IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10453

BENJAMIN FRANKLIN,

Plaintiff - Appellant

v.

GLENNA S. BLAIR,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
UNITED STATES CIRCUIT JUDGE

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10453

BENJAMIN FRANKLIN,

Plaintiff-Appellant

v.

GLENNA S. BLAIR,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:15-CV-164

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Benjamin Franklin, Texas prisoner # 01561085, filed a 42 U.S.C. § 1983 complaint against Glenna S. Blair, a prison official in the James V. Allred Unit of the Texas Department of Criminal Justice, alleging that she deprived him of a DVD that he ordered from a Christian bookstore, violating his due process rights, his right to exercise his religion, and his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court dismissed one claim in part without prejudice, dismissed his remaining claims

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX: C

with prejudice as frivolous pursuant to 28 U.S.C. § 1915(g), and certified that an appeal would not be taken in good faith. Franklin now requests leave to proceed in forma pauperis (IFP) on appeal.

"An appeal may not be taken [IFP] if the trial court certifies in writing that it is not taken in good faith." § 1915(a)(3). Franklin's IFP motion is construed as a challenge to the district court's certification decision. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). In determining whether a nonfrivolous issue exists, our inquiry "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citations omitted). If we uphold the district court's certification, Franklin must pay the filing fee, or the appeal will be dismissed for want of prosecution. *See Baugh*, 117 F.3d at 202. Alternatively, "where the merits are so intertwined with the certification decision as to constitute the same issue," we may deny the IFP motion and dismiss the appeal sua sponte if it is frivolous. *Id.* at 202 & n.24; *see* 5TH CIR. R. 42.2.

Franklin argues that the district court abused its discretion when it denied his motion to amend his complaint. The court instructed Franklin that he could file a motion to amend if he included a copy of the proposed amended complaint on the proper form. However, Franklin failed to do so. Over a year later, the district court ordered him to answer a questionnaire concerning his claims. By requesting a more definite statement through a questionnaire, the district court gave Franklin an opportunity to amend his complaint. *See Eason v. Thaler*, 14 F.3d 8, 9-10 (5th Cir. 1994). Therefore, Franklin has not shown that the district court abused its discretion when it denied his motion to amend. *See id.*

APPENDIX: C

The district court did not err in holding that Franklin could not raise a claim concerning the deprivation of property in a § 1983 action because he has an adequate postdeprivation remedy of a tort action for conversion under Texas state law. *See Cathey v. Guenther*, 47 F.3d 162, 164 (5th Cir. 1995). Further, Franklin has not shown that the deprivation of the DVD prevented him from engaging in religious activities or from attending religious services. *See Turner v. Safley*, 482 U.S. 78, 89 (1987); *Baranowski v. Hart*, 486 F.3d 112, 120-22 (5th Cir. 2007). In addition, Franklin may not recover damages from Blair in her individual or official capacity under the RLUIPA. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 289-90 (5th Cir. 2012). The district court correctly found that although the statute authorizes prospective injunctive relief, Franklin did not seek such relief, and his claims were conclusional. *See Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). Finally, to the extent that Franklin is raising new claims for the first time on appeal, this court will not consider new claims or new evidence presented for the first time on appeal. *See Burge v. St. Tammany Parish*, 336 F.3d 363, 372 (5th Cir. 2003); *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

Franklin has not shown that he will raise a nonfrivolous issue on appeal, and his appeal is frivolous. *See Howard*, 707 F.2d at 220. Accordingly, Franklin's IFP motion is denied and the appeal is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard*, 707 F.2d at 220; 5TH CIR. R. 42.2. The dismissal of this appeal as frivolous and the district court's dismissal of Franklin's § 1983 complaint in part as frivolous count as two strikes under 28 U.S.C. § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1761-64 (2015). Franklin is warned that once he accumulates three strikes, he may not proceed IFP in any civil action or appeal filed while he is incarcerated or detained in

APPENDIX C

any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

IFP MOTION DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENJAMIN FRANKLIN,	§	
TDCJ No. 1561085,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 7:15-cv-164-O**
	§	
GLENNA S. BLAIR,	§	
	§	
Defendant.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that Plaintiff's conversion claim is **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

Plaintiff's remaining civil rights claims are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

SIGNED this **27th day** of **March, 2019.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX: B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENJAMIN FRANKLIN,	§	
TDCJ No. 1561085,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 7:15-cv-164-O**
	§	
GLENNA S. BLAIR,	§	
	§	
Defendant.	§	

ORDER DISMISSING CASE

Background

This is a civil rights action filed pursuant to 42 U.S.C. § 1983 by an inmate who, at the time of filing, was confined in the James V. Allred Unit of the Texas Department of Criminal Justice ("TDCJ") in Iowa Park, Texas. Plaintiff states that he ordered a DVD from Christian Book Distributors. *See* Complaint, ECF No. 1 at 4. When the DVD arrived at the Allred Unit, Defendant Blair determined that it was contraband and, as such, Plaintiff was not permitted to have the DVD. *Id.* Plaintiff claims that, rather than return the DVD to the distributor as he requested, the DVD was stolen. *Id.* He claims to have written the distributor who replied that they did not received the DVD. *Id.* In addition to his claim of stolen property, Plaintiff claims that Blair's unlawful interference with his religious DVD violated his rights to freedom of speech and due process, and also violated his rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *Id.* at 8. Plaintiff seeks $10,000.00 in compensatory damages, $10,000.00 in punitive damages, and a declaration that the act and omissions of Defendant Blair violated his rights. *Id.* at 4.

APPENDIX : B

Legal Standards

A district court may summarily dismiss claims filed by a plaintiff proceeding *in forma pauperis* if it concludes that the claims are frivolous or malicious, fail to state a claim on which relief may be granted, or seek monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). To state a claim upon which relief may be granted, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and he must plead those facts with enough specificity "to raise a right to relief above the speculative level," *id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "A claim for relief is implausible on its face when 'the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.'" *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 679).

While, under Federal Rule of Civil Procedure 8(a)(2), a complaint need not contain detailed factual allegations, a plaintiff must allege more than labels and conclusions, and while the Court must accept all of the plaintiff's factual allegations as true, it is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). A threadbare or formulaic recitation of the elements of a cause of action, supported by mere conclusory statements, will not suffice. *See id.*

APPENDIX : B

Deprivation of Property

Plaintiff cannot prevail on his stolen property claim in federal court. The United States Supreme Court has held that the "unauthorized, intentional deprivation of property" does not constitute a civil rights violation if there exists a meaningful post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *accord Nickens v. Melton*, 38 F.3d 183, 184-85 (5th Cir. 1994); *see also Holloway v. Walker*, 790 F.2d 1170, 1174 (5th Cir. 1986) (finding no breach of federally guaranteed constitutional rights, even where a high level state employee intentionally engages in tortious conduct, as long as the state system as a whole provides due process of law). Under the circumstances of the instant case, Plaintiff has the state common-law action of conversion available to remedy his alleged deprivation of property. *Murphy v. Collins*, 26 F.3d 541, 543-44 (5th Cir. 1994); *Myers v. Adams*, 728 S.W.2d 771 (Tex. 1987). Conversion occurs when there is an unauthorized and unlawful exercise of dominion and control over the property of another which is inconsistent with the rights of the owner. *Armstrong v. Benavides*, 180 S.W.3d 359, 363 (Tex. App. – Dallas 2005, *no writ*); *Beam v. Voss*, 568 S.W.2d 413, 420-21 (Tex. Civ. App. -- San Antonio 1978, *no writ*). If Defendant Blair exercised unauthorized and unlawful control over Plaintiff's property, he has a factual basis to allege a cause of action in conversion. Such a common-law action in state court would be sufficient to meet constitutional due process requirements. *Groves v. Cox*, 559 F. Supp. 772, 773 (E.D. Va. 1983).

First Amendment Claim

Although incarcerated, an inmate retains his First Amendment right to the free exercise of religion, subject to reasonable restrictions and limitations necessitated by penological goals. *E.g.,*

APPENDIX: B

Turner v. Safley, 482 U.S. 78, 89-91 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987); *Powell v. Estelle*, 959 F.2d 22, 25-26 (5th Cir. 1992). To fall within the purview of the free exercise clause of the First Amendment, a religious claim must satisfy the following two criteria: "First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to 'so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity.'" *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (quoting *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974)). Second, "the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). Thus, only practices associated with sincerely held religious beliefs require accommodation by prison officials. *See, e.g., U.S. v. Daly*, 756 F.2d 1076, 1081 (5th Cir. 1985) (citing *United States v. Ballard*, 322 U.S. 78, 86-88 (1944) and *United States v. Seeger*, 380 U.S. 163, 184 (1965)); *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994), *supplemented*, 65 F.3d 148 (9th Cir. 1995); *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991). Unfortunately, the realities of prison life dictate that even religious practices associated with sincerely held religious beliefs may be limited "in order to achieve legitimate correctional goals or to maintain prison security." *O'Lone*, 482 U.S. at 348.

To establish a free exercise violation, an inmate must demonstrate that prison officials prevented him from engaging in his religious conduct without any justification related to legitimate penological concerns. *Turner*, 482 U.S. at 89. In reviewing such claims, the Court considers the following factors: (1) whether there is a rational connection between the prison regulation and the claimed penological goal; (2) whether alternative means of exercising the right in question remain

APPENDIX : B

open to inmates; (3) the impact of accommodation on guards, other inmates and prison resources in general, and; (4) whether there is an absence of ready alternatives which would evince the reasonableness of a regulation or the existence of reasonable alternatives which would evince the unreasonableness of a regulation. *Id.* In evaluating prison rules that impinge on religious practices, the Court must accord wide deference to prison officials' decisions in light of the need to preserve internal order and security unless there is substantial evidence to indicate that prison administrators have exaggerated their response to such considerations. *See id.*

The record reflects that Plaintiff ordered two books from "Christianbook" Distributors, Smith's Bible Dictionary and Unwrapping the Pharaohs. *See* Plaintiff's Exhibits, ECF No. 4 at 9. The book titled Unwrapping the Pharaohs contained a DVD.[1] The TDCJ contraband notice to Plaintiff stated that there was a "CD" in the book but that Plaintiff could have the book if the contraband was removed. *See* Plaintiff's Exhibits, ECF No. 4 at 1. Plaintiff makes no claim that he did not receive the two books. Thus, it appears that only the CD (DVD) was removed from Plaintiff's order.

Plaintiff concedes that the DVD was taken from him because it is considered contraband under TDCJ Board Policy 03.91, Correspondence Rules. *See* Plaintiff's Answer to the Court's Question No. 1, ECF No. 28 at 1. Other than Plaintiff's conclusory allegation that the taking of the DVD as contraband violated his First Amendment rights, he has not set forth any argument to

---

[1]*See* https://www.christianbook.com/unwrapping-egyptian-archaeology-confirms-biblical-timeline/john-ashton/9780890514689/pd/514682?product_redirect=1&Ntt=Hj514682&item_code=HJ&Ntk=keywords&event=ESRCG (last visited March 27, 2019).

APPENDIX: B

support such a claim. *See* Complaint, ECF No. 1 at 8. The religious books were given to Plaintiff and he has not indicated how the taking of the DVD prevented him from engaging in his religious activities. TDCJ's policy of prohibiting inmates from possessing videotapes, DVDs, and CDs arises out of security concerns that constitute legitimate government interests logically related to the policy. *See Jones v. Shabazz*, 352 Fed. App'x 910, 915 (5th Cir. 2009) (finding that TDCJ was justified in prohibiting inmate possession of videotapes because such tapes can be used to fashion weapons). Plaintiff's bald allegation that the taking of the DVD as contraband violated his First Amendment rights is insufficient to maintain this claim. *See Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) (holding that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."); *Van Cleave v. United States*, 854 F.2d 82, 84 (5th Cir. 1988) (requiring specific facts and noting that conclusory allegations are insufficient to maintain a claim under § 1983). The Court notes that Plaintiff does not claim that he is prohibited from watching religious DVDs presented by the prison Chaplaincy program.

RLUIPA Claim

Plaintiff states that Defendant Blair's actions in taking his DVD violated his rights under the Religious Land Use and Institutionalized Persons Act. RLUIPA does not create a cause of action against a defendant in her individual capacity. *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 331 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011). And any award of monetary damages against Defendant Blair in her official capacity is barred by Texas' sovereign immunity. *Id.* While the Court could award prospective injunctive relief on a viable RLUIPA claim, Plaintiff does not seek such relief. *See* Complaint, ECF No. 1 at 4 (seeking only monetary damages

APPENDIX: B

and declaratory relief). Moreover, as with his First Amendment claim, Plaintiff's RLUIPA claim is conclusory in nature. *See* Complaint, ECF No. 1 at 8. Therefore, he cannot prevail on this claim.

Conclusion

A district court may dismiss a complaint filed *in forma pauperis* if it determines that the action is frivolous. 28 U.S.C. § 1915(e)(2)(B)(i). An action is frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Henson-El v. Rogers*, 923 F.2d 51, 53 (5th Cir. 1991). A complaint is without an arguable basis in law if it is "based on an indisputably meritless legal theory." *Neitzke*, 490 U.S. at 327. The claims set forth in the case at bar have no arguable basis under federal law.

For the foregoing reasons, Plaintiff's conversion claim is **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

Plaintiff's remaining civil rights claims are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as frivolous.

SO ORDERED this **27th day** of **March, 2019.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX : B