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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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10 Barry Northcross Patterson,

CIV-05-1159-PHX-RCB (MHB)

11 Plaintiff,

**ORDER**

12 vs.

13 Charles L. Ryan, *et al.*,

14 Defendants.

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The court assumes familiarity with the fairly protracted history of this litigation, including the Ninth Circuit’s decision in Patterson v. Ryan, 338 Fed.Appx. 727, 729 (9<sup>th</sup> Cir. 2009) (Doc. 81-2). A few aspects of Ryan bear repeating as they directly relate to issues now before the court. The first is that in Ryan the Ninth Circuit affirmed this court’s grant of summary judgment insofar as it “determined that [plaintiff] Patterson failed to exhaust his prison grievance procedures with respect to his claims against defendants Wilber, Curran, and Soulvie.” Id. at 278 (citation omitted). The Ninth Circuit also found that this court “properly granted summary judgment with respect to Patterson’s claims of retaliation[.]” Id. (citation omitted). At the same time, however, the Ninth Circuit vacated this court’s grant of summary judgment as to Patterson’s First Amendment free exercise claims because this court “did not have the benefit” of a “recent” Ninth Circuit decision. Id.

In vacating that claim, the Ninth Circuit “remanded so that [this] . . . court can develop the factual record in light of the Turner factors as to the impact of the accommodation and

1 the availability of ready alternatives.” Id. at 728 - 729 (citations omitted). On remand, the  
2 Ninth Circuit further directed this court to “consider whether the refusal to provide [plaintiff]  
3 Patterson with kosher meals violated the Religious Land Use and Institutionalized Persons  
4 Act [(“RLUIPA”)], 42 U.S.C. § 2000cc *et seq.*” Id. at 729.

5 In accordance with that order, on August 2, 2010, the Honorable Michelle H. Burns,  
6 United States Magistrate Judge (“the Magistrate Judge”), granted plaintiff *pro se* 30 days to  
7 file an amended complaint to assert a claim under the RLUIPA against Defendants Broderick  
8 and Mason, based on the facts alleged in his First Amended Complaint (“FAC”). On August  
9 10, 2010, plaintiff moved to amend his complaint (Doc. 102).

10 On August 16, 2010, the Court granted plaintiff’s motion stating, “Plaintiff’s ‘motion  
11 to amend complaint’ seeking leave to assert a RLUIPA claim (Doc. 102) is **GRANTED**.  
12 Plaintiff shall file his amended complaint no later than September 13, 2010.” Doc. 104 at  
13 1:20-22. Then, on September 14, 2010, plaintiff filed his Second Amended Complaint  
14 (“SAC”) (Doc. 106), and “Application to Proceed In Forma Pauperis” (Doc. 107).<sup>1</sup>

15 Shortly thereafter, on September 20, 2010, defendants moved for clarification of the  
16 Magistrate Judge’s prior orders, *i.e.*, Docs. 100 and 104. In seeking clarification, defendants  
17 pointed out that the SAC “appears to have included amendments far in excess of what the  
18 Ninth Circuit’s Remand Order contemplated.” Doc. 108 at 2:4-5. As defendants read the  
19 SAC, plaintiff merely “attempted to rephrase his prior FAC to present substantially the same  
20 four Counts in the same order.” Id. at 2:6-7. Defendants also faulted plaintiff for  
21 “purport[ing] to include RLUIPA claims within Counts II, III, and IV[,]” despite the fact that  
22 “the predecessors to th[o]se Counts ha[d] all been adjudicated against [him] and the Remand  
23 Order did not allow for him to amend” those counts. Id. at 2:10-13. Pursuant to Fed. R. Civ.  
24 P. 12(f), defendants thus sought to have the court strike those counts as “redundant and  
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26 <sup>1</sup> Although plaintiff’s SAC originally exceeded the scope of the Ninth Circuit’s Mandate and the court’s order  
27 granting him leave to amend, in her order granting defendants’ “Motion for Clarification” the Magistrate Judge stated:  
28 “[O]nly Count I of Plaintiff[’s] [SAC], which asserts First Amendment and RLUIPA claims against Defendants  
Broderick and Mason, remains to be litigated. The remaining claims and Defendants are stricken from Plaintiff’s  
[SAC].” Doc. 109 at 3:3-5.

1 immaterial[.]” Id. at 2:13.

2 Agreeing with defendants, the Magistrate Judge found “that only Count I, which  
3 asserts First Amendment and RLUIPA claims against Defendants Broderick and Mason,  
4 remains to be litigated.” Doc. 109 at 2:19-21. The Magistrate Judge, therefore, required  
5 those defendants “to answer or otherwise respond to Plaintiff’s [SAC] no later than 14 days  
6 from the date the Screening Order is filed.” Id. at 2:22-24.

7 Plaintiff timely filed what he titles a “Motion for Judge Robert C. Broomfield to  
8 Reconsider Order from Magistrate Judge M.H. Burns of Sept. 29<sup>th</sup>, 2010.” Obj. (Doc. 110).  
9 However, because it is clear from the face of that document that plaintiff is objecting to the  
10 Magistrate Judge’s clarification order, as opposed to moving for reconsideration thereof, the  
11 court is treating this motion as an objection in accordance with Fed. R. Civ. P. 72(a). That  
12 Rule authorizes, within 14 days after being served with a copy of a magistrate judge’s order  
13 pertaining to a non-dispositive matter, a party “may serve and file objections to th[at] order.”  
14 Fed. R. Civ. P. 72(a).

15 In contrast to subpart (b)(2) of Rule 72, subpart (a) does not specifically allow for a  
16 party, such as defendants herein, who have prevailed before a magistrate judge, to respond  
17 to any objections filed by the opposing party. Ordinarily, consistent with the Advisory  
18 Committee Note to Rule 72(a),<sup>2</sup> this court would allow defendants to file a response to what  
19 the court has deemed to be plaintiff’s objections to the Magistrate Judge’s clarification order.  
20 As will quickly become evident, however, the court finds no merit to plaintiff’s objections.  
21 Consequently, there is no prejudice to defendants from this court resolving plaintiff’s  
22 objections without a response.

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27 <sup>2</sup>That Note states in relevant part “that [i]t is also contemplated that a party who is successful before the  
28 magistrate [judge] will be afforded an opportunity to respond to objections raised to the magistrate[] [judge’s] ruling.”  
Charles M. Brewer, Ltd. Restated Pension Plan v. CBIZ, Inc., 2010 WL 2367210, at \*1 (D.Ariz. June 10, 2010) (quoting  
90 F.R.D. 451, 495 (1981)).

1 **I. Clarification Order**

2 **A. Standard of Review**

3 This court “must consider timely objections and modify or set aside any part of the  
4 [Magistrate Judge's non-dispositive] order that is clearly erroneous or contrary to law.” Fed.  
5 R. Civ. P. 72(a); see also 28 U.S.C. § 636(b)(1)(A). “The clearly erroneous standard, which  
6 applies to a magistrate judge's findings of fact, is 'significantly deferential, requiring a  
7 definite and firm conviction that a mistake has been committed.” Crispin v. Christian  
8 Audigier, Inc., 2010 WL 2293238, at \*3 (C.D.Cal. May 26, 2010) (quoting Concrete Pipe  
9 & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623, 113 S.Ct. 2264, 124 L.Ed.2d  
10 539 (1993)) (other citations and internal quotation marks omitted). “By contrast, “the  
11 contrary to law standard . . . permits independent review of purely legal determinations by  
12 the magistrate judge.” Id. (citations and internal quotation marks omitted). With these  
13 standards in mind, the court will consider plaintiff’s objection to the clarification order.

14 **B. Objections**

15 Plaintiff objects to the Magistrate Judge’s order limiting his SAC to count I, as  
16 discussed above. There are two bases for plaintiff’s objection. First, he asserts that because  
17 “RLUIPA and the Turner factors apply to each of [his] original [four] counts, it *would seem*  
18 that the Court has ordered that he has the right to” amend his complaint as to all four counts.  
19 Obj. (Doc. 110) at 1 (emphasis added). Plaintiff’s reading of Ryan and the Magistrate  
20 Judge’s prior order reflects a fundamental misunderstanding of what claims he is allowed to  
21 pursue in light of those earlier rulings. The Ninth Circuit clearly delineated the scope of the  
22 issues on remand, as also discussed above. Allowing plaintiff's SAC to stand as filed, *i.e.*,  
23 allowing him to pursue claims which have already been adjudicated against him, would be  
24 in excess of the Ninth Circuit's remand order as this court construes it.

25 Plaintiff “understands” that the “rules of court relative to amended complaints allow  
26 any & all portions” of a complaint “to be amended unless the courts have denied those  
27 portions with prejudice.” Obj. (Doc. 110) at 1. Although unstated, evidently it is plaintiff’s  
28 contention that because neither the district court's prior summary judgment order or the Ninth

1 Circuit’s decision in Ryan explicitly state that the relief granted was "with prejudice[,]" he  
2 should be allowed to amend his complaint beyond the scope of the remand order. See id.

3 There is a presumption that where a dismissal order is silent as to the effect of a  
4 dismissal’s effect, that dismissal is without prejudice. See Romoland School Dist. v. Inland  
5 Empire Energy, 548 F.3d 738, 750 (9<sup>th</sup> Cir. 2008). That presumption “derives solely from  
6 the presumption in Federal Rule of Civil Procedure 41(a)(2) that ‘[u]nless the order states  
7 otherwise, a dismissal under this paragraph . . . is without prejudice.’” Id.

8 In the present case, the prior court rulings were not voluntary dismissals under that  
9 Rule. Plaintiff, therefore, cannot avail himself of that presumption. Consequently, the court  
10 finds no merit to plaintiff’s objection that the Magistrate Judge erred in limiting the scope  
11 of his SAC because the prior orders did not explicitly state that the granted relief was with  
12 prejudice. Thus, the court affirms that order.

13 Next, the court will proceed to conduct its statutorily mandated screening of the SAC,  
14 which after the clarification order alleges only one count.

15 **II. Statutory Screening of Prisoner Complaints**

16 The Court is required to screen complaints brought by prisoners seeking relief against  
17 a governmental entity or an officer or an employee of a governmental entity. See 28 U.S.C.  
18 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
19 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may  
20 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
21 See 28 U.S.C. § 1915A(b)(1), (2).

22 A pleading must contain a “short and plain statement of the claim *showing* that the  
23 pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2) (emphasis added). While Rule 8 does not  
24 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-  
25 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).  
26 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
27 statements, do not suffice.” Id.

28 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a

1 claim to relief that is plausible on its face.” Id. (quoting Bell Atlantic Corp. v. Twombly,  
2 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content  
3 that allows the court to draw the reasonable inference that the defendant is liable for the  
4 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for  
5 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
6 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual  
7 allegations may be consistent with a constitutional claim, a court must assess whether there  
8 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

### 9 **III. Second Amended Complaint**

10 In his amended complaint, Plaintiff names Defendants Broderick and Mason, and  
11 asserts a violation of his First Amendment rights and a claim under the RLUIPA. Plaintiff  
12 alleges that notwithstanding the fact that he is a Messianic Jew who applied for a kosher diet  
13 under ADOC regulations, he is receiving only kosher dinners and non-kosher breakfasts and  
14 lunches over his objections because Defendants Broderick and Mason have stated that only  
15 Orthodox Jewish inmates can receive three kosher meals a day. Plaintiff seeks injunctive  
16 relief and money damages.

17 Liberally construed, these allegations adequately state a violation of Plaintiff’s First  
18 Amendment rights and a claim under the RLUIPA. The Court will require Defendants  
19 Broderick and Mason to answer the Second Amended Complaint.

### 20 **IV. Warnings**

#### 21 **A. Release**

22 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.  
23 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay  
24 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result  
25 in dismissal of this action.

#### 26 **B. Address Changes**

27 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
28 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other

1 relief with a notice of change of address. Failure to comply may result in dismissal of this  
2 action.

3 **C. Copies**

4 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy  
5 of every document that he files. See Fed.R.Civ.P. 5(a). Each filing must include a certificate  
6 stating that a copy of the filing was served. See Fed.R.Civ.P. 5(d). Also, Plaintiff must  
7 submit an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to  
8 comply may result in the filing being stricken without further notice to Plaintiff.

9 **D. Possible Dismissal**

10 If Plaintiff fails to timely comply with every provision of this Order, including these  
11 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,  
12 963 F.2d 1258, 1260-61 (9<sup>th</sup> Cir. 1992) (a district court may dismiss an action for failure to  
13 comply with any order of the Court).

14 For the reasons set forth above,

15 **IT IS ORDERED** that Plaintiff's objections (Doc. 110) are without merit; and  
16 accordingly the Magistrate Judge's clarification order is affirmed; and

17 **IT IS FURTHER ORDERED** that Defendants Broderick and Mason must answer  
18 the Second Amended Complaint within 14 days from the date this Order is filed.

19 DATED this 13th day of October, 2010.

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22 \_\_\_\_\_  
23 Robert C. Broomfield  
24 Senior United States District Judge

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26 copies to counsel and plaintiff, *pro se*