

1 Defendant Van Sciver moved to dismiss the FAC on September 30, 2016. (Doc. No. 22.)
2 Defendants Brumfield and McNally moved to dismiss the FAC on October 11, 2016. (Doc. No.
3 24.) On November 14, 2016, plaintiff filed a document entitled “Cross Motion to Strike ‘All’ of
4 Consolidated Defendants Motions to Dismiss as Irrelevant FRCP 12(f).” (Doc. No. 30.) The
5 court construes this document as plaintiff’s untimely opposition to the motions to dismiss. A
6 hearing was held on November 15, 2016. Plaintiff appeared at that hearing telephonically on his
7 own behalf, attorney Mario Zamora appeared telephonically on behalf of defendants McNally and
8 Brumfield, and attorney Sebastien Bauge appeared telephonically on behalf of defendant Van
9 Sciver.

10 For the reasons set forth below, the court again concludes it lacks subject matter
11 jurisdiction and, accordingly, will grant defendants’ motions to dismiss and dismiss this action
12 with prejudice.²

13 **Background**

14 The court notes at the outset that plaintiff’s FAC does not appear to allege different facts
15 than those alleged in his original complaint which the court dismissed. As with the original
16 complaint, the FAC is difficult to decipher. Nonetheless, from the information before the court in
17 the various filed papers and the representations made by the parties at the hearing on the pending
18 motions, the court understands the following. Defendant Van Sciver is an attorney who
19 represented defendant Gschwend in a state court action before the Kern County Superior Court.
20 Defendant McNally is a clerk of that court, and defendant Brumfield is the Kern County Superior
21 Court Judge who presided over the case before that court. The state court action appears to have
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23 ² Defendants Gschwend and Kern County have not moved to dismiss the complaint, presumably
24 because they have not been served, as the docket reflects. Because this court does not have
25 subject matter jurisdiction over the complaint, *sua sponte* dismissal is appropriate as to these
26 defendants, notwithstanding the fact that they have not yet appeared. *See Abagninin v. AMVAC*
27 *Chemical Corp.*, 545 F.3d 733, 742–43 (9th Cir. 2008) (“[W]e have upheld dismissal with
28 prejudice in favor of a party which had not appeared, on the basis of facts presented by other
defendants which had appeared.”); *Silverton v. Dep’t of Treasury*, 644 F.2d 1341, 1345 (9th Cir.
1981) (“A [d]istrict [c]ourt may properly on its own motion dismiss an action as to defendants
who have not moved to dismiss where such defendants are in a position similar to that of moving
defendants.”).

1 been a contract dispute related to the rental of a house owned by defendant Gschwend. It appears
2 that Gschwend rented the home to a Theresa Moore who in turn assigned that lease to others,
3 including the plaintiff in this action, Carl Black. Defendant Gschwend alleged that he was not
4 being paid the agreed upon rent for the house and eventually regained possession of it through
5 eviction proceedings. In an action he brought in state court, defendant Gschwend sought the
6 award of damages for past due rent, damage to the property, costs incurred in the eviction
7 proceedings and the award of attorney’s fees and costs.

8 Plaintiff’s FAC in this federal court action states three claims. First, plaintiff alleges
9 generally that the summons issued by defendant McNally as Clerk of the Kern County Superior
10 Court was defective and therefore cause a “deprivation of rights under color of law (42 US
11 §1983).” (Doc. No. 16 at 16.) Plaintiff cites the Administrative Procedure Act (“APA”), and a
12 number of criminal statutes he cited in his original complaint, including 18 U.S.C. §§ 242, 371,
13 871 *et seq.*, 1341 *et seq.*, and 1512. (*Id.* at 16–17.) Plaintiff’s second claim suggests that he is
14 contesting the subject matter jurisdiction of the Kern County Superior Court because defendant
15 Van Sciver did not file an affidavit. (*Id.* at 17–18.) With respect to this claim of the FAC,
16 plaintiff similarly cites the APA and some of the aforementioned criminal statutes. (*Id.* at 18–19.)
17 In his third claim, plaintiff simply alleges:

18 For the determination of the ability of right to file
19 documents/contracts for relief by the Violation of Title 18 USC
20 § 2071 and HAINES v. KERNER, ET AL. 404 U.S. 519, 92 S.Ct.
21 594, 30 L. Ed. 2d 652. Denial of Contracts “Bills of the Ladings”
by the returned/redacted even though they were filed and then had
the stamps mutilated or crossed out, removing them from the public
record **(Exhibit 3) = Waiver of Clerks immunity.**³

22 (*Id.* at 19 (various emphases in original).) In his FAC plaintiff again cites the APA and several
23 cases in support of this claim, as he did in his original complaint. (*Id.* at 19–20.)

24 Defendant Van Sciver moves to dismiss plaintiff’s FAC pursuant to Rule 12(b)(1) for lack
25 of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim. (Doc. No.

