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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONALD GLASS,

 Plaintiff,

 v.

CDCR, et al.,

 Defendants.

CASE NO. 1: 15-cv-00988-DAD-MJS (PC)

FINDINGS AND RECOMMENDATION TO
DISMISS ACTION WITH PREJUDICE FOR
FAILURE TO STATE A CLAIM

(ECF No. 13)

FOURTEEN (14) DAY OBJECTION
DEADLINE

I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF Nos. 1 & 5.)

The Court screened Plaintiff’s Complaint and dismissed it with leave to amend. (ECF No. 8.) Plaintiff’s First Amended Complaint (“FAC”) is now before the Court for screening. (ECF No. 13.)

1 **II. SCREENING REQUIREMENT**

2 The Court is required to screen complaints brought by prisoners seeking relief
3 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has
5 raised claims that are legally “frivolous, malicious,” or that fail “to state a claim upon
6 which relief may be granted,” or that “seek monetary relief from a defendant who is
7 immune from such relief.” 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee,
8 or any portion thereof, that may have been paid, the court shall dismiss the case at any
9 time if the court determines that . . . the action or appeal . . . fails to state a claim on
10 which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

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12 **III. SUMMARY OF COMPLAINT**

13 Plaintiff identifies Warden Martin M. Biter, Sergeant J. McMahon, Correctional
14 Counselors/Appeals Coordinators D. Tarnoff and S. Tallerico, Appeals Analyst K. Carter,
15 Facility Captain and Litigation Coordinator W. Adams, Ombudsman Sonya Valle, and
16 Trust/Accounting Correctional Officers W. Estrella, Mike Fre¹, S. Pickering, J. Molly², J.
17 Calasin, and L. Sanchez as Defendants.

18 Plaintiff’s allegations can be summarized essentially as follows:

19 Defendants Biter, Estrella, Mike, Calasin, Molly, Pickering, Sanchez, and Adams
20 intentionally and illegally deducted funds from Plaintiff’s trust fund account on three
21 separate occasions ((1) \$55 for destruction of a mattress, (2) \$455 in court filing fees
22 erroneously deducted twice for the same court case, and (3) a \$720 restitution fee)
23 without providing him with a pre- or post-deprivation due process hearing. Defendants
24

25 _____
26 ¹ Plaintiff believes these are the first three letters of this Defendant’s last name. Plaintiff attaches as
27 Exhibit A to his FAC, a document signed by this Defendant, indicating he is the “Authorized Officer of the
28 Institution”. (ECF No. 13 at 17.) The last name of the Defendant’s signature is illegible. The Court will refer
to the Defendant by first name throughout this Order.

² Plaintiff attaches two Exhibits signed by this Defendant (Exhibit C & D). (ECF No. 13 at 21, 23.) The
Court cannot decipher the spelling of Defendant’s last name. The Court will use the spelling provided by
Plaintiff throughout this Order.

1 Biter, Tarnoff, Tallerico, Adams, Carter, and Valle then retaliated against Plaintiff “to chill
2 his First Amendment rights to file and exhaust administrative grievances. . .” (ECF No.
3 13 at 4.)³ Defendant Valle became aware that the above funds were deducted from
4 Plaintiff’s account erroneously and without him receiving a pre- or post-deprivation
5 hearing and failed to provide Plaintiff a hearing or return the funds to his account.

6 A. \$55 Mattress Deduction

7 From November 2010 to early 2011, Defendants McMahon, Estrella, Mike,
8 Calasin, Molly, Pickering, and Sanchez deducted \$55 from Plaintiff’s prison account
9 under “the guise of an internal disciplinary sanction” for a damaged mattress. (ECF No.
10 13 at 4.) There was no hearing to determine whether Plaintiff was, in fact, responsible
11 for the destruction of the mattress. When Plaintiff refused to sign a form authorizing the
12 deduction, Defendant McMahon forged Plaintiff’s signature, and the amount was
13 deducted. Plaintiff filed several appeals on the issue.

14 Defendant Tarnoff retaliated against Plaintiff by redacting the appeals.
15 Defendants McMahon, Estrella, Mike, Calasin, Molly, Pickering, Sanchez, Adams,
16 Tallerico, Carter, and Valle also retaliated against Plaintiff for filing an appeal in
17 November 2010 regarding the erroneous deduction from his account.

