UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUNDAY HINTON, on behalf of herself and others similarly situated, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	No. 1:21-cv-1295-JDB

REPLY IN SUPPORT OF PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER

The entire opposition from the Department of Corrections (DOC) to Plaintiff's application for a temporary restraining order rests on a single factual assertion that is dubious on its face and of highly suspect provenance: that Plaintiff Sunday Hinton, despite repeatedly asserting that she wanted a transfer to the women's unit, *see* ECF 3-8 (Hinton Decl.) ¶¶ 5-7, 12, and filing a grievance seeking that relief, *id.* ¶ 7, and filing a lawsuit to the same end, ECF 1, in fact did not want that at all and merely wanted to be moved to a men's unit where a friend of hers is housed. All of this is implausible enough on its own, but DOC's conduct underlying its claim introduces a problem of a different order of magnitude: all of the support for DOC's factual assertion is based, by its own admission, on its brazen attempt to settle an aspect of Ms. Hinton's case directly with Ms. Hinton herself, a represented party, without involving her lawyers. Ms. Hinton's supplemental declaration, filed with this reply, fills in the gaps in DOC's selective account of its aggressive attempt to moot this motion, and explains that she signed the waiver form DOC now touts, despite having explicitly asked for and been refused access to her lawyers, because she believed it was the only way to improve, even marginally and inadequately, her dangerous situation. But the Court need not take

Ms. Hinton's word for it, because DOC's improper conduct is apparent from its own declaration, which recites how four DOC officials convened a meeting yesterday morning, without her lawyers, at which it procured Ms. Hinton's "waiver" of her rights. ECF 14-1 (Reid Decl.) ¶ 9. Based on that impropriety, the Court should assign no weight to DOC's representations about Ms. Hinton's wishes or the waiver form DOC procured in violation of the basic norms of our adversary legal system.

Other than its insistence on Ms. Hinton's change of heart, DOC offers no argument disputing any other aspect of Ms. Hinton's TRO application. It has nothing to say about the merits of her claims or about the danger she faces. Instead, DOC's brief discussion of each of the equitable-relief factors and of the PLRA are all premised on the idea that Ms. Hinton does not actually want the relief she seeks—in other words, that Ms. Hinton expressed her wishes through her purported waiver on May 12, when DOC officials met with her to discuss the resolution of her case without inviting (or, indeed, even notifying in advance) her lawyers.

If the Court has any doubts about Ms. Hinton's wishes, it should speak via remote technology with Ms. Hinton at tomorrow's status hearing. But that is not necessary: the Court can easily conclude, on the papers, that (1) DOC's evidence should be disregarded as tainted by its improper conduct, and (2) because the remainder of Ms. Hinton's arguments stand unchallenged, the TRO is warranted for the reasons provided in her application. This is the appropriate course, as Ms. Hinton has amply demonstrated the urgency of her situation. Moreover, rejecting out of hand supposed "evidence" procured through underhanded conduct like DOC's sends a strong message about the high ethical standard to which the Court will hold not just lawyers but also litigants—particularly institutional parties like DOC, which cannot profess not to know better—and thereby vindicates the integrity of the Court's proceedings.

The TRO should be granted without delay.

SUPPLEMENTAL STATEMENT OF FACTS

Defendant's account of the meeting between Ms. Hinton and DOC officials on May 12, 2021 is a misleadingly incomplete view of Ms. Hinton's preferences that ignores her lack of real choice in a room with four DOC officials and no counsel. That morning, Ms. Hinton met with Charlene Reid, Traci Outlaw, Lieutenant Moore, and the chief of case management at CDF, where Ms. Hinton informed them that she wished to be housed in a women's unit at CTF. Supp. Hinton Decl. ¶ 4. ("I explained to them in detail why I wanted to go to a women's unit."). Ms. Outlaw discouraged Ms. Hinton from moving to the women's side by telling her that she could be sexually assaulted there. *Id.* ¶ 6. Ms. Hinton responded that she had already been harassed by the men, *id.* ¶ 3, and explained that the men's side was more dangerous because, for example, she could be pressured into performing oral sex. *Id.* ¶ 6. Nevertheless, the DOC officials still refused to transfer her to a women's unit. *Id.* ¶ 7.

Now understanding that there was no option for her to be transferred to a women's unit, Ms. Hinton asked the officials if they would allow her to be housed in a men's unit with a transgender friend of hers. *Id.* ¶ 7. The officials agreed, reiterating that they would not put her on the women's unit, before stating, "we're going to make that happen for you, but you need to sign a waiver" stating that she wanted to be housed in a men's unit. *Id.* ¶ 8. Ms. Hinton requested the presence of counsel because she was confused, particularly as she "had just told them [she] wanted to be housed with the women." *Id.* ¶ 9. DOC officials informed her that speaking with counsel was not an option, and she signed the waiver because she thought "it would be a little safer" to be housed with her transgender friend than on the general population men's unit. *Id.* ¶ 9. It was only

after this meeting that undersigned counsel was informed of the meeting's existence and of what had occurred.

Defendant shoehorns this entire interaction into one line: "THC asked Ms. Hinton about her housing preference and she again expressed her desire to be housed on the unit with her friend . . . in a men's housing unit." ECF 14 (Def.'s Opp. To TRO) at 5. But Ms. Hinton's own sworn declaration demonstrates that this is misleading. Her supposed "expressed . . . desire" to be housed in a men's unit with her friend came only *after* (1) she was told that being housed in a women's unit was absolutely not an option; and (2) she requested and was denied the opportunity to consult with counsel. DOC was well aware of her preference to be housed on a women's unit; she had informed multiple officials previously of this request, ECF 3-8 (Hinton Decl.) ¶ 12, had filed an emergency grievance reiterating the same request, ECF 3-8 (Hinton Decl.) ¶ 7 & Ex. A, and had filed this lawsuit, with a sworn declaration, making her wishes clear.

Ms. Hinton's difficulties reaching her counsel—who of course can only speak with her when actively facilitated by DOC—have continued, as DOC failed to facilitate a call between Ms. Hinton and her counsel between the filing of the Defendant's opposition to the TRO and 3:26 pm this afternoon (with Plaintiff's reply brief due at 4 pm). Plaintiff's counsel had previously scheduled two separate calls with Ms. Hinton on May 13, 2021, with the goal of providing this Court with as recent an update as possible on Ms. Hinton. Supp. Cicurel Decl. ¶ 2. As of 3:26 pm, these calls had not come, as documented in the attached declaration, despite at least 9 calls and emails to DOC officials throughout the course of the day, *id.* ¶¶ 3-4, 6-8, 11. Plaintiff's counsel additionally reached out to opposing counsel through urgent emails and calls, *id.* ¶¶ 5, 9-10; opposing counsel also could not confirm an opportunity to speak with Ms. Hinton. Given that Ms. Hinton was denied access to counsel just yesterday when she supposedly expressed her preference

for her current housing situation, DOC's intractable approach is particularly troubling. As of 3:26 pm., Plaintiff's counsel has not been able to access their client. *Id.* ¶ 12. Accordingly, the declaration from Ms. Hinton submitted with today's filing is based on a simultaneous transcription by one of undersigned counsel of a call with Ms. Hinton yesterday, May 12, before DOC's opposition was filed. (Counsel notes that as this brief and its exhibits were being finalized for filing by the court's 4 pm deadline, Ms. Hinton was finally able to call one of undersigned counsel at 3:30 pm.)

ARGUMENT

The only basis for DOC's opposition to the TRO is tainted evidence procured unethically through a coercive meeting with a represented party to make an end run around her lawyers in trying to get her to settle the emergency-relief aspect of her case. The remainder of DOC's arguments rest entirely on its compromised factual premise, which this Court should not entertain.

I. DOC's Attempt to Induce Ms. Hinton to Settle Her TRO Claim and Waive Her Rights in the Absence of Her Counsel Was Improper and No Evidence Resulting from DOC's Gambit Should Be Considered.

