

1 JULES LOBEL (*pro hac vice*)  
ALEXIS AGATHOCLEOUS (*pro hac vice*)  
2 RACHEL MEEROPOL (*pro hac vice*)  
CENTER FOR CONSTITUTIONAL RIGHTS  
3 666 Broadway, 7th Floor  
New York, New York 10012  
4 Tel: 212.614.6432  
Fax: 212.614.6499  
5 Email: jll4@pitt.edu

6

7 (Additional counsel listed on signature page)

8

9

**UNITED STATES DISTRICT COURT**

10

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11

**OAKLAND DIVISION**

12

TODD ASHKER, et al.,

Case No.: 4:09-cv-05796-CW

13

Plaintiffs,

CLASS ACTION

14

v.

**REPLY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
LEAVE TO FILE A  
SUPPLEMENTAL COMPLAINT**

15

GOVERNOR OF THE STATE OF  
CALIFORNIA, et. al.,

16

Defendants.

Judge: Honorable Claudia Wilken

17

18

19

20

21

22

23

24

25

26

27

28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION.....	1
ARGUMENT .....	3
I. Plaintiffs’ Supplemental Claim Is Closely Related to Their Initial Eighth Amendment Claim .....	3
II. Plaintiffs’ Motion to Supplement Should Be Granted .....	6
A. Supplementing the Complaint Will not Prejudice Defendants, nor Are Plaintiffs Guilty of Undue Delay .....	6
B. Plaintiffs’ Motion to Supplement Is not Futile.....	8
III. Plaintiffs Transferred from Pelican Bay SHU Retain Live Claims .....	9
A. Certified Class Representatives May Continue to Represent a Class Even if Their Individual Interests Become Moot.....	10
B. The Individual Plaintiffs’ Claims Are not Moot .....	10
IV. The Court Need not Vacate all Pending Litigation Dates .....	14
CONCLUSION .....	14



## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Albino v. Baca</i> , 747 F.3d 1162 (9th Cir. 2013) (en banc).....	9
<i>Betts v. Reliable Collection Agency, Ltd.</i> , 659 F.2d 1000 (9th Cir. 1981).....	11
<i>Burke v. Steadman</i> , Civil No. 13-CV-0582-DMS (WVG), 2014 U.S. Dist. LEXIS 52243 (S.D. Cal. Jan. 27, 2014)13	
<i>Cohea v. Pfler</i> , No. 2:00-cv-2799 GEB EFB, 2013 U.S. Dist. LEXIS 26247 (E.D. Cal. Feb. 25, 2013) .....	11
<i>Demary v. Arpaio</i> , 378 F.3d 1020 (9th Cir. 2004).....	11
<i>Dilley v. Gunn</i> , 64 F.3d 1365 (9th Cir. 1995).....	11
<i>Glickman v. Wileman Bros. &amp; Elliott, Inc.</i> , 521 U.S. 457 (1997) .....	12
<i>Hirst v. Gertzen</i> , 676 F.2d 1252 (9th Cir. 1982).....	6
<i>Jones v. Bock</i> , 549 U.S. 199 (2007) .....	9
<i>Keith v. Volpe</i> , 858 F.2d 467 (9th Cir. 1988).....	4
<i>La Duke v. Nelson</i> , 762 F.2d 1318 (9th Cir. 1985).....	10
<i>Norman-Bloodsaw v. Lawrence Berkeley Lab.</i> , 135 F.3d 1260 (9th Cir. 1998).....	11, 12, 13
<i>Northwest Envtl. Defense Center v. Gordon</i> , 849 F.2d 1241 (9th Cir. 1988).....	12
<i>Padilla v. Nev. Dep't of Corr.</i> , 510 Fed. Appx. 629 (9th Cir. 2013) .....	12
<i>Peck v. McDaniel</i> , Case No.: 2:12-cv-01495-JAD-PAL, 2014 U.S. Dist. LEXIS 166858 (D. Nev. Dec. 1, 2014)13	
<i>Planned Parenthood of So. Arizona v. Neely</i> , 130 F.3d 400 (9th Cir. 1997).....	4

1 *Pratt v. Rowland*,  
 769 F. Supp. 1128 (N.D. Cal. 1991) ..... 3, 4, 8

2

3 *Rivera v. Dyett*,  
 No. Civ. 4707 (PKL), 1993 U.S. Dist. LEXIS 1689 (S.D.N.Y. Feb. 16, 1993) ..... 3, 8

4 *Rouser v. White*,  
 No. CIV S-93-0767, 2009 U.S. Dist. LEXIS 122244 (E.D. Cal. Dec. 10, 2009) ..... 3

5

6 *Save Our Sonoran, Inc. v. Flowers*,  
 No. CV-02-0761-PHX-SRB, 2006 U.S. Dist. LEXIS 26185 (D. Az. May 2, 2006) ..... 12

7 *Sosna v. Iowa*,  
 419 U.S. 393 (1975) ..... 10

8

9 *United States v. Concentrated Phosphate Export Ass’n*,  
 393 U.S. 199 (1968) ..... 11

10 *United States v. Ohio*,  
 No. 2:08-CV-00475, 2014 U.S. Dist. LEXIS 42159 (S.D. Ohio Mar. 28, 2014) ..... 4

11

12 *United States v. W.T. Grant Co.*,  
 345 U.S. 629 (1953) ..... 11

13 *Verinata Health, Inc. v. Sequenom, Inc.*,  
 No. C 12-00865 SI, 2014 U.S. Dist. LEXIS 67221 (N.D. Cal. May 14, 2014) ..... 6

14

15 *Walker v. Life Ins. Co. of the Southwest*,  
 No. CV 10-9198 JVS (RNBx), 2012 U.S. Dist. LEXIS 186296 (C.D. Cal. Nov. 9, 2012) ..... 11

16 *Warren v. Wyant*,  
 563 Fed. Appx. 576 (9th Cir. 2014) ..... 13

17

18 *Wingate v. Gives*,  
 No. 05 Civ. 1872 (LAK) (DF), 2009 U.S. Dist. LEXIS 12592 (S.D.N.Y. Feb. 13, 2009) ..... 3, 8

19 **FEDERAL RULES AND STATUTES**

20 28 U.S.C. § 1391(b) ..... 9

21 Cal. Code Regs. Tit 15 § 3378.3(b)(1)-(3) ..... 12

22 Cal. Code Regs. Tit 15 § 3378.3(a)(1)-(5) ..... 12

23 F.R.Civ.P. 15 ..... 4

24 F.R.Civ.P. 15(d) ..... 1, 3

25 F.R.Civ.P. 23(a) ..... 10

26

27

28

**INTRODUCTION**

1  
2 In response to Plaintiffs' legal challenge and to peaceful protest by thousands of California  
3 prisoners, Defendants have enacted a series of prison reforms: after *decades* of warehousing  
4 prisoners in torturous confinement based on mere gang association, California claims to have  
5 changed its ways. Plaintiffs' motion to supplement the complaint would hold them to this claim,  
6 ensuring this Court's power to review whether the ten named Plaintiffs who brought this case have  
7 indeed achieved the relief they originally sought for themselves and hundreds of similarly situated  
8 Pelican Bay prisoners: release from prolonged and unjustified solitary confinement and relief from  
9 its continuing effects.

10 Plaintiffs' supplemental complaint would thus add one new claim on behalf of a new class  
11 of prisoners with two main characteristics in common: 1) they have spent over ten continuous  
12 years at the Pelican Bay SHU; and 2) they were subsequently transferred from Pelican Bay to Step  
13 Three or Step Four at another SHU, where they continue to spend over 22 hours a week in solitary  
14 confinement. The supplemental complaint does not assert that the placement of a prisoner in any  
15 SHU in California violates the constitution. Rather, Plaintiffs seek to challenge a continuing  
16 constitutional violation resulting from CDCR's transfer to a second SHU of prisoners whose  
17 Eighth Amendment rights were violated by ten years of unjustified isolation in the Pelican Bay  
18 SHU. Because the predicate for the supplemental class is that all members have spent at least ten  
19 years in the Pelican Bay SHU, this claim is deeply connected to Plaintiffs' original Eighth  
20 Amendment claim, and thus is appropriate for a Rule 15(d) motion. Moreover, it is only made  
21 necessary by Defendants' gamesmanship in reaction to Plaintiffs' initial litigation and organizing  
22 success.

23 Success on this motion does not require that conditions in the Tehachapi SHU exactly  
24 mirror those at Pelican Bay; indeed, Plaintiffs have explicitly noted some differences between the  
25 two SHUs. See Pls.' Proposed Supplemental Compl. ("SC") ¶ 203, Dkt. No. 345-1. What is  
26 relevant is that the heart of Plaintiffs' complaint – 22 plus hours of solitary confinement a day –  
27  
28

1 has not yet been remedied. California cannot defeat Plaintiffs’ challenge to prolonged and  
2 torturous solitary confinement merely by changing the site of Plaintiffs’ abuse.

3 Plaintiffs also seek to add allegations related to the Step Five Plaintiffs. Under either  
4 complaint, Plaintiffs’ individual claims have not been dismissed, and thus they currently remain in  
5 the case. *See* Def.’s Opp’n to Pls.’ Mot. for Leave to File a Supplemental Compl. (“Def. Opp.”) at  
6 8, Dkt. # 362 (acknowledging that transferred Plaintiffs have not been dismissed from the case).  
7 Plaintiffs do not seek to bring a new claim on behalf of prisoners transferred to Step Five, but  
8 rather to add allegations in support of their argument that *all* the individual Plaintiffs’ two original  
9 claims – as set forth in the Second Amended Complaint – have not been mooted by Defendants’  
10 voluntary cessation of unconstitutional treatment.

11 In response to the transferred Plaintiffs’ supplemental allegations, Defendants resort to  
12 misdirection and alarmist hyperbole. Plaintiffs’ supplemental complaint *does not* add claims  
13 arising from “every CDCR institution throughout the state.” Def. Opp. at 4; *see also id.* at 2, 5, 6  
14 (repeating the false assertion that Plaintiffs are seeking to challenge CDCR general population  
15 units). As stated in Plaintiffs’ opening motion, Step Five Plaintiffs “do not seek to supplement the  
16 complaint for the purpose of challenging [step five] conditions . . . they seek only to clarify their  
17 right to continue in this litigation as *individual plaintiffs*.” Pls.’ Mem. of P. & A. in Support of  
18 Mot. for Leave to File a Supplemental Compl. (“Op. Br.”) at 4. For the Court’s ease (and to  
19 address Defendants’ substantial confusion on this issue), Plaintiffs have included a chart of current  
20 and proposed claims; it is attached as Exhibit A.

21 Along with blatantly mischaracterizing Plaintiffs’ proposed supplemental complaint,  
22 Defendants insist that supplementing the complaint will prejudice them by leading to more work,  
23 and that Plaintiffs unduly delayed their motion. But, as explained below, Plaintiffs moved as soon  
24 as Defendants finalized their frequently shifting reforms. And a change in case deadlines (which  
25 could be minimal or even avoided altogether, *see infra*), need not be prejudicial.