18 B. \$455 Court Filing Fee

19 On February 9, 2011, the District Court authorized the taking of a \$455 court filing
20 fee for Plaintiff’s appellate case (Case No. 11-15109). On July 25, 2011, Defendants
21 Estrella, Mike, Calasin, Molly, Pickering, Sanchez, Biter, and Adams violated Plaintiff’s
22 due process rights by erroneously deducting the \$455 court filing fee in the District Court
23 case (Case No. 1:04-cv-05953-LJO-DLB) in addition to the fee authorized in the
24 appellate case. Plaintiff filed an appeal disputing the deduction for the District Court
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26 ³ Initially, Plaintiff identifies only Defendants Biter, Estrella, Mike, Calasin, Molly, Pickering, Sanchez, and
27 Adams as being involved in the illegal deductions from his account, and Defendants Biter, Tarnoff,
28 Tallerico, Adams, Carter and Valle as those who retaliated against him. (ECF No. 13 at 4.) As noted
more specifically below, Plaintiff alleges other Defendants were also involved in the deductions and
retaliation.

1 case. Defendant Tarnoff rejected the appeal in retaliation for Plaintiff filing an earlier
2 appeal against her.

3 C. \$720 Restitution Fee

4 On July 25, 2011, Defendants Biter and Adams sent a “non-collecting bill of costs
5 court order” to Defendants Estrella, Mike, Calasin, Molly, Pickering, and Sanchez
6 instructing them to illegally deduct \$720 from Plaintiff’s account. (ECF No. 13 at 6.)
7 Plaintiff appealed the wrongful deduction. Defendants Tarnoff and Tallerico denied the
8 appeals in retaliation for Plaintiff filing other appeals against them.

9 Plaintiff seeks monetary damages, costs, and declaratory relief for the violation of
10 his First, Fifth, and Fourteenth Amendment rights.

11
12 **IV. ANALYSIS**

13 **A. Section 1983**

14 Section 1983 “provides a cause of action for the ‘deprivation of any rights,
15 privileges, or immunities secured by the Constitution and laws’ of the United States.”
16 *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
17 Section 1983 “‘is not itself a source of substantive rights,’ but merely provides ‘a method
18 for vindicating federal rights conferred elsewhere.’” *Graham v. Connor*, 490 U.S. 386,
19 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979)).

20 To state a claim under Section 1983, a plaintiff must allege two essential
21 elements: (1) that a right secured by the Constitution and laws of the United States was
22 violated and (2) that the alleged violation was committed by a person acting under the
23 color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988); see also *Ketchum v.*
24 *Cnty. of Alameda*, 811 F.2d 1243, 1245 (9th Cir. 1987).

25 A complaint must contain “a short and plain statement of the claim showing that
26 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
27 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
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1 supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S.
2 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff
3 must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
4 plausible on its face.’” *Id.* Facial plausibility demands more than the mere possibility
5 that a defendant committed misconduct and, while factual allegations are accepted as
6 true, legal conclusions are not. *Id.*

7 **B. Due Process – Property Deprivation**

8 The Due Process Clause protects against property deprivation without due
9 process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). To the extent that
10 Plaintiff might allege the deprivation was not authorized by state law, *Hudson* precludes
11 a procedural due process claim based upon an “unauthorized intentional deprivation of
12 property by a state employee if a meaningful post-deprivation remedy for the loss is
13 available.” *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). “California law provides an
14 adequate post-deprivation remedy for any property deprivations.” *Barnett v. Centoni*, 31
15 F.3d 813, 816–17 (9th Cir.1994) (citing Cal. Gov't Code §§ 810–895).

16 In the prior screening order, the Court advised Plaintiff that he could not state a
17 due process claim based upon the Defendants’ unauthorized and intentional taking of
18 funds from his trust fund account. (ECF No. 8.) Plaintiff again alleges that the three
19 transactions he is disputing were not random acts, that they were done intentionally, and
20 that they were not authorized by law. To the extent that Plaintiff wants to dispute these
21 erroneous deductions from his account, he has a post-deprivation remedy available
22 under California law. Plaintiff does not allege that said remedy is inadequate. Plaintiff
23 does not state a cognizable Due Process claim. Leave to amend should be denied as
24 futile.