A plaintiff's release of her constitutional claims must be voluntary, deliberate, and informed. *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 213 (4th Cir. 2007). In general, courts strongly disapprove of coercive conduct by one party with the intent to force settlement. *See Ingenuity13 LLC v. Doe*, 651 F. App'x 716, 718, 720 (9th Cir. 2016) (finding district court acted within its discretion in imposing sanctions on principals of copyright holders who engaged in abusive litigation tactics to pressure settlement); *Ponte v. Sage Bank*, 255 F. Supp. 3d 344, 351 (D.R.I. 2015) (sanctioning party who participated in "strong-arm tactic" to leverage settlement by reading privileged information against attorney's advice). Such conduct is especially egregious where agreements are reached in the absence of counsel, which risks "destroying the vital attorney-

client relationship." *Loatman v. Summit Bank*, 174 F.R.D. 592, 601 (D.N.J. 1997) (sanctioning defendant after senior vice president of defendant-bank made settlement offers to plaintiff outside the presence of her attorney); *see also Fair Hous. Council of Cent. California, Inc. v. Tylar Prop. Mgmt. Co.*, 975 F. Supp. 2d 1115, 1124 (E.D. Cal. 2012) (denying defendants' motion to enforce settlement in part because representatives of defendant-corporation presented the settlement to plaintiffs as take-it-or-leave-it offer when plaintiffs' attorneys were not present); *Stribling v. S. Pac. Transp. Co.*, 1988 WL 17097 at *2 (9th Cir. Feb. 24, 1988) (mem.) (reversing grant of summary judgment based on signed settlement where plaintiff "did not understand the release to include her case, and her attorney was not present at the signing to advise her").

DOC acted coercively by compelling Ms. Hinton, under threat of remaining in a dangerous housing situation, to sign a waiver indicating her preference to be housed with her friend, in an attempt to moot her claims and outside the presence of her lawyers. In other cases, courts have refused to give effect to documents signed by litigants in similar circumstances. *See, e.g., Davis v. Oregon*, 2009 WL 2475442, at *4 (D. Or. Aug. 11, 2009) (finding dispute of fact regarding whether plaintiff's execution of settlement agreement was voluntary, where plaintiff was incarcerated when he received agreement, had never met his attorney in person, and did not speak to his attorney about the settlement because it was sent to him directly); *see also Jones v. Taber*, 648 F.2d 1201, 1203-05 (9th Cir. 1981) (reversing summary judgment on validity of incarcerated plaintiff's release of § 1983 claims, where plaintiff had been put into special segregation facility before settlement meeting with prison officials, and counsel was not present at meeting); *Smith v. Homes*, 2014 WL 4851503, at *12 (D. Nev. Sept. 26, 2014) (absence of counsel militates in favor of finding that release of claims by inmate litigant was not voluntary and deliberate). Ms. Hinton's request that her lawyers be present—a request that DOC refused—highlights the inappropriateness of

DOC's conduct. DOC's meeting with Ms. Hinton to get her to sign a waiver, without allowing Ms. Hinton an opportunity to consult her lawyers, lays bare DOC's attempt to get rid of a putative class action asserting serious and valid claims. *See Mueller v. Chesapeake Bay Seafood House Assocs., LLC*, 2018 WL 1898557, at *8 (D. Md. Apr. 20, 2018) (ordering new opt-in notices be sent to class members who were presented with misleading arbitration agreement outside the presence of counsel); *Bowens v. Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 90 (E.D.N.Y. 2008) ("Now that the Court has recommended certification of this case as a collective action, defendant's discussion with potential opt-in class members in the absence of notice to plaintiffs' counsel would be improper.").

The appropriate remedy for the improper conduct described above is the exclusion of the evidence procured from the coercive May 12, 2021 meeting with Ms. Hinton. Federal courts have the authority to exclude evidence obtained through deceptive or improper means in a civil case. *See Trans-Cold Exp., Inc. v. Arrow Motor Transit, Inc.*, 440 F.2d 1216, 1218–20 (7th Cir. 1971) (upholding trial judge's refusal to admit transcript of interview of plaintiff's father in presence of plaintiff, conducted by defendant's investigator without notifying plaintiff's attorney of interview, and noting "we share [the trial judge's] unfavorable reaction to the deceptive manner in which the evidence was obtained, and to its subsequent nondisclosure . . . . [T]he desirability of deterring improper investigative conduct was a factor which the court could properly consider in the exercise of its discretion to exclude the evidence"); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1066 (5th Cir. 1985) (noting that exclusion of deceptively obtained evidence is within the court's discretion); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 440 (1st Cir. 1991) ("If the issue [of exclusion of an improperly obtained statement] were raised, the decision whether to exclude the evidence would be in the district court's discretion."); *Cataphote Corp. v. Hudson*, 422 F.2d

1290, 1295–96 (5th Cir. 1970) (finding district court did not abuse its discretion in excluding evidence obtained through improper means in a trade secret case); *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1325 (D. Utah 2016) (excluding wrongfully obtained documents from proceedings on corporation's breach of contract and declaratory judgment claims), *aff'd*, 890 F.3d 868 (10th Cir. 2018).

If the Court has any doubt on the matter of Ms. Hinton's wishes and intentions, it can arrange for her to participate remotely in tomorrow's 11:45 status hearing so that the Court can hear from her directly. But the better course is to reject DOC's evidence out of hand as the product of improper conduct.

II. All of DOC's Arguments Are Built on Its Faulty Factual Premise and Therefore Fail.

It bears emphasizing once again that DOC offers no response to Ms. Hinton's arguments on the merits of her constitutional and DCHRA claims. Nor does Defendant dispute the remaining factors in any substantive manner: that Ms. Hinton faces irreparable harm in the ongoing deprivation of her constitutional rights as well as risk to her physical safety as a transgender woman housed in a men's unit, ECF 3-1 (Pl.'s. Br.) at 16-17; that the balance of equities favors Ms. Hinton because relief furthers Ms. Hinton's safety while imposing no burden on Defendant, *id.* at 19-20; and that preventing constitutional violations is always in the public interest, *id.* at 21. The same is true for Ms. Hinton's showing that her own transfer to a general population's women facility meets the PLRA's requirement that relief be narrowly drawn, extend no further than necessary, and be the least intrusive means necessary. *Id.* at 15-16.

Instead, DOC argues against each aspect of Ms. Hinton's case for a TRO by reference to its faulty factual premise that all Ms. Hinton wants (in spite of her declarations, her repeated protestations, her formal grievance, and the filing of this lawsuit) is to be housed near a friend in

a men's unit. Without that premise, DOC's entire opposition falls apart.

1. *Likelihood of Success.* DOC's only argument on this factor is that Ms. Hinton's TRO motion is "moot" because she has already gotten what she wants. ECF 14 (Def.'s Opp. to TRO) at 8. DOC is correct that mootness arises when it has become impossible to grant effectual relief, *see id.* (citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)), but whether that is in fact the case here is highly disputed. Ms. Hinton, of course, has identified clearly the relief the Court can grant: transfer to a women's housing unit. A motion does not become moot on a party's say-so; rather, the party asserting mootness bears the "'heavy burden' of establishing mootness." *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998)). The Court should not permit DOC to carry that burden with tainted evidence in the form of a "waiver" procured via an end-run around a represented party's counsel. Without DOC's faulty factual premise, this motion remains very much live.

To the extent DOC has anything else to say about the merits, it is merely that Ms. Hinton cited the wrong version of DOC's policy. ECF 14 (Def.'s Opp. to TRO) at 3 n.3. But DOC does not even argue this makes a difference to the outcome or that the gravamen of the policy is other than what Ms. Hinton says. And indeed, the relevant provisions of the 2019 policy are virtually identical to the 2018 version Ms. Hinton cited, with minor clerical changes. *See, e.g.*, DOC Policy 4020.3G (2019 Policy) § 2(a) (employing the same default presumption that DOC "shall classify an inmate who has male genitals as a male and one who has female genitals as a female"); *id.* § 11(b) (requiring the THC to ask for a detained individual's "opinion regarding . . . vulnerability"); *id.* § 11(c) (outlining the process of requesting a hearing). If anything, the current version of the policy makes even clearer that DOC in fact understands full well the danger faced by transgender

individuals in its custody: the latest version of the policy adds a definition for "vulnerability" which refers to "any person or population targeted for physical and sexual violence and abuse based on their gender identity or presentation"—thereby explicitly acknowledging that transgender individuals are at risk of physical harm. *Id.* § 7(g); *see also id.* § 11(a) (describing the THC recommendation as "part of the housing assessment for vulnerability").

In sum, DOC's only argument on the likelihood of success is mootness, and mootness depends on DOC's tainted factual premise. The entirety of Ms. Hinton's case on the merits stands unchallenged.

2. *Irreparable Injury.* Defendant has not discussed the serious risk of harm that transgender women face in being housed with cisgender men, the ongoing irreparable violation of her constitutional rights, or the fact that any protective custody option would subject her to serious psychological harm. Instead, Defendant's response is one line: that "DOC has already granted plaintiff's request to be transferred to her preferred housing." ECF 14 (Def.'s Opp. to TRO) at 11. As explained, this assertion cannot be credited. Indeed, Ms. Hinton's supplemental declaration underscores the precarious nature of her situation and explains in concrete terms why she wants a transfer. Ms. Hinton finds it "scary to be the only girl on the [men's] unit," is concerned about being pressured into oral sex, and has gone so far as to remove her wig as a precautionary measure. Supp. Hinton Decl. ¶¶ 3, 6-7.

3. *Balance of equities and public interest.* Both prongs continue to favor Plaintiff, whose ongoing deprivation of rights and risk of harm dwarf any burden to DOC. Defendant offers no response on these factors, merely stating that they weigh in DOC's favor because Ms. Hinton's request has been met. ECF 14 (Def.'s Opp. to TRO) at 11. The same wrong premise again produces a wrong conclusion. Ms. Hinton's continued detention on a men's unit violates her constitutional

rights to equal protection and due process—which Defendant has not contested on the merits—and it is "always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (citation omitted).

4. *The PLRA.* Ms. Hinton has met the requirements for PLRA relief. Defendant's response on relief is to state that her supposed preferences were met and that any further relief would "contradict[] [the THC's] decision and plaintiff's housing preferences." ECF 14 (Def.'s Opp. to TRO) at 10. Once again, DOC's argument depends on its wrongheaded view of plaintiff's preferences; the fact of a THC "decision" based on a coerced waiver of rights and a Hobson's choice between two unacceptable and discriminatory alternatives is meaningless. It remains the case that Ms. Hinton's requested remedy "could not possibly be narrower" and meets the PLRA's requirements, as "she requests only that she herself be transferred." ECF 3-1 (Pl.'s Br.) at 15.

In sum, DOC has exactly one thing to say to all of Ms. Hinton's arguments and declarations: that Ms. Hinton is satisfied with her current housing. Ms. Hinton has demonstrated repeatedly that this is untrue, and DOC's only evidence is the product of tactics that this Court should not countenance.

CONCLUSION

The TRO should be expeditiously granted on the papers alone.

May 13, 2021

Respectfully submitted,

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* In accordance with D.D.C. Local Civil Rule 83.2(g), the attorneys whose names are marked with an asterisk above certify that: (i) they are members in good standing of the District of Columbia Bar; (ii) they are representing a petitioner who is indigent within the meaning of Local Rule 83.2(g), at no cost to petitioner; (iii) they have never been subject to disciplinary complaint or sanction by any court or other disciplinary authority; and (iv) they possess a copy of the Local Rules of this District and are familiar with the rules generally and as they pertain to this proceeding.