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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**

9 HOWARD ACKERMAN, on his own behalf  
and on behalf of a class of those similarly  
10 situated,

11 Plaintiff,

12 v.

13 STATE OF NEVADA DEPARTMENT OF  
CORRECTIONS; BRIAN SANDOVAL, in  
14 his official and individual capacity; ROSS  
MILLER, in his official and individual  
15 capacity; CATHERINE CORTEZ-MASTO,  
in her official and individual capacity; and  
16 JAMES COX, in his official and individual  
capacity

17 Defendants.  
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Case No. 2:11-cv-00883-GMN-PAL

**DEFENDANTS' OPPOSITION TO:**

**Plaintiff's Emergency Motion for  
Preliminary Injunction  
Preventing the Implementation of the  
Common Fare Menu**

**(DOCKET NO. 031)**

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**HEARING:**

February 10, 2012, 10:15 A.M.  
Courtroom 7D  
U.S. Dist. Ct. Dist. Of Nevada  
Las Vegas, Nevada

20 Defendants STATE OF NEVADA DEPARTMENT OF CORRECTIONS, BRIAN  
21 SANDOVAL, ROSS MILLER, CATHERINE CORTEZ MASTO, and JAMES COX by and  
22 through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, and  
23 William J. Geddes, Senior Deputy Attorney General, hereby submit *Defendants'*  
24 *Opposition to Plaintiff's Emergency Motion for Preliminary Injunction Preventing the*  
25 *Implementation of the Common Fare Menu (Docket No. 031.)* This opposition is based  
26 upon the Memorandum of Points and Authorities herein contained, the declarations and  
27 exhibits attached hereto, as well as the oral arguments the Court will entertain at the  
28

1 hearing on this matter, currently scheduled for Friday, February 10, 2012 at 10:05 a.m. in  
2 the U.S. District Court of Nevada in Las Vegas, Nevada.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 **A. Inmate-Civil-Rights Action Regarding Kosher Meals**

6 This case is an inmate-civil-rights action regarding kosher meals. (*See generally*  
7 *Plaintiffs' Amended Complaint*, Docket No. 29.) Currently, the Nevada Department of  
8 Corrections ("NDOC") intends to implement its "Common Fare Menu" ("CFM") on or  
9 about February 21, 2012. (*See Defendants' Motion to Dismiss*, Docket No. 33, p. 2, ll.  
10 16-25.) The CFM will be provided to NDOC inmates who require a religious-dietary  
11 accommodation, in the form of a Kosher meal, according to NDOC Administrative  
12 Regulation ("AR") 814 and controlling legal authority. (*See* Docket No. 33, p. 2, ll. 16-25.)  
13 Plaintiffs contend that the implementation of the CFM will violate the Protection of  
14 Religious Land Use and Institutionalized Persons Act ("RLUIPA"), codified at 42 U.S.C. §  
15 2000 cc-1(a) *et seq.* (*See* Docket No. 029, p. 7, ll. 3-4, *Id.*, p. 8, l. 14 to p. 9, l. 2.) With  
16 the assistance of their kosher expert, Gary Friedman, Defendants have carefully crafted  
17 the CFM to be kosher, and they deny that the implementation of CFM will violate  
18 RLUIPA.

19 **B. Kosher Expert Gary Friedman Has Confirmed the CFM to be Kosher**

20 The CFM has been confirmed to be kosher by the NDOC's Kosher expert, Gary  
21 Friedman, a 67-year-old Orthodox Jew who has personally observed Kashruth  
22 throughout his entire life, and who has attained over twenty (20) years' experience  
23 consulting and advising institutions on pastoral matters relating to Jewish standards and  
24 practices in prisons, jails, detention facilities, and who has advised correctional agencies  
25 across the United States, Canada, Israel, and other foreign countries. (*See generally*  
26 *Declaration of Gary Friedman with attached exhibits ("Friedman Declaration")*, and  
27 specifically at ¶¶ 1-13 and ¶¶ 24-28 and Exhs. C-E, attached to the *Friedman*  
28 *Declaration.*) Given that Gary Friedman's expertise and qualifications have come under

1 attack by Plaintiffs in various briefs filed in this Court, it is important to correct the record  
2 and underscore Gary Friedman's extensive qualifications at the outset of this brief. (See  
3 e.g. Docket No. 031, p. 9, ll. 13-14 ("Mr. Friedman, however, is not a rabbi and has not  
4 formal authority to declare or certify that anything is kosher"); and Docket No. 41, pp. 9-  
5 12, § D (entitled "*Defendants' Motion is Nothing More than a Ruse to Create Credibility*  
6 *for Defendants' Expert*").

7 For approximately 4-½ years, Gary Friedman resided at the "Central Organization  
8 for Jewish Education" (a.k.a. "Chabad") Northwest Regional Headquarters in Seattle,  
9 where he studied under Chassidic (i.e. 'Ultra-Orthodox') rabbis, worked in Jewish  
10 communal outreach, and was responsible for the facility's commercial kitchen operations  
11 that regularly produced large quantities of kosher meals for Jewish community events.  
12 *Friedman Declaration*, ¶ 8.) Gary Friedman has been endorsed for all aspects of Jewish  
13 chaplaincy – which includes kosher supervision – for approximately 15 years by the  
14 Va'ad HaRabanim of Greater Seattle, the primary Orthodox rabbinic board and kosher  
15 supervision/certification authority for the Pacific Northwest region of the United States, for  
16 which a true and correct copy of his current endorsement is attached as Exhibit A to the  
17 *Friedman Declaration*. (*Friedman Declaration*, ¶ 9, and Exh. A, attached thereto.) In  
18 1989, Gary Friedman first designed and assisted in the implementation of a correctional  
19 institution kosher menu plan which was for Geiger Corrections Center in Spokane,  
20 Washington, and since the early-1990's, he has conducted several kosher diet trainings  
21 for correctional food service personnel. (*Friedman Declaration*, ¶ 10(a)-(b).) Since 1991,  
22 Gary Friedman has been extensively involved in the evolution of the Washington State's  
23 Department of Corrections' ("WDOC") kosher diet program, and from 1992 to 2005, he  
24 served as a community representative on the WDOC's Religious Services Advisory  
25 Committee ("RSAC"). (*Friedman Declaration*, ¶ 10(c)-(d).) In 1993, at the  
26 recommendation of the Northwest Board of Rabbis (now known as the Washington  
27 Coalition of Rabbis), Gary Friedman was appointed as the WDOC's first Jewish chaplain,  
28 since 1998, he has served on the Executive Council of the American Correctional

1 Chaplains Association (“ACCA”). (*Friedman Declaration*, ¶ 10(e)-(h).) Since 2000, Gary  
2 Friedman has served as Vice-Chairman of the Religion and Faith-Based Services  
3 Committee of the American Correctional Association (“ACA”), and from 2002 through  
4 2010, he served as a member of the Resolutions and Policies Development Advisory  
5 Committee of the ACA. (*Friedman Declaration*, ¶ 10(i)-(j).) In 2005, Gary Friedman was  
6 selected as the corrections industry “Chaplain of the Year,” and in 2010, he was selected  
7 by the American Jail Association as an instructor for its “Religious Issues in Jails”  
8 seminars that are conducted around the country. (*Friedman Declaration*, ¶ 10(k)-(l).)  
9 Over the past 20-plus years, Gary Friedman has served as a consultant in the  
10 development of other prison and jail kosher diet programs—for example, in 1997 and  
11 1998, he assisted in the establishment of the Oregon DOC’s initial kosher diet program,  
12 and from 2004-2006, he served as a member of the California Department of Corrections  
13 and Rehabilitation (“CDCR”) Kosher Diet Task Force which implemented a kosher diet  
14 program for all CDCR facilities (*Friedman Declaration*, ¶ 10(m).) Gary Friedman is also  
15 currently involved as a consultant and expert witness for prison-related, kosher-diet  
16 matters and lawsuits in several states, including the states of Georgia, Texas, Oklahoma,  
17 Maryland, Indiana, New Mexico, and North Carolina, and he is regularly contacted by  
18 corrections administrators, food service personnel, chaplains, attorneys, inmates and  
19 others who are seeking information and advice about the specialized aspects of religious  
20 diet preparation in correctional food service operations. (*Friedman Declaration*, ¶ 10(n)-  
21 (o).) Gary Friedman is a frequent speaker/presenter on religious issues – including  
22 religious diet issues – at corrections industry conferences, and he has written, been  
23 written about, and been quoted in numerous newspaper and magazine articles about  
24 religious issues in corrections. (*Friedman Declaration*, ¶ 10(p).) At various times in Gary  
25 Friedman’s life, he has worked at, designed, and implemented menus for kosher  
26 restaurants, including “Kosher Delight” and “The Park Deli” in Seattle, Washington.  
27 (*Friedman Declaration*, ¶ 10(q).) Historically, Gary Friedman has been retained as an  
28 expert in two (2) civil litigations, at the request of a Jewish chaplaincy organization known

1 as the Aleph Institute, in support of the plaintiff and against the Florida Department of  
2 Corrections, regarding matters involving the provision of kosher diets to inmates confined  
3 in prisons, and he has provided expert testimony at trial and/or by deposition and/or  
4 expert report within the last ten years in many cases, including *G. Michael Strauss v.*  
5 *Albert Nerio, et al.*, U.S. District Court for the Western District of Washington, C02-  
6 5544RJB – Defense Declaration and Witness (via Deposition); *Alan J. Cotton v. Florida*  
7 *Department of Corrections, et al.*, U.S. District Court for the Southern District of Florida,  
8 1:02-cv-22760-KMM – Plaintiff Expert Report; *Dennis Florer v. Cheryl Johnson et al.*,  
9 U.S. District Court for the Western District of Washington at Tacoma, 3:06-cv-05561-RJB  
10 – Declaration in Support of Defendants’ summary judgment motion; *Dennis Florer v.*  
11 *William Peck, et al.*, U.S. District Court for the Eastern District of Washington, CV-05-  
12 5039-EFS – Expert Report for Defense and Deposition; *Ross Jay Lawson v. Florida*  
13 *Department of Corrections*, U.S. District Court for the Northern District of Florida, 4:04-cv-  
14 105 MMP/AK – Expert Report for Plaintiff; *Amicus Curiae* (with JPSI) in *Jeffrey Beard v.*  
15 *Ronald Banks*, U.S. Supreme Court, 04-1739; *Cutter v. Wilkinson*, U.S. Supreme Court,  
16 03-9877; *Madison and United States of America v. Commonwealth of Virginia*, U.S.  
17 Court of Appeals for the Fourth Circuit, 06-6266 and 06-6296; and *Americans United for*  
18 *Separation of Church and State, et al. v. Prison Fellowship Ministries, Inc.*, U.S. Court of  
19 appeals for the Eighth Circuit, App. No. 06-2741. (*Friedman Declaration*, ¶ 10(r)-(s).)  
20 Gary Friedman has further assisted and continues to assist plaintiff(s) and defendant(s)  
21 in an advisory or consultancy capacity in similar cases, for which cases he has not yet  
22 provided testimony. (*Friedman Declaration*, ¶ 10(s)(7).) Particularly relevant to the  
23 above-captioned matter, Gary Friedman assisted in the drafting of the landmark  
24 legislation, *The Religious Land Use and Institutionalized Persons Act of 2000* (more  
25 commonly known as “RLUIPA”), codified at 42 U.S.C. § 2000 cc-1(a) *et seq.* (*Friedman*  
26 *Declaration*, ¶ 11.) Importantly, Gary Friedman’s expertise draws on his ongoing  
27 consultations with Jewish Kashruth authorities. (*Friedman Declaration*, ¶ 12, ll. 1-12).  
28 There is no serious question here that Gary Friedman’s credentials qualify him as an as

1 an expert witness in this case, including on the topics of Kashruth and the provision of  
2 kosher meals to inmates, and on matters concerning the claims and issues of this case,  
3 based on his extensive, specialized education, training, and experience.

4 **C. Plaintiffs Aim to Impose Stricter-than-Required Standards on the**  
5 **NDOC's Kosher Menu, at an Exorbitant Cost During a Budgetary**  
6 **Shortfall, but the CFM Is Kosher**

7 Plaintiffs aim to impose a stricter standard on the NDOC's kosher menu than is  
8 required by mainstream Orthodox protocols, at an exorbitant cost during a budgetary  
9 shortfall, and Plaintiffs want the NDOC's kosher menu to include more varietal and costly  
10 food, but expert Gary Friedman is cognizant of the budgetary constraints facing  
11 institutions and prisons, and he has confirmed that kosher requirements are satisfied by  
12 the CFM. (*Friedman Declaration*, ¶ 29; see also the Declaration of Deborah L. Reed  
13 (“*Reed Declaration*”) and Exhibits A-C, attached thereto (detailing the historical and  
14 projected trends, and the fiscal impact relating to the NDOC's provision of kosher food to  
15 NDOC inmates, during a budgetary shortfall).)

16 The products being used in the CFM meet or exceed the Orthodox Union  
17 Standards for kosher food. (*Friedman Declaration*, ¶¶ 24-28 and Exhs. C-E, attached  
18 thereto.) The plan for the CFM calls for numerous safeguards, which satisfies the  
19 Kashruth requirements for providing kosher food to NDOC inmates, including the  
20 following safeguards:

- 21 • separate culinary-kitchen areas in each NDOC facility that  
22 offers the CFM, which is an advanced feature not common to  
23 many prisons at this point in time;
- 24 • none of the food on the CFM will be cooked from a raw<sup>1</sup> state  
25 at any NDOC facility, and where food on the CFM is served  
26 hot, that food will have already arrived at the NDOC facility  
27 pre-cooked and certified as kosher, then simply be reheated  
28 and/or reconstituted at the NDOC kosher culinary before  
service, which will not render these items unkosher<sup>2</sup>;

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26 <sup>1</sup> In this regard, the hardboiled eggs will be pre-cooked and certified to be kosher, before their  
27 arrival at an NDOC facility.

28 <sup>2</sup> Even in the case of the soy/rice/bean-based mixes, these dried items can be consumed in their  
raw state, by reconstituting them via simply soaking them in cold water. Hence, under kosher law, these  
food items are not subject to any requirement of Jews having to participate in their cooking.

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- kosher utensils will be clearly marked to designate their kosher-only use, to avoid the mistaken use of such utensils on the mainline, thereby helping to ensure that such utensils do not become cross-contaminated with non-kosher food;
- separate kosher-washing areas in some CFM locations, and where unavailable, dedicated kosher-bus-tub inserts will be used, to line the sinks so as to maintain kosher separateness when washing the kosher equipment and utensils, such cleaned utensils being locked in a cabinet and equipment being locked in the kosher-culinary room;
- once cleaned, all kosher utensils will be locked in a cabinet and all kosher equipment will be locked in the kosher-culinary room, preventing unauthorized access to such items, helping to maintain the kosher-quality of the utensils and equipment on a continuous basis;
- disposable kosher-food serving containers and reusable, inmate-issued plastic utensils, which avoids the need to run kosher trays and utensils through a dishwashing machine that is also used for the mainline food trays and utensils, thereby eliminating the risk of cross-contamination of kosher and non-kosher food through a single dishwashing machine;
- after the sealed packaging of kosher food has been opened, such kosher food is stored separately and apart from the storage of non-kosher food;
- open-ended, surprise, random inspections, which helps ensure that the culinary supervisors and workers are maintaining kosher vigilance at all times in the kosher culinary, as is done in free society at kosher restaurants and kosher manufacturing plants, where the cooking of meat is not performed;
- the ongoing availability of kosher supervisors (at this time to include Gary Friedman and Rabbi Bronchtain) on demand (by phone) or on short notice (in person or by e-mail), to answer questions, conduct trainings, and address issues or problems that might arise;
- multiple product-check-point verifications (*i.e.*, upon receipt at the warehouse, upon receipt at the culinary storage, and when pulled for use), to ensure that only products bearing the reliable, NDOC-approved kosher symbols on their packaging are received, stored, and used;
- video monitoring to record the CFM operations, for purposes of: deterring non-compliance with Kosher-handling procedures; evidencing compliance with Kosher-handling procedures; and providing on-going training;
- specific, written, handling procedures;

- 1 • staff supervision of dedicated inmate culinary workers, where  
2 the inmate culinary workers will work only in the kosher  
3 kitchen, separate and apart from the inmate workers who  
4 work the main-line (non-kosher) kitchen areas, the effect of  
5 which should eliminate the risk of cross contamination of  
6 kosher and non-kosher foods and equipment by the use of  
7 inmate workers serving across multiple workstations; and
- 8 • staff training.

9 (*Friedman Declaration*, ¶¶ 27(a)-(n); and Declaration of Dawn Rosenberg (*Rosenberg*  
10 *Declaration*), ¶¶ 15 (a)-(l).)

11 **D. Plaintiff's Motion for Preliminary Injunction**

12 Plaintiffs have filed their *Motion for Preliminary Injunction* (*Injunction Motion*),  
13 seeking to prevent the implementation of the CFM. (See e.g. Docket No. 031, p. 10, ll.  
14 17-27 (summary of legal argument).) Plaintiffs equate the implementation of the CFM as  
15 a policy change "to discontinue the kosher diet in the Nevada state prisons." (Docket No.  
16 031, p. 10, ll. 17-19.) Plaintiffs argue that they are likely to succeed on the merits of his  
17 RLUIPA-violation claim because the alleged "failure of [the NDOC] to serve kosher meals  
18 to Plaintiff Ackerman, an Orthodox Jewish prisoner, and the class which he seeks to  
19 head, creates a substantial burden on the ability of Mr. Ackerman and the prospective  
20 class to exercise their religion and violates [RLUIPA]." (Docket No. 031, p. 10, ll. 20-24.)  
21 Accordingly, Plaintiffs allege that "[a]bsent injunctive relief, [Plaintiffs] will not be able to  
22 eat in a manner that is permissible within their religious tenants. Such is irrevocable  
23 harm which cannot be undone." (Docket No. 031, p. 10, ll. 24-27.) Defendants herein  
24 oppose the *Injunction Motion*, which should be denied for all the reasons stated herein.

25 **II. MATERIAL FACTS NOT GENUINELY IN DISPUTE**

26 **A. Kosher Issues Concerning the CFM**

27 Plaintiffs have failed to submit competent evidence in support of their *Injunction*  
28 *Motion*, and on this basis the Court should deny their motion. Defendants point out such  
deficiencies in this section of the brief, as well as offering competent evidence to show  
that there are no material facts that are genuinely in dispute in the *Injunction Motion*. A  
fact is "material" if it "might affect the outcome of the suit under the governing law."

1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is “genuine” if “the  
2 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
3 *Id.*

4 In their *Injunction Motion*, Plaintiffs state, without offering any evidentiary support,  
5 that one must be a rabbi to confirm that food is kosher. (Docket No. 031, at p. 9, ¶ 33.)  
6 However, Plaintiffs’ have contradicted themselves on this very point, “[r]abbis or *other*  
7 *persons trained in the laws of kosher* will certify that food coming from a kitchen or  
8 production area is kosher....” (Docket No. 031, at p. 14, ll. 7-8.) Moreover, Defendants  
9 offered the expert opinion of Gary Friedman to establish the fallacy of Plaintiffs’  
10 contention here. (*Friedman Declaration* at ¶ 9 and n.3 (Gary Friedman confirms that one  
11 need not be an ordained rabbi to perform kosher supervision); see also *Friedman*  
12 *Declaration*, Exhibit A, (confirming that Gary Friedman has been endorsed to perform  
13 kosher diet supervision in correctional facilities by the six-member panel of the Va’ad  
14 HaRabanim of Greater Seattle, comprised of Rabbi Yechezkel Kornfeld, Rabbi Solomon  
15 Maimon, Rabbi Shalom Bar Levitin, Rabbi Moshe Kletenik, Mordechai Farkash, and  
16 Rabbi Simon Benzquen); see *Friedman Declaration*, at ¶¶ 8-12 (Gary Friedman’s  
17 extensive training, education, and experience clearly establishes that he is an expert on  
18 the topic of kosher food in the inmate setting).) Plaintiffs also misleadingly claim, without  
19 offering any evidentiary support, that Defendants will not provide rabbinic supervision to  
20 ensure that the CFM and its ingredients are kosher. (Docket No. 031 at p. 9, ¶¶ 35-36.)  
21 However, this is incorrect and/or misleading, as defendants will not be “cooking” meals  
22 from a raw state, and Defendants have confirmed that the ingredients of the CFM are  
23 kosher, by way of kosher certifications for all packaged items in the CFM.<sup>3</sup> (See  
24 *Friedman Declaration*, ¶ 27, including at 27(b) and n.9; see Kosher Certifications for the  
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26 <sup>3</sup> The whole, fresh fruit and whole, fresh vegetables used in the CFM are naturally kosher, and if  
27 cut with a kosher implement at the NDOC culinary facilities, they remain kosher. In this regard, the CFM  
28 Plan calls for the NDOC kosher culinary areas to have kosher-maintained cutting utensils, cutting boards,  
and tables by which to cut whole fruits and vegetables, and on this basis the cutting of whole fresh fruit and  
vegetables will not render the fruit and vegetables non-kosher. (*Friedman Declaration*, ¶ 26(q).)

1 CFM items, attached as Exhibit D to the Rosenberg Declaration and Exhibit E to the  
2 Friedman Declaration.) Plaintiffs also argue, without providing any evidentiary support,  
3 that that food is cooked on, and in, the same surfaces, pots, and pans as are used for  
4 preparing meat, or in which meat and milk have been mixed. (Docket No. 031, p. 9, ¶  
5 37.) However, this is incorrect, as Defendants have established that all CFM items will  
6 be prepared in a separate kosher-culinary area, with kosher-designated equipment and  
7 utensils, and that no food is “cooked,” nor is any meat “prepared,” nor can the meat and  
8 milk be mixed, given that they both are served in factory-sealed packaging. (See  
9 *Friedman Declaration*, at ¶ 26(r) (“the only dairy item included in the CFM is kosher,  
10 unflavored, liquid milk that will be served to inmates in factory-sealed cartons during  
11 breakfast meals only, and the only meats included in the CFM will be sliced, deli-style  
12 sandwich products that will be served to inmates in factory-sealed, plastic packages at  
13 selected lunch and dinner meals); and ¶ 27 (confirming the separate kosher culinary  
14 kitchen operations and use of separate kosher equipment and utensils).) Likewise, there  
15 is no factual support offered for Plaintiff’s claim that breakfasts featuring hot foods such  
16 as pancakes are prepared with non-kosher equipment or on non-kosher surfaces.  
17 (Docket No. 031, p. 9, ¶ 38.) As stated above, all CFM items will be prepared in a  
18 separate kosher-culinary area, with kosher-designated equipment and utensils. Plaintiffs  
19 offer no evidentiary support that CFM meals will contain non-kosher meat. (Docket No.  
20 031, p. 9, ¶ 39.) As above confirmed, the only meats included in the CFM will be sliced,  
21 deli-style sandwich products that will be served to inmates in kosher-certified, factory-  
22 sealed, plastic packages at selected lunch and dinner meals. (*Friedman Declaration*,  
23 ¶ 26 (e) (kosher certificates confirm that the meat is kosher) and ¶ 26(r) (confirming the  
24 meat comes in factory-sealed packages); *Rosenberg Declaration*, ¶ 12(b) and Exhibit D,  
25 p. 2 to the same (providing kosher certificate for these CFM meats).) As well, Plaintiffs  
26 claim, without providing any evidentiary support, that silverware will be used in the CFM,  
27 that such silverware is not kosher and may have been used in earlier meals, including  
28 non-kosher foods or combinations of food, rendering the meals of the CFM unkosher.

1 (Docket No. 031, p. 9, ¶ 40.) In connection with this claim, Plaintiffs also assert, without  
 2 offering any evidentiary basis, that CFM serving trays will be re-used from mainline-  
 3 service trays (*i.e.*, non-kosher food trays), rendering the CFM food placed on such trays,  
 4 unkosher. (Docket No. 031, p. 9, ¶ 41.) In this regard, Plaintiffs claim that this practice of  
 5 the CFM differs from that of the CKM, inasmuch that Plaintiffs claim that the kosher  
 6 meals formerly served were served in disposable trays which are not reused. (Docket  
 7 No. 031, p. 9, ¶ 42.) However, Plaintiffs are incorrect in their assumptions here.  
 8 Silverware and reusable serving trays/containers are not being used in the CFM.  
 9 (*Rosenberg Declaration*, ¶ 14(e) (confirming that plastic utensils and disposable food  
 10 containers will be used in the CFM, obviating the need to wash trays and utensils in a  
 11 dishwashing machine); *Friedman Declaration*, ¶ 27(e) (confirming the same, and  
 12 explaining that this one of many safeguard features of the CFM).) As well, (Docket No.  
 13 031, p. 9, ¶ 40.) Accordingly, there is no factual basis, supported by competent  
 14 evidence, in the *Injunction Motion* that would support Plaintiffs' conclusory allegation that:

15 Defendants' policy of refusing kosher diets and offering  
 16 prisoners only a "common fare" alternative imposes a  
 17 substantial burden on the exercise of his religion in that it  
 18 renders his religious exercise effectively impracticable. He is  
 19 forced to go without food or to modify his behavior, eat non-  
 20 kosher foods, and violate his beliefs.

21 (Docket No. 031, p. 10, ¶ 43.)

22 In Docket No. 034, Plaintiffs' Supplement to their *Injunction Motion* ("*Injunction  
 23 Motion Supplement*"), Plaintiffs make more uninformed statements of fact that are simply  
 24 incorrect. Plaintiffs state that Defendants:

25 have submitted a common fare menu which includes various  
 26 items which raise significant questions of kashrut, many of  
 27 which will be questions of fact for this Court to decide in this  
 28 litigation. Notwithstanding, one item on the menu does not  
 create a question of fact—sausage! Defendants have  
 suggested that the common fare menu is "confirmed kosher,"  
Document 31-1 at 2, and yet, it includes sausage bought from  
 a standard food distributor. While the method of how food is  
 prepared may be a question of kashrut, **pork is not**. The  
 mere fact that Defendants submitted a menu which they plan  
 of providing to the Plaintiff which includes sausage is proof  
 that the menu is not kosher, giving this Court all the evidence

1 it needs to find that Defendants, by and through the admitted  
 2 implementation of the Common Fare Diet, are violating  
 3 Plaintiff's constitutional rights. **AS SUCH, PLAINTIFF**  
 4 **REQUESTS THAT THIS COURT NOT ONLY CONSIDER**  
 5 **ISSUING A PRELIMINARY INJUNCTION, AS REQUESTED**  
 6 **IN THE PENDING MOTION, DOCUMENT 31, BUT, A**  
 7 **PERMANENT INJUNCTION PREVENTING THEM FROM**  
 8 **EVER IMPLEMENTING THE COMMON FARE MENU**  
 9 **WHICH THEY SUBMITTED TO THIS COURT.**

6 (Docket No. 034, p. 2, l. 15 to p. 3, l. 1.) (Emphasis in original.) Again, Plaintiffs err.  
 7 There is no sausage product in the CFM. (*Rosenberg Declaration*, ¶ 12(i) (confirming  
 8 that kosher certifications for the "Rice-Veggie Meals," in the CFM, one of which is simply  
 9 named "Sausage, Rice, Veggie" (SSP 080103)); and *Friedman Declaration*, ¶ 26(i)  
 10 (addressing the same kosher certification for the "Sausage, Rice, Veggie" product (SSP  
 11 080103), and explaining in note 9 that "[a]lthough these items are termed 'beef,' 'chicken,'  
 12 and 'sausage,' they are actually kosher, Pareve, non-meat, non-dairy, textured-protein,  
 13 soy-based products"); and see *Friedman Declaration*, ¶ 26(f) (confirming that "[t]he only  
 14 meats included in the CFM will be sliced, deli-style sandwich products that will be served  
 15 to inmates in factory-sealed, plastic packages at selected lunch and dinner meals, which  
 16 have been confirmed above to be certified kosher.) As well, Plaintiffs express concern  
 17 about NDOC Administrative Regulation ("AR") 814, stating that the "Culinary Manger is  
 18 responsible for ... proper preparation and service of Common Fare meals." (Docket 034,  
 19 p. 3, ll. 2-4.) Plaintiffs go on to argue that AR 814 further provides that inmates at each  
 20 facility will be responsible for the food preparation." (Docket 034, p. 3, ll. 4-5.) Plaintiffs  
 21 state that "[t]his is problematic because clearly foods will be prepared and cooked at the  
 22 various prisons, however, there are no provisions for any rabbinic supervision of the  
 23 foods." (Docket No. 034, p. 3, ll. 4-7.) Plaintiffs conclude that the failure to provide on-  
 24 going kosher certification/rabbinic supervision "destroys any legitimacy which a kosher  
 25 menu may otherwise have." (Docket No. 034, p. 3, ll. 10-11.) However, Plaintiffs have  
 26 not offered any evidence to support the proposition that rabbinic supervision of the  
 27 NDOC's operations, in the manner suggested, is required, and the time to come forward  
 28 with such evidence in this motion for preliminary injunction is *in* Plaintiffs' motion brief, not

1 at some undisclosed time in the future, when Plaintiffs “will provide testimony from  
2 numerous well qualified experts who will state that commercially prepared foods,  
3 especially meat dishes, require rabbinic supervision to ensure that they are kosher.”  
4 (Docket No. 034, p. 3, ll. 7-9; Docket No. 046 (order on Defendants’ *Motion for*  
5 *Clarification* regarding the argument hearing on the *Injunction Motion*, “the Court will hear  
6 argument only, not the presentation of evidence).) Accordingly, Plaintiffs will not be  
7 providing any such expert testimony in support of any arguments made in their *Injunction*  
8 *Motion* at the hearing where argument on this motion is presented.<sup>4</sup> Moreover, Plaintiffs’  
9 concerns regarding these matters are without merit. The CFM calls for various  
10 safeguards to ensure proper supervision and handling of kosher products, as above  
11 recited. (*Friedman Declaration*, ¶ 27, including the ongoing availability of kosher  
12 supervisors to answer questions, conduct trainings and address issues or problems that  
13 might arise, video monitoring will be phased in, to deter non-compliance with Kosher-  
14 handling procedures, specific-handling procedures, staff supervision of dedicated inmate  
15 culinary workers who will not work in multiple stations (*i.e.*, kosher and non-kosher  
16 areas); staff training; and open-ended, surprise, random inspections, which helps ensure  
17 that the culinary supervisors and workers are maintaining kosher vigilance at all times in  
18 the kosher culinary, as is done in free society at kosher restaurants and kosher  
19 manufacturing plants, where the cooking of meat is not performed.) The plan for the  
20 CFM does not call for the cooking of meats at any NDOC facility, and, as such, there is  
21 no Kashruth requirement for *continuous*, on-site, kosher supervision of the culinary areas.  
22 (*Friedman Declaration*, ¶ 28.) In this regard, the NDOC CFM plan is set up to operate in  
23 a manner similar to how many kosher restaurants and kosher manufacturing plants  
24 operate (where the cooking of meat is not performed), with random inspections, rather  
25

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26  
27 <sup>4</sup> Again, the Court has confirmed that the Status Conference scheduled for Friday, February 10,  
28 2012, including on Plaintiff’s *Injunction Motion* will not be an evidentiary hearing, but only a hearing to  
receive argument on the briefs. (Docket No. 046 (“the Court will hear argument only, not the presentation  
of evidence).)

1 than *continuous*, on-site, kosher supervision, which is costly and unnecessary.  
2 (*Friedman Declaration*, ¶ 28.)

3 **B. Fiscal Impact of the NDOC Providing Kosher Meals to its Inmates**

4 In the Fiscal Year 2007, there were 4 inmates in NDOC prisons receiving kosher  
5 meals. (*Reed Declaration*, Exhibit A, p. 2, column for FY 07.) However, by the Fiscal  
6 Year 2013, it is projected that 559 NDOC inmates will participate in receiving kosher  
7 meals. (*Reed Declaration*, Exhibit C, column 2, bottom row.) Under the current kosher  
8 meal plan (“CKM”) the cost of providing kosher meals to these 559 NDOC inmates in  
9 Fiscal Year 2013 is projected to be \$3,095,939.65. (*Reed Declaration*, Exhibit C, column  
10 5, bottom row.) Under the CFM, the cost of providing kosher meals to these 559 NDOC  
11 inmates in Fiscal Year 2013 is projected to be about *half that cost*, \$1,556,217.80. (*Reed*  
12 *Declaration*, Exhibit C, column 6, bottom row.) Moreover, budgetary resources presently  
13 committed to pay for food costs of both kosher meals and mainline/non-kosher meals in  
14 Fiscal Year 2013 are \$465,406.63. (*Reed Declaration*, Exhibit C, column 4, bottom row.)  
15 Based on fiscal realities and trends, providing mainline/non-kosher meals and kosher  
16 meals under the CKM to NDOC inmates in Fiscal Year 2013 would create a budgetary  
17 *shortfall* of \$2,630,533.02. (*Reed Declaration*, Exhibit C, column 7, bottom row.) By  
18 comparison, providing mainline/non-kosher meals and kosher meals under the CFM to  
19 NDOC inmates in Fiscal Year 2013 would reduce that budgetary shortfall to less than half  
20 that amount, \$1,090,811.17. (*Reed Declaration*, Exhibit C, column 7, bottom row.)  
21 Based on the foregoing analysis, offering the CFM to inmates is projected to save the  
22 NDOC \$1,539,721.85 in Fiscal Year 2013. (*See Reed Declaration*, Exhibit C, columns 5-  
23 6, bottom row.)

24 **C. Plaintiff Ackerman Has Consumed Non-Kosher Food From the NNCC**  
25 **Canteen and Coffee Shop, Refuting the Claim that His Belief that he**  
26 **must eat a Kosher diet is sincerely held and is rooted in his religious**  
**beliefs as an Orthodox Jew**

27 Inmate Ackerman has an extensive history of consuming non-kosher food while  
28 incarcerated at NNCC, as evidenced by his purchases at the NNCC Canteen and NNCC

1 Coffee shop, which purchases were recorded and itemized in the ordinary course of  
2 NDOC business operations. (See *Rosenberg Declaration*, at ¶¶ 17 to 26(p) and Exhibits  
3 F and G attached thereto (which explains how such purchases are recorded in the  
4 NDOC's "NISS/AS-400" database when an inmate orders items from the Canteen and  
5 Coffee Shop of NDOC prisons, and which further itemizes food that did not appear to be  
6 kosher and could not be confirmed as kosher by way of kosher certifications requested  
7 and not provided by the distributor); see Exhibits F and G attached.) For instance, for  
8 nearly two years while confined at NNCC, from June 1, 2009 to March 14, 2011, Plaintiff  
9 Ackerman purchased 174 packages of non-kosher "Top Ramen" products at the NNCC  
10 store canteen of many varieties (*i.e.*, "Texas Beef," "Chili," "Beef," "Chicken," and "Spicy  
11 Vegetable"). (See *Rosenberg Declaration*, at ¶ 21 and Exhibit F, attached thereto.)  
12 During that period, Plaintiff Ackerman purchased many other non-kosher items, including:  
13 28 separate purchases of Cheese-Squeeze-Cheddar; 1 purchase of Chicken Breast BC  
14 Pouch; 1 purchase of Squeeze Spaghetti Sauce; 2 purchases of Burrito Breakfast  
15 Egg/Cheese/Sausage; 1 purchase of PreCooked *Bacon* Meat; and 1 purchase of Party  
16 Mix – wh Enchilada CA. (See *Rosenberg Declaration*, at ¶¶ 21-25 and Exhibit G,  
17 attached thereto.) As well, during the period of May 21, 2009 to January 12, 2010,  
18 Plaintiff Ackerman purchased the following non-kosher items: a total of 4 packages of  
19 precooked hamburger patty meat on three occasions; a total of 12 packages of brand  
20 franks on three separate occasions; a total of 5 packages of Banq-Fried Chicken Reg  
21 Frz, on four occasions; a total of 13 packages of precooked BBQ *Pork* Patty Meat on  
22 three occasions; a total of six packages of provolone cheese on two occasions; a total of  
23 2 packages of precooked, frozen *ham steak*, on two occasions; a total of 2 packages of  
24 *sausage-kielbasa*, on one occasion; a total of 5 packages of spicy/hot *pork rinds*, on two  
25 occasions; a total of 1 package of posada chimichunga beef, on one occasion; a total of  
26 one package of *pepperoni* pizza, on one occasion; a total of 1 package of hot/spicy  
27 frozen banq-chik wings, on one occasion; a total of 16 packages of instant lunch-beef, on  
28 two occasions; a total of 3 packages of summer *sausage* beef on two occasions; a total

1 of 14 packages of instant lunch, picante *shrimp*, on two occasions; a total of 18 packages  
2 of chicken egg rolls, on three occasions; and a total of 2 packages of mozzarella cheese,  
3 on two occasions. (See *Rosenberg Declaration*, at ¶¶ 26 and Exhibit G, attached thereto.)

4 Plaintiff Ackerman does not claim to be a recent convert to Judaism, as evidenced  
5 by the fact that, during his initial, intake classification at the NDOC, held on September  
6 21, 2005, Plaintiff Ackerman declared himself to be Jewish. (*Rosenberg Declaration*, p.  
7 8, n.2.) Plaintiffs assert that Howard Ackerman is an observant Orthodox Jew. (Docket  
8 No. 031, p. 5, l. 14.) According to Plaintiffs, Orthodox Jews and Plaintiff Ackerman  
9 believe that the laws of kashrut are commanded by God, and as an Orthodox Jew,  
10 Plaintiff Ackerman is commanded to obey the laws of kashrut and to keep kosher in his  
11 diet. (Docket No. 031, p. 5, ll. 15-19.) According to Plaintiffs, pork may not be eaten, nor  
12 seafood that has neither fin nor scales. (Docket No. 031, p. 5, ll. 20-26.) However, not  
13 only has Ackerman consumed non-kosher food, but he has consumed non-kosher food  
14 for which it is fundamentally apparent that Kashrut law prohibits, according to his own  
15 court filings, such as the consumption of *pork* (including *bacon* and *ham*) and seafood,  
16 such as picante *shrimp*, which products the *Rosenberg Declaration* and its Exhibits F and  
17 G confirm, that Ackerman purchased *after* he declared himself to be Jewish to NDOC  
18 officials in 2005. (*Rosenberg Declaration*, ¶¶ 17-26(p) and Exhibits F and G to the same,  
19 and *Rosenberg Declaration*, p. 8, n.2.) Accordingly, Ackerman's alleged belief that he  
20 must eat a kosher diet is not sincerely held or rooted in his religious beliefs as an  
21 Orthodox Jew.

### 22 III. SUMMARY OF LEGAL ARGUMENT

23 Plaintiffs have not shown that they are likely to succeed on the merits of their  
24 amended complaint for several reasons. First, Plaintiff Ackerman has not exhausted his  
25 available administrative remedies regarding the CFM, as fully set forth in Defendants'  
26 pending *Motion to Dismiss*. (See *generally* Docket No. 33.) Second, evidence of  
27 Ackerman's consumption of non-kosher-food refutes his claimed sincere belief that he  
28 need adhere to a religious-dietary accommodation of kosher meals, rooted in his

1 Orthodox Jewish faith. (*Rosenberg Declaration*, ¶¶ 17-26(p) and Exhibits F and G to the  
2 same, and *Rosenberg Declaration*, p. 8, n.2.) Moreover, Plaintiffs err when concluding  
3 that the implementation of the CFM will cause the deprivation of kosher meals to inmates  
4 because the CFM *is* kosher. (See § IB and § IIA, *supra*.) As shown herein, the products  
5 used in the CFM meet or exceed the Orthodox Union standards for kosher food. (See §  
6 IB and § IIA, *supra*.) The plan for the CFM includes numerous safeguards which satisfies  
7 the Kashruth requirements for providing kosher food to NDOC inmates, including the  
8 following safeguards: surprise, random inspections; availability of kosher supervisors to  
9 deal with issues as they might arise; multiple product-check-in procedures; video  
10 monitoring; specific, written, handling procedures, and staff training; and staff supervision  
11 of inmate workers. (See § IB and § IIA, *supra*.) As well, Plaintiffs cannot show that they  
12 are likely to suffer irreparable harm in the absence of preliminary relief because the CFM  
13 is *kosher*, and, moreover, Plaintiffs scenario of how the CFM might possibly become  
14 contaminated is not based on competent evidence before the Court and would be  
15 speculative and conclusory at best, which is insufficient to warrant granting them a  
16 preliminary injunction. (See § IB and § IIA, *supra*.)

17 Moreover, the balance of equities tips in favor of the NDOC because it is not  
18 necessary to provide the old kosher meal at an exorbitant cost, when a more-cost-  
19 effective kosher meal is provided by the CFM. (See § IIB, *supra* and the Reed  
20 Declaration and Exhibits A-C, attached thereto.) Indeed, the harm to the NDOC by  
21 unnecessarily requiring it to forego a projected savings of \$1,539,721.85 in Fiscal Year  
22 2013 during a budgetary shortfall, to provide the old kosher meals of the CKM, instead of  
23 the more cost-effective kosher meals of the CFM, compels the obvious result that calls  
24 for the denial of the *Injunction motion*. (See § IIB, *supra* and the Reed Declaration and  
25 Exhibits A-C, attached thereto.)

26 Also, Plaintiffs cannot show that an injunction, under the circumstances where the  
27 NDOC is providing kosher meals to inmates, promotes the public interest. (See § IIB,  
28 *supra* and the Reed Declaration and Exhibits A-C, attached thereto (supporting the

1 conclusion that the public has an interest in conserving fiscal resources, in the projected  
2 amount of \$1,539,721.85 for Fiscal Year 2013).) To the contrary, the public interest is  
3 promoted by achieving economical savings during a budgetary shortfall, without  
4 compromising one's religious dietary accommodation. (*See Id.*)

5 Finally, Plaintiffs cannot satisfy the *additional* requirements for obtaining an  
6 injunction for matters pertaining to prison conditions, as imposed by the Prison Litigation  
7 Reform Act ("PLRA) codified at 18 U.S.C. § 3626 *et seq.* In fact, Plaintiffs completely  
8 ignored this requirement in their briefs, which, alone, should warrant the denial of their  
9 *Injunction Motion*. (See Docket Nos. 31 and 34 (which do not contain any reference to  
10 the United States Code Title 18, the Prison Litigation Reform Act, or the PRLA).) To be  
11 sure, Plaintiffs relief requested—the imposition of the current kosher meal—is an all-or-  
12 nothing approach that is not *narrowly drawn* to the scope of necessity, nor is it the least  
13 intrusive means necessary, because Plaintiffs' solution of the injunction is excessively  
14 costly in the projected amount of \$1,539,721.85 for Fiscal Year 2013, during a budgetary  
15 shortfall. Moreover, Plaintiffs' injunction is *not* substantially deferential to any adverse  
16 impact that might result to the operation of the prison administration system, namely that  
17 arising from the waste or misallocation of \$1,539,721.85 in scarce fiscal resources for  
18 Fiscal Year 2013 resources, and the resultant micromanagement of prisons, which  
19 courts disfavor.<sup>5</sup> For all these reasons, the *Injunction Motion* should be denied.

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22 <sup>5</sup> "When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison  
23 management." *Taylor v. U.S.*, 181 F.3d 1017, 1027 (9<sup>th</sup> Cir. 1999). "[C]ourts are ill equipped to deal with  
24 the increasingly urgent problems of prison administration and reform." *Turner v. Safley*, 482 U.S. 78, 84  
25 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). "As the *Martinez* Court acknowledged,  
26 'the problems of prisons in America are complex and intractable, and, more to the point, they are not  
27 readily susceptible of resolution by decree.'" *Turner*, 482 U.S. at 84 (quoting *Martinez*, at 404-405.)  
28 "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the  
commitment of resources, all of which are peculiarly within the province of the legislative and executive  
branches of government." *Turner*, 482 U.S. at 84-85. "Prison administration is, moreover, a task that has  
been committed to the responsibility of those branches, and separation of powers concerns counsel a  
policy of judicial restraint." *Turner*, 482 U.S. at 85.

1           **IV. LEGAL STANDARDS FOR PRELIMINARY INJUNCTIONS**

2           Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 65 governs the filing of  
 3 preliminary injunctions. Injunctions come in two varieties: (1) a *prohibitory* injunction,  
 4 which commands a party *not* to do an act, so as to preserve the status quo; and (2) a  
 5 *mandatory* injunction, which commands a party to *do* an act or take *affirmative* action,  
 6 irrespective of the status quo. *Stanley v. University of Southern California*, 13 F.3d 1313,  
 7 1320 (9<sup>th</sup> Cir. 1994); see also, *Venetian Casino Resort, L.L.C. v. Local Joint Executive*  
 8 *Bd. Of Las Vegas*, 45 F.Supp.2d 1027, 1031 (D. Nev. 1999) (citing *Dahl v. HEM*  
 9 *Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9<sup>th</sup> Cir. 1993). Here, Plaintiffs seek a  
 10 *prohibitory* form of injunctive relief, given that Plaintiffs seek to prohibit the NDOC from  
 11 implementing its Common Fare Menu.

12           “A preliminary injunction is an ‘extraordinary and drastic remedy.’ It should never  
 13 be awarded as of right, and requires a demonstration of, *inter alia*, ‘a likelihood of  
 14 success on the merits.’” *Munaf v. Geren*, 553 U.S. 674, 676, (2008) (quoting *Yakus v.*  
 15 *United States*, 321 U.S. 414, 440 (1944) and *Gonzales v. O Centro Espirita Beneficente*  
 16 *União do Vegetal*, 546 U.S. 418, 428 (2006) (internal quotations removed)). “A plaintiff  
 17 seeking a preliminary injunction must establish that he is likely to succeed on the merits,  
 18 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
 19 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*  
 20 *v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (U.S.,2008) (citing *Munaf v.*  
 21 *Geren*, 553 U.S. 674, 689-690 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531,  
 22 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312 (1982); see also  
 23 *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9<sup>th</sup>  
 24 Cir. 2009)(same).<sup>6</sup>

25           The burden of proof required at the preliminary injunction phase of a case tracks  
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27           <sup>6</sup> After the *Winter* decision was handed down, the Ninth Circuit abrogated any lesser standard for  
 28 the adjudication of preliminary injunctions. *American Trucking Associations, Inc.*, 559 F.3d at 1052 and  
 n.10 (citing *Lands Council v. Martin*, 479 F.3d 636, 639 (2007)).

1 the burden of proof at trial. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9<sup>th</sup>  
 2 Cir. 2011). “Issuing a preliminary injunction based only on a possibility of irreparable  
 3 harm is inconsistent with our characterization of injunctive relief as an extraordinary  
 4 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to  
 5 such relief.” *Winter*, 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972  
 6 (1997) (*per curiam*) (emphasis added)). “In deciding a motion for a preliminary injunction,  
 7 the district court ‘is not bound to decide doubtful and difficult questions of law or disputed  
 8 questions of fact.’” *Int’l. Molders and Allied Workers Local Union No. 164*, 799 F.2d 547,  
 9 551 (9<sup>th</sup> Cir. 1986) (quoting *Dymo Industries, Inc. v. Tapewriter, Inc.*, 326 F.2d 141, 143  
 10 (9th Cir.1964).) Courts will not grant the extraordinary remedy of a preliminary injunction,  
 11 based on conclusory allegations that are factually unsupported. See *Beaver-Jackson v.*  
 12 *Ocwen Fed Bank*, 2007 WL 3358068, 1 (W.D.Wash. 2007) (failure to “present any facts,  
 13 declarations, exhibits, affidavits, or any other objective proof to support” a motion for  
 14 preliminary injunction, warrants the denial of that motion); *Dunn v. Fisher*, 2011 WL  
 15 489596, 1 (E.D. Cal. 2011) (“[a] party seeking a preliminary injunction or temporary  
 16 restraining order cannot prevail when that motion is unsupported by evidence.”)  
 17 “Preliminary injunctive relief is an extraordinary remedy and will not be granted in the  
 18 absence of extraordinary evidence.” *Dunn*, 2011 WL 489596 at 1 (emphasis added).  
 19 “Since preliminary injunctive relief consists of relief granted to parties *before* the merits of  
 20 the case are decided, the Court will only grant preliminary injunctive relief in the rare  
 21 circumstance where a litigant can satisfy the extraordinary burden of proof necessary to  
 22 justify such relief. *Dunn*, 2011 WL 489596 at 2 (emphasis added).

23 Moreover, where the relief sought concerns prison conditions, *additional*  
 24 *requirements* must be satisfied, as specified in 18 U.S.C. § 3626 (1)(A), which provides:

25 The court shall not grant or approve any prospective relief  
 26 unless the court finds that such relief is narrowly drawn,  
 27 extends no further than necessary to correct the violation of  
 28 the Federal right, and is the least intrusive means  
necessary to correct the violation of the Federal right. The  
court shall give substantial weight to any adverse impact  
on public safety or the operation of a criminal justice  
system caused by the relief.

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(18 U.S.C. § 3626 (1)(A) Emphasis added.) Notwithstanding the fact that RLUIPA has an element that requires a defendant to prove the least restrictive means, where its compelling governmental interest substantially burdens one’s exercise of their religion, it should be noted that in an RLUIPA case, a plaintiff cannot obtain preliminary injunctive relief that is not narrowly drawn to the least-restrictive scope of necessity to correct the alleged violation of RLUIPA. See *Mayweathers v. Terhune*, 328 F.Supp.2d 1086, 1097-1098 (E.D.Cal. 2004); and *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9<sup>th</sup> Cir. 1998) (“[w]e interpret the statute to mean just what it says-before granting prospective injunctive relief, the trial court must make the findings mandated by the PLRA.”)

