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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

FRANK CLEMENT, Plaintiff, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS, et. al., Defendants.	No. C 00-1860 CW PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATE: August 9, 2002 TIME: 10 a.m. BEFORE: Hon. Claudia Wilken

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INTRODUCTION

Mail is a prisoner's lifeline to the outside world. It is often the only way that a prisoner can obtain news of distant family and friends, or information on topics of interest ranging from health, news or religion, to simple jokes or poems. To provide this type of material, correspondents often may enclose materials clipped from newspapers or, more recently, downloaded from the Internet. Correspondents may also wish to enclose a letter from a mutual friend or family member or, more recently, a hard copy of an email from them. Many California state prisons permit their prisoners to receive this type of information so long as the content of the material passes muster. Pelican Bay State Prison, however, prohibits prisoners from receiving these types of materials, regardless of their content, if the materials enclosed in the letters were printed from the Internet.

The Pelican Bay regulation is arbitrary, irrational and therefore an unconstitutional abridgement of the First Amendment. Prison security does not depend on whether the article from the New York Times that a mother sends her son in prison was clipped from a hard copy of the newspaper or, because she did not have enough money to subscribe to the newspaper, downloaded from the online version of the New York Times on a computer at her office. Nor is there a meaningful difference from the prison's perspective between a hard copy of an email enclosed in a letter, and that same missive re-typed before being enclosed. Nevertheless, Pelican Bay categorically prohibits prisoners from receiving any mail that contains material printed from the Internet, regardless of its content. The regulation is peculiarly irrational in that oft-times a letter's enclosure printed from the Internet cannot be distinguished from the same enclosure printed from a library or retyped by the sender. Worse yet, the regulation prevents prisoners from receiving those materials that increasingly are available only on the Internet, such as the information on preventing prisoner rape published on the website of an organization named Stop Prisoner Rape, or information that government agencies publish only on their websites.

By focusing on the means by which material is reproduced, rather than its content, Pelican Bay's regulation irrationally deprives prisoners of access to information. Security is not an issue. If the prison fears a deluge of bulky letters with reams of material downloaded from the Internet that may overburden its mail staff checking for illicit content, the simple answer is to limit the number of pages of enclosures permitted in any given letter. As the Ninth Circuit held in Morrison v. Hall, 261 F.3d 896, 903-4 (9th Cir. 2001), in striking down a ban on prisoner's receiving bulk mail, "prohibiting prisoners from receiving mail based on the postage rate at which mail was sent is an arbitrary means of achieving the goal of volume control." In accord is Crofton v. Roe, 170 F.3d 957, 960 (9th Cir. 1999). It is as if the prison sought to reduce its workload by permitting only materials printed on a Gutenberg printing press or mail sent via Pony Express, in the hope that fewer people would go to the trouble of communicating with prisoners.

Nor is the policy justified by any concern about the traceability of emails or other information downloaded from the Internet. The material at issue is always sent as an enclosure to a letter sent via the U.S. mail. Prisoners do not have direct access to the Internet (and we do not challenge that restriction here). If the prison wants to trace the sender of the letter, it can do so regardless of the enclosure. If, for some reason, the prison wants to trace the enclosure, separate from tracing the letter, the truth is that it is much easier to trace an email than other types of permitted enclosures, such as a piece of paper with no identifying marks.

I. STATEMENT OF FACTS

1. As early as 1998, Pelican Bay State Prison ("Pelican Bay") adopted a policy that materials printed from the Internet and sent into the institution were considered "unauthorized publications" and could not be enclosed in letters sent to prisoners from the outside. See Am. Compl., ¶ 1. The prison changed this policy several times over the next two years, and the most recent version was formalized in a memo from the Warden in February 2001. Mulligan Decl., Ex. C, McGrath Memo, dated 2/13/01; see e.g., Collins v. Ayers, Del Norte Superior Court, Case No. 98-273-x, Transcript of Evidentiary Hearing,

May 27, 1999 (attached to Request for Judicial Notice), at 13, 39 (describing changing policy) ("Collins' transcript"). A similar policy was implemented at San Quentin State Prison during the summer of 2001. Declaration of Beverly Lozano, ¶ 6 ("Lozano Decl.").

2. Pelican Bay's policy bans prisoners from receiving hard-copies of documents downloaded from the Internet, including hard-copies of emails, regardless of content. Lozano Decl., ¶ 6. Given the scope of the information available on the Internet, and the widespread, often exclusive use of the Internet by many businesses, non-profit organizations and government agencies, the ban substantially impairs prisoners' abilities to receive important information. Declaration of Mike Godwin, ¶ 6,7 ("Godwin Decl."); Lozano Decl., ¶ 5-6. Prisoners are not permitted to access the Internet directly. Collins' transcript at 6. To obtain information from the Internet, they depend on friends and family to send them material printed from the Internet and enclosed in letters via the U.S. Mail. See e.g., Lozano Decl., ¶ 9.

3. Information of vital interest to prisoners is often available only on the Internet. For example, Stop Prisoner Rape, a national non-profit group that helps prisoners prevent prison rape and counsels victims of prison rape, only publishes its materials on the Internet. Declaration of Lara Stemple, ¶ 2-3 ("Stemple Decl."). The organization cannot afford the substantial costs of publishing its materials in paper form and mailing them to prisoners across the country. Id. at ¶ 8. Instead, it refers families and friends of prisoners to its website so that they can download the materials and mail them to the prisoner. Id. at ¶ 4. Pelican Bay's ban on materials printed from the Internet thus puts this information off-limits for prisoners.

4. In other cases, as a practical matter, information of vital interest to prisoners is available only on the Internet. Lozano Decl., ¶ 3. Many organizations and service-providers provide information to the public first and foremost through the Internet. Id. For example, the California Supreme Court publishes its rules relating to procedures in death penalty cases on its website. Id. at ¶ 10. Even defendant CDC responds to requests for information by referring callers to the Internet. Id. at ¶ 8.

5. Beverly Lozano, a death penalty activist in Dixon, California, corresponds with San Quentin death row prisoner Scott Collins. Id. at ¶ 1. Before San Quentin implemented its Internet policy, she often sent him materials downloaded from the Internet concerning his attempt to have habeas counsel appointed and other information relevant to his habeas petition. Id. at ¶ 11. In her experience, organizations and service-providers, including the CDC, have not been willing to mail her hard-copies of requested information. Id. at ¶ 8. In addition, she has found that there is substantial delay and cost associated with attempting to obtain legal and other materials from the library. Id. at ¶ 10.

6. Email has replaced paper mail as the primary method of communication for many people. Godwin Decl., ¶ 5. As with the Internet, email allows distant people to obtain and exchange information reliably, quickly and inexpensively. Id. For example, Larry Stiner, a prisoner at San Quentin, has a family in Surinam. Declaration of Sheilah Glover, ¶ 3 ("Glover Decl."). The only way that Watani (as Stiner is known) can receive timely information about the welfare of his children or participate in decisions about their upbringing is through emails sent by a social service worker in Surinam to Watani's friend in California, Sheilah Glover. Id. at ¶ 8. However, San Quentin prohibits Glover from forwarding the emails to Watani. Id. at ¶ 8. Similarly, when Watani's eldest daughter sent an email letter to Watani via Glover, prison authorities returned it to Glover because of the ban on Internet material. Id. at ¶ 9.

7. The named plaintiff, Pelican Bay prisoner Frank Clement, filed an inmate grievance in January 1999 when his pen-pal correspondence was returned to the sender due to the new policy. Am. Compl. ¶ 3. Clement had subscribed to an Internet pen-pal service which allows a prisoner to post a web page and solicit pen-pal correspondents. Id. Potential correspondents respond by sending an email to the prisoner's web page, which is then downloaded by the service-provider and mailed to the inmate via the U.S. Postal Service. Id. at ¶ 8. On January 10, 1999 and April 6, 1999, the prison mailroom rejected letters sent by the Internet service to Clement containing messages downloaded from

Clement's web page. Id. at ¶ 3, 4. Clement filed a grievance which was ultimately denied by prison authorities. Id. at ¶ 5, 6.

