

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID FLORENCE,

Plaintiff-Appellant,

v.

S. FRAUENHEIM, Correctional Officer,
Pleasant Valley State Prison; R. RESER,
Correctional Officer, Pleasant Valley State
Prison,

Defendants-Appellees.

No. 19-15679

D.C. No. 1:15-cv-01383-AWI-JDP
Eastern District of California,
Fresno

ORDER

Before: CANBY, FRIEDLAND, and R. NELSON, Circuit Judges.

We treat Florence's motion for reconsideration (Docket Entry No. 28) as a petition for panel rehearing, and deny the petition.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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JUL 22 2020

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DAVID FLORENCE,

Plaintiff-Appellant,

v.

S. FRAUENHEIM, Correctional Officer,
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Defendants-Appellees.

No. 19-15679

D.C. No. 1:15-cv-01383-AWI-JDP

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted July 14, 2020**

Before: CANBY, FRIEDLAND, and R. NELSON, Circuit Judges.

California state prisoner David Florence appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging First Amendment claims arising out of the confiscation of personal property. We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. We review de novo. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007). We affirm.

The district court properly granted summary judgment on Florence's First Amendment claims on the basis of qualified immunity because it would not have been clear to every reasonable prison official that confiscating CDs with explicit lyrics pursuant to a policy that prohibited prisoners from possessing media that promoted gang activity, violence, and criminal activity was unlawful under the circumstances. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right."); *Foster v. Runnels*, 554 F.3d 807, 815 (9th Cir. 2009) ("A right is 'clearly established' when its contours are sufficiently defined, such that 'a reasonable official would understand that what he is doing violates that right.'" (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999))).

The district court properly dismissed Florence's due process, access-to-courts, and retaliation claims in the original and amended complaints for failure to state a claim. *See Byrd v. Maricopa Cty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017) (standard of review); *see also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (elements of a due process claim for property deprivation); *Nev. Dep't of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011) (elements of an access-to-courts claim); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (elements of a

retaliation claim in the prison context).

The district court did not abuse its discretion in denying Florence's motion for leave to amend to add previously dismissed claims as well as new claims because amendment would have been futile. *See Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999) (setting forth standard of review and factors to consider in denying a motion to amend).

Florence's motion to take judicial notice is denied as unnecessary.

AFFIRMED.

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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10 DAVID FLORENCE,

11 Plaintiff,

12 v.

13 S. FRAUENHEIM, and R. RESER,

14 Defendants.

) Case No.: 1:15-cv-01383-AWI-JDP (PC)

) ORDER ADOPTING FINDINGS AND
) RECOMMENDATIONS (ECF No. 51),
) GRANTING DEFENDANT'S MOTION FOR
) SUMMARY JUDGMENT (ECF No. 37),
) AND DENYING ALL OTHER PENDING
) MOTIONS AS MOOT (ECF No. 44)

) ORDER DIRECTING CLERK OF THE
) COURT TO CLOSE CASE

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17 Plaintiff David Florence is a state prisoner proceeding with counsel in this civil rights
18 action pursuant to 42 U.S.C. § 1983. This case proceeds on Plaintiff's first amended complaint
19 against Defendants S. Frauenheim and R. Reser for violating plaintiff's First Amendment right to
20 free speech. (ECF Nos. 9, 15.)

21 On February 13, 2019, the assigned Magistrate Judge issued findings and recommendations
22 ("F&R") recommending that Defendant's motion for summary judgment be granted. (ECF
23 No. 51.) The parties were given an opportunity to object to the F&R within fourteen days. No
24 objections were filed.

25 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, the
26 Court has conducted a *de novo* review of the case. Having carefully reviewed the matter, the Court
27 concludes that the F&R is supported by the record and by proper analysis.
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ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed on February 13, 2019, (ECF No. 51) are adopted in full;
2. Defendants' motion for summary judgment, filed November 13, 2018, (ECF No. 37), is granted;
3. All other pending motions (ECF No. 44), are denied as moot; and
4. The Clerk of Court is directed to enter judgment in favor of Defendants Frauenheim and Reser and to close this action.

IT IS SO ORDERED.

Dated: March 19, 2019



SENIOR DISTRICT JUDGE

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 DAVID FLORENCE,
12 Plaintiff,
13 v.
14 S. FRAUENHEIM, R. RESER,
15 Defendants.
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Case No. 1:15-cv-01383-AWI-JDP

FINDINGS AND RECOMMENDATIONS
THAT

- (1) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BE GRANTED IN FULL
- (2) ALL OTHER PENDING MOTIONS BE DENIED AS MOOT
- (3) THIS CASE BE DISMISSED WITHOUT PREJUDICE

OBJECTIONS DUE IN 14 DAYS

ECF Nos. 37, 44

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20 This matter is before the court on defendants' motion for summary judgment. ECF No.
21 37. Plaintiff David Florence is a state prisoner proceeding without counsel in this civil rights
22 action brought under 42 U.S.C. § 1983. During the relevant timeframe, defendant S. Frauenheim
23 was the acting warden at Pleasant Valley State Prison ("PVSP") and defendant R. Reser was a
24 receiving and release officer at PVSP. This action proceeds on plaintiff's first amended
25 complaint, which alleges a First Amendment free speech claim against defendants. ECF Nos. 9,
26 15.

27 On November 13, 2018, defendants moved for summary judgment under Federal Rule of
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1 Civil Procedure 56, arguing that defendants are qualifiedly immune because the law was not so
2 clear that they would know their conduct violated the First Amendment. ECF No. 37. Plaintiff
3 filed an opposition to summary judgment on January 11, 2019. ECF No. 47. Defendants replied
4 on January 17, 2019. ECF No. 49. The motion was submitted on the record without oral
5 argument under Local Rule 230(l).¹ Defendants' motion for summary judgment is now before
6 the court, and we recommend granting it.

7 **I. Statement of Undisputed Facts**

8 On December 5, 2012, plaintiff transferred to PVSP. ECF Nos. 9 at 8; 37-2 at 2; 47 at 9.
9 Defendant Reser processed plaintiff's property upon plaintiff's arrival at PVSP. ECF Nos. 9 at
10 8-9; 37-5 at ¶¶ 2, 4; 47 at 9-11, 21. While processing plaintiff's property, defendant Reser
11 confiscated approximately six CDs that had parental advisory stickers indicating explicit
12 material. ECF Nos. 9 at 9; 37-4 at 5, 7; 37-5 at ¶ 4; 47 at 27. Defendant Reser confiscated those
13 CDs pursuant to a PVSP policy, ECF Nos. 9 at 41-42; 37-5 at ¶¶ 2-4, 6, which stated that CDs
14 containing "explicit lyrics that promote or depict gang activity, unlawful activities, or any matter
15 of a character tending to incite . . . violence or physical harm . . . will be confiscated as
16 contraband," ECF Nos. 9 at 42; 37-6 at 5. PVSP Warden James A. Yates established the explicit
17 lyrics CD policy in a 2007 memorandum, and defendant S. Frauenheim maintained the policy
18 when he became the acting warden. ECF Nos. 9 at 42; 37-6 at 1-2, 5; 47 at 32. Plaintiff is no
19 longer located at PVSP. ECF No. 50.

20 **II. Standard of Review**

21 Summary judgment is appropriate when there is "no genuine dispute as to any material
22 fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual
23 dispute is genuine if a reasonable trier of fact could find in favor of either party at trial. *See*
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The disputed fact is material if it
25 "might affect the outcome of the suit under the governing law." *See id.* at 248.

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27 ¹ As required by *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998), plaintiff was provided
28 with notice of the requirements for opposing a summary judgment motion via an attachment to
defendant's motion for summary judgment. ECF No. 37-1.

1 The party seeking summary judgment bears the initial burden of demonstrating the
2 absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
3 Once the moving party has met its burden, the non-moving party may not rest on the allegations
4 or denials in his pleading, *Anderson*, 477 U.S. at 248, but “must come forward with ‘specific
5 facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith
6 Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

7 In making a summary judgment determination, the court “may not engage in credibility
8 determinations or the weighing of evidence,” *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir.
9 2017) (citation omitted), and it must view the inferences drawn from the underlying facts in the
10 light most favorable to the non-moving party. See *United States v. Diebold, Inc.*, 369 U.S. 654,
11 655 (1962) (per curiam); *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002).

12 **III. Analysis**

13 **A. Qualified Immunity**

14 Defendants contend that they are entitled to qualified immunity because their challenged
15 conduct did not violate a “clearly established” right. Qualified immunity shields government
16 officials from money damages unless their conduct violates “clearly established statutory or
17 constitutional rights of which a reasonable person would have known.” *City of Escondido, Cal.
18 v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) (internal citations and quotation marks
19 omitted); accord *Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018). To assess whether
20 qualified immunity attaches, we ask “two questions: (1) whether the facts, taken in the light most
21 favorable to the non-moving party, show that the officials’ conduct violated a constitutional
22 right, and (2) whether the law at the time of the challenged conduct clearly established that the
23 conduct was unlawful.” *Felarca*, 891 F.3d at 815. These questions may be addressed in any
24 order, and a negative answer to either is sufficient for qualified immunity to attach. See *Pearson
25 v. Callahan*, 555 U.S. 223, 236 (2009).

26 To determine whether defendants’ alleged conduct violated a “clearly established” right,
27 the court must consider whether the defendants “would have had fair notice that the action was
28 unlawful.” *Chappell v. Mandeville*, 706 F.3d 1052, 1056-57 (9th Cir. 2013) (internal citations

1 and quotation marks omitted). The relevant law must be “sufficiently clear that every
2 reasonable official would have understood” that the conduct in question was unlawful.
3 *Rodriguez v. Swartz*, 899 F.3d 719, 732 (9th Cir. 2018).

4 In this case, it was reasonable for defendants to enforce the PVSP policy against CDs with
5 explicit lyrics. Defendants did not have “fair notice” that confiscating the CDs at issue would
6 be unlawful. Although prisoners retain First Amendment rights while incarcerated, the exercise
7 of such rights is limited by the fact of confinement and the needs of the penal institution. *See*
8 *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149
9 (9th Cir. 2001). “[W]hen a prison regulation impinges on inmates’ constitutional rights, the
10 regulation is valid if it is reasonably related to legitimate penological interests.” *Turner v.*
11 *Safely*, 482 U.S. 78, 89 (1987).

12 As of December 5, 2012—the date of the relevant incident—some cases with allegations
13 similar to those in this case had been allowed to progress past screening or dispositive motions.
14 *See Lyons v. Bisbee*, No. 3:07-CV-0460-LRH RAM, 2011 WL 2313652, at *15-16 (D. Nev.
15 Apr. 7, 2011), *report and recommendation adopted*, No. 3:07-CV-00460-LRH, 2011 WL
16 2293333 (D. Nev. June 9, 2011) (finding a challenge to a policy against CDs with explicit lyrics
17 survived summary judgment because no evidence of legitimate penological interests was
18 produced by defendants); *Golden v. McCaughtry*, 915 F. Supp. 77, 79 (E.D. Wis. 1995)
19 (allowing an action challenging a prison policy against cassette tapes with explicit lyrics to
20 proceed after screening complaint for *in forma pauperis* status). However, no court had held
21 that a prison’s policy disallowing recorded music with explicit lyrics in prison was
22 unconstitutional. To the contrary, the only final court decisions on the issue had upheld similar
23 policies against First Amendment challenges. *See Herlein v. Higgins*, 172 F.3d 1089, 1091 (8th
24 Cir. 1999) (“In sum, we believe that the ban on the possession of tapes with labels that warn of
25 explicit lyrics is reasonably related to the legitimate penological objective of maintaining prison
26 security.”); *Hensley v. Verhagen*, No. 01-C-0495-C, 2002 WL 32344440, at *9 (W.D. Wis. May
27 23, 2002) (holding that “that the regulation banning cassette tapes and players is reasonably
28 related to legitimate penological interests”).

1 Therefore, defendants have shown that a reasonable official at the relevant time would not
2 have known that enforcing the PVSP policy prohibiting CDs with explicit content was
3 unlawful. Defendants are thus qualifiedly immune from money damages. For these reasons,
4 defendants are entitled to summary judgment on the issue of qualified immunity.

5 **B. Declaratory Judgment**

6 The defendants in this case are qualifiedly immune from money damages. The only other
7 relief that plaintiff seeks is a declaratory judgment that defendants violated plaintiff's
8 constitutional rights. *See* ECF No. 9 at 33. "[A] declaratory judgment merely adjudicating past
9 violations of federal law—as opposed to continuing or future violations of federal law—is not an
10 appropriate exercise of federal jurisdiction." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853,
11 868 (9th Cir. 2017). In this case, a declaratory judgment would have no impact on plaintiff
12 because he cannot receive damages for the past violation, if any, and because there is no
13 allegation or evidence of a continuing violation against plaintiff. Therefore, plaintiff's claim for
14 a declaratory judgment is moot. *See Bayer*, 861 F.3d at 868 (holding that a "claim for
15 declaratory relief is moot" when there is "no evidence to show the conduct complained of in this
16 action presently affects [plaintiff] or can reasonably be expected to affect [plaintiff] in the
17 future") (internal citations omitted).

18 **IV. Findings and Recommendations**

19 For the foregoing reasons, we recommend:

- 20 1. that the court grant in full defendants' motion for summary judgment, ECF No. 37;
- 21 2. all other pending motions be denied as moot, ECF No. 44; and
- 22 3. that this case be dismissed without prejudice.

23 These findings and recommendations are submitted to the U.S. district judge presiding
24 over the case under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within fourteen days of the
25 service of the findings and recommendations, the parties may file written objections to the
26 findings and recommendations with the court and serve a copy on all parties. That document
27 must be captioned "Objections to Magistrate Judge's Findings and Recommendations." The
28 presiding district judge will then review the findings and recommendations under 28 U.S.C.

1 § 636(b)(1)(C). If the parties fail to file objections within the specified time, they may waive
2 their rights to object to factual findings on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839
3 (9th Cir. 2014).

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5 IT IS SO ORDERED.

6 Dated: February 13, 2019


UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID FLORENCE,

Plaintiff,

v.

S. FRAUENHEIM, et al.,

Defendants.

CASE NO. 1:15-cv-01383-AWI-MJS (PC)

**FINDINGS AND RECOMMENDATION TO
DISMISS ACTION FOR FAILURE TO
STATE A CLAIM**

(ECF NO. 9)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

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.

On November 24, 2015, the Court dismissed Plaintiff's complaint for failure to state a claim but gave leave to amend. (ECF No. 8.) His first amended complaint is before the Court for screening.

I. Screening Requirement

The in forma pauperis statute provides, "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if

1 the court determines that . . . the action or appeal . . . fails to state a claim upon which
2 relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

3 **II. Pleading Standard**

4 Section 1983 "provides a cause of action for the deprivation of any rights,
5 privileges, or immunities secured by the Constitution and laws of the United States."
6 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
7 Section 1983 is not itself a source of substantive rights, but merely provides a method for
8 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94
9 (1989).

10 ¶ To state a claim under § 1983, a plaintiff must allege two essential elements:
11 (1) that a right secured by the Constitution or laws of the United States was violated and
12 (2) that the alleged violation was committed by a person acting under the color of state
13 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d
14 1243, 1245 (9th Cir. 1987).

15 A complaint must contain "a short and plain statement of the claim showing that
16 the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
17 are not required, but "[t]hreadbare recitals of the elements of a cause of action,
18 supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S.
19 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
20 Plaintiff must set forth "sufficient factual matter, accepted as true, to state a claim to relief
21 that is plausible on its face." Id. Facial plausibility demands more than the mere
22 possibility that a defendant committed misconduct and, while factual allegations are
23 accepted as true, legal conclusions are not. Id. at 677-78.

24 **III. Plaintiff's Allegations**

25 Plaintiff is incarcerated at Kern Valley State prison but complains of acts that
26 occurred at Pleasant Valley State Prison ("PVSP") in Coalinga, California. Plaintiff
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1 names as Defendants PVSP Correctional Officer ("CO") R. Reser in his individual
2 capacity, and PVSP Warden Scott Frauenheim in his individual and official capacities.

3 Plaintiff's allegations may be summarized essentially as follows.

4 Plaintiff transferred to PVSP on December 5, 2012, with nine boxes of personal
5 property. Upon Plaintiff's arrival, CO Reser told Plaintiff that he was only allowed four
6 boxes. Plaintiff countered that he had a permissible amount of property – according to
7 Plaintiff, six cubic feet of property and one cubic foot of legal material – because his nine
8 boxes were only half full. Plaintiff threatened to file a grievance. Reser became angry.

9 Reser confiscated six CDs containing explicit lyrics, telling Plaintiff that explicit
10 lyrics were not allowed pursuant to prison policy. Plaintiff stated that he was filing an
11 appeal and asked Reser to hold the CDs. Reser refused, telling Plaintiff to send the CDs
12 home or donate them.

13 Reser removed Plaintiff's civil rights complaint in another case and the related
14 inmate appeals, stating, "You sure don't have a problem with filing 602s." He then
15 stated, I'm going to give you something to file an appeal about," and confiscated
16 Plaintiff's hot pot, orthopedic shoes, extension cord, and other items

17 On December 6, 2012, Plaintiff sent a CDCR Form-22 to the Warden¹ regarding
18 the policy of prohibiting CDs with explicit lyrics and the confiscation of Plaintiff's CDs.
19 Plaintiff received a memorandum back stating that the items were contraband.

20 In January or February 2013, Plaintiff suffered a nervous breakdown. He was
21 placed in a crisis room and then transferred to California Medical Facility for treatment.
22 He then was transferred to California State Prison – Corcoran ("CSP-COR") for ninety
23 days pending transfer to Richard J. Donovan Correctional Facility ("RJD"), where he is
24 presently housed. Since his personal property remained at PVSP following his nervous
25 breakdown, he sent a letter on June 26, 2013, to Defendant Warden Frauenheim

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28 ¹ Presumably Defendant Warden Frauenheim, although this is not expressly stated.