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27 ³ With respect to these allegations, in *Haines v. Kerner*, 404 U.S. 519, 521 (1972), the court held
28 that dismissal of a *pro se* complaint is inappropriate unless it is “beyond doubt that plaintiff can prove
no set of facts” which would entitle him to relief, while 18 U.S.C. § 2071 criminalizes the
destruction or mutilation of court records.

1 22-1.) Defendants Brumfield and McNally move to dismiss plaintiff’s FAC pursuant to Rule
2 12(b)(1) for lack of subject matter jurisdiction, Rule 12(b)(6) for failure to state a claim, and on
3 various immunity grounds. (Doc. No. 24-1.) The court concludes it does not have subject matter
4 jurisdiction over this action and that it must be dismissed.

5 **Legal Standard**

6 As stated by the court in its prior order, federal courts are courts of limited subject matter
7 jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “It is to be
8 presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the
9 contrary rests upon the party asserting jurisdiction.” *Id.* (citations omitted). “If jurisdiction is
10 lacking at the outset, the district court has no power to do anything with the case except dismiss.”
11 *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380
12 (9th Cir. 1988) (quotations and citation omitted). “If the court determines at any time that it lacks
13 subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

14 Aside from cases based on diversity jurisdiction, district courts have original jurisdiction
15 in matters involving questions of federal law. 28 U.S.C. § 1331. “The presence or absence of
16 federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides
17 that federal jurisdiction exists only when a federal question is presented on the face of the
18 plaintiff’s properly pleaded complaint.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)
19 (citing *Gully v. First Nat’l Bank*, 299 U.S. 109, 112–13 (1936)). Generally, a federal court has
20 jurisdiction under 28 U.S.C. § 1331 even where some constructions of the statute or law at issue
21 would find the plaintiff does not state a claim for relief. *Bell v. Hood*, 327 U.S. 678, 685 (1946)
22 (“[T]he right of the petitioners to recover under their complaint will be sustained if the
23 Constitution and laws of the United States are given one construction and will be defeated if they
24 are given another. For this reason the district court has jurisdiction.”). Only where a claim
25 alleged “clearly appears to be immaterial and made solely for the purpose of obtaining
26 jurisdiction or where such a claim is wholly insubstantial and frivolous” should a complaint be
27 found jurisdictionally deficient. *Id.* at 682–83.

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1 **Analysis**

2 Plaintiff’s FAC largely repeats legal claims, with no further argument or support for their
3 validity, already alleged in his original complaint which was dismissed by this court. The court
4 will not revisit these issues or repeat its analysis. The court discerns only two differences of any
5 potential significance between plaintiff’s original complaint and the FAC: plaintiff’s invocation
6 of the Fifth Amendment’s due process clause and his assertion of admiralty jurisdiction. Below,
7 the court addresses those issues.

8 *1. Any Due Process Claim is Frivolous*

9 Plaintiff refers to the Fifth Amendment in several places in his FAC. (*See* Doc. No. 16 at
10 2, 4, 13, 19.) Similar to the original complaint, the FAC does not describe with any clarity how
11 the defendants named in this action are alleged to have violated plaintiff’s due process rights
12 guaranteed under the Fifth Amendment. Plaintiff alleges defendants “blocked all [our]
13 Contracts/Bills of the Ladings to be entered and entered on the record.” (Doc. No. 16 at 14
14 (alteration in original).) This allegation may refer to the following passage of plaintiff’s FAC:

15 Bills of the Lading Act 49 U.S. Code § 80101 (includes a criminal
16 penalty) as in [our] payment-bonds-credits of “good faith” of
17 1740.00 (Exhibit 4) for entry into the COUNTY OF KERN
18 SUPERIOR COURT and then by having due process violated by
19 the Clerk of the court, Terry McNally =
20 (Postmaster/Carrier/Shipper) that extorted by taking of fees/credits,
21 then by misplacing/miss-delivering and mutilating [our] cargo-
22 contracts-lawsuit (paperwork) (Exhibit 3) in violation of 18 U.S.C.
23 §2071 and the Judge Lorna Hislop Brumfield refusing to
24 acknowledge and prejudiced [us] against filing [our] claims to force
25 proof of subject-matter-jurisdiction relating to case BCV-15-
26 100371 LHB COUNTY OF KERN; = State-Waived-Immunity by
27 breach of trust;

22 (Doc. No. 16 at 7 (emphases and alterations in original).) As best the court can glean from the
23 above passage, plaintiff seems to be attempting to allege that he was prevented from doing or
24 filing something in defendant Gschwend’s action in the Kern County Superior Court and that
25 violated his right to due process. It may be that plaintiff sought to deposit approximately \$1,740
26 with the court, and was refused. Regardless, no cognizable Fifth Amendment claim is stated by
27 these allegations.

