IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, MELINDA WASHINGTON, DAVID SMITH and JAMES DOUGLAS,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: 2:11-CV-00224**
ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON,	)	
Defendants.	)	

DEFENDANTS' MOTION TO STRIKE

Defendants ROBERT BENTLEY ("Governor Bentley"), KIM THOMAS ("Mr. Thomas"), BILLY MITCHEM ("Mr. Mitchem"), FRANK ALBRIGHT ("Mr. Albright"), BETTINA CARTER ("Ms. Carter") and EDWARD ELLINGTON ("Mr. Ellington," or collectively with Governor Bentley, Mr. Thomas, Mr. Mitchem, Mr. Albright and Ms. Carter, the "State"), respectfully request that this Court strike from the record certain inadmissible evidence submitted by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, DAVID SMITH, JAMES DOUGLAS and MELINDA WASHINGTON (the "Named Plaintiffs") with their Memorandum of Law in Opposition to Defendants' Motion to Dismiss (the "Response"; Doc No. 37). In support of this Motion, the State submits the following:

1. The Named Plaintiffs attached to their Response a total of eleven (11) exhibits – three (3) of which directly contravene fundamental, black-letter procedural and evidentiary jurisprudence. Specifically, these three (3) exhibits (Exhibit Nos. 1-3 to Named Plaintiffs' Response, collectively referred to as the "Inadmissible Exhibits") are offered for an impermissible use and violate the long-standing principle that Named Plaintiffs cannot avoid the dismissal of this action by submitting materials for review outside the "four corners of the Complaint."[1] Secondly, the Inadmissible Exhibits are submitted without satisfying any of the evidentiary bases for submission, including the evidentiary requirements related to (a) authenticity, and (b) hearsay.

2. The Inadmissible Exhibits upon which the Named Plaintiffs attempt to rely consist of unauthenticated website printouts that Named Plaintiffs purport to be excerpts from the U.S. Department of Health and Human Services website (Ex. 1 to Named Plaintiffs' Response, referred to herein as "Webpages"), unauthenticated correspondence between Ms. Neal, Named Plaintiffs' counsel, and the Alabama Department of Corrections ("ADOC") (Ex. 2 to Named Plaintiffs Response, referred to herein as the "Correspondence"), and an affidavit from Allison Neal, an attorney of record for Named Plaintiffs (Ex. 3 to Named Plaintiffs Response, referred to herein as the "ACLU Affidavit").

[1] The remaining exhibits proffered by the Named Plaintiffs relate to the ADOC's grievance procedures and specifically whether the existing remedies were exhausted by Plaintiffs as required by the PLRA. Only these eight (8) exhibits are permissible under the Eleventh Circuit's precedent allowing this Court to "look beyond the pleadings to relevant evidentiary materials in deciding the issue of proper exhaustion." Brinson v. Darbouze, No. CIV A 2:09-CV-400TFM, 2009 WL 1956389, at *1 (M.D. Ala. July 8, 2009) (citing Bryant v. Rich, 530 F.3d 1368, 1374, 1375 (11th Cir. 2008)). As set forth herein, the Inadmissible Exhibits do not fall within this exception, or any other exception, and are thus due to be stricken from the record.

Named Plaintiffs Cannot Escape Dismissal Relying Upon Matters Outside the Amended Complaint Pursuant to Rule 12(b)(6)

3. In opposing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Named Plaintiffs may only consider the "four corners of the complaint," and should not submit matters outside the pleadings. Speaker v. U.S. Dep't of HHS Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010) ("[I]t is generally true that the Court's scope of the review must be limited to the four corners of the complaint.'" (quoting St. George v. Pinellas Cnty., 285 F.3d 1334, 1337 (11th Cir. 2002))). See also FED. R. CIV. P. 12(d); 5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004).

4. This rule prohibiting the submission and reliance on extraneous documents in opposition to a motion to dismiss is stringent. Only two narrow exceptions to this black-letter rule exist. First, and only in limited circumstances, the Eleventh Circuit has allowed courts to take judicial notice of certain facts when reviewing a motion to dismiss. Horne v. Potter, 392 F. App'x 800, 802 (11th Cir. 2010). "[A] court may take judicial notice of the public record, without converting the motion into one for summary judgment, because such documents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Spechler v. Tobin, 591 F. Supp. 2d 1350, 1356 (S.D. Fla. 2008) (citation omitted). The second exception is similarly narrow and rarely applied. Only in limited circumstances, a court has the discretion to consider documents outside the pleadings if the court finds that two conditions are satisfied: "if [the documents are] (1) central to the plaintiff's claim, and (2) [their] authenticity is not challenged." SFM Holdings, Ltd. v. Banc of Am. Sec., LLC, 600 F.3d 1334, 1337 (11th Cir. 2010); see also Brown v. Brock, 169 F. App'x 579, 582 (11th Cir. 2006).

5. None of these limited exceptions apply to the Named Plaintiffs' Inadmissible Exhibits. First, the public record exception does not apply to the Inadmissible Exhibits. Obviously, neither the Correspondence exhibit or the ACLU Affidavit exhibit would not be considered public records. These two exhibits contain private correspondence between counsel and an affidavit with testimony from *counsel* for the Named Plaintiffs. There is no basis to take judicial notice or consider these exhibits public record and the exception would thus be inapplicable.

6. The Webpage exhibit similarly does not qualify as a public record. In fact, Courts have held that website printouts are judicially noticeable **only for their existence and not for the truth of the matters asserted therein.** Central Delta Water Agency v. U.S. Fish and Wildlife Serv., 653 F. Supp. 2d 1066, 1078 (E.D. Cal. 2009); see also Brown v. Kinchen, No. 09-20945-CIV, 2011 WL 1085342, at *5 n.1 (S.D. Fla. Feb. 9, 2011) (taking judicial notice only of the *existence* of a website of another Court). In this matter, the Named Plaintiffs have specifically offered the Webpages for the truth of the matter asserted, or to support their position on HIV treatment options. Indeed, the Named Plaintiffs cite to the Webpages and specifically ask this Court to take "judicial notice of the fact that HIV can now be successfully managed…" See Response, at p. 3. This submission is impermissible.

7. Also of equal importance is that judicial notice is reserved for specific, undisputed facts, not matters in question. *See* Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997) (noting that matters generally reserved for judicial notice include scientific facts, matters of geography, or matters of political history). This proffer of the Webpages exhibit improperly requests that this Court take judicial notice of facts not yet established, namely the state of HIV "management" and treatment for prisons and inmates. Shockingly, even though Plaintiffs ask

the Court to take "judicial notice of the fact that HIV can be successfully managed," the very Webpages improperly submitted to the Court explicitly caution that "complications from HIV infection remain and possibility" and "there is no cure for HIV." See Response, Webpages Exhibit 1 at pg. 1. The Webpages Exhibit simply does not qualify as a "fact" that is properly considered for judicial notice and Named Plaintiffs' request clearly runs afoul of Eleventh Circuit caselaw. Ultimately, there are no grounds to consider any of Inadmissible Exhibits as public records, including the Webpages, and all three (3) exhibits are due to be stricken from the record.

8. Since these Inadmissible Exhibits are not public record, the Named Plaintiffs must show that such Exhibits are central to their claims and the authenticity of the Inadmissible Exhibits is unquestioned. See SFM Holdings, Ltd, *infra*. This is a showing the Named Plaintiffs also cannot make. First, the Named Plaintiffs produced the Inadmissible Exhibits only in response to Defendants' Motion to Dismiss. The Named Plaintiffs neither attached these exhibits to, nor mentioned them in the Amended Complaint. If the Inadmissible Exhibits are "central to [the Named Plaintiffs]' claims," then they should have been produced before now, not at the eleventh hour. See Renfrow v. First Mortg. Am., Inc., No. 08–80233–CIV, 2011 WL 2416247, at *2 (S.D. Fla. June 13, 2011).

9. In Renfrow, the court refused to take judicial notice of a purchase and assumption agreement that was posted on the Securities and Exchange Commission's website. Id. The court noted that the law did not require the agreement to be filed and concluded that the agreement was not essential to the plaintiffs' claims *since it was not mentioned in the plaintiffs' Second Amended Complaint*. Id. Similarly, the Webpages offered by Named Plaintiffs were not mentioned in their Amended Complaint. Rather, the Named Plaintiffs attached these documents

in a last-ditch effort to save their Complaint from dismissal. The Webpages were offered specifically for judicial notice, not because the Webpages are central to the Named Plaintiffs' claims, but because the Named Plaintiffs have failed to state a claim through the allegations in their Amended Complaint. See Response at p. 3. Similarly, the Correspondence and ACLU Affidavit were offered because the Named Plaintiffs failed to meet their pleading burden in the Amended Complaint. None of these documents were mentioned in the Amended Complaint and could hardly be considered essential to the Named Plaintiffs' claims. The Named Plaintiffs' simply cannot make a showing that the Inadmissible Exhibits are central to their claims.