1 requesting that the property be forwarded to him at RJD because of upcoming court
2 deadlines.

3 On August 20, 2013, Plaintiff was called to pick up his personal property at RJD.
4 He was given four boxes of property that were in his cell at the time he was placed in the
5 crisis room. This property had been "transpacked" by non-party correctional officers on
6 December 10, 2012. Some of the property was damaged. Plaintiff's legal documents
7 were missing.

8 Plaintiff directly sent Defendant Warden Frauenheim several appeals and a letter
9 regarding his missing legal documents, damaged personal property, and the above-
10 described incident with Defendant Reser. The letter was forwarded to Lieutenant K.D.
11 Geringer, who advised Plaintiff on October 7 2013, to submit a Form-22 to the "R-R"²
12 sergeant regarding his issues. Plaintiff thereafter filed many appeals regarding his
13 personal property. He now alleges, in essence, that his appeals were improperly
14 processed, rejected, cancelled and/or otherwise inappropriately evaluated. He contends
15 that Defendant Frauenheim falsely stated he did not receive Plaintiff's appeals, impeding
16 Plaintiff's access to the courts.

17 In December 2013 or January 2014, Plaintiff received a response from PVSP
18 stating that four boxes of property had been located and would be sent to Plaintiff.
19 Plaintiff eventually received three boxes of property.

20 Plaintiff brings retaliation and denial of court access claims against the
21 Defendants, as well as claims for various provisions of title 15 of the California Code of
22 Regulations and CDCR internal policies and manuals. He seeks damages and
23 declaratory relief.

24 **IV. Analysis**

25 Plaintiff previously was advised of the legal standards applicable to his claim and
26 was afforded the opportunity to cure noted defects in his pleading. Nonetheless, the
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28 ² Presumably "Receiving and Release."

1 allegations in Plaintiff's amended complaint differ only marginally from the original,
2 defective pleading. Accordingly, the Court will recommended that the action be
3 dismissed for failure to state a claim. The Court again sets forth the legal standards
4 applicable to Plaintiff's claims, although the analysis remains largely the same.

5 **A. First Amendment Retaliation**

6 "Within the prison context, a viable claim of First Amendment retaliation entails
7 five basic elements: (1) An assertion that a state actor took some adverse action against
8 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)
9 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
10 reasonably advance a legitimate correctional goal ." Rhodes v. Robinson, 408 F.3d 559,
11 567-68 (9th Cir. 2005) (footnote and citations omitted).

12 Under the first element, plaintiff need not prove that the alleged retaliatory action,
13 in itself, violated a constitutional right. Pratt v. Rowland, 65 F.3d 802, 806 (1995) (to
14 prevail on a retaliation claim, plaintiff need not "establish an independent constitutional
15 interest" was violated); see also Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997)
16 ("[P]risoners may still base retaliation claims on harms that would not raise due process
17 concerns."); Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985) (transfer of prisoner to a
18 different prison constituted adverse action for purposes of retaliation claim). The interest
19 cognizable in a retaliation claim is the right to be free of conditions that would not have
20 been imposed but for the alleged retaliatory motive. However, not every allegedly
21 adverse action is sufficient to support a claim for retaliation under § 1983. Watison v.
22 Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (harm must be "more than minimal" (quoting
23 Rhodes, 408 F.3d at 568, n.11)); see also Bell v. Johnson, 308 F.3d 594, 603 (6th Cir.
24 2002) ("[S]ome adverse actions are so de minimis that they do not give rise to
25 constitutionally cognizable injuries." (citing Thaddeus-X v. Blatter, 175 F.3d 378, 396 (6th
26 Cir. 1999))).

1 To prove the second element, retaliatory motive, plaintiff must show that his
2 protected activities were a "substantial" or "motivating" factor behind the defendant's
3 challenged conduct. Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009) (quoting
4 Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989)). Plaintiff must
5 provide direct or circumstantial evidence of defendant's alleged retaliatory motive; mere
6 speculation is not sufficient. See McCollum v. CDCR, 647 F.3d 870, 882-83 (9th Cir.
7 2011); accord, Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014). In addition to
8 demonstrating defendant's knowledge of plaintiff's protected conduct, circumstantial
9 evidence of motive may include: (1) proximity in time between the protected conduct and
10 the alleged retaliation; (2) defendant's expressed opposition to the protected conduct;
11 and (3) other evidence showing that defendant's reasons for the challenged action were
12 false or pretextual. McCollum, 647 F.3d at 882 (quoting Allen v. Iranon, 283 F.3d 1070,
13 1077 (9th Cir. 2002)).

14 The third element includes prisoners' First Amendment right to access to the
15 courts. Lewis v. Casey, 518 U.S. 343, 346 (1996). While prisoners have no freestanding
16 right to a prison grievance process, see Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.
17 2003), "a prisoner's fundamental right of access to the courts hinges on his ability to
18 access the prison grievance system," Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir.
19 1995), overruled on other grounds by Shaw v. Murphy, 532 U.S. 223, 230 n.2 (2001).
20 Because filing administrative grievances and initiating civil litigation are protected
21 activities, it is impermissible for prison officials to retaliate against prisoners for engaging
22 in these activities. Rhodes, 408 F.3d at 567.

23 Under the fourth element, plaintiff need not demonstrate a "total chilling of his
24 First Amendment rights," only that defendant's challenged conduct "would chill or silence
25 a person of ordinary firmness from future First Amendment activities." Rhodes, 408 F.3d
26 at 568-69 (emphasis in original, citation and internal quotation marks omitted). Moreover,
27 direct and tangible harm will support a retaliation claim even without demonstration of a
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1 chilling effect on the further exercise of a prisoner's First Amendment rights. Id. at 568 n.
2 1. "[A] plaintiff who fails to allege a chilling effect may still state a claim if he alleges he
3 suffered some other harm" as a retaliatory adverse action. Brodheim, 584 F.3d at 1269
4 (citing Rhodes, 408 F.3d at 568 n.11).