8. Obtaining information via incoming mail serves important rehabilitative and integrative functions for prisoners. It encourages prisoners to maintain ties to their families and the community, helps prisoners acquire skills in prison, and allows them to consult with an attorney. See e.g., Collins' transcript at 11.

9. The majority of other state prisons in California, including other high security prisons like Pelican Bay, do not have such a policy prohibiting incoming mail containing Internet-generated materials. Declaration of Deirdre Mulligan, ¶ 4 ("Mulligan Decl.").

10. For all of the Internet-generated materials identified above, Pelican Bay Warden Auggie Lopez admits that the information would be allowed if the materials were recopied by hand. Collins' transcript at 14-15. Thus, the Internet policy bans the information solely on the basis of the medium by which it was sent. Ultimately, the policy discriminates against persons who use modern technology to provide information to and otherwise communicate with prisoners. If a correspondent photocopies a poem, for example, or an article from Time magazine, and sends it to a prisoner, the material will be allowed. Collins' transcript at 43. By contrast, if a correspondent prints the same poem or article from the Internet and encloses it in a letter to the prisoner, the material will not be allowed.

II. THE STANDARD FOR SUMMARY JUDGMENT

Summary judgment is not proper unless the record shows the absence of any "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). All inferences are drawn in favor of the non-moving party. All allegations of the nonmoving party that conflict with those of the moving party are taken as true. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). At this stage, the district court may not evaluate the evidence or make determinations as to the relative

weight it should be accorded; instead, "the court's role is limited to determining whether there is a genuine issue for trial." Malik v. Brown, 16 F.3d 330, 334 (9th Cir. 1994).

III. ARGUMENT.

A regulation that impinges on a prisoner's constitutional rights is valid only if it is reasonably related to the prison's legitimate penological interests. Turner v. Safely, 482 U.S. 78, 89 (1987). Four factors determine the reasonableness of the regulation:

> First, there must be a "valid and rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it…
>
> A second factor relevant in determining the reasonableness of the prison restriction … is whether there are alternative means of exercising the right that remain open to prison inmates…
>
> A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other prisoners, and on the allocation of prison resources generally…
>
> Finally, the absence of ready alternatives is evidence of the reasonableness of the prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns…

Id. at 89-90. Although the judgment of prison officials is entitled to some deference, this "reasonableness standard is not toothless." Thornburgh v. Abbott, 490 U.S. 401, 414 (1989).

Defendants have presented no evidence whatsoever in support of their motion for summary judgment. Instead, they rely solely on the California Court of Appeal's decision in In re Collins, 86 Cal. App. 4th 1176 (2001). That decision, however, is no substitute for evidence on the factual question whether the prison's policy satisfies Turner. As we show below, neither the prison's asserted concern about security nor its claim that the policy is needed to prevent an unmanageable workload are legitimately served by this irrational policy. The only interest it advances is preventing prisoners from obtaining any and all information generated on the Internet. That interest is not a legitimate penological interest. Any evidence that defendants may try to present with their reply brief would, at most, create disputed factual issues. If defendants submit evidence with their reply brief, we request an opportunity to take discovery relating to it before this motion is decided.

A. Information Available on the Internet is Important to Prisoners.

Information available on the Internet is as "diverse as human thought," with the capability of providing instant access on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls." Reno v. ACLU, 521 U.S. 844, 851-2 (1997). In today's world, most business and non-profit organizations, as well as state and federal government organizations, provide information efficiently and inexpensively to clients and constituents over the Internet. Godwin Decl., ¶ 5.

A prisoner's constitutional right to receive information via incoming mail is undisputed. See e.g., Prison Legal News v. Cook, 238 F.3d 1145, 1149 (9th Cir. 2001). Because prisoners do not have access to the Internet inside the prison (a restriction not challenged here), they must rely on friends and family members to download relevant information and send it to them via the U.S. mail. If that link to the outside world and the wealth of information available on the Internet is broken—as the challenged restriction purports to do—the constitutional rights of prisoners are plainly violated.

