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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

L. QIY AM POGUE,

Plaintiff,

No. CIV S-05-1873 MCE GGH P

vs.

JEANNE WOODFORD, et al.,

Defendants.

ORDER and FINDINGS AND  
RECOMMENDATIONS

Introduction and Summary

On account of prison transfers and vague claims, plaintiffs' pleadings in this religion-in-prison case are dysfunctional giving rise to numerous questions as to the proper parties and claims and exhaustion status. However, given liberal pro se pleading standards as they are, district courts are compelled to divine what is at issue. A good part of the Findings and Recommendations will be spent in setting forth the history of this case and the appropriate issues as the undersigned has seen and presently sees them.

Plaintiff has filed suit essentially claiming that his abilities to practice his Muslim religion were unduly burdened at his former institution (Sierra Conservation Center), and have been unduly infringed at Pleasant Valley State Prison, his present incarceration locale. The motions and oppositions in this matter at bar total approximately 1,000 pages. In those pages,

1 defendants seek to have two of plaintiff's purported six claims dismissed on the basis that they  
2 were not administratively exhausted prior to filing suit, and on the merits of all six claims.

3 For the reasons that follow defendants' exhaustion ground should be denied.

4 However, but for the halal/kosher diet claim, defendants should be awarded summary judgment  
5 on all other claims. Even for the diet claim, defendants in their individual capacity are qualifiedly  
6 immune from damages. This case should go to trial on the diet claims for prospective relief only.

7 Pertinent Case Chronology

8 On September 10, 2005, plaintiff filed his complaint while housed at Sierra  
9 Conservation Center. The complaint named Jeanne Woodford, then the Director of CDCR and  
10 also "all unknown wardens of all CDC prisons." "Class Action" was denominated on this  
11 pleading. The complaint raised four issues:

- 12 1. Be allowed to participate in Jumu'ah without penalty<sup>1</sup>;
- 13 2. That CDCR hire paid imams for religious services involving Muslim prisoners;
- 14 3. That Muslim prisoners be allowed to have beards and long hair;
- 15 4. That Muslim prisoners be given halal/kosher diets.

16 The complaint sought injunctive relief and \$10,000 in total damages.

17 Director Woodford was ordered served on January 13, 2006; Director Tilton was  
18 substituted in with respect to his official capacity on September 8, 2006. The court also sought,  
19 in vain, to acquire counsel for plaintiff. In his September 8th order, the undersigned found that  
20 no class action motion had been filed, that class actions litigated by pro se plaintiffs were nearly  
21 impossible with a layperson acting as both the class representative and class counsel, and that the  
22 action would be "presently construed" as a non-class action.<sup>2</sup> Plaintiff was ordered to amend the

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24 <sup>1</sup>Plaintiff spells "Jumu'ah" without the apostrophe; nevertheless, the court will use the  
more common spelling.

25 <sup>2</sup>The conclusion section of that order erroneously stated that plaintiff's motion for a class  
26 action was denied. First, no bona fide motion had been filed. Second, the undersigned does not  
have the authority in a non-consent case to deny class action status. The correct status of this

1 complaint for various reasons. The First Amended Complaint was filed, but now plaintiff had  
2 several other prisoners join in as plaintiffs. For the reasons set forth in the court's April 30, 2007  
3 order, the multi-plaintiff action was severed, plaintiff was ordered to proceed on his own, and file  
4 a Second Amended Complaint.

5 The Second Amended Complaint was filed essentially reiterating the issues in the  
6 initial complaint. However, in an attached Memorandum of Points and Authorities, plaintiff  
7 appeared to attempt to add two new issues:

- 8 5. Being permitted to purchase and use prayer oils;
- 9 6. Being permitted single cell status on account of cleanliness requirements of the Muslim  
10 religion.

11 Defendants<sup>3</sup> brought a motion to dismiss for lack of exhaustion of administrative  
12 remedies. Although recognizing that the court had not included plaintiff's spurious add on  
13 claims as referenced in the memorandum, attached to the Second Amended Complaint, see Order  
14 of September 25, 2007, defendants collectively attacked all six issues. Defendants reasoned that  
15 because plaintiff had been transferred to Pleasant Valley, any exhaustion of remedies at Sierra  
16 Conservation Center (SCC) could not be applicable to complaints at Pleasant Valley. No  
17 mention was made in the first motion that the last two of the six claims applied *only* to Pleasant  
18 Valley. In adjudicating defendants' first motion to dismiss for lack of exhaustion, the  
19 undersigned responded to the collective attack by finding that the previous exhaustion at SCC  
20 would apply to a transferred plaintiff. Order; Findings and Recommendations of March 21,  
21 2008. This holding was adopted by the district judge. Whether defendants can bring a second  
22 motion on a theory that the last two issues required exhaustion since they only applied to the new

23 \_\_\_\_\_  
24 case is as set forth in the text of the order – as presently construed, plaintiff is proceeding on his  
25 own as an individual. Plaintiff may file a motion for class certification assuming that issues  
26 survive the motion for summary judgment, but he must realize that such a motion filed by a pro  
se in all probability will ultimately be denied.

<sup>3</sup> The status of the defendants in their individual and official capacity is set forth below.

1 prison is discussed below.

2 We now arrive at the point of defendants' combined motion to dismiss and for  
3 summary judgment.

4 Motion to Strike Declarations

5 Plaintiff seeks to strike three reply declarations (Myers, Igbinosa, Duncan) on the  
6 basis that the initial declarations filed omitted the "I declare under penalty of perjury..." sentence.  
7 When brought to the attention of defendants' counsel, substitute declarations were filed with the  
8 inadvertently omitted sentence now in place.

9 While plaintiff is, of course, correct that unsworn declarations are not admissible  
10 on summary judgment, plaintiff posits no legitimate reason why technical errors such as the one  
11 at issue cannot be rectified in the absence of bona fide prejudice to plaintiff. The motion to strike  
12 is ordered denied.

13 Exhaustion

14 Defendants contend in this motion to dismiss for failure to exhaust that plaintiff  
15 cannot rely on the court's previous holding of a "transferred exhaustion" from SCC to Pleasant  
16 Valley for his 5th (prayer oils) and 6th (single cell) claims because plaintiff did not make these  
17 claims at SCC, but only Pleasant Valley. While defendants' assertion may be factually accurate,  
18 defendants do not address the reasons why they did not make this assertion in the previous  
19 exhaustion motion.

20 As set forth above, defendants made the previous exhaustion dismissal motion on  
21 the basis that none of the claims were exhausted, administrative proceedings having been  
22 commenced at SCC, but not at Pleasant Valley, prior to the bringing of the federal complaint.  
23 However, they did not argue that only some of the claims were Pleasant Valley only claims. The  
24 second motion is therefore a seriatim, non-enumerated Fed. R. Civ. P 12(b) motion, i.e., based on  
25 a different theory. "[W]hen a court decides upon a rule of law, that decision should continue to  
26 govern the same issues in subsequent stages in the same case." United States v. Park Place

1 Assoc., Ltd., 563 F.3d 907, 925 (9th Cir. 2009). In this case, the court has decided that plaintiff  
2 exhausted administrative remedies. That order is ultimately a ruling on the law, and should not  
3 be upset absent satisfactory reasons. Here, defendants posit no reasons to be relieved of the law  
4 of the case doctrine. Hence, the motion to dismiss claims 5 and 6 based on lack of exhaustion  
5 should be denied.

6 The Merits

7 A. Standards

8 Summary judgment is appropriate when it is demonstrated that there exists “no  
9 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
10 matter of law.” Fed. R. Civ. P. 56(c).

11 Under summary judgment practice, the moving party  
12 always bears the initial responsibility of informing the district court  
13 of the basis for its motion, and identifying those portions of “the  
14 pleadings, depositions, answers to interrogatories, and admissions  
15 on file, together with the affidavits, if any,” which it believes  
16 demonstrate the absence of a genuine issue of material fact.

15 Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986) (quoting Fed. R. Civ.  
16 P. 56(c)).

17 “[W]here the nonmoving party will bear the burden of proof at trial on a  
18 dispositive issue, a summary judgment motion may properly be made in reliance solely on the  
19 ‘pleadings, depositions, answers to interrogatories, and admissions on file.’” Id. Indeed,  
20 summary judgment should be entered, after adequate time for discovery and upon motion, against  
21 a party who fails to make a showing sufficient to establish the existence of an element essential  
22 to that party’s case, and on which that party will bear the burden of proof at trial. See id. at 322,  
23 106 S. Ct. at 2552. “[A] complete failure of proof concerning an essential element of the  
24 nonmoving party’s case necessarily renders all other facts immaterial.” Id. In such a  
25 circumstance, summary judgment should be granted, “so long as whatever is before the district  
26 court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is

1 satisfied.” Id. at 323, 106 S. Ct. at 2553.

2           If the moving party meets its initial responsibility, the burden then shifts to the  
3 opposing party to establish that a genuine issue as to any material fact actually does exist. See  
4 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356  
5 (1986). In attempting to establish the existence of this factual dispute, the opposing party may  
6 not rely upon the allegations or denials of its pleadings but is required to tender evidence of  
7 specific facts in the form of affidavits, and/or admissible discovery material, in support of its  
8 contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11,  
9 106 S. Ct. at 1356 n. 11. The opposing party must demonstrate that the fact in contention is  
10 material, i.e., a fact that might affect the outcome of the suit under the governing law, see  
11 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); T.W. Elec.  
12 Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the  
13 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the  
14 nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

15           In the endeavor to establish the existence of a factual dispute, the opposing party  
16 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
17 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
18 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary  
19 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a  
20 genuine need for trial.’” Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P.  
21 56(e) advisory committee’s note on 1963 amendments).

22           In resolving the summary judgment motion, the court examines the pleadings,  
23 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
24 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
25 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
26 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587, 106 S. Ct.

1 at 1356. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's  
2 obligation to produce a factual predicate from which the inference may be drawn. See Richards  
3 v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902  
4 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than  
5 simply show that there is some metaphysical doubt as to the material facts . . . . Where the record  
6 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
7 'genuine issue for trial.'" Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (citation omitted).

8 On February 24, 2006, the court advised plaintiff of the requirements for opposing  
9 a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154  
10 F.3d 952, 957 (9th Cir. 1998) (en banc); Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir.  
11 1988).

#### 12 B. Types of Claims; Status of Defendants

13 Plaintiff's present claims against defendants located at SCC can only be  
14 predicated on a claim for damages as plaintiff is no longer housed in that institution. However,  
15 claims against officials at Pleasant Valley can sound in both damages and injunctive relief,  
16 assuming that the claims are otherwise appropriate against the named defendants. The problem  
17 here is that plaintiff was not very careful in identifying the defendants he desired to sue, and with  
18 the exception of Warden Yates, defendants have made no attempt to separate the defendants'  
19 activities insofar as they may relate to SCC or Pleasant Valley.

20 As related above, the operative complaint is the second amended complaint.  
21 Plaintiff sued therein the California Department of Corrections, which cannot be sued under the  
22 Eleventh Amendment (see Findings and Recommendations of 9/26/07), Secretaries Woodford,  
23 Hickman and Tilton. Plaintiff also sued all unknown wardens of every CDCR institution. For  
24 obvious reasons, none of these anonymous wardens were served.<sup>4</sup> The court did substitute in the  
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26 <sup>4</sup> Plaintiff had sued these wardens just in case he was ever sent to another institution.

1 warden at plaintiff's present institution, Pleasant Valley-defendant Yates. An answer was filed  
2 on behalf of these defendants. (Answer, June 5, 2008).

3 Plaintiff purported to sue all defendants in their individual and official capacities.  
4 As CDCR has undergone quite a bit of leadership change in the past several years, none of the  
5 above Secretaries currently hold the position of Secretary, CDCR, and can have no official  
6 capacity. Matthew Cate is the present Secretary of CDCR and he will be substituted in this case  
7 *in his official capacity only*. See Fed. R.Civ.P. 25(d). Plaintiff has never sought leave to identify  
8 individuals at his former SCC facility as defendants in this action.

9 Defendants have made no assertion, and do not assert here, that the remaining  
10 defendants are somehow not individually linked to plaintiff's allegations at either SCC or  
11 Pleasant Valley for purposes of individual liability. Thus, the status of defendants is as follows:

- 12 1. Cate: official capacity only;
- 13 2. Woodford: individual capacity only;
- 14 3. Tilton; individual capacity only;
- 15 4. Hickman: individual capacity only;
- 16 5. Yates: individual and official capacity (but only for Pleasant Valley).<sup>5</sup>

17 C. Plaintiff's Failure to Organize Disputed Facts

18 In making their motion for summary judgment, defendants correctly, and pursuant  
19 to the rules of this court, set forth a separate statement of undisputed facts. Eastern District Local  
20 Rule 56-260. Plaintiff is supposed to counter this with a fact-by-fact agreement, agreement in  
21 part and/or a showing by reference of where the court might find a disputed fact. The reasons for  
22 the court rules are obvious – the adjudicator should be able to look in one place to see if a party is  
23 disputing a fact set forth by the moving party as undisputed. In an action such as this which  
24 presents multiple issues of an important nature, the need for organization of facts is even more

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26 <sup>5</sup> Thus, the only "individual capacity" defendants are former Directors of CDCR. Defendants do not bring their motions, however, on a linking basis.



