also cautioned that "the governmental objective [at issue] must be a legitimate and neutral one," and that "prison regulations restricting inmates' First Amendment rights [must have] operated in a neutral fashion, without regard to the content of the expression." *Id*. (citing *Pell v. Procunier*, 417 U.S. 817, 828 (1974); *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)).

The second *Turner* factor is "whether there are alternative means of exercising the right that remain open to prison inmates," recognizing that "[w]here 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the . . . 'judicial deference owed to corrections officials . . . .'" *Id*. (citations omitted).

The third *Turner* factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id*. According to *Turner*, "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Id*.

The final factor is "the absence of ready alternatives" to the regulation at issue, which, according to *Turner*, "may be evidence that the regulation is . . . an 'exaggerated response' to

prison concerns." *Id*. Here, if a claimant "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 91. Nevertheless, the Court cautioned, "[t]his is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id*. at 90-91.

1. First *Turner* Factor

The instant dispute will likely turn on *Turner*'s first factor, what courts have deemed the "sine qua non" of the *Turner* test. *See Pope v. Hightower*, 101 F.3d 1382, 1384-85 (11th Cir. 1996) (noting that if the restriction at issue bears a reasonable relation to a legitimate penological objective, "the inquiry is at an end"). *See also Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2004) (same).

According to *Thornburgh v. Abbott*, 490 U.S. 401 (1989), *Turner*'s first factor "is multifold," and requires a court to "determine [1] whether the governmental objective underlying the regulations at issue is legitimate and neutral, and [2] that the regulations are rationally related to that objective." 490 U.S. at 414.

As to the first *Thornburgh* point, PLN does not dispute that the objectives underlying the regulations at issue are "legitimate," at least on their face. Rather, invoking *Turner*'s statement that "prison regulations restricting inmates' First Amendment rights [must have] operated in a neutral fashion, without regard to the content of the expression," 482 U.S. at 90, PLN claims that the regulations at issue are not "neutral" as applied to PLN. As to the second point, PLN further contends that the regulations at issue are not rationally related to the relevant governmental objectives underlying those regulations.

While there is some merit to each of PLN's arguments, PLN is not entitled to summary judgment on these points due to disputed issues of fact as to each. First, PLN contends that the regulations at issue are not "neutral" within the meaning of *Turner* because, according to PLN, the only reason the Admissible Reading Rule was changed in 2009 was to pull PLN within its grasp. PLN apparently rests this assertion on the fact that it has been critical of the FDOC and the prison system in the past, as well as the history of litigation between the parties. According to PLN, "[a]ny other reason [for the 2009 Rule change] provided now – such as the alleged increase in the number of stamps-for-cash transactions – is simply a post-hoc justification that is provided to bolster Defendant's litigation position." ECF No. 153, at 12.

While not directly responding to this point, the FDOC has presented evidence to suggest that it is *Prison Legal News*'s advertising content alone that has led to the recent round of censorship. *See, e.g.*, ECF No. 135, at 8 ¶ 17 ("[t]he Literature Review Committee rejected issues of PLN since September 2009 based on advertising content, not substantive content"); *see also* Dep. of James R. Upchurch, ECF No. 135, Ex. 2, at 16 & 127-28 (stating that the FDOC has always considered *Prison Legal News* "not a bad publication," and noting that PLN's content "is very well done and has some good information that could be beneficial to inmates").

If PLN is able to prove that the Admissible Reading Rule was indeed amended solely to permit the FDOC to impound *Prison Legal News*, as PLN claims, then *Turner*'s first factor might weigh in PLN's favor. Interpreting *Turner*'s requirement that "prison regulations restricting inmates' First Amendment rights [must have] operated in a neutral fashion, without regard to the content of the expression," 482 U.S. at 90, some courts have found that this requirement mandates that the rule at issue treat all similar mailings alike, without regard to content. *See, e.g.*, *Waterman v. Commandant*, 337 F.Supp.2d 1237, 1241 (D.Kan. 2004) (finding

that "the [rule at issue] appears to operate in a neutral fashion, banning all non-original source generated regular mail without regard to content"); *see also Livingston*, 683 F.3d at 216 (recognizing that inconsistencies in censorship as between similar publications may constitute evidence that a prison's censorship is "arbitrary or irrational" under *Turner*).

Applying these principles, PLN argues that "[m]any other 'mainstream' magazines are admitted into FDOC facilities, even though they contain ads for products or services that inmates are not allowed to have." ECF No. 139, at 9 (citing Decl. of E. Eugene Miller, ECF No. 139, Ex. 20, ¶ 30). To support this claim, PLN points to magazines containing ads for such things as alcohol and firearms, items that inmates are prohibited from possessing. However, PLN has not presented evidence of the FDOC refusing to admit publications that contain the very same types of ads as *Prison Legal News* (e.g., ads for pen-pal services or three-way calling). This type of evidence, if it existed, would be the type of inconsistency that would be more problematic under *Turner*. *See Livingston*, 683 F.3d at 220-21 (recognizing the possibility that inconsistencies in censorship of otherwise similar publications "could become so significant that they amount to a practical randomness that destroys the relationship between a regulation and its legitimate penological objectives"). Thus, because this Court is not presently aware of any evidence to suggest inconsistencies in the FDOC's censorship of *Prison Legal News* and publications containing materially similar advertisements, this particular argument is not one for which PLN is entitled to summary judgment.

PLN's second primary argument under *Turner*'s first factor is that the regulations at issue are not rationally related to the FDOC's penological objectives. Here, PLN's approach is to identify the narrowest objectives and to tie those objectives to each specific type of prohibited advertisement. The FDOC, on the other hand, presents a much broader argument in its attempt

to establish a rational connection between subsections (3)(l) and (3)(m) and the penological objectives it has identified.

The FDOC presents what is essentially a three-step argument. First, the FDOC claims that preventing inmates from engaging in the underlying *activities* targeted by the advertisements at issue – *i.e.*, soliciting pen pals, engaging in three-way calling, using stamps as currency, and running a business from prison – furthers FDOC's legitimate penological interests in security, protecting the public, rehabilitation, and protecting FDOC staff and inmates. *See* ECF No. 135, at 12-14. Second, the FDOC next claims that there is evidence that inmates are currently using the prohibited services offered in *Prison Legal News*; indeed, the FDOC claims such use is "widespread." *See* ECF No. 135, at 7, 12 & 14-15 (citing exhibits). Finally, the FDOC contends that because the specific ads appearing in *Prison Legal News* provide inmates a "means of access" to the prohibited activities, those ads are "adverse" to the legitimate penological interests of the FDOC, making its rejection of *Prison Legal News* reasonable. *Cf. Woods v. Comm'r of the Ind. Dept. of Corr.*, 652 F.3d 745, 749 (7th Cir. 2011) (finding that "[a] regulation [preventing inmates from] advertising for pen-pals relates fairly directly to the goal of preventing fraud since it cuts off the inmates' access to potential victims").

PLN rebuts each of these points. As to the FDOC's first point, PLN argues that the penological objectives advanced by the FDOC cannot be so broadly worded (*i.e.*, security, protecting the public) that they would encompass virtually any prison regulation. Rather, this Court should focus on the more specific objectives identified by the FDOC as to each type of prohibited advertisement at issue.

Eleventh Circuit precedent does not clearly address this issue. *See, e.g.*, *Perry*, 664 F.3d at 1363 & 1366 (describing the purpose of the FDOC's pen pal solicitation rule narrowly as one

designed "to prevent inmates from using pen pal-solicitation services to defraud people," but later analyzing *Turner*'s first factor based upon the more broadly-worded "legitimate penological interests of protecting the public and ensuring internal prison security"). Assuming, for the sake of argument, that PLN has the better view on this particular point, PLN would still not be entitled to summary judgment because even under PLN's point-by-point approach, there are disputed issues of material fact pertaining to each of the four types of advertisements that would render summary judgment inappropriate.

With respect to the first type of advertisement prohibited by subsection (l), three-way calling ads, the FDOC's stated justification for regulating such ads is two-fold: first, to prevent inmates from calling unapproved phone numbers, so that the department may determine who is being called; and second, to prevent inmates from calling phone numbers that cannot be traced, so that the department can determine where the recipient is located. *See* FDOC's Interrogatory Responses, at ¶ 10.

According to PLN, the department's stated security concerns are either overstated or non-existent. For example, PLN claims that the FDOC's telephone provider, Securus, is contractually obligated to block attempts at three-way calling and call forwarding, and Securus claims on its website that its call blocking technology works with "near perfect accuracy." *See* ECF No. 139, Ex. 25, at 14; *see also* ECF No. 139, Ex. 26.[14] In contrast, the FDOC has presented evidence that it has not been able to successfully block all call forwarding schemes

[14] PLN further argues that because the FDOC allows calls to be made to cell phones, which can be located anywhere, this "loophole" undermines the FDOC's concerns and indicates that the true motive for the 2009 rule change was to censor *Prison Legal News* (particularly since cell phones often permit three-way calling through one click of a button). *See* ECF No. 139, at 18; *see also* Fla. Admin. Code R. 33-602.205(2)(a) (permitting inmates to make calls to personal cell phones).

offered by the companies that advertise in *Prison Legal News*. *See, e.g.*, Dep. of James R. Upchurch, ECF No. 139, Ex. 18. Also, the FCC's recent ruling, described above, has effectively prevented Securus from implementing new solutions to this issue, at least for the time being. Accordingly, there is a disputed issue of material fact as to whether banning *Prison Legal News* for containing such advertisements is, in fact, rationally related to the FDOC's penological objectives, making summary judgment inappropriate as to these types of ads.

With respect to the second type of advertisement prohibited by subsection (l), pen pal ads, the FDOC's asserted justification for banning publications containing non-incidental pen pal advertisements is to protect the public from fraud scams perpetrated through pen pal services, which can be used by prisoners to manipulate vulnerable persons into giving them their money or engaging in criminal activities, such as trafficking contraband. *See* FDOC's Interrogatory Responses, at ¶ 11.

On this issue, PLN asserts that there are few reported incidents of inmates perpetuating scams through pen-pal services, claiming the FDOC is aware of only six such reported incidents, none of which were related to *Prison Legal News* and most of which are remote. *Id.* (citing FDOC's Interrogatory Responses, at ¶ 14; Dep. of James R. Upchurch, ECF No. 139, Ex. 18, at 58). Accordingly, PLN claims, the connection between the FDOC's stated objectives and application of this particular aspect of the rule to PLN is too tenuous to pass muster under *Turner*. In response, the FDOC contends that from September 2005 to June 2009, FDOC personnel noticed an increasing problem with inmates soliciting for pen pals, and that such conduct by FDOC inmates is "widespread." *See* ECF No. 135, at 5, 7, 12 & 14-15 (citing exhibits). Given the disputed evidence on this point, this Court again cannot grant summary judgment to either party as to these particular advertisements.

With respect to the third type of advertisement prohibited by subsection (l), advertisements for purchasing products or services with stamps, the FDOC's asserted justification for banning publications containing such ads is to eliminate any type of currency within its prisons, recognizing that if stamps became currency, they could be used to facilitate a host of objectionable activities such as bartering, extortion, and acquiring contraband. *See* FDOC's Interrogatory Responses, at ¶ 12.

As to these types of ads, PLN again notes the lack of reported incidents to justify this prohibition. According to PLN, the FDOC has not identified a single adverse incident that occurred due to the use of postage stamps in this manner, let alone one that was tied to a prohibited *Prison Legal News* advertisement. *See* ECF No. 139, at 20. Accordingly, PLN contends that there is no rational connection between the FDOC's asserted justification behind this aspect of the rule and its application to PLN. *Cf. Waterman v. Commandant*, 337 F.Supp.2d 1237, 1242 (D. Kan. 2004) (deeming it unconstitutional for a department to prevent a prisoner from receiving a copy of *Prison Legal News* because PLN itself accepted stamps as payment).

In response, the FDOC argues that its records reveal "a massive growth" in inmates receiving money orders from a cash-for-stamps operator in 2008, the same time period during which FDOC personnel also began to notice an increasing problem with inmates using stamps as currency. *See* ECF No. 135, at 5 (citing Dep. of James R. Upchurch, ECF No. 135, Ex. 2, at 27 & 74-76). The FDOC also notes that from March 2010 through August 2012, every issue of *Prison Legal News* had a half-page cash for stamps ad on the back cover from an operator that had deposited over $50,000 into FDOC trust accounts since June 2006. ECF No. 135, at 6 (citing exhibits).

Here again, the parties have raised a factual dispute regarding the department's need to regulate the use of stamps as currency within FDOC facilities, and how that might relate to the particular advertisements contained within *Prison Legal News*. This evidence again presents a disputed issue of material fact that precludes summary judgment as to these types of ads.

With respect to the fourth and final type of advertisement prohibited by subsection (l), those relating to conducting a business while incarcerated, the FDOC's asserted justification for banning publications containing such ads is to prevent a host of evils that would occur as a result of inmates engaging in a business while incarcerated, including various frauds that could be committed through running a business, increased administrative burdens due to mail and money handling, and difficulty in controlling inmates' interactions with the public. *See* FDOC's Interrogatory Responses, at ¶ 13.

With respect to this particular restriction, PLN again argues that the FDOC has presented no evidence to show that any of this has ever happened. *See* ECF No. 139, at 21. This is a common theme across all four types of advertisements.

To support its overall approach of requiring the FDOC to come forward with specific evidence linking the advertisements in *Prison Legal News* with specific incidents of prison misconduct, PLN invokes *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868 (9th Cir. 2002), which noted that "[a]lthough prison officials may pass regulations in anticipation of security problems, they must at a minimum supply some evidence that such potential problems are real, not imagined." *Id*. at 882. Here, PLN contends that just as in *Woodford*, the FDOC must offer something "more than questionable speculation" to demonstrate its regulation of the four types of ads at issue is rational. *See id*. at 880.

In direct rebuttal to this point, the FDOC argues that that there is no requirement, even in an 'as applied' challenge, to offer specific evidence of a causal link between the advertisements at issue and actual incidents of violence or the breaking of prison rules. ECF No. 155, at 3-4. To support this argument, the FDOC cites *Lawson v. Singletary*, 85 F.3d 502 (11th Cir. 1996). In *Lawson*, in providing guidance to the lower court in its consideration of a similar as-applied challenge on remand, the Eleventh Circuit declared that "the district court may have labored under the misconception that the Department was required to adduce specific evidence of a causal link between text that it wants to remove [in that case, certain religious texts] and actual incidents of violence (or some other actual threat to security). To the extent that the district court did in fact labor under any such belief, it erred. Requiring proof of such a correlation constitutes insufficient deference to the judgment of the prison authorities with respect to security needs." 85 F.3d 502, 513 n.15 (citing *Martinez* for the proposition that "[p]rison authorities are not 'required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty.'").

Given the deference owed to prison officials, *Lawson* appears to establish that *Woodford*'s requirement of offering specific evidence of a causal link between the advertisements at issue and actual incidents of prison rule violations is not a *per se* requirement. However, the particular statement at issue in *Lawson* was not part of that court's holding, and the Eleventh Circuit has not directly resolved the extent to which such evidence might be relevant. *See, e.g.*, *Perry*, 664 F.3d at 1366 ("[Plaintiffs] rely on [*Woodford*] to establish that prison administrators must provide evidence that the asserted claims are true. Even if we were bound

by this articulation, the FDOC meets this standard by offering expert testimony to establish that the Rule will help curb pen pal scams").

