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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LEONSO DEJESUS,
CDCR #J-35972,

Plaintiff,

vs.

CABALES, Officer;
CLARK, Officer,

Defendants.

Civil No. 11cv0423 WQH (POR)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2)(B) & 1915A(b)**

I. PROCEDURAL HISTORY

On March 1, 2011, Plaintiff, a state inmate currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he filed a certified copy of his inmate trust account statement which the Court liberally construed to be a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

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1 The Court granted Plaintiff's Motion to Proceed IFP but sua sponte dismissed his
2 Complaint for failing to state a claim. *See* March 18, 2011 Order at 4-5. Plaintiff was granted
3 leave to file an Amended Complaint in order to correct the deficiencies of pleading identified
4 by the Court. *Id.* On April 27, 2011, Plaintiff filed his First Amended Complaint ("FAC").

5 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

6 As the Court stated in its previous Order, the Prison Litigation Reform Act ("PLRA")'s
7 amendments to 28 U.S.C. § 1915 obligate the Court to review complaints filed by all persons
8 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility
9 [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
10 terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as
11 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these
12 provisions, the Court must sua sponte dismiss any prisoner civil action and all other IFP
13 complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which
14 seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;
15 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v.*
16 *Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

17 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
18 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
19 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner's suit
20 make and rule on its own motion to dismiss before directing that the Complaint be served by the
21 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits,
22 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
23 claim."); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
24 § 1915A).

25 "[W]hen determining whether a complaint states a claim, a court must accept as true all
26 allegations of material fact and must construe those facts in the light most favorable to the
27 plaintiff." *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
28 "parallels the language of Federal Rule of Civil Procedure 12(b)(6)"). Here, however, even

1 presuming Plaintiff's factual allegations true, the Court finds his Complaint both fails to state
2 a claim upon which relief can be granted and seeks monetary relief from defendants who are
3 immune. See 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213
4 F.3d at 446, n.1.

5 As he did in his original Complaint, Plaintiff alleges that Defendant Cabales and Clark
6 removed and destroyed personal items from his cell during a cell search. (*See* FAC at 1-2/
7 However, as the Court previously informed Plaintiff, where a prisoner alleges the deprivation
8 of a liberty or property interest caused by the unauthorized negligent or intentional action of a
9 prison official, the prisoner cannot state a constitutional claim where the state provides an
10 adequate post-deprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990);
11 *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The California Tort Claims Act ("CTCA")
12 provides an adequate post-deprivation state remedy for the random and unauthorized taking of
13 property. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Thus, Plaintiff has an
14 adequate state post-deprivation remedy and his claims relating to the taking of his property are
15 not cognizable in this § 1983 action, and must be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)
16 and 1915A(b)(1).

17 **III. CONCLUSION AND ORDER**

18 Good cause appearing, **IT IS HEREBY ORDERED** that:

19 1) Plaintiff's First Amended Complaint [ECF No. 4] is **DISMISSED** without
20 prejudice for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C.
21 § 1915(e)(2)(b) and § 1915A(b). In addition, the Court finds further amendment would be futile.
22 *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a leave to amend
23 is not an abuse of discretion where further amendment would be futile); *see also Robinson v.*
24 *California Bd. of Prison Terms*, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has
25 not, and cannot, state a claim containing an arguable basis in law, this action should be dismissed
26 without leave to amend; any amendment would be futile.") (citing *Newland v. Dalton*, 81 F.3d
27 904, 907 (9th Cir. 1996)).

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