IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

BEAUFORT DIVISION

Lumumba Kenyatta Incumaa, #155651, Plaintiff, v. Honorable William R. Byars, Jr., as Director of the SCDC, Defendant.	Civil Action No. 9:12-3493-CMC-BM **REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Plaintiff has filed a response to the motion for summary judgment and supporting memorandum filed by the Defendant. In replying to that response, the Defendant relies on the arguments previously made in his supporting memorandum. However, there are also a few additional points that the Defendant wishes to make in reply.

DISCUSSION

In support of his Religious Land Use and Institutionalized Persons Act (RLUIPA) claim, the Plaintiff argues that the application of the SCDC Security Threat Group (STG) Policy substantially burdens his claimed "religious beliefs" as a Five Percenter. He insists that the STG Policy, by allowing an STG member to attempt to renounce his beliefs and further affiliation with an STG and thereby obtain reclassification from security detention, places substantial

pressure on him to modify his behavior and to violate his "religious beliefs." That is clearly not the case. Importantly, as the Plaintiff readily admits, SCDC has allowed him to practice his "religious beliefs," including allowing his possession of Five Percenter literature and materials which are otherwise contraband, for eighteen years now. Moreover, the Plaintiff has not cited one attempt by any SCDC official or employee to convince or coerce the Plaintiff into abandoning his beliefs or renouncing his affiliation with the Five Percenters. SCDC is content with the Plaintiff remaining a member of the Five Percenters, but for the security reasons upheld in *In re Long Term Administrative Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464 (4th Cir. 1999) (case hereafter referred to as "*Five Percenters*"), the Plaintiff must remain classified for security detention.[1] SCDC is not trying to change the Plaintiff's beliefs. It is unclear whether SCDC would even allow the Plaintiff to renounce and be reassigned to the general population given his involvement as a ringleader in the 1995 riot at Broad River Correctional Institution.

As the Defendant previously pointed out, instead of showing that SCDC is pressuring him to renounce his "religious beliefs," what the Plaintiff contends is that the greater privileges and better conditions of confinement existing for inmates in the general population is what may be pressuring him to renounce his "religious beliefs." However, SCDC did not create this system of greater privileges for general population inmates or providing them less harsh conditions of confinement in order to impact anyone's religious beliefs. Likewise, there is no evidence that SCDC is using the privileges and conditions in general population to pressure the Plaintiff to

[1] The Plaintiff erroneously describes security detention as "punishment." That is not correct. An inmate is placed in disciplinary detention (DD) as punishment for a disciplinary offense. Security detention (SD), however, is not a form of punishment but is designed to provide for security and order within SCDC for inmates and staff. *See, Fair v. Ozmint*, 2011 WL 1658761 (D.S.C. 2011).

modify or change his beliefs. Consequently, the Plaintiff has not sustained his burden of proof that his custody classification as Validated-SD and his confinement in security detention substantially burden his "religious exercise" as a Five Percenter.[2]

In addition, the Plaintiff argues that the Defendant has failed to prove that the STG Policy and its enforcement against the Plaintiff serve compelling governmental interests and that no less restrictive alternatives exist to serve those compelling governmental interests. The Plaintiff is critical of the Defendant's reliance on the *Five Percenters* decision; however, even though the Fourth Circuit was addressing a Free Exercise Clause claim rather than a RLUIPA claim, the Court's analysis cannot be disregarded. The Fourth Circuit discusses the interests served by the STG policy and the reclassification of Five Percenters to a higher custody level requiring their confinement in SMU, and the Court describes those interests as "compelling." Specifically, the Fourth Circuit concluded that such interests "are not simply legitimate penological interests -- they are compelling." *Five Percenters*, 174 F.3d at 469. Even in the context of RLUIPA, that discussion is pertinent – there is no reasonable argument denying that the preservation of internal order and discipline and maintaining institutional security are compelling governmental interests.

[2] In his response to summary judgment, the Plaintiff concedes that he may possess Five Percenter literature in the Special Management Unit. He also seems to agree that he may pray, fast and study those materials. He does, however, argue for the first time that he is not allowed to observe the "Honor (Holy) Days." He then states that SCDC does not recognize the "Honor (Holy) Days." *See*, Plaintiff's Memorandum, p. 14. The Plaintiff, nonetheless, never describes what the "Honor (Holy) Days" are or how they are to be celebrated. He fails to explain how he is prevented from recognizing and celebrating those days in his cell on an individualized basis. He also fails to show the importance of the "Honor (Holy) Days" to his so-called "God Centered Culture of Islam" nor how he is barred from "observing" those days by SCDC nor how his "religious exercise" has been substantially affected or burdened thereby. Furthermore, if SCDC does not "observe" the "Honor (Holy) Days," as Plaintiff claims, that would seem to be the case regardless of whether the Plaintiff is in SMU or in the general population, and hence, have no relevance to the Plaintiff's claims.

The Plaintiff further complains that the Defendant cites to the *Five Percenters* decision to show that no less restrictive alternatives exist to serve those compelling governmental interests. Again, even though *Five Percenters* was not a RLUIPA claim, which the Defendant concedes, the Fourth Circuit's analysis cannot be disregarded. The Fourth Circuit explained that "there are no ready alternatives to the SCDC's course of action." *Five Percenters*, 174 F.3d at 470. That is reasoning that is persuasive, if not dispositive, of the issue before this Court.

Nonetheless, to the extent that the Plaintiff contends that the Defendant did not present sufficient evidence in the affidavit of Elbert Pearson filed with the motion for summary judgment, Pearson submits a supplemental affidavit providing some statistical information showing that Five Percenters remain a dangerous security threat group. Attached to Pearson's supplement affidavit is a chart showing the actual number of assaults involving Five Percenters since 2003, including assaults on other inmates and assaults on employees. *See*, Pearson Supp. Affidavit, Ex. A. While those numbers remain substantial, there is a downward trend which Pearson attributes to the success of the STG Policy and the re-classification of Five Percenters to SD-Validated custody status when deemed appropriate. Pearson states:

> In my view, that reflects that the STG Policy has been and continues to be effective. SCDC has been successful in identifying the validated Five Percenters who have engaged in assaultive and other criminal conduct within the general population, re-classifying them as Validated-SD, and as a result committing them to security detention where they are subject to greater control and observation. I believe that the STG Policy and its application with respect to the Five Percenters has successfully reduced the overall number of assaults.

See, Pearson Supp. Affidavit, para. 3.

Finally, the Plaintiff cites to cases from New York and Michigan for the suggestion that those correctional systems do not designate Five Percenters as an STG and thus allow the "free

exercise" of those beliefs "without causing any disruption to their internal order, discipline or institutional security." *See*, Plaintiff's Memorandum, p. 16. The Plaintiff's premise, however, is flawed and has previously been rejected by several courts including this one. For example, in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), the Eighth Circuit affirmed the district court's dismissal of a RLUIPA challenge to the Arkansas Department of Corrections grooming policy which did not include a religious exemption. The *Fegans* Court rejected the plaintiff's reliance on "more liberal grooming policies" from other correctional systems:

> [A]lthough prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.

537 F.3d at 905.

Similarly, this Court addressed a similar issue in *Malik v. Ozmint*, 2010 WL 1052660 (D.S.C. 2010), which involved a RLUIPA challenge to the SCDC Grooming Policy. District Judge R. Bryan Harwell ultimately rejected an inmate's argument that inmates confined in other prison systems are not required to adhere to hair length limits and forced haircuts and that should demonstrate that the SCDC Grooming Policy was not the least restrictive alternative available. Judge Harwell wrote:

> [T]he fact that some prison systems employ exemption approaches similar to that proposed by the Plaintiff is simply not dispositive. Federal courts should extend great deference to the experience and expertise of the prison administrators responsible for the particularized circumstances of their penal institution. Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.

2010 WL 1052660, *6. (Citations omitted).

The case of *Ragland v. Angelone*, 420 F.Supp.2d 507 (W.D.Va. 2006), is also instructive. In that case, the district court explained as follows:

> To accept the logic of this argument the court would have to conclude that the least restrictive means necessary to serve the interests of one jurisdiction's prison system is the only lawful means to serve the same interests of another jurisdiction's system though they may be entirely different in terms of their history, inmate population, structure and funding. To state this proposition is to refute it. The drafters of the RFRA did not intend to require a "one size fits all" approach to evaluating rules of neutral applicability in any context and certainly not in the context of prison condition litigation.

Id. The court in *Ragland* further recognized that:

> The Supreme Court insists that courts must defer appropriately to the expertise of prison officials in matters of prison administration even when reviewing a prison regulation under the RLUIPA strict scrutiny standard. This court believes that any court ruling which would force VDOC officials to make the same choices as prison officials in other jurisdictions have made, in balancing the established risks of inmates' uncut hair against the many other issues involved in managing a prison system, would be entirely inconsistent with the high Court's deference mandate.

420 F.Supp.2d at 520.

Consequently, the Plaintiff's reliance on the fact that New York and Michigan may not treat the Five Percenters as an STG is not evidence that a least restrictive alternative is available in the South Carolina corrections system. Furthermore, as Elbert Pearson attests, there are other corrections systems, including New Jersey and Virginia, that have designated the Five Percenters as an STG or gang. *See*, Pearson Affidavit, para. 6. (Dkt. #25-2). The designation of the Five Percenters as an STG have been likewise upheld by the federal courts in those jurisdictions. *See*, *Fraise v. Terhune*, 283 F.3d 506 (3d. Cir. 2002); *Johnson v. Jabe*, 2011 WL 2493763 (W.D. Va. 2011); *Holley v. Johnson*, 2010 WL 2640328 (W.D. Va. 2010); *Johnson v. Jabe*, 2010 WL

3855217 (W.D. Va. 2010).

In sum, the Plaintiff's RLUIPA claim, even assuming that the Five Percenters are a religious group, fails. The Five Percenters have been and remain designated an STG within SCDC. The constitutionality and propriety of that designation should be upheld. Moreover, the enforcement of the STG Policy and specifically the classification of the Plaintiff as Validated-SD and his confinement in a Special Management Unit in security detention do not violate his rights under RLUIPA. As a result, the Defendant is entitled to summary judgment on all claims for declaratory and injunctive relief.

CONCLUSION

Based on the foregoing analysis and discussion, the Defendant William R. Byars, Jr. respectfully renews his request that this Court grant his motion for summary judgment and dismiss the Plaintiff's complaint with prejudice on the merits.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:___s/ *Andrew F. Lindemann* _____

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