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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JORGE RUBIO,

Plaintiff,

v.

THE RUSHCARD and THE BANCORP
BANK;

Defendants.

1: 13-cv-1470 AWI-GSA

**FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF THIS
ACTION WITHOUT LEAVE TO AMEND**

INTRODUCTION

Plaintiff, Jorge Rubio (“Plaintiff”), a civil detainee at the Coalinga State Hospital appearing pro se, filed the instant civil rights complaint alleging violations of 42 U.S.C. § 1983. (Doc. 1). Plaintiff has named the RushCard and The Bankcorp Bank in this action as defendants (“Defendants”). The court has screened the complaint and recommends that the complaint be dismissed without leave to amend.

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1 **DISCUSSION**

2 **A. Screening Standard**

3 Pursuant to 28 U.S.C. § 1915(e)(2), the court must conduct an initial review of the
4 complaint for sufficiency to state a claim. The court must dismiss a complaint or portion thereof
5 if the court determines that the action is legally “frivolous or malicious,” fails to state a claim
6 upon which relief may be granted, or seeks monetary relief from a defendant who is immune from
7 such relief. 28 U.S.C. § 1915(e)(2). If the court determines that the complaint fails to state a
8 claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be
9 cured by amendment.
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11 A complaint must contain “a short and plain statement of the claim showing that the
12 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
13 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
14 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing
15 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff
16 must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its
17 face.’” *Ashcroft v. Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). While factual
18 allegations are accepted as true, legal conclusion are not. *Id.* at 1949.
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20 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
21 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
22 support of the claim or claims that would entitle him to relief. See *Hishon v. King & Spalding*,
23 467 U.S. 69, 73 (1984), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Palmer v.*
24 *Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a
25 complaint under this standard, the Court must accept the allegations in the complaint as true,
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27 *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976), construe the pro se
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1 pleadings liberally in the light most favorable to the Plaintiff, *Resnick v. Hayes*, 213 F.3d 443,
2 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff's favor. *Jenkins v. McKeithen*, 395
3 U.S. 411, 421 (1969). Pleadings of pro se plaintiffs "must be held to less stringent standards than
4 formal pleadings drafted by lawyers." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)
5 (holding that pro se complaints should continue to be liberally construed after *Iqbal*).
6 Accordingly, pro se plaintiffs are afforded the benefit of any doubt. *Id.*

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8 **B. Plaintiff's Allegations**

9 Plaintiff alleges that on May 31, 2012, while he was housed at Coalinga State Hospital,
10 the Internal Revenue Service placed \$1,468.69 for payment of his tax refund onto a prepaid
11 debit/credit card issued by RushCard. On June 4, 2012, it was discovered that the card had been
12 allegedly activated by another inmate at the institution, Mr. Lewis, who had helped Plaintiff
13 obtain the card. Subsequently, Mr. Lewis allegedly admitted that he had arranged that the card be
14 sent to him rather than to Plaintiff, and he had deducted \$19.46 from the card to purchase tea.
15 Upon the discovery of these facts, Plaintiff called the RushCard, and requested that a hold be
16 placed on the card until further notice. Plaintiff subsequently has tried to receive the funds from
17 RushCard, but the company has refused to release the money or reactivate the card as requested.¹

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19 Plaintiff contends that Bancorp is the "financial banker" who holds all of the RushCard's
20 "prepaid financial transactions." He brings this action against both of these defendants alleging
21 they have interfered with his ability to obtain rightful possession of his funds, and failed to advise
22 Plaintiff that the card was issued in a different inmate. He alleges the companies engaged in
23 fraud, breached their contractual agreements which have resulted in a violation of the Fair
24 Business Practices Act and the Federal Tort Claims Act. He also asserts a violation the
25 Fourteenth Amendment's Equal Protection Clause. He contends that all of these violations serve
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¹ Plaintiff asserts that the bank has advised him that it will refund the money if Plaintiff gives a friend who is assisting him power of attorney. It appears that Plaintiff does not want to pursue this avenue.

1 as a basis for his section 1983 claim. Plaintiff requests that the Court issue a declaratory
2 judgment that Defendants violated the Fair Business Practices Act and that Defendants violated
3 his Constitutional rights pursuant to 42 U.S.C. § 1983. He also requests compensatory damages
4 in the amount of \$15,000.00 against each Defendant, \$50,000 punitive damages against each
5 Defendant, \$1,468.69 the amount of his tax refund, and any other relief the Court deems
6 appropriate.
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8 **C. Analysis**

9 ***I. 42 U.S.C. § 1983***

10 The Civil Rights Act under which this action was filed provides:

11 Every person who, under color of [state law] ... subjects, or causes to be subjected, any
12 citizen of the United States ... to the deprivation of any rights, privileges, or immunities
13 secured by the Constitution... shall be liable to the party injured in an action at law, suit in
14 equity, or other proper proceedings for redress ...
42 U.S.C. § 1983.

15 To state a claim under section 1983, a plaintiff must allege a deprivation of a right secured
16 by the Constitution or other law of the United States, and must show that the alleged deprivation
17 was committed by a person acting under color or state law. *West v. Atkins*, 487 U.S. 42 (1988).
18 Moreover, Plaintiff must demonstrate that each defendant personally participated in the
19 deprivation of his rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). This requires the
20 presentation of factual allegations sufficient to state a plausible claim for relief. *Iqbal*, 129 S.Ct.
21 at 1949-50; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility
22 of misconduct falls short of meeting this plausibility standard. *Iqbal*, 129 S.Ct. at 1949-50; *Moss*,
23 572 F.3d at 969.
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26 A civil rights plaintiff suing a private individual under § 1983 must demonstrate that the
27 private individual acted under color of state law; plaintiffs do not enjoy Fourteenth Amendment
28 protections against “private conduct abridging individual rights.” *Burton v. Wilmington Parking*

1 *Auth.*, 365 U.S. 715 (1961). Moreover, “private parties are not generally acting under color of
2 state law.” *Price v. Hawaii*, 939 F.2d 702, 707–09 (9th Cir.1991); see also *Harvey v. Harvey*, 949
3 F.2d 1127, 1130 (11th Cir.1992) (“Only in rare circumstances can a private party be viewed as a
4 ‘state actor’ for section 1983 purposes.”). Section 1983 liability attaches only to individuals “who
5 carry a badge of authority of a State and represent it in some capacity.” *Franklin v. Fox*, 312 F.3d
6 423, 444 (9th Cir.2002) (citations omitted). The Supreme Court has identified four tests to
7 determine whether a private individual's actions implicate state action: (1) the public function test,
8 (2) the joint action test, (3) the state compulsion test, and (4) the governmental nexus test.

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10 *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir.1997).

11 Here, Plaintiff does not allege that the Defendants are state actors. In fact, both
12 Defendants are private financial institutions and the transaction in question is a private monetary
13 exchange between the Plaintiff and financial institutions. Therefore, no state actor exists and
14 allegations of constitutional violations are not applicable in this situation. Accordingly,
15 Plaintiff's complaint fails to state a § 1983 claim and the case will be dismissed without leave to
16 amend as no amendment will cure this deficiency.

17 18 **2. Federal Tort Claims Act**

19 Plaintiff's complaint makes reference to a violation of the Federal Tort Claims Act,
20 however his reliance on this statute is misplaced. The Federal Tort Claims Act applies only to
21 cases brought against the United States and relate to damages caused by a wrongful act of a
22 federal government employee while acting within the scope of the employee's office or
23 employment. See 28 U.S.C., §§1346(b), 2672. Here, there is no federal employee involved in
24 the financial transaction, nor is the United States a party. Therefore, Plaintiff cannot state a claim
25 pursuant to the Federal Tort Claims Act.
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1 **3. State Law Claim**

2 Although Plaintiff has not alleged separate causes of actions for any state law claim, the
3 Complaint makes reference to a violation of the “Fair Business Practices Act” which the Court
4 construes as a violation of the California Unfair Practices Act. Cal. Bus. & Prof Code § 17000 *et*
5 *seq.* Plaintiff is advised that this Court does not have jurisdiction to consider this claim.

