



1 defendants and addressing prison conditions. His initial Complaint  
2 (docket no. 4) was received September 4, 2008, lodged September 5,  
3 2008, and filed October 15, 2008, pursuant to the court's Order re  
4 Leave to File Action Without Prepayment of Full Filing Fee (docket no.  
5 3).<sup>2</sup> The court dismissed the Complaint with leave to amend in a  
6 memorandum and order filed August 19, 2009. [Docket no. 7.]  
7 Plaintiff's First Amended Complaint was filed September 11, 2009  
8 (docket no. 8), and was superceded by his Second Amended Complaint  
9 ("SAC") filed October 12, 2010 (docket no. 11).<sup>3</sup>

10 **STANDARD OF REVIEW**

11 Because plaintiff is a prisoner, seeking to proceed in forma  
12 pauperis, on a civil rights complaint naming governmental defendants  
13 and addressing prison conditions, his complaint is subject to review  
14 under provisions of the Prison Litigation Reform Act of 1995 ("PLRA"),  
15 Pub. L. No. 104-134, 110 Stat. 1321 (1996). See 28 U.S.C. § 1915A(a).  
16 The court shall dismiss such a complaint, at any time, if it is  
17 frivolous or malicious, fails to state a claim on which relief may be  
18 granted, or seeks monetary relief from an immune defendant. See Lopez  
19 v. Smith, 203 F.3d 1122, 1126-27 and n.7 (9th Cir. 2000)(en banc); 28  
20 U.S.C. § 1915(e)(2)(B)(in forma pauperis complaints); 28 U.S.C.  
21 § 1915A(b)(prisoner complaints against government defendants); 42

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23 <sup>2</sup> The Complaint named seventeen individual capacity defendants:  
24 Haws, Henderson, Reaume, Cagalawan, Harris, Clemons, Cruz, Parker,  
25 McGuinness, Fortson, Cromwell, Fallon, Wofford, Gonzalez, Teaney,  
26 Nipper, and Foote.

27 <sup>3</sup> The First Amended Complaint named eight individual capacity  
28 defendants: Fallon, Fortson, Henderson, Harris, Foote, Reaume, Luu,  
and Clemons. The SAC named these eight and a ninth, Defendant Fisher.  
[SAC caption.] Plaintiff has thus effectively dismissed Defendants  
Haws, Cagalawan, Cruz, Parker, McGuinness, Cromwell, Wofford,  
Gonzalez, Teaney, and Nipper.

1 U.S.C. § 1997e(c)(complaints re: prison conditions).

2 PLRA review for failure to state a claim applies the same  
3 standard applied in reviewing a motion to dismiss for failure to state  
4 a claim under Fed. R. Civ. P. 12(b)(6). See Barren v. Harrington, 152  
5 F.3d 1193, 1194 (9th Cir. 1998). A Rule 12(b)(6) motion to dismiss  
6 for failure to state a claim tests the legal sufficiency of a claim  
7 for relief. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "In  
8 deciding such a motion, all material allegations of the complaint are  
9 accepted as true, as well as all reasonable inferences to be drawn  
10 from them." Id. "A Rule 12(b)(6) dismissal may be based on either a  
11 'lack of a cognizable legal theory' or 'the absence of sufficient  
12 facts alleged under a cognizable legal theory.'" Johnson v. Riverside  
13 Healthcare System, 534 F.3d 1116, 1121 (9th Cir. 2008)(quoting  
14 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
15 1990)). A complaint may also be dismissed for failure to state a  
16 claim if it discloses a fact or defense that necessarily defeats the  
17 claim. Franklin v. Murphy, 745 F.2d 1221, 1228-29 (9th Cir. 1984)  
18 (citing 2A Moore's Federal Practice ¶ 12.08).

19 Possible failure to state a claim is reviewed under the pleading  
20 standard of Fed. R. Civ. P. 8(a)(2), which requires a "short and plain  
21 statement of the claim showing that the pleader is entitled to  
22 relief." Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937,  
23 173 L. Ed. 2d 868 (2009)("Iqbal"). The Rule 8 pleading standard "does  
24 not require detailed factual allegations," but does require more than  
25 merely "labels and conclusions or a formulaic recitation of the  
26 elements of a cause of action." Iqbal, 556 U.S. at 678 (citations and  
27 internal quotation marks omitted). Instead, "a complaint must contain  
28 sufficient factual matter, accepted as true, to state a claim to

1 relief that is plausible on its face." Id. (citations and internal  
2 quotation marks omitted). "A claim has facial plausibility when the  
3 plaintiff pleads factual content that allows the court to draw the  
4 reasonable inference that the defendant is liable for the misconduct  
5 alleged." Id. This plausibility standard is not a probability  
6 requirement, but does ask for more than mere possibility. Id.