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1 The Fifth Amendment provides that no person shall be “deprived of life, liberty, or
2 property, without due process of law.” U.S. Const. amend. V. Generally, the Fifth Amendment’s
3 due process clause protects individuals from deprivations caused by the federal government,
4 while the Fourteenth Amendment’s analogous clause protects individuals from deprivations
5 caused by the state governments. *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (noting the
6 incorporation of the Fifth Amendment’s right to silence against the states by saying “[t]he
7 Fourteenth Amendment secures against state invasion the same privilege that the Fifth
8 Amendment guarantees against federal infringement”). Under either clause, it is clear any due
9 process claim plaintiff may be attempting to present in this action is frivolous.

10 “A procedural due process claim has two distinct elements: (1) a deprivation of a
11 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
12 protections.” *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001) (quoting *Brewster v.*
13 *Board of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971 (9th Cir. 1998)). Plaintiff here has
14 not alleged facts sufficient to show he has been deprived of a constitutionally protected liberty or
15 property interest. In this regard, he has not alleged facts explaining even in a general sense what
16 he was deprived of and how it could be considered a liberty or property interest. *See Bell Atl.*
17 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (plaintiff must allege “enough facts to state a claim
18 to relief that is plausible on its face”). Nor do the allegations of plaintiff’s FAC explain what
19 procedural protections he was denied in the course of this deprivation, the absence of which
20 violates due process of the law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[T]he tenet that
21 a court must accept as true all of the allegations contained in a complaint is inapplicable to legal
22 conclusions. Threadbare recitals of the elements of a cause of action, supported by mere
23 conclusory statements, do not suffice.”). The FAC does not even allege a theoretical basis for a
24 due process violation. Therefore, any due process claim that could be read into the complaint
25 now before the court is “wholly insubstantial and frivolous,” and the FAC therefore remains
26 jurisdictionally deficient. *See Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

27 Alternatively, this court would lack jurisdiction over general allegations of state court
28 error under the *Rooker-Feldman* doctrine, since federal district courts do not have appellate

1 jurisdiction over state court actions. *Dubinka v. Judges of Los Angeles Cty. Superior Ct.*, 23 F.3d
2 218, 221 (9th Cir. 1994). *See also Noel v. Hall*, 341 F.3d 1148, 1154–56 (9th Cir. 2003)
3 (describing the *Rooker-Feldman* doctrine, which requires a party disappointed by a state court
4 decision to “seek reversal of that decision by appealing to a higher state court,” rather than a
5 federal district court). This court does not sit as an appellate court to review the holdings of the
6 Kern County Superior Court, to the extent plaintiff may be seeking such review.

7 2. *This Court Also Clearly Does Not Have Admiralty Jurisdiction Over This Action*

8 Throughout the FAC, plaintiff seeks to invoke admiralty jurisdiction, noting at various
9 points that he is alleging wrongdoing such as “interference of commerce by way of extorting
10 time/labor and credits by use of simulations to gain ‘unwarranted-prize’ with respect to alleged
11 contracts by bar attorneys and officials who have committed barratry, chicanery, press-ganging
12 and inland piracy.” (Doc. No. 16 at 5.) Given the court’s understanding of the underlying
13 dispute, it undoubtedly does not have admiralty jurisdiction over this action.

14 A district court has original jurisdiction over “[a]ny civil case of admiralty or maritime
15 jurisdiction.” 28 U.S.C. § 1333. As the Supreme Court has noted:

16 Determination of the question whether a tort is ‘maritime’ and thus
17 within the admiralty jurisdiction of the federal courts has
18 traditionally depended upon the locality of the wrong. If the wrong
occurred on navigable waters, the action is within admiralty
jurisdiction; if the wrong occurred on land, it is not.

19 *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253 (1972). It is true that this rule
20 changed somewhat as a result of the decision in *Executive Jet*, with the question becoming one of
21 whether the alleged injury arises “in the course of a traditional maritime activity.” *Martinez v.*
22 *Pacific Indus. Serv. Corp.*, 904 F.2d 521, 522–23 (9th Cir. 1990). Regardless of the exact bounds
23 of the term “traditional maritime activity,” here plaintiff’s FAC includes no factual allegations
24 remotely touching on maritime-related activity. Plaintiff’s complaints, whatever they may be, are
25 entirely related to a state court lawsuit concerning a dispute about real property within landlocked
26 Kern County. Clearly, this court does not have admiralty jurisdiction over plaintiff’s complaint.

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Conclusion

Plaintiff’s due process claim related to unspecified state court procedural errors is “wholly insubstantial and frivolous,” and therefore fails to present a federal question affording jurisdiction under 28 U.S.C. § 1331. *Bell*, 327 U.S. at 682–83. Since the court also clearly lacks admiralty jurisdiction over this matter, the court lacks subject matter jurisdiction over this action. The court previously concluded that the granting of leave to amend would likely be futile. (Doc. No. 15 at 8.) Now, it is sure of it. Since the court need not allow further futile attempts to amend a complaint, *see California Architectural Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1988), *Klamath–Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983), the defendants’ motions to dismiss (Doc. Nos. 22, 24) are granted, and the complaint is dismissed as to all defendants, both those served and those not served, with prejudice and without further leave to amend. Accordingly, the Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: November 18, 2016



UNITED STATES DISTRICT JUDGE