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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THOMAS L. DAVIS,

Plaintiff,

v.

RONALD NUCI, et al.,

Defendants.

CASE NO. 1:10-cv-01457-MJS

ORDER DISMISSING PLAINTIFF'S SECOND
AMENDED COMPLAINT

(ECF No. 21)

I. PROCEDURAL HISTORY

On August 2, 2010, Plaintiff Thomas L. Davis, a federal prisoner proceeding pro se and in forma pauperis, filed a civil rights action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for the violation of civil rights by federal actors.¹ (Compl., ECF No. 1.) The Court

¹ Petitioner was in the custody of the United States Penitentiary, Atwater (USP Atwater), in Atwater, California, when he filed the complaint. He has since been transferred to the United States Penitentiary, Tucson, in Tucson, Arizona. His subsequent transfer does not affect a determination of venue made when the action is commenced. Tenefrancia v. Robinson Export and Import Corporation, 921 F.2d 556, 559 (4th Cir. 1990); Barcal v. United States, 1997 U.S. Dist. LEXIS 7059 (E.D. Cal. May 6, 1997).

1 subsequently redesignated Plaintiff's action as a civil action rather than a Bivens civil rights
2 action because the Complaint did not involve prison conditions of confinement.
3 (Redesignation Order, ECF No. 11.) On November 17, 2010, the Court screened the
4 Complaint, found that Plaintiff had not stated a cognizable claim, and gave him leave to
5 amend. (Screening Order, ECF No. 17.) Plaintiff filed a First Amended Complaint on
6 November 16, 2010. (First Am. Compl., ECF No. 19.) Shortly thereafter, and before the
7 Court could screen the First Amended Complaint, Plaintiff filed a Motion to Amend the
8 Complaint and a Second Amended Complaint. (Mot. to Amend., ECF Nos. 20-21.) The
9 Court granted the motion, and gave notice it was proceeding with the Second Amended
10 Complaint as the operative pleading in the case. (Order, ECF No. 22.) Plaintiff's Second
11 Amended Complaint is before the Court for screening.

12 Plaintiff has consented to Magistrate Judge jurisdiction. (ECF No. 10.)

13 **II. SCREENING REQUIREMENT**

14 The Court is required to screen all complaints brought by plaintiffs proceeding in
15 forma pauperis. 28 U.S.C. § 1915(e)(2); Calhoun v. Stahl, 254 F.3d 845 (9th Cir. 2001).
16 The Court must dismiss a complaint or portion thereof if the action has raised claims that
17 are legally "frivolous or malicious; fails to state a claim upon which relief may be granted;
18 or seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. §
19 1915(e)(2)(B).

20 A complaint must contain "a short and plain statement of the claim showing that the
21 pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
22 not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by
23 mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949
24 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set
25 forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its
26 face.'" Id. Facial plausibility demands more than the mere possibility that a defendant
27 committed misconduct and, while factual allegations are accepted as true, legal
28 conclusions are not. Id. at 1949-50.

1 **III. PLAINTIFF'S CLAIMS**

2 The Second Amended Complaint names the following individuals as defendants:
3 Ronald Nuci, Correctional Officer, United States Prison, Florence; Scott Davis, Chairman
4 and Chief Executive Officer, United Parcel Services of America (UPS); and Michael L.
5 Eskew, an employee of Courier Services.

6 The Second Amended Complaint contains fewer factual allegations than the
7 previous two complaints. The Court instructed Plaintiff in the Screening Order to strike
8 through the title of the form complaint as a "Bivens action," and replace it with the type of
9 action he is pursuing should he pursue a different basis for relief. (Order at 3.) Plaintiff did
10 so, and titled the Second Amended Complaint "Administrative adjustment of Claims 28
11 U.S.C. § 2672." Section 2672 is one of the sections of the Federal Tort Claims Act.

12 The federal courts have a duty to construe pro se pleadings liberally. Hamilton v.
13 United States, 67 F.3d 761, 764 (9th Cir.1995) (citing Hughes v. Rowe, 449 U.S. 5, 9
14 (1980) (quotation omitted)). Consistent with such duty, the Court shall consider Plaintiffs
15 claim based on the Federal Tort Claims Act (FCTA).

16 Specifically, Plaintiff alleges that on or about September 23, 2009, he was
17 transferred to USP Atwater. (Compl. at 3.) Plaintiff's legal books and manuals, 480 pages
18 of final appeals, and eye glasses were in ten boxes. (Id. at 2-3.) The legal books included
19 a copy of the 2010 Federal Rules of Civil Procedure, a soft cover version of Black's Law
20 Dictionary, and a Self-Help Litigation Manual. (Id.) Implicit in the Second Amended
21 Complaint is the allegation that Defendants lost the property in the boxes. UPS issued
22 a check to Plaintiff for \$110.54. (Id. at 2.) Plaintiff alleges that the amount paid by UPS
23 does not cover the actual loss. (Id.) Plaintiff further contends that the compensation
24 provided by UPS was less than the value of the property because Defendant Nuci
25 incorrectly represented to UPS that the boxes contained religious books. (Id.) Plaintiff is
26 seeking damages in the amount of \$91,483.15 from UPS and \$25,000 from Defendant
27 Nuci. (Compl. at 3.)

28 ///

1 **A. General Deficiencies**

2 There are several deficiencies in Plaintiff's complaint. First, Plaintiff has not named
3 a proper defendant. In a FTCA action, the United States is the only proper defendant.
4 Hawkins v. USA, No. 1:04-cv-05771-LJO-SMS (PC), 2008 U.S. Dist. LEXIS 86231, 2008
5 WL 4492183, at *2 (E.D. Cal. Oct. 2, 2008) (citing Lance v. United States, 70 F.3d 1093,
6 1095 (9th Cir. 1995)). Second, although Plaintiff asserts that he was offered some
7 compensation for his loss, he does not allege that he presented a claim to an appropriate
8 federal agency. This Court lacks jurisdiction over an action brought under the FTCA unless
9 the claim presentation requirement is satisfied. 28 U.S.C. § 2675(a). Third, it appears that
10 Plaintiff's claim is barred by the FTCA's exception for detention of goods by a law
11 enforcement officer. See 28 U.S.C. § 2680(c).² Instructive in this regard is the recent
12 decision in Daley v. United States, No. CV 08-0261-TUC-CKJ, 2009 U.S. Dist. LEXIS
13 33798, 2009 WL 1047930, at *4 (D. Ariz. April 20, 2009), in which the court determined
14 that the plaintiff's FTCA claim arising from the loss of his personal property when he was
15 transferred to a federal correctional facility was barred by the exception for detention of
16 goods by a law enforcement officer. Relying on the decision in Ali v. Federal Bureau of
17 Prisons, 552 U.S. 214, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008), the court was not
18 persuaded by the plaintiff's arguments that his loss was due to faulty policies and protocols
19 and that the detention-of-goods exception did not apply to officers who deliberately steal
20 or destroy private property. 2009 U.S. Dist. LEXIS 33798, 2009 WL 1047930 at *4; see
21 also Falls v. United States DOJ, 2009 U.S. Dist. LEXIS 112347, 4-5 (E.D. Cal. Dec. 2,
22 2009) The Court finds the reasoning of the decision in Daley to be persuasive.

23 **B. Claims Against Defendant Nuci**

24 Plaintiff's claims against Nuci, a law enforcement officer, are barred by Ali. 128 S.
25 Ct. at 841. Indeed, Plaintiff's claims are even more attenuated than those found in Ali or

27 ² Section 2680 of Title 28 U.S.C. provides: "The provision of this chapter and section 1346(b) of
28 this title shall not apply to - - (c) Any claim arising in respect of . . . the detention of any goods,
merchandise, or other property by . . . any other law enforcement officer. . . ."

1 Dailey. His claim is based on allegedly incorrect information being provided by Nuci
2 regarding the contents of the packages rather than Nuci having a role in the loss of the
3 property. “[T]he Supreme Court has instructed that the FTCA ‘maintain[s] sovereign
4 immunity for the entire universe of claims against law enforcement officers . . . arising in
5 respect of the detention of property. Foster v. United States, 522 F.3d 1071, 1079 (9th Cir.
6 2008) (citing Ali, 128 S. Ct. at 841.).

7 Plaintiff could not cure these deficiencies in his claim against Defendant Nuci. No
8 additional facts could create a cognizable claim for relief given the FTCA's exception for
9 detention of goods by a law enforcement officer. See Lopez v. Smith, 203 F.3d 1122, 1129
10 (9th Cir. 2000) (“Under Ninth Circuit case law, district courts are only required to grant
11 leave to amend if a complaint can possibly be saved. Courts are not required to grant leave
12 to amend if a complaint lacks merit entirely.”). Plaintiff was forewarned in the screening
13 order that failure to file an amended complaint that stated an appropriate federal claim
14 would be dismissed with prejudice. Accordingly, Plaintiff’s claim against Nuci is dismissed
15 with prejudice.

16 **C. Claims Against UPS and Related Actors**

17 Plaintiff’s claims against UPS, its CEO, and other related actors (collectively “UPS”),
18 also fail. UPS is a privately owned company. As it is not a federal actor, it is not subject
19 to claims under the FTCA. Construing Plaintiff’s pleadings liberally, it could be that he
20 intends to assert claims against UPS on a different legal theory such as breach of contract
21 or tort.

22 However, federal courts are courts of limited jurisdiction. This Court only has
23 jurisdiction to adjudicate those cases which involve either diversity of citizenship (citizens
24 of different states) and meet a threshold amount in controversy requirement or present a
25 federal question (such as a constitutional claim). See Kokkonen v. Guardian Life Ins. Co.
26 of Am., 511 U.S. 375, 380-81 (1994); 28 U.S.C. § 1330 et seq. “If the court determines at
27 any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed.
28 R. Civ. P. 12(h)(3).

1 **1. Diversity Jurisdiction and Amount in Controversy**

2 Plaintiff has not stated a claim based on federal law against UPS. Any claims based
3 on contract, tort, or other state cause of action could only proceed in federal court if Plaintiff
4 properly alleged diversity jurisdiction. “Section 1332 of Title 28 confers jurisdiction on
5 federal courts where there is diversity of citizenship between plaintiffs and defendants.
6 Diversity jurisdiction requires complete diversity between the parties--each defendant must
7 be a citizen of a different state from each plaintiff. Strawbridge v. Curtiss, 7 U.S. (3 Cranch)
8 267, 267, 2 L. Ed. 435 (1806); Diaz v. Davis (In re Digimarc Corp. Derivative Litig.), 549
9 F.3d 1223, 1234 (9th Cir. 2008).

10 Even if there were geographic diversity of the parties, Plaintiff also must claim
11 damages that in excess of \$75,000 to properly allege diversity jurisdiction. 28 U.S.C. §
12 1332(a). Petitioner alleges damages in the amount of \$91,483.15 against UPS. However,
13 his unsupported assertion of damages is not necessarily sufficient to overcome the amount
14 in controversy requirement. “While a federal court must of course give due credit to the
15 good faith claims of the plaintiff, a court would be remiss in its obligations if it accepted
16 every claim of damages at face value, no matter how trivial the underlying injury.”
17 Diefenthal v. Civil Aeronautics Bd., 681 F.2d 1039, 1052 (5th Cir. 1982). See also
18 Christensen v. Northwest Airlines, Inc., 633 F.2d 529 (9th Cir. 1980) (affirming dismissal
19 on ground that injury was too small to establish requisite amount of damages); Anthony v.
20 Security Pac. Fin. Serv. Inc., 75 F.3d 311, 318 (7th Cir. 1996); Surber v. Reliance Nat'l
21 Indem. Co., 110 F. Supp. 2d 1227, 1231 (N.D. Cal. 2000).

22 **2. Actual Damages**

23 Plaintiff has alleged that he lost ten boxes of property. The boxes contained several
24 law books, legal research, and other personal effects of Petitioner.³ The Court understands

25
26 ³While Plaintiff’s Second Amended Complaint must stand by itself, the Court notes that in the
27 original complaint, Plaintiff provides a more exhaustive list of property and claims monetary damages in
28 the amount of \$1,483.15. (Compl. at 5.) In Plaintiff’s First Amended Complaint, he again alleges monetary
damages in the amount of \$1,483.15 (First Am. Compl. at 4.) In both complaints, Plaintiff claims punitive
damages in the amount of \$90,000. The combined amounts claimed for monetary and punitive damages
equal the total claimed in the Second Amended Complaint.

1 that the material may have contained family pictures and other items of great sentimental
2 value to Plaintiff. But it is patently incredible that the actual monetary value of his lost
3 property was worth more than a few thousand dollars.

4 **3. Punitive Damages**

5 Since Plaintiff's compensatory damages appear to amount to less than \$2000, the
6 balance of claimed damages appear to be punitive damages.

7 "When a claim for punitive damages makes up the bulk of the amount in
8 controversy, and may even have been colorably asserted solely to confer jurisdiction, we
9 should scrutinize that claim closely." Anthony v. Security Pac. Fin. Servs., 75 F.3d 311, 315
10 (7th Cir. 1996). Plaintiff has not alleged any facts to support a claim which would entitle him
11 to punitive damages. However, even if Plaintiff were entitled to punitive damages under
12 California law, the addition of punitive damages could not raise the amount in controversy
13 over the jurisdictional limit.

14 The California Supreme Court has set guidelines governing the award of punitive
15 damages in California. In Simon, the plaintiff unsuccessfully attempted to buy an office
16 building from the defendant and sued for promissory fraud when the transaction was not
17 completed. Simon v. San Paolo U.S. Holding Co., Inc., 35 Cal.4th 1159, 1166, 29
18 Cal.Rptr.3d 379, 113 P.3d 63 (2005). The jury awarded the plaintiff \$5,000.00 in
19 compensatory damages and \$1.7 million in punitive damages. Id. The California Supreme
20 Court determined (1) the award of punitive damages exceeded the federal due process
21 limitations set forth in BMW⁴ and State Farm⁵, (2) appellate courts must conduct an
22 independent review when assessing excessiveness under the federal due process clause,
23 and (3) the maximum award constitutionally permissible was \$50,000.00, which reflected
24 a 10- to-1 ratio between punitive and compensatory damages. Simon, 35 Cal.4th at
25 1187-1188, 1189.

26 ⁴BMW of North America, Inc. V. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

27 ⁵State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585
28 (2003).

1 In Johnson v. Ford Motor Co., 35 Cal.4th 1191, 29 Cal. Rptr. 3d 401, 113 P.3d 82
2 (2005), the California Supreme Court reversed the reduction of a punitive damage award
3 to three times the compensatory award based on its determination that the lower court may
4 have misapplied two of the guideposts from BMW and State Farm and may have
5 undervalued the state's interest in punishing and deterring wrongful corporate practice.
6 Johnson, 35 Cal.4th at 1213. On remand, the lower court determined that punitive
7 damages of \$175,000, or just less than 10 times the compensatory award, was sufficient
8 to vindicate California's legitimate interest in punishing the misconduct and deterring its
9 repetition. Johnson v. Ford Motor Co., 135 Cal.App.4th 137, 150, 37 Cal. Rptr. 3d 283
10 (2005).

11 As the court in Simon explained,

12 Though one court has referred to a 9-to-1 ratio as the constitutional trigger
13 point (McClain v. Metabolife International, Inc. (N.D. Ala. 2003) 259
14 F.Supp.2d 1225, 1231), one could also argue a "single-digit" ratio includes
15 anything less than 10 to 1. (See Hollock v. Erie Insurance Exchange (Pa.
16 2004) 2004 PA Super 13, 842 A.2d 409, 422 [10-to-1 ratio "just barely
exceeds" single-digit level].) The question is of little or no importance,
however, as the presumption of unconstitutionality applies only to awards
exceeding the single-digit level "to a significant degree." (State Farm, supra,
538 U.S. at p. 425, 123 S.Ct. 1513.)

17 Simon, 35 Cal.4th at 1182 n.7. Thus, a ratio of more than 10 to one between punitive and
18 compensatory damages is presumed constitutionally excessive in California. Id.

19 Taking the facts of the Second Amended Complaint in the light most favorable to
20 Plaintiff, the claim of punitive damages is constitutionally suspect due to the lack of actual
21 damages incurred by Plaintiff. See BMW, Inc., 517 U.S. at 574-75. Even if Plaintiff were
22 ultimately to be awarded punitive damages in the ratio of 10 to 1, his total damages would
23 not meet the \$75,000.00 pleading minimum.⁶ Accordingly, Plaintiff's claim against UPS
24 and related defendants is not supported by the factual evidence and should be dismissed
25 for lack of subject matter jurisdiction. Lopez, 203 F.3d at 1129. The dismissal will be
26 without prejudice so Plaintiff may pursue his claims in state court, if desired.

27
28 ⁶The punitive damage amount based on actual damages in the Second Amended Complaint
would be no more than \$20,000, making the total damages less than \$22,000.

1 **IV. ORDER**

2 Plaintiff has failed to state a cognizable federal claim. As Plaintiff may be able to
3 bring state claims against UPS and related Defendants in state court, the action is
4 dismissed without prejudice.

5 Accordingly, it is HEREBY ORDERED that:

- 6 1. Plaintiff's Second Amended Complaint against Defendant Nuci is
7 DISMISSED with prejudice;
- 8 2. Plaintiff's Second Amended Complaint against Defendants UPS, Davis and
9 Eskew is DISMISSED without prejudice; and
- 10 3. All pending motions are DENIED as MOOT.

11
12 IT IS SO ORDERED.

13 Dated: August 9, 2011

1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE