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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA (FRESNO DIVISION)

JANINE CHANDLER; KRYSTAL
GONZALEZ; TOMIEKIA JOHNSON; NADIA
ROMERO, individuals; and WOMAN II
WOMAN, a California non-profit corporation,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
KATHLEEN ALLISON, Secretary of the
California Department of Corrections and
Rehabilitation, in her official capacity;
MICHAEL PALLARES, Warden, in his official
capacity; MONA D. HOUSTON, Warden, in
her official capacity; and DOES 1-10, inclusive,

Defendants.

Case No. 1:21-cv-01657-JLT-HBK

**PLAINTIFFS' OPPOSITION TO
PROPOSED INTERVENORS'
MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL REPLY IN
SUPPORT OF DEFENDANTS'
MOTION TO STRIKE**

Before: Hon. Jennifer L. Thurston
Complaint Filed: 11/17/21
Trial Date: None

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs oppose Proposed Intervenor's Motion for Leave to File a Supplemental Reply In Support of Defendants' Motion to Strike (ECF No. 43). The supplemental reply brief Proposed
PLAINTIFFS' OPPOSITION TO PROPOSED INTERVENORS' MOTION FOR LEAVE
TO FILE SUPPLEMENTAL REPLY

Intervenors seek to file is an unauthorized and unnecessary filing piled onto an already fully briefed motion. Moreover, the substance of Proposed Intervenors' supplemental reply does not support the relief requested in the motion to which they wish to add briefing. Plaintiffs urge the Court to deny permission for Proposed Intervenors to file a supplemental reply brief.

II. ARGUMENT AGAINST GRANTING LEAVE FOR PROPOSED INTERVENORS TO FILE FURTHER BRIEFINGS

Filing "supplemental" briefs is not authorized under the Federal Rules of Civil Procedure, nor the Local Rules, and is discouraged under the Court's Standing Order by expressly requiring leave of Court.

A. Contesting Plaintiffs' Evidence Does Not Support Striking Plaintiffs' Evidence

Proposed Intervenors claim that "good cause" exists because they wish to contest or controvert certain factual statements contained in Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF. No. 36) and declarations submitted therewith (ECF Nos. 36-1 to 36-12). Two conflicting declarations about the same incident do not "cancel each other out," but show that the incident at issue involves disputed facts. Proposed Intervenors' request to submit their own declaration to contradict one of Plaintiff's declarations is not properly "in support of" Defendant's Motion to Strike. Defendants' Motion to Strike argued that Plaintiffs' declarations are "immaterial," (ECF No. 38 at p. 2), but Proposed Intervenors' desire to dispute one of Plaintiffs' declarations contradicts the Defendants' position and instead demonstrates agreement with Plaintiffs that the subject matter addressed by these declarations is relevant and material.

Prior to filing their instant Motion for Leave, Proposed Intervenors never identified to Plaintiffs' counsel which statements they contend are "false," despite Plaintiffs' counsel's response to their meet and confer email indicating that specification was needed. Now on one hand Proposed Intervenors admit that their single declaration disputes whether "*a sexual assault*" by one specific inmate occurred. (ECF No. 43-2 at 3; emphasis added), and on the other hand they argue that

1 disputing *a single incident* among the many circumstances causing harm alleged by Plaintiffs
 2 supports excluding *all* of Plaintiffs' declarations. If anything, Proposed Intervenor's desire to
 3 contradict some of Plaintiffs' evidence supports denial of the Motion to Strike.

