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U.S. DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

2009 FEB 10 P 2:48

<p>KARL DEE KAY, Plaintiff, v. NANCY BEMIS et al., Defendants.</p>	<p>BY: _____ DISTRICT CLERK</p> <p>MEMORANDUM DECISION AND ORDER</p> <p>Lead Case: 2:05-CV-995 DS Member Case: 2:06-CV-23</p> <p>District Judge David Sam Magistrate Judge David Nuffer</p>
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Plaintiff, Karl Dee Kay, an inmate at the Utah State Prison, filed this *pro se* civil rights suit under 42 U.S.C. § 1983. See 42 U.S.C.A. § 1983 (West 2007). Plaintiff was granted leave to proceed *in forma pauperis* under 28 U.S.C. § 1915. See 28 id. 1915. Before the Court are motions to dismiss two of the defendants in the lead case, and a separate motion to dismiss all claims against the consolidated defendants from the member case.

ANALYSIS

I. Background

This case consists of two separate suits challenging under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), see 42 U.S.C.A. §§ 2000cc et seq. (West 2009), restrictions on Plaintiff's right to

practice Wicca¹ while in Utah Department of Corrections' (UDC) custody. In the lead case, 2:05-CV-995-DS (filed December 1, 2005), Plaintiff alleges interference with his religious observance while at the Bonneville Community Correctional Center (BCCC), a halfway house operated by UDC. The lead case names as defendants numerous BCCC officials in their individual capacities. On January 25, 2007, the Court dismissed the Complaint in the lead case for failure to state a claim, however, the Tenth Circuit subsequently reversed the dismissal in part, concluding that Plaintiff's Complaint sufficiently pleaded claims under the First Amendment and RLUIPA. The case was remanded for further proceedings and Plaintiff was allowed to file an Amended Complaint.

The member case, 2:06-CV-23 (filed January 6, 2006), challenges restrictions imposed on Plaintiffs religious practices during his confinement at the Utah State Prison (USP), prior to his release to BCCC. The original Complaint and First Amended Complaint filed in the member case were dismissed for failure to state a claim and Plaintiff timely filed a Second Amended

¹ "Wicca is a polytheistic faith based on beliefs that prevailed in both the Old World and the New World before Christianity. Its practices include the use of herbal magic and benign witchcraft." O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400 (7th Cir. 2003) (internal quotation omitted).

Complaint on September 17, 2007, naming various prison officials as defendants. Based on the Tenth Circuit's reasoning in the BCCC case the Court found Plaintiff's Second Amended Complaint sufficient to state a claim.

Following remand of the lead case from the Tenth Circuit the above cases were consolidated and the United States Marshals Service was ordered to complete service of process upon Defendants. After being properly served the BCCC defendants--with the exception of Defendants Bodily and Schube who have filed motions to dismiss--filed timely Answers to Plaintiff's pleadings.² The consolidated USP defendants, on the other hand, filed a motion to dismiss which is now before the Court. The defendants also filed a combined *Martinez* Report addressing Plaintiff's allegations and explaining relevant UDC policies. The BCCC defendants request that after ruling on the pending motions to dismiss the Court enter a briefing schedule for summary judgment proceedings based on the information presented in the *Martinez* Report.

² Defendants Stamper, Bemis, Green and Heywood answered the original Complaint on April 2, 2008, and answered the Amended Complaint on July 28, 2008.

II. USP Defendants' Motion to Dismiss

The consolidated USP defendants move for dismissal of all claims against them based on *res judicata* and the *Rooker-Feldman*³ doctrine. Although Defendants' motion raises *res judicata* before addressing the applicability of the *Rooker-Feldman* doctrine, because *Rooker-Feldman* is jurisdictional in nature the Court must determine its applicability before considering Defendants' *res judicata* argument. See *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554-55 (7th Cir. 1999).

A. *Rooker-Feldman* Doctrine

i. Legal Standard

The *Rooker-Feldman* doctrine is a jurisdictional prohibition based on 28 U.S.C. § 1257 which divests lower federal courts of subject-matter jurisdiction over appeals from state-court decisions. See 28 U.S.C.A. § 1257 (West 2009). The doctrine "bars a party losing in state court from seeking what in substance would be appellate review of the state judgment in a United States district court" *Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163, 1169 (10th Cir. 1998). The *Rooker-Feldman*

³ The *Rooker-Feldman* doctrine derives its name from two decisions of the United States Supreme Court, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983).

doctrine asks:

[I]s the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.

GASH Assoc. v. Village of Rosemont, Ill., 995 F.2d 726, 728 (7th Cir. 1993). The *Rooker-Feldman* doctrine "prohibits a lower federal court [both] from considering claims actually decided by a state court, and claims inextricably intertwined with a prior state-court judgment." *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002) (internal citation and quotations omitted). A federal claim is inextricably intertwined with a state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 1533 (1987) (Marshall, J. concurring). Moreover, a federal claim is barred if "the injury alleged by the federal plaintiff resulted from the state court judgment itself," as opposed to being distinct from that judgment. For *Rooker-Feldman* to apply the state court decision must be final. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 287, 125 S. Ct. 1517,

1522-23,1526 (2005). A state court decision is final "if a lower state court issues a judgment and the losing party allows the time for appeal to expire." Bear v. Patton, 451 F.3d 639, 642 (10th Cir. 2006).

ii. Rooker-Feldman Analysis

The USP Defendants argue that under *Rooker-Feldman* the Court lacks subject matter jurisdiction over Plaintiff's First Amendment free exercise claims because Plaintiff's present suit essentially seeks to overturn a prior decision of the Utah state courts. Attached as Exhibit B to Defendants' supporting memorandum is an Order from the Utah Third Judicial District Court granting summary judgment against Plaintiff in *Kay v. Friel*, No. 050901211 (Salt Lake D. Utah August 17, 2005). According to that Order, in 2005 Plaintiff filed a state court motion for extraordinary relief against Warden Friel challenging the prison's refusal to allow Plaintiff to possess tarot cards to practice his Wicca religion. Based on the evidence presented the state court found that the prohibition on tarot cards was reasonably related to legitimate penological interests in promoting institutional safety and security, as required under *Turner v. Safely*, 482 U.S. 78, 107 S. Ct. 2254 (1987). Accordingly, the state court concluded that the prohibition on tarot cards did not violate the First Amendment and that Warden

Friel was entitled to summary judgment. As shown by Defendants' Exhibit C that decision was subsequently upheld by the Utah Court of Appeals in Kay v. Friel, No. 20050748-CA, 2005 WL 3131590 (Utah App. Nov. 25, 2005) (per curiam).

Plaintiff concedes that his tarot card claim is barred under *Rooker-Feldman* based on the state court's prior decision, however, Plaintiff argues that his additional claims against the USP defendants in this case--based on the denial of other religious items including tobacco, spices, crystals, books, sacred items box, wand, AD&D game etc.--are not barred by *Rooker-Feldman*. Although the state court's Order does include findings of fact relevant to some of the additional claims raised by Plaintiff here, the Court agrees with Plaintiff that the state court's holding addresses only the tarot card issue, therefore, Plaintiff's additional claims are not barred by *Rooker-Feldman*.

Accordingly, based on the *Rooker-Feldman* doctrine and the prior state court judgment the Court concludes that it lacks subject matter jurisdiction to hear Plaintiff's claim regarding denial of tarot cards at the prison and that claim is dismissed. The Court will now address whether Plaintiff's remaining claims against the USP defendants in the member case are barred by *res judicata*.

B. Res Judicata

i. Legal Standard

As the Tenth Circuit has explained, "res judicata bars a claim or issue that was actually decided or could have been decided in a previous action." Kenmen Engineering v. City of Union, 314 F.3d 468, 479 (10th Cir. 2002); see also Baker v. General Motors Corp., 522 U.S. 222, 233, n. 5, 118 S. Ct. 657, 664, n. 5 (1998) ("a valid final adjudication of a claim precludes a second action on that claim or any part of it"). Under 28 U.S.C. § 1738, commonly known as the full faith and credit statute, federal courts are required to give the same preclusive effect to a state court judgment that the judgment would receive in the courts of the issuing state. See 28 U.S.C.A. § 1738 (West 2009). "The United States Supreme Court has determined that § 1738 and traditional rules of preclusion are applicable to § 1983 actions." Jarrett v. Gramling, 841 F.2d 354, 356 (10th Cir. 1988).

Claim preclusion is usually raised as an affirmative defense in the answer to the complaint, or on motion for summary judgment. See 18 Moore's Federal Practice § 131.50[1]-[3] (3d ed. 2002). However, "where the substantive rights of parties are not endangered, a district court may in its discretion consider *res judicata* issues raised by motion to dismiss, rather than by the more usual form of an answer to a complaint." Limerick v.

Greenwald, 666 F.2d 733, 736 (1 Cir. 1982) (citing Diaz-Buxo v. Trias Monge, 593 F.2d 153 (1 Cir. 1979)). A court may also raise the issue of preclusion on its own motion, in appropriate cases. See Arizona v. California, 530 U.S. 392, 412, 120 S. Ct. 2304, (2000) (allowing that *res judicata* might be raised *sua sponte* in "special circumstances").

A federal court asked to determine whether a claim before it is precluded by a previous state court decision must look first to preclusion principles of the state wherein the rendering state court resides, in this case Utah. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380-83, 105 S. Ct. 1327, 1331-33 (1985) (quoting 28 U.S.C. § 1738). The Utah Supreme Court has held that in order for claim preclusion to bar a subsequent cause of action, a plaintiff must satisfy the following three requirements:⁴

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or *must be one*

⁴ Federal courts require three elements to establish claim preclusion: (1) identity of the parties or their privies in both suits; (2) identity of the cause of action in both suits; and (3) a final judgment on the merits in the earlier action. Yapp v. Excel Corp., 186 F.3d 1222, 1227 (10th Cir. 1999). The Utah Court of Appeals has observed that "the legal analysis under the claim preclusion branch of *res judicata* in the Utah common law is virtually identical to that in the federal common law." Youren v. Tintic School Dist., 86 P.3d 771, 772 (Utah App. 2004).

that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214, 1219

(Utah 2000) (emphasis added). The Utah courts have adopted the rule that "a party is required to include claims in an action for *res judicata* purposes only if those claims arose before the filing of the complaint in the first action." Id. at 1220.

Thus, under Utah claim preclusion law "a plaintiff must include claims in a suit for *res judicata* purposes if the plaintiff was aware of the facts upon which the latter claims were based at the time the first suit was filed." Id.

ii. Res Judicata Analysis

Plaintiff concedes that the first and third elements for claim preclusion are satisfied here because the USP Defendants were in privity with the defendant in Plaintiff's prior state court case (Warden Friel) and a final judgement was rendered. Plaintiff, however, argues that the second element is not satisfied here because his present suit alleges additional religious infringements which "[were] not raised and need not have been raised in the state court action" including "the denial of Wiccan books, religious silver metallic pendant, herbs, incense, precious stones and crystals, and time and place for

group or solitary worship." (Mem. Opp. at 8.) Plaintiff asserts that these deprivations were "an entirely separate event from the denial of tarot cards" raised in the state court suit and, therefore, they are not barred by claim preclusion. (Mem. Opp. at 9.)

Plaintiff's argument regarding the nature and timing of his remaining claims is not supported by the record. In fact, Plaintiff's Amended Complaint clearly shows that prior to filing his state court suit Plaintiff was well aware of the prison's additional restrictions on his religious exercise besides the tarot card ban. Plaintiff alleges in his Amended Complaint that he filed numerous grievances challenging all manner of prison restrictions on Wicca religious observance, including *inter alia* denial of group worship opportunities, role-playing games, metallic religious symbols, a paid Wicca chaplain, a pentacle/pendant necklace, and religious celebrations. (Am. Compl. at 21-27.) Plaintiff also states that prior to filing his state court suit he received numerous grievance responses from all levels of the prison administration denying his requests for various religious items and accommodations. Based on these allegations, and the supporting grievance documents attached to Plaintiff's pleadings, Plaintiff cannot possibly show that he was unaware of the relevant facts underlying his additional claims

against the USP Defendants when he filed his state court suit challenging the tarot card ban. Therefore, the Court rejects Plaintiff's argument that his remaining claims were entirely separate from his tarot card claim and could not have been pursued in his prior state court case.

Plaintiff also argues that based on his *pro se* status he should be allowed to pursue his additional claims here regardless of whether he could have brought them in his state court case. The Court is not convinced that Plaintiff should be excused from the claim preclusion requirements based merely on his *pro se* status or lack of legal training. As the Tenth Circuit has recognized, "a *pro se* plaintiff requires no special legal training to recount the facts surrounding his alleged injury, and he must provide such facts if the court is to determine whether he makes out a claim on which relief can be granted." Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Excusing *pro se* litigants from compliance with preclusion rules would undermine the very purposes for which they were developed, namely, to prevent repetitious and vexatious litigation and to conserve judicial resources. Allowing Plaintiff to bring his numerous claims piecemeal would not only waste judicial resources it would also cause considerable hardship to Defendants.

Thus, the Court concludes that Plaintiff's remaining claims

against the USP Defendants could and should have been brought in Plaintiff's prior state court case, therefore, those claims are now barred by claim preclusion and must be dismissed.⁵ Moreover, because all claims against them have been dismissed, each of the Defendants named in the member case are dismissed from this suit.

⁵ The Court notes that Plaintiff's claims in the lead case stem from religious restrictions imposed at BCCC following Plaintiff's release from prison, therefore, those claims could not have been included in the prior state court case and are not precluded by *res judicata*.

III. Motions to Dismiss Defendants Schube and Bodily

Defendants Schube and Bodily, parties in the lead case, move for dismissal of Plaintiff's claims against them pursuant to Rule 12(b)(6). Schube and Bodily argue that the allegations in Plaintiff Amended Complaint are not sufficient to state a claim against them.

A. Rule 12(b)(6) Standard

Under Rule 12(b)(6) a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) for failure to state a claim is generally with prejudice. See Sheldon v. Vermonty, 269 F.3d 1202, 1207 (10th Cir. 2001). When reviewing the sufficiency of a complaint the Court "presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Moreover, when the plaintiff is proceeding pro se the Court must construe the pleadings liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers. Id. However, "[t]he broad reading of the plaintiff's complaint does not relieve [him] of the burden of alleging sufficient facts on which a recognized legal claim could be based." Id. While a plaintiff need not describe every fact in specific detail, "conclusory allegations without

supporting factual averments are insufficient to state a claim on which relief can be based." Id.

The Supreme Court recently clarified the standard for motions to dismiss by stating that a complaint must contain enough factual allegations "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007). The Tenth Circuit has interpreted this to mean that "[t]he complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." Shero v. City of Grove, 510 F.3d 1196, 1200 (10th Cir. 2007) (quoting Twombly, 127 S. Ct. at 1965). "Factual allegations [in a complaint] must be enough to raise a right to relief above the speculative level." Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008). And, "the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for [his] claims." Ridge at Red Hawk, L.L. C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). The "requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." Robbins, 519 F.3d at 1248.

B. Defendant Schube

Plaintiff's Amended Complaint alleges that Schube was employed by BCCC as a licensed clinical social worker involved with the Sex Offender Treatment Program (SOTP). During an SOTP group therapy session Schube allegedly questioned Plaintiff about the length of his hair, to which Plaintiff responded that his hair "is religiously sacred and symbolic to his Wiccan beliefs." (Am. Compl. at ¶22.) Plaintiff alleges that Schube later belittled Plaintiff's religion, questioned the sincerity of his religious beliefs, and told him that he would not graduate from SOTP unless he cut his hair. Plaintiff alleges that Schube's actions amounted to religious discrimination in violation of the First Amendment and cruel and unusual punishment under the Eighth Amendment.

In order to state a viable free-exercise claim Plaintiff must satisfy a two-step inquiry. See Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007). First, Plaintiff must allege facts showing that Defendant's actions substantially burdened Plaintiff's sincerely held religious beliefs. Id. Once Plaintiff makes such a showing Defendants may defend their actions by showing that they were justified by a legitimate penological interest. Id. At that point the Court must balance the factors set forth in Turner v. Safley, 482 U.S. 78, 107 S.

Ct. 2254(1987), to determine the reasonableness of the challenged action or regulation. Id.

Here, Plaintiff has not satisfied his initial burden of showing that his religious beliefs were substantially burdened by Schube's actions. Although Plaintiff states that he felt "threatened", "chastised," "ridiculed" and "belittled" by Schube's comments there is no indication that Plaintiff's religious observance was actually burdened in any way. Plaintiff does not allege that Schube actually forced Plaintiff to cut his hair, nor does Plaintiff allege that Schube sanctioned Plaintiff for refusing to do so. Moreover, Plaintiff's allegations show that he had little reason to fear any sanction from Schube because she was only a back-up "secondary" counselor in the program and Defendant Bodily, the program director, had previously told Plaintiff that he did not have to cut his hair. (Am. Compl. ¶¶ 10, 21-22.) Because Plaintiff's Amended Complaint does not show that Schube substantially burdened Plaintiff's religious beliefs, the Court concludes that Plaintiff's allegations fail to state claim under the First Amendment.

Plaintiff's allegations also fail to state a claim against Schube under the Eighth Amendment. To state a claim for cruel and unusual punishment based on conditions of confinement a plaintiff must satisfy both an objective and subjective

component. The objective component is met only if the condition complained of is "sufficiently serious," meaning that it must pose "a substantial risk of serious harm" to the inmate. Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994). The subjective component requires the plaintiff to show that the defendant exhibited "deliberate indifference" to the inmate's health or safety. Id. at 832. Here, Plaintiff has not shown any serious threat to his health or safety. Although Plaintiff may have suffered emotionally or psychologically as a result of Schube's actions there is no indication that he faced any substantial risk of serious harm. Thus, Plaintiff's Eighth Amendment Claim against Schube must also be dismissed for failure to state a claim.

C. Defendant Bodily

Plaintiff's Amended Complaint alleges that Defendant Bodily was the director of SOTP and was Plaintiff's "primary one-on-one" therapist. Plaintiff alleges that after his encounter with Schube he contacted a local attorney regarding Schube's alleged religious discrimination. After speaking with the attorney Plaintiff had a conversation with Bodily in which she "manipulated" Plaintiff into disclosing the nature and details of the attorney meeting. Plaintiff alleges that Bodily later conveyed this information to the entire treatment team and

accused Plaintiff of having a persecution complex.

Applying the standards outlined above the Court concludes that Plaintiff's allegations are not sufficient to state a constitutional claim against Bodily. Bodily clearly did not substantially burden Plaintiff's religious exercise, nor did she infringe Plaintiff's free speech rights or prevent him from contacting an attorney or accessing the courts. Even assuming that Bodily disclosed confidential communications between herself and Plaintiff, such disclosure would not amount to a constitutional violation. Thus, the Court concludes that Plaintiff's Amended Complaint fails to state a claim against Bodily, and Bodily's motion to dismiss must be granted.

D. RLUIPA

The Tenth Circuit interpreted Plaintiff's original Complaint in the lead case as asserting a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C.A. §§ 2000cc et seq. (West 2009). Defendants note that although Plaintiff's Amended Complaint cites RLUIPA in the caption no RLUIPA claim is specifically alleged in the body of the pleading, thus, Defendants argue that Plaintiff appears to have abandoned his RLUIPA claim. Given the fact that the Tenth Circuit specifically remanded the lead case for consideration under RLUIPA the Court rejects the notion that Plaintiff has abandoned

his RLUIPA claims. Therefore, the Court must address whether Plaintiff's allegations against Schube and Bodily might be sufficient to state a claim under RLUIPA.⁶

RLUIPA requires strict scrutiny of correctional regulations that infringe upon inmates' religious practices. Under section 3 of RLUIPA, a correctional institution that receives federal financial assistance is forbidden from "impos[ing] a substantial burden on the religious exercise of [an inmate] . . . unless [it] demonstrates that imposition of the burden on that person-- (1) is in furtherance of a *compelling governmental interest*; and (2) is the *least restrictive means* of furthering that compelling governmental interest." See 42 U.S.C.A. § 2000cc-1(a) (West 2009) (emphasis added).