**V. THE COURT SHOULD DENY THE *INJUNCTION MOTION* BECAUSE PLAINTIFFS HAVE NOT SHOWN THEY ARE LIKELY TO SUCCEED ON THE MERITS, NOR HAVE THEY SHOWN THEY WILL SUFFER IRREPARABLE HARM**

Plaintiffs have not established that they are likely to succeed on the merits of their underlying claim, and this failure requires that their *Injunction Motion* be denied. *Winter*, 555 U.S. at 20; *Mazurek*, 520 U.S. at 972; *Munaf*, 553 U.S. at 689-690; *Amoco Production Co.*, 480 U.S. at 542; *Weinberger*, 456 U.S. at 311–312; and *American Trucking Associations, Inc.*, 559 F.3d at 1052. First, for all the reasons stated in Defendants’ Motion to Dismiss, Docket No. 033, the amended complaint must be dismissed, for Ackerman’s failure to exhaust his available administrative remedies for its claims. (See generally Docket No. 033.) Second, in order to prevail on an RLUIPA claim, Ackerman must be able to demonstrate that his belief that he must eat a Kosher diet is sincerely held and is rooted in his religious beliefs as an Orthodox Jew. *Wofford v. Williams*, 2008 WL 3871756, 7 (D.Or. 2008) (“[t]he proper inquiry for the Court is whether Plaintiff’s belief is sincerely held and the desired practice is ‘rooted in his religious belief.’” (quoting *Shakur v. Schriro*, 514 F.3d 878, 885 (9<sup>th</sup> Cir. 2008).) However, Defendants have established above that Ackerman has consumed non-kosher food, including instances of his consuming *pork*, *bacon*, *ham*, and *shrimp*, regularly an extended period

1 of time while at NNCC, from at least May 21, 2009 to March 14, 2011, which  
2 consumption occurred *after* he previously declared in his initial classification in 2005, that  
3 he was a Jew. (*Rosenberg Declaration*, ¶¶ 17-26(p) and Exhibits F and G to the same,  
4 and *Rosenberg Declaration*, p. 8, n.2; see also ) Accordingly, Defendants have refuted  
5 or cast a significant pall of doubt on Ackerman’s claim that his belief that he must eat a  
6 Kosher diet is sincerely held and rooted in his religious beliefs as an Orthodox Jew.  
7 Third, and most fundamentally, Plaintiffs have not demonstrated with “extraordinary  
8 proof” that the implementation of the CFM will effect the denial of kosher meals to  
9 Plaintiffs that they claim would constitute a substantial burden on their religious exercise.  
10 This is true because, as Defendants have abundantly demonstrated, the CFM will provide  
11 kosher meals to NDOC inmates. (See § IB and § IIA, *supra*.) As shown herein, the  
12 products used in the CFM meet or exceed the Orthodox Union standards for kosher food.  
13 (See § IB and § IIA, *supra*.) The plan for the CFM includes numerous safeguards which  
14 satisfies the Kashruth requirements for providing kosher food to NDOC inmates, including  
15 the following safeguards: surprise, random inspections; availability of kosher supervisors  
16 to deal with issues as they might arise; multiple product-check-in procedures; video  
17 monitoring; specific, written, handling procedures, and staff training; and staff supervision  
18 of inmate workers. (See § IB and § IIA, *supra*.) Axiomatically, Plaintiffs cannot show that  
19 they will suffer irreparable harm by the implementation of the CFM.

20 On all these points, Plaintiffs have failed to come forward with a clear showing that  
21 they are entitled to preliminary injunctive relief. At best, Plaintiffs have conclusory  
22 allegations unsupported by proof, which is a far cry from the required “extraordinary  
23 evidence.” *Winter*, 555 U.S. at 22; *Mazurek*, 520 U.S. at 972; *Beaver-Jackson*, 2007 WL  
24 3358068 at 1; and *Dunn*, 2011 WL 489596 at 1-2. Moreover, even if these matters did  
25 not favor Defendants so strongly, but were “close calls,” the Court is not here “bound to  
26 decide doubtful and difficult questions of law or disputed questions of fact.” *Int’l. Molders*  
27 *and Allied Workers Local Union No. 164*, 799 F.2d at 551; *Dymo Industries, Inc.*, 326  
28 F.2d at 143. Accordingly, the Court should deny Plaintiff’s *Injunction Motion*.

1           **VI. THE COURT SHOULD DENY THE *INJUNCTION MOTION* BECAUSE THE**  
2           **BALANCE OF EQUITIES TIPS IN DEFENDANTS' FAVOR, AND THE**  
3           **INJUNCTION IS NOT IN THE PUBLIC INTEREST**

4           When adjudicating motions for preliminary injunctions, courts “must balance the  
5 competing claims of injury and must consider the effect on each party of the granting or  
6 withholding of the requested relief.” *Winter*, 555 U.S. at 24 (citing *Amoco Production Co.*,  
7 480 U.S. at 542). “In exercising their sound discretion, courts of equity should pay  
8 particular regard for the public consequences in employing the extraordinary remedy of  
9 injunction.” *Winter*, 555 U.S. at 24 (citations omitted). “In the prison context, RLUIPA  
10 must be administered in a balanced way, recognizing the prison's need to maintain  
11 security, discipline and order, ‘consistent with consideration of costs and limited  
12 resources.’” *Jenkins v. Vail*, 2010 WL 3715154, 7 (E.D.Wash. 2010) (quoting *Cutter v.*  
13 *Wilkinson*, 544 U.S. 709, 717 and 723 (2005)) (emphasis added). Here, it is important to  
14 administer the provision of kosher meals as a religious-dietary accommodation to  
15 inmates, in a manner consistent with consideration of costs and limited resources.  
16 *Jenkins*, 2010 WL 3715154, at 7; *Cutter*, 544 U.S. at 717 and 723. This translates into  
17 promoting the public interest in conserving fiscal resources, in the projected amount of  
18 \$1,539,721.85 for Fiscal Year 2013, especially *where there are expected budgetary*  
19 *shortfalls*. (See § IIB, *supra* and the Reed Declaration and Exhibits A-C, attached  
20 thereto.) These projected savings are significant. However, the unsupported and  
21 speculative concerns of Plaintiffs expressed in the *Injunction Motion*, do not outweigh the  
22 balance of equity favoring Defendants, and Plaintiffs’ concerns do not promote the public  
23 interest because they would deny the tax-paying public a savings more than \$ 1.5 million  
24 for *one year’s* provision of kosher foods in Fiscal Year 2013, by means of the CFM, as  
25 opposed to the CKM.

26           Plaintiffs cite cases to undermine Defendants’ claim that conserving scarce fiscal  
27 resources should carry the argument here. (See *e.g.*, Docket No. 031, p. 17, l. 23 to p.  
28 23, l. 18.) Plaintiff cites *Shakur*, 514 F.3d 878 and *Wofford v. Williams*, 2008 WL  
3871756 (D.Or. 2008), explaining that a conservation-of-fiscal resources argument was

1     tried and failed in these cases. (Docket No. 031, p. 19, ll. 1-11) However, Plaintiffs  
2     conceded that the failure of such arguments owed to a failure of *evidence* in those cases.  
3     Such failures did not constitute a failure of the principle that conserving scarce  
4     governmental resources is an important issue. Moreover, the *Shakur* decision was  
5     predicated on the cost of adding one inmate to a kosher meal list, which is not the case  
6     here; here, the NDOC aims to provide a projected 515 inmates in Fiscal Year 2012 and  
7     559 inmates in Fiscal Year 2013 with a more cost-effective means of providing kosher  
8     meals. See *Shakur*, 514 F.3d at 886 (“the marginal cost and administrative burden of  
9     adding Shakur to the roster of kosher-diet inmates would be small or even negligible”).  
10    (See *Reed Declaration*, Exhibit A, p. 2; and Exhibit C p. 2.) In *Wofford*, the Defendants  
11    submitted their evidence concerning the kosher-meal fiscal analysis by way of an affidavit  
12    of a religious services administrator, not an official specializing in food service or  
13    procurement, which proved fatal to their motion. *Wofford*, 2008 WL 3871756 at 8.  
14    However, here, such kosher-meal fiscal impact analysis is provided by the competent  
15    *Reed Declaration*, and Ms. Reed specializes in performing such fiscal impact analysis.  
16    (See *Reed Declaration*, ¶¶ 1-6, and Exhibits A-C attached thereto.) Similarly, the *Toler v.*  
17    *Leopold*, 2008 WL 926533 (E.D. Mo. 2008), cited by Plaintiffs (Docket No. 031, p. 19, ll.  
18    12-19), is not on point here because, in *Toler*, the defendants “failed to offer any  
19    evidence at trial to quantify the economic impact of accommodating prisoners with  
20    Kosher meals.” However, Defendants have quantified this economic impact in the *Reed*  
21    *Declaration*, and its exhibits. As well, the case cited by Plaintiffs (Docket No. 031, p. 19,  
22    l. 20-p. 20, l. 1), *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9<sup>th</sup> Cir. 1997) is unavailing  
23    because, in *Ashelman*, the issue was merely supplementing a kosher meal with fruits,  
24    vegetables, nuts, and cereals “not tough to come by.” *Ashelman*, 111 F.3d at 678.  
25    However, here, the issue is not merely supplementing a meal with low-cost items, but  
26    switching to a more cost-effective kosher meal plan, that would achieve a projected  
27    savings of \$1,539,721.85 for Fiscal Year 2013, where there are expected budgetary  
28    shortfalls. Plaintiffs concede that the outcome in *Beerheide v. Suthers*, 286 F.3d 1179

1 (10<sup>th</sup> Cir. 2002) turned on the defendants' failure to provide reliable evidence that the cost  
2 differential in the meals was more than "*de minimus*." (Docket No. 031, p. 20, ll. 1-7.) As  
3 above discussed, Defendants here have provided reliable evidence of more than a "*de*  
4 *minimus*" cost differential between the CKM and the CFM for the remainder of Fiscal  
5 Year 2012 and Fiscal Year 2013. Similarly, Plaintiffs have conceded there were failures  
6 of proof in *Kahane v. Carlson*, 527 F.2d 492 (2<sup>nd</sup> Cir. 1975) and *Harvey v. Adams County*  
7 *Sheriff's Office*, 2008 WL 2396761 (D.Col. 2008). (Docket No. 031, p. 20, ll. 7-21).  
8 Again, the proof offered here is competent. Finally, Plaintiff's argument that "any cost  
9 justification articulated by Nevada to deny kosher diets is weakened by the fact that so  
10 many prison systems serve such diets," and the line of cases cited in support thereof  
11 (Docket No. 031, p. 20, l. 22 to p. 23, l. 18.) simply misses the point. Here, Defendants  
12 *are* providing a kosher diet to NDOC inmates under the CFM.

13 Accordingly, given that the CFM is kosher, and under the CFM program, the  
14 NDOC will achieve projected savings in the remainder of Fiscal Year 2012 and a  
15 projected savings of \$1,539,721.85 for Fiscal Year 2013, where there are expected  
16 budgetary shortfalls, as compared to continuing the CKM program, the balance of  
17 equities tips decidedly in Defendants' favor. This also demonstrates that denying the  
18 Injunction Motion is in the public interest. Plaintiffs' argument that the Defendants cannot  
19 show that the termination of kosher diets is the least restrictive means of furthering a  
20 compelling governmental interest (Docket No. 031, p. 23, l. 20 to p. 24, l. 7) is also  
21 misplaced because the CFM is a kosher diet.

22 **VII. THE COURT SHOULD DENY THE *INJUNCTION MOTION* BECAUSE THE**  
23 **RELIEF REQUESTED IS NOT NARROWLY DRAWN OR THE LEAST-**  
24 **RESTRICTIVE RELIEF TO ADDRESS RLUIPA CONCERNS HERE**

25 Under the PLRA, the Court cannot grant or approve any prospective relief that is  
26 not narrowly drawn, to apply the least-restrictive scope of relief to address the  
27 constitutional issues at hand. 18 U.S.C. § 3626 (1)(A). Moreover, the Court is required  
28 to give substantial weight to any adverse impact that may accrue to public safety or the  
operation of a criminal justice system caused by the relief. Under NRS 179A.020 and

1 030, the NDOC is an “agency of criminal justice” because it performs a function in the  
2 “administration of criminal justice,” which phrase is defined to include “correctional  
3 supervision or rehabilitation of ‘criminal offenders.’” (See NRS 179A.020 and 030.)  
4 Allowing Plaintiffs to require that the NDOC incur additional costs in the remainder of  
5 Fiscal Year 2012 and a projected additional cost of \$1,539,721.85 in Fiscal Year 2013,  
6 then such relief would certainly present an adverse financial impact to the operation of  
7 the NDOC, especially given that it is already experiencing a budgetary shortfall for its  
8 food service accounts. See *Reed Declaration* and Exhibits A-C, attached thereto.  
9 Accordingly, under the PLRA, the Court should give great deference to the NDOC on this  
10 point, before fashioning any injunctive relief to Plaintiffs. Given that Plaintiff’s proposition  
11 is an all-or-nothing proposition that assumes that the CFM is not kosher, and seeks to  
12 block its implementation—notwithstanding the fact that Defendants have shown that it *is*  
13 kosher—there is no middle ground to be achieved here in granting the relief requested by  
14 Plaintiffs. Accordingly, given that the scope of the relief request is not the least-restrictive  
15 scope necessary to address the concerns at issue, and given that there will be significant  
16 adverse impact to the NDOC, to which fact the Court should give particular weight, as  
17 required by the PLRA, the Court should deny Plaintiff’s *Injunction Motion*. See 18 U.S.C.  
18 § 3626 (1)(A); NRS 179A.020 and 030; *Mayweathers v. Terhune*, 328 F.Supp.2d 1086,  
19 1097-1098 (E.D.Cal. 2004); and *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9<sup>th</sup> Cir. 1998).

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**VIII. CONCLUSION**

FOR ALL THE FOREGOING REASONS, the Court should DENY Plaintiffs' *Injunction Motion*.

DATED this 6<sup>th</sup> day of February 2012.

By: 

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Carson City District Attorney and that on this 6<sup>th</sup> day of February 2012, I caused to be served a copy of the foregoing *Defendants’ Opposition to Plaintiff’s Emergency Motion for Preliminary Injunction Preventing the Implementation of the Common Fare Menu (Docket No. 031.)* by Electronic Court Filing via “CM/ECF” to:

JACOB L. HAFTER, ESQ.  
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**DEFENDANTS' EXHIBITS  
IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

NO. OF PAGES (including exhibit-divider page)	BATES RANGE			DESCRIPTION
	Prefix	PG. START	PG. END	
15	D-OPI	001	015	<b>DECLARATION OF GARY FRIEDMAN</b> and attached exhibits:
2	D-OPI	016	017	<b>EXHIBIT A</b> - Rabbinical Endorsement Ltr;
3	D-OPI	018	020	<b>EXHIBIT B</b> - NDOC Approved Kosher Symbols List;
2	D-OPI	021	022	<b>EXHIBIT C</b> - Common Fare Menu;
2	D-OPI	023	024	<b>EXHIBIT D</b> - Common Fare Menu Item Code and Vendor Chart; and
27	D-OPI	025	051	<b>EXHIBIT E</b> - Common Fare Menu Kosher Certifications.
12	D-OPI	052	063	<b>DECLARATION OF DAWN ROSENBERG</b> and attached exhibits:
9	D-OPI	064	072	<b>EXHIBIT A</b> - Current Kosher Menu;
2	D-OPI	073	074	<b>EXHIBIT B</b> - Common Fare Menu;
2	D-OPI	075	076	<b>EXHIBIT C</b> - Common Fare Menu Item Code and Vendor Chart;
27	D-OPI	077	103	<b>EXHIBIT D</b> - Common Fare Menu Kosher Certifications;
3	D-OPI	104	106	<b>EXHIBIT E</b> - NDOC Approved Kosher Symbols List;
49	D-OPI	107	155	<b>EXHIBIT F</b> - Ackerman's NNCC Canteen Purchases; and
53	D-OPI	156	208	<b>EXHIBIT G</b> - Ackerman's NNCC Coffee Shop Records;
8	D-OPI	209	216	<b>DECLARATION OF DEB REED</b> and attached exhibits
3	D-OPI	217	219	<b>EXHIBIT A</b> - Table: Historical Kosher Expenditures
23	D-OPI	220	242	<b>EXHIBIT B</b> - Table: Kosher Meal Cost Summary
2	D-OPI	243	244	<b>EXHIBIT C</b> - Table: Kosher Common Fare FY13