While this will certainly be an important issue to resolve at trial, just as in *Perry*, this particular issue need not be presently resolved, as the FDOC has presented evidence of instances where the services offered in *Prison Legal News* are, in fact, being used by FDOC inmates, rendering summary judgment inappropriate for PLN on this basis.

2. Second *Turner* Factor

The second *Turner* factor requires consideration of whether PLN has alternative means of exercising the right in question. *Turner*, 482 U.S. at 90. As to this factor, *Turner* indicated that "[w]here 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the . . . 'judicial deference owed to corrections officials . . . .'" *Id*. (citations omitted).

To resolve this issue, this Court must first identify the "right" at issue. PLN argues that "the right" in question is its First Amendment right "to communicate its message to prisoners," rather than to the world at large, including the "right" to publish articles critical of the prison system. ECF No. 153, at 12. *See Thornburgh*, 490 U.S. at 408 ("[T]here is no question that publishers who wish to communicate with those who . . . seek their point of view have a legitimate First Amendment interest in access to prisoners"); *Perry*, 664 F.3d at 1367-68 (noting that "publishers (including advertisers) have a First Amendment right to access inmates"). In response, the FDOC argues that the "right" in question is PLN's right to advertise generally, arguing that the right in question should be construed more expansively than PLN contends. *See Thornburgh*, 490 U.S. at 417 (citing *Turner* for the proposition that ""the right' in question must be viewed sensibly and expansively").

Assuming, for the sake of argument, that PLN has the better view, the parties next debate a potential alternative means of PLN communicating its message to FDOC inmates, and present competing evidence as to whether it would be economically feasible for PLN to create a special edition of *Prison Legal News* for Florida prisoners that does not contain the offending ads at issue.

According to PLN, it would incur an "extraordinary expense" to create a special edition of *Prison Legal News* for Florida inmates, as doing so would cost more than $30,000 per year at current subscriber levels, or even higher if subscriber levels increase. *See* ECF No. 153, at 13; ECF No. 139, at 24 (citing Wright Decl., ECF No. 139, Ex. 1, ¶¶ 21-37). As a non-profit organization, any such increase in costs would threaten to put them out of business in Florida, in turn amounting to a restriction on speech itself.

The FDOC disputes this claim by arguing that PLN can simply use AdobePro to create a special edition of its magazine at little expense. According to the FDOC, a redacted issue of *Prison Legal News* can be mailed for under $2 and costs less than $1 to print. Assuming 92 FDOC inmates, the total expense of this special edition would be no more than $266.80 per issue, and PLN could defray some of that cost by charging Florida prisoners more. ECF No. 152, at 8-9.

Given the competing evidence regarding the cost of creating a special edition for Florida inmates, the question of whether PLN has alternative means of communicating its message to Florida inmates is not one this Court may resolve on summary judgment. Accordingly, summary judgment is again not appropriate for either party on this particular factor.

3. Third *Turner* Factor

The third *Turner* factor requires this Court to consider the impact accommodation of the asserted constitutional right would have on guards and other inmates, and on the allocation of prison resources generally. *Turner*, 482 U.S. at 90. According to *Turner*, "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Id*.

Here, PLN claims that allowing inmates to receive *Prison Legal News* will have no adverse impact on prison staff, as FDOC employees already routinely inspect and deliver thousands of publications. In fact, not impounding *Prison Legal News* will result in less work for the FDOC because the literature review committee will no longer be obligated to review the impounded publications.

In response, the FDOC argues that allowing inmates to receive *Prison Legal News* will result in more rules violations, which will then create more work for the already overburdened department. In rebuttal, PLN argues that the FDOC's argument is speculative. Indeed, PLN notes, the FDOC allowed *Prison Legal News* to be admitted for years without a prohibitive strain on resources, and there is no evidence that it cannot continue to do so now.

PLN appears to have the stronger argument on this particular *Turner* factor. However, given disputed issues of fact regarding the other *Turner* factors, this Court cannot conclude that summary judgment is appropriate for PLN on this basis. Accordingly, this Court now turns to the fourth and final *Turner* factor.

4. Fourth *Turner* Factor

The final *Turner* factor requires this Court to consider whether there are "ready alternatives" to the rule in question, which, if so, "may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90.

PLN's approach here is two-fold. First, PLN argues that the Admissible Reading Rule, as applied to PLN, represents total censorship; accordingly, this Court must consider alternatives to total censorship. PLN argues that the best alternative to total censorship is to include a disclaimer in every issue of *Prison Legal News*, similar to that utilized by the New York Department of Corrections, stating that the magazine may have ads for services that inmates are prohibited from using. ECF No. 139, at 27. The FDOC responds by noting that it already considered, but rejected, such a disclaimer. *See* ECF No. 135-5, at 15-16.

As to the disclaimer alternative, given the deference owed to prison officials on such issues, along with the *Turner* Court's statement that this factor "is not a 'least restrictive alternative' test," *id*. at 90, this Court will assume, for sake of argument, that the disclaimer option does not represent a "ready alternative" sufficient to find the Admissible Reading Rule unreasonable as applied to *Prison Legal News*.