10. Finally, this last, limited exception also requires that the authenticity of the extraneous documents be "unchallenged." The State certainly challenges the authenticity of the Inadmissible Exhibits for use in response to the State's Motion to Dismiss, and on separate, independent grounds, as discussed below. In conclusion, all three (3) of the Inadmissible Exhibits fail to qualify for the exceptions to the Eleventh Circuit's rule prohibiting the review of extraneous material in response to a motion to dismiss.

The Inadmissible Exhibits Have Not Been Authenticated and Should Be Excluded

11. The Named Plaintiffs Inadmissible Exhibits have never been authenticated, which is another stringent requirement for submission before this Court. Beginning with the Webpages, Named Plaintiffs offer neither testimony nor sworn statements, such as testimony of an employee of the governmental department hosting the site, attesting to the authenticity of the Webpages. As such, these exhibits cannot be authenticated as required under the Rules of Evidence. See, e.g., United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000) (holding that evidence taken from the Internet lacked authentication where the proponent was unable to show that the information had been posted by the organizations to which she attributed it); Sun Protection

Factory, Inc. v. Tender Corp., No. 604CV732ORL19KRS, 2005 WL 2484710 at *6 n.4 (M.D. Fla. Oct. 7, 2005) ("Printouts from a website do not bear the indicia of reliability demanded for other self-authenticating documents under Fed.R.Evid. 902.") (quoting In re Homestore.com, Inc. Sec. Litig., 347 F. Supp. 2d 769, 782 (C.D. Cal. 2004)); Costa v. Keppel Singmarine Dockyard PTE, Ltd., No. 01–CV–11015 MMM (Ex), 2003 U.S. Dist. LEXIS 16295 at *29 n.74 (C.D. Cal. Apr. 25, 2003) (declining to consider evidence downloaded from corporation's website in the absence of testimony from the corporation authenticating such documents); St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) ("Anyone can put anything on the internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation."). Indeed, courts should be especially cautious of taking judicial notice of websites when they are unauthenticated. In re Easysaver Rewards Litig., 737 F. Supp. 2d 1159, 1169 (S.D. Cal. 2010) ("The law allows a court to consider extrinsic evidence in a motion to dismiss . . . however, the rule expressly states that the material must be beyond dispute. In this instance, the requirements of the rule have not been met because Plaintiffs challenge the authenticity of the screenshots.") (internal citations omitted). Likewise, the Named Plaintiffs have also failed to authenticate the Correspondence exhibit, consisting of a series of letters between the Named Plaintiffs' counsel and ADOC and the ACLU Affidavit. In fact, the refusal to consider the ACLU Affidavit on these grounds would be consistent with this Court's jurisprudence. See Lawrence v. Christian Mission Center Inc. of Enterprise, 10–CV–133-MEF, 2011 U.S. Dist. LEXIS 9239 (M.D. Ala. Jan. 31, 2011) (this Court refused to consider an affidavit attached to a response in opposition to a motion to dismiss when ruling on the motion to

dismiss). The Court should strike all three (3) Inadmissible Exhibits on for lack of authentication.

The Inadmissible Exhibits Are Hearsay and Should Be Excluded

12. Along with the numerous reasons set forth herein to strike the Named Plaintiffs' Inadmissible Exhibits, these exhibits are also due to be excluded as inadmissible hearsay under Rule 801 of the Federal Rules of Evidence. Specifically, the Webpages exhibit, the Correspondence exhibit and the ACLU Affidavit are "statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