Based on the Court's conclusion that Plaintiff's allegations do not show that Bodily or Schube substantially burdened Plaintiff's religious exercise it is apparent that Plaintiff's allegations also do not state a claim under RLUIPA. As the Tenth Circuit has recognized, the term "substantial burden" as used in RLUIPA is not intended to be given any broader interpretation

⁶ The Court notes that Plaintiff's Second Amended Complaint in the member case also cited RLUIPA, however, the above holding that Plaintiff's remaining claims in the member case are barred by *res judicata* (see *supra* Part II-B-ii) also applies to any RLUIPA claim against the defendants named in that case.

than the Supreme Court's articulation of the concept in the First Amendment context. See Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 661 (10th Cir. 2006). Accordingly, the Court concludes that Plaintiff's Amended Complaint fails to state a claim against Defendants Bodily and Schube under RLUIPA.⁷

IV. Motion for Discovery

Plaintiff has filed a motion for discovery requesting depositions upon written questions under Rule 31(a). See Fed. R. Civ. P. 31(a). Defendants object to the motion on the grounds that Plaintiff's motion requests more than 10 depositions, Plaintiff has not properly identified the witnesses or the officer before whom the depositions will be taken, and, Plaintiff requests depositions from people who are no longer parties. In lieu of granting Plaintiff's discovery motion, Defendants request that after a ruling has been rendered on the present motions to dismiss any remaining defendants be allowed to file summary judgment motions based on evidence presented in the previously filed *Martinez Report*.

⁷ Defendants argue that even if Plaintiff could show a substantial burden on his religious exercise he cannot state a claim against Bodily or Schube under RLUIPA because the Act does not create a cause of action against individuals, as opposed to government entities. See *Smith v. Allen*, 502 F.3d 1255, 1276077 (11th Cir. 2007). In light of its conclusion that no substantial burden has been shown with regard to Bodily or Schube the Court declines to address this argument here.

The Court finds that allowing the remaining Defendants to file a summary judgment motion would help to narrow the remaining issues in this case and prevent the need for unnecessary discovery. Thus, Defendants shall have forty-five days from the date of this order to file their motion for summary judgment. After a summary judgment motion is filed, if Plaintiff believes that additional discovery is necessary to respond he may file a discovery motion within twenty days. Plaintiff's discovery motion shall specifically identify the information sought and shall clearly explain how the information is relevant to the claim or defense at issue. Within ten days Defendants shall respond to the discovery motion and may object to any discovery request that is not specifically tailored to meet Defendants' summary judgment motion or otherwise fails to comply with the Federal Rules of Civil Procedure.

If a timely discovery motion is not filed Plaintiff shall respond to Defendants summary judgment motion within thirty days after it is filed. Plaintiff is hereby notified that in responding to a summary judgment motion he cannot rest upon the mere allegations in his pleadings. Instead, as required under Federal Rule of Civil Procedure 56(e), Plaintiff must come forth with specific facts, admissible in evidence, showing that there is a genuine issue remaining for trial.

ORDER

Based on the forgoing, **IT IS HEREBY ORDERED** that:

(1) the USP Defendants' motion to dismiss is **GRANTED**, and, all defendants named in the member case (2:06-CV-23) are **DISMISSED** from this action;

(2) Defendant Schube's Motion to Dismiss is **GRANTED**;

(3) Defendant Bodily's Motion to Dismiss is **GRANTED**;

(4) Plaintiff's Motion for Discovery is **DENIED**;

(5) the remaining Defendants shall have forty-five days to file their motion for summary judgment;

(6) Plaintiff may file a motion for discovery in accordance with this Order within twenty days of receiving Defendants' motion for summary judgment, and Defendants may object within ten days; and,

(7) if a timely motion for discovery is not filed Plaintiff shall respond to the summary judgment motion within thirty days.

BY THE COURT:

DATED this 10th day of February, 2009.



DAVID SAM

United States District Judge