Setting aside the disclaimer possibility, PLN next identifies specific alternatives for each of the four types of prohibited advertisements. With respect to three-way calling ads, PLN argues that the following alternatives more than satisfy the FDOC's security concerns, making the ban on three-way calling ads an "exaggerated response:" rules that directly prohibit inmates from engaging in three-way calling and call forwarding; Securus' contractual obligation to detect and block all attempts at three-way calling and call forwarding; the rule permitting calls to be

recorded and monitored; and finally, the rule that restrict inmates to just 10 phone numbers on a pre-approved call list. *See* ECF No. 139, at 27-29.

PLN presents a similar argument with respect to pen pal ads. Recognizing that inmates are permitted to have pen pals, but are not permitted to engage in the more specific activity of engaging in scams relating to the solicitation of pen pals, PLN identifies several existing rules that are better suited to accomplish this particular objective. PLN points to rules that permit inspection of mail; that require inmates to reveal their status on envelopes; that prohibit inmates from engaging in correspondence that would threaten prison security; that prohibit inmates from corresponding with someone who does not want mail; and that criminalize fraud through correspondence. ECF No. 139, at 19 & 28.[15]

With respect to advertisements regarding the use of postage stamps as currency, PLN again points to alternative rules that already prevent postage stamps from becoming currency, including the rule banning all types of currency, as well as the rule permitting inmates to possess only 40 stamps at one time. PLN further notes that the FDOC could simply ban stamps altogether and allow inmates to purchase stamps electronically, consistent with the practices of other state prison systems.

Finally, with respect to advertisements that promote the conducting of a business or profession while incarcerated, PLN again argues that inmates are already directly prohibited from conducting such activities. Accordingly, the more specific ban on advertisements relating to such activities is an exaggerated response to the department's concerns.

[15] Notably, in 2005, Judge Moore found that other restrictions were sufficient to prevent such scams. According to Judge Moore, "[i]nmates cannot participate in pen-pal services, and the Florida prisons mail system reviews all outgoing and incoming mail to make sure that inmates are not participating in any illicit or prohibited services." Moore Order, at 14.

As PLN argues, this case is not about whether the FDOC can prohibit its inmates from engaging in certain activities it deems dangerous. Rather, this case is about whether the FDOC can censor an entire publication because it contains advertisements for services that might facilitate such activities. On the flip-side, given the deference owed to prison officials in the area of prison administration, and given that the advertisements at issue provide Florida inmates with a means of access to the various prohibited activities encompassed by subsection (l) of the Admissible Reading Rule, under *Turner*'s "reasonableness" approach, the FDOC may ultimately have the stronger position.[16] Thus, while this case involves a somewhat remote connection between the legitimate objectives of preventing inmates from engaging in the four types of underlying, prohibited activities encompassed by subsection (3)(l), and the distinct issue of preventing the introduction of advertisements offering services that might facilitate inmates in carrying out those prohibited actions, this asserted connection is not one this Court is prepared to deem "arbitrary or irrational" as a matter of law, particularly given the existence of multiple underlying issues that turn on factual disputes. Accordingly, summary judgment is not appropriate for either party under *Turner*.

[16] Although the analysis above has focused on subsection (l) of the Admissible Reading Rule, the possibility of censorship in this case is especially pronounced because, according to the FDOC, just one advertisement that would offend subsection (m) of the Admissible Reading Rule would be enough to censor an entire magazine. *See* ECF No. 135, at 2 n.1. According to the FDOC, every rejected issue of *Prison Legal News* contained advertisements for services which could be used to obtain personal information about correctional staff, witnesses, or judicial officers, including their home addresses and family members. ECF No. 152, at 4. PLN disputes this claim, and instead asserts that none of its advertisements actually offer to locate witnesses, victims, judges, and the like, and there is no evidence they have been used in that way. Further, PLN contends that ads for these services appeared in numerous issues of *Prison Legal News* the FDOC deemed admissible. *See* ECF No. 153, at 17 (citing ads from the year 2005).

D. Procedural Due Process Claim

The final argument advanced by PLN is a procedural due process claim. According to Count VI of PLN's Complaint, the FDOC's failure to notify PLN each time its magazine is rejected violates PLN's due process rights to notice and an opportunity to appeal that rejection, as guaranteed by the Fifth and Fourteenth Amendments. *See* Complaint at ¶ 55.

To cure this alleged violation, PLN requests that the FDOC be required to notify PLN each time a monthly issue of *Prison Legal News* is impounded – *i.e.*, one notice per monthly issue of the magazine that is impounded. ECF No. 153, at 20. PLN goes further, however, and also argues that due process requires the FDOC to notify PLN every time an individual copy of a particular monthly issue is impounded, a request that could require dozens of such notices each month. *Id*.

PLN's Count VI claim requires this Court to determine (1) what test governs this issue, including the amount of notice that is required, a constitutional issue; and (2) whether PLN has established that it failed to receive the required notice for issues of *Prison Legal News* that have been impounded since September 2009. With respect to the first issue, because the Florida Administrative Code already imposes requirements mirroring those of the most heightened constitutional standard argued by the parties, this Court need not resolve exactly what form of notice is constitutionally required. With respect to the second issue, because there is a genuine issue of disputed fact regarding whether the FDOC has complied with the governing administrative requirements, summary judgment is not appropriate for either party on this claim. Each of these points is discussed more fully below.

