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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EMELITO EXMUNDO,

CASE NO. 1:07-cv-01711-LJO-GBC (PC)

Plaintiff,

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF ACTION,
WITH PREJUDICE, AS DUPLICATIVE OF
CIVIL ACTION NOS. 1:06-CV-00205 AND
1:07-CV-01714

v.

MTA DREW, et al.,

Defendants.

/ OBJECTIONS DUE WITHIN THIRTY DAYS

I. Procedural History

Plaintiff Emelito Exmundo (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis.

On February 23, 2006, Plaintiff filed a civil action in this Court, pursuant to 42 U.S.C. § 1983. *See Emelito Exmundo v. A.K. Scribner, et al.*, 1:06-cv-00205-AWI-GBC (E.D. Cal).

On April 9, 2007, Plaintiff filed the instant action in California Superior Court, County of Kings, pursuant to 42 U.S.C. § 1983. Doc. 1.

On June 15, 2007, Plaintiff filed a third civil action in California Superior Court, County of Kings, pursuant to 42 U.S.C. § 1983. *See Emelito Exmundo v. Vella, et al.*, 1:07-cv-01714-AWI-GBC (E.D. Cal). On November 21, 2007, Defendants removed *Exmundo v. Vella* to Federal Court. *See id.*

On November 26, 2007, Defendants removed the instant action to Federal Court. Doc. 1.

On March 31, 2009, the Court ordered the consolidation of cases *Exmundo v. Scribner*, 1:06-cv-00205-AWI-GBC and *Exmundo v. Vella*, 1:07-cv-01714-AWI-GBC.

1 On June 19, 2009, in *Exmundo v. Scribner*, Plaintiff filed a second amended complaint. Doc.
2 32. On October 8, 2010, the Court screened Plaintiff's complaint and required Plaintiff to amend his
3 complaint or notify the Court of willingness to proceed on only the cognizable claims. Doc 35.

4 On October 15, 2010, the Court ordered the joined cases severed.

5 On November 3, 2010, in *Exmundo v. Scribner*, Plaintiff notified the Court of his willingness
6 to proceed on only the cognizable claims. Doc 37. On November 15, 2010, the Court ordered that
7 the case proceed on only the cognizable claims against Defendants Bell and Johnson for excessive
8 force and dismissed the remaining claims and defendants. Doc 38.

9 On January 14, 2011, in *Exmundo v. Vella*, Plaintiff filed a second amended complaint. Doc.
10 26. On May 2, 2011, the Court screened Plaintiff's claim and required Plaintiff to amend his
11 complaint or notify the Court of willingness to proceed on only the cognizable claims. Doc 28. On
12 May 12, 2011, Plaintiff notified the Court of his willingness to proceed on only the cognizable
13 claims. Doc 29. On August 31, 2011, the Court ordered that the case proceed on only the cognizable
14 claims against Defendant Vogel for excessive force and retaliation and dismissed the remaining
15 claims and defendants. Doc 31.

16 On October 5, 2011, Plaintiff filed his fourth amended complaint in the instant action. Doc.
17 42. For the reasons set forth below, the undersigned recommends dismissal of this action, with
18 prejudice, as duplicative of Civil Action Numbers 1:06-cv-00205 and 1:07-cv-01714.

19 **II. Standard of Review**

20 Pursuant to 28 U.S.C. § 1915A(a), the Court is required to screen prisoner complaints
21 seeking relief against a governmental entity, officer, or employee and must dismiss a complaint if
22 the action is frivolous, malicious, or fails to state a claim upon which relief may be granted. *See* 28
23 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Duplicative lawsuits filed by a plaintiff proceeding in forma
24 pauperis are subject to dismissal as either frivolous or malicious under 28 U.S.C. § 1915(e). *See, e.g.,*
25 *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995); *McWilliams v. State of Colo.*, 121
26 F.3d 573, 574 (10th Cir. 1997); *Pittman v. Moore*, 980 F.2d 994, 994-95 (5th Cir. 1993); *Bailey v.*
27 *Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988). An in forma pauperis complaint that merely repeats
28 pending or previously litigated claims may be considered abusive and dismissed under § 1915. *Cato*,

1 70 F.3d at 1105 n.2; *Bailey*, 846 F.2d at 1021. Repeating the same factual allegations asserted in an
2 earlier case, even if now filed against new defendants, is subject to dismissal as duplicative. *See, e.g.,*
3 *Bailey*, 846 F.2d at 1021; *Van Meter v. Morgan*, 518 F.2d 366, 368 (8th Cir. 1975). “Dismissal of
4 the duplicative lawsuit, more so than the issuance of a stay or the enjoinder of proceedings,
5 promotes judicial economy and the comprehensive disposition of litigation.” *Adams v. California*,
6 487 F.3d 684, 688, 692-94 (9th Cir. 2007).

7 **III. Analysis**

8 **A. Plaintiff’s Complaints**

9 **1. Plaintiff’s Fourth Amended Complaint in the Instant Case**

10 In Plaintiff’s fourth amended complaint, Plaintiff alleges interference with his mail,
11 retaliation, excessive force, insufficient due process, violations of prison policies, conspiracies, and
12 other state law claims. Pl. 4th Am. Compl., Doc 42. Plaintiff names the following Defendants:
13 California Department of Corrections and Rehabilitation (“CDCR”), R. Vella, D. G. Adams, S. Pina,
14 H. Q. Gadsden, R. Speidell, M. Drew, Cooper, Renteria, and Vogel. *Id.* at 1 & 10.

15 Plaintiff alleges that he filed a grievance against Defendant Renteria for opening his legal and
16 confidential mail. *Id.* at 3. Defendants Renteria and Cooper retaliated against Plaintiff for filing a
17 grievance by opening his legal and confidential mail and delaying giving Plaintiff his mail. *Id.*
18 Defendant Renteria refused to call Plaintiff to his assigned “Porter” job, arbitrarily only searched
19 Plaintiff before going into buildings, and gave Plaintiff’s niece’s letter to a child molester. *Id.*
20 Defendant Renteria said Plaintiff was in trouble for filing a grievance. *Id.* Defendants Renteria and
21 Drew retaliated against Plaintiff for filing a grievance by forcing Baeza to file an RVR for misuse
22 of food because Plaintiff was given an apple. *Id.* at 4. Defendant Drew gave Plaintiff the RVR during
23 the grievance hearing against Defendant Renteria to intimidate Plaintiff. *Id.* at 5. After the grievance
24 hearing, Defendants Cooper and Renteria then searched Plaintiff and went through his record while
25 requiring Plaintiff to keep his arms raised, causing Plaintiff great pain. *Id.* Defendant Renteria told
26 Plaintiff “you wrote me up, get out of the building,” preventing Plaintiff doing his job to assist the
27 ADA disabled inmates. *Id.*

28 On February 19, 2006, Defendant Drew ordered Defendant Cooper to body search Plaintiff,

1 and Defendant Cooper kicked Plaintiff's feet and ankles apart, which aggravated Plaintiff's earlier
2 injury from tripping on a sprinkler hole. *Id.* at 6. Defendant Drew told him he will continue to harass
3 him if he does not withdraw the grievance. *Id.* at 7. Plaintiff filed another grievance for this
4 retaliatory action. *Id.* On March 24, 2006, Defendant Pina interviewed Plaintiff for the grievance he
5 filed about the retaliations he is subject to by prison officials and their supervisors not doing anything
6 to stop it. *Id.* at 7. Defendant Pina retaliated against Plaintiff by filing a false RVR against him. *Id.*
7 On April 3, 2006, Defendant Speidell had the hearing for the RVR for "filing a false document." *Id.*
8 at 8. Plaintiff was found guilty of the RVR, but the charges were unsupported and Plaintiff was
9 denied witnesses. *Id.* at 8-9. Defendants Vella and Speidell conspired to retaliate against Plaintiff
10 by filing frivolous RVRs. *Id.* at 9. Defendant Gadsden removed Plaintiff from his job because of
11 Defendant Vella, a wrongful termination. *Id.* Defendant Vella and the frivolous RVR caused Plaintiff
12 to be placed on C-status. *Id.*

13 On May 6, 2006, Plaintiff was extracted from his cell by order of Defendant Vella. *Id.* at 10.
14 Plaintiff was placed in administrative segregation. *Id.* When Defendant Vogel came to his cell, he
15 pulled Plaintiff's arm, felt his right shoulder pop, and hit his head on the bunk. *Id.* Defendant Vogel
16 grabbed the back of Plaintiff's neck and slammed his face into the concrete wall. *Id.* It was so strong
17 that it loosened his teeth and injured his neck. *Id.* at 11. Plaintiff's injury required fusion surgery. *Id.*
18 He was in pain for three years before the surgery, and it took one and one-half years for the surgery
19 to heal. *Id.* The dentist had to pull four loose teeth. *Id.* The excessive force was retaliation and a
20 conspiracy with Defendant Vella. *Id.* Plaintiff alleges assault and battery. *Id.* at 12.

21 Plaintiff alleges retaliation for assisting with disabled inmates. *Id.* Plaintiff's complaint seeks
22 the gym cleaned and wheelchair access to the side doors. *Id.* Prison officials removed him from
23 disability mobility impairment and stopped his pain treatment to his back because of his lawsuits.
24 *Id.* For relief, Plaintiff requests the Court expunge frivolous RVRs from his record; that he be
25 returned to his job with backpay; treatment for his neck and back injuries; a declaratory judgment;
26 an injunction; and damages. *Id.* at 3 & 13.

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1 he felt his right shoulder [pop]. *Id.* Plaintiff hit his head on the bunk and Vogel slammed Plaintiff's
2 face into the concrete wall so hard that it loosened his teeth. *Id.* Lt. Gadsden told Plaintiff he had the
3 lock up order. *Id.* Vogel and Vella retaliated and conspired against Plaintiff by using excessive force
4 and placing Plaintiff in administrative segregation for filing grievances, for his "jailhouse lawyering"
5 activities, and for assisting inmates with disabilities. *Id.* at 22.

6 Plaintiff attached exhibits to his second amended complaint. *Id.* at 26-120. On December 12,
7 2005, Plaintiff filed a grievance that C.O. Cooper is not calling him to work as a porter. *Id.* at 86. On
8 January 12, 2006, Plaintiff filed a grievance against Renteria for refusing to accept his legal mail
9 without first inspecting the contents. *Id.* at 83. Plaintiff wrote that Renteria is delaying his mail in
10 retaliation for the times Plaintiff wrote to Lt. Gadsden and Sgt. Burgess about not being called to
11 work. *Id.* at 85-86. Renteria was arbitrarily searching Plaintiff, messing with his mail, and not calling
12 him for work. *Id.* On February 2, 2006, Plaintiff filed a grievance against C.O. Renteria for
13 harassment, delaying his legal mail, and obstructing his access to courts. *Id.* at 41. On February 21,
14 2006, Plaintiff filed a grievance against Sgt. Drew, Renteria, and Cooper for attempting to coerce
15 Plaintiff to withdraw a grievance. *Id.* at 91. Sgt. Drew ordered C.O. Cooper to body search Plaintiff,
16 and C.O. Cooper kicked Plaintiff's feet and ankles apart, which aggravated Plaintiff's earlier injury
17 from tripping on a sprinkler hole. *Id.* On March 15, 2006, Lt. Pina interviewed Plaintiff for an RVR
18 charging Plaintiff with falsification of documents. *Id.* at 96. Plaintiff alleged that Sgt. Drew
19 threatened Plaintiff to withdraw his appeal. *Id.* Plaintiff alleged that Renteria kicked Plaintiff out of
20 the building, preventing him from performing his job. *Id.* at 100.

21 For relief, Plaintiff requests the Court expunge frivolous RVRs from his record; that he be
22 transferred out of administrative segregation; that certain defendants be unable to work near Plaintiff;
23 a declaratory judgment; an injunction; and damages. *Id.* at 3 & 24.

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1 neck, back, knees, and elbow; expunge frivolous RVRs from his record; that certain defendants be
2 unable to work near Plaintiff; a declaratory judgment; an injunction; and damages. *Id.* at 3 & 8-9.

