IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JESUS CHRIST PRISON MINISTRY, et al.,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Defendants.
___________________________/

No. CIV.S-05-0440 DAD

ORDER

Upon consent of the parties, this action has been assigned to the undersigned for all proceedings. See 28 U.S.C. § 636(c). It is before the court on the parties' cross-motions for summary judgment. For the reasons explained below, those motions will be granted in part and denied in part.

BACKGROUND

Plaintiffs initiated this civil rights action by filing their verified complaint on March 3, 2005. The named plaintiffs are Jesus Christ Prison Ministry ("JCPM") and state prisoners Daniel

Leffel, Marvin Salinas, and Daniel Marchy. The named defendants are the California Department of Corrections (now the California Department of Corrections and Rehabilitation ("CDCR")); Jeane S. Woodford (Director of CDCR); and Derral G. Adams (Warden of California State Substance Abuse Treatment Facility ("SATF") in Corcoran, California).

The verified complaint contains three causes of action. The first cause of action is brought only by the prisoner plaintiffs against all defendants. It alleges that SATF's policy prohibiting the sending of free softbound, Christian literature, compact discs and tapes to prisoners who have requested those materials violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").

The second cause of action is brought by plaintiff JCPM and the plaintiff prisoners against all defendants. It alleges that defendants' actions deprive both JCPM and the prisoners of the free exercise of religion in violation of the First and Fourteenth Amendments.

The third cause of action is brought by JCPM and the prisoners against all defendants. It alleges that defendants' actions deprive JCPM and the prisoners of their right to free speech in violation of the First and Fourteenth Amendments.

The complaint prays for injunctive relief, declaratory relief, nominal damages and reasonable attorney fees and costs. However, plaintiffs withdrew their request for nominal damages at the hearing on the cross-motions for summary judgment.

After settlement negotiations proved unsuccessful, the parties were directed to file cross-motions for summary judgment. Those motions came on for hearing on April 21, 2006. Kevin T. Snider of the Pacific Justice Institute appeared on behalf of plaintiffs. John W. Riches, II, Deputy Attorney General, appeared on behalf of defendants.

LEGAL STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992).

> The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

"[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Celotex Corp., 477 U.S. at 323. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will

1 bear the burden of proof at trial. See id. at 322. "[A] complete
2 failure of proof concerning an essential element of the nonmoving
3 party's case necessarily renders all other facts immaterial." Id.
4 In such a circumstance, summary judgment should be granted, "so long
5 as whatever is before the district court demonstrates that the
6 standard for entry of summary judgment, as set forth in Rule 56(c),
7 is satisfied." Id. at 323.

8 If the moving party meets its initial responsibility, the
9 burden then shifts to the opposing party to establish that a genuine
10 issue as to any material fact actually does exist. Matsushita Elec.
11 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also
12 First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89
13 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th
14 Cir. 1979). The opposing party must demonstrate that the fact in
15 contention is material, i.e., a fact that might affect the outcome of
16 the suit under the governing law, and that the dispute is genuine,
17 i.e., the evidence is such that a reasonable jury could return a
18 verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc.,
19 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec.
20 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Thus, the
21 "purpose of summary judgment is to 'pierce the pleadings and to
22 assess the proof in order to see whether there is a genuine need for
23 trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)
24 advisory committee's note on 1963 amendments).

25 In resolving the summary judgment motion, the court
26 examines the pleadings, depositions, answers to interrogatories, and

1 admissions on file, together with the affidavits, if any. Rule
2 56(c); see also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th
3 Cir. 1982). The evidence of the opposing party is to be believed,
4 Anderson, 477 U.S. at 255, and all reasonable inferences that may be
5 drawn from the facts placed before the court must be drawn in favor
6 of the opposing party. Matsushita, 475 U.S. at 587 (citing United
7 States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); see also United
8 States v. First Nat'l Bank of Circle, 652 F.2d 882, 887 (9th Cir.
9 1981). Nevertheless, inferences are not drawn out of the air, and it
10 is the opposing party's obligation to produce a factual predicate
11 from which the inference may be drawn. See Richards v. Nielsen
12 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd,
13 810 F.2d 898, 902 (9th Cir. 1987).

14 Finally, "[a] scintilla of evidence or evidence that is
15 merely colorable or not significantly probative does not present a
16 genuine issue of material fact" precluding summary judgment. Addisu
17 v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). See also
18 Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997).
19 On summary judgment the court is not to weigh the evidence or
20 determine the truth of the matters asserted but must only determine
21 whether there is a genuine issue of material fact that must be
22 resolved by trial. See Summers, 127 F.3d at 1152. Nonetheless, in
23 order for any factual dispute to be genuine, there must be enough
24 doubt for a reasonable trier of fact to find for the plaintiff in
25 order to defeat a defendant's summary judgment motion. See Addisu,
26 198 F.3d at 1134.

FACTS[1]

Plaintiff JCPM is a religious organization that provides predominately softbound Christian literature, free of charge, to incarcerated individuals in several states. These religious materials are provided only to prisoners who specifically request them. JCPM sends written materials to incarcerated persons based on its sincerely held religious beliefs. Plaintiffs Daniel Leffel, Marvin Salinas and Daniel Marchy are sincere adherents of the Christian faith and are confined at SATF.

In accordance with their religious beliefs, plaintiffs Leffel, Salinas and Marchy seek to reform their behavior and attitudes through religious exercise. At the core of that religious exercise is studying the Bible. Another important aspect of plaintiffs' exercise of their religion is worshiping and meditating on God through music. To study the Bible, the plaintiff prisoners need Christian literature that explains biblical theology, doctrine and Christian concepts. To worship and meditate on God through music, plaintiffs require compact discs and/or tape recordings of Christian music.

To engage in this exercise of religion, the prisoners correspond with charitable religious organizations offering spiritual assistance through free study materials. The plaintiff prisoners are indigent and thus unable to purchase Christian literature, tapes and

[1] Unless otherwise noted, the facts set forth in this section are the undisputed facts material to the disposition of the motions. Many of these facts have been adopted from the parties' statements of undisputed facts.

compact discs. The prisoners rely on charitable religious organizations to send them free religious materials when requested in writing. Those materials include softbound books, unbound study guides and pamphlets as well as sermons and Christian music on audio tapes and compact discs. The plaintiff prisoners sincerely believe their religious exercise, through the regular use of such religious materials, has encouraged their conformity with prison guidelines regarding appropriate behavior.

While incarcerated at SATF, plaintiff Salinas was sent softbound printed religious materials from JCPM free of charge. Plaintiffs Leffel and Marchy were sent materials from other ministries. Although plaintiffs had received these materials previously, pursuant to a new policy instituted in March or April of 2004 at SATF, prison officials began denying plaintiffs these religious materials because the literature was not sent from an "approved vendor" and was thus considered contraband. (Defs.' Statement of Undisp. Facts, Ex. E at 8.) In response to the decision in Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005), CDCR Deputy Director Suzan L. Hubbard issued a memorandum on April 5, 2005 directing all institutions to process and permit incoming "non-subscription bulk mail and catalogs" addressed to individual prisoners. (Defs.' Statement of Undisp. Facts, Ex. A, Attach. 3.) Effective March 1, 2006, this policy implementation was changed yet again. (Id. at Ex. A, Attach. 2 and Ex. B.) Thus, during the period of time relevant to this action the policies at SATF with respect to

/////

1 the processing of religious materials sent to the plaintiff prisoners
2 via the mail have changed three times.

3 Currently, and pursuant to the various policy changes noted
4 above, the manner of processing mail depends on which of three
5 categories the mail falls into. The first category is properly
6 addressed unbound study guides, pamphlets, and other religious
7 literature. This category of mail is no longer to be subject to the
8 approved vendor policy and is to be delivered directly to the
9 prisoner from the SATF mailroom.

10 The second category is softbound books (such as a Bible)
11 from a publisher, bookstore, or other organization which does mail
12 order business. The SATF mailroom considers plaintiff JCPM to be an
13 organization conducting a mail order business, although the term
14 "mail order business" has not been defined in connection with the
15 motions pending before the court. Upon receipt by the SATF mailroom,
16 properly addressed softbound books are to be forwarded to receiving
17 and release ("R&R") for processing. The R&R softbound book
18 processing consists of opening and inspecting the package; entering
19 the contents of the package on the prisoner's property inventory
20 card; and sending the package to the prisoner. This second category
21 of materials is also no longer intended to be subject to the approved
22 vendor policy.

23 The third category of mail consists of audio tapes and
24 compact discs. These materials remain subject to the approved vendor
25 policy. The details of the current approved vendor policy are set
26 /////

1 forth in Operational Procedure 129 ("OP-129"), governing prisoner
2 mail at SATF. According to OP-129:

3 Inmates are allowed to receive religious
4 books/materials directly from authorized religious vendors through Special Purchases or through the quarterly packages by approved
5 vendors as listed in OP 201. All materials must
6 be sealed in the manufacturer's wrapping and accompanied with a purchasing order/invoice.

7 (Defs.' Statement of Undisp. Facts, Ex. A, Attach. 2 at 5.) There
8 are only six approved vendors at SATF: Walkenhorst's; Union Supply
9 Company, Inc.; Music by Mail; Access Company; Pack Central; and
10 Amazon.com. (Defs.' Statement of Undisp. Facts, Ex. E at 8.) In
11 short, the approved vendor policy allows prisoners to receive tape
12 recordings and compact discs from only a handful of specifically
13 identified approved vendors and only so long as the materials are in
14 their original wrapping and are accompanied by a purchase receipt.
15 Once tape recordings and compact discs are received in the mailroom
16 from an approved vendor, they are forwarded to R&R and processed
17 accordingly. Plaintiff JCPM is not an approved vendor. It is a non-
18 profit religious organization that donates, rather than sells, its
19 materials which are not always unused. Therefore, its religious
20 materials do not come with a purchase order and they are not wrapped
21 in packaging.

22 Finally, tape recordings and compact discs with religious
23 content may also be donated to the institution, but not to prisoners
24 directly, pursuant to a gifts and donations operations procedure.
25 Under that procedure, a chaplain prepares an authorization form based
26 on information provided by the donor of the religious materials.

Once the donation is approved, the donation will be accepted on behalf of SATF. Upon delivery of the donation, it is subject to review and inspection for safety and security purposes. Once the donation has been reviewed and inspected, it is held and made available to prisoners through the chaplain on a check out basis. A prisoner may check out a donated item and keep it in his housing unit for a specified period, usually two weeks. Donated materials are not subject to the restrictions on the amount of property allowed in a prisoner's cell because they are technically held by the chaplain. If the donated item is an audio tape or compact disc that has been removed from the manufacturer’s original packaging, the item will be reviewed for content prior to being made available to prisoners. The institution’s R&R officers are not involved in this donation process.

In sum, the undisputed facts establish that unbound study guides, pamphlets, softbound books such as Bibles and other literature sent by JCPM to SATF prisoners requesting those materials are currently to be delivered to the prisoners following some sort of inspection for safety purposes. Tape recordings and compact discs sent to SATF prisoners are delivered following inspection only if they are from one of the six approved vendors. Because JCPM is not an approved vendor, and does not qualify as such under the policy, it cannot send religious tape recordings and compact discs to the plaintiff prisoners or to other prisoners at SATF.

/////

/////

/////

1 **ANALYSIS**

2 **I. Threshold Issues**

3 Before turning to the merits of plaintiffs' claims the
4 court must address a myriad of issues presented by the parties in the
5 pending motions. First, the scope of this action must be addressed.
6 It is clear that JCPM would prefer to determine its free exercise and
7 free speech rights in relation to SATF as well as every other CDCR
8 institution through this lawsuit. However, plaintiffs' verified
9 complaint makes no mention of any other institution other than SATF.
10 The "Nature of Action" alleged at the outset of the complaint
11 mentions only SATF and its warden, Warden Adams. (Compl. at 2.) No
12 other warden from any other institution is named or mentioned in the
13 complaint. The only individual plaintiffs are SATF prisoners and no
14 prisoners from other institutions are mentioned in the complaint.
15 The mail policies alleged in the complaint are those of SATF, not any
16 other institution. (Compl. at 3-4.) Finally, the only suggestion
17 that this action encompasses CDCR institutions statewide is the fact
18 that CDCR and Director Woodford are named defendants. The fact that
19 those named defendants have statewide responsibilities as a general
20 matter does not transform this action into one encompassing all CDCR
21 institutions. The court finds that the scope of this lawsuit is
22 limited to the civil rights of plaintiff JCPM and the individual
23 plaintiffs in relation to the policies and practices at SATF only.

24 Plaintiffs' complaint does clearly encompass claims by the
25 individual plaintiffs that defendants have unlawfully prohibited
26 religious organizations other than JCPM from sending them religious

materials. However, the record in this regard has not been sufficiently developed. The only evidence addressing the issue of the treatment of mail from religious organizations other than JCPM is a declaration from plaintiff Leffel indicating he was declined a "package" from "Bible Pathway Ministries" because it was not an approved vendor and the declaration from plaintiff Marchy stating he was denied "materials" from "Gospel Echoes Team" and "Fairhaven Bible Church" because they did not appear on the approved vendors list. (Decl. of Daniel Marchy in Supp. of Mot. for Summ. J. at 2-3; Decl. of Daniel Leffel in Supp. of Mot. for Summ. J. at 2-3.) While this record raises an issue regarding the individual plaintiffs' ability to receive religious materials from other organizations, the evidence with respect to the nature of these other organizations and the religious materials they desire to send to the plaintiffs at SATF is scant. Absent additional evidence, these issues are not ripe for resolution on summary judgment. Therefore, plaintiffs' motion for summary judgment will be denied in this regard. See Chao v. Bremerton Metal Trades Council, AFL-CIO, 294 F.3d 1114, 1124 (9th Cir. 2002) ("The district court erred in granting summary judgment in favor of the Bremerton Council on this limited record. A deeper record on relevant issues is necessary to determine whether the qualification was reasonable in all the circumstances."); Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc., 563 F.2d 391, 396 (9th Cir. 1977).

Next, defendants argue that this action is moot with respect to the written materials because prisoners at SATF may now

receive all softbound books, unbound study guides, pamphlets and other literature from JCPM since those materials are no longer subject to the approved vendor policy. Defendants assert the issues with respect to these written materials are no longer "live" and the parties therefore "lack a legally cognizable interest" in the outcome of this action. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Sample v. Johnson, 771 F.2d 1335, 1338 (9th Cir. 1985). Defendants' argument is unpersuasive.

"Mere voluntary cessation of allegedly illegal conduct does not moot a case[.]" United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). The party asserting mootness has a heavy burden of demonstrating that "subsequent events have made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1274 (9th Cir. 1998)(internal quotations, alterations and citations omitted). See also Demery v. Arpaio, 378 F.3d 1020, 1026 (9th Cir. 2004); Fed. Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1238 (9th Cir. 1999). Here, defendants have failed to meet this heavy burden.

As set forth above, the mail policies implicated by this action have been changed by officials at SATF three times in the last two years. In so doing, defendants have created somewhat of a "moving target" accompanied by no concrete assurances that the policies in question will not be subject to further modification and

change. Indeed, with respect to the 2005 Hubbard memorandum, the most defendants can muster is the noncommittal statement by Warden Adams that "I am unaware of any intent to rescind this directive." (Defs.' Statement of Undisp. Facts, Ex. A at 2.) Such vague representations do not make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and therefore those representations do not establish mootness. See Halet v. Wend Inv. Co., 672 F.2d 1305, 1308 (9th Cir. 1982)("This court cannot rely on Wend's statement alone. Wend could revert to an adults-only policy in the future, and Wend has not demonstrated that there is no reasonable expectation of such an occurrence.") Finally, plaintiffs have presented evidence that despite the changes in policy, written materials from plaintiff JCPM and similar non-profit religious organizations continue to be rejected pursuant to the approved vendor policy. (Declaration of Kevin Snider, Exs. 6-8.) For these reasons, defendants' mootness argument will be rejected.

Another preliminary matter is CDCR Director Woodford's contention that she is entitled to summary judgment in her favor because there has been no showing that she was personally involved in formulating the mail policies at SATF. The court agrees. Supervisory personnel such as defendant Woodford are not liable under § 1983 for the actions of their employees under a theory of respondeat superior. Therefore, when a named defendant holds a supervisory position, a causal link between the defendant and the claimed constitutional violation must be shown. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589

F.2d 438, 441 (9th Cir. 1978). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)(citing Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984)). A supervisor may be liable upon a showing that he or she "implement[ed] a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and was 'the moving force of the constitutional violation.'" Redman v. County of San Diego, 942 F.2d 1435, 1446-47 (9th Cir. 1991)(citations omitted).

Here, plaintiffs' verified complaint contains no allegations specific to defendant Woodford. It is not seriously disputed that prison regulations provide that wardens are responsible for the operational procedure governing prisoners' mail at their respective institutions. (See Defs.' Cross-mot. at 6.) OP-129, the internal procedure governing the handling of prisoner mail at SATF, specifically provides that "[t]he Warden is responsible for the overall operation of this procedure." (Defs.' Statement of Undisp. Facts, Attach. 2 at 1.) While the 2005 memorandum from Deputy Director Hubbard, which directed CDCR institutions to process and permit incoming non-subscription bulk mail and catalogs, was not authored by a warden, it also was not written by defendant Woodford. No evidence before the court suggests Director Woodford's personal involvement in the issuing of that memorandum or in any other changes in mail policies at SATF. Based on this evidence, the court finds

1 that there is no genuine issue as to whether defendant Woodford was
2 personally involved in imposing the mail policies at issue or was a
3 moving force behind those policies. Accordingly, defendant Woodford
4 is entitled to summary judgment in her favor.

5 Next, defendant CDCR asserts that as an arm of the state it
6 is not a "person" under 42 U.S.C. § 1983 and therefore not a proper
7 party to this action. It is true that state agencies and state
8 officials acting in their official capacities are not "persons" for
9 purposes of a § 1983 suit seeking monetary damages. See Arizonans
10 for Official English v. Arizona, 520 U.S. 43, 69 n.24 (1997); Will v.
11 Michigan Dep't. Of State Police, 491 U.S. 58, 71 (1989). However,
12 state agencies and officials sued in their official capacities for
13 injunctive relief are persons for purposes of § 1983. See Will, 491
14 U.S. at 71, n.10; Bank of Lake Tahoe v. Bank of America, 318 F.3d
15 914, 918 (9th Cir. 2003). As noted above, plaintiffs have withdrawn
16 their request for nominal damages and currently seek declaratory and
17 injunctive relief only. Therefore, defendant CDCR's argument that it
18 is not a proper party to this action must be rejected.

19 Because plaintiffs have withdrawn their request for
20 monetary damages, the court also rejects defendants' claim of
21 entitlement to qualified immunity. Qualified immunity shields an
22 official from liability for civil damages only; it does not apply to
23 injunctive or declaratory relief. Hydrick v. Hunter, 449 F.3d 978,
24 992 (9th Cir. 2006); American Fire, Theft & Collision Managers, Inc.
25 v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991); Backlund v.
26 Barnhart, 778 F.2d 1386, 1389 n.3 (9th Cir. 1985).

Finally, defendants argue that plaintiffs Leffel and Salinas failed to exhaust their administrative remedies prior to initiating this action.[2] Therefore, in addition to moving for summary judgment, defendants have moved to dismiss the claims of plaintiffs Leffel and Salinas's without prejudice. For the reasons explained below, defendants' motion to dismiss will be denied.

By the Prison Litigation Reform Act of 1995 ("PLRA"), Congress amended 42 U.S.C. § 1997e to provide that "[n]o 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." 42 U.S.C. § 1997e(a). The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

The Supreme Court has ruled that exhaustion of prison administrative procedures is mandated regardless of the relief offered through such procedures. Booth v. Churner, 532 U.S. 731, 741 (2001). The Court has also cautioned against reading futility or other exceptions into the statutory exhaustion requirement. Id. at 741 n.6. Because proper exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal.

[2] It is undisputed that plaintiff Marchy exhausted his administrative remedies.

Woodford v. Ngo, ___ U.S. ___, 126 S. Ct. 2378, 2387 (2006). Prisoners must exhaust administrative remedies before submitting any papers to the federal courts. Vaden v. Summerhill, 449 F.3d 1047, 1048, 1051 (9th Cir. 2006); McKinney v. Carey, 311 F.3d 1198, 1200-01 (9th Cir. 2002).

In California, state regulations permit prisoners to appeal "any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). Most appeals progress from an informal review through three formal levels of review. See Cal. Code Regs. tit. 15, § 3084.5. A decision at the third formal level, also referred to as the director's level, is not appealable and will conclude a prisoner's administrative remedy. Cal. Code Regs. tit. 15, §§ 3084.1(a) and 3084.5(e)(2). A California prisoner is required to submit an inmate appeal at the appropriate level and proceed to the highest level of review available before filing suit. Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002).

The PLRA exhaustion requirement creates an affirmative defense that a defendant may raise in an unenumerated Rule 12(b) motion. Wyatt v. Terhune, 315 F.3d 1108, 1117-19 & nn.9 & 13 (9th Cir. 2003), cert. denied sub nom. Alameida v. Wyatt, 540 U.S. 810 (2003). The defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315 F.3d at 1119; Zarco v. Burt, 355 F. Supp. 2d 1168, 1172 (S.D. Cal. 2004). "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may

look beyond the pleadings and decide disputed issues of fact." Id. at 1119-20. "I[f] the district court looks beyond the pleadings to a factual record in deciding the motion to dismiss for failure to exhaust - a procedure closely analogous to summary judgment - then the court must assure that [the prisoner] has fair notice of his opportunity to develop a record." Id. at 1120 n.14. If the district court concludes that the prisoner has not exhausted administrative remedies on a claim, "the proper remedy is dismissal of the claim without prejudice." Id. at 1120. See also McKinney, 311 F.3d at 1200-01 (concluding that it would undermine attainment of congressional objectives to permit a prisoner to exhaust administrative remedies while proceeding with a federal suit).

Here, it is undisputed that plaintiff Leffel's inmate appeal was denied at the second level of review in July of 2004 and plaintiff Salinas's second level denial was issued in September of 2004. Defendants merely assert in conclusory fashion that plaintiffs then abandoned their administrative appeals and did not present their grievance to the third formal level of review. Other than citing, without explanation, records documenting the second level denial provided by SATF's custodian of records (see Defs.' Statement of Undisp. Facts, Ex. E at 1, 15-20 and 36-37), defendants offer no evidence demonstrating that plaintiffs Leffel and Salinas failed to exhaust the third level of review.[3]

/////

[3] No declaration has been submitted by the Appeals Coordinator at the institution.

On the other hand, plaintiff Leffel has submitted a declaration signed under penalty of perjury stating that he received a second level denial on July 9, 2004, and promptly filed a third level appeal on July 21, 2004. The declaration sets forth the address to which that final appeal was mailed and states that he received no response thereto. (Decl. of Daniel Leffel in Opp'n to Defs.' Mot. at 1.) Plaintiff Salinas also has submitted a declaration signed under penalty of perjury stating that while his second level denial occurred in September of 2004, he did not receive notice of it until January 3, 2005. (Decl. of Marvin Salinas in Opp'n to Defs.' Mot. at 2-3.) He then immediately filed a third level appeal on January 9, 2005, only to have it returned accompanied by a letter dated March 21, 2005, explaining that the appeal was untimely because it was not filed within fifteen days of the decision being challenged (i.e., the second level denial in September of 2004).

Defendants have filed no response to plaintiffs' declarations and the version of events set forth therein. Defendants have simply failed to carry their burden of establishing plaintiffs' failure to exhaust the available administrative remedies.[4] The defendants' motion to dismiss will therefore be denied.

---

[4] On this record it would appear that defendants' failure to timely respond to the grievances filed by plaintiffs Leffel and Salinas rendered any further administrative remedy unavailable. See Hemphill v. New York, 380 F.3d 680, 687 n.6 (2d Cir. 2004)(collecting cases from various circuits recognizing proposition that institution's failure timely to respond renders administrative remedies unavailable).

II. The Merits of Plaintiffs' Claims

The court now turns to the merits of plaintiffs' claims. Defendants have mounted a minimal defense in this regard, opting instead to litigate these motions on the many technical grounds addressed above. Nevertheless, the court will now address plaintiffs' free exercise and free speech claims to the extent they concern the prisoners' right to receive materials from JCPM at SATF and JCPM's right to send religious materials to prisoners incarcerated at SATF. The court will then address the prisoner plaintiffs' claims that the defendants' approved vendor policy also violates the provisions of RLUIPA.

