

1 Count II alleges that ESP's Institutional Operational Procedure (IP) 5.13 grants Warden
2 E.K. McDaniel the authority to adopt regulations and penalties that violate Nevada Revised
3 Statute § 209.361 and NDOC Administrative Regulations (ARs) 585 and 707. Plaintiff alleges
4 that IP 5.13 denies him a fair hearing, notice of charges, or appeal. (*Id.* at 6.)

5 Count III alleges that Plaintiff has been placed in administrative segregation as a
6 sanction for failing to cooperate in an informant program. (*Id.* at 8.) Plaintiff alleges that
7 various unnamed prison officials are using this classification status to continue to retaliate
8 against Plaintiff under the guise of protective segregation after he debriefed from a prison gang.
9 He also alleges that his requests for a full classification hearing and to be provided the
10 privileges of protective segregation have been denied. Plaintiff further alleges that there are
11 no penological concerns justifying his administrative segregation, as his debriefing was a
12 confidential matter that would not be known to the general prison population. (*Id.* at 9.)

13 Based on these allegations, Plaintiff alleges violations of his Eighth Amendment right
14 to be free from cruel and unusual punishment and his Fourteenth Amendment right to
15 procedural due process and equal protection for each of his claims. (*Id.*) Plaintiff seeks
16 declaratory and injunctive relief as well as damages. (Doc. #5 at 14-15.) Defendants move to
17 dismiss based on Eleventh Amendment immunity, lack of personal participation, and because
18 the lawsuit duplicates a pending action already before the court. (Doc. #16 at 2.)

19 III. DISCUSSION

20 **A. Defendants' Motion to Dismiss**

21 Before the court is Defendant's Motion to Dismiss. (Doc. #16.) Plaintiff has opposed.
22 (Doc. #25.) After a thorough review, the court orders that Defendants' motion be denied in
23 part and granted in part.

24 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for failure
25 to state a claim upon which relief can be granted. All allegations of material fact are construed
26 in the light most favorable to Plaintiff, taking any reasonable inferences drawn from them as
27 true. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). The plaintiff need only give
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1 defendants a fair notice of what the claim is and the grounds upon which it rests. *Erickson v.*
2 *Pardus*, 127 S.Ct. 2197, 2200 (2007). A Rule 12(b)(6) dismissal may arise from a lack of a
3 cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Johnson*
4 *v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (citing *Balistreri v.*
5 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). “Conclusory allegations of law and
6 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a
7 claim.” *In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993). At minimum, the
8 complaint should plead “enough facts to state a claim for relief that is plausible on its face.”
9 *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007).

10 *Pro se* complaint, however inartfully pleaded, must be held to less stringent standards
11 than formal pleadings drafted by lawyers. *Erickson*, 127 S.Ct. at 2200 (quoting *Estelle v.*
12 *Gamble*, 429 U.S. 97, 106 (1976)). The court must construe the pleadings liberally and afford
13 the plaintiff any benefit of the doubt. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).
14 However, sweeping conclusory allegations will not suffice. *Leer v. Murphy*, 844 F.2d 628, 634
15 (9th Cir. 1988). In giving liberal construction to a *pro se* civil rights complaint, the court is not
16 to supply essential elements of the claim that were not initially pled. *Ivey v. Bd. of Regents of*
17 *the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

18 **1. ELEVENTH AMENDMENT IMMUNITY**

19 The Eleventh Amendment bars federal courts from hearing suits brought against an
20 unconsenting state. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). This immunity
21 extends to state agencies administering prisons. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
22 1989). Accordingly, the State of Nevada, the Nevada Department of Corrections, and the
23 Nevada Board of Prison Commissioners should be dismissed from this lawsuit.

24 The Eleventh Amendment bar also extends to a federal court action for damages (or
25 other retroactive relief) brought by a citizen against state official acting in his official capacity.
26 *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1993) (citing *Edelman v. Jordan*, 415 U.S. 651,
27 664 (1974)). It will not, however, bar claims against the officials in their personal capacities.

1 *Hafer v. Melo*, 502 U.S. 21, 25 (1991). To the extent that the complaint can be construed as
2 alleging a damages claim against the named defendants in their official capacities, those claims
3 are dismissed. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1981).

4 **2. PERSONAL PARTICIPATION**

5 As indicated in the screening order dismissing Plaintiff's original complaint, a showing
6 of personal participation by a defendant is necessary for personal liability under a § 1983 claim.
7 *Taylor*, 880 F.2d at 1045. A supervisor is only liable for constitutional violations of his
8 subordinates if the supervisor participated in or directed the violations, or knew of the
9 violations and failed to act to prevent them. There is no respondeat superior liability under §
10 1983. *Id.* (citing *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81 (9th
11 Cir.1984)).

12 Defendants Skolnik and Doe #2 are named in the complaint as directors of the
13 Department of Corrections. Similarly, Defendant Gibbons and John Doe #1 are named in their
14 capacity as members of the Nevada Board of Prison Commissioners. While these defendants
15 had supervisory responsibilities over the Nevada prison system, Defendant has not alleged how
16 these defendants personally directed, participated in, or had knowledge of the alleged
17 misconduct by the prison officials at ESP. Thus, dismissal of these defendants is proper.

