UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PETER J. MCDANIELS, Plaintiff, v. BILL ELFO, et al., Defendants.	CASE NO. C12-1289-TSZ-MAT REPORT AND RECOMMENDATION

INTRODUCTION

Plaintiff Peter J. McDaniels proceeds *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 civil rights case. He is currently incarcerated at Stafford Creek Corrections Center, but brings claims regarding religious practices, jail conditions and services, medical complaints, and access to law issues associated with his prior confinement at Whatcom County Jail. (*See* Dkt. 142.) This matter is now pending against twenty-eight individuals, sued in their personal and official capacities, and Whatcom County.

The Court herein addresses a Motion for Summary Judgment Regarding Religious

Practices filed by defendants Wendell Terry, Chief Corrections Deputy Wendy Jones, Lieutenant Mark Raymond, Grievance Coordinator Greg DePaul, Food Service Manager Robin Weiss, Sergeant Darrell Smith, Nurse Shari Holst, and Deputies Jonathan Bitner and Connie George. (Dkt. 90.) The Court also addresses plaintiff's Cross Motion for Summary Judgment Regarding Religious Practices filed against those same individuals, as well as against Whatcom County, Dr. Stuart Andrews, Sergeant Peter Klein, and Deputy Jess Barrios. (Dkt. 141.)

Because defendants filed their motion prior to the inclusion of Whatcom County in this matter, they do not address plaintiff's claims against that entity, or any official capacity claims against the individual defendants. *See Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 966-67 (9th Cir. 2010) (a claim against a government official in his official capacity is treated as a claim against the entity itself) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)). Given the lack of complete briefing on this issue, the Court addresses only plaintiff's claims for damages against the individual defendants in their personal capacities. In this respect, the Court notes plaintiff does not seek declaratory or injunctive relief in relation to his religious practice claims. (*See* Dkt. 5-1 at 12-18 and Dkts. 14 & 142.)[1] Also, due to the absence of adequate briefing on other claims, the Court addresses only claims brought pursuant to the Free Exercise Clause of the First Amendment, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and alleging unconstitutional punishment.[2]

Finally, the Court does not address whether or not plaintiff exhausted his administrative

1 Because plaintiff is no longer at the jail, any such claims would likely be deemed moot. *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *Dilley v. Gunn*, 64 F.3d 1365, 1368-69 (9th Cir. 1995).

2 For example, any claims arising under the Equal Protection or Procedural Due Process Clauses of the Fourteenth Amendment are addressed only by plaintiff, and only then to a minimal extent. (*See* Dkt. 141.)

remedies as required by the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.") Exhaustion is an affirmative defense, and defendants bear the burden of raising and proving the absence of exhaustion. *See Jones*, 549 U.S. at 212-17, and *Wyatt v. Terhune*, 315 F.3d 1108, 1117-19 (9th Cir. 2003). Defendants include, at most, observations in declarations as to an absence of evidence of grievances or written complaints. (*See also* Dkt. 142 at 35 (plaintiff attests that defendants prevented him from exhausting his claims).) The Court reserves ruling on issues of exhaustion pending receipt of briefing from the parties.

Now, having considered plaintiff's claims within the above-described parameters and for the reasons described below, the Court recommends defendants' motion be GRANTED in part and DENIED in part, and plaintiff's cross-motion be DENIED.

BACKGROUND

Plaintiff is Muslim and was incarcerated at Whatcom County Jail in both 2009 and 2011. He alleges violations of his constitutional and statutory rights to practice his faith in a variety of respects during his incarceration, and maintains all of the practices at issue are fundamental and required tenets of his religion.

A. Ramadan

Ramadan entails a month of fasting, from sunrise to sunset, and other religious

obligations for Muslims. In anticipation of plaintiff's 2011 Ramadan, Lieutenant Raymond issued a memorandum setting forth the accommodations to be provided by Whatcom County Jail. (Dkt. 93, Ex. A.) Plaintiff would begin his fast on the morning of August 1, 2011, with a morning meal prior to sunrise, two meals would be provided "during the hours of darkness, after sunset and prior to sun rise[,]" dried dates "may be provided" pending availability through the jail's food service provider, Aramark, a concluding feast would not be provided, and medical staff had been notified of "the Ramadan diet." (*Id*.)

Plaintiff was not provided with a meal before sunrise on the first day of Ramadan, and maintains the omission was intentional. (Dkt. 142 at 1-3.) He alleges his food was thereafter repeatedly delivered one and a half or more hours after sunset throughout the month, that his suggestion food be brought at the regular dinner hour was refused, and that the timing of the evening meal delivery interfered with the breaking of his fast and prayers. (*Id*. at 5.) Plaintiff also contends defendants tried to force him to break his fast prior to the conclusion of Ramadan on August 30, 2011. (*Id*. at 7.)

Defendants maintain Sergeant Smith unintentionally erred in failing to provide plaintiff's first pre-sunrise meal. (Dkt. 90 at 2; Dkt. 92 at 3; and Dkt. 93 at 2-3.) They deny any other meal delivery error or that Ramadan was cut short. (*See* Dkt. 92 at 2-4 and Dkt. 93 at 2-3.) Defendants further deny any indication of significant delay in evening meal delivery, while observing meals were to be delivered after sunset, rather than at a specific time. (Dkt. 93, Ex. A; *see also* Dkt. 6 at 49.) Chief Corrections Deputy Jones adds that early meal delivery could have posed a health issue by leaving perishable food unrefrigerated. (Dkt. 92 at 3.)

Plaintiff was not provided with dates for use in breaking his daily fasts in 2011. (Dkt.

139 at 4, 11 and Dkt. 142 at 3.) Jones describes this change from plaintiff's 2009 Ramadan as resulting from a standardization of religious-based diets between the periods of plaintiff's incarceration. (Dkt. 92 at 11.) She concluded that supplying foods requested by offenders of various faiths would result in over-spending the meal budget, and asserts that her research revealed other foods available to plaintiff, or even water, could be used to break his fast. (*Id.*; *see also* Dkt. 137 at 5-6.)

Nor did the jail provide plaintiff with an Eid al-Fitr feast at the conclusion of Ramadan. (Dkt. 142 at 7.) Jones explains that a variety of religious feasts are not provided at the jail, and distinguishes the meals provided for Thanksgiving and Christmas. (Dkt. 92 at 11-12.)

Plaintiff also takes issue with the failure to provide him with Ensure drink supplements, nutritionally adequate food, and pain reliever during Ramadan. (Dkt. 142 at 3-5.) While provided two cans of Ensure each night in 2009, his request was denied in 2011. (*Id*. at 3.) He maintains he required the supplement given the insufficient nutrition in the diet provided, and that defendants refused to provide pain reliever during the hours he could consume it according to his religious beliefs. (*Id*.) Weiss, the Food Service Manager at the jail employed through Aramark, and Jones attest to the nutritional adequacy of the Ramadan diet, and the approximately 2,800 calories and ninety grams of protein provided in the meals. (Dkt. 92 at 11 and Dkt. 95 at 1-2.) Nurse Holst, after consultation with Dr. Andrews, denied the request for Ensure as not medically necessary given that plaintiff's weight was within normal range. (Dkt. 91 at 1-2 and Exs. A and B.) Also, documents confirm the denial of plaintiff's requests for pain reliever. (*Id*., Exs. A and B.)

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B. Halal Meat

Whatcom County Jail does not provide inmates with Halal meat, which excludes certain types of meat and includes only meat slaughtered in a specific manner. (Dkt. 92 at 5 and Dkt. 137 at 12-15.) Instead, pursuant to a policy adopted August 10, 2009, the jail provides a vegetarian diet for offenders with religious restrictions, and vegan meals for offenders whose faiths prohibit the consumption of all animal-based proteins. (Dkt. 92 at 7.)

The jail adopted its religious diet policy in an effort to standardize the process for observant offenders of different faiths, allowing for meal options that did not violate religious prohibitions, could be quickly provided, met necessary nutritional standards, allowed the jail to remain within its allocated budget resources and administrative capabilities, reduced the probability of conflict, and avoided the need for specialized vendor contracts. (*Id*. at 4-7.) Aramark provides a meal option for both vegetarian and vegan meals that can be provided on a few hours notice and can be substituted for standard meals at the same cost, while other religious diets can be provided "at a price to be mutually agreed upon in advance." (*Id*. at 7 and Ex. 2 at 5.)

Inmates can request a vegetarian or vegan meal during the booking process, in a response to a question on a medical screening form, or at any time during their incarceration in an inmate request form, or "kite." (*Id*. at 7-8.) Inmates can also choose to eat the standard meal, which includes no pork products, and primarily poultry, coupled with textured vegetable protein, to meet dietary protein requirements. (*Id*. at 8.)

Plaintiff requested placement on a religious diet during his April 16, 2009 booking. (*Id*. at 8.) He submitted a "Health Request" form two days later, stating he had not yet been

placed on the diet and could not eat the meat provided, adding: "I am also poor. Instead of a eating a Halaal/Kosher diet at home, I just became a vegetarian because the price of the Halaal/Kosher meat is very high." (*Id*., Ex. 3.) He was told to submit a request and, Jones attests, was placed on the vegetarian diet as of April 25, 2009. (*Id*. at 8 and Ex. 3.)

In a September 21, 2009 kite, plaintiff requested he be "re-issue[d] either a vegetarian or halal special tray now that Ramadan is over." (Dkt. 137, Ex. A.) However, in a letter to Jones dated October 5, 2009, plaintiff stated that, as of October 17, 2009 ("six months after [his] arrest"), the vegetarian meal would "no longer be acceptable[,]" and he required a "Halal diet," including Halal meat. (*Id*., Ex. B.) Jones denied plaintiff's request. (Dkt. 92 at 8.)

Jones maintains that, upon his second incarceration in 2011, plaintiff initially requested a no-pork diet, which was accommodated by the standard diet, but went on to repeatedly request Halal meat. (*Id*. at 9.) She states that plaintiff was placed on a vegetarian diet on October 20, 2011 and, at his request, was removed from that diet on October 28, 2011. (*Id*.) Plaintiff denies he requested removal from the vegetarian diet, contending he, instead, requested a Halal diet. (Dkt. 139 at 2.)

Plaintiff maintains Halal meat is inexpensive, while also conceding he could not afford to purchase it when not in jail and was at "the mercy of others in the Muslim Community to provide Halal meats." (Dkt. 142 at 4 and Dkt. 127-6 at 2-3.) Plaintiff also maintains Jones refused to provide canned tuna or other fish as an alternative to Halal meat, and refused to entertain the idea of Halal meat being provided by individuals outside the jail. (Dkt. 126-6 at 5 and Dkt. 142 at 4-6; *see also* Dkt. 6 at 54 (September 30, 2011 kite proposing outside sources be contacted).) Jones avers an absence of any indication plaintiff requested canned tuna or other

fish, and states a request that Halal meat be provided from individuals outside the jail would have been denied for security purposes. (Dkt. 137 at 4-5.)

C. Arabic Qur'an

Plaintiff alleges he was deprived of an Arabic Qur'an for some nine months in 2011. (Dkt. 142 at 9.) He avers Terry failed to supply an Arabic Qur'an as requested, while supplying "very expensive Protestant bibles[]" to other inmates. (*Id*. at 9-10.) Terry, who serves as a volunteer minister at the jail, does not recall ever speaking with plaintiff or receiving a request for a Qur'an, either in English or Arabic. (Dkt. 94.)

Defendants assert that, while first providing plaintiff with an English Qur'an, they subsequently obtained and provided plaintiff with an Arabic version. (Dkt. 92 at 12.) Plaintiff denies he ever received an Arabic Qur'an, stating the version provided was a "3-column Roman Transliteration which [did] him absolutely no good[,]" that the Arabic script was "a novelty[]" and the book "a phonetic attempt to help non-Arabic readers do their prayers." (Dkt. 141 at 6.)

DISCUSSION

Summary judgment is appropriate when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving party bears the initial burden of showing the district court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. The moving party can carry its initial burden by producing affirmative evidence that negates an essential element of the nonmovant's case, or by establishing that the nonmovant lacks the quantum of evidence needed to satisfy its burden of persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the nonmoving party to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-87.

In supporting a factual position, a party must "cit[e] to particular parts of materials in the record . . .; or show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 585. "[T]he requirement is that there be no *genuine* issue of material fact. . . . Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 247-48 (emphasis in original). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient[]" to defeat summary judgment. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Nor can the nonmoving party "defeat summary judgment with allegations in the complaint, or with unsupported conjecture or

conclusory statements." *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003).

A. RLUIPA

RLUIPA provides in relevant part as follows:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . unless the government 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.

42 U.S.C. § 2000cc-1(a). The statute defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A).

A plaintiff bears the initial burden under RLUIPA of demonstrating a religious exercise impinged upon by the government, and that the government's conduct imposed a substantial burden on that religious exercise. *Greene v. Solano County Jail*, 513 F.3d 982, 987 (9th Cir. 2008); *Warsoldier v. Woodford*, 418 F.3d 989, 994-95 (9th Cir. 2005). If plaintiff succeeds in that prima facie showing, the burden shifts to the government to establish that the challenged practice furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. § 2000cc-2(b); *Green*, 513 F.3d at 986.

"RLUIPA does not define 'substantial burden.'" *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). However, the Ninth Circuit has explained that a substantial burden on religious exercise "must be 'oppressive' to a 'significantly great' extent[,]" imposing a "significantly great restriction or onus upon such exercise." *Id.* The government "must place more than an inconvenience on religious exercise." *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (internal quotation

marks omitted). In considering a prisoner's challenge to institutional policies, the Court considers whether the government's conduct "'denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1124-25 (9th Cir. 2013) (quoting *Warsoldier*, 418 F.3d at 995 (alteration in original)).

"'Context matters'" in the application of the compelling governmental interest standard adopted in RLUIPA. *Id.* at 1124 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005)). That is, "[c]ourts are expected to apply RLUIPA's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id*. (quoting *Cutter*, 544 U.S. at 723).

1. Arabic Qur'an:

The parties do not dispute that recitation from an Arabic Qur'an constitutes a religious exercise for plaintiff, but disagree as to whether or not he was provided with such an item. However, even assuming as true plaintiff's assertion that the Qur'ans provided by defendants did not meet his religious requirements, he fails to set forth a RLUIPA violation.

Plaintiff challenges only the failure of defendants to provide him with this religious item. Yet, "directed at obstructions institutional arrangements place on religious observances, RLUIPA does not require a State to pay for an inmate's devotional accessories." *Cutter*, 544 U.S. at 720 n.8 (quoting 42 U.S.C. § 2000cc-1(a)(1)-(2) and citing *Charles v. Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (overturning prohibition on possession of Islamic prayer oil but

leaving inmate with responsibility for purchasing the oil)). *See also Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 925 (9th Cir. 2011) ("But the DOC is not under a comparable duty to provide religious materials and services to inmates; rather, the DOC must provide reasonable opportunities to exercise religious freedom.") (cited sources omitted). Given the absence of any evidence, or even suggestion, that defendants prohibited or prevented plaintiff from obtaining an Arabic Qur'an, this claim fails to set forth a RLUIPA violation, and should be dismissed. *See, e.g., Low v. McGinness*, No. 2:10-cv-2398 JFM (PC), 2012 U.S. Dist. LEXIS 20428 at *18 (E.D. Cal. Feb. 17, 2012) (recommending dismissal of RLUIPA and First Amendment claim given absence of evidence plaintiff prevented from possessing Qur'an or other devotional material), *adopted by* 2012 U.S. Dist. LEXIS 45583 (Mar. 30, 2012).

2. Ramadan:

Plaintiff identifies a number of religious exercises impinged upon by defendants in relation to Ramadan. Specifically, plaintiff points to his need for meals to be timely consumed before sunrise and at a certain time after sunset, dates to conclude his daily fasts, to maintain his fast until the conclusion of Ramadan, and to conclude Ramadan with an Eid al-Fitr feast.[3]

a. Failure to provide meals:

There is no dispute that the requirement to consume food only before sunrise and after sunset during the month of Ramadan constitutes a religious exercise under RLUIPA. Also, defendants admittedly failed to provide plaintiff with a pre-sunrise meal on the first day of Ramadan in 2011. However, the parties disagree as to whether that failure was an error or

3 Plaintiff's claim as to Halal meat extends beyond Ramadan and is discussed below. Also, and as requested by plaintiff (Dkt. 141 at 4), the Court addresses his allegations regarding the failure to provide adequate nutrition and pain reliever in relation to the Fourteenth and Eighth Amendments.

intentional, and whether it imposed a substantial burden. The parties further disagree as to whether or not defendants failed to provide plaintiff with meals at the conclusion of Ramadan.

Plaintiff's contention that defendants intentionally failed to deliver his first pre-sunrise meal lacks support in the record. (*See, e.g.*, Dkt. 6 at 24, 35, 49 (documents reflecting plaintiff was to be provided a pre-sunrise meal beginning on August 1, 2011, and apologizing for the failure to provide that meal).) Moreover, in his declaration as to "Islamic Authority," plaintiff concedes that, while "preferable," the morning meal "is not a condition for the correctness of the fast (i.e. if you wake up late and don't eat, it does not nullify the fast)[,]" and that his belief to the contrary, as asserted in his complaint, has now been "corrected[.]" (Dkt. 127-7 at 19.) In other words, the omission of this first meal, whether intentional or not, did not prevent plaintiff from proceeding with his fast.

Plaintiff also claims defendants attempted to end Ramadan early.[4] Defendants deny this allegation, pointing to the response to an August 29, 2011 kite in which plaintiff was told that, consistent with his request, the fast would end on August 30, 2011. (Dkt. 92 at 13.) However, defendants do not address other kites submitted by plaintiff, including another August 29, 2011 kite reflecting his report that he had not received breakfast. (Dkt. 6 at 51.) Yet, whatever meal omissions occurred at the conclusion of Ramadan, plaintiff concedes he

4 Plaintiff's latest description of this claim is difficult to understand: "I was only given one very small sack lunch to last from 10 PM on the 28th until 10 PM on the 29th. Then again, I was only given dinner, a small sack, so I had no food for breakfast the next day (the 30th) nor did I get lunch or dinner the next day." (Dkt. 142 at 7.) His prior descriptions of this claim, and other documents, appear to reflect that he did not receive one or both meals on a single day. (Dkt. 2 at 36-38 (alleging he received an evening meal on August 28, 2011, but was not provided breakfast or dinner on August 29, 2011); Dkt. 14 at 10 (alleging he was refused food on the "last night of the fast and the previous morning, so other than a couple of cookies, I had nothing to eat for over twenty-four hours."); Dkt. 6 at 51 (August 29, 2011 kite: "I was not given any breakfast this morning."); and Dkt. 141 at 24 (stating he was denied food for both the first meal and "once again on the last day of Ramadan as well."))

was not forced to break his fast because he had saved "emergency back up food[.]" (Dkt. 2 at 36-37; *accord* Dkt. 14 at 10.)

