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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ISAIAH JOEL PETILLO,
CDCR #T-44601,

Plaintiff,

vs.

SCOTT KEARNAN, et al.

Defendants.

Case No.: 3:16-cv-01950-MMA-JMA

**ORDER DISMISSING SECOND
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND § 1915A(b)**

I. Procedural History

On August 1, 2016, Isaiah Joel Petillo (“Plaintiff”), a prisoner incarcerated in Corcoran State Prison located in Corcoran, California, and proceeding *pro se*, filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. (Doc. No. 1.) Plaintiff alleged that prison officials at five separate prisons violated his constitutional rights when they

1 classified him with an “R” suffix¹. (Compl., Doc. No. 1 at 1, 10.) Plaintiff has named
2 thirty one (31) defendants in this matter. (*Id.* at 1-9.) Plaintiff did not prepay the civil
3 filing fee required by 28 U.S.C. § 1914(a) when he filed his Complaint; instead, he filed a
4 Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (Doc. No.
5 4).

6 On October 24, 2016, Plaintiff’s IFP motion was granted but his Complaint was
7 simultaneously dismissed for failing to state a claim upon which relief could be granted.
8 (Doc. No. 7 at 15-16.) On November 28, 2016, Plaintiff filed his First Amended
9 Complaint (“FAC”) and later filed a “Declaration in Support of Complaint.” (Doc. Nos.
10 8, 10.) However, the Court once again found that Plaintiff’s FAC failed to state a claim
11 upon which relief could be granted and dismissed his FAC. (Doc. No. 11 at 9-10.)
12 Plaintiff was again granted leave to file an amended pleading in order to correct the
13 deficiencies of pleading identified in the Court’s Order. (*Id.*) On March 9, 2017,
14 Plaintiff filed his Second Amended Complaint (“SAC”). (Doc. No. 12.)

15 **II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

16 **A. Standard of Review**

17 Because Plaintiff is a prisoner and is proceeding IFP, his SAC requires a pre-
18 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
19 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of
20 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
21 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
22 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
23 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
24 the targets of frivolous or malicious suits need not bear the expense of responding.’”
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27 ¹ Pursuant to Cal. Code Regs., tit. 15 § 3377.1(b), “[a]n ‘R’ suffix shall be affixed to an inmate’s
28 custody designation to ensure the safety of inmates, correctional personnel, and the general public by
identifying inmates who have a history of specific sex offenses as outlined in Penal Code (PC) section
290.”

1 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
2 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

3 “The standard for determining whether a plaintiff has failed to state a claim upon
4 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
5 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
6 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
7 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
8 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
9 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,
10 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
11 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

12 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
13 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
14 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
15 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
16 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
17 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
18 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
19 (9th Cir. 2009).

20 B. Rule 8

21 As a preliminary matter, the Court finds that Plaintiff’s SAC fails to comply with
22 Rule 8 of the Federal Rules of Civil Procedure. Rule 8 of the Federal Rules of Civil
23 Procedure provides that in order to state a claim for relief in a pleading it must contain “a
24 short and plain statement of the grounds for the court’s jurisdiction” and “a short and
25 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
26 8(a)(1) & (2).

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1 Here, Plaintiff’s SAC offers far less factual allegations than his Complaint. Instead
2 of setting for specific factual allegations to support his claims, Plaintiff cites to his
3 original Complaint. (*See* SAC at 2-6). However, Plaintiff was instructed by this Court
4 that if he elected to “file an Amended Complaint, it must be complete by itself without
5 reference to his original pleading.” (Doc. No. 11 at 9-10 *citing* S.D. CAL. CIVLR 15.1;
6 *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir.
7 1989) (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693
8 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which
9 are not re-alleged in an amended pleading may be “considered waived if not repled.”).
10 Plaintiff failed to follow this instruction in both his FAC and SAC.

11 In addition, throughout his SAC, Plaintiff simply lists a number of Defendants
12 without connecting them to any specific factual allegation. (*See* SAC at 6-8.) “The
13 pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it
14 demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.”
15 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

16 Thus, the Court finds that Plaintiff’s SAC plainly falls short of complying with
17 Rule 8 and the Court’s local rules, and for that reason alone, requires dismissal.

18 D. Fourteenth Amendment due process claims

19 Throughout Plaintiff’s SAC, he alleges that he has been housed at a number of
20 different institutions under the jurisdiction of the California Department of Corrections
21 and Rehabilitation (“CDCR”). The only allegations regarding Defendants at Calipatria
22 State Prison (“CAL”) involve the CAL institutional classification committee’s (“ICC”)
23 decision to apply an “R” suffix to Plaintiff in 2010. (*See* SAC at 2-3.) The Due Process
24 Clause protects prisoners against deprivation or restraint of “a protected liberty interest”
25 and “atypical and significant hardship on the inmate in relation to the ordinary incidents
26 of prison life.” *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (quoting *Sandin v.*
27 *Conner*, 515 U.S. 472, 484 (1995)) (internal quotation marks omitted).

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1 Although the level of the hardship must be determined in a case-by-case
2 determination, courts look to:

3 1) whether the challenged condition ‘mirrored those conditions imposed
4 upon inmates in administrative segregation and protective custody,’ and thus
5 comported with the prison’s discretionary authority; 2) the duration of the
6 condition, and the degree of restraint imposed; and 3) whether the state’s
7 action will invariably affect the duration of the prisoner’s sentence.

8 *Ramirez*, 334 F.3d at 861 (quoting *Sandin*, 515 U.S. at 486-87). Only if an inmate has
9 alleged facts sufficient to show a protected liberty interest does the court next consider
10 “whether the procedures used to deprive that liberty satisfied Due Process.” *Ramirez*, 334
11 F.3d at 860.

12 As currently pleaded, Plaintiff’s SAC fails to allege facts which show that having
13 an “R” suffix subjected him to any “atypical and significant hardship in relation to the
14 ordinary incidents of prison life.” *Id.*; *Sandin*, 515 U.S. at 584. Plaintiff claims that he
15 has suffered “atypical and significant hardship” because “parole board members will be
16 reluctant to give Plaintiff a parole date based on the “R” suffix classification.” (SAC at
17 9.) However, this is purely speculative on his part and he provides no factual allegations
18 as to whether he is eligible for parole or that there is any date for a parole hearing.

19 In addition, Plaintiff claims that the “R” suffix “restricts Plaintiff from enjoying the
20 privilege regular prisoners receive in regard to [conjugal] visitations with family &
21 friends.” (*Id.* at 10-11.) However, it is “well-settled that prisoners have no constitutional
22 right while incarcerated to contact visits or conjugal visits.” *Gerber v. Hickman*, 291
23 F.3d 617, 621 (9th Cir. 2002) (citing *Kentucky Dep’t of Corrs v. Thompson*, 490 U.S.
24 454, 460 (1989)).

25 Based on these claims alone, the Court finds his pleading contains no “factual
26 content that allows the court to draw the reasonable inference,” *Iqbal*, 556 U.S. at 678,
27 that Defendants’ actions “presented a dramatic departure from the basic conditions of
28 [Plaintiff’s] indeterminate sentence,” or caused him to suffer an “atypical” or “significant
hardship.” *Sandin*, 515 U.S. at 584-85.

1 However, even if Plaintiff has alleged facts sufficient to invoke a protected liberty
2 interest under *Sandin*, he fails to plead facts to plausibly show he was denied the
3 procedural protections the Due Process Clause requires. *See Iqbal*, 556 U.S. at 678;
4 *Ramirez*, 334 F.3d at 860 (citations omitted); *see also Brown v. Oregon Dep’t of Corr.*,
5 751 F.3d 983, 987 (9th Cir. 2014). Those procedures include: (1) written notice of the
6 charges at least 24 hours before the disciplinary hearing; (2) a written statement by the
7 fact-finder of the evidence relied on and reasons for the disciplinary action; (3) the right
8 to call witnesses and present documentary evidence if doing so will not jeopardize
9 institutional safety or correctional goals; (4) the right to appear before an impartial body;
10 and (5) assistance from fellow inmates or prison staff in complex cases. *Wolff v.*
11 *McDonnell*, 418 U.S. 539, 563-72 (1974); *Serrano v. Francis*, 345 F.3d 1071, 1079-80
12 (9th Cir. 2003). Plaintiff offers no factual allegations to support a finding that he was
13 denied his due process rights during his 2010 classification hearing.

14 Accordingly, the Court finds that Plaintiff’s SAC fails to state a procedural due
15 process claim as to any Defendant; therefore, his Fourteenth Amendment claims are also
16 subject to sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and
17 § 1915A(b)(1). *See Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

18 D. Eighth Amendment failure to protect claims

19 Plaintiff also alleges that he has been subjected to cruel and unusual punishment in
20 violation of his Eighth Amendment rights by having the “R” suffix classification. The
21 Eighth Amendment requires that prison officials take reasonable measures to guarantee
22 the safety and well-being of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994);
23 *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To state an Eighth Amendment
24 failure to protect claim, however, Plaintiff must allege facts sufficient to plausibly show
25 that (1) he faced conditions posing a “substantial risk of serious harm” to his health or
26 safety, and (2) the individual prison officials he seeks to hold liable were “deliberately
27 indifferent” to those risks. *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611 F.3d 1144,
28 1150 (9th Cir. 2010). To demonstrate deliberate indifference, Plaintiff must show that the

1 defendant both knew of and disregarded a substantial risk of serious harm to his health
2 and safety. *Farmer*, 511 U.S. at 837. Thus, Plaintiff must allege “the official [was] both
3 be aware of facts from which the inference could be drawn that a substantial risk of
4 serious harm exist[ed], and [that] he . . . also dr[e]w that inference.” *Id.*

5 There are no facts from which the Court could conclude that any Defendant acted
6 with “deliberate indifference” to a serious risk of harm to Plaintiff. Plaintiff does not
7 allege, in any way, that apart from having the “R” suffix that any named Defendant was
8 actually aware of any known, specific threats to Plaintiff’s safety. Plaintiff does not
9 allege that any of the named Defendants were aware that other inmates allegedly knew of
10 Plaintiff’s classification status.²

11 Here, the Court finds that Plaintiff fails to allege that any Defendant was aware of
12 any facts demonstrating an “obvious” risk and failed to take any action. *Farmer*, 511 U.S.
13 842; *see also Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003) (“Much like
14 recklessness in criminal law, deliberate indifference . . . may be shown by circumstantial
15 evidence when the facts are sufficient to demonstrate that a defendant actually knew of a
16 risk of harm.”).

17 For these reasons, the Court finds Plaintiff’s failure to protect claims against all
18 Defendants also must be dismissed for failing to state a claim pursuant to 28 U.S.C.
19 § 1915(e)(2)(b)(ii) and § 1915A(b)(1). *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at
20 1004.

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26 ² Plaintiff does allege Correctional Officer Gonzalez “told another correctional officer that “that dude
27 [Plaintiff] there is a rapist.” (SAC at 4.) However, Plaintiff indicates that Gonzalez is not a defendant in
28 this action and the Court takes judicial notice that Plaintiff is already bringing a separate action against
Gonzalez for claims he refers to in this action. *See Petillo v. Peterson, et al.*, E.D. Cal. Civil Case No.
1:16-cv-00488-MJS.

1 E. Leave to Amend

2 Finally, while Rule 15(a)(2) provides that “[t]he court should give leave [to amend]
3 freely when justice so requires,” the Court further finds that amendment under the
4 circumstances of this case would be futile. *See Vasquez v. Los Angeles County*, 487 F.3d
5 1246, 1258 (9th Cir. 2007) (citing *Schmier v. U.S. Court of Appeals for the Ninth Circuit*,
6 279 F.3d 817, 824 (9th Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis
7 for dismissal without leave to amend)).

8 **III. Conclusion and Order**

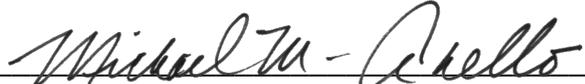
9 Good cause appearing, the Court:

10 **DISMISSES** Plaintiff’s Second Amended Complaint for failing to state a claim
11 upon which § 1983 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and
12 1915A(b)(1) and **DENIES** leave to amend as futile.

13 The Clerk of Court is instructed to close the file.

14 **IT IS SO ORDERED.**

15 DATE: April 26, 2017

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18 HON. MICHAEL M. ANELLO
19 United States District Judge
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