

Kirtlan G. Naylor ISB 3569
James R. Stoll ISB 7182
NAYLOR & HALES, P.C.
950 W. Bannock Street, Suite 610
Boise, Idaho 83702
Telephone: (208) 383-9511
Fax: (208) 383-9516
kirt@naylorhales.com
jrs@naylorhales.com

Daniel P. Struck AZB 012377
(Admitted Pro Hac Vice)
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Telephone: (602) 263-7323
Fax: (602) 200-7811
dstruck@jshfirm.com

Attorneys for Defendants Corrections
Corporation of America, Valdez, Rodriguez,
Rose, Danforth and Dean

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

MARLIN RIGGS, individually, and JOSE PINA, JOE
ROCHA, ANDREW IBARRA, JOSHUA
KELLY, and RAY BARRIOS, individually and on
behalf of a class of all other persons
similarly situated,

Plaintiff,

v.

PHILLIP VALDEZ, NORMA RODRIGUEZ,
CHRISTOPHER ROSE, TODD DANFORTH, and
OFFICER DEAN, individually and in their official
capacities; BRENT REINKE,
MARK FUNAIOLE, JANIE DRESSEN, NORMAN
LANGERAK, MIKE MATTHEWS, and BILL
YOUNG, in their official capacities; and
CORRECTIONS CORPORATION OF AMERICA,
Inc.

Defendants.

Case No. 1:09-cv-00010-S-BLW

**DEFENDANTS' MOTION FOR
RESTRAINING ORDER**

(DKT NO. 118)

Pursuant to Civil Rule 83.1(c), Defendants Phillip Valdez, Norma
Rodriguez, Christopher Rose, Steven Danforth, William Dean, and Corrections

Corporation of America, Inc. ("Defendants") respectfully request an Order from this Court restraining all parties and counsel in the above captioned matter from making extrajudicial statements, comments, or communications about the subject matter of this lawsuit directly to the media or in such a manner that the speaker intends such statement to be disseminated by means of public communication.¹ This Motion is supported by the following Memorandum of Points and Authorities, attached exhibits, and proposed Order.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

In January 2010, the Court appointed counsel to represent Plaintiff Marlin Riggs in this matter ("Plaintiffs' Counsel"). *See* Dkt. No. 11. On March 11, 2010, Plaintiff filed an Amended Complaint, adding five plaintiffs and asserting class claims which detailed serious allegations of wrongdoing against Defendants, a private prison operator and its employees. *See* Dkt. No. 16. On the same day that Plaintiffs filed their Amended Complaint, Plaintiffs' Counsel began issuing press releases, speaking to the media, and offering commentary in excess of that presented in Plaintiffs' Amended and subsequent Second Amended Complaint, Dkt. No. 71. *See* Exhibit A (Sample of News Articles Quoting Stephen Pevar). For example, in a press release posted on the ACLU's website, Plaintiffs' Counsel stated, "In my 39 years of suing prisons and jails, I have never confronted a more disgraceful, revolting and inexcusable case of mass abuse and federal rights violations than this one . . . the level of unnecessary human suffering is appalling." *See* Exhibit A-1 (3/11 ACLU press release). That same day, Plaintiffs' Counsel is quoted in a news article as saying, "Our country should be ashamed to send human beings to that facility." *See* Exhibit A-2 (3/11 OregonLive.com).

Because of the gravity of the allegations involved in this case and the

¹ This would include counsel conveying information to a third party that the counsel authorizes, intends, or expects the third party to disseminate publicly.

nature of Plaintiffs' Counsel's hyperbole, it is not surprising that this case captured the attention of the press and, consequently, the public. In the ensuing months, this and related cases garnered steady and unrelenting attention. Media attention increased dramatically when, on November 30, 2010, the Associated Press ("AP") released graphic video footage of an inmate-on-inmate assault that occurred at Idaho Correctional Center in January 2010. The assault depicted is mentioned in Plaintiffs' Second Amended Complaint, but was the subject of an entirely separate lawsuit² and is distinguishable from the litany of other incidents described *ad nauseum* in Plaintiffs' Second Amended Complaint. The video footage reached an international audience within mere hours, and Plaintiffs' Counsel joined the fray, offering inflammatory and sensational commentary. *See Exhibit A.* Most notably, he is quoted as saying, "This isn't even what we know of as a prison – this is a gulag."³

Finally, to confirm Defendants' suspicions about the breadth of the audience coverage of this and related cases have reached, the *Idaho Statesman* - the most widely read newspaper in the state of Idaho and the primary news serving Ada County - listed the Idaho Correctional Center as one of Idaho's top news stories from 2010.⁴

Although Defendants are confident that the Court will not be influenced by Plaintiffs' Counsel's outside remarks on this case, Defendants are concerned about their right to a fair and impartial jury with respect to the Riggs compensatory damage claim, a claim that Plaintiffs' Counsel elected to lump with the purported class claims for

² The parties to that lawsuit, *Elabed v. Corrections Corp. of Am., et al*, 1:10-cv-00218-EJL, have since reached a confidential settlement.

³ According to Merriam-Webster's online dictionary, "gulags" were "the penal system of the Union of Soviet Socialist Republics consisting of a network of labor camps." Plaintiffs' Second Amended Complaint alleges a failure to protect inmates from violence at the hands of their fellow inmates, not that ICC was running a Soviet-style labor camp.

⁴ Jessie L. Bonner and John Miller, *Idaho's top stories from 2010: Foul economy dominates*, IDAHO STATESMAN, Dec. 29, 2010. For newspaper circulation statistics, see <http://custserv.idahostatesman.com/about-us.php>.

injunctive relief. Defendants would be remiss if they did not take proactive steps to preserve their fair trial rights. As such, subsequent to the AP's November 30 release of the bootleg video footage, Defendants attempted to confer with Plaintiffs' Counsel, via email, about the possibility of the parties voluntarily refraining from feeding the media frenzy with extrajudicial statements. *See* Exhibit C (E-mail exchange). Defendants provided Plaintiffs' Counsel with a copy of Idaho Rule of Professional Conduct 3.6, detailed *infra*, and stated that "we would consider your statement . . . calling ICC a 'Gulag' as being outside the scope" of Rule 3.6. *Id.* Plaintiffs' Counsel, however, did not agree "that equating ICC to a Gulag violates 3.6." *Id.*

The parties were obviously unable to reach an agreement, as Plaintiffs' Counsel again appeared in the news on December 31, 2010, following the December 30, 2010 filing of Plaintiffs' Motions for Preliminary Injunction and Partial Summary Judgment. *See* Dkt. Nos. 108-110. Rather than letting Plaintiffs' pleadings speak for themselves, Plaintiffs' Counsel proselytized about wanting "to eliminate as much suffering as quickly as we can." *See* Exhibit A-3 (12/31 *Spokesman-Review* article).

Over the course of this litigation, Defendants have tried to remain vigilant, yet reasonable, in protecting their fair trial rights.⁵ Defendants recognize the Constitutional interests implicated by their request and further understand that the media has a right to report to the public the facts of this lawsuit, obtained from the court file or hearings in open court. Defendants do object, however, to what has become Plaintiffs' Counsel's penchant for disseminating unfair, prejudicial, and often misleading statements for public consumption. *See* Exhibit A. Despite Plaintiffs' Counsel's belief to the contrary, Defendants do not believe that attorneys have an unfettered right to discuss pending litigation in a public forum, especially when a jury trial on a compensatory damage claim looms.

⁵ And courts, recognizing Defendants' interest in preserving their right to a fair trial have agreed. *See, e.g.,* Exhibit B (Memorandum Decision and Order in *State v. Haver*, Case No. CR-FE-10-0004368 (4th Jud. Dist. Idaho Nov. 16, 2010)).

II. LEGAL ARGUMENT

A. **Defendants have a fundamental right to a fair and impartial jury that is recognized by this Court's Local Rules, by the Federal Rules, and by case law.**

Local Civil Rule 83.1 is entitled "Free Press – Fair Trial Provisions."

Subpart (c) provides, specifically, for the relief Defendants seek:

- (1) In a widely publicized or sensational case likely to receive massive publicity, the Court, on its own motion or on motion of either party, *may issue a special order governing such matters as extrajudicial statements by lawyers, parties, witnesses, jurors, and Court officials likely to interfere with the rights of the accused to a fair trial by an impartial jury[.]*"

Civ. R. 83.1(c) (emphasis added). As the Rule's heading indicates, Rule 83.1 is intended to protect the parties' rights to a fair trial by an impartial jury. Both the Seventh Amendment to the United States Constitution and Rule 38(a) of the Federal Rules of Civil Procedure also preserve the "inviolable" right to a trial by an impartial jury in civil matters. Fed. R. Civ. P. 38(a); *see also Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1151 (9th Cir. 2001) ("[F]airness to parties and the need for a fair trial are important not only in criminal, but also in civil proceedings, both of which require due process"); *Davidson v. Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995) ("In civil as well as criminal cases, the right to a fair trial is fundamental"); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 97-98 (3d Cir. 1988) (the "conflict between freedom of speech and the right to a fair trial is no less troubling in the non-criminal context. . . . [F]airness in a jury trial, whether criminal or civil in nature, is a vital constitutional right").

Preserving parties' fair trial rights in the face of media scrutiny is a difficult undertaking in this internet age, where information is more accessible than ever before in history. Accordingly, "unfair and prejudicial news comment on pending trials has become increasingly prevalent." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).⁶ This

⁶ Although *Sheppard* reflects on a criminal proceeding, the analysis is relevant in civil proceedings, as well – the right to a fair trial is fundamental in both arenas.

is true in both the criminal and civil arenas. Despite the constant and pervasive news coverage that the public – potential jurors – is exposed to, due process still requires that the parties to litigation receive a trial by an impartial jury that is "free from outside influences." *Id.*

Although a party prejudiced by pre-trial publicity may seek changes of venue, continuances, jury sequestration, and may appeal an adverse ruling, such remedies "are but palliatives." *Id.* at 363. "The cure lies in those remedial measures that will prevent the prejudice at its inception. The courts have a duty to take such steps by rule and regulation that will protect their processes from prejudicial outside interferences" and counsel for neither party "should be permitted to frustrate its function." *Id.* In fact, "the measures a judge takes or fails to take to mitigate the effects of pretrial publicity . . . may well determine whether the defendant receives a trial consistent with the requirements of due process." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (1976).

The District of Idaho has, in adopting Civil Rule 83.1(c), provided its Courts and judges with a tool by which they may "protect their processes from prejudicial outside interferences[.]" *Id.* The instant case – one of the top Idaho news stories of 2010 – is a prime example of the type of "widely publicized or sensational case," the parties to which Civil Rule 83.1(c) was created to protect. Defendants respectfully request the remedy set forth therein – "a special order governing such matters as extrajudicial statements by lawyers[.]"

B. Counsel for both parties have a fiduciary responsibility to avoid obstructing the fair administration of justice.

Also recognizing the impact publicity can have on a proceeding, the Idaho Supreme Court adopted the Idaho Rules of Professional Conduct ("IRPC"), to guide the conduct of attorneys practicing in Idaho. Rule 3.6 sets forth, in detail, ethical constraints on the making of extrajudicial statements by lawyers involved in adjudicative proceedings:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto[.]

IDAHO RULES OF PROF'L CONDUCT R. 3.6 (eff. 1999). IRPC 3.6 is modeled after the ABA Model Rules of Professional Conduct and in line with Supreme Court precedent. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a majority of the Supreme Court held that the "substantial likelihood of materially prejudicing an adjudicative proceeding" test, as set forth in IRPC 3.6(a), is a constitutionally permissible restriction on the free speech rights of attorneys, emphasizing that an attorney's rights of speech in connection with a judicial proceeding are necessarily circumscribed by the substantial state interest in preventing prejudice to the proceeding. *See also* D. Craig Lewis, *Idaho Trial Handbook* 17 (Thomson West 2005). Comments to ABA Model Rule 3.6, of which IRPC 3.6 is a copy, further acknowledge,

Preserving the right to a fair trial necessary entails some curtailment of the information that may be disseminated about a party prior to the trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence.

The Supreme Courts of both Idaho and the United States, have thus recognized the difficulty involved in preserving a party's right to a fair trial – civil or otherwise – and the importance of attempting to do so.

In speaking to the press, Plaintiffs' Counsel has repeatedly exhibited an intent to fan the flames and provoke public outrage. Most of his published statements

serve no purpose under IRPC 3.6, other than to inflame the public (and future jury pool), which he reasonably should know will "materially prejudice" ongoing proceedings in this matter. *See* IRPC 3.6(a). Calling ICC a "gulag" is neither a statement of a claim against Defendants, nor a statement of Plaintiffs' offense. *See* IRPC 3.6(b)(1). It is a purely outrageous, prejudicial, and inaccurate analogy to Soviet forced labor camps, which were responsible for the deaths of *millions*. Similarly, Plaintiffs' Counsel's statement that he has "never confronted a more disgraceful, revolting and inexcusable case of mass abuse and federal rights violations than this one" is an exaggeration intended to prejudice Defendants. Plaintiffs' Counsel's past experience is irrelevant to the present case, and has nothing to do with the claims or offenses Plaintiffs have or will present. Finally, Plaintiffs' Counsel's statement that CCA has "literally profited by the PLRA, and they've had very little financial incentive to do the right thing" is again unsupported by the allegations in his Complaint or Response to Defendants' Motion to Dismiss. CCA is a lawfully operated for-profit corporation, and its business status is not the issue in this case. Similarly, the PLRA, a federal law, contains an exhaustion requirement that Defendants would be remiss in not seeking to enforce through a Motion to Dismiss. The above examples are a mere sampling of the commentary Plaintiffs' Counsel has provided to the media and public at large. Plaintiffs' Counsel's inflammatory statements to the press are outside the limits of IRPC 3.6.