26 Finally, Defendants allude to a bevy of undeveloped and unsupported arguments, including  
27 exhaustion, venue, and joinder without citing any cases or even explaining their theories. Beneath  
28

1 this bluster lies the unavoidable truth: Plaintiffs’ motion meets all of Rule 15(d)’s requirements. It  
2 is not an attempt to “greatly expand the scope of this litigation,” but simply an effort to achieve the  
3 very same relief the ten named Plaintiffs and proposed class originally sought: release from  
4 solitary confinement, and relief from the continuing impact of ten years in the Pelican Bay SHU.

## 5 ARGUMENT

### 6 I. Plaintiffs’ Supplemental Claim Is Closely Related to Their Initial Eighth Amendment 7 Claim

8 Step Three and Four Plaintiffs seek to supplement the complaint (and ultimately to certify  
9 a class), to challenge their ongoing solitary confinement as cruel and unusual. Defendants’ bare  
10 assertion that this supplemental claim “is only tangentially related to the Eighth Amendment claim  
11 certified by the Court over seven months ago” does not make it so. Def. Opp. at 3.

12 Prisoners are frequently transferred between facilities. Where the *same* alleged  
13 constitutional violation occurs in a new location, motions to supplement are frequently granted.  
14 *See, e.g., Rouser v. White*, No. CIV S-93-0767, 2009 U.S. Dist. LEXIS 122244, at \*13-14 (E.D.  
15 Cal. Dec. 10, 2009) (granting prisoner’s motion to supplement complaint to include allegations of  
16 retaliation and ongoing interference with religious practice by new defendants after transfer to new  
17 prison); *Rivera v. Dyett*, No. Civ. 4707 (PKL), 1993 U.S. Dist. LEXIS 1689, at \*19-20 (S.D.N.Y.  
18 Feb. 16, 1993) (granting prisoner’s motion to supplement complaint to include allegations of  
19 continuing failure to provide suitable conditions of confinement in light of medical needs, even  
20 though “the supplemental facts involve a different time period and location”); *see also Wingate v.*  
21 *Gives*, No. 05 Civ. 1872 (LAK) (DF), 2009 U.S. Dist. LEXIS 12592, at \*20 (S.D.N.Y. Feb. 13,  
22 2009) (granting prisoner’s motion to supplement complaint to include allegations of same  
23 defendants’ continued failure to provide medically-prescribed diet during a subsequent period of  
24 incarceration).

25 The decision in *Pratt v. Rowland*, 769 F. Supp. 1128, 1129-30 (N.D. Cal. 1991) is  
26 particularly instructive in this regard. In that case, Elmer “Geronimo” Pratt, a former Black  
27 Panther leader, filed an initial complaint challenging allegedly false charges and retaliatory  
28

1 transfers by CDCR officials and won a preliminary injunction ordering that he be returned to his  
2 initial prison. Following a second transfer, Pratt moved to supplement his complaint to allege new  
3 facts regarding his continued mistreatment at Tehachapi prison as examples of the *same*  
4 *continuing unlawful retaliation*. *Id.* at 1130. California opposed, arguing just as they do here, that  
5 the Tehachapi allegations gave rise to new claims related to distinct events. *Id.* at 1131. The court  
6 disagreed, noting that supplemental pleadings need only bear “‘some relationship’ to the subject of  
7 the original action,” and the test was met where the proposed supplemental complaint “merely  
8 seeks to demonstrate that prison officials have continued their long history of purported retaliatory  
9 action against Pratt.” *Id.* (quoting *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988)).

10       Were motions to supplement not granted after prisoner transfers, states could avoid  
11 constitutional review of questionable policies simply by moving prisoners to new facilities but  
12 continuing the same violation. Thus in *United States v. Ohio*, No. 2:08-CV-00475, 2014 U.S.  
13 Dist. LEXIS 42159, at \*10-11 (S.D. Ohio Mar. 28, 2014), the United States sought leave to file a  
14 supplemental complaint post-consent decree to address its concern that defendant State of Ohio  
15 was transferring youth in its care to other state facilities to avoid its obligations to limit the  
16 seclusion of youth in facilities covered by the consent decree. The State argued prejudice and  
17 delay, urging that the United States should instead have to file a separate lawsuit to address the  
18 new constitutional violations at new facilities. *Id.* at \*19. The court disagreed, as that would  
19 require “precisely the sort of piecemeal litigation and needless waste of judicial resources that  
20 Rule 15 was designed to avoid.” *Id.*

21       A continuing constitutional violation that spans different locales must be distinguished  
22 from a “separate, distinct, and new cause of action” that bears no relation to the original claim.  
23 Def. Opp. at 3 (citing *Planned Parenthood of So. Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir.  
24 1997)). The latter is more likely to arise where a prisoner seeks to challenge individual officers’  
25 actions, or abuse that is imposed despite (rather than pursuant to) prison policy. Thus, a prisoner  
26 would be unlikely to prevail on a motion to supplement his claim of an illegal beating at prison A  
27 with allegations of a separate beating, by a different guard and for a different reason, at prison B.

1 But where a prisoner is subjected *as a matter of policy* to regular mistreatment at prison A,  
2 inadequate food, for example, and is then transferred to prison B where provision of inadequate  
3 food continues under the same policy, the claims are closely related, and a supplemental complaint  
4 serves judicial efficiency.

5 Because Plaintiffs' supplemental claim includes their earlier confinement at Pelican Bay,  
6 rather than merely addressing their current solitary confinement at a Step Three or Four SHU,  
7 supplementing the complaint (rather than filing a new case) preserves judicial resources even more  
8 clearly than do the above examples. The first issue in the supplemental claim is identical to the  
9 factual and legal question raised by the class already certified by this Court, namely, whether ten  
10 years or more of confinement at the Pelican Bay SHU violates the Constitution. Identical issues  
11 are more efficiently considered by one court than by two.