1 critical.

2           Plaintiff did not follow the rules of this court. Rather, he filed a memorandum of  
3 points and authorities with hundreds of pages (mostly unreferenced) of exhibits attached thereto  
4 setting forth unauthenticated, for the most part, explications of the religion of Islam related to  
5 primarily diet issues. Two declarations, which are not referenced in any significant manner in the  
6 points and authorities, have been separately filed. The points and authorities themselves,  
7 although containing bits and pieces of valid argument, are rather stream of consciousness and flip  
8 back and forth between the issues. To complicate matters, plaintiff then decides to file various  
9 add-ons after the pleadings have closed for the summary judgment motion.

10           The point of this section is not to criticize plaintiff for the sake of criticizing.  
11 Indeed, the undersigned recognized the difficulties inherent in this case when it attempted to find  
12 counsel. But, the rules are in place for a purpose, and it is not feasible for the undersigned to  
13 start a document by document review of everything filed in the case by plaintiff for relevance and  
14 admissibility with respect to each issue.

15           The present opposition brings into focus the Ninth Circuit’s conflicting rulings on  
16 analysis of pro se oppositions to summary judgments. The Ninth Circuit has stated that pro se  
17 litigants must follow the same rules of procedure that govern other litigants. King v. Atiyeh, 814  
18 F.2d 565, 567 (9th Cir.1987). As a general rule for ordinary litigants, the judge does not have to  
19 scour the record in efforts to find evidence which might defeat summary judgment, i.e., the  
20 litigant must supply the needed evidence *within the motion or opposition*. See Carmen v. San  
21 Francisco Unified School Dist., 237 F.3d 1026, 1030 (9th Cir. 2001) (stating the rule for  
22 represented parties: “Other circuits are not unanimous, but *Forsberg* is both binding on us and  
23 consistent with the majority view that the district court may limit its review to the documents  
24 submitted for the purposes of summary judgment and those parts of the record specifically  
25 referenced therein.”); but see Jones v. Blanas, 393 F.3d 918, 922-923 (9th Cir. 2004) (“[b]ecause  
26 Jones is pro se, we must consider as evidence in his opposition to summary judgment all of Jones

1 [admissible] contentions offered in motions and pleadings [signed under penalty of perjury].”) It  
2 is difficult to square Jones with King because Jones clearly fashions a separate rule for pro se  
3 litigants in opposing summary judgment, and does away with the “same rules of procedure that  
4 govern other litigants.”

5           Moreover,

6           A trial court can only consider admissible evidence in ruling on a  
7 motion for summary judgment. See Fed.R.Civ.P. 56(e); *Beyene v.*  
8 *Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).  
9 Authentication is a “condition precedent to admissibility,” FN6 and  
10 this condition is satisfied by “evidence sufficient to support a  
11 finding that the matter in question is what its proponent claims.”  
12 FN7 Fed.R.Evid. 901(a). We have repeatedly held that  
13 unauthenticated documents cannot be considered in a motion for  
14 summary judgment. See *Cristobal v. Siegel*, 26 F.3d 1488, 1494  
15 (9th Cir.1994); *Hal Roach Studios, Inc. v. Richard Feiner & Co.,*  
16 *Inc.*, 896 F.2d 1542, 1550-51 (9th Cir.1989); *Beyene*, 854 F.2d at  
17 1182; *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th  
18 Cir.1987); *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684,  
19 686(9th Cir.1976).

20 Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir.2002) (footnotes omitted). But see Fraser v.  
21 Goodale, 342 F.3d 1032, 1036 (9th Cir.2003) (form of evidence is unimportant; only the  
22 substance matters, and as long as the substantive evidence “could” be made use of at trial, it does  
23 not have to be admissible per se at summary judgment. The Ninth Circuit also permits sworn to  
24 allegations of the complaint, Schroeder v. McDonald, 55 F.3d, 454, 460 (9th Cir. 1995), and  
25 seemingly almost any attachment thereto to be used to oppose the summary judgment because  
26 the substance, unless privileged, “could” conceivably be made admissible at trial if sufficient  
witnesses were called.

          If the national rules of civil procedure and the local rules of this court do not apply  
to pro se litigants, and if King v. Atiyeh, *supra*, is not good law, a clear statement to that effect  
should be made. Until such time, the undersigned is in a quandry about which line of authority  
to follow. Doing the best he can at this juncture, the undersigned will:

1. not review post-reply add on arguments and exhibits;

- 1 2. review any attachments to the opposition to summary judgment and declarations filed
- 2 therewith;
- 3 3. review those materials outside the summary judgment process, and filed before that process
- 4 began, if they were at least referenced by plaintiff anywhere in his summary judgment
- 5 opposition;
- 6 4. assume everything plaintiff files in the way of declarations and exhibits “could” be made
- 7 admissible at trial.

#### 8 D. RLUIPA

9 The undersigned commences discussion with the observation that the Religious  
10 Land Use and Institutionalized Persons Act (RLUIPA) imposes more stringent limitations than  
11 the Constitution’s Free Exercise part of the First Amendment on the day-to-day running of a  
12 prison vis-a-vis religious practice of the inmates. Warsoldier v. Woodford, 418 F.3d 989, 997-  
13 998 (9th Cir. 2005). Thus, the undersigned will analyze the statutory claim first.

14 Because the case of Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008), describes  
15 most of the RLUIPA principles applicable to this lawsuit, the undersigned quotes generously  
16 from the case without internal citations. “Section 3 of RLUIPA provides that ‘[n]o government  
17 shall impose a substantial burden on the religious exercise of a person residing in or confined to  
18 an institution ... even if the burden results from a rule of general applicability,’ unless the  
19 government demonstrates that the burden is “in furtherance of a compelling government interest”  
20 and is “the least restrictive means of furthering that ... interest.’ RLUIPA § 3(a), 42 U.S.C. §  
21 2000cc-1(a).” Id. at 888. “RLUIPA defines ‘religious exercise’ as ‘any exercise of religion,  
22 whether or not compelled by, or central to, a system of religious belief.’ § 2000cc-5(7)(A). We  
23 have noted that a burden is substantial under RLUIPA when the state “ ‘denies [an important  
24 benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on  
25 an adherent to modify his behavior and to violate his beliefs.’ ” Id. Proving that a prison  
26 institution has a “compelling” interest cannot be found on conclusory affidavits, and a prison

1 “cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually  
2 considered and rejected the efficacy of less restrictive measures before adopting the challenged  
3 practice.” *Id.* at 890. Applicable to all prison/religion cases, “[i]t is not within the judicial ken to  
4 question the centrality of particular beliefs or practices to a faith, or the validity of particular  
5 litigants’ interpretations of those creeds.” *Id.* at 884.