5 Regarding the fifth element, the Ninth Circuit has held that preserving institutional
6 order, discipline, and security are legitimate penological goals that, if they provide the
7 motivation for an official act taken, will defeat a claim of retaliation. Barnett v. Centoni, 31
8 F.3d 813, 816 (9th Cir. 1994); Rizzo, 778 F.2d at 532. When considering this final factor,
9 courts should "'afford appropriate deference and flexibility' to prison officials in the
10 evaluation of proffered legitimate penological reasons for conduct alleged to be
11 retaliatory." Pratt, 65 F.3d at 807 (quoting Sandin v. Conner, 515 U.S. 472, 482 (1995)).
12 Plaintiff bears the burden of pleading and proving the absence of legitimate correctional
13 goals for defendant's challenged conduct. Pratt, 65 F.3d at 806.

14 Plaintiff claims that Reser saw that he had filed a civil rights complaint and
15 numerous grievances at his prior institution, and thus retaliated against him by
16 confiscating his CDs. This argument fails. Plaintiff plainly states that Reser confiscated
17 the CDs pursuant to an institutional policy prohibiting explicit lyrics. Thus, Plaintiff fails to
18 allege an absence of legitimate penological interest in light of the institution's
19 determination that the CDs were contraband.

20 Plaintiff next claims that Reser confiscated other personal items, including a hot
21 pot, shoes, and an extension cord, in retaliation for Plaintiff having threatened Reser with a
22 grievance. However, Plaintiff also states that these items were confiscated pursuant to
23 the Department Operations Manual, or DOM. (ECF No. 9 at 25.) Again, Plaintiff's
24 argument fails because he has shown that departmental policy, rather than a retaliatory
25 motive, was the moving force behind Reser's action.

26 Plaintiff then claims that Reser retaliated against him by keeping or stealing some
27 of Plaintiff's items that remained at PVSP following his transfer. This allegation appears
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1 to be based entirely on speculation. Reser allegedly assumed control of Plaintiff's excess
2 property when the property arrived at the institution. There is nothing to indicate he was
3 responsible for locating or transferring Plaintiff's property after Plaintiff left PVSP.

4 Plaintiff claims that Defendant Frauenheim retaliated against Plaintiff by stating
5 that he never received some of Plaintiff's appeals. Plaintiff does not provide any facts to
6 suggest that Frauenheim retaliated against him for engaging in protected conduct. This
7 allegation fails to state a claim.

8 **B. Access to Courts**

9 Prisoners have a constitutional right to meaningful access to the courts. Silva v.
10 DiVittorio, 658 F.3d 1090, 1101-02 (9th Cir. 2011). The right of access to the courts
11 protects prisoners' right to file civil actions that have "a reasonable basis in law or fact"
12 without "active interference" by the government. Id. at 1102-03 (internal quotation marks
13 and emphasis omitted). The right of access to the courts "does not require prison
14 officials to provide affirmative assistance in the preparation of legal papers," but does
15 prohibit states from "erecting barriers that impede the right of access of incarcerated
16 persons," such as by depriving prisoners of the "tools necessary to challenge their
17 sentences or conditions of confinement." Id. at 1102-03 (internal brackets and quotation
18 marks omitted).

19 The Supreme Court distinguishes between "forward-looking" access to the courts
20 claims, in which the plaintiff alleges that official action is frustrating plaintiff's ability to
21 prepare and file a suit at the present time, and "backward-looking" claims, in which
22 plaintiff alleges that due to official action, a specific case cannot now be tried, or be tried
23 with all material evidence. Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). To state
24 a claim for denial of access to the courts, prisoners must allege an actual injury, i.e., that
25 some official action has frustrated or is impeding plaintiff's attempt to bring a nonfrivolous
26 legal claim. Nevada Dept. of Corrections v. Greene, 648 F.3d 1014, 1018 (9th Cir. 2011).

1 Plaintiff here claims that the Defendants denied him access to the courts.
2 However, he alleges no injury with respect to any ongoing or intended litigation, nor has
3 he alleged facts to suggest that his ongoing or intended legal actions are nonfrivolous.
4 Instead, Plaintiff alleges only that his many attempts to pursue grievances were
5 thwarted. However, absent some impact on Plaintiff's ability to pursue a nonfrivolous
6 claim in court, this allegation fails to state a claim. As Plaintiff fails to establish that he
7 suffered any prejudice in connection with any contemplated or pending litigation, this
8 claim must be dismissed.

9 **C. Fourteenth Amendment Due Process**

10 **1. Property Seizure**

11 A prisoner may not be deprived of a protected property interest without due
12 process. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). However, "the Due Process
13 Clause is simply not implicated by a negligent act of an official causing unintended loss
14 of or injury to ... property." Daniels v. Williams, 474 U.S. 327, 328 (1986). Similarly, "an
15 unauthorized intentional deprivation of property by a state employee does not constitute
16 a violation of the procedural requirements of the Due Process Clause of the Fourteenth
17 Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v.
18 Palmer, 468 U.S. at 533. In California, a meaningful postdeprivation remedy is available
19 in the form of a tort claim against public officials pursuant to California Government Code
20 § 900, et seq. See City of West Covina v. Perkins, 525 U.S. 234, 240 (1999). Because
21 the State of California provides a meaningful postdeprivation remedy for any property
22 deprivation that was either negligent or intentional but unauthorized, the allegation of
23 such a deprivation fails to state a claim upon which relief can be granted in the federal
24 courts. Only an authorized, intentional deprivation of property by a public official may
25 constitute an actionable violation of the Due Process Clause. Logan v. Zimmerman
26 Brush Co., 455 U.S. 422, 435-36 (1982).

1 To the extent Plaintiff's complaint can be construed as asserting a Due Process
2 violation relating to the box of property that apparently was lost, it fails since it is based
3 on a negligent or unauthorized deprivation, which is not actionable under the Fourteenth
4 Amendment. Plaintiff's allegation that his personal property was wrongfully lost,
5 misplaced, damaged, or stolen reflects a random and unauthorized deprivation of
6 property not cognizable under Section 1983. His property claim may be cognizable
7 under state law, but such a claim must be brought in state court rather than in federal
8 court.