7 In Iqbal, the Supreme Court applied a two-pronged approach to  
8 reviewing possible failure to state a claim. Id. at 678-81. First,  
9 the reviewing court may identify statements in a complaint that are  
10 actually conclusions, rather than factual allegations, and, as such,  
11 are not entitled to a presumption of truth. Id. at 678-79. It is the  
12 statements' conclusory nature, rather than any fanciful or nonsensical  
13 nature, "that disentitles them to the presumption of truth." Id. at  
14 681. Second, the court presumes the truth of any remaining "well-  
15 pleaded factual allegations," and determines whether these allegations  
16 and reasonable inferences from them plausibly support a claim for  
17 relief. Id. at 679-80. The Ninth Circuit has found two common  
18 principles in Supreme Court law on the Rule 8 pleading standard:

19 First, to be entitled to the presumption of truth,  
20 allegations in a complaint . . . may not simply recite the  
21 elements of a cause of action, but must contain sufficient  
22 allegations of underlying facts to give fair notice and to  
23 enable the opposing party to defend itself effectively.

24 Second, the factual allegations that are taken as true must  
25 plausibly suggest an entitlement to relief, such that it is  
26 not unfair to require the opposing party to be subjected to  
27 the expense of discovery and continued litigation.

28 Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011), cert. denied, 80

1 U.S.L.W. 3462 (U.S. Apr. 30, 2012)(No. 11-834); see also Hydrick v.  
2 Hunter, 669 F.3d 937, 940-41 (9th Cir. 2012)(on Iqbal and Starr).

3 If the court finds that a complaint should be dismissed for  
4 failure to state a claim, the court may dismiss with or without leave  
5 to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000)(en  
6 banc). Leave to amend should be granted if it appears that defects  
7 can be corrected, especially if the plaintiff is pro se. Id. at 1130-  
8 31; see also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir.  
9 1995). If, however, after careful consideration, it is clear that a  
10 complaint cannot be cured by amendment, the court may dismiss without  
11 leave to amend. Cato, 70 F.3d at 1107-11.

#### 12 THE SECOND AMENDED COMPLAINT

13 Although Plaintiff is now at Pelican Bay State Prison, the SAC  
14 concerns events that allegedly occurred when he was at California  
15 State Prison, Los Angeles County ("CSP-LAC"), in this district. As  
16 noted above, the SAC names nine state prison officers as individual  
17 capacity defendants: (1) Chief Deputy Warden Fallon, (2) Captain  
18 Fortson, (3) Captain Henderson, (4) Lieutenant Harris, (5) Lieutenant  
19 Foote, (6) Sergeant Reaume, (7) Officer Luu, (8) Officer Clemons, and  
20 (9) Chairperson Fischer. [Caption, SAC p.1.]<sup>4</sup> Plaintiff seeks  
21 declaratory and injunctive relief and monetary damages. [SAC pp. 26-  
22 27.] He sets forth twelve "causes of action" ("COAs") as follows:

- 23 COA 1: First Amendment - Access to Courts;  
24 COA 2: First Amendment - Right to Association;  
25 COA 3: First Amendment - Right to Association and Speech;  
26 COA 4: First Amendment - Retaliation;

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28 <sup>4</sup> Plaintiff lists all nine in the caption but omits Defendant  
Foote in listing defendants in the body of the SAC. [SAC ¶¶ 3-10.]

1 COA 5: Eighth Amendment - Cruel and Unusual Punishment;  
2 COA 6: Conspiracy;  
3 COA 7: Fourteenth Amendment - State Created Liberty Interest;  
4 COA 8: Federal Due Process;  
5 COA 9: State Due Process;  
6 COA 10: Violation of Mandatory Duties - State Law;  
7 COA 11: Failure to Lawfully Administer, Train, and Supervise;  
8 COA 12: Due process.  
9 [SAC pp. 19-25.] COAs 9 and 10 assert state law claims; the other  
10 COAs assert federal civil rights claims under 42 U.S.C. § 1983 (and,  
11 for COA 6, 42 U.S.C. § 1985).

12 Plaintiff summarizes the basis for his complaint as follows:

13 This action arises from the defendants' practices, acts  
14 and/or policies which have caused Plaintiff to be wrongly  
15 placed and retained in the SHU [Security Housing Unit] on  
16 the basis of alleged prison gang association/member[ship].  
17 Defendants have wrongly placed and retained Plaintiff in the  
18 SHU:

- 19 a) without due process of law;
- 20 b) when Plaintiff is not a prison gang  
21 associate/member;
- 22 c) on [the] basis of Plaintiff's innocent association  
23 with other inmates;
- 24 d) in retaliation for Plaintiff's legitimate speech,  
25 association and past SHU term disciplinaries [sic] he's  
26 completed successfully;
- 27 e) Plaintiff was not given notice and an opportunity to  
28 present his views before being placed in segregation;

1 f) in spite of the fact that Plaintiff's speech and  
2 association with other inmates did not violate any law or  
3 prison rule;

4 g) when Plaintiff has not been charged [with] or found  
5 guilty of violating Title 15, California Code of Regulations  
6 (CCR) section 3023 (the prison regulation prohibiting gang  
7 activity) or any other regulation;

8 h) on the basis of invalid/void, false and expired/  
9 unreliable information;

10 i) for an extended period of time in conditions that  
11 adversely impact Plaintiff's physical and psychological  
12 well-being;

13 j) pursuant to Defendants' customs, official policies  
14 and underground regulations.

15 [SAC pp. 3-4.]

16 This is followed by a lengthy section captioned "Facts," in  
17 which, however, Plaintiff fails to give a clear and concise factual  
18 account of what he alleges actually happened in connection with his  
19 various claims. Instead, he jumps around chronologically, and mixes  
20 actual factual allegations, unsupported inferences, and legal  
21 conclusions. [SAC pp. 4-18.] The "Facts" section is also missing two  
22 pages in the SAC as submitted to the court: page 5 (part of ¶ 18 and  
23 all of ¶¶ 19-26) and page 16 (part of ¶ 53 and all of ¶¶ 54-59).

24 **DISMISSAL UNDER RULE 8**

25 The SAC does not provide the "short and plain statement of the  
26 claim showing that the pleader is entitled to relief" required under  
27 Rule 8 and the PLRA. Instead, much of the SAC consists of "labels and  
28 conclusions" or "formulaic recitation" in the form of Plaintiff's

1 causes of action. Iqbal, 556 U.S. at 678. Several of these "causes  
2 of action" do not state separate legal claims (for violations of  
3 federal or state law), but, instead, assert theories for why certain  
4 defendants are liable under the claims asserted under other causes of  
5 action. [See, e.g., COAs 6 (conspiracy) and 11 (failure to  
6 supervise).] Some causes of action appear to be duplications. Thus,  
7 e.g., Plaintiff claims that Defendants denied him due process of law  
8 under the Fourteenth Amendment when they caused him to be assigned to  
9 the SHU indefinitely as a gang member after an investigation that was  
10 procedurally flawed and came to an erroneous conclusion. It is not  
11 clear why Plaintiff appears to have spread this federal due process  
12 claim across three COAs: 7, 8, and 12. It is also not clear whether  
13 Plaintiff's Eighth Amendment claim in COA 5 basically duplicates his  
14 Fourteenth Amendment claim (by asserting that indefinite placement in  
15 the SHU after he was erroneously found to be a gang member is cruel  
16 and unusual punishment), or whether Plaintiff is asserting a separate  
17 Eighth Amendment claim (that indefinite placement in the SHU for being  
18 a gang member is cruel and unusual punishment even if the prisoner  
19 actually is a gang member). It is also not clear whether COAs 2 and 3  
20 present separate First Amendment claims, or are simply part of COA 4  
21 (that is, as a claim that Defendants violated Plaintiff's First  
22 Amendment rights by retaliating against him for exercising his rights  
23 to freedom of speech and association).

24 Plaintiff also has not clearly articulated his claims under the  
25 state constitution and state law in COAs 9 and 10, and he has not  
26 stated that he satisfied the requirements of the California Tort  
27  
28



1 Claims Act, Cal. Gov't Code sections 810 et seq.<sup>5</sup> A plaintiff who  
2 seeks to sue a public employee under California law must file a timely  
3 written claim with the proper officer or governmental body before  
4 bringing suit, and must plead that he or she has done so in his or her  
5 complaint. Cal. Gov't Code §§ 905 et seq. Pendant state law claims  
6 in a federal civil rights suit may be dismissed if the complaint fails  
7 to allege compliance with California Tort Claims Act procedures. See  
8 Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 627 (9th Cir.  
9 1988); see also, e.g., White v. City of Bakersfield, No. 1:11-CV-1692,  
10 2012 WL 273088, at \*4 (E.D. Cal. Jan. 30 2012)(citing Karim-Panahi,  
11 id.); Butler v. Los Angeles County, 617 F. Supp. 2d 994, 1001 (C.D.  
12 Cal. 2008).

13 Furthermore, in the SAC, Plaintiff has not set forth factual  
14 allegations in such a way as to (1) allow the court to understand with  
15 reasonable clarity what allegedly happened; (2) support the elements  
16 of Plaintiff's specific legal claims; and (3) show how specific  
17 defendants may be liable under specific legal claims. One particular  
18 problem in Plaintiff's statement of facts is that he has not clearly  
19 distinguished the events surrounding (a) his brief initial placement  
20 in administrative segregation during the investigation of his possible  
21 gang association, and (b) his indefinite placement in segregated  
22 housing as a result of that investigation.<sup>6</sup> This is important because  
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24 <sup>5</sup> The requirements of the California Tort Claims Act do not  
25 apply to Plaintiff's claims under federal law, and they are separate  
26 from the requirement, under federal law, that a prisoner exhaust  
administrative remedies before filing suit.

27 <sup>6</sup> As to the denial of Plaintiff's administrative appeals, it is  
28 not clear whether he is simply arguing that the denials were in error,  
or that the denials were, themselves, further due process violations.

1 the Supreme Court has held that a brief period of administrative  
2 segregation (e.g., thirty days) does not implicate a liberty interest  
3 so as to support a due process claim. Sandin v. Conner, 515 U.S. 472,  
4 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); see also Richardson v.  
5 Runnels, 594 F.3d 666, 672 (9th Cir. 2010)(post-Sandin case finding  
6 that administrative segregation for some fifteen days did not concern  
7 a due process liberty interest).

8 Under Sandin, whether a due process liberty interest exists  
9 depends on whether the change in the prisoner's confinement imposed an  
10 atypical and significant hardship in relation to the ordinary  
11 incidents of prison life. Sandin, 515 U.S. at 484. Here, Plaintiff  
12 may be able to assert a state-created liberty interest and a due  
13 process claim based on his indefinite placement in segregated housing  
14 (after having been found to be a gang member) if he can show that such  
15 indefinite placement does constitute such an atypical and significant  
16 hardship.<sup>7</sup> See, e.g., Wilkinson v. Austin, 545 U.S. 209, 223-24, 228,  
17 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005)(post-Sandin Supreme Court  
18 case on liberty interest in not being assigned to "super-max"  
19 facility); Jackson v. Carey, 353 F.3d 750, 755-57 (9th Cir. 2003)  
20 (remanding for factual consideration as to whether plaintiff could  
21 show whether conditions in his disciplinary segregation amounted to  
22 atypical and significant hardship under Sandin).

23 Finally, Plaintiff's claims for injunctive relief appear to be  
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25 <sup>7</sup> Plaintiff does not have a liberty interest directly under the  
26 due process clause in remaining in general population. See Wolff v.  
27 McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).  
28 Therefore, any due process claim challenging his placement in the SHU  
must depend on a liberty interest created by state law. The Supreme  
Court redefined the criteria for finding such state-created liberty  
interests in Sandin.

1 moot in light of his transfer to another prison. See Johnson v.  
2 Moore, 948 F.2d 517, 519 (9th Cir. 1991)(per curiam)(prisoner's claims  
3 for injunctive relief regarding prison conditions moot in light of  
4 transfer); Smith v. Marshall, No. CV 07-0864-JHN (PJW), 2011 WL  
5 2563289, at \*5 (C.D. Cal. May 10, 2011)(citing Johnson v. Moore).  
6 Because of Plaintiff's transfer to another institution, none of the  
7 named defendants would have the power to effect the injunctive relief  
8 Plaintiff seeks, and none of the officials in his present institution  
9 who might have that power are defendants in this action.

10 **LEAVE TO AMEND**

11 Accordingly, the SAC is subject to dismissal, but Plaintiff may  
12 be able successfully to amend as to at least some of his claims and  
13 Defendants. Plaintiff's claims are all related to the process by  
14 which he was placed in administrative segregation while he was  
15 investigated as a gang member, then found to be a gang member and  
16 placed indefinitely in segregated housing. He may be able to amend to  
17 state several claims under 42 U.S.C. § 1983 for violations of his  
18 federal constitutional rights.<sup>8</sup> For example, (1) he may be able to  
19 state a Fourteenth Amendment due process claim if he can plead that  
20 indefinite segregation involves a state-created liberty interest, and  
21 that he was denied this interest without receiving all the process  
22 that was due him. (2) He may be able to state a First Amendment  
23 retaliation claim if he can allege facts showing that Defendants  
24 investigated him and imposed segregation with the intention of

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27 <sup>8</sup> Plaintiff's allegations do not support a separate claim under  
28 42 U.S.C. § 1985, which requires a showing of racial (or some other  
limited class-based) discrimination. See Griffin v. Breckenridge, 403  
U.S. 88, 102-03, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971).

1 retaliating against him for having exercised his First Amendment  
2 rights. (3) He may be able to state a First Amendment access to court  
3 claim if he can allege facts supporting a claim that he was denied  
4 access to the courts in regard to filing a criminal appeal, habeas  
5 petition, or civil rights action, and that this denial of access  
6 resulted in an actual injury. See Lewis v. Casey, 518 U.S. 343, 356,  
7 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); Madrid v. Gomez, 190 F.3d  
8 990, 995-96 (9th Cir. 1999). [See also the discussion of access to  
9 court claims in this court's first memorandum and order, cited  
10 above.]<sup>9</sup>

11 In an amended complaint, Plaintiff must meet the pleading and  
12 substantive requirements set forth in Ashcroft v. Iqbal, as discussed  
13 above. That is, Plaintiff must set forth actual factual allegations  
14 sufficient to support his legal claims, and sufficient to connect  
15 individual named defendants to specific claims. Plaintiff's  
16 allegations must show that each defendant, including any supervisors,  
17 caused a deprivation through the defendant's own actions. Iqbal, 556  
18 U.S. at 676. The specific factors necessary to establish a federal  
19 civil rights violation, including, for example, any intent  
20 requirement, vary depending on the constitutional or other legal  
21 provision involved. See Iqbal, 556 U.S. at 676. The intent  
22 requirement for a particular violation is the same whether the  
23 defendant is a supervisor or a subordinate. Id.; see also Starr, 652  
24 F.3d at 1206-07.

25 Finally, Petitioner is, once again, advised that, if he does  
26 amend his complaint, a defendant may move to dismiss for failure to

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28 <sup>9</sup> If Plaintiff includes other claims in an amended complaint, he  
must show how he can overcome the defects discussed above.

1 exhaust administrative remedies, under 42 U.S.C. § 1997e(a).<sup>10</sup>

2 **ORDERS:**

3 It is therefore **ORDERED** as follows:

4 1. The Second Amended Complaint is dismissed with leave to  
5 amend.

6 2. Within thirty (30) days of the date of this order Plaintiff  
7 may file a Third Amended Complaint correcting the defects discussed  
8 above and complying with the following requirements:

9 (a) The "Third Amended Complaint" must bear the present case number  
10 "CV 08-5834-GHK(CW)."

11 (b) It must be complete in itself and may not incorporate by  
12 reference any part of any prior complaint.

13 (c) Plaintiff may not use "et al." in the caption, but must name each  
14 defendant against whom claims are stated in the Third Amended  
15 Complaint. (The clerk uses the caption to make sure that  
16 defendants are correctly listed on the docket.)

17 (d) Plaintiff may not add new parties without the court's permission.

18 3. If Plaintiff files an amended complaint, the court will  
19 issue further orders, as appropriate and as soon as possible; if not,  
20 the magistrate judge will recommend that this action be dismissed,  
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22 <sup>10</sup> Compliance with this exhaustion requirement is mandatory.  
23 Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 152 L. Ed. 2d 12  
24 (2002); Booth v. Churner, 532 U.S. 731, 739-40 & n. 5, 121 S. Ct.  
25 1819, 149 L. Ed. 2d 958 (2001). A prisoner challenging conditions of  
26 confinement must exhaust available administrative remedies before  
27 filing suit even if it would futile to do so. Booth, 532 U.S. at 740-  
28 41. Under § 1997e(a), an action must be dismissed unless the prisoner  
exhausted administrative remedies before filing suit. McKinney v.  
Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). Such failure to exhaust  
is an affirmative defense, which may be raised in an "unenumerated"  
motion to dismiss under Fed. R. Civ. P. Rule 12(b). Wyatt v. Terhune,  
315 F.3d 1108, 1117-1119 and n.9 (9th Cir. 2003).

1 without prejudice, for failure to prosecute and/or failure to comply  
2 with court orders, as well as for the reasons stated above.

3  
4 DATED: May 16, 2012

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CARLA M. WOHRLE  
United States Magistrate Judge