A. Plaintiffs' First Amendment Claims

"Prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Bell v. Wolfish, 441 U.S. 520, 545 (1979). A prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner." Pell v. Procunier, 417 U.S. 817, 822 (1974). Among the rights retained are the "protections afforded by the First Amendment [citation omitted], including its directive that no law shall prohibit the free exercise of religion." O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). See also Cruz v Beto, 405 U.S. 319, 322 n.2 (1972). However, the right to exercise one's religion "is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to

/////

/////

maintain prison security."[5] O'Lone, 482 U.S. at 348. See also Turner v. Safley, 482 U.S. 78, 89-91 (1987); McElyea v. Babbitt, 833 F.2d 196, 197 (9th Cir. 1987). In particular, a prisoner's constitutional right to free exercise of religion must be balanced against the state's right to limit First Amendment freedoms in order to attain valid penological objectives such as rehabilitation of prisoners, deterrence of crime, and preservation of institutional security. Pell, 417 U.S. at 822-23.

The Supreme Court has established the following standard for balancing a prisoner's constitutional rights with legitimate correctional goals: "[W]hen a prison regulation impinges on prisoners' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. See also Prison Legal News, 397 F.3d at 699. When a prisoner challenges a regulation and correctional officials seek to justify the regulation on the basis of a legitimate penological interest, the court must determine whether the regulation is reasonably related to the penological interest asserted. Id. In making such a determination, courts consider four factors:

> First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, and the governmental objective itself must be a legitimate and neutral one. A second consideration is whether alternative means of exercising the right on which the regulation

---

[5] The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the making of laws "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

> impinges remains open to prison inmates. A third consideration is the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources. Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

Allen v. Toombs, 827 F.2d 563, 567 (9th Cir. 1987) (citing Turner, 482 U.S. at 89-91). See also Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (holding that the Turner test applies to a prison's regulation of incoming mail); O'Lone, 482 U.S. at 349-50; Prison Legal News, 397 F.3d at 699.

The plaintiff prisoners' First Amendment right to receive mail, and JCPM's right to send that mail to prisoners at SATF, "is subject to 'substantial limitations and restrictions in order to allow prison officials to achieve legitimate correctional goals and maintain institutional security.'" Prison Legal News, 397 F.3d at 699 (quoting Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) (citations omitted). In order for defendants' approved vendor policy to survive plaintiffs' free speech claims, it thus must be "reasonably related to legitimate penological interests" as determined by applying the Turner four-factor test. Prison Legal News, 397 F.3d at 699.

Here, there is no serious dispute that the approved vendor policy impinges on plaintiffs' free exercise and free speech rights. With respect to materials from plaintiff JCPM, there is no common-sense connection between a legitimate objective and the approved vendor policy. Thus, by establishing that the plaintiff prisoners have not been allowed to receive free religious materials from

plaintiff JCPM under the policy, plaintiffs have satisfied any initial burden they may bare. See Prison Legal News v. Cook, 238 F. 3d 1145, 1150 (9th Cir. 2001); Frost v. Symington, 197 F. 3d 348, 357 (9th Cir. 1999). In response, defendants have offered no evidence of a legitimate governmental interest justifying the policy. While the court can imagine hypothetical scenarios in which incoming mail purporting to be religious materials might pose safety or security concerns, defendants have submitted no such evidence.[6] Moreover, defendants do not contend that the religious literature, audio tapes and compact discs in and of themselves raise any security concern. For example, defendants do not contend that tape recordings and compact discs can be fashioned into weapons.[7] Rather, as long as the source of the materials is approved, under this policy prisoners can possess them. Nor do defendants argue that the penological goals of preventing receipt of contraband, reducing fire hazards, increasing efficiency of random cell inspections or enhancing prison security justify the policy. Presumably defendants do not advance these justifications because the Ninth Circuit has rejected such assertions in similar cases involving non-subscription bulk mail and catalogs; subscription non-profit mail; and subscription for-profit mail. See Prison Legal News, 397 F.2d at 699-700.

---

[6] This is most likely due to the fact that plaintiff JCPM is undisputedly a legitimate religious organization and that no such safety or security concerns exist with respect to the materials it is attempting to send to the prisoner plaintiffs.

[7] In any event, any such claim would be belied by the fact that there is not an outright ban on such materials under the approved vendor policy.

Rather, defendants appear to contend that religious literature, audio tapes and compact discs from unapproved vendors create some unspecified concern simply because they are from unapproved vendors. No evidence before the court even suggests that the distinction between an approved vendor and an unapproved vendor such as JCPM, is a meaningful one. Defendants have not presented evidence addressing any criteria an organization must meet to become an approved vendor under their policy. One thing is clear, plaintiff JCPM cannot be an approved vendor under the policy because it provides its religious materials to those who request them free of charge. Under these circumstances, defendants have failed to establish that their distinguishing between approved vendors and unapproved vendors is anything but arbitrary.

A regulation cannot be sustained where the logical connection between the regulation and the asserted goal has not been demonstrated, and the legitimacy and neutrality of the governmental objective has not been shown. Turner, 482 U.S. at 89-90. Here, the court finds that defendants' approved vendor policy is not reasonably related to legitimate penological interests. Because this first Turner factor "'constitutes sine qua non,'" the court need not reach the remaining three factors since the regulation at issue is not rationally related to a legitimate and neutral governmental objective. Prison Legal News, 397 F.3d at 699 (quoting Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990)). See also Ashker v. California Dept. of Corrections, 350 F.3d 917, 922 (9th Cir. 2003).

/////

1 While it is unnecessary to address the other Turner factors in light
2 of the conclusion reached above, the undersigned will do so briefly.
3 Defendants claim that the gifts and donations procedure
4 offers prisoners an alternative means of accessing religious
5 materials subject to the approved vendor policy. As noted above,
6 because the defendants have failed to establish that the policy is
7 reasonably related to legitimate penological interests, the
8 availability of alternative avenues by which prisoners may exercise
9 their First Amendment rights is irrelevant. Moreover, the proffered
10 alternative avenue is inadequate. The possibility that a prisoner
11 may be able to borrow a copy of an audio cassette or compact disc
12 from a chaplain for a short period of time subject to the demands of
13 others who may desire the same recording, is not an adequate
14 replacement for possessing it indefinitely and having access to it
15 when desired. The nature of religious worship, which is often
16 engaged in at specific times such as upon waking in the morning,
17 prior to meals and before retiring to bed, highlights the arguable
18 inadequacy of the offered alternative. Moreover, the undisputed
19 evidence shows that JCPM teaches Christians about the Christian faith
20 through written and audio media. JCPM only sends materials
21 specifically requested and as an exercise of its religious obligation
22 to reach out and directly connect with other Christians to propagate
23 the Christian faith and encourage Christians to conform to the
24 principles of Christianity. Accordingly, the gifts and donations
25 procedure also does not appear to provide an adequate alternative
26 means of exercising the First Amendment rights of all the plaintiffs

and upon which the approved vendor policy impinges. See Morrison v. Hall, 261 F. 3d 896, 904 (9th Cir. 2001) (availability of radio and television found not to be an adequate alternative to receiving newspapers and magazines).

The third Turner factor focuses on the impact that accommodating the asserted right will have on guards, prisoners and on the allocation of prison resources. Because defendants have made no showing in this regard, consideration of this factor favors plaintiffs. Finally, the fourth Turner factors requires the court to consider whether the existence of easy and obvious alternatives indicates that the challenged regulation is an exaggerated response by prison officials. Here, this factor strongly favors plaintiffs. Defendants have changed their policy three times in two years. They claim to be currently accommodating plaintiffs with respect to unbound study guides, pamphlets and softbound books sent to prisoners by plaintiff JCPM. As noted above, defendants allow cassette recordings and compact discs to enter the prison as long as they are from one of six approved vendors. No reason has been given as to why defendants could not maintain a list of non-profit organizations from which prisoners could receive such religious materials free of charge. However, even though there is no meaningful distinction between plaintiff JCPM and those on the approved vendor list, JCPM is prohibited from sending its religious materials to the prisoner plaintiffs.

For the reasons set forth above, the court finds that the approved vendor policy cannot survive plaintiffs Leffel, Salinas,

Marchy and JCPM's free exercise and free speech challenges. Summary judgment will be entered in favor of plaintiffs on these claims.

B. Prisoners' RLUIPA Claims

The plaintiff prisoners also claim that the approved vendor policy violates the terms of RLUIPA. That statute provides in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . ., even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on the person - -
>
> (1) is in furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc-1.

RLUIPA is "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (holding that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices"). See also Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978, 985 (9th Cir. 2006). In Cutter, the Supreme Court noted that Congress enacted RLUIPA after documenting, "in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." 544 U.S. at 716. The Court found that the Act "alleviates exceptional government-created burdens on private religious exercise" and "protects

1 institutionalized persons who are unable freely to attend to their
2 religious needs and are therefore dependent on the government's
3 permission and accommodation for exercise of their religion." Id. at
4 720-21. The Court noted congressional anticipation "that courts
5 entertaining complaints under § 3 would accord 'due deference to the
6 experience and expertise of prison and jail administrators.'" Id. at
7 717.

8 RLUIPA replaces the "legitimate penological interest"
9 standard articulated in Turner v. Safley, with a "compelling
10 governmental interest" and "least restrictive means" tests.
11 Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir. 2005). For
12 purposes of RLUIPA, "religious exercise" includes "any exercise of
13 religion, whether or not compelled by, or central to, a system of
14 religious belief." 42 U.S.C. § 2000cc-5(7)(A). The statute must be
15 "construed in favor of a broad protection of religious exercise, to
16 the maximum extent permitted" by the Act and the Constitution. 42
17 U.S.C. § 2000cc-3(g). Individuals may assert a violation of RLUIPA
18 as a claim or defense in judicial proceedings and obtain appropriate
19 relief. 42 U.S.C. § 2000cc-2(a).

