

1 **1. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if Plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 28 U.S.C. § 1915A(b)(1),(2).

8 A pleading must contain a “short and plain statement of the claim *showing* that the
9 pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2) (emphasis added). While Rule 8 does not
10 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
11 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).
12 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
13 statement, do not suffice.” *Id.*

14 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
15 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550
16 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that
17 allows the court to draw the reasonable inference that the defendant is liable for the
18 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
19 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
20 experience and common sense.” *Id.* at 1950. Thus, although a plaintiff’s specific factual
21 allegations may be consistent with a constitutional claim, a court must assess whether there
22 are other “more likely explanations” for a defendant’s conduct. *Id.* at 1951.

23 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
24 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th
25 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
26 than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94
27 (2007) (*per curiam*)).
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1 **2. Third Amended Complaint and Discussion**

2 An amended complaint supersedes its original complaint. *Hal Roach Studios v.*
3 *Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990); *King v. Atiyeh*, 814 F.2d 565,
4 567 (9th Cir. 1987). Causes of action alleged in an original complaint which are not alleged
5 in an amended complaint are waived. *King v. Atiyeh*, 814 F.2d at 567. Thus, Plaintiff's
6 Third Amended Complaint supersedes the Second Amended Complaint filed in June 2012.

7 Like the Second Amended Complaint, Plaintiff alleges fourteen causes of action in
8 the Third Amended Complaint. Plaintiff names twenty-one defendants in the Third Amended
9 Complaint, twenty of whom were named in the Second Amended Complaint.¹

10 **a. Count One**

11 Plaintiff's allegations in Count One are identical to the allegations in Count One of
12 the Second Amended Complaint. Having already analyzed these allegations in the prior
13 screening order, the Court need not repeat its analysis here. (Doc. 21 at 4-6) The Court finds
14 that Plaintiff has stated a retaliation claim against Defendants Savio, Ochoa, Hetmer, Jump,
15 Crabtree, and Trevino in Count One and will require them to answer the allegations therein.

16 **b. Count Two**

17 Plaintiff's allegations in Count Two are essentially the same as the allegations in
18 Count Two of the Second Amended Complaint. The only differences, a citation to a Ninth
19 Circuit case and the addition of a fifth defendant, are insufficient to alter the Court's due
20 process analysis from the prior screening order. (Doc. 21 at 6-7). Accordingly, Count Two
21 will be dismissed without prejudice.

22 **c. Count Three**

23 Plaintiff's allegations in Count Three are substantially the same as the allegations in
24 Count Three of the Second Amended Complaint. Other than adding two footnotes and a new
25 sentence at the end of paragraph 15 of the supporting facts, the allegations have not changed.

27 ¹ CO II Harris, who was named in the Second Amended Complaint is omitted from
28 the Third Amended Complaint. Defendant John Doe is named in the Third Amended
Complaint but was not named in the Second Amended Complaint.

1 In the prior screening order, the Court found that Plaintiff failed to state a due process claim
2 against the named Defendants. (Doc. 21 at 7-10) None of Plaintiff’s minor changes alters
3 the Court’s previous analysis. Accordingly, Count Three will be dismissed without
4 prejudice.

5 **c. Counts Four through Eleven**

6 Plaintiff’s allegations in Counts Four through Eleven are essentially the same as the
7 allegations in Counts Four through Eleven of the Second Amended Complaint.² In the prior
8 screening order, the Court dismissed Counts Four through Eleven for failure to state a claim.
9 (Doc. 21 at 11-13) None of Plaintiff’s very minor changes with respect to these claims have
10 any impact on the Court’s previous analysis of the claims in the prior screening order.
11 Accordingly, Counts Four through Eleven will be dismissed.

12 **d. Count Twelve**

13 In Count Twelve, Plaintiff raises the same claim alleged in Count Twelve of the
14 Second Amended Complaint. Plaintiff alleges that Defendants Ryan, Cardenas, Heet, Ochoa
15 and Dodds violated his right to due process by failing to provide “meaningful periodic review
16 of his supermax confinement based on his prison gang member validations and status.”
17 (Doc. 59 at 5F) In the prior screening order, the Court found Plaintiff failed to state a claim
18 because ““AD[O]C’s periodic review, combined with the ability to debrief at any time,’
19 satisfies due process.” (Doc. 21 at 10) (quoting *Hernandez v. Schriro*, 2011 WL 2910710,
20 *8 (D. Ariz. 2011) and citing *Faulkner v. Ryan*, 2012 WL 407452, *10 (D. Ariz. 2012)).

21 In the Third Amended Complaint, Plaintiff amends Count Twelve by adding two
22 paragraphs to his “Supporting Facts” section in which he attempts to distinguish his case
23 from the cases cited by the Court in the prior screening order. Plaintiff claims his case is
24 different from *Hernandez* because he is not alleging that the debriefing process violates his
25 Eighth Amendment rights by requiring him to risk his safety. (Doc. 59 at 5G) *Hernandez*,

27 ²The allegations in Counts Five through Eight and Eleven are identical to Counts Five
28 through Eight and Eleven in the Second Amended Complaint. In Count Four, a footnote has
been added, and in Counts Nine and Ten, a minor parenthetical has been added.

1 however, in addition to addressing the alleged Eighth Amendment violation, also addressed
2 whether the annualized review combined with the ability to debrief satisfies due process.
3 *Hernandez*, 2011 WL 2910710, *7. As noted above, the Court in *Hernandez* found that it
4 does satisfy due process. *Id.* at *8. Plaintiff fails to demonstrate any meaningful difference
5 between the due process allegations in his case and those in *Hernandez*.

6 Next, Plaintiff claims his case is distinguishable from *Faulkner* because, unlike the
7 plaintiff in *Faulkner*, Plaintiff here “is alleging that the initial validation process is subject
8 to a high degree of error” (Doc. 59 at 5G) Plaintiff claims that as a result of the high
9 error rate, more frequent reviews should be conducted to determine whether he has been
10 involved in recent gang activity. (*Id.*) Plaintiff, however, provides no facts to support his
11 contention that the initial validation process is subject to a high error rate. Thus, Plaintiff
12 fails to demonstrate any meaningful difference between the due process allegations in his
13 case and those in *Faulkner*.

14 Finally, Plaintiff’s additions to Count Twelve include allegations of a “blood in blood
15 out” rule pertaining to prison gang membership. (Doc. 59 at 5G) According to Plaintiff, the
16 rule compels a prisoner seeking membership in a prison gang “to violently stab or kill
17 another prisoner that has been targeted by group he desires to join.” (*Id.*) Plaintiff alleges that
18 absent evidence he ever completed the “blood in” requirement, “there is no basis for
19 concluding, even with evidence demonstrating a desire to associate with a given [Security
20 Threat Group (“STG”)], that such a prisoner must ‘bleed out’ prior to disassociating himself
21 from the gang.” (*Id.*) Plaintiff explains that the purpose of the “blood in blood out”
22 allegations is to demonstrate that indefinite confinement and the debriefing process
23 “comprise an exaggerated response” to the problems associated with prison gangs such that
24 an alternative method of meaningful periodic review should be implemented. (*Id.* at n. 20)

25 The Court finds that Plaintiff’s additional allegations in Count Twelve are insufficient
26 to state a due process violation. The mere fact that the Department of Corrections may not
27 have evidence Plaintiff completed an alleged “‘blood in’ ritual” is not a basis to find that the
28 Department’s STG policy is an exaggerated response to the prison gang problem such that

1 it violates the Due Process Clause. Because Plaintiff's allegations in Count Twelve fail to
2 state a claim, Count Twelve will be dismissed.

3 **e. Count Thirteen**

4 Plaintiff alleges in Count Thirteen that Defendants Ryan, Plausner, Trujillo, Ramos,
5 Heet and Cardenas have violated the Eighth Amendment prohibition against cruel and
6 unusual punishment. (Doc. 59 at 5G-5J) He contends that the "almost wholesale denial of
7 access to direct sunlight that is the result of the recreation practices [in the supermax unit]"
8 has exacerbated his previously diagnosed and ongoing mental illness. (*Id.*) Other than a new
9 footnote and four additional paragraphs, Plaintiff's four pages of allegations in Count
10 Thirteen are identical to his allegations in Count Thirteen of the Second Amended
11 Complaint. (Doc. 59 at 5I, n.28 and 5J, ¶¶ 33-36)

12 In the prior screening order, the Court found that Plaintiff's allegations in Count
13 Thirteen failed to state a claim against Defendants Cardenas, Ramos, Ryan and Plausner.
14 (Doc. 21 at 15) The Court further found that, liberally construed, Plaintiff's allegations stated
15 a claim against Defendants Heet and Trujillo. (*Id.*)

16 In the Third Amended Complaint, Plaintiff adds a footnote pertaining to Defendant
17 Plausner, who responded to Plaintiff's grievance appeal on behalf of Defendant Ryan. (Doc.
18 59 at 5I) In the response, Plausner stated that Plaintiff was provided access to sunlight during
19 recreation and that if further medical attention was needed, Plaintiff should submit a health
20 needs request to appropriate medical staff. (*Id.*) Plaintiff alleges in the footnote that despite
21 her response to Plaintiff's grievance appeal, Defendant Plausner knew the recreation
22 practices in Plaintiff's housing unit severely restrict access to direct sunlight, and that
23 Plausner failed to contact the psychiatric staff to determine the effects such conditions could
24 have on Plaintiff's mental condition. (*Id.* at n. 28)

25 The Court finds that Plaintiff's additional allegations regarding Defendant Plausner
26 are insufficient to state an Eighth Amendment deliberate indifference claim. Plaintiff's
27 conclusory assertion that Plausner knew access to direct sunlight was severely restricted in
28 Plaintiff's housing unit is unsupported by any factual allegations. Moreover, the fact that

1 Plausner may not have contacted psychiatric staff to determine the effects of limited sunlight
2 on Plaintiff's mental health, but instead referred Plaintiff to medical staff for further medical
3 attention if necessary, does not rise to the level of deliberate indifference to Plaintiff's serious
4 medical needs.

5 Likewise, Plaintiff's additional allegations against Defendant Ryan fail to state an
6 Eighth Amendment deliberate indifference claim against him. As with Defendant Plausner,
7 Plaintiff added an allegation that Defendant Ryan is aware the recreation practices at his
8 housing unit significantly limit prisoners' access to direct sunlight. (Doc. 59 at 5J) Plaintiff,
9 however, again provides no factual support for his conclusory assertion. Plaintiff's new
10 allegation against Defendant Ryan fails to show he acted with deliberate indifference to
11 Plaintiff's health or safety.

12 Finally in Count Thirteen, Plaintiff alleges that a Health Services Central Office
13 Physician, identified as "Defendant John Doe," in response to a grievance appeal by Plaintiff,
14 determined that because there is an abundance of sunlight in Arizona, "the necessity of
15 additional sunlight is not indicated." (Doc. 59 at 5J) Plaintiff further alleges, without any
16 factual support, that Defendant John Doe is aware that the recreation practices at Plaintiff's
17 housing unit significantly limit prisoners' access to direct sunlight, or that he failed to
18 sufficiently inquire into the essential facts to make an informed medical judgment. (*Id.*)

19 The Court finds Plaintiff's conclusory allegations against Defendant John Doe are
20 insufficient to state a claim for deliberate indifference in violation of the Eighth Amendment.
21 Moreover, Rule 10(a) of the Federal Rules of Civil Procedure requires a plaintiff to include
22 the names of the parties in the action. As a practical matter, it is impossible in most instances
23 for the United States Marshal or his designee to serve a summons and complaint or amended
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1 complaint upon an anonymous defendant.³ For these reasons, Defendant John Doe will be
2 dismissed.

3 As the foregoing analysis shows, Plaintiff's additional allegations in Count Thirteen
4 of the Third Amended Complaint fail to alter the Court's determinations from the prior
5 screening order. Accordingly, as in the prior screening order, the Court finds that, liberally
6 construed, Plaintiff has stated a deliberate indifference claim against Defendants Heet and
7 Trujillo. Because the allegations fail to state a claim against Defendants Cardenas, Ramos,
8 Ryan, Plauser and John Doe, the Court will dismiss Count Thirteen as it pertains to them.

9 **f. Count Fourteen**

10 Plaintiff's allegations in Count Fourteen of the Third Amended Complaint are
11 essentially the same as the allegations in Count Fourteen of the Second Amended
12 Complaint.⁴ In the prior screening order, the Court found that Plaintiff's allegations are too
13 vague to state an access-to-the-courts claim. (Doc. 21 at 16) The Court further found that
14 Plaintiff's allegations of conspiracy are nothing more than vague and conclusory allegations
15 and unwarranted deductions of fact. (*Id.* at 15) The Court, therefore, dismissed Count
16 Fourteen for failure to state a claim. (*Id.*) The addition of footnote 29 in Count Fourteen of
17 the Third Amended Complaint does nothing to alter the Court's analysis. Accordingly, the
18 Court reaches the same decision it did in the prior screening order and will dismiss Count
19 Fourteen.

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21 ³ The Ninth Circuit has held that where identity is unknown prior to the filing of a
22 complaint, the plaintiff should be given an opportunity through discovery to identify the
23 unknown defendants, unless it is clear that discovery would not uncover the identities, or that
24 the complaint would be dismissed on other grounds. *Wakefield v. Thompson*, 177 F.3d 1160,
25 1163 (9th Cir. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). Here,
because Plaintiff's allegations against Defendant John Doe fail to state a claim, it is
unnecessary to provide Plaintiff an opportunity to learn his identity through discovery.

26 ⁴ Plaintiff has dropped Defendant Harris from Count Fourteen and the allegations are
27 now asserted against Defendant Velasco only. (Doc. 59 at 5J-5K) The only other change is
28 the addition of footnote 29 which alleges that Defendant Velasco's actions were part of an
official pattern and practice of interfering with Plaintiff's access to the courts in light of his
litigation activities.

1 **3. Service of Defendants**

2 Based on the foregoing, the Court finds that the Third Amended Complaint states a
3 claim against the same nine defendants against whom the Second Amended Complaint stated
4 a claim. Accordingly, the Court will require service on and an answer from each of them.
5 As referenced above, the court docket reflects that all nine of these defendants have waived
6 service of process and some have appeared in this action, through counsel. The Court
7 assumes that the defendants who have not yet appeared will be represented by the same
8 counsel who has appeared on behalf of the other defendants. Plaintiff will therefore be
9 ordered to serve his Third Amended Complaint on the nine defendants pursuant to Rule 5(b)
10 of the Federal Rules of Civil Procedure by sending a copy to their attorney, along with a copy
11 of this Order.

12 **4. Warning of Possible Dismissal**

13 Plaintiff should take note that if he fails to timely comply with every provision of this
14 Order, this action may be dismissed without further notice. *See Ferdik v. Bonzelet*, 963 F.2d
15 1258, 1260-61 (9th Cir. 1992) (district court may dismiss action for failure to comply with
16 any order of the Court).

17 **5. Address Changes**

18 Plaintiff must file and serve a notice of change of address in accordance with Rule
19 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
20 relief with a notice of change of address. Failure to comply may result in dismissal of this
21 action.

22 **6. Copies**

23 Because Plaintiff is currently confined in ASPC-Eyman and this case is subject to
24 General Order 12-25, Plaintiff is not required to serve Defendants with a copy of every
25 document he files or to submit an additional copy of every filing for use by the Court, as
26 would ordinarily be required by Federal Rule of Civil Procedure 5 and Local Rule of Civil
27 Procedure 5.4. If Plaintiff is transferred to a prison other than ASPC-Eyman, he will be
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1 notified of the requirements for service and copies for the Court that are required for inmates
2 whose cases are not subject to General Order 12-25.

3 **7. No Further Amendments Without Leave of Court**

4 Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend his
5 pleading "once as a matter of course at any time before a responsive pleading is served . . ."
6 Because Plaintiff has now amended his complaint more than once, he may not file another
7 amended complaint without first seeking permission from the Court.

8 **IT IS ORDERED:**

9 (1) Counts Two through Twelve and Count Fourteen are **dismissed** without prejudice;

10 (2) Defendants Ryan, Herman, Freeland, McDonald, Shatto, Ramos, Valenzuela,
11 Weisheit, Velasco, Cardenas, Dodds, and Plausner are **dismissed** without prejudice;

12 (3) Defendants Savio, Ochoa, Hetmer, Jump, Crabtree, King, and Trevino must
13 answer Count One of the Third Amended Complaint;

14 (4) Defendants Heet and Trujillo must answer Count Thirteen of the Third Amended
15 Complaint;

16 (5) Plaintiff shall serve his Third Amended Complaint on Defendants Savio, Ochoa,
17 Hetmer, Jump, Crabtree, King, Trevino, Heet, and Trujillo pursuant to Rule 5(b) of the
18 Federal Rules of Civil Procedure by sending a copy to their attorney, along with a copy of
19 this Order;

20 (6) Defendants must answer the Third Amended Complaint or otherwise respond by
21 appropriate motion within the time provided by the applicable provisions of Rule 12(a) of
22 the Federal Rules of Civil Procedure;

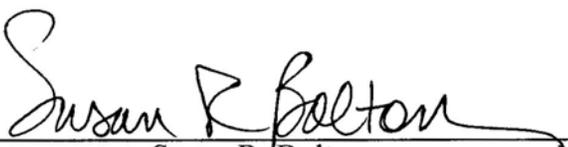
23 (7) Any answer or response must state the specific Defendant(s) by name on whose
24 behalf it is filed. The Court may strike an answer, response, or other motion or paper that
25 does not identify the specific Defendant(s) by name on whose behalf it is filed;

26 (8) This matter is again referred to Magistrate Judge Lawrence O. Anderson pursuant
27 to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further pretrial proceedings
28 as authorized under 28 U.S.C. § 636(b)(1).

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IT IS FURTHER ORDERED that Plaintiff comply with the Local Rules of Civil Procedure.

DATED this 28th day of May, 2013.



Susan R. Bolton
United States District Judge