1. Notice Requirements

The first step in resolving PLN's due process claim is to determine what procedural requirements apply. Going from the most restrictive to least restrictive alternative, possibilities here include (a) the requirements set forth in *Procunier v. Martinez*, 416 U.S. 396 (1974), as argued by PLN; (b) those set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as argued by the FDOC; or (c) an analysis of the FDOC's existing requirements under the "reasonableness" test of *Turner v. Safley*, an alternative approach of some courts.

PLN and amici argue that the *Martinez* test applies. Under the *Martinez* test, due process requires that the following safeguards be provided each time an item of mail is intercepted by prison officials: (1) the inmate must be notified; (2) the sender must be given a reasonable opportunity to protest the decision; and (3) any complaints must be referred to a prison official other than the person who originally disapproved the correspondence. *Martinez*, 416 U.S. at 418-19. In response, the FDOC argues that, rather than apply the *Martinez* test, this Court should apply the more lenient *Eldridge* test,[17] which, the FDOC claims, is mandated by Eleventh Circuit precedent, including *Perry v. Sec'y, Fla. Dept. of Corr.*, 664 F.3d 1359 (11th Cir. 2011).

Because the Florida Administrative Code already imposes requirements similar to those required by *Martinez*, the most heightened set of protections available, this Court need not resolve the issue regarding which form of notice is constitutionally required for magazines like *Prison Legal News*. *See PVC Windoors, Inc. v. Babbitbay Beach Const., N.V.*, 598 F.3d 802,

[17] Under the *Eldridge* test, a court must analyze three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Perry*, 664 F.3d at 1368 (quoting *Eldridge*, 424 U.S. at 335).

807 (11th Cir. 2010) (recognizing that "federal courts are duty bound to avoid a constitutional question if answering the question is unnecessary to the adjudication of the claims at hand").

The FDOC's mail inspection and impoundment process is set forth in detail in Title 33 of the Florida Administrative Code. The first step in the process is inspection by mailroom staff. *See* Fla. Admin. Code R. 33-210.101(5); *see also McDonough*, 200 F. App'x at 875.[18] Upon inspection, if a mailroom employee believes that a publication violates the Admissible Reading Rule, that employee then forwards the offending publication to the warden or warden's designee for review, who then makes the impoundment decision. *See* Fla. Admin. Code R. 33-501.401(8)(a). According to the governing rules, "[i]f only a portion of a publication meets one of the criteria for rejection established in [the Admissible Reading Rule], the entire publication shall be impounded." *Id.*

Once the warden or designee elects to impound a publication, that individual must then "advise the inmate in writing" of the impoundment decision, including the specific reasons for impoundment. *Id*. at r. 33-501.401(8)(b). Notice is provided on Form DC5-101, entitled Notice of Rejection or Impoundment of Publications ("Notice of Rejection"). *Id*.

Significantly, the requirement of notifying the effected *inmate* applies regardless of whether the publication at issue – e.g., the March 2012 edition of *Prison Legal News* – has or has not been previously rejected. *See id*. at rr. 33-501.401(7) & (8)(b) (each requiring notice).

[18] While Rule 33-210.101(1) applies solely to "routine mail" and exempts "publications," such as *Prison Legal News*, "publications" are likewise inspected to determine if they contain prohibited content. *See* Fla. Admin. Code R. 33-501.401 (delineating special procedures for "publications" entering FDOC facilities, and defining "publications" as "books, newspapers, magazines, journals and diaries, calendars and any other printed materials addressed to a specific inmate or found in the personal property of an inmate").

In the event of a publication's *initial* impoundment or rejection, but not for subsequent rejections of the identical publication, the impounding party must also provide a Notice of Rejection to both the literature review committee and to the "publisher" or "sender" of the publication.[19] *Id*. at r. 33-501.401(8)(b).

Once the required notices have been sent, the final step is review by the literature review committee, whose decisions are final. *See id*. at rr. 33-501.401(8)(c) & 33-501.401(14)(a). Although the rules outlined above ensure that all impoundment decisions are reviewed by the literature review committee, additional rules provide publishers such as PLN the right to "an independent review [by the literature review committee] of the warden's decision to impound a publication" upon a proper written request made "within 15 days following receipt of [the Notice of Rejection]." *Id*. at rr. 33-501.401(15)(a) & (15)(b).

In the instant case, the parties do not dispute the essential requirements of the governing administrative rules, as outlined above. *Compare* ECF No. 139 at 10-11, *with* ECF No. 135, at 9-10. Those requirements, in turn, fully comply with the following, constitutional requirements set forth in *Martinez*: (1) notification to the inmate; (2) a reasonable opportunity for the sender to

[19] Rule 33-501.401(8)(b) of the *Florida Administrative Code* explicitly provides that "[t]he warden or designee of the institution that originated the impoundment shall . . . provide a copy of the completed [notice] form to the *publisher*, mail order distributor, bookstore or *sender*, and to the literature review committee." This rule also notes that "[t]he copy of the impoundment notice that is sent to the literature review committee shall also include as attachments a copy of the publication's front cover or title page and a copy of all pages cited on Form DC5-101 . . . as including inadmissible subject matter." *Id*. The literature review committee, in turn, makes its decision based solely upon the provided material. *See* Dep. of Susan L. Hughes, ECF No. 139, Ex. 22, at 14. Applicable rules further require that "[t]he actual date that [the notice of rejection or impoundment form] is mailed to the publisher, mail order distributor, bookstore or sender shall be documented by date stamp on the copies provided to the publisher or sender, the literature review committee, and the institution's copy." *Id*.

protest the decision; and (3) review of complaints by a prison official other than the person who originally disapproved the correspondence. 416 U.S. at 418-19.

With respect to the first *Martinez* requirement, once a prison warden or warden's designee elects to impound a publication, rules require that individual to "advise the inmate in writing" of the impoundment decision, including the specific reasons for impoundment. *Id*. at r. 33-501.401(8)(b). This inmate notice requirement applies regardless of whether the publication at issue has or has not been previously rejected. *See id*. at rr. 33-501.401(7) & (8)(b) (each requiring notice to the inmate). Thus, there is no dispute that the governing rules comply with the first *Martinez* requirement, as notice is required for each affected inmate.

Under the second *Martinez* requirement, the sender of the publication, here PLN, must be given a reasonable opportunity to protest the impoundment decision. Again, governing rules comply with this requirement. As noted, in the event of a publication's *initial* impoundment or rejection, the warden or warden's designee must provide a copy of the Notice of Rejection to the "publisher" or "sender" of the publication. *Id*. at r. 33-501.401(8)(b). Moreover, rule 33-501.401(5) provides that "[a] subscription to a periodical cannot be totally rejected by the institution, but each issue of the subscription shall be reviewed separately and impoundment or rejection shall be based on the criteria established in [the Admissible Reading Rule]." There is no dispute that *Prison Legal News* is a "periodical," as that term is defined in Rule 33-501.401(2)(f) of the *Florida Administrative Code*.[20] Accordingly, there can be no dispute that FDOC officials are required to provide at least one notice to PLN per monthly issue of *Prison*

[20] Under this provision, a "periodical" is defined as "a publication issued under the same title and published at regular intervals of more than once a year. Examples of periodicals include magazines and newspapers." Fla. Admin. Code R. 33-501.401(2)(f).

Legal News that is impounded, and Rule 33-501.401(15) guarantees publishers such as PLN the right to appeal those decisions, thereby satisfying the second *Martinez* requirement.

Under the final *Martinez* requirement, complaints must be reviewed by a prison official other than the person who originally disapproved the correspondence. Under the governing rules, either the warden or the warden's designee originally disapproves a magazine such as *Prison Legal News*. The literature review committee, however, is responsible for reviewing any publisher complaint, *see* rr. 33-501.401(13)(b), (14)(c), & (15)(b), and that committee is comprised of three individuals, including a representative from library services, one from security, and one from inmate grievances. *See id*. at r. 33-501.401(14)(a); *see also* ECF No. 135, at 9. In addition, a majority vote of the literature review committee is required in order to overturn an impoundment decision. *Id*. at r. 33-501.401(14)(c). Thus, even if the warden or the warden's designee somehow makes it on the literature review committee (perhaps as a designee of one of the representatives), which appears unlikely, the complaint at issue would still be reviewed by someone other than that individual. Accordingly, there is no dispute that the governing rules satisfy the final *Martinez* requirement.

In regards to the additional issue regarding whether notice must be provided to PLN for each monthly edition of *Prison Legal News* that is impounded (*i.e.*, one notice per month), or whether such notice must be provided for each individual inmate subscriber (*i.e.*, multiple, repetitive notices per month), this Court assumes, for purposes of the following summary judgment analysis, that only the former is required.

As noted, PLN wishes to receive notice every time an individual inmate has an issue of *Prison Legal News* impounded. The FDOC, however, believes that only one such notice per rejected issue of *Prison Legal News* is required. The United States Supreme Court has not

addressed this precise issue,[21] but this Court is persuaded by the reasoning of the United States Court of Appeals for the Fifth Circuit, which recently rejected a similar argument.

In *Prison Legal News v. Livingston*, 683 F.3d 201 (5th Cir. 2012), the Fifth Circuit addressed a similar issue regarding whether senders of a particular publication, such as a book, are entitled to notice and appeal even after the identical publication has previously been denied. *Id*. at 223. Finding that the department's procedures requiring one notice per publication "are reasonable [under *Turner*] and do not run afoul of the Due Process Clause," the court reasoned that "[a]fter a [department]-level denial has become final, subsequent denials of identical publications amount to the routine enforcement of a rule with general applicability." *Id*. As a practical matter, the court felt that the department "must be permitted to pass rules of general application . . . without subjecting such rules to repetitive challenges every time they are applied." *Id*. The court thus concluded that while "publishers have due process rights when a prison bans their publications," those rights apply "at the time of the initial denial" of a publication because it is at that time that "an individualized decision (with respect to the [publication's] contents) must be made." *Id*. at 223-24.

