

1 On July 28, 2016, the assigned magistrate judge issued findings and recommendations
2 recommending that defendants motion for summary judgment be granted in part and denied in
3 part. (Doc. No. 56.) The findings and recommendations were served on the parties and contained
4 notice that any objections to the findings and recommendations were to be filed within thirty days
5 (30) days from the date of service. On August 15, 2016, plaintiff filed objections to the findings
6 and recommendations. (Doc. No. 59.) On August 24, 2016, plaintiff filed a document styled as
7 his “additional objections” to the findings and recommendations. (Doc. No. 61.) On August 26,
8 2016, defendants filed objections to the findings and recommendations. (Doc. No. 62.)² On
9 September 8, 2016, plaintiff filed a declaration and a motion to strike defendants’ objections to
10 the findings and recommendations. (Doc. Nos. 65, 66.)³

11 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has
12 conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds
13 the findings and recommendations to be largely supported by the record and by proper analysis.
14 However, given developments occurring after the findings and recommendations were served on
15 the parties, apparently resulting in substantive changes to what were represented to be the
16 undisputed material facts on summary judgment, the undersigned cannot adopt the findings and
17 recommendations in full. Accordingly, those findings and recommendations are adopted, save
18 and except as discussed below.

19 *I. The Shabbat Worship Claim*

20 In his complaint plaintiff alleged that his ability to celebrate Shabbat was being
21 substantially burdened for a variety of reasons. Defendants moved for summary judgment in their
22 favor on this claim based upon evidence that accommodations intended to ameliorate these
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24 ² In addition, on July 29, 2016, plaintiff filed a statement concerning Shabbat services and on
25 August 30, 2016, he filed a notice regarding his removal from the kosher diet program. (Doc.
26 Nos. 57, 63.)

27 ³ The findings and recommendations was served on defendants electronically on July 28, 2016,
28 and provided notice that objections were to be filed within thirty days. Defendants timely filed
their objections on August 26, 2016. Accordingly, plaintiff’s motion to strike the defendants’
objections (Doc. No. 66) is denied.

1 burdens had been in place at the time of the motion for more than a year. (Doc. No. 41-1 at 20.)
2 In the findings and recommendations, the magistrate judge noted these accommodations and
3 recommended that summary judgment be granted in defendants favor with respect to plaintiff's
4 Shabbat worship claim on that basis. (Doc. No. 56 at 25–26.) The two undisputed facts
5 underlying the magistrate judge's recommendation as to this claim were: (1) the Messianic Jewish
6 inmates were scheduled to have religious services in the Facility A main chapel on Saturday (the
7 day for celebrating Shabbat) from 10:00 a.m. to 11:00 a.m. and had been so scheduled for more
8 than a year; and (2) Chaplain Haroun was present to assist the inmates if needed during the
9 Shabbat services. (*Id.*) Based upon this evidence presented on summary judgment, the
10 magistrate judge concluded that plaintiff could not show any policy, practice, or procedure
11 instituted by the California Department of Corrections and Rehabilitation ("CDCR") had
12 substantially burdened his access to Shabbat services. (*Id.*)

13 In his objections, plaintiff asserts there is no longer a chaplain working on Saturdays and
14 that he is no longer receiving Shabbat services on Saturday mornings. (Doc. No. 59 at 1–2.)
15 Further, according to plaintiff, the Messianic Jewish inmates are no longer permitted to have
16 religious services in the main chapel during that time, but are required to conduct services
17 outside. (*Id.*) According to plaintiff, this change inhibits the religious practice in two ways: (1)
18 the Messianic Jewish inmates can no longer use TVs or DVD players in their services because
19 they are outside; and (2) plaintiff is forced to place the religious items used during worship on the
20 ground, which "is a defilement of our religious items." (*Id.*) In his objections, plaintiff has also
21 come forward with evidence of this change in practice, specifically an inmate request form in
22 which J. Moore, the community resources manager at Corcoran Substance Abuse Treatment
23 Facility advises that Chaplain Haroun "does not work weekends" and that services on Saturday
24 can be "scheduled in the outdoor religious grounds." (Doc. No. 59 at 6.) J. Moore's signature on
25 this form is dated August 3, 2016, approximately one week after the findings and
26 recommendations recommending that summary judgment be granted in favor of defendants were
27 issued.

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1 Thus, it now appears that the two factual circumstances noted by the magistrate judge in
2 concluding that summary judgment was appropriate on this claim have substantially changed.
3 Since these accommodations were the only basis upon which defendants moved for summary
4 judgment on this claim, and those accommodations are no longer being provided, the undersigned
5 does not adopt the recommendation that defendants be granted summary judgment in their favor
6 as to plaintiff's Shabbat worship claim.⁴ The undersigned expresses no opinion as to whether the
7 current accommodations, whatever they may be, are such that a triable issue of fact on plaintiff's
8 Shabbat worship claim exists or not.

9 II. *The Kosher Diet Claims*

10 Defendants also initially moved for summary judgment in their favor on any claim related
11 to the alleged failure to provide plaintiff a kosher diet based on their presentation of evidence that
12 plaintiff had, in fact, been receiving kosher meals since February 13, 2014. (Doc. No. 41-1 at
13 20.) The magistrate judge recommended that defendants' motion for summary judgment be
14 granted because it was undisputed that plaintiff was now receiving kosher meals, thereby mooted
15 the issue. (Doc. No. 56 at 27–29.) It now appears plaintiff was removed from the kosher diet
16 program on August 19, 2016, after the findings and recommendations were issued, because he
17 was charged with at least one and possibly two prison rule violations for purchasing non-kosher
18 items from the canteen. (Doc. Nos. 61, 68.) Because it is now clear that the undisputed material
19 facts presented to the assigned magistrate judge are no longer true, the undersigned does not
20 adopt the recommendation that defendants be granted summary judgment with respect to
21 plaintiff's kosher diet claim. Again, the undersigned expresses no opinion as to whether, based
22 upon the current evidence, plaintiff's religious practices are being subjected to a substantial
23 burden.