B. The Prohibition on Receiving Materials Printed from the Internet is Irrational.

The burden of proof for challenges to prison regulations is set forth in Frost v. Symington, 197 F.3d 348 (9th Cir. 1999). The initial burden is on the State to put forth a "common-sense" connection between its policy and a legitimate penal interest. If the State does so, plaintiff must present evidence that refutes the connection. Id. at 357. The State must present enough counter-evidence to show that the connection is not so "remote as to render the policy arbitrary or irrational." Id. On summary judgment, defendants must also show the absence of any material triable issues.

Defendants have not and cannot meet their initial burden of showing a "common-sense" connection, let alone the lack of disputed facts. No legitimate penological interest is served by discriminating against materials available on the Internet in favor of those available in a library, or against electronic mail in favor of regular mail. In Crofton v. Roe, 170 F.3d 957 (9th Cir. 1999), the Ninth Circuit upheld an order striking down a ban on

prisoners receiving publications paid for by family members or others. Finding that the ban did not reasonably relate to the valid penological interest of preventing contraband, the district court observed: "the prison offered 'no rational distinction between the risk of contraband if an inmate orders a publication directly from the publisher or if an inmate's family member orders a publication directly from the publisher." Crofton, 170 F.3d at 960. The same is true here, with respect to defendants' claims.

Defendants suggest two connections—the increased volume of mail that would result if correspondents are permitted to enclose material downloaded from the Internet, and the supposed difficulty of tracing the sender of an email, the hard copy of which is enclosed in a letter. As we show below, neither concern is sufficient to create a common sense connection between the policy and a legitimate penal interest. Failing to make the requisite threshold showing of a rational connection, the State cannot meet the first prong of Turner—and the inquiry is over. See Prison Legal News, 238 F.3d at 1151 ("[b]ecause the Department and its Officials have failed to show that the ban on standard mail is rationally related to a legitimate penological objective, we do not consider the other Turner factors"). Accord Armstrong v. Davis, 257 F.3d 849, 874 (9th Cir. 2001) ("We agree… that prison authorities cannot avoid court scrutiny under Turner by reflexive, rote assertions [regarding the prison's interests].")

1. Potential volume of mail.

Any concern with a potential influx of enclosures to letters that will tax their ability to screen incoming mail for prohibited content can be addressed by a neutral limit on the volume of mail. As noted, the Ninth Circuit in Morrison struck down a regulation prohibiting bulk rate and third and fourth class mail, on the ground that "prohibiting prisoners from receiving mail based on the postage rate at which mail was sent is an arbitrary means of achieving the goal of volume control." Morrison, 261 F.3d at 903-4. Similarly, a regulation barring "gift mail" was struck down in Crofton on the identical ground that "the prison could instead regulate the number of gift publications that inmates

could receive" rather than prohibiting them outright. Crofton, 170 F.3d at 960. It is just as arbitrary and illogical to regulate volume by having the permissibility of mail turn on whether the enclosures were printed or photocopied from a source other than the Internet. As in Morrison and Crofton, the prison can simply place non-discriminatory limits on the number of pages of enclosures permitted regardless of the means by which the enclosures were reproduced.

2. Traceability of email.

Nor is there any common sense connection between the regulation and tracing the source of letters. First, defendants screen mail primarily based on content, not the identity of the sender.[1] Collins' transcript at 36. They do not even require return addresses on letters—which they would do if they were interested in tracing senders. Collins' transcript at 39; Mulligan Decl. Ex. D, O.P. 205, sect. IV, L. In screening mail for content, it is easier to read material downloaded from the Internet than handwritten enclosures prepared in some other fashion. So the regulation is counterproductive if that is the State's purpose.

Second, aside from the ban on material printed from the Internet, the only other type of enclosure banned by defendants regardless of content is correspondence from another prisoner. 15 C.C.R. § 3133. Because prisoners cannot themselves send email, Collins' transcript at 6, prohibiting the enclosure of emails in no way addresses a concern that allowing prisoners to receive hard copies of emails will circumvent the ban on inter-prisoner correspondence.