4 **B. Proposed Intervenor's Filed No Reply, So Cannot File A "Supplemental Reply"**

5 Proposed Intervenor's seek leave to file additional briefing for a motion for which they never
 6 had permission to respond in the first place – Defendants' Motion to Strike. (Proposed Intervenor's
 7 nevertheless addressed admissibility of Plaintiffs' declarations, within their Reply re Plaintiffs'
 8 Opposition to Motion to Dismiss; *see* ECF No. 40.) It is strange that Proposed Intervenor's
 9 characterize their proposed filing as a "supplemental reply" when they did not file a reply regarding
 10 Defendants' Motion to Strike in the first place. (Nor could they have, without leave of Court or
 11 stipulation, because they are *proposed* intervenor's whose permission to file in this case is currently
 12 limited to their own Motion to Intervene, and briefing on Defendants' Motion to Dismiss.) Thus,
 13 Proposed Intervenor's' current proposed supplemental reply either: (i) actually relates to
 14 Defendants' Motion to Dismiss, but purports to relate to Defendants' Motion to Strike; or (ii) relates
 15 to the Motion to Strike but cannot properly be a "reply" or "supplemental reply" because Proposed
 16 Intervenor's never sought permission to brief in support of Defendants' Motion to Strike and have
 17 never filed a reply as to that motion. Either way, Proposed Intervenor's' motion for leave lacks
 18 reasonable justification and falls outside the boundary of their current status as *proposed*
 19 intervening parties.
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22 **C. Proposed Intervenor's Delayed Raising The Factual Issue They Now Wish To Present**

23 Proposed Intervenor's' assertion that they have moved for leave as quickly as they
 24 reasonably could is implausible. They state they received the declaration they want to file on June
 25 29, 2022, but also that they had communicated with Jennifer Orthwein (attorney for the reported
 26 sexual assault perpetrator) about this reported victim on June 7, 2022. The interview between the
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1 reported victim and Jennifer Orthwein occurred on June 17, 2022. Even if it took 12 days to then
2 obtain a signed statement from the reported victim, it is unlikely that Proposed Intervenor did not
3 know the substance of what they intended to present in that declaration by the time Defendants'
4 reply on the Motion to Strike was due (June 24).

5 Moreover, in their June 10, 2022 filing (Reply in Support of Defendants' Motion to Dismiss,
6 ECF No. 40 at fn. 10, p. 10), Proposed Intervenor (knowing by that date of the possibility that they
7 would obtain a statement from this reported victim) already expressed their position that if the Court
8 considers Plaintiffs' extrinsic evidence then Proposed Intervenor want opportunity to submit their
9 own evidence. Thus, Proposed Intervenor could have moved much earlier for leave to submit the
10 declaration with respect to either the Motion to Dismiss or Motion to Strike or alternatively, simply
11 waited to see if the Court acted on their June 10 request for opportunity to file additional evidence.

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13 **D. Proposed Intervenor's Evidence Denying An Alleged Sexual Assault Is Not Dispositive**

14 It is disingenuous for Proposed Intervenor to characterize disputing one of the events
15 included in Plaintiffs' filings as "correcting the record before the Court" (ECF No. 43-2 at 3).
16 Proposed Intervenor's declaration from a reported rape victim denying that sexual assault occurred,
17 only opens the door to further evidence demonstrating the complexity of the circumstances of this
18 reported sexual assault situation. The reported victim has made inconsistent statements about this
19 incident to various people in the seven weeks since multiple other inmates witnessed circumstances
20 that led them to report that she had been assaulted, including statements wherein she indicates that
21 she may not recall all of the pertinent events. *See* PREA Report attached as Exhibit A to Declaration
22 of Candice Jackson filed concurrently herewith ("PREA Report") at p 5. (Plaintiffs' counsel
23 recently filed this PREA Report with CDCR, reporting a list of incidents and experiences disclosed
24 to us by a number of incarcerated women.)
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27 Furthermore, Plaintiffs' claims do not rest on whether or not this specific sexual assault
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1 occurred. The alleged perpetrator of that reported incident proceeded to threaten to rape a group of
 2 women, and numerous other sexual risks and harms involving other SB 132-transferred male
 3 inmates are alleged and factually supported by Plaintiffs. The *risk* of such sexual harms is the
 4 gravamen of Plaintiffs' Eighth Amendment allegations; the law does not require Plaintiffs to wait
 5 to actually be raped in order to hold CDCR accountable for ignoring obvious risk of such harm.

6 Proposed Intervenor's instant Motion for Leave serves as pretext for what Proposed
 7 Intervenor seeks to accomplish: placing into the record evidence that controverts what they
 8 characterize as "scandalous and incendiary" factual contentions contained in Plaintiffs' declarations
 9 (ECF No. 43 at 3). Plaintiffs agree that the harms being caused by housing male inmates in women's
 10 prisons are "scandalous and incendiary." Plaintiffs' declarations (ECF Nos. 36-1 to 36-12), which
 11 Proposed Intervenor now seeks additional ways to attack after already responding to them (ECF
 12 No. 40), describe a wide variety of ways in which many incarcerated women now face daily fear,
 13 intimidation, and risk of forced sex or pregnancy, due to male inmates with functional penises being
 14 housed alongside women under a law (SB 132) that explicitly forbids Defendant CDCR from
 15 avoiding the obvious risks posed by forcibly confining men and women together.

18 **E. Proposed Intervenor Solicited Statements From A Reported Rape Victim In A**
 19 **Manner That Raises Concerns Of Undue Pressure**

20 Against the wide range of descriptions of events and observations about this dynamic raised
 21 by twelve of Plaintiffs' declarants, Proposed Intervenor would like the Court to let them present
 22 one declaration that disputes (but does not disprove) just one of the events described in Plaintiffs'
 23 declarations. Proposed Intervenor collected this declaration *from a reported sexual assault victim,*
 24 *by the attorney representing the reported sexual assault perpetrator.* That attorney, Jennifer
 25 Orthwein, also has an established working relationship with one or more of the organizations
 26 representing Proposed Intervenor and at least one of the individual proposed intervenors. This
 27 encroachment upon the privacy and autonomy of a reported sexual assault victim (whom Plaintiffs
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1 shielded from gratuitous or premature involvement in this lawsuit by not identifying her), was
2 entirely unnecessary. Statements from the reported victim would surface in a discovery phase of
3 this lawsuit and Proposed Intervenor's counsel had no need to jump ahead of that phase, particularly
4 when the Court has not granted their Motion to Intervene.

5 Plaintiffs' counsel are concerned based on Proposed Intervenor's solicitation of an interview
6 and sworn statement from a reported sexual assault victim, by counsel for the reported perpetrator,
7 that other incarcerated women who have or in the future report being victimized by SB 132-
8 transferred male inmates will receive similar pressure tactics. Combined with recent information
9 from female inmates that CDCR has been issuing retaliatory disciplinary punishments against
10 women who report inappropriate behavior by SB 132-transferred male inmates (see *infra*),
11 Plaintiffs' counsel reasonably believe that accurate testimony of Plaintiffs and witnesses in this case
12 is already being chilled and deterred.

14 That circumstance alone warrants skepticism that Proposed Intervenor's proposed
15 declaration can be taken at face value to "disprove" what other witnesses reported seeing, hearing,
16 and observing about that particular reported sexual assault incident. *If* Proposed Intervenor's
17 Motion to Intervene is granted, there would likely be a point in this case where presenting their own
18 evidence is appropriate. At present, however, Proposed Intervenor is strangers to this lawsuit
19 with no right to offer their own evidence relating to a Motion to Strike filed by Defendants.