13. Indeed, courts have held that website printouts are inadmissible hearsay when they are offered to prove the truth of the matter asserted. See Jackson, 208 F.3d at 638; Novak v. Tucows, Inc., No. 06-CV-1909 (JFB) (ARL), 2007 U.S. Dist. LEXIS 21269 at *15 (E.D.N.Y. Mar. 26, 2007) ("Where postings from internet websites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under Fed. R. Evid. 801.") (citing Jackson, 208 F.3d at 638). As explained above, the Named Plaintiffs offer the Webpages exhibit to show the changing knowledge and understanding of the Human Immunodeficiency Virus. This is the matter asserted in the unauthenticated Webpages. The series of letters in the Correspondence exhibit is also hearsay because the Named Plaintiffs offer these letters to show the truth of the matter asserted, that is, that the Named Plaintiffs made certain requests for information. Finally, the Named Plaintiffs offer the ACLU Affidavit to show that Plaintiffs' counsel lacks knowledge about ADOC administrative remedy and grievance procedures and took certain steps to attempt to learn more about these procedures. The ACLU Affidavit is being offered to prove the truth of the matter

asserted therein. Like the Webpages exhibit and the Correspondence exhibit, the ACLU Affidavit is inadmissible hearsay. See United Techs. Corp., 556 F.3d at 1278.

14. The burden is on the Named Plaintiffs to show that each document falls within a hearsay exception. U.S. v. Acosta, 769 F.2d 721, 723 (11th Cir. 1985) ("The burden of proving the [application of a hearsay exception] rests with the proponent of the hearsay evidence . . . ."); Los Angeles News Serv. v. CBS Broad., Inc., 305 F.3d 924, 934, as amended by 313 F.3d 1093 (9th Cir. 2002) ("[T]he proponent of evidence [bears] the burden of establishing a foundation from which to conclude that the statement was within a hearsay exclusion.") (citation omitted); U.S. v. Day, 789 F.2d 1217, 1221 (6th Cir. 1986) ("The proponent of a hearsay statement bears the burden of proving each element of a given hearsay exception or exclusion."); JVC Am., Inc. v. Guardsmark, LLC, No. 1:05-CV-0681-JOF, 2007 U.S. Dist. LEXIS 71529, at *11 (N.D. Ga. Sept. 26, 2007) ("It has always been the burden of the proponent of hearsay evidence to show that it fits within an exception."). The Named Plaintiffs have done nothing to demonstrate the applicability of a hearsay exception to any of these Inadmissible Exhibits. Thus, the Inadmissible Exhibits are all due to be stricken from the record as inadmissible hearsay.

15. In conclusion, as this matter is currently before the Court on the State's Motion to Dismiss brought pursuant to Rule 12(b)(6), the Court's review is limited to the "four corners of the complaint." See Bickley v. Caremark Rx, Inc., 461 F.3d 1325, 1329 n.7 (11th Cir. 2006). None of the Named Plaintiffs' exhibits fall within the limited and narrow exceptions set forth by the Eleventh Circuit and thus each of these exhibits is due to be stricken from the record.

WHEREFORE, Defendants respectfully request that the Inadmissible Exhibits (Exhibits 1, 2, and 3 attached to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss) be

stricken from the record and not considered by the Court in ruling on Defendants' 12(b)(6) motion.

Respectfully submitted on this 8th day of July, 2011,

/s/ Anne Adams Hill
One of the Attorneys for Defendants

/s/ William R. Lunsford
One of the Attorneys for Defendants

William R. Lunsford
David B. Block
MAYNARD, COOPER & GALE, P.C.
655 Gallatin Street
Post Office Box 18668 (35804-8668)
Huntsville, Alabama 35801-4936
Telephone (256) 551-0171
Facsimile (256) 512-0119

Anne Adams Hill
Scott L. Rouse
ALABAMA DEPARTMENT OF CORRECTIONS
Legal Office
301 South Ripley Street
Montgomery, AL 36104

Mitesh B. Shah
Janine A. McKinnon
MAYNARD, COOPER & GALE, P.C.
2400 Regions/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203
Telephone (205) 254-1000
Facsimile (205) 254-1999

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected by email to the CM/ECF participants or by postage prepaid first class mail to the following this the 8th day of July, 2011:

Rose Saxe
The Aids Project of the ACLU Foundation, Inc.
125 Broad Street, Eighteenth Floor
New York, NY 10004

Allison Neal
American Civil Liberties Union of Alabama
207 Montgomery Street, Suite 910
Montgomery, AL 36104

Carl Takei
ACLU National Prison Project
915 15th St NW - 7th Floor
Washington, DC 20005

Margaret Winter
ACLU National Prison Project
915 15th St NW - 7th Floor
Washington, DC 20005

Robert David Segall
Copeland Franco Screws & Gill
PO Box 347
Montgomery, AL 36101-0347

/s/ William R. Lunsford
Of Counsel