6 1. *Participation in Jumu’ah Without Penalty*

7 Defendants do not contest the legal assertion that plaintiff should be permitted to  
8 attend Friday Jumu’ah services without penalty. See *Mayweathers v. Newland*, 328 F. Supp. 2d  
9 1086, 1096-97 (E.D. Cal. 2004). Rather, the dispute here, if any, is whether in fact plaintiff is  
10 permitted to attend Jumu’ah services without penalty.

11 There appears to be no question that plaintiff currently is permitted to attend  
12 Jumu’ah services as the essential right to attend such services is not even at issue in the Second  
13 Amended Complaint. There also appears to be no question that plaintiff suffers no harm himself  
14 from such attendance. Other than the barest assertion in the Second Amended Complaint that he  
15 has been penalized (in some unknown fashion) for his participation at Jumu’ah, plaintiff presents  
16 no punishment facts. Defendants cited to those portions of plaintiff’s deposition where plaintiff  
17 conceded that he himself had not been harmed in setting forth the following undisputed facts.

18 48. Jumu’ah services are generally held in CDCR prisons, with the  
19 exception of the occasional security concern that may prevent  
20 Jumu’ah services.

21 49. Inmates committed to an indefinite term as a third strike  
22 offender are not entitled to earn any credit to reduce their minimum  
23 term.

24 50. Pogue is unassigned, without a job, and could not have been  
25 penalized for attending Jumu’ah services through the loss of work  
26 custody credits.

Because of plaintiff’s inability to earn credits for sentence reduction, and the lack of any other  
affirmative punishment, it does not appear that plaintiff could be harmed.<sup>6</sup> In opposing summary

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<sup>6</sup> Plaintiff’s deposition is attached to the Duncan declaration; it will be referenced by  
“RT.”

1 judgment, plaintiff posits no fact of punishment; in fact, the court cannot locate where plaintiff  
2 speaks about this issue at all. Summary judgment should be granted to defendants on this claim.<sup>7</sup>

3 2. Failure of SCC to Hire an Imam

4 In his deposition, plaintiff testified to his access to the imam at Pleasant Valley,  
5 and it was substantial. RT 32-35; 86-88. Thus, plaintiff's claim of a lack of access to an imam  
6 is related to SCC, and that only for money damages.<sup>8</sup> Defendants concede that no salaried imam  
7 is present at SCC for budgetary reasons. Chavez Declaration. However, some other "major"  
8 religions have paid chaplains at SCC. The relatively small number of Muslims at SCC is the  
9 reason why no paid imam is retained there. Chavez Declaration.

10 There are no material disputed facts over the lack of an Imam at SCC. The  
11 questions are whether RLUIPA requires such an appointment and, if so, whether lack of  
12 designated budgetary resources stands as a compelling reason for the non-appointment. The  
13 matter of whether plaintiff can seek monetary relief for an alleged RLUIPA violation, the only  
14 possible relief here in that plaintiff is no longer housed at SCC, need not be determined in this  
15 section.

16 RLUIPA is phrased in a way which prevents prison officials from substantially  
17 burdening the practice of religion; its text does not require the performance of affirmative acts,  
18 especially budget expenditures, in order to facilitate an inmate's religious practice. Thus, it is not  
19 surprising that many courts have determined that prisons do not have to hire clergy or imams to  
20 minister to inmates.

21 Not "every religious sect or group within a prison-however few in  
22 number-must have identical facilities or personnel ... nor must a

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23 <sup>7</sup> Indeed, from the excerpts of plaintiff's deposition, it appears that plaintiff was raising  
24 this claim on behalf of others, and not himself.

25 <sup>8</sup> In post-opposition filings, plaintiff discusses the fact that the previous imam has left,  
26 and Pleasant Valley is in the recruitment process for a new Imam. Although it is proving  
difficult to find a ready, willing and able imam, this temporary situation is not related to the  
claims of the complaint. The prison cannot force a paid imam to be present on the premises.

1 chaplain, priest, or minister be provided without regard to the  
2 extent of the demand.” Allen v. Toombs, 827 F.2d 563, 568 (9th  
3 Cir.1987). The Court notes that Defendants' evidence makes clear  
4 that Plaintiff may have access to a spiritual adviser, but that  
5 Plaintiff is responsible for co-ordinating such a visit. (Def's Ex. 7,  
6 Linderman Decl.FN3 at 19 .) Plaintiff has not alleged that he has  
7 been denied access to a spiritual adviser, only that one has not been  
8 provided for him. Plaintiff has not demonstrated that his ability to  
9 practice his religion is substantially burdened by the requirement  
10 that he bear the responsibility for co-ordinating his visits with a  
11 spiritual adviser, and the Court finds no RLUIPA violation in the  
12 ADOC's policy.

13 Jones v. Schiro, 2006 WL 2772641 (D. Ariz. 2006) \*4.

14 See also, Abdulhaseeb v. Culhane, 2008 WL 904661 (W.D. Ok. 2008); Tyson v. Guisto, 2008  
15 WL 2673371 (D. Or. 2008). See generally the First Amendment cases of Blair-Bey v. Nix, 963  
16 F.2d 162 (8th Cir. 1992); Reimers v. State of Oregon, 863 F.2d 630 (9th Cir. 1988).

17 If the rule were to the contrary, prisons would also have to fund any other religion  
18 facilitating request without which an inmate could claim a substantial burden: the construction of  
19 individual religious places of worship, the purchase of religious articles to be used in ceremonies,  
20 religious garments, religious publications and the like – all for the purpose of aiding an inmate in  
21 his practice of religion. These items may be of great importance to one in religious practice, but  
22 there is a distinct line to be drawn between providing a service of general applicability, e.g., food,  
23 such that it does not burden the practice of religion, and requiring affirmative acts of prison  
24 officials to provide services or items having no basis in the essentials of prison life. Moreover,  
25 there is similarly a distinction in requiring prison officials to construct a work schedule to permit  
26 attendance at religious ceremonies absent a compelling countervailing interest, and requiring the  
27 prison to satisfy all of one’s religious requests regardless of their non-availability within prison  
28 grounds.<sup>9</sup>

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<sup>9</sup> This is not to say that prison officials may provide services to one religion, but  
discriminate against another. However, this case contains no such discriminatory animus claims.