9 2. Grievance Process

10 Plaintiff does not have protected liberty interest in the processing his appeals,
11 and therefore, he cannot pursue a claim for denial of due process with respect to the
12 handling or resolution of his appeals. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.
13 2003) (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)).

14 Although prison officials cannot willfully turn a blind eye to constitutional violations
15 being committed by subordinates, Jett v. Penner, 439 F.3d 1091, 1098 (9th Cir. 2006),
16 there is no indication in this case that a constitutional violation occurred, let alone that
17 Defendant Frauenheim was aware of but disregarded a constitutional violation.

18 D. California Code of Regulations and CDCR Policies

19 Plaintiff alleges various violations of title 15 of the California Code of Regulations
20 and the Department Operations Manual. However, Plaintiff fails to provide authority for
21 the existence of a private right of action under either authority. See Gonzaga University
22 v. Doe, 536 U.S. 273, 283-86 (2002) (basing a claim on an implied private right of action
23 requires a showing that the statute both contains explicit rights-creating terms and
24 manifests an intent to create a private remedy); Davis v. Powell, 901 F.Supp.2d 1196,
25 1211 (S.D.Cal. 2012) (no implied private right of action for violation of Title 15 prison
26 regulations). Furthermore, any such claims arise under state law and are not properly
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1 before this Court absent a cognizable federal claim. 28 U.S.C. § 1367(a); Herman Family
2 Revocable Trust v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001).

3 **V. Conclusion and Recommendation**

4 Plaintiff's first amended complaint does not state a cognizable claim for relief. He
5 previously was advised of pleading deficiencies and afforded the opportunity to correct
6 them. He failed to do so. Any further leave to amend reasonably appears futile and
7 should be denied.

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

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

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22 IT IS SO ORDERED.

23 Dated: July 25, 2016

24 /s/ Michael J. Leng
25 UNITED STATES MAGISTRATE JUDGE
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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 DAVID FLORENCE,
12 Plaintiff,
13 v.
14 S. FRAUENHEIM, et al.,
15 Defendants.
16

CASE NO. 1:15-cv-01383-AWI-MJS (PC)
ORDER DISMISSING COMPLAINT
(ECF NO. 1)
AMENDED COMPLAINT DUE WITHIN
THIRTY (30) DAYS

17 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil
18 rights action brought pursuant to 42 U.S.C. § 1983. Plaintiff's complaint is before the
19 Court for screening.

20 I. SCREENING REQUIREMENT

21 The in forma pauperis statute provides, "Notwithstanding any filing fee, or any
22 portion thereof, that may have been paid, the court shall dismiss the case at any time if
23 the court determines that . . . the action or appeal . . . fails to state a claim upon which
24 relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

25 II. PLEADING STANDARD

26 Section 1983 "provides a cause of action for the deprivation of any rights,
27 privileges, or immunities secured by the Constitution and laws of the United States."
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1 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
2 Section 1983 is not itself a source of substantive rights, but merely provides a method for
3 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94
4 (1989).

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

10 A complaint must contain "a short and plain statement of the claim showing that
11 the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
12 are not required, but "[t]hreadbare recitals of the elements of a cause of action,
13 supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S.
14 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
15 Plaintiff must set forth "sufficient factual matter, accepted as true, to state a claim to relief
16 that is plausible on its face." Id. Facial plausibility demands more than the mere
17 possibility that a defendant committed misconduct and, while factual allegations are
18 accepted as true, legal conclusions are not. Id. at 677-78.

19 **III. PLAINTIFF'S ALLEGATIONS**

20 The acts giving rise to this action occurred at Pleasant Valley State Prison
21 ("PVSP") in Coalinga, California. Plaintiff names as Defendants PVSP Correctional
22 Officer ("CO") R. Reser and PVSP Warden Scott Frauenheim.

23 Plaintiff's allegations may be summarized essentially as follows.

24 Plaintiff transferred to PVSP on December 5, 2012, with nine boxes of personal
25 property. Upon Plaintiff's arrival, CO Reser told Plaintiff that he was only allowed four
26 boxes and then, due to prison policy, confiscated six CDs containing explicit lyrics. Reser
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1 also confiscated a hot pot, tennis shoes, and an extension cord. Plaintiff filed an appeal
2 regarding Defendant's confiscation of the CDs, but this appeal was denied.

3 In January or February 2013, Plaintiff suffered a nervous breakdown. He was
4 placed in a crisis room and then transferred to California Medical Facility for treatment.
5 Plaintiff was eventually transferred to Richard J. Donovan Correctional Facility ("RJD"),
6 where he is presently housed. Since his personal property remained at PVSP following
7 his nervous breakdown, he sent a letter on June 26, 2013, to Defendant Warden
8 Frauenheim requesting that the property be forwarded to him at RJD because of
9 upcoming court deadlines.

10 In August 2013, Plaintiff received some of his personal property, but his legal
11 documents were missing and some personal items were damaged. Plaintiff wrote to
12 Defendant Warden Frauenheim directly regarding his missing legal documents and
13 damaged personal property. The letter was forwarded to Lieutenant K.D. Geringer, who
14 advised Plaintiff on October 7 2013, to submit inmate appeals regarding his property
15 issues. Plaintiff thereafter filed many appeals regarding his personal property. He now
16 alleges, in essence, that his appeals were improperly processed, rejected, cancelled
17 and/or otherwise inappropriately evaluated.

18 Plaintiff brings retaliation and denial of court access claims against the
19 Defendants, as well as state law claims for violation of California Penal Code § 5058 and
20 California Government Code § 19572(f). He seeks damages and declaratory relief.

