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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

KAJAUNA KENYATTA IRVIN,	)	Case No.: 1:10-cv-01940-DAD-SAB (PC)
	)	
Plaintiff,	)	
	)	<b>FINDINGS AND RECOMMENDATIONS</b>
v.	)	<b>DENYING DEFENDANTS’ MOTION TO</b>
	)	<b>DISMISS</b>
JAMES A YATES, et al.,	)	
	)	[ECF Nos. 89, 109, 118, 120]
Defendants.	)	
	)	
	)	

Plaintiff Kajauna Kenyatta Irvin is appearing pro se in this civil rights action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). The case was removed from state court on October 14, 2010.

**I.  
PROCEDURAL BACKGROUND**

This action is proceeding on Plaintiff’s claims under the First Amendment, RLUIPA, and the Equal Protection Clause.

On April 10, 2015, Defendants Giurbino, Cate and Davis filed a motion to dismiss. After receiving several extensions of time, Plaintiff filed an opposition on September 18, 2015. (ECF No. 108.) Plaintiff also filed a motion for judicial notice and several declarations in support of his opposition. (ECF Nos. 109-115.) Defendants filed a reply to Plaintiff’s opposition and request for judicial notice on September 15, 2015. (ECF No. 116.) On September 17, 2015, and September 25,

1 2015, Defendants filed motions to strike the declarations filed by Plaintiff in support of his opposition.  
2 (ECF Nos. 118, 120.)

3 **II.**

4 **LEGAL STANDARD**

5 A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim,  
6 and dismissal is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts  
7 alleged under a cognizable legal theory. Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th  
8 Cir. 2011) (quotation marks and citations omitted). In resolving a 12(b)(6) motion, a court's review is  
9 generally limited to the operative pleading. Daniels-Hall v. National Educ. Ass'n, 629 F.3d 992, 998  
10 (9th Cir. 2010); Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007); Schneider v. California Dept. of  
11 Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

12 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as  
13 true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing  
14 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quotation marks omitted); Conservation  
15 Force, 646 F.3d at 1242; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The Court  
16 must accept the factual allegations as true and draw all reasonable inferences in favor of the non-  
17 moving party, Daniels-Hall, 629 F.3d at 998; Sanders, 504 F.3d at 910; Morales v. City of Los  
18 Angeles, 214 F.3d 1151, 1153 (9th Cir. 2000), and in this Circuit, pro se litigants are entitled to have  
19 their pleadings liberally construed and to have any doubt resolved in their favor, Wilhelm v. Rotman,  
20 680 F.3d 1113, 1121 (9th Cir. 2012); Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012); Silva v.  
21 Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011); Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010).

22 **III.**

23 **DISCUSSION**

24 **A. Allegations of Complaint**

25 Plaintiff is a sincere believer in the religion of Islam and actively participates in all religious  
26 activities prescribed by Islamic law.

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1 Plaintiff was housed at Pleasant Valley State Prison (PVSP) from January 25, 2006, to January  
2 13, 2011. At the time of his arrival, PVSP had in its employment a full-time Muslim Chaplain named  
3 Michael A. Salaam.<sup>1</sup>

4 In September of 2006, Chaplain Salaam had Plaintiff assigned as the inmate Muslim Clerk.  
5 While employed at PVSP, Chaplain Salaam ensured that Plaintiff and other Muslim inmates received  
6 weekly chapel access for Ta'leem and Jumu'ah prayer services, as well as approved requests to  
7 purchase and receive religious artifacts, which he ensured were issued in a reasonably timely fashion;  
8 obtained religious significant foods from outside Islamic business for the annual Ramadan and two Id  
9 banquets; obtained donations for PVSP's Islamic program; and managed a PVSP trust account with  
10 funds allotted by CDCR's religious budget for the benefit of Plaintiff and other Muslim inmates.

11 While Chaplain Salaam worked at PVSP, Plaintiff and other Muslim inmates had minimal  
12 problems receiving adequate religious accommodations. Indeed, on several occasions Chaplain  
13 Salaam had obtained permission from custody supervisory staff to allow Plaintiff and other Facility A  
14 Muslim inmates to gather in the chapel for religious services, under custody supervision, during his  
15 absences from PVSP.

16 During Chaplain Salaam's tenure, Plaintiff and other Muslim inmates were allowed to receive  
17 chapel access for Ta'leem and Jumu'ah services during program modifications, pursuant to PVSP  
18 policy.

19 On November 12, 2008, Chaplain Salaam submitted PVSP officials written notification of his  
20 last day at PVSP on December 5, 2008, to begin working at Avenal State Prison (ASP) on December  
21 8, 2008.

22 Prior to Chaplain Salaam's job transfer, he obtained written approval from then Facility A  
23 supervisory staff on November 14, 2008, to allow Plaintiff and other Muslim inmates to gather in the  
24 chapel, under custody staff supervision, on Thursdays for Ta'leem and Fridays for Jumu'ah during the  
25 interim of PVSP hiring a replacement Muslim Chaplain.

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28 <sup>1</sup> Plaintiff has used the word "Chaplain" in his complaint to refer Salaam, therefore, the court will also use this reference  
in its opinion. See ¶ 10. (ECF No. 50).

1           Soon after Chaplain Salaam’s departure, Plaintiff and other Facility A Muslim inmates began  
2 experiencing problems from PVSP staff regarding chapel access for scheduled religious services,  
3 issues concerning staff refusal to sign and promptly return religious service approval lists, and  
4 religious special purchase package forms, staff refusal to retrieve and promptly deliver religious  
5 special purchase pack forms within a reasonably timely fashion, and staff hindrance on religious  
6 accommodations for Ramada and two Ids.

7           **B. Plaintiff’s Motion for Judicial Notice**

8           As previously stated, in support of his opposition Plaintiff has filed a request for judicial notice  
9 and attaches several documents. Defendants oppose Plaintiff’s request for judicial notice.

10           Initially, Plaintiff’s motion for judicial notice is improper because Plaintiff failed to reference  
11 any of the documents for which he requests judicial notice in his opposition. Thus, there is no  
12 showing that the documents are relevant or support Plaintiff’s opposition to Defendants’ motion to  
13 dismiss, and it is not incumbent upon the Court to sort through all the documents to determine the  
14 relevancy, if any, of such documents. Furthermore, Plaintiff’s request for judicial notice is improper  
15 as it is a request for judicial notice of documents, not adjudicative facts. See Fed. R. Evid. 201.  
16 Accordingly, Plaintiff’s request for judicial notice is DENIED, with the exception of the March 18,  
17 2010, memorandum identified below in section D.

18           **C. Defendants’ Motion to Strike Declarations Filed by Plaintiff**

19           In support of his opposition to Defendants’ motion, Plaintiff filed declarations by himself and  
20 other inmates. Defendants move to strike the declarations on the ground they are untimely and are  
21 irrelevant and improper.

22           Irrespective of the timeliness of the submission of Plaintiff’s declarations, the declarations are  
23 irrelevant and improper because they are outside the scope of the pleadings and constitute extrinsic  
24 evidence, and the Court cannot consider such declarations in ruling on the instant motion to dismiss.  
25 United States v. Ritchie, 342 F.3d 903, 907-908 (9th Cir. 2003). Accordingly, the Court does not  
26 consider the declarations of Plaintiff and other inmates in ruling on the instant motion to dismiss, and  
27 Defendants’ motion to strike the declarations should be granted.

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1           **D.       Defendants’ Motion to Dismiss**

2           Defendants Giurbino, Cate and Davis move to dismiss the claims against them under Rule  
3 12(b)(6) of the Federal Rules of Civil Procedure.

4           1.       Defendant Giurbino

5           Defendant Giurbino is identified in the caption of the complaint as the “Director of California’s  
6 Division of Adult Institutions.” (ECF No. 50, at 1.) The Court found that Plaintiff stated a cognizable  
7 claim against Defendant Giurbino for violation of RLUIPA.

8           Plaintiff alleges that on March 18, 2010, Defendant Giurbino and Cate promulgated CDCR’s  
9 statewide Religious Meat Alternative Program, which amended Title 15 of the California Code of  
10 Regulations sections 3054 through 3054.7 to include a designated meal program category for Muslim  
11 inmates to receive halal certified meat, in addition to the previously existing religious meals for  
12 inmates of vegetarian and Jewish Kosher diets. To this end, the Court takes judicial notice of the fact  
13 that on March 18, 2010, Giurbino issued a memorandum dated March 18, 2010, which specifically  
14 stated:

15                     The purpose of this memorandum is to announce the approval of amendments to  
16 the departmental regulations for food service and inmate religious diets, California  
17 Code of Regulations, Title 15, Sections 3054 through 3054.7 Religious Diet Program  
(Attachment A). These amended regulations become effective on February 2, 2010.

18                     Effective immediately, adult institutions shall begin implementing the Religious  
19 Meat Alternate Program, the Vegetarian Diet Program, and the Jewish Kosher Diet  
20 Program as described in the amended regulations. For purposes of the Religious Meat  
21 Alternate Program, Correctional Food Managers (CFMs) shall purchase halal meats, on  
22 delegation, from Highland Foods .... Only halal meat processors who provide that they  
23 are currently certified to all halal standards will be utilized. All adult institutions shall  
use the halal certified meat products and attached menus, and begin serving Religious  
Meat Alternate entrees as soon as possible but no later than June 28, 2010. Updated  
menus with approved Religious Meat Alternate entrees for the fourth quarter are  
attached (Attachment B).

24                     CFMS are advised the Religious Meat Alternate Program is a religious diet  
25 program with the vegetarian option being served for breakfast and lunch. The  
26 vegetarian option for breakfast and lunch meets halal requirements. The Religious  
27 Meat Alternate (Chicken Patty, Beef Patty, or Turkey Frank) is only offered at the  
dinner meal. CFMs are reminded that halal meat is to be stored on a separate dedicated  
28 shelf/pallet, prepared on a clean table and cooked separately from non halal meat.  
Halal meat shall be placed on a sheet pan and baked. The halal meat should be cooked

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prior to any other menu item to avoid any cross contamination. During the serving of the meal please avoid any cross contamination. During the serving of the meal please ensure that a dedicated utensil is used for the halal meal item to avoid any cross contamination. Dedicate storage rooms, preparation tables, or cooking trays are not necessary for halal meat. Staff shall follow normal sanitation procedures prior to and following the preparation of halal meat.

Prior to implementation, please ensure that your institutions provide mandated On-The-Job (OJT) training concerning the amended regulations and the appropriate storage, preparation, and cooking of halal meat used for the Religious Meat Alternate Program. OJT training shall be given to appropriate custody, food service staff, and inmate workers.

(ECF No. 110-1, Ex. 56.)

The policy identified and upheld by Defendants is at the heart of Plaintiff’s complaint regarding the Religious Meat Alternative Program, and Defendant Giurbino was personally involved in the alleged constitutional violations by way of Memorandum approved and issued March 18, 2010 (as referenced in Plaintiff’s fourth amended complaint).<sup>2</sup> Accordingly, Defendant Giurbino’s motion to dismiss should be denied.

2. Defendant Cate

Defendant Cate is identified in the caption of the complaint as the former Secretary of CDCR. As with Defendant Giurbino, Plaintiff alleges that Defendant Cate promulgated CDCR’s statewide Religious Meat Alternative Program, which amended Title 15 of the California Code of Regulations sections 3054 through 3054.7 to include a designated meal program category for Muslim inmates to receive halal certified meat, in addition to the previously existing religious meals for inmates of vegetarian and Jewish Kosher diets. Plaintiff further alleges that Captain Allen rescinded a memorandum which authorized Plaintiff and other Muslim inmates chapel access for religious services under custody supervision, and implemented a policy that denies Muslim inmates chapel access during non-emergency program modifications when there is no chaplain or religious volunteer

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<sup>2</sup> Court may consider exhibits and documents attached or incorporated by reference to complaint in ruling on a motion to dismiss. See Tellabs, Inc v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (a court may consider “other sources courts ordinarily examine when ruling on Rule 12(b)(6) motion to dismiss, in particular, documents incorporated into the complaint by reference, and matters which a court may take judicial notice.”); see also Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

1 to supervise religious services [referenced by Plaintiff as Policy-I]. (ECF No. 50 at ¶ 18.) Plaintiff  
2 contends that in numerous written responses, Defendant Cate, among others, approved the  
3 enforcement of Policy-I. (Id. at ¶ 21.) “From December 2008 to January 2011, Plaintiff wrote over 20  
4 letter and proposals to Defendants Myers, Bennett, Walker, Nash, Brazelton, Yates and Cate,  
5 concerning this issue. No correction was made.” (Id. at ¶ 24.)

6 On a separate issue relating to denial of religious artifacts and packages, Plaintiff alleges that  
7 from 2008 to 2011, Plaintiff and other Muslim inmates were denied religious packages which included  
8 prayer rugs, kufi caps, beads, and prayer oils. (ECF No. 50 at ¶ 80.) From 2008 to 2010, Plaintiff  
9 wrote approximately 22 letters to several prison officials, including Defendant Cate. (Id. at ¶ 85.)

10 In opposition to the present motion to dismiss, Plaintiff references the many appeals he filed  
11 and submits that Defendant Cate affirmed the decision to deny the appeal at the third level of review.  
12 (ECF No. 110, ¶¶ 62, 63, 69, 72, 73, 77, 80, 83, 85, 97, 103.) Construing Plaintiff’s allegations  
13 liberally as this Court must, Plaintiff’s allegations are sufficient at the pleading stage to state a  
14 cognizable claim for relief against Defendant Cate. Assuming Plaintiff wrote several letters and  
15 appeals to Defendant Cate advising him of the policy violations and no action was taken in response,  
16 that is sufficient to state a cognizable claim for knowledge of the alleged constitutional violation.

17 Defendant is correct insofar as inmates lack a separate constitutional entitlement to a specific  
18 prison grievance procedure. However, in his fourth amended complaint, Plaintiff alleges that he filed  
19 administrative appeals with Defendant Cate in which he maintained that he was not being provided an  
20 appropriate diet and denied religious artifacts and practices to comply with his religious beliefs. The  
21 grievance procedure is the method by which Defendant Cate was notified of the alleged constitutional  
22 violation regarding his religious practices, which he failed to remedy. Where, as here, the problem is  
23 an ongoing religious need and the request is made in an inmate appeal to remedy the ongoing problem,  
24 liability can be based on the denial of an inmate appeal, just as it could be based on the denial of a  
25 verbal request from the inmate. Cf. Jett v. Penner, 439 F.3d 1091, 1098 (9th Cir. 2006) (supervisor  
26 may be liable for deliberate indifference to a serious medical need, for instance, if he or she fails to  
27 respond to a prisoner’s request for help).

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1 Based on the allegations in the complaint coupled with the notice provided by the  
2 administrative appeals, the Court finds, as stated in the prior screening order, that Plaintiff has stated a  
3 cognizable claim against Defendant Cate for subjecting him to conditions in violation of the violation  
4 of Plaintiff's rights under the free exercise clause of the First Amendment and the Religious Land Use  
5 and Institutionalized Persons Act. Accordingly, Defendants' motion to dismiss on this ground should  
6 be denied.

7 3. Defendant Davis

8 Defendant Davis is identified in the complaint as an Associate Warden at PVSP. (ECF No. 50  
9 at 2.)

10 Plaintiff contends that Defendant Davis, among others, approved of the religious violations in  
11 written appeal responses. As with Defendant Davis, there is no separate constitutional entitlement to a  
12 specific prison grievance procedure. However, in the fourth amended complaint, Plaintiff alleges that  
13 he filed several inmate appeals in which he maintained that he was not being provided an appropriate  
14 diet and denied religious artifacts and practices to comply with his religious beliefs. Defendant Davis  
15 denied all of the inmate grievances. The grievance procedure is the method by which Defendant  
16 Davis was notified of the alleged constitutional violation regarding his religious practices, which he  
17 failed to remedy. Based on the allegations in the complaint coupled with the notice provided by the  
18 administrative appeals, the Court finds, as stated in the prior screening order, Plaintiff has alleged a  
19 cognizable claim against Defendant Davis for subjecting him to conditions in violation of the violation  
20 of Plaintiff's rights under the free exercise clause of the First Amendment and the Religious Land Use  
21 and Institutionalized Persons Act. Accordingly, Defendant Davis's motion to dismiss on this ground  
22 should be denied.<sup>3</sup>

23 **IV.**

24 **CONCLUSION AND RECOMMENDATIONS**

25 In sum, based on the allegations outlined above and at the pleading stage, Plaintiff has alleged  
26 a sufficient causal link between the actions of Defendants Giurbino, Cate, and Davis and the alleged

27 \_\_\_\_\_  
28 <sup>3</sup> Plaintiff is cautioned that all Defendants may be entitled to summary adjudication if, after discovery, it is shown that  
these Defendants did not have sufficient personal involvement in the underlying constitutional violation.



1 constitutional violations. Indeed, at the pleading stage, the Court is required to liberally construe the  
2 pro se complaint, and Plaintiff has alleged sufficient facts to support a claim that Defendants Giurbino,  
3 Cate, and Davis “knew of the violations and failed to act to prevent them.” Taylor v. List, 880 F.3d  
4 1040, 1045 (9th Cir. 1989). Nothing in the complaint forecloses liability for Defendants based on  
5 their handling of the inmate grievances.

6 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 7 1. Plaintiff’s motion for judicial notice be denied;
- 8 2. Defendants’ motion to strike the declarations submitted by Plaintiff in support of his  
9 opposition; and
- 10 3. Defendants’ motion to dismiss for failure to state a cognizable claim for relief be  
11 denied.

12 These Findings and Recommendations will be submitted to the United States District Judge  
13 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30) days**  
14 after being served with these Findings and Recommendations, the parties may file written objections  
15 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
16 Recommendations.” The parties are advised that failure to file objections within the specified time  
17 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
18 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

19  
20 IT IS SO ORDERED.

21 Dated: February 8, 2016

  
22 UNITED STATES MAGISTRATE JUDGE