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[21] In *Martinez*, the Supreme Court held that senders and addressees were entitled to the basic due process protections of notice and an opportunity to be heard before the California Department of Corrections could censor personal letters between prisoners and outsiders. 416 U.S. at 417-19. The *Martinez* Court did not address whether those same requirements apply to magazine subscriptions, but lower courts have considered the issue and have extended *Martinez* to other types of mail beyond personal correspondence. Most notably, in *Montcalm Publ'g Corp. v. Beck*, 80 F.3d 105 (4th Cir. 1996), the Fourth Circuit, relying on *Martinez*, extended due process protections to publishers whose magazines were excluded by the Virginia Department of Corrections. *See id*. at 109 (discussing at length what process is due for the impoundment of magazine subscriptions, and concluding that it would be appropriate to provide a copy of the impound notice to publishers of disapproved publications and allow them to respond in writing, although the "district court is free [on remand] to fashion the remedy it deems most appropriate"); *see also Jacklovich v. Simmons*, 392 F.3d 420, 433-34 (10th Cir. 2004) (noting and agreeing with courts that "have recognized that both inmates and publishers have a right to procedural due process when publications are rejected").

These same principles apply here. As the FDOC argues, and as *Livingston* held, due process mandates just one notice per monthly issue of *Prison Legal News* that is impounded. The fundamental requirements of due process are notice and opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Here, Rules 33-501.401(8)(b) and 33-501.401(5) of the *Florida Administrative Code* require written notice to each "publisher" or "sender" of an impounded publication, including PLN, for each monthly issue of *Prison Legal News* that is impounded. In addition, Rule 33-501.401(15) provides PLN with an opportunity to contest those decisions. Accordingly, the basic requirements of due process are satisfied.

The requirement of one notice for each rejected issue of *Prison Legal News* fits neatly within the existing regulatory framework. Under Rule 33-501.401(4) of the *Florida Administrative Code*, the FDOC is required to maintain a list of all publications that have been reviewed by the literature review committee, and all institutions must keep a current copy of the list in every institutional mailroom. Under Rule 33-501.401(7), once the literature review committee has made a final impoundment decision under the Admissible Reading Rule, that decision "shall not be reviewed again" unless the offending material is removed. Accordingly, a publisher such as PLN has just one opportunity to contest a warden's impoundment decision before the literature review committee, whose decisions are final, and the requirement of one notice prior to that decision gives such a publisher notice of that opportunity. These protections are constitutionally sufficient under *Livingston*.[22]

[22] If PLN is not satisfied with the existing requirement of one notice for each impounded issue of *Prison Legal News*, then PLN can initiate rulemaking to change the frequency and extent of such notice.

In sum, given that the provisions of the *Florida Administrative Code* fully comply with the due process requirements set forth in *Martinez*, nothing more is required. For summary judgment purposes, the question thus becomes whether there is a disputed issue of fact as to whether the FDOC has complied with these requirements.

2. Whether the FDOC Has Complied with Applicable Notice Requirements

While PLN and the FDOC agree as to the essential requirements of the above administrative rules, the parties disagree as to whether the FDOC has complied with those requirements. The parties present competing data on this point.

According to the FDOC, "[f]rom September 2009 through December 2011, when suit was filed in this case, PLN received dated and signed [rejection or impoundment] notices for every month but November 2011." ECF No. 135, at 10, ¶ 21 (citing ECF No. 135, Ex. 36, containing notice forms). The FDOC further contends that for the September 2009 through July 2012 issues of *Prison Legal News*, "PLN received approximately 4,675 pages of notice concerning the rejection and/or impoundment of its publication." ECF No. 135, at 10, ¶ 22 (citing Decl. of Chrystal Harwood, Paralegal in the Office of the Attorney General, ECF No. 135, Ex. 54, at ¶ 6, finding at least one notice for every *Prison Legal News* issue from September 2009 through July 2012, and sometimes multiple notices per issue).

PLN disputes this data. According to PLN, the FDOC incorrectly asserts that PLN received notices for all but one month from September 2009 through July 2012. Rather, PLN contends that "since September 2009, the FDOC only provided notice to PLN for 16 [out of 35] issues." ECF No. 153, at 6, ¶ 21 (citing Wright Supplemental Decl., ECF No. 153, Ex. 4, ¶ 8).

In further rebuttal, PLN argues that most of the notice identified by the FDOC was from inmates, rather than from the FDOC. *See* ECF No. 153, at 18-19; ECF No. 153, at 7 ¶ 22.[23]

As the disputed data above reveals, this Court finds that there are disputed facts as to whether PLN did, or did not, receive the required notices, either pursuant to the requirements of *Martinez* or under governing rules, including rule 33-501.401(8)(b) of the *Florida Administrative Code*, which requires notice be sent to a "publisher" or "sender" when a publication is initially impounded. Accordingly, summary judgment is not appropriate for either party on this particular claim.

For the reasons set forth above, the motions for summary judgment filed by plaintiff Prison Legal News ("PLN"), ECF No. 139, and by defendant, Michael D. Crews, ECF No. 135, are **DENIED**.

SO ORDERED on August 11, 2014.

s/Mark E. Walker
United States District Judge

[23] PLN presents additional, similar evidence, including the declaration of PLN paralegal Zachary Phillips, who claims that 24 of the 27 notices contained in the FDOC's Exhibit 36 to its summary judgment motion, ECF No. 135, were actually mailed to PLN from the prisoner subscribers to whom the notices were issued, not from FDOC staff. *See* Unsworn Decl. of Zachary Phillips, ECF No. 153, Ex. 7. Thus, there is disputed evidence as to whether the FDOC itself sent notice for at least 24 of the 27 months from September 2009 through December 2011, when suit was filed in this case, as the FDOC claims. *See* ECF No. 135, at 10, ¶ 21.