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

ANDRE JAMAL ROBINSON,

Plaintiff,

No. 2:11-cv-2555 MCE AC P

vs.

MATTHEW CATES, et al.

Defendants.

FINDINGS & RECOMMENDATIONS

_____/

Plaintiff is a prisoner proceeding pro se in this civil action brought pursuant to 42 U.S.C. § 1983. Before the court are four pending applications: (1) defendants’ motion to dismiss for failure to state a claim (Doc. No. 18); (2) plaintiff’s motion for an order to show cause (Doc. No. 19); (3) plaintiff’s motion for default judgment (Doc. No. 21); and (4) the court’s own order to show cause why this action should not be dismissed as moot (Doc. No. 20). For the reasons outlined below, the undersigned recommends that this action be dismissed against defendant McDonald as moot, and against defendants Cate and Giurbino with leave to amend.

Background

The Complaint

Plaintiff filed this action on September 21, 2011. At the time of filing, plaintiff was housed at High Desert State Prison (“HDSP”), and alleged, among other things, that he is a

1 Muslim, that he was being denied an adequate Halal diet, and that he was prohibited from
2 participating in Ramadan services. See Doc. No. 1. Specifically, plaintiff alleged that he first
3 requested to be placed on Halal or Kosher diet in October 2008. See Doc. No. 1-1 at 1. On or
4 about January 16, 2009, after his request was denied, and his appeal of the denial was pending,
5 the California Department of Corrections and Rehabilitation (“CDCR”) proposed a policy
6 change allowing a religious meat alternative at dinner only. Id. Plaintiff also alleges that
7 defendant Giurbino authored a memo to Correctional Food Managers authorizing them to
8 substitute “unlawful meat” with a vegetarian option. Id. Plaintiff does not advise when the
9 Giurbino memo was written.

10 In November 2009, after completing his administrative remedies, plaintiff
11 petitioned the Lassen County Superior Court. See Doc. No. 1-1 at 1. Plaintiff does not provide
12 the court with a copy of the petition, or of the Lassen County Superior Court’s decision;
13 however, based on the allegations in plaintiff’s complaint, plaintiff appears to have asked that
14 court to direct that he be provided with meals in accord with his religious beliefs. According to
15 plaintiff, the state argued to the Lassen County Superior Court that plaintiff’s petition would
16 soon be moot, because plaintiff would soon be able to obtain halal meals. See id. Plaintiff
17 argues, however, that the state misled the state court, because the state’s attorney failed to advise
18 the Superior Court of the Guirbino memo. Id. Plaintiff’s petition was denied in June 2010, and
19 plaintiff alleged that, “to date, [he] still has problems receiving a halal diet.” See id.

20 In his complaint, plaintiff sought injunctive relief only, including an order
21 directing the CDCR to provide him with “full Halal meals.” Id.

22 In or around October, 2011, while this complaint was pending, plaintiff was
23 transferred to the California Substance Abuse Treatment Facility and State Prison at Corcoran.
24 See Doc. Nos. 6, 7.

25 *Defendants’ Motion to Dismiss*

26 On March 20, 2012, defendants Giurbino, Cate, and McDonald moved to dismiss

1 the complaint under Federal Rule of Civil Procedure 12(b)(6). Specifically, defendants argued:
2 (1) plaintiff failed to allege any personal participation by defendant Cate; (2) plaintiff failed to
3 allege a constitutional violation by defendant Giurbino; and (3) the allegations raised against
4 defendant McDonald are vague and speculative, and accordingly insufficient to state a colorable
5 claim. See Doc. No. 18.

6 Plaintiff filed an untimely opposition to the motion to dismiss on October 9, 2012.
7 See Doc. No. 25. Plaintiff argued that: (1) his equal protection rights had been violated, because
8 Jewish inmates receive a “complete Kosher meal” at breakfast, lunch, and dinner, while plaintiff
9 receives only a Kosher entree at dinner; and (2) CDCR’s Halal diet program is inadequate
10 because (a) plaintiff only receives a Kosher entree at dinner served with unlawful foods and
11 trays; (b) food managers substitute meat with non-kosher foods, such as Prison Industry
12 Authority food or foods not purchased from a certified Kosher/Halal vendor with a current halal
13 certification; and (c) plaintiff is not a vegetarian but the non-Kosher/Halal “vegetable option” is
14 forced on him, violating his free exercise rights. See Doc. No. 25.

15 Plaintiff’s Motion for an Order to Show Cause

16 On July 27, 2012, after his transfer to Corcoran, plaintiff filed a motion seeking
17 an Order to Show Cause for a Preliminary Injunction and a Temporary Restraining Order, raising
18 many of the same allegations included in his original complaint, and asking the court to order
19 that CDCR: (1) serve plaintiff Kosher meals until he is provided with Halal meals; (2) serve
20 plaintiff Kosher or Halal meat at breakfast; (3) prevent cross-contamination of Kosher/Halal
21 foods and utensils with non-Kosher/Halal foods; and (4) serve Kosher/Halal meals covered to
22 protect them from cross-contamination. See Doc. No. 19 at 1-2.

23 Among the allegations raised by the plaintiff in his motion were that CDCR does
24 not have a Halal diet option, and that CDCR official policy ignores plaintiff’s religious dietary
25 prescriptions, because it provides “full Kosher/Halal meals” to Jewish inmates, while only
26 offering plaintiff a “Kosher/Halal meat entree at dinner served with Haram (unlawful) foods.”

1 See Doc. No. 19 at 3.¹

2 Plaintiff argues that CDCR “uses a combination of the Religious Meat Alternative
3 Diet and the Vegetarian diet to circumvent” giving plaintiff a Kosher/Halal diet. Id. at 3.
4 According to plaintiff, the Religious Meat Alternative Diet and the Vegetarian Diet are : (1) not
5 certified Kosher/Halal; (2) are from general procured companies; and/or (3) are from prison
6 industry authority. Id. at 4. Plaintiff does not explain how foods from general procured
7 companies, or from PIA, makes the foods unacceptable. For example, at Exhibit C to the
8 plaintiff’s motion is a list of foods available for purchase from prison vendors, at least thirty of
9 which are Halal certified; nine of which are Kosher; and eighteen of which are both. Plaintiff
10 does not explain why these foods are not acceptable.²

11 The gist of plaintiff’s allegations appears to be: (1) that the CDCR’s Halal
12 offerings are somehow insufficient; and (2) that Kosher inmates receive more meat than Muslim
13 inmates, who are forced to eat largely vegetarian options. However, absent from plaintiff’s
14 motion is any specific information about how he was fed at Corcoran. This would have been
15 especially helpful to the court, as it would have provided some information about how the prison
16 was implementing the CDCR policy change described by plaintiff to have occurred in 2010.
17 While plaintiff describes his attempts to obtain Halal meals at HDSP, he fails to allege any

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21 ¹ Absent from plaintiff’s arguments in his motion for an order to show cause is any
22 information about whether his ability to attend services continued to be restricted, as he had
alleged in his complaint.

23 ² In his motion for an order to show cause, plaintiff alleges that “C.D.C.R. does not
24 address the Haram (unlawful) food items that make their foods haram (unlawful) such as,
25 additives, preservatives, dyes, pesticides, shelach, steroids, lanelin and vitamin A palmintate just
26 to name a few that make C.D.C.R. foods impure and thus Haram (unlawful) for [plaintiff] to
consume.” See Doc. No. 19 at 4. Again, while plaintiff generally alleges that CDCR foods are
not acceptable, he fails to state what foods, if any, he is being served that contain these additives.
Additionally, since he appears to allege that all CDCR foods are impure in this way, he fails to
explain how receiving a Kosher diet from the CDCR would solve his problem.

1 specific facts about the meals he was provided since his transfer.³

2 The Court's Order to Show Cause

3 On August 8, 2012, the court issued an order noting plaintiff's transfer to
4 Corcoran and directing plaintiff to show cause why the complaint should not be dismissed as
5 moot. See Doc. No. 20. The court noted that, under circuit precedent, a case and controversy
6 must exist throughout the litigation, not just at the time the complaint is filed, and that a
7 prisoner's transfer from one prison to another may moot a prisoner's requests for injunctive
8 relief. See id.

9 In response, plaintiff appears to allege: (1) that the denial of Halal meals to
10 plaintiff is an issue capable of repetition yet evading review; and (2) that defendant Cate is liable
11 *in respondeat superior*. See Doc. No. 28. He advises the court that he is due to be transferred to
12 California Correctional Facility in Tehachapi or Pleasant Valley State Prison, and that defendant
13 Cate is responsible for any institution to which plaintiff might be transferred. Id. Notably, the
14 response includes no information about whether plaintiff is currently receiving a Halal diet, or if
15 he has been prevented from attending services.

16 Defendants have replied to plaintiff's response. See Doc. No. 29. Defendants
17 argue that (1) plaintiff has shown no likelihood of returning to HDSP, and his complaint is
18 therefore moot; (2) plaintiff's allegations are not capable of repetition, yet evading review,
19 because plaintiff has not established that his allegations are of such a limited duration that he
20 will not be able to litigate them should they recur at a new institution; and (3) plaintiff has failed
21 to state a cognizable claim against defendant Cate, as he has not identified any personal
22 involvement by Cate and because Cate is not liable *in respondeat superior* in this section 1983
23 action. Id.

24
25 ³ In a pleading filed October 9, 2012, plaintiff generally alleges that "[s]ubsequent to
26 [plaintiff's] transfer to Corcoran Substance Abuse Treatment Facility, his rights were still being
unlawfully violated...." See Doc. No. 24. Plaintiff provided no additional detail of what rights
were involved, or how his rights were being violated.

1 Applicable Law

2 Mootness

3 The rule in federal cases is that an actual controversy must be extant at all stages
4 of review, not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 395, 401
5 (1975), quoting Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974).

6 An inmate’s transfer to another prison while his claims are pending generally will
7 moot any claims for injunctive relief relating to the prison’s policies unless the suit has been
8 certified as a class action. See Dilley v. Gunn, 64 F.3d 1365, 1368 (9th Cir. 1995), citing
9 Preiser, 422 U.S. at 402-03; Johnson v. Moore, 948 F.2d 517, 519 (9th Cir.1991); Darring v.
10 Kincheloe, 783 F.2d 874, 876 (9th Cir.1986). An exception to this mootness doctrine exists for
11 cases “capable of repetition, yet evading review,” which applies when (1) the challenged action
12 is too short in duration to be fully litigated prior to its expiration, and (2) there is a reasonable
13 expectation that the injury will occur again See Dilley, 64 F.3d at 1368; see also Wiggins v.
14 Rushen, 760 F.2d 1009, 1011 (9th Cir. 1985) (finding exception did not apply since “[t]his case
15 neither challenges a court order which expires in a few days nor raises questions which are
16 mooted by the termination of a nonjudicial activity that is of short duration.”)

17 Dismissal for Failure to State a Claim

18 A complaint must contain more than a “formulaic recitation of the elements of a
19 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
20 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “The pleading
21 must contain something more...than...a statement of facts that merely creates a suspicion [of] a
22 legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal Practice and
23 Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient factual
24 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
25 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility
26 when the plaintiff pleads factual content that allows the court to draw the reasonable inference

1 that the defendant is liable for the misconduct alleged.” Id.

2 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
3 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
4 Bank, N.A., 654 F.Supp.2d 1104, 1109 (E.D.Cal.2009). Under the “notice pleading” standard of
5 the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
6 plain” statement of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
7 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009), cert. denied, U.S. , 130 S.Ct.
8 1053 (2010). “A complaint may survive a motion to dismiss if, taking all well-pleaded factual
9 allegations as true, it contains ‘enough facts to state a claim to relief that is plausible on its
10 face.’” Coto Settlement v. Eisenberg, 593 F.3d 1031, 1034 (9th Cir. 2010) quoting Iqbal, 556
11 U.S. at 678. “‘A claim has facial plausibility when the plaintiff pleads factual content that
12 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
13 alleged.’” Caviness v. Horizin Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010)
14 quoting Iqbal, 556 U.S. at 678. The court accepts all of the facts alleged in the complaint as true
15 and construes them in the light most favorable to the plaintiff. Corrie v. Caterpillar, 503 F.3d
16 974, 977 (9th Cir. 2007). The court is “not, however, required to accept as true conclusory
17 allegations that are contradicted by documents referred to in the complaint, and [the court does]
18 not necessarily assume the truth of legal conclusions merely because they are cast in the form of
19 factual allegations.” Paulsen v. CNF, Inc., 559 F.3d at 1071 (citations and quotation marks
20 omitted).

21 In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court “may
22 generally consider only allegations contained in the pleadings, exhibits attached to the
23 complaint, and matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City
24 of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted); see
25 also Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 980 n. 18 (9th Cir. 1999) (“When
26 considering a motion for judgment on the pleadings, [the] court may consider facts that are

1 contained in material of which the court may take judicial notice.”) (citation and quotation marks
2 omitted).

3 Preliminary Injunctive Relief

4 The standards governing the issuance of temporary restraining orders are
5 “substantially identical” to those governing the issuance of preliminary injunctions. Stuhlbarg
6 Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc., 240 F.3d 832, 839 n. 7 (9th Cir. 2001).
7 Therefore, “[a] plaintiff seeking a [TRO] must establish that he is likely to succeed on the merits,
8 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
9 equities tips in his favor, and that an injunction is in the public interest.” Am. Trucking Ass'n,
10 Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir.2009) (*quoting* Winter v. Natural Res.
11 Def. Council, Inc., 555 U.S. 7, 20 (2008)). A preliminary injunction is appropriate when a
12 plaintiff demonstrates . . . “serious questions going to the merits and a hardship balance [] tips
13 sharply toward the plaintiff, ... assuming the other two elements of the Winter test are also met.”
14 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011). A TRO is “an
15 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled
16 to such relief.” Winter, 555 U.S. at 22.

17 The Ninth Circuit has reiterated that under either formulation of the principles, if
18 the probability of success on the merits is low, preliminary injunctive relief should be denied:

19 Martin explicitly teaches that “[u]nder this last part of the
20 alternative test, even if the balance of hardships tips decidedly in
21 favor of the moving party, it must be shown as an irreducible
22 minimum that there is a fair chance of success on the merits.”

22 Johnson v. California State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (*quoting*
23 Martin v. International Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984).

24 Speculative injury does not constitute irreparable harm. See Caribbean Marine
25 Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988); Goldie’s Bookstore, Inc. v. Superior
26 Court, 739 F.2d 466, 472 (9th Cir. 1984). A presently existing actual threat must be shown,

1 although the injury need not be certain to occur. See Zenith Radio Corp. v. Hazeltine Research,
2 Inc., 395 U.S. 100, 130-31 (1969); FDIC v. Garner, 125 F.3d 1272, 1279-80 (9th Cir. 1997),
3 cert. denied, 523 U.S. 1020, 118 S.Ct. 1299 (1998); Caribbean Marine Servs. Co., 844 F.2d at
4 674.

5 Analysis

6 The Claims against Defendant McDonald are Moot.

7 As noted above, plaintiff has been transferred from HDSP, the institution where
8 he was housed at the time he filed his complaint. There is nothing in the record to suggest that
9 plaintiff may return to HDSP. See Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991); Darring
10 v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986). The claims against McDonald, the warden at
11 HDSP, are accordingly moot, and should be dismissed.

12 Plaintiff's conclusory allegation that his claims are "capable of repetition, yet
13 evading review" is insufficient to bring his claims within this mootness exception. Courts
14 throughout the country have adjudicated claims made by Muslim prisoners regarding their food.
15 See, e.g., Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008). There is currently nothing in the
16 record to suggest that plaintiff's claims are of such a short duration that ordinary litigation is
17 inadequate. And again, there is no indication in the record that plaintiff will be returning to
18 HDSP, the only facility at which, according to the record, plaintiff has been served an inadequate
19 diet.

20 The claims against defendants Cate and Guirbino may not be mooted by
21 plaintiff's transfer. Construing plaintiff's pleadings as broadly as possible, he could be alleging
22 that a CDCR policy prevents him from receiving a "full Halal meal." As defendant Cate is the
23 Secretary of the CDCR, and defendant Guirbino was the Director of CDCR's Division of Adult
24 Institutions, plaintiff, who seeks injunctive relief only, may be articulating a claim against these
25 defendants in their official capacity. The court will accordingly consider defendants' motion to
26 dismiss the claims against defendants Cate and Guirbino.

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2 *The Complaint Should Be Dismissed for Failure to State a Claim.*

3 As detailed above, plaintiff’s allegations in both his complaint and his motion for
4 an order to show cause are vague. Construing plaintiff’s claims broadly – for example, that a
5 CDCR policy violates the First and Fourteenth Amendments by offering Muslim prisoners an
6 inadequate diet, while ensuring that Jewish prisoners have a full Kosher diet – plaintiff has still
7 failed to articulate a colorable claim. In order to do so, plaintiff would have to provide “well-
8 pleaded factual allegations” either (1) that he is currently not receiving an adequate Halal diet; or
9 (2) that a CDCR policy is likely to cause him injury in the future. See, e.g., City of Los Angeles
10 v. Lyons, 461 U.S. 95, 102 (1983), citing O’Shea v. Littleton, 414 U.S. 488, 495-96 (“[p]ast
11 exposure to illegal conduct does not in itself show a present case or controversy regarding
12 injunctive relief ... if unaccompanied by any continuing, present adverse effects.”)

13 This plaintiff has not done. Instead, his pleadings include general allegations
14 about an unidentified CDCR policy governing the provision of Halal meals, articulated in such a
15 way that the court cannot determine if plaintiff is currently suffering from a constitutional
16 violation or if he is instead recounting acts which occurred before his transfer to Corcoran.
17 Plaintiff’s conclusory allegation that he has generally had “problems” getting a Halal meal since
18 2010 is insufficient to state a colorable claim where plaintiff fails to identify what those
19 problems are, how these problems are a result of CDCR policy, and who, specifically, is
20 violating his rights.

21 The court finds the allegations in plaintiff’s complaint so vague and conclusory
22 that it is unable to determine whether the current action is frivolous or fails to state a claim for
23 relief. The court has determined that the complaint does not contain a short and plain statement
24 as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading
25 policy, a complaint must give fair notice and state the elements of the claim plainly and
26 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff

1 must allege with at least some degree of particularity overt acts which defendants engaged in that
2 support plaintiff's claim. Id. Because plaintiff has failed to comply with the requirements of
3 Fed. R. Civ. P. 8(a)(2), the undersigned recommends that the complaint be dismissed against
4 defendants Cate and Giubino with leave to file an amended complaint.

5 *Plaintiff's Request for Temporary Injunctive Relief Should be Denied.*

6 As noted above, there is nothing in the current record that suggests the existence
7 of a present, actual threat to plaintiff's First and Fourteenth Amendment rights. Additionally, in
8 light of this court's determination that the complaint either is moot, or fails to state a cognizable
9 claim, plaintiff has not established that he is likely to succeed on the merits. Accordingly, the
10 undersigned recommends that the request for a TRO and/or preliminary injunction be denied.

11 *Plaintiff's Motion for Default Judgement is without Merit.*

12 Plaintiff moved for entry of default judgment against defendants after he alleged
13 they failed to respond to the court's August 8, 2012 order to show cause. Plaintiff further
14 alleged that defendants had failed to respond to the complaint. These claims are without merit.

15 A review of the docket reflects that defendants responded to the complaint on
16 March 20, 2012, when they filed their motion to dismiss. A review of the court's August 8, 2012
17 order to show cause reflects that it was plaintiff who was directed to respond to the court's order
18 to show cause, after which the defendants had the option to respond. Because defendants have
19 neither failed to answer the complaint, nor failed to respond to a court order, the undersigned
20 recommends that plaintiff's motion for entry of default (Doc. No. 21) be denied.

21 Good cause appearing, IT IS HEREBY RECOMMENDED that:

- 22 1. The order to show cause, filed August 8, 2012, (Doc. No. 20) be discharged;
- 23 2. The complaint be dismissed as moot against defendant McDonald;
- 24 3. Plaintiff's motion for an order to show cause (Doc. No. 19) be denied;
- 25 4. Plaintiff's motion for default judgment (Doc. No. 21) be denied; and
- 26 5. Defendant's motion to dismiss (Doc. No. 18) be granted, and the complaint be

1 dismissed with leave to amend against defendants Cate and Giurbino.

2 These findings and recommendations are submitted to the United States District
3 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
4 days after being served with these findings and recommendations, plaintiff may file written
5 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
6 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
7 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
8 F.2d 1153 (9th Cir. 1991).

9 DATED: December 5, 2012.

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/s/
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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