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Attorneys for Plaintiffs
AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA and
SAN FRANCISCO BAY GUARDIAN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA; SAN
FRANCISCO BAY GUARDIAN,

Plaintiffs,

v.

DRUG ENFORCEMENT
ADMINISTRATION,

Defendant.

CASE NO.: C 11-01997 RS

**DECLARATION OF NATASHA
MINSKER ISO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

Hearing Date: May 12, 2011
Time: 1:30 pm
Dept.: Courtroom 3, 17th Floor

1 I, Natasha Minsker, declare as follows:

2 1. I am the Death Penalty Policy Director for Plaintiff American Civil Liberties
3 Union of Northern California (“ACLU-NC”). The facts set forth in this declaration are based on
4 my personal knowledge and, if called to testify, I would and could competently testify thereto.
5

6 **The American Civil Liberties Union of Northern California**

7 2. As Death Penalty Policy Director for the ACLU-NC, I am familiar with its mission
8 and organization. The ACLU-NC is an affiliate of the American Civil Liberties Union, a
9 national, non-profit, non-partisan organization with the mission of protecting civil liberties from
10 government incursions, safeguarding basic constitutional rights, and advocating for open
11 government. The ACLU-NC is established under the laws of the state of California and is
12 headquartered in San Francisco, California. The ACLU-NC has approximately 50,000 members.
13 In support of its mission, the ACLU-NC uses its communications department to disseminate to
14 the public information relating to its mission, through its website, newsletters, and other
15 publications.
16

17 **Nationwide shortage of sodium thiopental**

18 3. In my capacity as Death Penalty Policy Director, I am familiar with the
19 procedures for executing condemned inmates in California and I keep abreast with developments
20 relating to the death penalty in California and across the country.

21 4. California uses sodium thiopental as part of a three-drug protocol for executing
22 condemned inmates by lethal injection. *See, e.g.*, 15 Cal. Code Regs. §3349.1.1(q),
23 3349.4.5(g)(5)(A), (B). Twenty-nine other states continue to use the same three-drug protocol and
24 the state of Washington uses sodium thiopental alone to carry out executions.

25 5. Sodium thiopental is a Schedule III controlled substance under the Controlled
26 Substances Act, 21 U.S.C. § 801 et seq. *See* 21 U.S.C. § 812(b)(3); *see also*
27 http://www.deadiversion.usdoj.gov/schedules/orangebook/e_cs_sched.pdf.

1 Arizona drug became the focus of an intense legal battle with extensive local, national and
2 international media coverage. Although Arizona carried out two executions using the sodium
3 thiopental imported from the United Kingdom, the Arizona Supreme Court later delayed an
4 execution after questions arose about the origin and efficacy of the drug. A true and correct copy
5 of 39 media articles about these Arizona controversies are attached as Exhibit 4 to this
6 declaration.

7 10. On October 6, 2010, the California Department of Corrections and Rehabilitation
8 (“CDCR”) disclosed that it too had recently obtained 12 grams of sodium thiopental, with an
9 expiration date of 2014, despite the nationwide shortage. The CDCR did not disclose the source
10 of the drug or explain how it came into possession of the scare substance. Because the last supply
11 of sodium thiopental produced by Hospira has an expiration date of 2011, the sodium thiopental
12 in the CDCR’s possession could not have been manufactured domestically. A true and correct
13 copy of four media articles reporting on CDCR’s October 2010 acquisition of sodium thiopental
14 are attached as Exhibit 5 to this declaration.

15 11. On October 7, 2010, I sent a request under the California Public Records Act, Cal.
16 Gov. Code §6250 *et seq.*, for records regarding the CDCR’s acquisition of sodium thiopental.
17 After CDCR failed to produce responsive records, ACLU-NC filed suit and, on November 30, the
18 superior court ordered production in one week of all records as to which CDCR claimed no
19 exemption from disclosure. On December 8, 2010, CDCR produced approximately 1,000 pages
20 of heavily redacted documents. CDCR also withheld approximately 120 documents. A true and
21 correct copy of five articles reporting on the ACLU-NC’s Public Records Act suit and resulting
22 court-ordered production of documents are attached as Exhibit 6 to this declaration.

23 12. I personally reviewed the records produced by CDCR. Those records revealed that
24 California corrections officials had gone to great lengths in their search for the drug, including
25 attempting initially to import it from Pakistan and actually exchanging lethal injection drugs with
26 Arizona (California provided pancuronium bromide in exchange for imported sodium thiopental).
27 The records also revealed that Arizona corrections officials informed their California counterparts

1 that they had imported sodium thiopental from the United Kingdom and provided a roadmap for
2 doing so; and that California corrections officials then followed Arizona's lead and undertook the
3 process of importing the drug from the United Kingdom.

4 13. Separate from the record production, CDCR revealed to selected journalists in
5 December 2010 that it had ordered 521 grams of sodium thiopental manufactured by a company
6 in the United Kingdom, it had paid more than \$36,000 to acquire the drug, and the controlled
7 substance had arrived in the United States and was awaiting "inspection" by the FDA. A true and
8 correct copy of 11 articles reporting on these topics are attached as Exhibit 7 to this declaration.

9 14. I oversaw the dissemination to the public of the records the ACLU-NC obtained
10 from CDCR. The ACLU-NC posted the records produced by CDCR to our website promptly
11 upon receipt. Since posting, the page has been visited more than 2,000 times and been viewed
12 more than 3,000 times. From December 8, 2010 to December 13, 2010, it was the most
13 frequently viewed page on the ACLU-NC website. The records are available at:
14 [http://www.aclunc.org/issues/criminal_justice/death_penalty/cdr's_december_8,_2010_response](http://www.aclunc.org/issues/criminal_justice/death_penalty/cdr's_december_8,_2010_response_to_aclu_public_records_act_request.shtml)
15 [to_aclu_public_records_act_request.shtml](http://www.aclunc.org/issues/criminal_justice/death_penalty/cdr's_december_8,_2010_response_to_aclu_public_records_act_request.shtml).

16 15. The records the ACLU-NC obtained from CDCR raise questions about the conduct
17 of state officials in importing a controlled substance from abroad and exchanging controlled
18 substances with another state, and in particular, whether California corrections officials have
19 complied with the Controlled Substances Act and the Food Drug, and Cosmetics Act. *See, e.g.*,
20 21 U.S.C. § 829 (unlawful for person other than physician to dispense Schedule III substance
21 without prescription); 21 CFR § 1312.11(b) (requirement of authorization to import); 21 CFR §
22 207.40(b) ("No drug may be imported or offered for import into the United States unless it is
23 listed as required in subpart C of this part and manufactured, prepared, propagated, compounded,
24 or processed at a registered foreign drug establishment").

25 16. Those records also generated widespread media coverage in California, nationally,
26 and internationally. A true and correct copy of 13 media articles reporting on the information
27 revealed in those records is attached as Exhibit 8 to this declaration. In addition, the information
28

1 contained in the records was the subject of a segment on the cable television show The Colbert
2 Report, which can be viewed at [http://www.colbertnation.com/the-colbert-report-](http://www.colbertnation.com/the-colbert-report-videos/368731/december-15-2010/tiny-triumphs---lethal-drug-shortage?xrs=share_copy)
3 [videos/368731/december-15-2010/tiny-triumphs---lethal-drug-shortage?xrs=share_copy](http://www.colbertnation.com/the-colbert-report-videos/368731/december-15-2010/tiny-triumphs---lethal-drug-shortage?xrs=share_copy)

4 17. Records revealed by other FOIA requests and state public record act requests
5 across the county have now revealed that six states imported sodium thiopental from a distributor
6 in the United Kingdom, Dream Pharma, in 2010. In addition to California and Arizona,
7 Arkansas, Georgia, South Carolina, and Tennessee imported controlled substances from the same
8 United Kingdom distributor. A private company in the state of Georgia also provided some of the
9 imported sodium thiopental to prison officials in Kentucky. Two other states, Nebraska and
10 South Dakota, imported a controlled substance purporting to be sodium thiopental from a
11 company in India. A true and correct copy of media articles reporting on these topics is attached
12 as Exhibit 9 to this declaration.

13 18. The fact that state officials have been importing sodium thiopental from the United
14 Kingdom and India has generated significant public outcry, legal challenges, and media attention,
15 in the United Kingdom, in the United States, and internationally. Following disclosure that states
16 in the United States were acquiring execution drugs from sources in the United Kingdom, the
17 government of the United Kingdom imposed new restrictions preventing the export of all
18 controlled substances for purposes of execution. A true and correct copy of 21 media articles
19 reporting on these issues is attached as Exhibit 10 to this declaration.

20 21 **Plaintiff's FOIA Requests and Requests for Expedited Processing**

22 19. The records the ACLU-NC obtained from CDCR revealed that, in the course of
23 their efforts to import the drug from the United Kingdom, California corrections officials
24 communicated with various officials at Defendant DEA. Those records raised serious questions
25 about the role of federal government officials in the importation of execution drugs by states, and
26 about whether federal officials are following the law. CDCR, however, redacted portions of the
27 records relating to its communications with DEA and withheld other records on this subject

1 entirely, such as a list of importers approved by the DEA. Whether those records and redactions
2 are exempt from disclosure under the California Public Records Act is now pending before the
3 California Court of Appeal in *American Civil Liberties Union of Northern California v. Superior*
4 *Court (CDCR)*, A131111 (First District Court of Appeal).

5 20. On January 4, 2011, I co-authored on behalf of the ACLU-NC and *The Bay*
6 *Guardian* requests to the Drug Enforcement Administration under FOIA for records created since
7 January 1, 2010 of internal DEA communications and external communications with state
8 officials (including states other than California), other federal agencies, private individuals, or
9 persons outside the United States, relating to the importation from another country, transfer
10 between states, and purchase of sodium thiopental, pancuronium brome, and/or potassium
11 chloride for the purpose of execution. The requests also sought records of any actual importation,
12 transfer between states, or purchase of sodium thiopental, pancuronium bromide and/or potassium
13 chloride for the purpose of execution. Finally, the requests also sought a list of approved
14 importers of sodium thiopental provided by DEA to CDCR. A true and correct copy of the
15 January 14, 2011 letter is attached as Exhibit 11 to this declaration.

16 21. In the January 4, 2011, the ACLU-NC and *The Bay Guardian* also sought
17 expedited processing on the ground that Plaintiffs ACLU-NC and *The Bay Guardian* are
18 “primarily engaged in disseminating information” and there is an “urgency to inform the public
19 concerning about an actual or alleged federal government activity.” 5 U.S.C. §552(a)(6)(E)(v)(II);
20 32 C.F.R. §1700.12(c)(2) & 28 C.F.R. §16.5(d)(1)(ii). The request for expedited processing was
21 further based on the fact that the FOIA requests involves “[a] matter of widespread and
22 exceptional media interest in which there exist possible questions about the government’s
23 integrity which affect public confidence.” 28 C.F.R. §16.5(d)(1)(iv). I attached in support of the
24 request for expedited processing 139 media articles about efforts by states to acquire controlled
25 substances for purposes of execution to demonstrate the widespread and exceptional medial
26 interest in the subject of our FOIA requests. These 139 articles are attached as Exhibits 1 through
27 8 and 10 of this declaration.

1 22. We received from DEA an acknowledgment of our January 4, 2011 requests, in a
2 letter dated January 12, 2011, a true and correct copy of which is attached as Exhibit 12 to this
3 declaration.

4 23. We subsequently received a letter dated January 18, 2011, in which DEA granted
5 our request for expedited processing. A true and correct copy of DEA's January 18, 2011 letter is
6 attached as Exhibit 13 to this declaration.

7 24. In my capacity as Death Penalty Director I supervise Program Associate Ana
8 Zamora. I instructed her to follow-up on the status of our January 4, 2011 FOIA requests. Ms.
9 Zamora reported to me that on February 25, 2011, she spoke to Rita Cuellar, a FOIA specialist at
10 DEA who explained that she was handling Plaintiffs' requests and was waiting to hear back as to
11 when documents would be delivered to Plaintiffs.

12 25. We subsequently received a letter dated March 9, 2011 from the DEA in which it
13 "apologize[d] for the delay in the processing of [Plaintiffs'] request" and informed us that we
14 would be "notified of [DEA's] initial determination by correspondence at a later date." The letter
15 did not identify a date by which DEA would make an initial determination. A true and correct
16 copy of the March 9, 2011 letter is attached as Exhibit 14 to this declaration.

17 26. Under my instruction, Ms. Zamora left a voicemail for DEA FOIA specialist
18 Cuellar on April 7, 2011 inquiring as to the status of our FOIA requests.

19 27. As of the filing of the Complaint in this matter on April 22, 2011, we have not
20 received any follow-up communication from DEA. Thus, DEA has not communicated to us that
21 it has completed the processing of the requests, made an initial determination whether to comply
22 with the requests, or even informed us of a date by which it will make an initial determination or
23 complete the requests. DEA has not provided us with any documents in response to our January 4,
24 2011 request.

25 28. More than 20 working days have passed since DEA received our FOIA requests.

26 29. The ACLU-NC and *The Bay Guardian* have exhausted all applicable
27 administrative remedies.

1 controlled substances into the United States. A true and correct copy of a media article reporting
2 these facts is attached as Exhibit 18 to this declaration.

3
4 I declare under penalty of perjury under the laws of the United States that the foregoing is
5 true and correct.

6
7 Executed this 27 day of April, 2011 at San Francisco, CA

8
9
10 
Natasha Minsker