21 **IV. ANALYSIS**

22 **A. First Amendment Retaliation**

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

3 Under the first element, plaintiff need not prove that the alleged retaliatory action,
4 in itself, violated a constitutional right. Pratt v. Rowland, 65 F.3d 802, 806 (1995) (to
5 prevail on a retaliation claim, plaintiff need not "establish an independent constitutional
6 interest" was violated); see also Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997)
7 ("[P]risoners may still base retaliation claims on harms that would not raise due process
8 concerns."); Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985) (transfer of prisoner to a
9 different prison constituted adverse action for purposes of retaliation claim). The interest
10 cognizable in a retaliation claim is the right to be free of conditions that would not have
11 been imposed but for the alleged retaliatory motive. However, not every allegedly
12 adverse action is sufficient to support a claim for retaliation under § 1983. Watison v.
13 Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (harm must be "more than minimal" (quoting
14 Rhodes, 408 F.3d at 568, n.11)); see also Bell v. Johnson, 308 F.3d 594, 603 (6th Cir.
15 2002) ("[S]ome adverse actions are so de minimis that they do not give rise to
16 constitutionally cognizable injuries." (citing Thaddeus-X v. Blatter, 175 F.3d 378, 396 (6th
17 Cir. 1999))).

18 To prove the second element, retaliatory motive, plaintiff must show that his
19 protected activities were a "substantial" or "motivating" factor behind the defendant's
20 challenged conduct. Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009) (quoting
21 Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989)). Plaintiff must
22 provide direct or circumstantial evidence of defendant's alleged retaliatory motive; mere
23 speculation is not sufficient. See McCollum v. CDCR, 647 F.3d 870, 882-83 (9th Cir.
24 2011); accord, Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014). In addition to
25 demonstrating defendant's knowledge of plaintiff's protected conduct, circumstantial
26 evidence of motive may include: (1) proximity in time between the protected conduct and
27 the alleged retaliation; (2) defendant's expressed opposition to the protected conduct;

1 and (3) other evidence showing that defendant's reasons for the challenged action were
2 false or pretextual. McCollum, 647 F.3d at 882 (quoting Allen v. Iranon, 283 F.3d 1070,
3 1077 (9th Cir. 2002)).

4 The third element includes prisoners' First Amendment right to access to the
5 courts. Lewis v. Casey, 518 U.S. 343, 346 (1996). While prisoners have no freestanding
6 right to a prison grievance process, see Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.
7 2003), "a prisoner's fundamental right of access to the courts hinges on his ability to
8 access the prison grievance system," Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir.
9 1995), overruled on other grounds by Shaw v. Murphy, 532 U.S. 223, 230 n.2 (2001).
10 Because filing administrative grievances and initiating civil litigation are protected
11 activities, it is impermissible for prison officials to retaliate against prisoners for engaging
12 in these activities. Rhodes, 408 F.3d at 567.

13 Under the fourth element, plaintiff need not demonstrate a "total chilling of his
14 First Amendment rights," only that defendant's challenged conduct "would chill or silence
15 a person of ordinary firmness from future First Amendment activities." Rhodes, 408 F.3d
16 at 568-69 (emphasis in original, citation and internal quotation marks omitted). Moreover,
17 direct and tangible harm will support a retaliation claim even without demonstration of a
18 chilling effect on the further exercise of a prisoner's First Amendment rights. Id. at 568 n.
19 1. "[A] plaintiff who fails to allege a chilling effect may still state a claim if he alleges he
20 suffered some other harm" as a retaliatory adverse action. Brodheim, 584 F.3d at 1269
21 (citing Rhodes, 408 F.3d at 568 n.11).

22 Regarding the fifth element, the Ninth Circuit has held that preserving institutional
23 order, discipline, and security are legitimate penological goals that, if they provide the
24 motivation for an official act taken, will defeat a claim of retaliation. Barnett v. Centoni, 31
25 F.3d 813, 816 (9th Cir. 1994); Rizzo, 778 F.2d at 532. When considering this final factor,
26 courts should "'afford appropriate deference and flexibility' to prison officials in the
27 evaluation of proffered legitimate penological reasons for conduct alleged to be
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1 retaliatory.” Pratt, 65 F.3d at 807 (quoting Sandin v. Conner, 515 U.S. 472, 482 (1995)).
2 Plaintiff bears the burden of pleading and proving the absence of legitimate correctional
3 goals for defendant's challenged conduct. Pratt, 65 F.3d at 806.

4 Plaintiff accuses Defendant Reser of withholding Plaintiff's legal materials and
5 damaging his personal property in response to Plaintiff's filing of a grievance. Plaintiff's
6 claim, however, is purely speculative. It contains no alleged facts that might be said to
7 connect Reser to the missing and damaged property or to suggest that the property was
8 taken for other than legitimate penological reasons. Rather, Plaintiff apparently assumes
9 Reser is responsible because Reser objected to the volume of Plaintiff's personal
10 property. Indeed, no facts suggest Reser was even aware of Plaintiff's grievance.

11 The same is true regarding the purported retaliation claim against Warden
12 Frauenheim. Plaintiff asserts that the warden conspired with Reser and other COs to
13 steal his legal materials and damage his personal property in response to Plaintiff's filing
14 of multiple appeals. As plead, this allegation also appears to be based solely upon
15 Plaintiff's speculation, assumptions and surmise. It fails to state a claim.

16 **B. Access to Courts**

17 Prisoners have a constitutional right to meaningful access to the courts. Silva v.
18 DiVittorio, 658 F.3d 1090, 1101-02 (9th Cir. 2011). The right of access to the courts
19 protects prisoners' right to file civil actions that have “a reasonable basis in law or fact”
20 without “active interference” by the government. Id. at 1102-03 (internal quotation marks
21 and emphasis omitted). The right of access to the courts “does not require prison
22 officials to provide affirmative assistance in the preparation of legal papers,” but does
23 prohibit states from “erecting barriers that impede the right of access of incarcerated
24 persons,” such as by depriving prisoners of the “tools necessary to challenge their
25 sentences or conditions of confinement.” Id. at 1102-03 (internal brackets and quotation
26 marks omitted).

27 The Supreme Court distinguishes between “forward-looking” access to the courts
28

1 claims, in which the plaintiff alleges that official action is frustrating plaintiff's ability to
2 prepare and file a suit at the present time, and "backward-looking" claims, in which
3 plaintiff alleges that due to official action, a specific case cannot now be tried, or be tried
4 with all material evidence. Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). To state
5 a claim for denial of access to the courts, prisoners must allege an actual injury, i.e., that
6 some official action has frustrated or is impeding plaintiff's attempt to bring a nonfrivolous
7 legal claim. Nevada Dept. of Corrections v. Greene, 648 F.3d 1014, 1018 (9th Cir. 2011).

8 Plaintiff here claims that the Defendants denied him access to the courts. As
9 noted above, Plaintiff fails to adequately link either of the Defendants to the withholding
10 of his legal materials. Plaintiff also fails to allege any injury. He fails to establish that he
11 suffered any prejudice in connection with any contemplated or pending litigation.
12 Accordingly, this claim must be dismissed.

13 **C. Fourteenth Amendment Due Process**

14 A prisoner may not be deprived of a protected property interest without due
15 process. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). However, "the Due Process
16 Clause is simply not implicated by a negligent act of an official causing unintended loss
17 of or injury to ... property." Daniels v. Williams, 474 U.S. 327, 328 (1986). Similarly, "an
18 unauthorized intentional deprivation of property by a state employee does not constitute
19 a violation of the procedural requirements of the Due Process Clause of the Fourteenth
20 Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v.
21 Palmer, 468 U.S. at 533. In California, a meaningful postdeprivation remedy is available
22 in the form of a tort claim against public officials pursuant to California Government Code
23 § 900, et seq. See City of West Covina v. Perkins, 525 U.S. 234, 240 (1999). Because
24 the State of California provides a meaningful postdeprivation remedy for any property
25 deprivation that was either negligent or intentional but unauthorized, the allegation of
26 such a deprivation fails to state a claim upon which relief can be granted in the federal
27 courts. Only an authorized, intentional deprivation of property by a public official may
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1 constitute an actionable violation of the Due Process Clause. Logan v. Zimmerman
2 Brush Co., 455 U.S. 422, 435-36 (1982).

3 To the extent Plaintiff's complaint can be construed as asserting a Due Process
4 violation, it fails since it is based on an unauthorized, intentional deprivation, which is not
5 actionable under the Fourteenth Amendment. Plaintiff's allegation that his personal
6 property was wrongfully lost, misplaced, damaged, or stolen reflects a random and
7 unauthorized deprivation of property not cognizable under Section 1983. His property
8 claim may be cognizable under state law, but such a claim must be brought in state court
9 rather than in federal court.

10 **D. California Penal Code Section § 5058**

11 Plaintiff asserts a violation of California Penal Code 5058 against both
12 Defendants. A private right of action under a criminal statute has rarely been implied.
13 Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979). Where a private right of action has
14 been implied, "there was at least a statutory basis for inferring that a civil cause of action
15 of some sort lay in favor of someone." Chrysler Corp., 441 U.S. at 316 (quoting Cort v.
16 Ash, 422 U.S. 66, 79 (1975)). Section 5058 merely authorizes the director of CDCR to
17 prescribe and amend rules and regulations for the administration of the prisons.
18 Accordingly, the Court finds that Plaintiff fails to state any claim upon which relief may be
19 granted under state law based on the alleged violations of California Penal Code § 5058.

20 **E. California Government Code § 19572(f)**

21 Lastly, Plaintiff claims that Defendants were dishonest in violation of California
22 Government Code § 19572(f). The Government Code section cited by Plaintiff relates to
23 discipline of state civil service personnel. There is no indication that Plaintiff is authorized
24 to bring a private cause of action based on this Government Code provision.

25 **V. CONCLUSION AND ORDER**

26 Plaintiff's complaint does not state a claim for relief. The Court will grant Plaintiff
27 an opportunity to file an amended complaint. Noll v. Carlson, 809 F.2d 1446, 1448-49
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1 (9th Cir. 1987). If Plaintiff opts to amend, he must demonstrate that the alleged acts
2 resulted in a deprivation of his constitutional rights. Iqbal, 556 U.S. at 677-78. Plaintiff
3 must set forth "sufficient factual matter . . . to 'state a claim that is plausible on its face.'"
4 Id. at 678 (quoting Twombly, 550 U.S. at 555 (2007)). Plaintiff must also demonstrate
5 that each named Defendant personally participated in a deprivation of his rights. Jones
6 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

7 Plaintiff should note that although he has been given the opportunity to amend, it
8 is not for the purposes of adding new claims. George v. Smith, 507 F.3d 605, 607 (7th
9 Cir. 2007). Plaintiff should carefully read this Screening Order and focus his efforts on
10 curing the deficiencies set forth above.

11 Finally, Plaintiff is advised that Local Rule 220 requires that an amended
12 complaint be complete in itself without reference to any prior pleading. As a general rule,
13 an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d
14 55, 57 (9th Cir. 1967). Once an amended complaint is filed, the original complaint no
15 longer serves any function in the case. Therefore, in an amended complaint, as in an
16 original complaint, each claim and the involvement of each defendant must be
17 sufficiently alleged. The amended complaint should be clearly and boldly titled "First
18 Amended Complaint," refer to the appropriate case number, and be an original signed
19 under penalty of perjury. Plaintiff's amended complaint should be brief. Fed. R. Civ. P.
20 8(a). Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a
21 right to relief above the speculative level" Twombly, 550 U.S. at 555 (citations
22 omitted).

23 Accordingly, it is HEREBY ORDERED that:

- 24 1. The Clerk's Office shall send Plaintiff (1) a blank civil rights complaint form and
25 (2) a copy of his complaint, filed September 10, 2015;
- 26 2. Plaintiff's complaint (ECF, No. 1) is dismissed for failure to state a claim upon
27 which relief may be granted;

1 3. Plaintiff shall file an amended complaint within thirty (30) days; and

2 4. If Plaintiff fails to file an amended complaint in compliance with this order, the
3 Court will dismiss this action, with prejudice, for failure to state a claim and
4 failure to comply with a court order.

5 IT IS SO ORDERED.
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7 Dated: November 23, 2015

8 /s/ Michael J. Leng
9 UNITED STATES MAGISTRATE JUDGE
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