1           The undersigned is aware of a decision in this district, Rouser v. White, \_\_\_ F.Supp.  
2 2d \_\_\_, 2009 WL 1393215 (E.D. Cal. May 15, 2009), in which Judge Karlton declined to enter  
3 summary judgment for defendants on a claim, *inter alia*, that the prison had failed to hire Wiccan  
4 ministers. The undersigned finds this decision inapplicable for two reasons. First, to the extent  
5 that the Rouser court found a Constitutional or RLUIPA requirement for prisons to provide such  
6 facilitative acts, not based within the essentials provided in a prison context, the undersigned  
7 respectfully disagrees for the reasons set forth above. Secondly, Judge Karlton found that  
8 defendants in Rouser had not demonstrated with sufficient particularity the budgetary concerns  
9 which allegedly animated their decision not to hire a Wiccan minister. In this case, plaintiff in no  
10 way challenges the budgetary assertions of defendants.

11           Summary judgment should be awarded to the SCC defendants on this claim.

12           3. Beards and Long Hair

13           There is no dispute that CDCR policies regarding grooming have changed since  
14 January 2006, permitting inmates to have reasonably lengthy hair and beards. 15 Cal. Code  
15 Regs. 3062(e),(h). Inmates may now wear their hair at any length, not to extend over the  
16 inmate’s eyebrows or face, and beards of up to one-half inches are permitted. Id. Plaintiff  
17 focuses on policies in the past which prohibited beards and hair longer than three inches.  
18 Plaintiff was never disciplined about his grooming, but he claims that he cut his hair, and did not  
19 have a beard, to avoid discipline, contrary to his religious beliefs. Plaintiff admitted in his  
20 deposition that the current regulations are satisfactory. RT 111.

21           Because the changed, current regulations cannot be reasonably challenged as  
22 infringing on plaintiff’s religious practice/beliefs, plaintiff may not receive any prospective relief.  
23 42 U.S.C. § 2000cc-3 (e) (safe harbor provision).<sup>10</sup>

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24  
25           <sup>10</sup> “A government may avoid the preemptive force of any provision of this chapter by  
26 changing the policy or practice that results in a substantial burden on religious exercise, by  
retaining the policy or practice and exempting the substantially burdened religious exercise, by  
providing exemptions from the policy or practice for applications that substantially burden

1 As plaintiff observes, there is a serious question concerning whether monetary  
2 damages are awardable under RLUIPA. The weight of circuit authority, which the undersigned  
3 chooses to follow, does not permit damages against a state entity or persons in their official  
4 capacity as Congress did not expressly waive a state's sovereign immunity as to damages. See  
5 Rendelman v. Rouse, 569 F.3d 182, 187 (4th Cir. 2009) citing Madison v. Virginia, 474 F.3d 118  
6 (4th Cir. 2006); Cardinal v. Metrish, 564 F.3d 794, 800-801 (6th Cir. 2009); Sossaman v. Lone  
7 Star State, 560 F.3d 316, 330-332 (5th Cir. 2009); but see Smith v. Allen, 502 F.3d 1255 (11th  
8 Cir. 2007) (allowing nominal damages).

9 Again, the weight of circuit authority holds that Congress cannot render  
10 individuals in their individual capacity liable when Congress enacts a statute such as RUILPA  
11 pursuant to the Spending Clause. All of the above cited cases agree.

12 Because plaintiff can secure no relief on his claim of past compliance with  
13 repealed grooming regulations, summary judgment should be awarded against this claim under  
14 RLUIPA.

#### 15 4. Halal and Kosher Diets

16 Plaintiff invests most of his time opposing defendants' motion for summary  
17 judgment on this issue. Defendants have supplied the court two declarations containing the  
18 following pertinent facts.

19 Matthew B. Hamidullah is a practicing Muslim, an imam, and also a former  
20 warden in the federal correctional system. He has experience in the practice of the Muslim  
21 religion in the prison context. He states that Muslims may only eat meat slaughtered in a  
22 particular way; if so slaughtered, the meat is characterized a halal meat. Muslims may eat  
23 seafood and a wide variety of fruits, grains and vegetables. The Muslim faith may prohibit the  
24 eating of some foods, e.g. "unclean meat," but the religion does not mandate the eating of any

25 \_\_\_\_\_  
26 religious exercise, or by any other means that eliminates the substantial burden."



1 particular foods. “Many Muslims” believe that eating a Kosher diet is acceptable with Muslim  
2 practices.

3 Susan Summersett was the former CDCR food administrator, and she held that  
4 position from 2001-2008. She is an expert dietician. In her position, she was responsible for  
5 implementing the kosher diet served to Jewish prisoners. She has overseen the implementation  
6 of the general religious vegetarian diet. This diet meets the nutritional needs of male prisoners  
7 ages 31-70. The religious vegetarian diet was designed to apply to religions which prescribe a  
8 limited diet of some sort. Seafood is served once a week; there are no proscriptions for  
9 vegetarians who desire to have seafood. *None* of CDCR food served contains pork or pork  
10 products.

11 Generally, inmates desiring the religious vegetarian diet can apply for a diet card  
12 after his practice of a certain religion is verified by a chaplain. After being given the religious  
13 meal card, the inmate shows this card in the dining hall to obtain the religious vegetarian diet.  
14 Jewish prisoners must obtain a verification from a rabbi that the inmate is an adherent to the  
15 Jewish religion. Only Jewish inmates may receive the kosher diet which presumably contains  
16 kosher meat products. The kosher diet has been implemented because of its relative minimal  
17 cost due to the low number of Jewish prisoners.

18 CDCR maintains these three diets (the “regular” diet, religious diet and kosher  
19 diet) because of the logistical and financial difficulties which would ensue if a multitude of  
20 different diets were to be maintained.

21 10. All special meals create increased demands on CDCR staff.  
22 Should CDCR be required to serve a halal menu, extensive  
23 administrative, operational, budgetary, and security functions must  
24 be considered before its implementation. At the department level,  
25 staff would initially need to design a new policy and procedure,  
26 write new sections into the state regulations and the Department  
Operations Manual, seek approval for and allow public comment  
on these sections, research new food vendors, arrange  
transportation of food, create budgets for accessing and  
transporting new food items, build a menu that meets nutritional  
guidelines, analyze nutritional values of any halal food, and

1 purchase any additional equipment for institutions in order to cook  
2 or prepare the food items. In addition, each institution would have  
3 to properly train staff on how to prepare, cook, and sanitize food;  
4 staff and inmate workers would need to receive briefing on proper  
5 distribution of meals, custody officials must verify and learn new  
6 procedures regarding the distribution of food; chaplains must be  
7 trained; and new administrative forms printed and distributed to [ ]  
8 each prison.

9  
10 11. Currently, there are approximately 460 Jewish inmates  
11 participating in the kosher diet program at CDCR. By comparison,  
12 there are approximately 10,000 Muslim inmates in CDCR adult  
13 facilities. Should Muslim inmates want to participate in the Jewish  
14 kosher diet program, the sheer number of Muslim inmates would  
15 significantly impact the current administration of CDCR's food  
16 program. In order to provide Muslim inmates with a kosher diet,  
17 the current method of informally assembling and distributing the  
18 kosher diet within a designated kitchen area would no longer be  
19 feasible. In most institutions, the lay-out of the kitchen and the  
20 distribution method would have to be significantly re-worked to  
21 accommodate the service of kosher food to 10,000 Muslim  
22 inmates, or alternatively, the meals would have to be prepared off-  
23 site by an outside vendor. Modifying the kitchens in each of the  
24 thirty-three institutions within CDCR to provide a kosher diet to  
25 the Muslim inmates in CDCR would require extensive planning,  
26 coordination, and cost. Furthermore, because the religious  
vegetarian diet program currently satisfies the dietary restrictions  
for Muslim inmates, a new diet program would duplicate and  
further complicate the prison's food administration.

12. In my former capacity as Departmental Food Administrator, I  
analyzed the nutritional value of CDCR menus.

a. A daily average of menus served over seven weeks shows that  
CDCR's religious vegetarian diet exceeds the nutritional standards  
for men, as set by the Food and Nutrition Board of the Institute of  
Medicine, National Academy of Sciences. For men ages fifty-one  
to seventy, the religious vegetarian diet provides 176 percent of the  
recommended daily protein and 280 percent of the recommended  
daily iron.

b. Attached as Exhibit A are true and correct copies of my  
nutritional analyses of CDCR's religious vegetarian diet, regular  
diet, and Jewish kosher diet for men ages thirty-one to fifty, and for  
men ages fifty-one to seventy. These analyses show that the daily  
averages over a seven-week period fully satisfy the nutritional  
requirements of adult males 31-50 and 51-70 years of age.

13. I am personally familiar with the costs of each diet program  
that CDCR serves. As Exhibit A shows, the costs per day per  
inmate are as follows: (1) the religious vegetarian diet costs  
\$2.6268; (2) the standard pork-free diet costs \$2.8066; and (3) the  
Jewish kosher diet costs \$7.77.

- 1 a. There are approximately 10,000 Muslim inmates in the CDCR  
2 system. If all 10,000 Muslim inmates were to receive the religious  
3 vegetarian diet option, then this would cost \$9,587,820 per year. If  
4 only 5,000 Muslim inmates were to receive the religious vegetarian  
5 diet option, then this would cost \$4,793,910.  
6 b. If all 10,000 Muslim inmates could receive the Jewish kosher  
7 diet, then this would cost \$26,221,600 per year. If only 5,000  
8 Muslim inmates could receive the Jewish kosher diet, then this  
9 would cost \$13,110,800 per year.  
10 c. Therefore the Jewish kosher diet would cost CDCR \$16,633,780  
11 more per year than the religious vegetarian diet for 10,000 Muslim  
12 inmates. For only 5,000 Muslim inmates, the Jewish kosher diet  
13 would cost CDCR \$8,316,890 more per year than the religious  
14 vegetarian diet.  
15 d. Since the CDCR food budget is approximately \$165,000,000 per  
16 year, the direct cost of providing kosher meals to the Muslim  
17 inmates would increase CDCR food costs by approximately 10%,  
18 not including the cost of increased staffing and retrofitting the  
19 kitchens.

14. Despite the complications described above, CDCR is currently  
exploring how each of its 33 institutions can accommodate Muslim  
inmates with a new halal meat option. CDCR has established a  
Director's Work Group to explore and provide recommendations  
on how to provide this new halal meat option. This group is  
composed of food managers, Muslim chaplains, and various prison  
administrators who have been meeting for the past few months.  
The option being considered would substitute the regular meat  
entree at dinner with a halal meat entree. The group has prepared a  
memo complete with recommendations for the Secretary to  
consider. At this time, we anticipate the halal meat option would  
begin in July 2009 at the start of the next fiscal year. CDCR is  
developing proposed regulations for the halal meat option that  
should be submitted for public comment in the coming months.

15. Cost estimates for the halal meat option have not been finalized  
but early information suggests that it will not be as costly or as  
time consuming to roll out as the Jewish kosher diet. Since the  
halal option will simply substitute pre-cooked halal beef or chicken  
for the non-halal meat entrees, there will be no need to acquire  
additional equipment or set aside a portion of an institution's  
kitchen for preparation.

Summersett Declaration at 4-6.

Plaintiff vigorously opposes a vegetarian diet, but it is difficult to find the facts on  
which he bases his opposition. His points and authorities do not contain an organized rebuttal to  
the facts presented by defendants. Although plaintiff attaches several dietary exhibits, the  
undersigned is not equipped to read them all and make plaintiff's case for him. Nevertheless, the

1 undersigned has understood that plaintiff believes that a kosher diet should be given to him on an  
2 interim basis at the very least, until a halal diet is obtained. He alleges, perhaps after reading  
3 Shakur, supra, that he suffers gastric distress with a vegetarian diet. He observes, correctly, that  
4 defendants have not ruled out the provision of halal diets to Muslims in that the cost of such may  
5 well be less than Kosher diets.

6 Issues of fact remain precluding summary judgment, at least on an injunctive  
7 relief basis, see discussion above which finds damages unavailable in RUILPA actions. The  
8 undersigned notes that declarant Summersett believed that the halal meat option could actually be  
9 in effect approximately one month ago. Summersett was optimistic in her declaration that a halal  
10 diet could be implemented without extraordinary expense. The undersigned is not aware of facts  
11 which would actually preclude the institution of providing such a diet. If such a diet cannot be  
12 instituted immediately, the undersigned remains unconvinced that CDCR has compelling reasons  
13 not to give *plaintiff* a Kosher diet for a short interim period in that the diet is already in effect for  
14 Jewish inmates. Again, this action has not been certified to be a class action at this time and  
15 involves this plaintiff only. While there may be some ripple effect to giving plaintiff an interim  
16 Kosher diet, it is quite possible that the ripples would cease when a halal diet is finally  
17 implemented. It is unclear in light of the facts that under RLUIPA a Muslim inmate must be  
18 forced to give up eating meat, and perhaps eggs and cheese, because a vegetarian diet is  
19 technically, sufficiently nutritious. See Shakur v. Schiro, supra. In addition, while defendants  
20 can argue with some force that plaintiff's vegetarian gastric problems do appear to be contrived,  
21 the undersigned is unable to rule upon such as a matter of law.

22 Summary judgment should be denied for this claim insofar as plaintiff seeks  
23 injunctive relief. Again, no damages are available under RLUIPA.

#### 24 5. Prayer Oils

25 Defendants posit the following facts taken from plaintiff's concessions at  
26 deposition:

1 Pogue admits that he has access to a variety of religious artifacts  
2 including: a prayer rug, a religious medallion, a kuffi cap, prayer  
3 beads, and a copy of the Qur'an. (Decl. Duncan2 3, Ex. B (Pl.'s  
4 Dep. 47:5-23.))

5 In addition, Pogue is allowed to purchase Islamic videos, cassettes,  
6 and books. (Id. 10.)

7 Pogue is allowed to use prayer oil on the days that Imam Salaam  
8 conducts Jumu'ah services at Pleasant Valley. (Id. 96:19-25.)

9 But Pogue claims that his religious practice is burdened by the  
10 Pleasant Valley fire marshal's requirement that prayer oil bottles be  
11 factory sealed with a Material Safety Data Sheet (MSDS) before the  
12 inmates can retain prayer oil in their cells. (Id. 95:11-25.)

13 Pleasant Valley allows inmates to purchase prayer oil, and use it  
14 during religious services. (Decl. Hudson 10, Ex. D.) But inmates are  
15 not allowed to retain the oil in their cell unless the oil complies with  
16 institutional operating procedures because the oil is a combustible  
17 material. (Id.)

18 Pogue admits that prayer oils were also retained in the chapel  
19 at SCC. (Decl. Duncan2 3, Ex. B (Pl.'s Dep. 97:4-21.))

20 Muslim inmates at SCC voluntarily agreed to retain their  
21 prayer oil in the chapel, whereas Muslim inmates at Pleasant  
22 Valley are required to retain prayer oil in the chapel unless the  
23 fire marshal's safety restrictions are met. (Id. 95-99.)

24 Prayer oil is retained in the chapels at both Pleasant Valley  
25 and SCC, and no Muslim inmates at either institution  
26 possesses prayer oil in their cells.

27 The court cannot find any place within plaintiff's papers where he disputes  
28 any of the above facts. It is true, as defendants point out in their reply, that the permanent  
29 imam position at Pleasant Valley is currently vacant, and that access to prayer oils is limited  
30 to the chapel unless fire restrictions are met. However, the court does not find these minor  
31 inconveniences to be a substantial burden on plaintiff's practice of religion. More  
32 importantly, the fire marshal has determined that it is a safety hazard to maintain flammable  
33 oil in a cell without the appropriate seal or seal documentation. Plaintiff is no way

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1 contradicts this compelling need to keep improperly sealed oil out of his cell.<sup>11</sup> Moreover,  
2 the alternatives offered are the least restrictive alternatives to the compelling need not to  
3 have improperly sealed and documents flammable oil outside of the prison cell. At least,  
4 plaintiff does not conceive of any.

5 Summary judgment should be granted to defendants on this RLUIPA claim.

6 6. Single Cell Status

7 This claim epitomizes the excess to which RUILPA assertions can be made.  
8 Petitioner would like single cell status in an overcrowded prison system because he asserts  
9 his cellmate is not fastidious in his toilet practices, and petitioner needs a clean place to pray  
10 when he is in his cell. One can sense that the next RUILPA claim will require a prison to  
11 maintain near total silence at times so as to not allow distractions to religious thought. In  
12 fact, plaintiff does make that claim when he asserts that cellmates won't probably respect  
13 the need for silence at prayer times. RT 114. However, RUILPA is not a omnibus prison  
14 reform act such that a prison will be more like a monastery than a prison. Moreover, at  
15 some point the necessary RLUIPA accommodation of religious practice crosses the line into  
16 fostering a certain religion, even discriminating against others because of their religion, or  
17 the lack of specific tenets/practices.

18 As defendants set forth, California law provides that prisoners should expect  
19 to be double celled, 15 Cal. Code Regs. § 3269. The major exception are inmates who have  
20 been chronic victims of prison violence or chronic perpetrators thereof, and medically  
21 impaired inmates. Section 3269(d)(f). The undersigned can take judicial notice that

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22  
23 <sup>11</sup> Plaintiff argues that baby oil and olive oil are permitted in cells – so why not prayer  
24 oils. This argument does not controvert the expertise of the Fire Marshal. Plaintiff, a layperson,  
25 in no way demonstrates that all oil is equally dangerous or flammable. Plaintiff also alleges that  
26 because of the temporary absence of an imam, he can have no access to prayer oils, presumably  
because he cannot access the chapel. However, plaintiff establishes no fact that he cannot use the  
chapel when opened for services even in the absence of an imam, nor does he contest that the  
prayer oil could be kept there. Evidently, inmates at SCC, who have no access to a paid imam do  
just fine in having their oil stored in the chapel.

1 California prisons are overcrowded. See Coleman v. Schwarzenegger, 2009 WL 2430820  
2 (E.D. Cal. 2009). Granting single cell status to an inmate on the basis of religious needs  
3 would certainly exacerbate the problem.

4           Although a case falling under the First Amendment, Richards v. White, 957  
5 F.2d 471 (7th Cir. 1992), speaks to the issue here. In that case, an inmate of the Thelemite  
6 religion requested to be given a place in the prison complex where he could be alone for ½  
7 hour a day, or to be given single cell status. He claimed that his religion required this  
8 privacy. The court disposed of the request for being given a private place for a short time  
9 every day, something that even plaintiff does not request, and similarly disposed of the  
10 request for single cell status.

11           It is undisputed that Richards' request came at a time of  
12 overcrowding at the prison, which was in fact the reason  
13 Richards was initially placed in a double cell. Richards'  
14 request for a single cell is unreasonable given the  
15 unavailability of empty cells, the substantial effect the change  
would have on the particular inmate forced to give up a single  
cell for a double cell, and resentment other prisoners in  
double cells would naturally have because of the granting of  
such a request.

16 Id. at 474.

17           Plaintiff's claim is unreasonable in the RLUIPA context as well. Even if not  
18 being able to pray in solitude is a burden on one's religious practice, clearly, California has  
19 a compelling interest in ensuring that its prisons contain all those that should be there. If  
20 double celling is necessary to accomplish this compelling purpose, and without a doubt it is  
21 at this time, double celling itself is compelling. Further, there is simply no other way to  
22 house prisoners in light of the numbers of inmates outside of a general rule for double  
23 celling. Moreover, it does not take a trial to understand that single cell status in general  
24 populations would be a most welcome benefit to most inmates. If only one religious group  
25 received this major benefit, resentments would flourish and/or there would be a rush by all  
26 other religious groups to formulate a religious practice which required solitariness in

1 celling.<sup>12</sup> Either way, such would wreak havoc in the prison system. In short, RLUIPA  
2 cannot be interpreted to make inherent prison characteristics unlawful.

3 Summary judgment should be granted on this claim.

4 E. First Amendment

5 While inmates retain their First Amendment right to the free exercise of  
6 religion, a regulation impinging on an inmate’s constitutional rights passes muster so long  
7 as it is reasonably related to a legitimate penological interest. Henderson v. Terhune, 379  
8 F.3d 709, 712 (9<sup>th</sup> Cir. 2004), citing O’Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S.  
9 Ct. 2400 (1987) and Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254 (1987). The Turner  
10 test includes four factors to determine if a prison regulation violates a prisoner’s  
11 constitutional rights. “First, there must be a valid, rational connection between the prison  
12 regulation and the legitimate governmental interest put forward to justify it, and the  
13 governmental objective itself must be a legitimate and neutral one. A second consideration  
14 is whether alternative means of exercising the right on which the regulation impinges  
15 remains open to prison inmates. A third consideration is the impact accommodation of the  
16 asserted right will have on guards, other inmates, and the allocation of prison resources.  
17 Finally, the absence of ready alternatives is evidence of the reasonableness of a prison  
18 regulation.” Allen v. Toombs, 827 F.2d 563, 567 (9<sup>th</sup> Cir. 1987) (citing Turner, 482 U.S. at  
19 89-91); see also, Malik v. Brown III, 71 F.3d 724, 728-729 (9<sup>th</sup> Cir. 1995).

20 The Turner test is generally interpreted as less restrictive than RLUIPA on  
21 the ability of prison officials to issue policies at odds with a professed religious belief.  
22 Warsoldier v. Woodford, 418 F.3d 989, 997-998 (9<sup>th</sup> Cir. 2005).

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25 <sup>12</sup> Prisoners may understand the need for a certain inmate to be released early from work  
26 to attend a religious service, but they are not going to be understanding when they are deprived of  
a major benefit on account of another’s, or another’s group, stated religious belief.



1                   1. Participation in Jumu'ah Without Penalty

2                   For the same reasons as expressed for the RLUIPA claim, i.e., plaintiff does  
3 not demonstrate in any fashion that he has been punished for attending Jumu'ah services,  
4 defendants are entitled to summary judgment on this claim.

5                   2. Failure of SCC to Hire an Imam

6                   The undersigned previously found that plaintiff had access to a paid imam at  
7 Pleasant Valley (except for the temporary absence of an imam at this time due to  
8 resignation/transfer), and had no right to a paid imam at SCC. This ruling does not change  
9 under the First Amendment analysis.

10                  3. Beards and Long Hair

11                  The undersigned previously found that under RLUIPA, plaintiff's claim was  
12 moot as far as prospective relief was concerned, and that RLUIPA did not allow a claim for  
13 damages. An action under the First Amendment would permit a claim for damages.<sup>13</sup>

14                  Plaintiff's "injury" is his forced grooming under compulsion of the then  
15 extant grooming regulations. However, the Ninth Circuit's previous ruling in Henderson v.  
16 Terhune, 379 F.3d 709, 715-16 (9th Cir.2004) (CDCR hair-length restriction does not  
17 violate First Amendment) precludes plaintiff from proceeding further on this First  
18 Amendment claim.

19                  4. Halal and Kosher Diets

20                  Under the RLUIPA claim, the undersigned found that issues of fact remained  
21 concerning implementation of an [overdue] halal diet for Muslim prisoners, and whether for  
22 the short interim, plaintiff could not be afforded a kosher diet. Those same issues of fact  
23 remain under a First Amendment Turner analysis. Summary judgment should be denied on  
24

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25                  <sup>13</sup> Even though plaintiff has not suffered physical injury, as required by the PLRA for  
26 emotional damages claims, the Ninth Circuit does not enforce this aspect of the PLRA for First  
Amendment purposes. Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).

1 this claim. All defendants should remain for this claim for purposes of injunctive relief and  
2 First Amendment damages analysis.

3 5. Prayer Oils

4 As set forth above, a compelling need exists not to have improperly  
5 sealed/documented flammable oil in prison cells. At SCC, the Muslim inmates voluntarily  
6 agreed to have their oil kept in the chapel; at Pleasant Valley, the oil is kept in the chapel  
7 unless the Fire Marshal requirements are met for in-cell use. Because plaintiff cannot make  
8 out a RLUIPA claim, he will not be able to make a cognizable First Amendment claim.

9 6. Single Cell Status

10 Plaintiff's unreasonable claim for single cell status fares no better under the  
11 First Amendment than it did for RLUIPA. Summary judgment should be granted to  
12 plaintiffs.

13 F. Qualified Immunity

14 For the five claims upon which the court has found summary judgment should  
15 be granted, there is no need to analyze qualified immunity. The law regarding the need to  
16 modify diets for religious purposes has been well established for a number of years. Indeed,  
17 CVDR has recognized this in implementing a religious vegetarian diet and kosher diet.

18 However, the claim here is more nuanced. Plaintiff was not simply told to eat  
19 what was placed before him; he was told that he could have a religious vegetarian diet which  
20 would not contradict his religious tenets. There is no dispute in this case that the Muslim  
21 religion does not *require* the eating of certain foods; it simply requires that some foods be  
22 processed in a particular way, and pork products are off limit no matter how processed. The  
23 court finds that the nuanced claim qualifies for qualified immunity. The claim here is  
24 identical to that of Thompson v. Williams, 320 Fed. Appx. 678 (9th Cir. 2009) (finding that  
25 reasonable prison officials would not have known that a substitute ovo-lacto diet would not  
26 have met constitutional muster when these officials denied a halal/kosher diet.) While not

1 precedent, the case is persuasive. None of the defendants sued in their individual capacity  
2 are liable for damages on the diet claim.

3 CONCLUSION

4 IT IS HEREBY ORDERED that plaintiff's motion to strike declarations  
5 (Docket #140) is denied.

6 IT IS HEREBY RECOMMENDED that defendants' motion to dismiss and  
7 for summary judgment (Docket # 117) should be denied insofar as administrative exhaustion  
8 is concerned; it should be denied for Claim 4 (halal/kosher diet) as listed above on the merits  
9 (both RLUIPA and First Amendment) for prospective relief purposes; the summary  
10 judgment motion should be granted on the merits for Claims 1, 2, 3, 5 and 6 as listed above;  
11 and defendants sued in their individual capacity have qualified immunity for Claim 4.

12 These findings and recommendations are submitted to the United States  
13 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).  
14 Within twenty days after being served with these findings and recommendations, any party  
15 may file written objections with the court and serve a copy on all parties. Such a document  
16 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."  
17 Any reply to the objections shall be served and filed within ten days after service of the  
18 objections. The parties are advised that failure to file objections within the specified time  
19 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
20 (9th Cir. 1991).

21 DATED: 08/25/09

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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