3 **B. Duplicative Claims**

4 [I]n assessing whether the second action is duplicative of the first, we
5 examine whether the causes of action and relief sought, as well as the
6 parties or privies to the action, are the same . . . “There must be the
7 same parties, or, at least, such as represent the same interests; there
8 must be the same rights asserted and the same relief prayed for; the
9 relief must be founded upon the same facts, and the . . . essential
10 basis, of the relief sought must be the same.” *Curtis v. Citibank, N.A.*,
11 226 F.3d 133 (2d Cir. 2000) (holding that the trial court did not abuse
its discretion in dismissing *Curtis II* claims arising out of the same
events as those alleged in *Curtis I*, which claims would have been
heard if plaintiffs had timely raised them). *Serlin v. Arthur Andersen
& Co.*, 3 F.3d 221, 223-24 (7th Cir. 1993) (“[A] suit is duplicative if
the claims, parties, and available relief do not significantly differ
between the two actions.”).

12 *See Adams*, 487 F.3d at 689. From a review of Plaintiff’s three cases, the Court finds that Plaintiff’s
13 instant case is duplicative because the claims, parties, and available relief do not significantly differ
14 between this case and the other two pending actions. In all three cases, Plaintiff alleges claims of
15 excessive force, retaliation, insufficient due process, and conspiracy. In all three cases, Plaintiff
16 states similar allegations against officers employed at California State Prison at Corcoran. In all three
17 cases, Plaintiff requests relief of expunging the frivolous RVRs from his record, equitable relief, and
18 damages.

19 In the instant case, Plaintiff’s allegations are duplicative of *Exmundo v. Scribner*,
20 1:06-cv-00205-AWI-GBC and *Exmundo v. Vella*, 1:07-cv-01714-AWI-GBC. First, Plaintiff alleges
21 that Renteria and Cooper interfered with Plaintiff’s mail in retaliation for filing grievances, prevented
22 him from doing his job as a porter, arbitrarily searched him, and gave his niece’s letter to a child
23 molester. Pl. 4th Am. Compl. at 3-4, Doc 42. Plaintiff made the same allegations in *Exmundo v.*
24 *Scribner*, Pl. 2nd Am. Compl. at 41, 83, 85-86, 91, 100, Doc. 32, and *Exmundo v. Vella*, Pl. 2nd Am.
25 Compl. at 5, Doc. 26. Second, Plaintiff alleges that Sgt. Drew and C.O. Cooper harassed Plaintiff,
26 filed a frivolous RVR against him, retaliated against him for filing a grievance, attempted to coerce
27 him into withdrawing his grievance, and kicked his feet apart while conducting a body search,
28 causing him pain. Pl. 4th Am. Compl. at 6-7, 91, Doc 42. Plaintiff made the same allegations in

1 *Exmundo v. Scribner*, Pl. 2nd Am. Compl. at 14-15, 91, 96, Doc. 32. Third, Plaintiff alleges that
2 Pina, Vella, and Speidell conspired against Plaintiff, filed frivolous RVRs against him, harassed him,
3 and denied him due process during his grievance hearings. Pl. 4th Am. Compl. at 7-9, Doc 42.
4 Plaintiff made the same allegations in *Exmundo v. Scribner*, Pl. 2nd Am. Compl. at 15-16, 96, Doc.
5 32, and *Exmundo v. Vella*, Pl. 2nd Am. Compl. at 4-5, Doc. 26. Fourth, Plaintiff alleges that
6 Gadsden, Vella, and Vogel conspired to remove Plaintiff from his job, caused him to be placed in
7 C-status, caused him to be placed in administrative segregation, and used excessive force against him
8 by extracting him from his cell and injuring his teeth and neck. Pl. 4th Am. Compl. at 7-11, Doc 42.
9 Plaintiff made the same allegations in *Exmundo v. Scribner*, Pl. 2nd Am. Compl. at 17, 22, 85-86,
10 Doc. 32, and *Exmundo v. Vella*, Pl. 2nd Am. Compl. at 4-5, 7, Doc. 26.

11 Plaintiff's fourth amended complaint in the instant case is essentially duplicative of his other
12 two pending cases, *Exmundo v. Scribner*, 1:06-cv-00205-AWI-GBC and *Exmundo v. Vella*,
13 1:07-cv-01714-AWI-GBC. Plaintiff's complaint chronologizes an unending chain of allegations of
14 wrongdoing on the part of the correctional officers; grievances due to the alleged wrongdoing; and
15 retaliations resulting from his grievances. Plaintiff has made the same allegations in his two other
16 cases. Therefore, the claims in the instant case are duplicative of those in his two other pending
17 cases.

18 **C. Privity Between Parties**

19 An in forma pauperis complaint repeating the same factual allegations asserted in an earlier
20 case, even if now filed against new defendants, is subject to dismissal as duplicative. *See Bailey*, 846
21 F.2d at 1021; *see also Van Meter v. Morgan*, 518 F.2d at 368. Plaintiff's fourth amended complaint
22 in the instant case names defendants CDCR, R. Vella, D. G. Adams, S. Pina, H. Q. Gadsden, R.
23 Speidell, M. Drew, Cooper, Renteria, and Vogel, who were also directly named or mentioned in his
24 other pending cases. In *Exmundo v. Scribner*, 1:06-cv-00205-AWI-GBC, the case is proceeding on
25 the claims against defendants Bell and Johnson for excessive force. Doc. 37. However, Plaintiff
26 made allegations against all of the named defendants in the instant case, or mentioned all of the
27 named defendants in the instant case, in his second amended complaint. Moreover, in response to
28 a motion to dismiss filed by the defendants for failure to exhaust, Plaintiff states that on February

1 2, 2006, he filed grievance against Renteria for retaliation of the grievances he filed against Bell and
2 Johnson. Pl. Resp. at 3, Doc. 48.

3 In *Exmundo v. Vella*, 1:07-cv-01714-AWI-GBC, the case is proceeding on the claims against
4 defendant Vogel for excessive force and retaliation. Doc. 29. In response to a motion to dismiss filed
5 by the defendant for failure to exhaust, Plaintiff cites the grievance he filed on May 23, 2006 against
6 Vella, Rosenquist, and H.Q. Gadsden for a retaliation conspiracy to transfer Plaintiff to
7 administrative segregation. Pl. Resp. at 13, Doc. 35. Plaintiff also attaches the January 12, 2006 and
8 February 2, 2006 grievances he filed against Renteria for retaliation, interference with his legal mail,
9 and interference with access to courts. *Id.* at 35 & 37.

10 Although Plaintiff filed *Exmundo v. Vella* on June 15, 2007, shortly after he filed the instant
11 action on April 9, 2007, the Court had consolidated *Exmundo v. Vella* with *Exmundo v. Scribner*,
12 which Plaintiff filed on February 23, 2006. Moreover, the sole remaining defendant in *Exmundo v.*
13 *Vella* has been served with the complaint and has filed a responsive pleading. Doc. 32. The instant
14 case is still in the screening stage, so it would not be in the interest of judicial economy to dismiss
15 *Exmundo v. Vella* and permit the instant case to move forward.

16 Finally, all the defendants are in privity with the other correctional officer defendants as
17 employees of the California State Prison in Corcoran. *See Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402,
18 1405 (9th Cir. 1993); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940);
19 *Adams*, 487 F.3d at 691. In the instant case, Plaintiff also names defendant CDCR, which would
20 have Eleventh Amendment immunity, *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th
21 Cir. 2007), and D. G. Adams, the warden at Corcoran, who would not liable as a supervisor without
22 any direct participation in the deprivation of Plaintiff's rights, *Ashcroft v. Iqbal*, 556 U.S. 662, __,
23 129 S. Ct. 1937, 1948-49 (2009).

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1 **IV. Conclusion and Recommendation**

2 The Court finds that Plaintiff's fourth amended complaint in the instant case is duplicative
3 of Plaintiff's two other pending cases, *Exmundo v. Scribner*, 1:06-cv-00205-AWI-GBC and
4 *Exmundo v. Vella*, 1:07-cv-01714-AWI-GBC. Therefore, the Court hereby RECOMMENDS that
5 this action be DISMISSED WITH PREJUDICE as duplicative of Civil Action Numbers
6 1:06-CV-00205 and 1:07-CV-01714.

7 These Findings and Recommendations will be submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days**
9 after being served with these Findings and Recommendations, Plaintiff may file written objections
10 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
11 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
12 waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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15 IT IS SO ORDERED.

16 Dated: December 22, 2011

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18 UNITED STATES MAGISTRATE JUDGE