12 If the Court answers this first question in the affirmative, only then does the second issue  
13 raised by the proposed supplemental claim become relevant: whether transfer of a prisoner who  
14 has spent over ten years at the Pelican Bay SHU to another California SHU *continues* the  
15 constitutional violation already suffered by these prisoners, or instead *remedies* that violation.  
16 Plaintiffs allege the former. *See* SC ¶ 204 ("The limited out-of-cell programming and social  
17 interaction these plaintiffs and class members receive on Steps Three and Four is wholly  
18 inadequate to repair the extreme injuries caused by their prolonged solitary confinement at the  
19 Pelican Bay SHU."); ¶ 213 ("The Eighth Amendment violations alleged in the Second Amended  
20 Complaint have not been remedied; they continue unabated in a new location.").

21 This second question is also closely related to the original Eighth Amendment claim  
22 because it is almost certain to arise should the Court find an Eighth Amendment violation on the  
23 current complaint. Defendants have already stated their position that "CDCR's new Security  
24 Threat Group regulations and step-down program address and remedy the very constitutional  
25 claims Plaintiffs asserted in their second amended complaint." Def. Opp. at 8. Plaintiffs disagree  
26 and will assert that the Step Down program continues CDCR's constitutional violation. Thus, the  
27  
28

1 issue will necessarily be explored should Plaintiffs prevail on liability, regardless of whether or  
 2 not the motion to supplement is granted.<sup>1</sup>

3 In line with this analysis, Plaintiffs' supplemental claim is *not* "separate and distinct" from  
 4 their original Eighth Amendment claim. Def. Opp. at 3. Were Step Three and Four Plaintiffs  
 5 instead forced to bring a new case, another judge would have to replicate this Court's analysis of  
 6 the constitutionality of ten years at the Pelican Bay SHU, before considering the constitutionality  
 7 of continuing solitary confinement, which would in turn replicate this Court's analysis of the  
 8 proper remedy. These are precisely the inefficiencies Rule 15(d) is designed to avoid.

9 **II. Plaintiffs' Motion to Supplement Should Be Granted**

10 Given that Plaintiffs' supplemental claim is closely related to their original Eighth  
 11 Amendment claim, leave to supplement is appropriate absent prejudice, undue delay or futility.  
 12 *See Verinata Health, Inc. v. Sequenom, Inc.*, No. C 12-00865 SI, 2014 U.S. Dist. LEXIS 67221, at  
 13 \*5 (N.D. Cal. May 14, 2014). Defendants' argument as to each is unavailing.

14 **A. Supplementing the Complaint Will not Prejudice Defendants, nor Are**  
 15 **Plaintiffs Guilty of Undue Delay**

16 In response to Plaintiffs' proposed supplemental complaint, the only "prejudice"  
 17 Defendants identify is that responding to the new complaint would require them to do more work.  
 18 *See* Def. Opp. at 5-6. Defendants are correct that discovery thus far has focused on Pelican Bay,  
 19 and that some additional discovery into conditions at Step Three and Four SHUs will be required.  
 20 Currently, most Step Three and Four prisoners are housed at Tehachapi, so additional discovery

21  
 22  
 23 <sup>1</sup> Given this dynamic, one method of addressing the supplemental complaint without delaying the  
 24 trial would be to bifurcate questions of liability and remedy. Such bifurcation is perfectly  
 25 appropriate in a civil rights or prisoner case. *See, e.g., Hirst v. Gertzen*, 676 F.2d 1252, 1261-62  
 26 (9th Cir. 1982) (bifurcated trial appropriate in civil rights challenge to prisoner's death in custody).  
 27 Plaintiffs see no obstacle to maintaining the current trial schedule of December 2015 to try the  
 28 original question before this Court, raised also by the supplemental class, as to whether ten or  
 more continuous years at the Pelican Bay SHU violates the Eighth Amendment. If the Court  
 answers this question in the affirmative, it could then notice a remedy hearing for some later date,  
 at which the Court could consider remedy in conjunction with the supplemental class claim of a  
 continuing violation through detention in a Step Three or Four SHU.

1 should be discrete.<sup>2</sup> Defendants’ alarmist insistence otherwise notwithstanding, there is simply no  
2 reason why Plaintiffs would possibly need further discovery into conditions at “general population  
3 units statewide” (Def. Opp. at 6), as Plaintiffs do not assert any claims regarding conditions at  
4 CDCR general population units. And if the Court is concerned that even minimal additional  
5 discovery will affect the current trial date, Plaintiffs’ suggestion of bifurcating liability and remedy  
6 (*see supra*, n. 1) could address this concern. The common issue of whether ten years of Pelican  
7 Bay SHU confinement violates the Eighth Amendment could be tried in December 2015, and if  
8 Plaintiffs prevail, the Court could schedule a remedy hearing to determine whether transfer to a  
9 Step Three or Four SHU continues or remedies the constitutional violation.

10 Defendants also claim undue delay. According to them, Plaintiffs should have moved for  
11 leave to supplement the complaint while CDCR’s reform program was in its pilot stage.  
12 Defendants do not acknowledge nor address the fact that the pilot program was revised twice after  
13 it was initially proposed, before being finalized with *more revisions* in October of 2014. SC ¶  
14 177. Hindsight proves Plaintiffs’ course to be a reasonable and efficient one.

15 Defendants insist that Plaintiffs “had no reason to wait until they personally received the  
16 results of a Department Review Board hearing” to move to supplement (Def. Opp. at 6), but this  
17 ignores the realities of civil litigation. Of course Plaintiffs (and class counsel) needed to  
18 investigate the factual underpinnings of their new claim before bringing it. Moreover, class  
19 actions require the identification of class representatives and the factor of numerosity, both of  
20 which needed to be in place before Plaintiffs could move to supplement. Defendants fault  
21 Plaintiffs for failing to announce their plans at the June 4, 2014 scheduling conference, but at that  
22 time only two Plaintiffs (Troxell and Franklin) had been moved to Tehachapi, and each had only  
23 been there for a few weeks. Plaintiffs did not undertake this motion—with its resulting additional  
24 work and potential delay—lightly. Plaintiffs hoped that CDCR’s promised reforms would prove  
25 meaningful, and that Step Three and Four prisoners would receive significant benefits and

26 \_\_\_\_\_  
27 <sup>2</sup> It is Plaintiffs’ understanding that all Step Three and Four Plaintiffs from Pelican Bay SHU are  
28 being sent to Tehachapi, with the possible exception of one or more individuals with specific  
medical needs.

1 transitional assistance, in keeping with other states' stepdown programs; thus, Plaintiffs waited  
2 until it was absolutely clear that CDCR's stepdown program was unacceptable before deciding to  
3 act. This careful approach should not be dis-incentivized.

4 **B. Plaintiffs' Motion to Supplement Is not Futile**

5 Defendants also argue that Plaintiffs' supplemental complaint "fails to allege sufficient  
6 facts to state a plain and plausible claim for relief." *See* Def. Opp. at 7-8. Presumably, this is an  
7 argument that supplementing the complaint would be futile. In support, Defendants quote  
8 Plaintiffs' explanation that they "*do not* seek to challenge conditions at Tehachapi SHU *on their*  
9 *own*" (Def. Opp. at 7), but completely fail to explain why the claim Plaintiffs *do* seek to assert –  
10 an Eighth Amendment challenge to ten years of solitary confinement in the Pelican Bay SHU  
11 followed by solitary confinement in a Step Three or Four SHU – fails to state a claim. There is  
12 ample support for a single claim that spans two locales. *See, e.g., Pratt*, 769 F. Supp. at 1134-35,  
13 *Wingate*, 2009 U.S. Dist. LEXIS 12592, at \*20, *Rivera*, 1993 U.S. Dist. LEXIS 1689, at \*15-16,  
14 \*19-20.

15 As for the supplemental allegations about Step Five, Defendants miss the point when they  
16 argue that "[t]he proposed supplement does not assert any specific claim for relief on these alleged  
17 'continuing individual claims.'" Def. Opp. at 7. The continuing individual claims are the two  
18 claims asserted in the Second Amended Complaint: that Plaintiffs' confinement in the Pelican Bay  
19 SHU violates the Eighth Amendment and Procedural Due Process. *See* Exhibit A. The new  
20 allegations merely buttress the argument, explained in section III below, that none of the  
21 transferred Plaintiffs' original individual claims have been mooted.

22 Defendants also argue that they "are entitled to challenge whether Plaintiffs properly  
23 exhausted their administrative remedies under the Prison Litigation Reform Act as to their  
24 supplemental Eighth Amendment claim." Defs. Opp. at 8. While this is true as a general matter,  
25 it is unclear whether Defendants are actually raising exhaustion at this time, in opposition to  
26 Plaintiffs' motion, as they fail to cite a single case or expound further on their statement.  
27 Assuming, *arguendo*, that Defendants would oppose supplementing the complaint based on failure  
28

1 to exhaust, the challenge is both premature and inappropriate. As an affirmative defense, “inmates  
2 are not required to specially plead or demonstrate exhaustion in their complaints.” *Jones v. Bock*,  
3 549 U.S. 199, 216 (2007). Exhaustion can be raised by Defendants during the summary judgment  
4 stage, at which point they “must produce evidence . . . to carry their burden.” *Albino v. Baca*, 747  
5 F.3d 1162, 1166, 1168 (9th Cir. 2013) (en banc). It is only “in the rare event that a failure to  
6 exhaust is clear on the face of the complaint” that an earlier exhaustion motion is appropriate. *Id.*  
7 at 1166. Nothing on the face of the supplemental complaint indicates that Plaintiffs have failed to  
8 exhaust administrative remedies.

9 Finally, Defendants proffer equally undeveloped and unsupported arguments that  
10 Plaintiffs’ supplemental complaint could not be heard in this District as a matter of venue, and/or  
11 would run afoul of the Federal Rules regarding improper joinder of claims and parties. Def. Opp.  
12 at 8. The Court need not consider completely undeveloped arguments, without a single citation.  
13 Regardless, venue is proper in the Northern District because “a substantial part of the events or  
14 omissions giving rise to the claim” occurred here. *See* 28 U.S.C. § 1391(b). And, since Plaintiffs  
15 do not challenge conditions of confinement at Tehachapi as dictated by Tehachapi’s warden, but  
16 rather the conditions applicable to California prisoners placed in Steps Three and Four, which are  
17 set as a matter of CDCR policy, there is no need to add additional Defendants beyond those  
18 policy-makers named in the Second Amended Complaint.

### 19 **III. Plaintiffs Transferred from Pelican Bay SHU Retain Live Claims**

20 Defendants argue that *all* the individual Plaintiffs who have been transferred from Pelican  
21 Bay should be dismissed from the case. Def. Opp. at 8-9. Defendants do not bother to analyze  
22 separately the distinct questions of whether (1) certified class representatives should be dismissed  
23 from a case upon a change in their individual interest in the controversy; and (2) individual  
24 plaintiffs whose situations changed *prior* to certification can maintain individual claims. The first  
25 question is easily answered; the second requires more analysis, but the result is the same: all the  
26 named Plaintiffs can continue in this lawsuit.

1           **A. Certified Class Representatives May Continue to Represent a Class Even if**  
 2           **Their Individual Interests Become Moot.**

3           It is black letter law that a certified class representative can continue to represent the  
 4 interests of the class even if his individual interest has been mooted post-certification.<sup>3</sup> *Sosna v.*  
 5 *Iowa*, 419 U.S. 393, 403 (1975). All that is required is that the class representative continues to  
 6 “fairly and adequately protect the interests of the class.” *Id.* (citing Rule 23(a)). Defendants do  
 7 not argue that any Plaintiff is no longer able to adequately represent the class, nor could they in the  
 8 present suit “where it is unlikely that segments of the class . . . would have interests conflicting  
 9 with those [t]he has sought to advance, and where the interests of that class have been competently  
 10 urged at each level of the proceeding.” *Id.*; see also *La Duke v. Nelson*, 762 F.2d 1318, 1326 (9th  
 11 Cir. 1985). Thus, Defendants have no basis to seek the dismissal of class representatives  
 12 Dewberry and Johnson, who were transferred from the Pelican Bay SHU *after* being certified as  
 13 class representatives.<sup>4</sup>

14           **B. The Individual Plaintiffs’ Claims Are not Moot.**

15           Plaintiffs Franklin, Redd, Reyes, Ruiz and Troxell are in a different category. They were  
 16 transferred from the Pelican Bay SHU prior to this Court’s class certification decision, and thus  
 17 the Court declined to certify them as class representatives. See Order Granting in Part Mot. for  
 18 Class Certification at 17, Dkt. No. 317. Though these men are neither class representatives nor  
 19 members, they brought suit in their representative *and* individual capacities, and because their  
 20  
 21  
 22

23 <sup>3</sup> Plaintiffs do not concede that the transferred class representatives have no continuing individual  
 24 stake in this action. As argued below, all the named Plaintiffs retain a live stake in this  
 25 controversy, as they face the possibility of transfer back to the Pelican Bay SHU, and the effects of  
 26 the initial constitutional violations have not been eradicated.

27 <sup>4</sup> Defendants assert that Plaintiff Esquivel is no longer housed at the Pelican Bay SHU. Def. Opp.  
 28 at 8. While Plaintiffs have learned that Esquivel recently received a DRB hearing at which it was  
 determined that he will be placed in Step Five, according to “Inmate Locator” he has not yet been  
 transferred from Pelican Bay. Should the Court grant Plaintiffs’ motion, Plaintiffs respectfully  
 request the opportunity to amend the allegations in the proposed supplemental complaint relevant  
 to Esquivel to reflect his current status as of the day the complaint is filed.

1 individual claims have not been dismissed, they remain individual Plaintiffs in this case.<sup>5</sup> See Def.  
2 Opp. at 8 (acknowledging that transferred Plaintiffs currently remain in the case).

3 Defendants have removed these individuals from the Pelican Bay SHU and codified new  
4 procedures for gang validation, but “mere voluntary cessation of allegedly illegal conduct does not  
5 moot a case; if it did, the courts would be compelled to leave the defendant . . . free to return to his  
6 old ways.”<sup>6</sup> *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)  
7 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, (1953)). A claim for injunctive  
8 relief is not moot if there is a likelihood of recurrence. *Demary v. Arpaio*, 378 F.3d 1020, 1025-26  
9 (9th Cir. 2004). Rather, “[t]o establish mootness, Defendants bear a “heavy burden” of showing  
10 that (1) “subsequent events [have] made it absolutely clear that the allegedly wrongful behavior  
11 [cannot] reasonably be expected to recur,” and (2) “interim relief or events have completely and  
12 irrevocably eradicated the effects of the alleged violation.” *Norman-Bloodsaw v. Lawrence*  
13 *Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) (internal quotation marks omitted).  
14 Defendants cannot meet this burden regardless of which complaint controls.

15 First, transferred Plaintiffs’ claims are not moot because they face a realistic threat of  
16 return to the Pelican Bay SHU. While a bare assertion that a prisoner could *possibly* be returned  
17 to the prison where the injury occurred is too speculative to prevent mootness, *Dilley v. Gunn*, 64  
18 F.3d 1365, 1369 (9th Cir. 1995), where there is *real threat* of transfer back, a claim is not moot.  
19 See, e.g., *Cohea v. Pfler*, No. 2:00-cv-2799 GEB EFB, 2013 U.S. Dist. LEXIS 26247, at \*22  
20 (E.D. Cal. Feb. 25, 2013) (prisoner’s claim for injunctive relief not mooted by his transfer to a  
21 new facility, given specific facts that he has “in fact, been close to . . . a transfer [back] in the

22  
23 <sup>5</sup> Absent some other reason to dismiss, general practice allows for a named plaintiff who is not  
24 certified as a class representative to proceed with individual claims alongside the class. See, e.g.,  
25 *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) (explaining that,  
26 should a given subclass fail to meet Rule 23 requirements, the individual members of that subclass  
27 can proceed as individuals); see also *Walker v. Life Ins. Co. of the Southwest*, No. CV 10-9198  
28 JVS (RNBx), 2012 U.S. Dist. LEXIS 186296, at \*20 (C.D. Cal. Nov. 9, 2012) (same).

<sup>6</sup> It is clear that Defendants’ targeted release of class members and representatives from the  
Pelican Bay SHU is in response to this litigation, thus rendering voluntary cessation analysis  
applicable. See SC ¶ 200 (Defendants are “prioritizing” DRBs for prisoners held in Pelican Bay  
SHU for over ten years.).