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25 ⁴ The timing of these apparent changes to the accommodations being extended to plaintiff is
26 somewhat troubling. Perhaps the court is not aware of all of the surrounding circumstances.
27 However, regardless of the reasons for the changes, the undersigned would have expected
28 defendants to advise the court if the undisputed material facts on summary judgment had changed
at any point during the pendency of this lawsuit and especially while their motion for summary
judgment was still under submission.

1 III. *Defendants' Objections*

2 Defendants moved for summary judgment on any claim that they be required to hire a
3 Messianic Jewish chaplain, asserting there was no legal obligation for CDCR to hire such an
4 employee and that the failure to do so did not impose a “substantial burden” on plaintiff. (Doc.
5 No. 41-1 at 16–18.) The magistrate judge recommended denying defendants’ motion for
6 summary judgment with respect to this claim, noting that plaintiff had presented some evidence
7 that due to confusion amongst the prison chaplains about the differences between traditional and
8 Messianic Judaism, the prison chaplains were compelling prisoners to use inappropriate religious
9 items in their services and to celebrate religious holidays in inappropriate ways. (Doc. No. 56 at
10 20.) Defendants believe this recommendations should be rejected for much the same reason as
11 initially argued, namely, that they have no obligation to hire a Messianic Jewish chaplain or
12 supply inmates with religious items for their personal use. (Doc. No. 62 at 1–5.) The
13 undersigned is not persuaded by these arguments, which largely miss the point.

14 The magistrate judge found a genuine dispute of material fact because these two failures
15 by prison chaplains—requiring prisoners to use inappropriate religious items and celebrate
16 holidays in inappropriate ways—could constitute evidence of a substantial burdening of
17 plaintiff’s practice of his religion. (Doc. No. 56 at 20.) While defendants might not be required
18 to provide plaintiff’s choice of a religious chaplain as a general rule, the evidence presented by
19 plaintiff on summary judgment indicates that this failure in this particular circumstance may be
20 leading to a Hobson’s choice wherein plaintiff either celebrates holidays in an inappropriate
21 manner for his religion or is barred from celebrating them at all. *See Greene v. Solano Cty. Jail*,
22 513 F.3d 982, 987–88 (9th Cir. 2008) (noting that the Ninth Circuit had previously found that the
23 “false choice” between complying with a regulation or having privileges revoked for the failure to
24 do so was no defense to an RLUIPA claim) (discussing *Warsoldier v. Woodford*, 418 F.3d 989
25 (9th Cir. 2005)).

26 Further, to the extent defendants seek rejection of the magistrate judge’s finding that there
27 is a genuine dispute of material fact as to whether plaintiff is being accommodated with two
28 annual special religious meals on Passover and Yom Kippur, they do so by disputing plaintiff’s

1 evidence. This is no basis upon which to reject the magistrate judge's recommendation. Rather,
2 the argument itself establishes the correctness of the magistrate judge's conclusion that the
3 evidence on summary judgment establishes the existence of disputed issues of material fact
4 precluding the granting of summary judgment as to this claim.

5 For the reasons set forth above:

6 1. The Clerk of the Court is directed to correct the docket to reflect that plaintiff is
7 proceeding pro se in this action and that appointed counsel is appearing on his behalf only for the
8 limited purpose of assisting plaintiff in connection with the upcoming settlement conference;

9 2. Plaintiff's motion to strike defendants' objections as untimely (Doc. No. 66) is denied;

10 3. The findings and recommendations filed July 28, 2016 (Doc. No. 56) are adopted in
11 part;

12 4. Defendants' motion for summary judgment (Doc. No. 41) is granted in part and denied
13 in part as follows:

14 a. Defendants' motion for summary judgment with respect to plaintiff's third
15 party claims is granted;

16 b. Defendants' motion for summary judgment with respect to plaintiff's RLUIPA
17 claims for Messianic Jewish religious personal items and approval of plaintiff's
18 designated vendors is granted;

19 c. Defendants' motion for summary judgment with respect to plaintiff's RLUIPA
20 claims for a Messianic Jewish chaplain, two special religious meals per year,
21 Saturday morning Shabbat services, three kosher meals daily, and Messianic
22 Jewish items for corporate worship is denied; and

23 5. This action is now proceeding against defendants on plaintiff's RLUIPA claims for a
24 Messianic Jewish chaplain, two special religious meals per year, Saturday morning Shabbat
25 services, three kosher meals daily, Messianic Jewish items for corporate worship, and a religious
26 designation for Messianic Judaism to be officially accepted and endorsed by CDCR, and claims

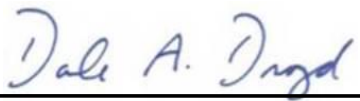
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1 for violation of the First Amendment; and against defendant Jerald Sharon on plaintiff's
2 individual equal protection claim.

3 IT IS SO ORDERED.

4 Dated: November 3, 2016


5 UNITED STATES DISTRICT JUDGE

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