20 Under RLUIPA, plaintiffs bear the burden of demonstrating
21 that the institution's policy places a substantial burden on the
22 exercise of their religious beliefs. Warsoldier, 418 F.3d at 994.
23 The focus of this initial inquiry is on how plaintiffs' religious
24 exercise is impacted, rather than on the reasonableness of the
25 facility's policy or regulation. If the plaintiffs establish a prima
26 facie case of a substantial burden on the exercise of their religion,

the burden shifts to the defendants to prove that any substantial burden is both in furtherance of a compelling governmental interest and is the least restrictive means for furthering that interest. Id. at 995.

While RLUIPA does not define the term "substantial burden," the following analysis provides guidance:

> Because RLUIPA is a statute of relatively recent vintage, there is little precedent interpreting its key terms. However, because the Religious Freedom Restoration Act (RFRA) and early free exercise jurisprudence imposed the requirement that plaintiffs demonstrate a "substantial burden" on their exercise of religion, those cases decided under RFRA and under the pre-Smith regime provide some guidance as to the meaning of this pivotal, but open-ended, statutory term. See Marria v. Broaddus, 200 F. Supp. 2d 280, 298 (S.D. N.Y. 2002) (adopting precedent interpreting "substantial burden" under RFRA in applying RLUIPA); Charles v. Verhagen, 220 F. Supp. 2d 937 (W.D. Wis. 2002) (same). Under the case law, it is established that a substantial burden "must be more than an inconvenience." Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) (quoting Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987), aff'd sum nom. Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). The Supreme Court, however, has articulated the substantial burden test differently over the years. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); Sherbert v. Verner, 374 U.S. 398, 404, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).
>
> In Lyng, the Court declared that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. 485 U.S. at 450-51, 108 S. Ct. 1319; see also, Thomas, 450 U.S. at 717-18, 101 S. Ct. 1425 (holding that a substantial

> burden exists where the government "puts pressure on an adherent to modify his behavior and to violate his beliefs."). Conversely, a government regulation does not substantially burden religious activity when it has only an incidental effect that makes it more difficult to practice the religion. Id.; Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996). Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996).

Guru Nanak Sikh Society of Yuba City v. County of Sutter, 326 F. Supp. 2d 1140, 1151-52 (E.D. Cal. 2003), aff'd 456 F.3d 978, 985 (9th Cir. 2006). Thus, "a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." Guru Nanak Sikh Society, 456 F.3d at 988 (quoting San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)).

With respect to plaintiffs' RLUIPA claims, the defendants' position is essentially that plaintiffs cannot meet their initial burden of establishing that the approved vendor policy places a "substantial burden" on the exercise of their religious beliefs. The plaintiff prisoners, however, have submitted declarations demonstrating that they are sincere adherents of the Christian faith who are confined and indigent and therefore dependent on the free materials provided by JCPM to exercise their religion in the hope of self-improvement as a general matter and conforming to prison guidelines governing behavior in particular. (Decl. of Daniel Marchy in Supp. of Mot. for Summ. J. at 2-3; Decl. of Daniel Leffel in Supp.

1 of Mot. for Summ. J. at 2-3; Decl. of Marvin Salinas in Supp. of Mot.
2 for Summ. J. at 2-3.) Without access to the materials provided by
3 JCPM at no cost, the plaintiff prisoners are unable to engage in
4 conduct that is motivated by their sincere religious beliefs and is
5 important to them. (Id.) These declarations have not been
6 controverted by defendants in any way. Moreover, it is undisputed
7 that the unique study and worship materials provided by JCPM are
8 unavailable through any of the approved vendors.

9 The limitations of the gifts and donations procedure, as
10 discussed above, do not reduce this burden to a mere inconvenience.
11 Being denied access to these religious materials compels inaction
12 with respect to studying the Bible, listening to sermons and
13 Christian music and propagating and teaching others about the
14 Christian faith, all of which the undisputed evidence establishes as
15 core elements of plaintiffs' Christian faith. Thus, the undisputed
16 evidence demonstrates that the restrictions imposed by the authorized
17 vendor policy place a substantial burden on the exercise of
18 plaintiffs' religious beliefs. Finally, defendants have offered no
19 evidence in support of any assertion that the approved vendor policy
20 is in furtherance of any compelling governmental interest, much less
21 that it is the least restrictive means for furthering any such
22 interest. Therefore, the approved vendor policy also cannot survive
23 the prisoner plaintiffs' RLUIPA challenges. Summary judgment will be
24 entered in favor of plaintiffs on these claims as well.

25 /////

26 /////

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

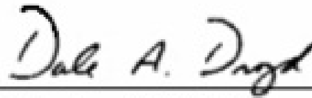
1. Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) is denied;

2. Defendants' motion for summary judgment is granted with respect to defendant Woodford and denied in all other respects;

3. Plaintiffs' motion for summary judgment is granted in part and denied in part to the extent set forth above;

4. A status conference is **SET** for **November 3, 2006,** at **11:00 a.m.** At that time the parties shall be prepared to discuss how to proceed so as to aid in resolution of this case including, but not limited to, the scheduling of the case.

DATED: September 27, 2006.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:th
ddad1\orders.consent\jesus0440.msj.order.v3