Although the media will report what it will, Defendants' position, supported by IRPC 3.6 and case law, is that parties to this litigation should refrain from contributing prejudicial, unsupported remarks to what has become a very public dialogue. Plaintiffs' Counsel's statements to the press are widely disseminated within Idaho, and are therefore falling upon the ears of an unsuspecting prospective jury pool. Defendants seek assurances from the Court, by way of a restraining order, that the attorneys involved in this matter will not further fan the flames with remarks that Defendants believe are in violation of IRPC 3.6 – a rule intended to ensure as equal a footing as possible for all

MOTION FOR RESTRAINING ORDER (DKT NO. 118) - 8.

parties to litigation.

C. **Restrictions on attorney speech in highly publicized cases are permissible under the First Amendment.**

What Defendants seek is not unreasonable or out of the ordinary. Appellate courts throughout the country, including the 9th Circuit, have upheld restraints on the public speech of trial participants. In *Levine v. United States District Court for the Central District of California*, for example, the Ninth Circuit held that although a restraining order on attorney speech was a First Amendment prior restraint, "the case for restraints on trial participants is especially strong with respect to attorneys." 764 F.2d 590, 595 (9th Cir. 1985). "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (Brennan, J., concurring)).⁷ Similarly, in *In re Russell*, the Fourth Circuit upheld a gag order preventing potential witnesses in a highly publicized trial, including some of the plaintiffs, from making extrajudicial statements "if such potential witness *intends* such statement to be disseminated by means of public communication." 726 F.2d 1007, 1009 (4th Cir. 1984). The court determined that the proscription of certain extrajudicial communications was necessary in order to "protect the right to a fair trial 'based solely on admissible evidence.'" *Id. Accord Cent. South Carolina Chapter, Soc'y of Prof'l Journalists v. Martin*, 556 F.2d 706, 708 (4th Cir. 1977) (affirming order prohibiting extrajudicial witness statements); *United States v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir. 1969). As in *Russell*, Defendants believe that "[t]he tremendous publicity attending this trial, the potentially inflammatory and highly prejudicial statements that could reasonably be expected from [Plaintiffs' Counsel], . . . and the relative ineffectiveness of the considered

⁷ The *Levine* court ultimately held that the restraining order at issue was appropriate, albeit overbroad.


alternatives, dictate[] the 'strong measure'" of restricting Plaintiffs' Counsel's statements to the press. *In re Russell*, 726 F.2d at 1010.

III. CONCLUSION

Although Defendants are confident that the Court will not be influenced by Plaintiffs' Counsel's extrajudicial hyperbole, Defendants are concerned about their right to a fair and impartial jury with respect to the Riggs compensatory damage claim. In the interest of protecting the parties' fair trial rights, Defendants respectfully request this Court to invoke Civil Rule 83.1(c) and issue a restraining order restricting participants in this litigation from making extrajudicial statements, comments, or communications about the subject matter of this lawsuit directly to the media or in such a manner that the speaker intends such statement to be disseminated by means of public communication.

DATED this 18th day of January 2011.

JONES, SKELTON & HOCHULI, P.L.C.

By 
Daniel P. Struck
E-mail: dstruck@jshfirm.com

Kirtlan G. Naylor, Of the Firm
E-mail: kirt@naylorhales.com

Attorneys for CCA, Valdez, Rodriguez, Rose,
Danforth and Dean

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

- **James D. Huegli**, Attorney for Plaintiffs
jameshuegli@yahoo.com
- **Lea Candy Cooper**, Attorney for Plaintiffs
lcooper@acluidaho.org

MOTION FOR RESTRAINING ORDER (DKT NO. 118) - 10.

- **Stephen L. Pevar**, Attorney for Plaintiffs
Pevaraclu@aol.com
- **Krista Howard**, Attorney for IDOC
khoward@idoc.idaho.gov
- **Paul Panther**, Attorney for IDOC
ppanther@idoc.idaho.gov

2378858.1