6 Federal courts can only adjudicate cases authorized by the United States Constitution and
7 Congress. Generally, federal courts have jurisdiction to handle state law claims only when
8 diversity of citizenship is established (the matter in controversy exceeds \$75,000 and is between
9 citizens of different states). 28 U.S.C. § 1332(a); *See also, Kokkonen v. Guardian Life Ins. Co.*,
10 511 U.S. 375 (1994); *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 2008 (1989). Here,
11 Plaintiff has not established the required \$75,000.00 in damages for diversity jurisdiction.
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13 First, the complaint alleges compensatory damages of \$15,000.00, \$50,000.00 in punitive
14 damages, and \$ 1,468.69, restitution, for a total of \$66,468.69 against each Defendant. Whether a
15 single Plaintiff’s damages against several defendants can be aggregated for jurisdictional
16 purposes depends on whether the defendants are jointly liable to Plaintiff on each claim. *Libby,*
17 *McNeill & Libby v. City of Nat’l Bank*, 592 F. 2d 504, 509 (9th Cir. 1978). Here, assuming
18 Plaintiff could establish a claim under the California Unfair Practices Act, there is no indication
19 that these defendants would be jointly liable to Plaintiff.
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21 Furthermore, the requested compensatory and punitive damages are not available under
22 this statute. There are only three types of remedies available under the California Unfair
23 Practices Act : injunctive relief, restitution, and civil penalties. Injunctive relief and restitution
24 are available in both private party and government actions. Cal. Bus. & Prof. Code § 17203. A
25 civil penalty of \$2,500.00 for each violation is available only in government enforcement actions.
26 Cal. Bus. & Prof. Code § 17206. Since Plaintiff is a private party, if he is successful, he would
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1 only be entitled to \$1,468.69 restitution, which is well below the required. \$75,000.00 threshold.
2 A dismissal for lack of a jurisdictional amount is proper if it appears to a legal certainty that the
3 claim is less than the jurisdictional amount. *Pachinger v. MGM Grand-Hotel –Las Vegas, Inc.*,
4 802 F. 2d 362, 364-365 (9th Cir. 1986). Legal certainty exists in only three situations: (1) when
5 the terms of a contract limit the plaintiff’s possible recovery, (2) when a specific rule of law or
6 measure of damages limits the amount of damages recoverable, and (3) when independent facts
7 show that the amount of damages was claimed merely to obtain federal court jurisdiction.
8 *Pachinger*, 802 F. 2d at 364. Because the requested damages are not available under the relevant
9 statute, Plaintiff is unable to establish that jurisdiction in this Court is proper for this claim. *Id.*

11 **3. Conclusion**

12 Given that the above, Plaintiff has failed to state a cognizable claim under 42 U.S.C. §
13 1983 and under the Federal Tort Claim Act. Plaintiff has also failed to establish that jurisdiction
14 is proper for any other state law claim asserted in the complaint. Since these deficiencies are not
15 curable by amendment, the Court will recommend that Plaintiff’s complaint be dismissed without
16 leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Noll v. Carlson*, 809 F.2d
17 1446, 1448-49 (9th Cir. 1987).

19 **RECOMMENDATION**

20 For the reasons set forth above, the Court recommends that Plaintiff’s complaint be
21 **DISMISSED WITHOUT LEAVE TO AMEND** for failure to state a claim.

22 These findings and recommendations are submitted to the District Court Judge assigned to
23 this case pursuant to 28 U.S.C. § 636(b)(1)(B). Within **thirty (30) days** after the date of this
24 Finding and Recommendation, the parties may file written objections with the Court. The
25 document should be captioned “Objections to Magistrate Judge’s Finding and Recommendation.”
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The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 16, 2014

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE