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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 LEE THAO,

12 Plaintiff,

13 v.

14 KATHLEEN DICKINSON, et al.,

15 Defendants.  
16

No. 11-cv-2235 KJM AC P

ORDER AND

FINDINGS AND RECOMMENDATIONS

17 Plaintiff is a state prisoner proceeding in pro per and in forma pauperis in this action for  
18 damages and declaratory relief filed pursuant to 42 U.S.C. § 1983. The original complaint (ECF  
19 No. 1) was dismissed on screening, and plaintiff was granted leave to amend. ECF No. 6. The  
20 First Amended Complaint (ECF No. 11) survived screening, and service was ordered on  
21 defendant Dickinson. ECF No. 14. On March 19, 2014, however, the court granted defendant's  
22 motion to dismiss the First Amended Complaint and again granted plaintiff leave to amend. ECF  
23 No. 38. Plaintiff has now filed a "Third Amended Complaint" ("Complaint") (ECF No. 48), with  
24 the aid of counsel appointed solely for the purpose of assisting with that filing.

25 Defendant Dickinson has now moved to have the Complaint screened pursuant to 28  
26 U.S.C. § 1915A. In light of the large number of new defendants plaintiff now seeks to sue, and  
27 plaintiff's apparent failure to address the bases for the dismissals of his earlier complaints, the  
28 court will grant defendant's motion and deem her motion to be the responsive pleading required

1 by Fed. R. Civ. P. 15(a)(3).

2 Apparently in response to the court's last dismissal order, plaintiff does add detail about  
3 which prison employees carried out which actions, and he drops the Equal Protection allegations.  
4 However, there is nothing in the remaining allegations, detailed below, that shows that plaintiff  
5 suffered a cognizable constitutional injury of any kind. Accordingly, and for the reasons outlined  
6 below, the undersigned recommends that the court dismiss the Complaint with prejudice.

## 7 I. THE COMPLAINT

8 On or about June 9, 2010, plaintiff, a prisoner, was handcuffed, placed in a holding cage,  
9 and ultimately placed in administrative segregation ("Ad-Seg"). Complaint (ECF No. 48)  
10 ¶¶ 28-31. In explanation, plaintiff was told that he was a suspect in a conspiracy to murder a  
11 CMF employee, and that he was under investigation. Id., ¶ 30.

12 On June 11, 2010, defendant J. Cates issued a "CDCR 114 Administrative Segregation  
13 Placement Notice," which, apparently, authorized plaintiff's placement in Ad-Seg. Id., ¶ 34. At  
14 some unspecified time, plaintiff "was served two further CDCR 114 placement orders." Id., ¶ 35.  
15 On June 15, 2010, defendant K.E. Providence issued another CDCR 114 notice. Id., ¶ 36.  
16 Plaintiff was given no help from a staff assistance or investigative employee in connection with  
17 these CDCR 114 notices. Id., ¶ 37. Plaintiff attended an "ASU-ICC Initial Review hearing" on  
18 June 15, 2010, at which the prison authorities apparently determined that plaintiff did not need  
19 help from a staff assistant or investigative employee. Id., ¶ 38.

20 A Notice of Classification Hearing was conducted on June 22, 2010. Id., ¶¶ 39-41. A  
21 "CDCR 128-G" issued from that hearing, determining that pending the investigation, "continued  
22 segregated placement [of plaintiff] was required." Id., ¶ 41. On June 25, 2010, defendant T. Lee  
23 notified plaintiff that the investigation was completed but that since plaintiff's participation in the  
24 conspiracy could neither be proved or disproved, Lee was recommending that plaintiff be  
25 transferred to another facility, "'due to the facts revealed in the investigation.'" Id., ¶ 42.

26 Plaintiff remained in Ad-Seg. Id., ¶ 43. On July 21, 2010, defendant Cates issued a  
27 CDC 114 notice, endorsed by defendant Flores, authorizing plaintiff's continued retention in Ad-  
28 Seg "until ICC ruled on the matter." Id., ¶¶ 43 & 45. On the same day, defendant Puig

1 “approved a 45 day extension” of an unexplained and unidentified July 22, 2010 ICC action that  
2 was taken to protect the investigation into the conspiracy to murder a staff employee. Id., ¶ 44.

3 Another hearing was held on July 27, 2010, at which defendant J. Gonzalez issued a  
4 “CDCR 128-G,” requiring plaintiff to be retained in segregation “in a ‘non-adverse’ transfer.”  
5 Id., ¶ 46. Plaintiff was denied access to the evidence against him at this hearing. Id., ¶ 47.

6 On August 19, 2010, plaintiff was given a “CDCR 1030 Confidential Information  
7 Disclosure Form” indicating that a confidential memorandum exists in plaintiff’s “confidential  
8 file” stating the he was “a threat to staff safety if released to CMF general population.” Id., ¶ 48.  
9 No information was provided plaintiff to back up this finding, however. Id. Plaintiff was  
10 transferred to Ad-Seg at the California Correctional Center on September 9, 2010, and ultimately  
11 released from Ad-Seg sometime before June 2011. Id., ¶ 50.

12 Plaintiff alleges that the conduct described above violated his rights under the Fifth,  
13 Eighth and Fourteenth Amendments to the U.S. Constitution. Id., ¶ 51. Plaintiff alleges that the  
14 following specific conduct was unlawful: failing to provide plaintiff with “adequate notice of the  
15 charges against him;” refusing to provide him with evidence relevant to his defense; failing to  
16 adequately assess the credibility and reliability of the evidence against him; finding plaintiff to be  
17 a threat in the absence of evidence linking him to a criminal conspiracy; retaining plaintiff in Ad-  
18 Seg without a basis for it; and retaining accusatory information in plaintiff’s file without a basis.  
19 Id.

## 20 II. ANALYSIS

21 The court has previously set out the standard for screening a complaint, and adopts that  
22 standard here. See ECF No. 6.

23 Plaintiff does not specify exactly what constitutional violations he is alleging, instead  
24 naming only the Fifth, Eighth and Fourteenth Amendments. The court presumes that plaintiff is  
25 alleging violation of his rights under the Due Process Clauses of the Fifth and Fourteenth  
26 Amendments, and his right to be free of cruel and unusual punishment under the Eighth  
27 Amendment.

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1           A.     Fourteenth Amendment Due Process

2           The court has already dismissed plaintiff's claims that were based upon his being held in  
3 Ad-Seg without due process of law, and his transfer to another institution without due process of  
4 law. See ECF No. ECF No. 31 at 8-9. In short, plaintiff's allegations fail to show that he has any  
5 protected liberty interest in being free from incarceration in Ad-Seg, or from being transferred to  
6 another institution. Without a liberty interest at stake, there can be no violation of the Due  
7 Process clause.

8           First, plaintiff has no freestanding right to be free from incarceration in Ad-Seg, or in  
9 being transferred to another facility. May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997) ("May's  
10 due process claim fails because he has no liberty interest in freedom from state action taken  
11 within the sentence imposed, and the Ninth Circuit explicitly has found that administrative  
12 segregation falls within the terms of confinement ordinarily contemplated by a sentence")  
13 (citation and internal quotation marks omitted), cert. denied, 522 U.S. 921 (1997).

14           Second, while California can create protected liberty interests enjoyed by prisoners, those  
15 interests are "generally limited to freedom from restraint which . . . imposes atypical and  
16 significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v.  
17 Conner, 515 U.S. 472, 484 (1995). Nothing in plaintiff's complaint alleges facts showing that  
18 Ad-Seg or the institution he was transferred to imposed such hardships on him, and accordingly,  
19 this claim should again be dismissed.

20           B.     Fifth Amendment Due Process

21           "[T]he Fifth Amendment's due process clause only applies to the federal government."  
22 Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008). The complaint contains no allegation  
23 of unconstitutional conduct by the federal government, and therefore this claim should be  
24 dismissed.

25           C.     Eighth Amendment

26           The Cruel and Unusual Punishments Clause of the Eighth Amendment protects prisoners  
27 from the imposition of wanton and unnecessary pain. See Wilson v. Seiter, 501 U.S. 294, 298  
28 (1991) (only conduct that constitutes the "unnecessary and wanton infliction of pain" violates the

1 Eighth Amendment). Nothing in the complaint alleges facts showing that plaintiff's placement in  
2 Ad-Seg, alone, imposed wanton and unnecessary pain on plaintiff, or deprived him of "the  
3 minimal civilized measure of life's necessities." Id. Nor does the complaint allege conditions in  
4 Ad-Seg that might rise to the level of an Eighth Amendment violation. Without such allegations,  
5 the complaint does not state an Eighth Amendment claim, and should be dismissed.

### 6 III. RECOMMENDATION

7 Plaintiff has three times failed to state a claim in this action. Plaintiff's most recent  
8 attempt, in which he was aided by counsel, repeats many of the allegations that the court had  
9 already found to be insufficient to state a claim. The most recent complaint not only fails to show  
10 the existence of constitutional violations, but if the facts alleged are true, the complaint appears to  
11 show affirmatively that no constitutional violations occurred.


12 Accordingly, IT IS HEREBY ORDERED that defendant's motion to have the "Third  
13 Amended Complaint" screened (ECF No. 49), is GRANTED.

14 Further, IT IS HEREBY RECOMMENDED that plaintiff's "Third Amended Complaint"  
15 (ECF No. 48), be DISMISSED with prejudice.

16 These findings and recommendations are submitted to the United States District Judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 21 days after  
18 being served with these findings and recommendations, any party may file written objections with  
19 the court and serve a copy on all parties. Such a document should be captioned "Objections to  
20 Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served  
21 and filed within 14 days after service of the objections. The parties are advised that failure to file  
22 objections within the specified time may waive the right to appeal the District Court's order.

23 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 DATED: January 14, 2015

25   
26 ALLISON CLAIRE  
27 UNITED STATES MAGISTRATE JUDGE  
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