The Court does not doubt that the failures in relation to meal delivery made plaintiff's ability to fast on the days in question more difficult. However, plaintiff fails to support the contention that such failures were more than isolated incidents or an inconvenience, and, instead, imposed a significantly great restriction on his religious practice or substantial pressure to modify his behavior and violate his beliefs. *See*, *e.g.*, *Boyd v. Lehman*, C05-0020-JLR, 2006 U.S. Dist. LEXIS 94222 at *31 (W.D. Wash. Mar. 20, 2006) (failure to provide evening meal after sunset for first three days of Ramadan did not impose a substantial burden), *adopted by* 2006 U.S. Dist. LEXIS 94223 (May 19, 2006); *Maynard v. Hale*, No. 3:11-CV-1233, 2012 U.S. Dist. LEXIS 114136 at *15-16 (M.D. Tenn. Aug. 14, 2012) (finding no substantial burden due to one day of missed meals during Ramadan where plaintiff made no showing he suffered poor health or was unable to practice his religion). Indeed, in neither instance can it be said that plaintiff was compelled to break his fast or otherwise modify his religious practice. Defendants are, therefore, entitled to dismissal of these claims on summary judgment.

b. Late delivery of evening meals:

Plaintiff alleges his evening meals were not brought "at the correct time or anywhere near the correct time to be meaningful[,]" and were brought "one and one half hours or more late most every night." (Dkt. 142 at 5.) He maintains this rendered him unable to break his fast at or near the time required, and forced him to miss his "sunset prayer" each night. (*Id.*)

Defendants deny any evidence of significant delay in the delivery of plaintiff's evening meals, and suggest the absence of any evidence plaintiff complained to that effect. They

further state that plaintiff was, as planned, properly provided with meals "during the hours of darkness, after sunset." (Dkt. 93, Ex. A.) Pointing to plaintiff's statement that Muslims break their fast "[e]ach night after sunset," defendants note that this phrase does not state "at sunset or as the sun sets." (Dkt. 136 at 2.)

In a kite dated August 1, 2011, plaintiff requested delivery of his evening meal "sometime between now (i.e. 6:55 pm) and 8:40 PM tonight." (Dkt. 6 at 40.) Plaintiff's "requests for meal service to be delivered at a specific time" was "denied[.]" (*Id*. at 49.) Raymond responded: "[Y]our accommodation is for meals to be delivered during the hours of darkness only. If you want to eat the items at a later time you can save the food items to eat, as you feel fit." (*Id*.) Plaintiff did, therefore, raise an issue as to the delivery of his meals. However, while finding the quality of the argument supplied by defendants on the issue underwhelming at best, the Court nonetheless finds an absence of support for plaintiff's contention of a RLUIPA violation.

Plaintiff avers he required his evening meals "around 8 PM[.]" (*See, e.g.*, Dkt. 141 at 11.) However, records reflect that, at the time, plaintiff twice informed defendants he was required to end his fast at some point after 8:45 p.m. (Dkt. 6 at 32 (August 10, 2011 grievance stating that on "a normal day during Ramadan" his "meal would be eaten right after sunset which is currently 8:45-8:50ish PM.") and 42 (August 1, 2011 kite indicating he could not consume pain relievers until "after 8:45 at night).) Plaintiff submits that his meals were brought "closer to 10 PM[.]" (Dkt. 141 at 11.) (*See also* Dkt. 127-11 at 3 (plaintiff's former cellmate, Asher Becker, states plaintiff was not "given his meals until almost 10 pm or later[]").) The question, therefore, is whether the delivery of evening meals some one hour

and fifteen minutes after sunset imposed a substantial burden on plaintiff's religious exercise.

There is an absence of support for plaintiff's contention that the delay in the delivery of his evening meals resulted in his inability to break his fast at or near the time required, and prevented him from reciting his prayers. Notably, in his declaration regarding Islamic Authority, plaintiff does not discuss a need to consume a full meal at the time he breaks his fast, at any specific time, or at some specific time in relation to his prayers. (*See* Dkt. 127-7.) Plaintiff, rather, discusses in detail his need to break his fast by eating dates and recites portions of the Qur'an as requiring that the "sunset prayer" not be said until the fast has been broken. (*Id*. at 8-13.) Another document submitted by plaintiff states:

> *It is customary to break one's fast as soon as the sun has set with a light snack* (often with one or three dates, according to the Prophet's custom). . . . The breaking of the fast is called *iftar*. It is followed by Maghrib (sunset prayer), *which may be followed at one's convenience by a full dinner*. It is suggested not to overeat in order to compensate for the period of fasting. This is a good time to drink plenty of water or other fluid, which the body needs.

(Dkt. 127-12 at 52 (emphasis added).) (*See also id*. at 22-23 (other documents reflect no more than that daily fasts are broken with a prayer and "*iftar*" meal after sunset, and quote the Qur'an as stating: "One may eat and drink at any time during the night 'until you can plainly distinguish a white thread from a black thread by the daylight[.]")) Nor does plaintiff dispute, as Raymond had suggested, that he could have saved items of food to eat at the breaking of his fast. (Dkt. 6 at 49.)

As with the omission of meals, the delivery of plaintiff's evening meals some one hour and fifteen minutes after plaintiff was allowed to eat according to the tenets of his religion can be understood to have made his fasts more difficult to endure. However, at most, plaintiff

contends his religious practice required he break his fast at a certain time and with a certain food item. His inability to consume a full meal at or immediately after sunset does not demonstrate defendants imposed a significant onus or substantial pressure on plaintiff to modify his behavior and violate his beliefs. Nor was the delay so extreme it could be reasonably construed as serving to compel plaintiff to abandon his religious principles. Defendants are, as such, also entitled to summary judgment in relation to this claim.[5]

c. Dates:

It is undisputed that plaintiff was not provided with dates to end his daily fasts in 2011. Plaintiff maintains eating dates is an obligatory tenet of the Ramadan fast. (Dkt. 142 at 3.) He asserts dates are "readily available in Bellingham, and they are a dried good, so it is easy to obtain them through the mail via the Internet. (*Id*.) Jones attests that dates were not provided in 2011 as a result of the standardization of religious-based diets between the two periods of plaintiff's incarceration, and asserts other foods available to plaintiff, or even water, could be used to break his fast. (Dkt. 92 at 11; Dkt. 137 at 5-6.) (*See also* Dkt. 95 at 8 (Weiss declares that the provision of dates required departure from the standard menu and would result in increased supply and administrative costs for the jail).) Plaintiff cites to numerous provisions of the Qur'an as mandating the use of dates to break fasts (Dkt. 127-7 at 8-13), and states that any reference to the use of water "is a mercy from Allah[,]" and "meant for people who are either lost in the wilderness or captives of war." (Dkt. 139 at 4, 11.)

Plaintiff provides support for his contention that his religious practice requires the use

5 Because plaintiff fails to demonstrate a substantial burden, the Court need not address his contention that meals could have been brought to him at the regular dinner hour. *See Greene*, 513 F.3d at 987.

of dates to end his fasts, and the Court declines to address defendants' contention that he may satisfy this practice in some other respect. *See Thomas v. Review Bd. of Indiana Employment Security Sec. Division*, 450 U.S. 707, 714 (1981) (noting, in relation to free exercise claims, that "[c]ourts are not arbiters of scriptural interpretation.") Therefore, the failure of defendants to provide plaintiff with dates may be fairly said to have impacted the practice of his religion. However, the Court nonetheless finds no RLUIPA violation in relation to dates.

Each of the several complaints plaintiff submitted to the Court set forth his claim as challenging defendants' failure to provide him with dates. (*See* Dkts. 2, 14 & 142.) Plaintiff further submits several kites and grievances confirming that he requested dates be provided and complained about the failure to satisfy those requests. (*See, e.g.*, Dkt. 6 at 25, 26, 31, 36).) Plaintiff concedes the provision of dates "would have caused the jail to actively make an effort to obtain the accommodation." (Dkt. 141 at 2.) He states: "Everything else except the dates, is something that they already had. They just refused to assist with me practicing my religion." (*Id.*) However, as stated above, RLUIPA does not require that a government "pay for an inmate's devotional accessories." *Cutter*, 544 U.S. at 720 n.8. Therefore, the jail's failure to provide plaintiff with dates cannot be considered as imposing a substantial burden on his ability to practice his religion.

Plaintiff now contends, in his response to defendants' motion for summary judgment and cross motion, that defendants "essentially 'banned' and 'prohibited'" dates by refusing to respond to his request for assistance in acquiring them from the Islamic community. (Dkt. 141 at 2-3.) He avers he "asked" for help in getting dates from the Islamic community and "started pursuing other means of obtaining them" after August 11, 2011, and defendants "refused to

even consider the idea (i.e. I got no responses from them[;] [t]hey prohibited them because when I told them I would pay for them myself, they refused to respond to my requests.)" (*Id*. at 3.) He further states he "had no way to contact" his Mosque "because they were in the middle of renovating a new building" and he "did not have the address[,]" that he could not get through to certain individuals "because their electronic phone system is incompatible with the jail's[,]" and that, because he did not have any envelopes for several days during Ramadan, it was "too late" by the time he eventually sent a letter. (*Id*.)