21 **F. Proposed Intervenor's Declaration Does Not Refute Plaintiffs' Allegations And**
22 **Evidence Of Continuing Harms To Women Due To SB 132**

23 Proposed Intervenor seek to submit a declaration that is not material to the pervasive,
24 serious harms and risks being posed by women from increasing numbers male inmates with penises
25 placed into CCWF due to SB 132 and thus has no bearing on Defendants' Motion to Strike.
26 Plaintiffs' evidence regarding an alleged rape incident is part of the totality of the circumstances
27 under which one of the SB 132-transferred male inmates, known to women in CCWF (including
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Proposed Intervenor's declarant) as Jonathan Robertson using "he/him" pronouns, threatened to rape a group of ten or more women. This context is relevant regardless of Proposed Intervenor's declaration denying that Robertson sexually assaulted one particular victim. Robertson's rape and violence threats have made many women in CCWF feel sexually vulnerable, frightened, and traumatized. Proposed Intervenor's proposed declaration does not dispute those rape threats nor the impact of those threats on the victimized women. Nor does it address or dispute the report from another female inmate who states that Robertson threatened to kill her and her family members, and gloated about having given her AIDS. *See* PREA Report at pp. 6-7. The fear of many incarcerated women being housed with Robertson is well grounded, and Robertson is only one of many SB 132-transferred males who in no way blend in as "women" and pose a significant threat to incarcerated women,¹ not only by way of male-perpetrated rape and violence but also from negative consequences of even consensual male-female sex in prison, such as sexually transmitted diseases and pregnancies.

The PREA Report filed recently by Plaintiffs' counsel details the observations of multiple victims of rape threats by Jonathan Robertson (at pp. 4-6) and additional sexually abusive incidents involving other male inmates transferred into CCWF due to SB 132 (PREA Report at pp. 7-11). As noted *supra*, we are receiving information from female inmates that CDCR has recently imposed retaliatory discipline against women who report witnessing or being victimized by inappropriate conduct perpetrated by SB 132-transferred male inmates. *See* PREA Report at pp. 17-18.

Women incarcerated under the dictates of SB 132 (including Plaintiffs and Plaintiffs' declarants but also other women continually coming forward), are suffering intensifying physical, sexual, and psychological traumas of sexual harassment, sexual violence, and pregnancy posed by forced housing of male inmates with penises in women's facilities. This is not surprising in light of

¹ *See* PREA Report (attached as Exhibit A to Jackson's Declaration) at pp. 18-20.

the fact that data from CDCR itself discloses that (as of December 2021), approximately one-third of the inmates requesting transfer to women's facilities are criminal sex offenders, a factor that PREA regulations classify as predictive of being sexually abusive. *See* PREA Report at Appendix Bates stamp No. 0184; *see also* 28 CFR 115.41(e). At the same time, approximately 50% of all male PREA sex offenders do *not* have sexual offense criminal histories,² and not all of the reported perpetrators in the PREA Report have sexual offense criminal backgrounds. Women incarcerated in CCWF, then, are facing risks of sexual abusiveness from a broad population of male criminals with functional penises. Plaintiffs' declarations (ECF Nos. 36-1 to 36-12), the PREA Report, and additional information coming to light, show that the situation for incarcerated women forcibly housed with male inmates is not static but reflects steadily worsening conditions. Facts "on the ground" continue coming to light supporting Plaintiffs' allegations that incarcerated women are suffering constitutional-level harms due to SB 132.

At a stage of this lawsuit where Defendants have moved for dismissal in large part by denying that Plaintiffs have suffered any harm that confers standing, Plaintiffs have raised factual reasons supporting their allegations that SB 132 directly imposes serious harm to Plaintiffs and many other incarcerated women. Nothing about Proposed Intervenor's desire to contradict some of Plaintiffs' evidence at this stage of litigation supports dismissal of Plaintiffs' claims or striking Plaintiffs' submitted declarations.

III. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Proposed Intervenor's Motion for Leave to File a Supplemental Reply brief.

² *See* "Federal Bureau of Prisons Annual PREA Report (Calendar Year 2021)," https://www.bop.gov/inmates/custody_and_care/docs/prea_report_2021.pdf (accessed 7/13/22).

1 Dated: July 14, 2022

RESPECTFULLY SUBMITTED,

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4 By: /s/ Lauren Adams
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