Third, to the extent defendants have an interest in tracing the source of an enclosure to a letter, it is easier to do so for a hard copy of an email than for other types of enclosures, such as a typed sheet with no identifying marks. As explained in the Godwin Declaration, most email messages include the sender's email address in the header of the email. Godwin

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[1] See also Mulligan Decl., Ex. D, Pelican Bay Operational Procedure ("O.P.") 205 sect. IV, U(1)(a), (disallowing mail that contains information posing a threat of physical harm to another inmate or staff person), O.P. 205 sect. IV, U(1)(c), (disallowing mail that concerns escape plans), O.P. 205 sect. IV, U(1)(g) (disallowing mail that contains coded messages that are not decipherable by prison staff); see also 15 C.C.R. § 3006.

Decl., ¶ 10. In addition, the major providers of email services, including AOL, Pacific Bell, Hotmail, and Yahoo, include a coded Internet Protocol address ("IP address") in the header of every email. Id. at ¶ 12. This IP address, assigned by the service provided to the sender whenever he sends an email, is not readily apparent from the face of the email and most senders do not realize that it is included in the email. The IP address allows the recipient of an email to identify the sender by contacting the service provider. Id. at ¶ 13. The hidden, embedded identifier makes the sender of an email more traceable than enclosures that have no identifying characteristics such as a typed sheet of paper with only text.[2] Id. at ¶ 9.

In short, defendants can offer no basis for disparate treatment of the enclosures of hard copies of electronic mail and enclosures of letters written the old-fashioned way. The former poses no greater risks to the prison than the latter.[3]

3. In re Collins.

Instead of offering any evidence on these dispositive points, defendants only cite the state court of appeal's decision in In re Collins. That decision is insufficient to carry defendants' burden for several reasons. (1) It is not evidence. See United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994). (2) As a state court decision, it is not binding on this Court. See Street v. New York, 394 U.S. 576, 583 (1969). (3) Under principles of issue

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[2] By way of contrast, no technological sophistication is required to make it almost impossible to trace the source of a piece of mail sent through the U.S. postal service. Godwin Decl., ¶ 9. The sender need only use a false address, use water to moisten the flap of the envelope and the stamp, and mail the letter from a distant post office or one that handles a large volume of mail. As the trial court in Collins noted, the inability of the FBI to locate or identify the Unabomber based on his use of the U.S. mail is a potent example. Collins' transcript at 29. The inability of law enforcement to trace the source of the anthrax mailings last fall, despite Herculean efforts, is a more recent example.

[3] Other high security facilities allow email and other materials downloaded from the Internet. Neither High Desert State Prison nor Mule Creek State Prison, both of which are maximum security facilities, prohibit prisoners from receiving Internet-generated materials. Mulligan Decl., Ex. E. While not conclusive, "policies followed at other well-run institutions are relevant to a determination of the need for a particular type of restriction." Morrison, 261 F. 3d at 905.

preclusion, it is not binding on plaintiff Clement since he was not a party to that litigation. See Hydranautics v. FilmTec Corp., 204 F.3d 880 (9th Cir. 2000). (4) Collins only challenged the ban applied to email whereas Clement challenges the ban as to all Internet-generated materials. (5) Unlike Clement, Collins did not present any evidence to refute the evidence presented by the state, an important point noted by the court of appeal. See Collins, 86 Cal.App.4th at 1184. (6) Collins was not decided on summary judgment. Perhaps most importantly, the appellate decision in Collins was demonstrably wrong. The trial court, after hearing the evidence, held that the ban on sending prisoners hard copies of emails was unconstitutional in part because any concern about an increased flow of material could be easily addressed by placing a "numerical limitation on the volume of email-related correspondence an inmate could receive." In re Collins, 86 Cal.App.4th at 1186. The Court of Appeal reversed, on the mistaken basis that trial court's alternative was "not a viable alternative" because, by another regulation, a state regulation prohibits the prison from limiting the number of people who may correspond with a prisoner. Id.

The court of appeal's reasoning was wrong for two reasons. First, the regulation does not prohibit a limitation on the number of **pages** (the alternative suggested by the trial court); it only prohibits a limitation on the number of **correspondents**. Thus, there was no obstacle to the trial court's proposed alternative. Second, even if the regulation did prohibit the imposition of page limits, that regulation would not save an otherwise unconstitutional ban on Internet-generated materials. To allow the prison to do so would be the ultimate bootstrap. Defendants cannot take a regulation that is unconstitutional because of other less restrictive alternatives and make it constitutional by banning the other alternatives.

C. The Prohibition on Receiving Materials Printed from the Internet Fails to Satisfy the Other *Turner* Requirements.

As noted above, "the first Turner factor is the *sine qua non*" in determining the constitutionality of a prison regulation. Morrison, 261 F.3d at 901. Here, there is no rational connection between the prison's interests in either security or workload. Defendants motion for summary judgment must fail on this ground alone. However, as shown below, the ban on Internet materials also fails to satisfy Turner's other requirements as well.

1. There are no effective alternatives for providing prisoners information available through the Internet.

Non-profits, public institutions and other service-providers are increasingly turning to the Internet as a primary means of reaching their constituencies. Godwin Decl., ¶ 5; Lozano Decl., ¶ 3, 5. Defendants' regulation is invalid on its face because prisoners do not have an effective alternative for receiving such information. Watani relies on emails sent from Surinam to allow him to participate in helping his children and their caretakers make important decisions about their lives in Surinam while he is imprisoned in California. Glover Decl., ¶ 8-10. He cannot rely on the Surinam postal service. Id. Similarly, email provides a means for his children to keep in touch with him in a situation where, because of inefficiencies and distance, the postal system provides no viable alternative. Id. It can literally take weeks for a simple letter to make the journey from Surinam to Marin County. Id.

Scott Collins relies on legal information regarding his case downloaded from the California Supreme Court website, among other sources. Lozano Decl., ¶ 9-11. It is time-consuming, expensive and, depending on how recent the materials are, in some cases impossible for him to obtain those same materials from a library. Id. at 10. Prisoners across the state can learn about defending themselves from prison rape in materials downloaded from the Stop Prisoner Rape website. Stemple Decl., ¶ 5. SPR does not

publish hard-copy brochures. Id. at ¶ 3,8. For these prisoners, and many others like them, there is no practical alternative to information downloaded from the Internet and sent by mail to the prison. Id. at ¶ 14.

2. Defendants cannot establish the third prong of the Turner test regarding the impact on prison resources.

The third prong of the Turner test looks at "the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources." Prison Legal News, 238 F.3d at 1149. Defendants have provided no information concerning the impact on Pelican Bay staff of allowing Internet-generated materials. It appears that the prison receives only 500 pieces of mail per month containing Internet-generated materials, out of a total pool of 300,000 pieces of incoming mail. Mulligan Decl. at ¶ 9. As discussed above, the review process for both email and other Internet-generated materials is the same: prison officials scan the materials for prohibited content. As Morrison court noted, "[t]he reality is that all incoming mail must be sorted." Morrison, 261 F.3d at 903. Like Morrison, where the amount of incoming materials is "relatively insignificant," the regulation is unduly burdensome. See id. But, as noted above, if the amount of material was significant, limiting the number of pages of enclosures provides a simple remedy that can be applied equally to all mail enclosures without prohibiting enclosures simply because they were printed from the Internet.

3. Defendants have an obvious alternative to protect legitimate prison interests and thus the regulation is unreasonable.

While the Turner test does not require defendants to employ the least restrictive means to protect penological interests, evidence of an "alternative that fully accommodates the prisoner's rights at a de minimis cost to valid penological interests" is evidence that the regulation is unreasonable. Turner, 482 U.S. at 92. Where obvious alternatives exist, the court may conclude that defendants' regulation was an "exaggerated response" to the alleged problem. Id. at 90. That is certainly the case here.

As shown above, the alternative of limiting the volume of mail rather than discriminating against the Internet as a source of enclosures protects any legitimate interest that defendants may have.

CONCLUSION

For these reasons, defendants' motion for summary judgment should be denied.

Dated: June 17, 2002

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