The Court finds significant the absence of any documentation showing plaintiff asked for assistance in obtaining dates from another source, particularly in light of the many kites and grievances provided in this action. (*See, e.g.*, Dkt. 6 (attaching 333 pages of exhibits).) Also, plaintiff's arguments reflect that his inability to obtain dates from an outside source resulted from factors unrelated to defendants, such as an absence of adequate contact information.

Given the above, the Court finds plaintiff's contention that defendants "essentially" banned or prohibited him from obtaining dates to be self-serving and of questionable veracity, and, therefore, insufficient to set forth a genuine issue of material fact. *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."). For this reason, and for the reason stated above, defendants should be granted summary judgment in relation to this claim.

d. Concluding feast:

Plaintiff avers that the Eid al-Fitr feast is an obligatory tenet of Ramadan. (Dkt. 142 at 7.) He maintains special feasts are provided to inmates celebrating Christmas and Easter, and

that defendants "stopped [him] from fulfilling this simple obligation." (*Id*.) Defendants counter that they do not provide feasts for Eid al-Fitr, or various other religious holidays, including, for example, Easter,[6] Passover, Gurpurb, or Diwali. (Dkt. 92 at 11-12.) Jones distinguishes meals provided for Thanksgiving and Christmas, stating that the former is a secular holiday and that both meals involve the same foods served on typical days, and are provided at lunch at the request of Aramark, in order to allow the food service workers to leave early. (*Id*. at 12.) She contends the provision of an Eid Al-Fitr feast to plaintiff would have opened defendants "to charges of discrimination against the other faiths represented in the jail population." (*Id*.)

It would appear that, in stating the above, defendants maintain that the failure to provide plaintiff with an Eid al-Fitr feast furthers a compelling governmental interest; that is, the need to maintain a consistent policy in regard to religious holiday feasts. However, the Court need not address the sufficiency of this argument given plaintiff's failure to demonstrate the imposition of a substantial burden on his religious practice.

Plaintiff avers he "needed only a small snack lunch to replace one of the regular hot meals[,]" and that he "should have been able to at least get a sack lunch to eat in my room by myself for my holiday." (Dkt. 142 at 7.) At the same time, in his declaration of Islamic Authority, plaintiff states the feast "need not be a full scale meal, but merely something should be eaten after the prayer which is the forenoon – approximately 9 to 10 AM." (Dkt. 127-7 at

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6 There is a discrepancy between defendants' motion and the affidavit from Smith as to whether or not a special meal is provided on Easter. However, the language in the motion appears to be merely responsive to plaintiff's allegation, and otherwise relies on the declaration from Jones, who specifies that an Easter meal is not provided, while meals are provided on Thanksgiving and Christmas. (*See* Dkt. 90 at 2-3 and Dkt. 92 at 11-12.)

14.) Yet, there is no indication plaintiff was denied the opportunity to eat something at the time and in the location in question, or was in some other respect compelled to abandon his religious obligations. While he may have preferred to eat a full lunch in his cell at that time, his religious obligations, as he describes them, did not require that he do so. As such, plaintiff's claims as related to an Eid al-Fitr feast should be dismissed.

3. Halal Meat:

Plaintiff alleges defendants imposed a substantial burden on his religious exercise through the failure to provide him with Halal meat. *See Shakur v. Schriro*, 514 F.3d 878, 882 n.2 (9th Cir. 2008) ("Halal meat is ritually slaughtered and prepared according to Islamic specifications. Muslims are instructed to eat meat only if it is Halal. Meat that is not Halal is referred to as Haram and is forbidden.") Plaintiff maintains he is required to eat Halal meat as a component of his religious exercise. (Dkt. 127-7.) Defendants point to evidence that plaintiff admittedly could not afford Halal meat when he was free of incarceration (*see, e.g.*, Dkt. 92, Ex. 3, Dkt. 142 at 4, and Dkt. 127-6 at 2-3), as supporting the conclusion that "meat cannot be considered a necessary practice, or to have that significant of an impact on his sincerely held religious beliefs." (Dkt. 90 at 8.)

"RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion," but "does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter*, 544 U.S. at 725 n.13 (citing *Gillette v. United States*, 401 U.S. 437, 457 (1971) ("'The "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.'") (quoted source omitted)). Documents submitted by the parties arguably raise a question as to the sincerity of plaintiff's belief that he was required to

eat Halal meat. In particular, an April 18, 2009 kite from plaintiff in which he requested a vegetarian diet states: "Instead of eating a Halaal/Kosher diet at home, I just became a vegetarian because the price of the Halaal/Kosher meat is very high." (Dkt. 92 at 26.) (*See also* Dkt. 137, Ex. A (September 21, 2009 kite asking "the kitchen to re-issue either a vegetarian or halal special tray now that Ramadan is over.")) However, the fact that plaintiff could not afford Halal meat does not preclude the sincerity of his belief his religion required its consumption. *Cf. Shakur*, 514 F.3d at 858 (stating, in relation to free exercise claim, that the district court should have focused on whether the plaintiff "sincerely believes eating kosher meat is consistent with his faith.")

Defendants also suggest that, if plaintiff did not consume Halal meat as a regular part of his diet outside of his incarceration, it is difficult to reconcile this fact with his contention that the diet provided to him in jail put substantial pressure on him to modify his behavior and violate his religious beliefs. However, plaintiff denies he was a vegetarian when not incarcerated, maintaining he consumed Halal meat donated by his religious community, purchased Kosher meat when he could afford it, and frequently ate fish. (Dkt. 141 at 14-15 and Dkt. 142 at 9.)[7] Other documents suggest plaintiff anticipated his consumption of a vegetarian diet would be only temporary. (Dkt. 137, Ex. B.)

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7 Plaintiff states he "reluctantly agreed" to a vegetarian diet at booking in 2009, upon being told he would not be getting a Halal diet. (Dkt. 141 at 14-15.) He believed he would only be in jail for a few days, "so the vegetarian diet would not have been a big deal." (*Id*. at 15.) Plaintiff further explains that, while "living on the 'streets[]'" prior to his incarceration in 2009, he was "forced into making 'culinary choices' that often meant eating a lot of frozen fish and beans." (*Id*. at 15.) He adds: "It's not that I couldn't afford Halal Meat, it was just that the grocery stores would not make special orders of 'specialty meats' for someone using the Washington 'EBT' food stamp program." (*Id*.) The Islamic Community thereafter "came to the rescue." (*Id*.) Plaintiff avers: "I have never been a vegetarian in any way shape or form by my own will and desire. Even then, I was still provided with halal meats, and I ate a whole lot of fish." (*Id*.)

On the other hand, it is noteworthy that plaintiff maintains he requested canned tuna or other fish as an alternative, stating that, while eating Halal meat is a fundamental tenet of his religion, "all fish is Halal[,]" and need not be "'specially slaughtered.'" (Dkt. 127-7 at 7-8.) He contends Jones denied his suggestion, despite the fact that "[t]una is a product that they already have in stock." (Dkt. 141 at 5.) Jones denies plaintiff requested fish as an alternative to Halal meat, and further notes plaintiff's admission that he did receive fish on the vegetarian diet. (Dkt. 137 at 3.)

Plaintiff, in fact, states that the vegetarian diet included fish "at least once a week," while maintaining "it wasn't really fish[,] [i]t was mostly breading with a thin-fishy-paste in the center about as thick as a finger nail." (Dkt. 127-6 at 3.) While plaintiff apparently found the quality of the fish unsatisfactory, the fact that he concedes fish is "Halal," that he frequently ate fish when not incarcerated, and that he apparently received fish as a regular part of his diet while incarcerated, raises a question as to whether it can be reasonably said that defendants imposed a significant onus on his religious practice, or put substantial pressure on plaintiff to modify his behavior and violate his beliefs. Indeed, while stating canned tuna or other fish would have sufficed as a temporary solution, plaintiff also observes that the availability of Halal meat was "irrelevant" given that the jail stocked canned tuna. (Dkt. 141 at 5, 38.)

Arguably, the above reflects the existence of issues of fact precluding a finding of summary judgment for either party on the question of whether the diet provided to plaintiff substantially burdened his religious practice. Nor does the Court, at this time, otherwise find summary judgment in relation to this claim appropriate.

Effective August 10, 2009, the jail instituted a policy of providing either a vegetarian or

ovo-lacto vegetarian diet to all offenders following "religious diets[.]" (Dkt. 6 at 55.) This policy was enacted in an effort to standardize the process for observant offenders of different faiths. (Dkt. 92 at 9; Dkt. 137 at 4.) It allowed for meal options that did not violate any religious prohibitions, meals that could be provided quickly, met necessary nutritional standards, budget resources, and administrative capabilities, allowed for order and avoided conflict, and avoided specialized vendor contracts. (Dkt. 92 at 4-10; Dkt. 137 at 2-5.)

Jones attests she considered the dietary restrictions of various faiths in adopting the religious diet policy. (Dkt. 92 at 4-6.) She states that, with the exception of a branch of Orthodox Christianity, all of the faiths she considered allowed for the consumption of a vegetarian or vegan diet. (*Id*.)

Jones further attests she considered but rejected the possibility of developing specialized meals fitting the requirements of various religions as "an administrative nightmare." (*Id*. at 6.) This would have, for example, required that Aramark develop a number of different menus by faith and variants of faiths. (*Id*.) Other considerations included the fact that the jail serves three meals a day to a large and rapidly fluctuating population, and is limited to the use of a jail kitchen and cold, freezer, and dry storage areas designed for a capacity of less than half of the average daily population. (*Id*. at 9-10 (the jail has a combined average daily population of 375 offenders, with 7,767 offenders booked in 2009 and 7,900 offenders in 2011; average length of stay for an offender is twenty days, but some fifty-two percent and some forty-seven percent of offenders were released within seventy-two hours in 2009 and 2011 respectively, and slightly over eighty percent of offenders were released within thirty days; the jail kitchen was originally designed for a capacity of 148 inmates).)

Jones contrasts the jail's short-term population, with, for example, the State prison system's "stable and long term offender population[,]" stating that "[a] stable population allows the prisons time for diet creation, menu planning, bulk purchasing, and controlled preparation to prevent the cross contact of foodstuffs from different religions." (*Id*. at 9.) Weiss maintains that the food service staff at the jail do "not have the background or expertise to prepare, store and handle Halal meat[,]" and the absence of any practical way to guarantee no cross-contamination. (Dkt. 95 at 2-3.)

Jones attests that she considered the impact to the jail's budget, which included meal costs of approximately $615,000 and $576,000 in 2009 and 2011 respectively. (Dkt. 92 at 7, 10.) She reflects consideration of the jail's existing contract with Aramark and the possibility of additional, specialized vendor contracts. (*Id*. at 4, 7.) Aramark had an already developed meal option for vegetarians and ovo-lacto vegetarians that could be substituted on a few hours notice at the same per meal costs, while meals for other religious diets could be provided "at a price to be mutually agreed in advance." (*Id*. at 7 (citing *id*., Ex. 2 at 5).) Jones contends the creation of a meal plan accommodating all religious requirements and restrictions would have "decimate[d]" the meal budget and not have allowed for the "control of food costs in any meaningful way." (*Id*.)

Jones also sets forth concerns as to security, including the objective of providing meals with equal appeal to the standard menu so as to reduce conflicts between offenders. (Dkt. 92 at 4.) She rejects the viability of allowing the Islamic Community to provide Halal meat due to the significant "opportunity for the introduction of contraband[.]" (*Id*. at 4-5.) She further asserts that, if the jail were to provide plaintiff with a separate, faith-based diet, with foods of

his choosing, the jail would be expected to provide the same for other inmates, resulting in "significant financial burden" and "organizational chaos in the kitchen." (Dkt. 137 at 4.)

Defendants bear the burden under RLUIPA of demonstrating their religious diet policy furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000cc-2(b); *Green*, 513 F.3d at 986. Defendants here identify compelling governmental interests as a general matter, including cost containment, practical and administrative considerations and burdens, and issues of security and order. *See, e.g.*, *Hartmann*, 707 F.3d at 1124-25 (acknowledging need for "regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."); *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (finding, with respect to free exercise claim by Jewish inmate, that a "prison has a legitimate interest in running a simplified food service, rather than one that gives rise to many administrative difficulties."); *Baranowski v. Hart*, 486 F.3d 112, 125-26 (5th Cir. 2007) (holding that, where kosher meals were not provided to a Jewish inmate, policy "related to maintaining good order and controlling costs" involved compelling governmental interests). They also maintain the religious diet policy adopted is the least restrictive means of furthering those interests. However, defendants fail to provide sufficient information or argument demonstrating satisfaction of their burden.

A correctional facility must produce "competent evidence" to support the existence of a compelling governmental interest. *Shakur*, 514 F.3d at 889-90. Conclusory affidavits do not suffice. *See id*. Nor may the facility rely on a mere assertion that a practice is the least restrictive means. *Id*. at 890. The facility "'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less

restrictive measures before adopting the challenged practice.'" *Id*. (quoting *Warsoldier*, 418 F.3d at 996).

In this case, defendants maintain alternatives to their existing religious diet policy would be cost prohibitive. However, while identifying total food costs, defendants provide no competent evidence – and, in fact, no information whatsoever – as to the costs of alternative measures, and, therefore, the potential impact on their budget. For example, neither Jones, nor Weiss attests to the costs of "[o]ther religious meals" provided by Aramark under the existing contract. (Dkt. 92 at 18.) The contract reflects that such meals would be provided "at a price to be mutually agreed in advance." (*Id*.) There is no indication whether or not Jones inquired into pricing, and no indication from either Jones or Weiss, the latter of whom is directly employed by Aramark, as to what that pricing might be. Rather, the assertions of both Jones and Weiss as to cost are conclusory.

Defendants also focus on either the alternative of providing meals for all practitioners of different faiths and variants of those faiths, or the alternative of making a single exception for plaintiff. There is no indication whether they considered any other alternatives, such as, for example, providing kosher meals as an additional religious diet option, thereby satisfying the requirements of both Jewish and Islamic offenders. (*See* Dkt. 92 at 4-6.) Also, while pointing to the variety of diet restrictions in different religions, there is an absence of information as to the populations actually served by the jail. At most, defendants observe that, in both 2009 and 2011, "plaintiff was the only inmate practicing Islam and seeking meal accommodation to do so[.]" (Dkt. 90 at 9.) While it may be true that "one inmate simply does not justify the cost and administrative burden[]" of procuring Halal meat, the existence of only one such inmate

also implicates defendants' contentions as to the degree of the burdens alleged, and their assertion that they adopted the least restrictive means to further their interests.

In addition, while pointing to practical and administrative burdens posed by the alternatives considered, defendants appear to focus exclusively on the alternative of preparing Halal meat and other religious meals within their facility. Yet, the Aramark contract identifies the availability of "prepackaged [religious] meals[.]" (Dkt. 92 at 18.) Defendants do not address the availability or impacts of utilizing such an alternative. Nor, given the absence of any information or discussion as to the alternatives available through Aramark, is it clear whether defendants reasonably point to the possible need for additional vendor contracts.

Finally, while the Court does not intend for any inference as to merit, it notes one additional argument raised by plaintiff.[8] In response to defendants' assertions as to the fluctuating and short-term population served at the jail, plaintiff points to King County and Pierce County Jails, and the receiving units in Shelton, as handling significantly larger number of inmates in the same "high turnover rate atmosphere[.]" (Dkt. 141 at 39.) Plaintiff provides no information as to what religious meal options those facilities provide, but it is worthwhile to note the Ninth Circuit's observation that it has "'found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means[,]'" and that "'the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a

8 Although declining to address each of the many different arguments raised by plaintiff, the Court observes that his "Budget Analysis for Whatcom County Jail & Profit Surplus" is, at best, speculative, and in large part irrelevant to the questions before the Court. (Dkt. 127-8 (construing the budget numbers provided as reflecting a surplus, positing that defendants make a substantial profit from commissary and other inmate purchases, and alleging defendants engaged in an "indigent kit scam" as a "tax write-off").)

failure to establish that the defendant was using the least restrictive means.'" *Shakur*, 514 F.3d at 890-91 (quoting *Warsoldier*, 418 F.3d at 1000).

For the reasons set forth above, the Court concludes that defendants fail to meet their burden of demonstrating their religious diet policy furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. *See, e.g., id.* at 890 (finding no competent evidence as to the additional cost of providing Halal or kosher meat to Muslim prisoners where defendants provided only conclusory affidavit that did not affirmatively show personal knowledge of specific facts); *McDaniels v. Fischer*, No. C10-823-MJP-JPD, 2011 U.S. Dist. LEXIS 79588 at *38-39 (W.D. Wash. June 17, 2011) (defendants failed to offer any evidence supporting their assertion that the cost of providing inmate with a no-peanut Halal diet "would be so cost prohibitive as to constitute a compelling government interest."), *adopted by* 2011 U.S. Dist. LEXIS 79591 (Jul. 21, 2011); *Thompson v. Williams*, No. C06-5476-FDB-KLS, 2007 U.S. Dist. LEXIS 102081 at *40-50, 55-56 (W.D. Wash. Sept. 18, 2007) (finding defendants failed to satisfy burdens on free exercise and RLUIPA claims by showing with any specificity the "ways or amounts" the provision of Halal meat diets would "create additional costs, decrease efficiency of the food preparation, and necessitate hiring additional staff members," or to show that they actually explored other alternatives), *adopted by* 2007 U.S. Dist. LEXIS 80487 (Oct. 31, 2007), and *aff'd* 2009 U.S. App. LEXIS 6158 (9th Cir. 2009); *Shilling v. Crawford*, 536 F. Supp. 2d 1227, 1233-34 (D. Nev. 2008) (defendants failed to address whether they considered alternatives to transfer policy, such as providing pre-packaged or frozen kosher meals, or to submit "any concrete evidence of the costs of alternatives they may have considered."). Given the lack of necessary

information and argument on these issues, neither party is entitled to summary judgment.

B. First Amendment

The First Amendment guarantees the right to the free exercise of religion. However, the free exercise right "is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987).[9]

To establish a free exercise claim, an inmate "must show the [defendants] burdened the practice of [his] religion, by preventing him from engaging in conduct mandated by his faith, without any justification reasonably related to legitimate penological interests." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *overruled in part as stated below by Shakur*, 514 F.3d at 884-85. The Ninth Circuit has clarified that it examines free-exercise claims according to the "sincerity" test rather than according to the "centrality test." *Shakur*, 514 F.3d at 885. Therefore, a prisoner's religious concern implicates the Free Exercise Clause if it is (1) "sincerely held" and (2) "rooted in religious belief," rather than in secular, philosophical concerns. *Id*. (citing *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994)).

"[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988). However, "[t]his does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting

9 The Court applies the same standards for pretrial detainees and prisoners in considering First Amendment claims. *Pierce v. County of Orange*, 526 F.3d 1190, 1209 (9th Cir. 2008); *Valdez v. Rosenbaum*, 302 F.3d 1039, 1047-49 (9th Cir. 2002).

contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id*. As under RLUIPA, a free exercise violation occurs where a burden imposes more than an inconvenience on religious exercise. *See Guru Nanak Sikh Soc'y*, 456 F.3d at 988 (relying on the Supreme Court's free exercise jurisprudence in defining a substantial burden under RLUIPA); *Warsoldier*, 418 F.3d at 995-96 (same).

The impingement of an inmate's constitutional rights is valid if reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Court balances the four factors set forth in *Turner* in making a determination: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether alternative means of exercising the right on which the regulation impinges remains open to prison inmates; (3) whether accommodation of the asserted constitutional right will impact guards, other inmates, and the allocation of prison resources; and (4) whether there is an absence of ready alternatives, versus the presence of obvious, easy alternatives. *Id.* at 89-91.

The court "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). The burden is not on the state to prove the validity of a challenged regulation, but is instead on the inmate to disprove it. *Id*.

1. Qur'an and Ramadan:

For the same reasons discussed above, the Court concludes that plaintiff fails to set forth

a free exercise claim in relation to the provision of a Qur'an or his 2011 Ramadan. That is, defendants were not required to provide plaintiff with an Arabic Qur'an or dates to be used in his devotional practice, and, given the absence of any showing defendants prevented him from obtaining such items, his free exercise claims fail. *See, e.g.*, *Florer*, 639 F.3d at 925; *Low*, 2012 U.S. Dist. LEXIS 20428 at *18. Likewise, in failing to show defendants' actions in relation to the provision of meals or a feast prevented plaintiff from complying with or engaging in his sincerely held religious beliefs and/or requirements, plaintiff fails to demonstrate defendants impinged upon his constitutional rights. *See, e.g.*, *Maynard*, 2012 U.S. Dist. LEXIS 114136 at *11-12 ("short-term and sporadic disruption of . . . Ramadan eating habits" did not demonstrate a free exercise violation); *Sandeford v. Plummer*, No. C06-06794 SBA (PR), 2010 U.S. Dist. LEXIS 35044 at *27-28 (N.D. Cal. Mar. 31, 2010) ("A mistaken denial of two meals does not rise to the level of a constitutional violation."). Defendants should, therefore, be granted summary judgment on these claims.

2. Halal Meat:

As stated above, while the Court has no reason to question the sincerity of plaintiff's belief that he is required by his religion to consume Halal meat as a part of his diet, material issues of fact may nonetheless preclude resolution of whether the diet offered to plaintiff did, in fact, impose a substantial burden on his religious practice. The Court is likewise unable to resolve whether or not the jail's religious diet policy withstands scrutiny under *Turner*.

As opposed to the "much stricter burden" set forth in RLUIPA, *Turner* sets forth a "deferential rational basis standard" for review of the government's burden. *Greene*, 513 F.3d at 986. However, as with a RLUIPA claim, prison officials' bare assertions regarding burdens

imposed by religious accommodations are insufficient; the officials must tender evidence allowing the Court to analyze each of the factors set forth in *Turner*.

In this case, the Court concludes that the absence of sufficient information and conclusory assertions offered by defendants in support of their religious diet policy preclude resolution as to the merits of plaintiff's free exercise claim. *See, e.g., Shakur*, 514 F.3d at 886-87 (finding affidavit setting forth cost of accommodation conclusory, noting absence of evidence suggesting officials "actually looked into" the request to provide kosher meals to Muslim prisoners, "investigated suppliers of Halal meat, solicited bids or price quotes, or in any way studied the effect that accommodation would have on operating expenses[,]" and "no indication that other Muslim prisoners would demand kosher meals if Shakur's request were granted[,]" and, therefore, insufficient findings in relation to third *Turner* factor); *Ward*, 1 F.3d at 879-79 (finding insufficient findings in regard to third and fourth *Turner* factors; noting court "cannot simply accept the warden's assertion" that providing a special meal for one prisoner would significantly disrupt "efficient operation of culinary services[,]" and must make specific findings as to both financial impact of such accommodation, and whether reasonable alternatives to adopted policy exist); *McDaniels*, 2011 U.S. Dist. LEXIS 79588 at *48 (defendants failed to provide more than "bare assertions regarding the burdens of a proposed accommodation" of no-peanut Halal diet, including evidence showing the accommodation "actually imposed either budgetary or administrative burdens"). The Court should, therefore, deny summary judgment in relation to this claim.

C. Punishment Claims

Plaintiff maintains defendants' actions and omissions as described above amounted to

punishment in violation of his constitutional rights. (Dkt. 142 at 1-10, 22.) He also avers unconstitutional punishment through the failure to provide him with Ensure drink supplements or an otherwise nutritionally adequate Ramadan diet, and the failure to provide him with pain reliever to consume in his cell after sunset during Ramadan. (*Id*.)

As defendants observe, because plaintiff was a pretrial detainee at the time of the events in question, the Fourteenth Amendment applies. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.") However, courts apply the Eighth Amendment standard to determine if a violation of a pretrial detainee's Fourteenth Amendment right has occurred. *Simmons v. Navajo County Ariz.*, 609 F. 3d 1011, 1017-18 (9th Cir. 2010) (cited source omitted).

A viable Eighth Amendment claim has an objective and subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the objective component, the offending conduct "must be objectively, 'sufficiently serious[;] a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities'[.]" *Id*. (quoted sources omitted). The subjective component requires that a prison official have a "'sufficiently culpable state of mind[,]'" acting with "'deliberate indifference'" to an inmate's health or safety. *Id*. (quoted source omitted). The prison official will be liable only if "the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference." *Id.* at 837.

The actions and omissions challenged in relation to an Arabic Qur'an, and the provision

of meals, dates, a feast, and Halal meat cannot be reasonably construed as objectively, sufficiently serious, amounting to denial of "'the minimal civilized measure of life's necessities[,]'" or demonstrating that that jail officials knew of and disregarded an "excessive risk" to plaintiff's health and safety. *Id*. at 834, 837; *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992) ("Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation.") (internal citations and quoted sources omitted). *See also LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) ("The Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing.") and *Foster v. Runnels*, 554 F.3d 807, 811-14 & n.2 (9th Cir. 2009) (contrasting a claim that an inmate missed sixteen meals in twenty three days, and lost some thirteen pounds, which constituted a "sustained deprivation of food" and, therefore, sufficiently serious deprivation of life's basic necessities, with a claim he was denied meals on two other dates: "These relatively isolated occurrences do not appear to rise to the level of a constitutional violation.")) These claims should be dismissed.

Plaintiff also avers he "got extremely sick[]" when denied Ensure drink supplements in 2011 given the nutrition lacking in the Ramadan diet, causing him to suffer "physically and spiritually," and leaving him "lethargic and sickly[.]" (Dkt. 142 at 3.) He challenges defendants' refusal to provide him with pain reliever for use during the hours he could consume it according to his religious beliefs, adding that inmates with funds were allowed to have pain reliever during those hours. (*Id*. at 5.) He states that, as a result, he experienced "debilitating

headaches[]" during Ramadan in both 2009 and 2011, "was in a lot of pain most of the month," and "couldn't sleep because of the pain among other reasons." (*Id*.)

Defendants' briefing on the above consists of the observation that plaintiff was not given Ensure because it was not deemed medically necessary, the assertion that "[n]one of the conditions or accommodations this Plaintiff alleges he was subjected to were used or implemented in an effort to punish this inmate[,]" and the argument that Weiss should be dismissed from this suit because "the vegetarian meal is nutritionally sufficient." (Dkt. 90 at 3, 12-13.) They do not mention plaintiff's allegation regarding pain reliever.

Defendants do provide relevant information in attached declarations. Holst attests and provides evidence supporting the fact that plaintiff's request for drink supplements was denied as "not medically necessary" given that his weight "was within a normal range." (Dkt. 91 at 1-2 and Ex. A at 1.) An attached August 9, 2011 kite reflects plaintiff's report that he was "feeling sick" due to the inconsistent and nutritionally deficient Ramadan sacks provided, and was told there was "nothing that medical can do about what the kitchen serves[]" and that he was "not underweight[.]" (*Id*., Ex. A at 2.)

Jones and Weiss attest that the meals provided to plaintiff, during Ramadan and otherwise, contained a total of 2,800 calories and 90 grams of protein. (Dkt. 92 at 11; Dkt. 95 at 2.) Weiss attaches a document from Aramark attesting to the caloric content of the Ramadan diet and a standard Aramark Ramadan menu, while explaining that the meat items reflected on that menu "were replaced with peanut butter as a protein substitute." (Dkt. 95 at 2 and Ex. A.)

Also, while Holst does not discuss the issue in her declaration, she attaches a kite and

progress note touching upon the issue of pain reliever. In the August 16, 2011 kite, plaintiff requests a medical referral, stating it was his third request for "Tylenol at night" because he is "getting headaches again[]" and has been "miserable for a couple of weeks now[.]" (Dkt. 91, Ex. A at 2.) The kite response reflects that plaintiff previously complained about headaches stemming from lights being left on all night, states that medical "had no control over" that, and recommends plaintiff "stop all commissary food items[]" and "try drinking more water," as "[d]ehydration can cause headaches." (*Id*.) The progress notes reflect that, earlier in July and August, plaintiff complained about the light being kept on in his cell and was seen in the clinic for headaches. (*Id*., Ex. B.)

The Court has concerns about the allegations raised by plaintiff. For example, the Eighth Amendment "requires only that prisoners receive food that is adequate to maintain health." *LeMaire*, 12 F.3d at 1456. Plaintiff, while maintaining the provision of nutritionally inadequate food, does not dispute that his weight did not differ between 2009, when he was provided with drink supplements, and 2011, when his request for drink supplements was denied. (Dkt. 141 at 52; *see also* Dkt. 127-9 at 1 ("Plaintiff's weight was not the issue. It was malnutrition.")) Also, his arguments raise a concern that his diet-related complaints reflect his preferences, rather than setting forth a viable claim of food inadequate to maintain health. (*See, e.g.*, Dkt. 139 at 8 (plaintiff complains the "gross inadequate 'high-sugar' diet they were forcing [him] to eat" made him "very sick.") and Dkt. 127-6 at 3 ("[The meals] were mostly sugar foods. Plain white bread, cookies, cake, and peeled-dehydrated-potatoes were the common fare for regular and vegetarian meals both.")) Nor is it at all apparent plaintiff could support a contention that defendants acted with deliberate indifference in relation to his

nutritional needs. In addition, documents provided by plaintiff raise questions as to whether defendants can be said to bear the responsibility, or to have acted with deliberate indifference in relation to plaintiff's pain-relief issues. (*See, e.g.*, Dkt. 127-12 at 13-14 (one 2009 kite reflects plaintiff was told he could purchase Tylenol for use in his cell and that blood testing had revealed normal results, and another 2009 kite shows that plaintiff had run out of Tylenol he had purchased for his headaches, was told on-going Tylenol was not provided, and was advised to "push fluids" during the time he was allowed to eat to help alleviate his headaches).)

However, it remains that defendants fail to meet their initial burden on summary judgment of demonstrating an absence of evidence to support plaintiff's claims as to the nutrition he received and as to his ability to consume pain reliever during Ramadan. *Nissan Fire & Marine Ins. Co., Ltd.*, 210 F.3d at 1102. Indeed, as described above, defendants provide no more than a modicum of argument or information in relation to these claims, and, instead, rely almost entirely on their conclusory assertions.[10]

Plaintiff, on the other hand, does provide argument and evidence in relation to these claims beyond the allegations set forth in his Second Amended Complaint. He provides an affidavit from Becker, his former cellmate, attesting to the nutritional deficiencies of the meals provided at the jail, both generally and during Ramadan. (Dkt. 127-10.) He denies that the meals he was provided were consistent with that reflected on the standard Aramark Ramadan menu, or contained 2,800 calories. (*See, e.g.*, Dkt. 127-9 and Dkt. 139.) He provides a

10 Defendants do address plaintiff's claims as to nutrition and pain relievers generally in the factual section of their pending Motion for Summary Judgment re: Conditions of Confinement & Medical Claims. (Dkt. 157 at 7, 9.) However, that motion is not ripe for consideration. Nor can it be said to provide adequate argument or evidence related to the precise claims at issue herein.

document dated January 30, 2010 and entitled "Nutritional Analysis of Whatcom County Jail Menus" that includes detailed information as to the meals provided by the jail, and information relevant to plaintiff's claim, such as the observation that the special diet menus provided by the jail "seem to be a little lower in calories that [sic] what the ARAMARK nutrition requirement [sic] state." (Dkt. 6-1 at 94-96 (describing the calorie differential as 2,700 calories versus 2,416 or 2,646 calories).) He also provides a diary containing detailed descriptions of meals received in 2011. (Dkt. 6-2 at 24-44.)

However, as with defendants, the Court finds no basis for granting plaintiff summary judgment in relation to the Ramadan-related nutrition and pain relief claims. In addition to the concerns raised above, it remains unclear, at this time, whether any material factual disputes exist. The Court should, as such, deny summary judgment in relation to these claims.

D. Wendell Terry

Defendants argue Terry, a volunteer chaplain at the jail, should be dismissed from this matter as he is not a "state actor" amenable to suit under 42 U.S.C. § 1983, and because he had no involvement with any of the allegations at issue in this action. The Court declines to address whether or not Terry could be considered a state actor under § 1983. *See, e.g.*, *Florer*, 639 F.3d at 919, 924-27 (noting that the Supreme Court has identified at least seven approaches to the question of whether a private party has acted under color of state law, and concluding that plaintiff failed to demonstrate, under two such approaches, that private entities operating as contract chaplains within the Washington State prison system were state actors). Nonetheless, the Court agrees with defendants that plaintiff's claims against Terry should be dismissed.

Plaintiff appears to name Terry as a personal participant in the failure to timely provide

him with his Ramadan evening meals, a concluding feast, dates, Halal meat, or an Arabic Qur'an. (Dkt. 142 at 1-10.) He also alleges Terry is liable in that he conspired with and failed to prevent other defendants from violating his constitutional rights in relation to the first and concluding Ramadan meals, and adequate nutrition throughout Ramadan. (*Id*.) He does not elsewhere name Terry in his Second Amended Complaint. (Dkt. 142.) Terry attests he is one of several volunteer chaplains at the jail. (Dkt. 94 at 1.) He denies having any input or control over jail administration, function, or policy, and does not recall ever speaking with plaintiff. (*Id*. at 1-3.)

A plaintiff in a § 1983 action must allege facts showing how individually named defendants caused or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). Supervisory personnel may not be held liable for actions of subordinates under a theory of vicarious liability. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

In order to establish liability for a conspiracy, a plaintiff in a § 1983 case "must 'demonstrate the existence of an agreement or meeting of the minds' to violate constitutional rights." *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (quoted source omitted). While they "'need not know the exact details of the plan, . . . each participant must at least share the common objective of the conspiracy.'" *Id*. (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc)).

Plaintiff's claims can be reasonably read as alleging, at most, facts supporting Terry's involvement in the denial of a Qur'an and, possibly, dates. (*See* Dkts. 141 & 142.) However, as stated above, those claims lack merit and should be dismissed. Further, plaintiff fails to set

forth any factual basis for Terry's involvement, either personally or as part of a conspiracy, in the claims withstanding defendants' motion for summary judgment. Plaintiff's contentions to the contrary are no more than unsupported conjecture and conclusory, and may not, therefore, serve to defeat summary judgment. *Hernandez*, 343 F.3d at 1112. For these reasons, plaintiff's claims against Terry should be dismissed.

E. Personal Involvement of Other Individual Defendants

Defendants assert that Raymond, DePaul, Bitner, George, Weiss, and Holst had no decision-making authority regarding plaintiff's diet, whether or not he was given dates, Halal meat, Ensure supplements, or even as to the timing of meals. Defendants concede Smith erred in failing to deliver one meal, but contend that error was a mistake, corrected quickly, and never repeated. They point to Jones as having made the decisions regarding Halal meat, dates, and as to the religious diets.

As discussed above, the Court concludes that the only religious practice claims surviving defendants' motion for summary judgment include those related to Halal meat, the nutritional adequacy of plaintiff's 2011 Ramadan diet, and the denial of pain reliever during Ramadan. Because plaintiff alleges facts associating Jones, Weiss, and Holst with one or more of those claims, defendants fail to support dismissal based on an absence of personal participation. However, having reviewed plaintiff's Second Amended Complaint, briefing in relation to the current motion, and the remainder of the record, the Court concludes that plaintiff sets forth no factual basis supporting the participation, either personally or as part of a conspiracy, of defendants Raymond, DePaul, Bitner, George, and Smith in relation to such

claims.[11] Plaintiff's religious practices claims against these defendants should, accordingly, be dismissed. *See generally Arnold*, 637 F.2d at 1355, and *Crowe*, 608 F.3d at 440.

F. Qualified Immunity

The individual defendants assert their entitlement to qualified immunity in relation to plaintiff's Halal meat claim, arguing it is well established inmates of the Muslim faith do not have a constitutional right to Halal meat. (Dkt. 90 at 15-16 (citing cases).) Defendants also assert that plaintiff's claims against Weiss should be dismissed both because "the vegetarian meal is nutritionally sufficient[]" (*id*. at 13) and because, as a private individual performing a public job, she is similarly entitled to qualified immunity, *see Filarsky v. Delia*, ___ U.S. ___, 132 S.Ct. 1657, ___ (2012) ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.").

As stated above, the Court lacks sufficient information to address plaintiff's claim as to the nutritional adequacy of the Ramadan diet. Neither defendants' bare assertion that the vegetarian meal is nutritionally adequate, nor the declaration from Weiss stating as such provides a sufficient basis upon which to decide whether Weiss or any other defendants are entitled to qualified immunity. The Court, therefore, addresses only the qualified immunity argument raised in relation to plaintiff's Halal meat claim.

Under the doctrine of qualified immunity, state officials "performing discretionary

11 DePaul, in his position as Grievance Coordinator, can be said to have been involved in the processing of related grievances. (*See, e.g.*, Dkt. 6 at 33, 76-80.) However, plaintiff sets forth no basis for DePaul's involvement in the issues underlying those grievances, namely, whether or not plaintiff was to be provided with Halal meat, drink supplements, or pain relievers.

functions [are protected] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether qualified immunity applies, the Court considers whether the plaintiff alleged sufficient facts to make out a violation of a constitutional right, and whether the constitutional right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *modified by Pearson v. Callahan*, 555 U.S. 223 (2009) (explaining "that, while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory").

"'If the right was not clearly established at the time of the violation, the official is entitled to qualified immunity.'" *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011) (quoted and cited sources omitted)). In considering whether a right is clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The court applies an objective standard; "the defendant's subjective understanding of the constitutionality of his or her conduct is irrelevant." *Clairmont*, 632 F.3d at 1109 (internal quotation marks and quoted source omitted). An official who makes a reasonable mistake as to what the law requires is entitled to immunity. *See Saucier*, 533 U.S. at 295; *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).

In this case, plaintiff alleges a violation of his constitutional rights through the failure to provide him with Halal meat, and, possibly, with canned tuna or other fish as a substitute for Halal meat. Considered as such, the Court finds defendants entitled to qualified immunity.

"Inmates . . . have the right to be provided with food sufficient to sustain them in good

health that satisfies the dietary laws of their religion." *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987). However, it remains true that, as previously found by this Court, "the majority of circuit and district courts that have looked at this specific issue have concluded there is no such clearly established right to Halal meals, with or without Halal meat, under the First Amendment's Free Exercise of Religion Clause, RLUIPA or the Equal Protection Clause of the Fourteenth Amendment." *Thompson*, 2007 U.S. Dist. LEXIS 102081 at *63, *adopted by* 2007 U.S. Dist. Lexis 80487, and *aff'd by* 2009 U.S. App. LEXIS 6158 at *2-3 ("The district court also properly concluded that the defendants are entitled to qualified immunity because it was not clearly-established at the time of the violation that the defendants were required to provide him with either Halal or Kosher meals with meat in lieu of an ovo-lacto diet.").[12] *Accord Williams v. Morton*, 343 F.3d 212, 217-21 (3d Cir. 2003) (upholding denial of Halal meat meals and provision of vegetarian diets to Muslim inmates under Free Exercise Clause); *Bilal v. Lehman*, No. C04-2507-JLR, 2006 U.S. Dist. LEXIS 89430 at *18-20 (W.D. Wash. Dec. 8, 2006) (no clearly established right to a Halal meat diet); *Ellis v. United States*, No. 08-160 Erie, 2011 U.S. Dist. LEXIS 86927 at * 26-27 (W.D. Pa. Jun. 17, 2011) (same), *adopted by* 2011 U.S. Dist. LEXIS 83833 (Aug. 1, 2011); *Green v. Tudor*, 685 F. Supp. 2d 678, 702 (W.D. Mich.

12 The Ninth Circuit's decision in *Shakur* is not to the contrary. In that case, the Court addressed a prison's refusal to provide a kosher diet to a Muslim inmate who alleged the vegetarian diet he was provided caused gastrointestinal disturbance, thereby interfering with his religious practice. *Shakur*, 514 F.3d at 885. The Court found those facts demonstrated implication of the Free Exercise Clause and that adverse health effects from a prison diet can be relevant to the RLUIPA substantial burden inquiry, but remanded for development of the factual record. *Id*. at 885, 888-91. The Court did not address Halal meat, or some other formulation of a Halal or other religious diet, separate and apart from adverse health effects. Nor did the Court address qualified immunity.

2009) (same).[13]

Given the lack of clearly established law, a reasonable prison official would not have been on notice that the provision of a vegetarian or ovo-lacto vegetarian diet to a Muslim prisoner, in lieu of Halal meat or some other formulation of a Halal diet, would have violated plaintiff's rights. Accordingly, the individual defendants should be found immune from liability in this case, and their motion for summary judgment granted in this respect.

G. Damages under RLUIPA:

Although not raised by defendants, the Court also finds it prudent to address the availability, or lack thereof, of damages against defendants in their personal capacities under RLUIPA. The United States Supreme Court has not resolved the issue, and the Ninth Circuit has expressly reserved a ruling. *Florer*, 639 F.3d at 922 n.3. However, five circuit courts and numerous district courts, including the Western District of Washington, have held that RLUIPA does not authorize suits for damages against government officials in their personal capacities. *See Stewart v. Beach*, 701 F.3d 1322, 1334 (10th Cir. 2012); *Rendelman v. Rouse*, 569 F.3d

13 Cases addressing varying factual patterns reflect similar conclusions. *See, e.g.*, *Muhammad v. Sapp*, No. 09-14943, 2010 U.S. App. LEXIS 15175 at *9-10, 15 (11th Cir. Jul. 21, 2010) (upholding dismissal of RLUIPA claim and granting qualified immunity on free exercise claim based on denial of alcohol-free lacto-vegetarian diet prepared with and served by non-disposable utensils not having contact with meat or alcohol); *Kind v. Frank*, 329 F.3d 979, 981 (8th Cir. 2003) (jail officials entitled to qualified immunity where policy of providing Muslim inmate with pork-free, rather than vegetarian, diet was objectively reasonable); *Kahey v. Jones*, 836 F.2d 948, 949-50 (5th Cir. 1988) (noting that "prisons need not respond to particularized religious dietary requests" and upholding dismissal of free exercise claim by Muslim inmate whose beliefs prevented her from eating any food cooked or served in or on utensils which had come into contact with pork or any pork by-product); *Jihad v. Fabian*, No. C09-1604 (SRN/LIB), 2011 U.S. Dist. LEXIS 46930 at *47-50 (D. Minn. Feb. 17, 2011) (no clearly established right to prepackaged halal meals); *Hudson v. Maloney*, 326 F. Supp. 2d 206, 211-14 (D. Mass. 2004) ("[N]o reasonable prison official would have concluded that Muslim inmates had an established right to Halal meals prepared by other Muslim inmates or that prison administrators did not have broad discretion in the matter of prison dietary alternatives.").

182, 187-89 (4th Cir. 2009); *Sossamon v. Texas*, 560 F.3d 316, 327-29 (5th Cir. 2009); *Nelson v. Miller*, 570 F.3d 868, 886-89 (7th Cir. 2009); *Smith v. Allen*, 502 F.3d 1255, 1271-75 (11th Cir. 2007), *abrogated on other grounds by Sossamon*, ___ U.S. ___, 131 S. Ct. 1651 (2011); *see also, e.g.*, *Mahone v. Pierce County*, C10-5847 RBL/KLS, 2011 U.S. Dist. LEXIS 62617 at *11-17 (W.D. Wash. May 23, 2011), *adopted by* 2011 U.S. Dist. LEXIS 83980 (Aug. 1, 2011); *Florer v. Bales-Johnson*, 752 F. Supp. 2d 1185, 1205-06 (W.D. Wash. 2010), *aff'd on other grounds*, No. 11-35004, 2012 U.S. App. LEXIS 10298 (9th Cir. May 22, 2012). These courts reason that, because individual officers are not the recipients of federal funds, Congressional enactments pursuant to the Spending Clause do not impose liability on individual defendants. *See id.* Courts have further found "there is no evidence of an effect on interstate or international commerce by an alleged denial of a nutritionally or religiously adequate diet to indicate that RLUIPA should be interpreted under the Commerce Clause." *Bales-Johnson*, 752 F. Supp. 2d at 1206.

The Court finds no reason to depart from the circuit courts identified above and numerous district courts within the Ninth Circuit. Accordingly, the Court also recommends a finding that plaintiff is not entitled to damages under RLUIPA against defendants in their personal capacities.

CONCLUSION

For the reasons described above, the Court recommends defendants' motion (Dkt. 90) be GRANTED in part and DENIED in part, and plaintiff's cross-motion (Dkt. 141) be DENIED. Plaintiff's RLUIPA, First Amendment, and unconstitutional punishment claims related to an Arabic Qur'an and meals, dates, and a feast during his 2011 Ramadan should be

dismissed, as should his claim that the denial of Halal meat amounted to unconstitutional punishment. The parties should be denied summary judgment in relation to plaintiff's RLUIPA and First Amendment claims challenging the denial of Halal meat, and as to his unconstitutional punishment claims regarding drink supplements/the nutritional adequacy of the Ramadan diet and the denial of pain reliever during Ramadan. All of plaintiff's claims against Terry should be dismissed, as should plaintiff's religious practice claims against Raymond, DePaul, Bitner, George, and Smith. Further, the individual defendants are entitled to qualified immunity in relation to plaintiff's Halal meat claim, and should not be held liable for damages in their personal capacities under RLUIPA. A proposed order accompanies this Report and Recommendation.

DATED this 19th day of August, 2013.

Mary Alice Theiler
Chief United States Magistrate Judge