1 past”). Contrary to Defendants’ unsupported avowal that “Plaintiffs and other inmates would have  
2 to engage in gang activity as defined under CDCR’s new validation regulations to have grounds to  
3 assert a new claim” (Def. Opp. at 9), Plaintiffs face the threat of return to the Pelican Bay SHU if  
4 they engage in minor misconduct, such as possessing gang-related artwork or literature, if they fail  
5 to participate in as-of-yet undescribed program requirements *or* if they fail to “maintain acceptable  
6 behavior.” *See* Cal. Code Regs. Tit 15 § 3378.3 (a)(1)-(5), 3378.3(b)(1)-(3); *see also* SC ¶ 191,  
7 192.

8 Second, and more fundamentally, transferred Plaintiffs’ claims are not moot because their  
9 release from the Pelican Bay SHU has not “completely and irrevocably eradicated the effects of  
10 the alleged violation[s].” *Norman-Bloodsaw*, 135 F.3d at 1274. “A case is not moot if the court  
11 can provide any effective relief, even if it is not the precise relief originally sought.” *Save Our*  
12 *Sonoran, Inc. v. Flowers*, No. CV-02-0761-PHX-SRB, 2006 U.S. Dist. LEXIS 26185, at \*13 (D.  
13 Az. May 2, 2006) (*citing Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997));  
14 *Northwest Envtl. Defense Center v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (“[W]here the  
15 violation complained of may have caused continuing harm and where the court can still act to  
16 remedy such harm by limiting its future adverse effects, the parties clearly retain a legally  
17 cognizable interest in the outcome.”).

18 Transferred Plaintiffs’ placement in the Step Down program is a collateral consequence of  
19 their prior gang validation, which could be remedied by this Court’s ruling on the old gang  
20 validation policies. Plaintiffs were validated under the old Title 15 policies. The DRBs have not  
21 revisited whether that validation was proper – rather, the DRBs merely decide which of the five  
22 steps of the Step Down program is appropriate. SC ¶ 193. Everyone goes to one of the five steps  
23 – no one is excused from the program altogether. *Id.* at ¶ 194. Were it not for their gang  
24 validation, which Plaintiffs allege violated due process (*see* Second Amended Complaint ¶¶193-  
25 202), Step Three and Four Plaintiffs would be in a general population unit rather than an SHU.  
26 Similarly, Step Five plaintiffs would not face the possibility of return to the SHU for minor  
27 misconduct or failure to meet stepdown requirements. Because these transferred Plaintiffs  
28

1 continue to suffer significant collateral consequences from their unconstitutional gang validation,  
2 their procedural due process claim remains live. *See Padilla v. Nev. Dep't of Corr.*, 510 Fed.  
3 Appx. 629, 630 (9th Cir. 2013) (prisoner's procedural due process claim not moot despite transfer  
4 to the extent that he seeks injunctive relief for ongoing effects of Security Threat Group  
5 classification). Put differently, Plaintiffs' claim is not moot because this Court's ruling that their  
6 prior gang validations were unlawful would require CDCR to reexamine their current status,  
7 possibly resulting in their release from the Step Down program. *See Norman-Bloodsaw*, 135 F.3d  
8 at 1275 (where continued storage of private medical information, though not itself a constitutional  
9 violation, is an ongoing effect of unconstitutional medical testing, the case is not moot because  
10 expungement could be appropriate remedy).

11 As for the transferred Plaintiffs' Eighth Amendment claim, Defendants fail to even argue,  
12 much less prove, that the mental and physical harm visited upon Plaintiffs during their ten plus  
13 years in the Pelican Bay SHU has been remedied by further, albeit different, SHU confinement.  
14 *See, e.g., Warren v. Wyant*, 563 Fed. Appx. 576, 577 (9th Cir. 2014) (reversing dismissal of a  
15 Montana State prisoner's injunctive claim for confiscation of a religious text because his transfer  
16 to a new facility "failed to rectify the injury" alleged – he still didn't have his book). The  
17 significant damage caused by Plaintiffs' ten years in the Pelican Bay SHU can only be alleviated  
18 by release into a true general population unit and transitional assistance; release into another SHU,  
19 or even into Step Five, is not effective relief, and thus the claim is not moot.

20 Were the Court to hold otherwise, especially in a case where significant evidence indicates  
21 that CDCR has purposefully acted to moot Plaintiffs' claims, prison officials could "avoid liability  
22 merely by pushing a prisoner to the next institution—and then the next—and thereby moot a claim  
23 for injunctive relief." *Peck v. McDaniel*, Case No.: 2:12-cv-01495-JAD-PAL, 2014 U.S. Dist.  
24 LEXIS 166858, at \*14 (D. Nev. Dec. 1, 2014); *see also Burke v. Steadman*, Civil No. 13-CV-  
25 0582-DMS (WVG), 2014 U.S. Dist. LEXIS 52243, at \*29 (S.D. Cal. Jan. 27, 2014) ("The Court is  
26 concerned that whenever an inmate files a civil rights action seeking injunctive relief, the  
27  
28

1 Department of Corrections can choose to transfer that inmate to a different institution, and the  
2 issue will never be resolved.”).

3 **IV. The Court Need not Vacate all Pending Litigation Dates**

4 Finally, the Court need not vacate all pending litigation dates should it grant the instant  
5 motion. Plaintiffs have no objection to Defendants’ proposal that they move to dismiss thirty days  
6 after the Court rules, but would suggest that all current deadlines stand until such time as the  
7 parties can appear for a scheduling conference to determine the most efficient approach to  
8 proceeding with this litigation.

9 **CONCLUSION**

10 For the foregoing reasons and those laid out in Plaintiffs’ opening brief, Plaintiffs  
11 respectfully request that this Court grant their motion for leave to file a Supplemental Complaint.

12 Dated: January 29, 2015

Respectfully submitted,

13 /s/ Rachel Meeropol  
14 RACHEL MEEROPOL (*pro hac vice*)  
Email: rachelm@ccrjustice.org

15 JULES LOBEL (*pro hac vice*)  
16 Email: jll4@pitt.edu  
17 ALEXIS AGATHOCLEOUS (*pro hac vice*)  
Email: aagathocleous@ccrjustice.org  
18 CENTER FOR CONSTITUTIONAL RIGHTS  
666 Broadway, 7th Floor  
19 New York, NY 10012  
Tel: (212) 614-6432  
20 Fax: (212) 614-6499

21 With significant assistance by  
22 SOMALIA SAMUEL,  
*recent law grad, not yet admitted*

23 ANNE CAPPELLA (Bar No. 181402)  
24 Email: anne.cappella@weil.com  
25 AARON HUANG (Bar No. 261903)  
Email: aaron.huang@weil.com  
26 BAMBO OBARO (Bar No. 267683)  
Email: bambo.obaro@weil.com  
27 WEIL, GOTSHAL & MANGES LLP  
28 201 Redwood Shores Parkway

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Redwood Shores, CA 94065-1134  
Tel: (650) 802-3000  
Fax: (650) 802-3100

CAROL STRICKMAN (SBN 78341)  
Email: carol@prisonerswithchilodren.org  
LEGAL SERVICES FOR PRISONERS WITH  
CHILDREN  
1540 Market Street, Suite 490  
San Francisco, CA 94102  
Tel: (415) 255-7036  
Fax: (415) 552-3150

CARMEN E. BREMER  
Email: Carmen.bremer@cojk.com  
CHRISTENSEN, O'CONNOR,  
JOHNSON & KINDNESS PLLC  
1201 Third Avenue, Suite 3600  
Seattle, WA 98101-3029  
Tel: (206) 695-1654  
Fax: (206) 224-0779

CHARLES F.A. CARBONE (Bar No. 206536)  
Email: Charles@charlescarbone.com  
LAW OFFICES OF CHARLES CARBONE  
P. O. Box 2809  
San Francisco, CA 94126  
Tel: (415) 981-9773  
Fax: (415) 981-9774

MARILYN S. MCMAHON (SBN 270059)  
Email: Marilyn@prisons.org  
CALIFORNIA PRISON FOCUS  
1904 Franklin Street, Suite 507  
Oakland, CA 94612  
Tel: (510) 734-3600  
Fax: (510) 836-7222

ANNE BUTERFIELD WEILLS (SBN 139845)  
Email: abweills@gmail.com  
SIEGEL & YEE  
499 14th Street, Suite 300  
Oakland, CA 94612  
Tel: (510) 839-1200  
Fax: (510) 444-6698

*Attorneys for Plaintiffs*

# EXHIBIT A

**Second Amended Complaint Claims**

CLAIM	PARTY ASSERTING
<p>Ten or more continuous years of solitary confinement in the Pelican Bay SHU violates the Eighth Amendment</p>	<p><b>Eighth Amendment Class</b>, represented by the five named Plaintiffs (Ashker, Dewberry, Esquivel, Franco, Johnson) present in the Pelican Bay SHU at the time of the Court’s Class Certification decision</p> <p><b>Individual Plaintiffs</b> (Franklin, Redd, Reyes, Ruiz and Troxell) no longer in Pelican Bay SHU at the time of the Court’s Class Certification decision (on theory that the claims have not been mooted by Defendant’s voluntary cessation)</p>
<p>CDCR’s old Title 15 policies for validating and reviewing gang affiliates violate procedural due process</p>	<p><b>Due Process Class</b>, represented by the five named Plaintiffs (Ashker, Dewberry, Esquivel, Franco, Johnson) present in the Pelican Bay SHU at the time of the Court’s Class Certification decision</p> <p><b>Individual Plaintiffs</b> (Franklin, Redd, Reyes, Ruiz and Troxell) no longer in Pelican Bay SHU at the time of the Court’s Class Certification decision (on theory that the claims have not been mooted by Defendant’s voluntary cessation)</p>

**Supplemental Complaint Claims**

CLAIM	PARTY ASSERTING
<p>Ten or more continuous years of solitary confinement in the Pelican Bay SHU violates the Eighth Amendment</p>	<p><b>Eighth Amendment Class</b>, represented by the named Plaintiffs (Ashker, Dewberry, Esquivel, Franco, Johnson) present in the Pelican Bay SHU at the time of the Court’s Class Certification decision</p> <p><b>Individual Plaintiffs</b> (Franklin, Redd, Reyes, Ruiz and Troxell) no longer in Pelican Bay SHU at the time of the Court’s Class Certification decision (on theory that the claims have not been mooted by Defendant’s voluntary cessation)</p>
<p>Ten or more continuous years of solitary confinement in the Pelican Bay SHU followed by transfer to a Step Three or Four SHU violates the Eighth Amendment</p>	<p><b>Supplemental Class</b>, to be represented by the Step Three and Four Plaintiffs (Dewberry, Ruiz, Troxell &amp; Franklin) should the Court certify that class in the future</p>
<p>CDCR’s old Title 15 policies for validating and reviewing gang affiliates violate procedural due process</p>	<p><b>Due Process Class</b>, represented by the five named Plaintiffs (Ashker, Dewberry, Esquivel, Franco, Johnson) present in the Pelican Bay SHU at the time of the Court’s Class Certification decision</p> <p><b>Individual Plaintiffs</b> (Franklin, Redd, Reyes, Ruiz and Troxell) no longer in Pelican Bay SHU at the time of the Court’s Class Certification decision (on theory that the claims have not been mooted by Defendant’s voluntary cessation)</p>