18 Defendants Peltzer and Chambliss are named as caseworkers at Ely State Prison. Even
19 liberally construing the pleadings and Plaintiff's opposition, the court is unable to discern
20 how these defendants personally participated in the alleged constitutional violations. Plaintiff
21 seems to name these defendants because they denied Plaintiff's grievances. This does not mean
22 that they played a role in the alleged constitutional violations. Plaintiff fails to plead any facts
23 sufficient to state a theory of supervisory liability based on their knowledge of the alleged
24 constitutional violations. Therefore, these defendants are dismissed.

25 Defendants rely on the same reasoning to move for dismissal of Defendants Warden E.K.
26 McDaniel, Associate Warden of Programs Adam Endel, and Associate Warden of Operations
27 Debra Brooks. Unlike the defendants discussed above, however, Plaintiff specifically alleges
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1 their role in the alleged deprivations. For example, Count I alleges that Warden McDaniel was
2 responsible for imposing the allegedly unlawful sanctions and directed the assistant wardens
3 to enforce them, and Count II contains similar allegations. *See, e.g.*, Doc. #25 at 3; Doc. #5 at
4 6. Therefore, dismissal of these defendants is denied.

5 With respect to Count III, the screening order (Doc. #3) granted Plaintiff leave to amend
6 his complaint to link the named defendants with an affirmative act or omission violating his
7 constitutional rights. *Id.* at 4 (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).
8 Count III of the amended complaint fails to remedy this deficiency, as it generally names the
9 prison administrators at Ely State Prison as responsible for the claims related to administrative
10 segregation. *See* Doc. #5 at 6A-6C. Plaintiff's opposition to the motion to dismiss does not
11 clarify against which defendants he is alleging these claims. Plaintiff has already been granted
12 leave to amend to properly plead this claim. Because of his failure to do so, the claim is
13 dismissed.

14 **3. DUPLICATIVE ACTIONS**

15 Defendant argue that this lawsuit should be dismissed because it duplicates Count II of
16 a previous filing, Case No. 3:07-CV-171-RAM ("the '171 action"). Where two lawsuits may be
17 duplicative, the court should "examine whether causes of action and relief sought, as well as
18 the parties or privies to action, are the same." *Adams v. Cal Dep't of Health Servs.*, 487 F.3d
19 684, 689 (9th Cir. 2007). In analyzing an identity between the causes of action, four criteria
20 are examined, with an emphasis on the last:

21 (1) whether rights or interests established in the prior judgment would be
22 destroyed or impaired by prosecution of the second action; (2) whether
23 substantially the same evidence is presented in the two actions; (3) whether the
two suits involve infringement of the same right; and (4) whether the two suits
arise out of the same transactional nucleus of facts.

24 *Id.* at 689 (citing *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir.1982)).

25 Count II of the '171 action alleges that Plaintiff suffered from procedural due process,
26 Eighth Amendment, and equal protection violations after he was punished for refusing to
27 return to his cell in the administrative segregation unit. Plaintiff alleges that the he was

1 justified in his actions because he believed his cellmate presented a danger to him. At the
2 disciplinary hearing, Plaintiff alleges that he was not provided an adequate opportunity to
3 present this defense. (Case No. '171, Doc. #16 at 8.) This is factually distinct from Count I of
4 the instant action, which challenges an additional set of sanctions that were imposed *after*
5 Plaintiff served his original punishment. (Doc. #5 at 5.) It is unclear whether that original
6 punishment refers to the same one in the '171 action for Plaintiff's to return to his cell. Even
7 if it were, however, the two lawsuits involve different causes of action.

8 Count II of this action is also distinct from Count II of the '171 action, as here Plaintiff
9 challenges more generally Warden McDaniel's ability to incorporate certain punishments into
10 the institutional procedures at his institution. That claim relies on a broader set of facts than
11 the specific incident Plaintiff complains about in the '171 action. Defendants do not explain
12 how these claims duplicate one another or why a ruling on one would impair the judgment on
13 the other. Therefore, their motion on this basis is denied.

14 **B. Plaintiff's Motion for Summary Judgment**

15 Before the court is Plaintiff's Motion for Summary Judgment. (Doc. #25.) Defendants
16 have opposed (Doc. #43), and Plaintiff has replied (Doc. #46). The motion is denied.

17 The purpose of summary judgment is to avoid unnecessary trials when there is no
18 dispute as to the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
19 F.3d 1468, 1471 (9th Cir. 1994). All reasonable inferences are drawn in favor of the non-moving
20 party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*,
21 477 U.S. 242, 244 (1986)). Summary judgment is appropriate if "the pleadings, the discovery
22 and disclosure materials on file, and any affidavits show that there is no genuine issue as to any
23 material fact and that the movant is entitled to judgment as a matter of law." *Id.* (citing
24 Fed.R.Civ.P. 56(c)). Where reasonable minds could differ on the material facts at issue,
25 however, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441
26 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996).

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1 Under the Due Process Clause, a prisoner is entitled to certain procedural protections
2 when he is charged with a disciplinary violation. *Wolff v. McDonnell*, 418 U.S. 539, 564-571
3 (1974). These protections include the rights to call witnesses, to present documentary evidence
4 and to have a written statement by the factfinder as to the evidence relied upon and the reasons
5 for the disciplinary action taken. *Id.* However, these protections only apply when the
6 disciplinary action implicates a protected liberty interest in some “unexpected matter” or
7 imposes an “atypical and significant hardship on the inmate in relation to the ordinary
8 incidents of prison life.” *Sandin v. Connor*, 515 U.S. 472, 484 (1995). The inquiry into whether
9 a prison hardship is atypical and significant is determined by three factors: (1) whether the
10 challenged condition “mirrored those conditions imposed upon inmates in administrative
11 segregation and protective custody” and thus comported with the prison's discretionary
12 authority; (2) the duration of the condition and degree of restraint imposed; and (3) whether
13 the state's action will invariably affect the duration of the prisoner's sentence. *Id.* at 486-87.

14 In this case, Plaintiff offers inadequate evidence to prove his claims that the sanctions
15 imposed an undue hardship. Plaintiff's discipline consisted of the revocation of the following
16 privileges: personal phone calls for 180 days, electrical appliances for 180 days, personal visits
17 for one year, canteen privileges for 180 days, and package privileges for two years. The extent
18 to which these privileges are granted to other inmates is a material fact not addressed by the
19 evidence submitted by Plaintiff. The fact that they are denominated as “privileges” suggests
20 that they are not rights created by state law that could give rise to a due process liberty interest.
21 There is also no evidence that these are privileges normally accorded to inmates in
22 administrative segregation or that this was an unusual punishment for Plaintiff's disciplinary
23 offense. These are material facts that go to the seriousness of the deprivation alleged by
24 Plaintiff.

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1 Even assuming he stated a constitutionally protected liberty interest, it is unlikely that
2 Plaintiff was deprived of due process. Plaintiff argues that he was denied a hearing when he
3 was disciplined under IP 5.13. However, Plaintiff was provided with a notice of charges and
4 disciplinary hearing when he was initially sanctioned under the ARs. See Doc. #25 at 11-13
5 [notice of charges and summary of disciplinary hearing]. After reviewing the various
6 regulations and statutes cited by Plaintiff, the court finds no requirement that Plaintiff receive
7 a second hearing before the Warden could impose additional penalties under an IP for the same
8 offense. Neither is there any indication that the ARs prescribe the exclusive means for Plaintiff
9 to be punished or establish a maximum punishment for an offense. While AR 105.01-10 forbids
10 an IP that “supersede[s]” the ARs, it is silent on whether a punishment may be enhanced.
11 Therefore, the mere fact that Plaintiff did not receive a rehearing for his disciplinary violation
12 does not prove that he is entitled to summary judgment on procedural due process grounds.

13 **C. Motions for Preliminary Injunction**

14 Before the court are duplicative motions for preliminary injunction filed by Plaintiff.
15 (Docs. #13 and #34) consisting of requests for documents and access to legal copywork. These
16 requests are not properly brought in a motion for preliminary injunction and are therefore
17 denied. If Defendants’ recent good faith efforts to comply with his requests are still not
18 satisfactory, Plaintiff is ordered to follow the proper procedure for requesting documents
19 pursuant to Rule 34 of the Federal Rules of Civil Procedure. Plaintiff’s request for legal
20 copywork is moot, as this issue was resolved during a motion hearing for the ‘171 case held on
21 January 21, 2009 (Case No. ‘171, Doc. #117) and is demonstrated by the voluminous exhibits
22 he has included with his opposition to his motion for summary judgment. (Doc. # 46.) If
23 Plaintiff again encounters problems with obtaining copies, he is instructed to file a one-page
24 motion with the court.

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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that:

- 3 • The Motion to Dismiss (Doc. #16) is **GRANTED IN PART** with respect to
4 Defendants State of Nevada in relation to the Nevada Department of Corrections,
5 Nevada Board of Prison Commissioners, Governor Jim Gibbons, John Doe #1,
6 Howard Skolnick, John Doe #2, Harry Peltzer, and Robert Chambliss and **DENIED**
7 **IN PART** with respect to Defendants E.K. McDaniel, Adam Endel, and Debra
8 Brooks;
- 9 • The Motion to Dismiss the complaint for being a duplicative action is **DENIED**;
- 10 • The Motion to Dismiss Count III of the Amended Complaint is **GRANTED**;
- 11 • Plaintiff's Motion for Summary Judgment (Doc. #25) is **DENIED**; and
- 12 • Plaintiff's Motions for Preliminary Injunction (Docs. #13 and #34) are **DENIED**.

13 DATED: March 11, 2009.

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16 UNITED STATES MAGISTRATE JUDGE
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