25 **C. Retaliation**

26 “Within the prison context, a viable claim of First Amendment retaliation entails
27 five basic elements: (1) An assertion that a state actor took some adverse action against
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1 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)
2 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
3 reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559,
4 567-68 (9th Cir. 2005).

5 Plaintiff alleges that Defendants Biter, Tallerico, Tarnoff, Adams, Carter, and Valle
6 retaliated against him in some unspecified manner regarding the three deductions from
7 his prison account. He also alleges that Defendant Tarnoff retaliated against him for
8 filing an appeal regarding the \$55 deduction from his prison account by redacting and
9 rejecting his appeals. Defendants McMahon, Estrella, Mike, Calasin, Molly, Pickering,
10 Sanchez, Adams, Tallerico, Carter, and Valle retaliated against him in some unspecified
11 manner because Plaintiff filed an appeal regarding the \$55 deduction. Defendant
12 Tarnoff rejected Plaintiff's appeal on the \$455 deduction from his account in retaliation
13 for Plaintiff filing an earlier appeal against her. Defendants Tarnoff and Tallerico denied
14 Plaintiff's appeals regarding the \$720 deduction from his prison account in retaliation for
15 Plaintiff filing other appeals against them.

16 While Plaintiff alleges that Defendant Tarnoff redacted and rejected his appeals
17 and Defendants Tarnoff and Tallerico denied his appeal regarding the \$720 deduction
18 from his prison account, Plaintiff fails to allege what adverse action the other Defendants
19 took against him. Plaintiff also fails to connect any adverse conduct by any of the
20 Defendants to his filing of grievances. Plaintiff's speculation that Defendants' conduct
21 was motivated by his filing of grievances is insufficient. Plaintiff must allege facts to
22 support each Defendant had a retaliatory mindset. *See Bruce v. Ylst*, 351 F.3d 1283,
23 1289 (9th Cir. 2003) (finding that a prisoner established a triable issue of fact regarding
24 prison officials' retaliatory motives by raising issues of suspect timing in addition to other
25 evidence, including statements). Additionally, Plaintiff fails to allege that "the prison
26 authorities' retaliatory action did not advance legitimate goals of the correctional
27 institution or was not tailored narrowly enough to achieve such goals." *Brodheim v. Cry*,

1 584 F.3d 1262, 1271 (9th Cir. 2009) (*quoting Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d
2 1310, 1314 (9th Cir. 1989)); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985).
3 Plaintiff was advised of these deficiencies in the Court's prior screening order. Leave to
4 amend should be denied as futile.

5 **D. Declaratory Relief**

6 In addition to damages, Plaintiff seeks a declaration that Defendants violated his
7 constitutional rights. Plaintiff's claims for damages necessarily entail a determination of
8 whether his rights were violated, and therefore, his separate request for declaratory relief
9 is subsumed by those claims. *Rhodes v. Robinson*, 408 F.3d 559, 566 n.8 (9th Cir.
10 2005). In the Court's prior screening order, Plaintiff was advised of his inability to seek a
11 declaration that Defendants violated his rights. Leave to amend is denied as futile.

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13 **V. CONCLUSION AND ORDER**

14 Plaintiff's First Amended Complaint does not state a claim upon which relief may
15 be granted. Plaintiff was advised in the prior screening order of deficiencies in his claims
16 and was given the opportunity to correct them. Plaintiff has failed to do so. Any further
17 leave to amend reasonably appears futile and should be DENIED. The Clerk should
18 send Plaintiff a copy of his First Amended Complaint filed on November 5, 2015 (ECF
19 No. 13.) with this Order.

20 The undersigned recommends that the action be dismissed with prejudice, that
21 dismissal count as a strike pursuant to 28 U.S.C. § 1915(g), and that the Clerk of the
22 Court terminate any and all pending motions and close the case.

23 These findings and recommendations will be submitted to the United States
24 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
25 636(b)(1). Within **fourteen** (14) days after being served with the findings and
26 recommendations, the parties may file written objections with the Court. The document
27 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
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A party may respond to another party's objections by filing a response within fourteen (14) days after being served with a copy of that party's objections. The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: December 7, 2015

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE