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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTOR CURRY,
Plaintiff,
v.
FPC LOMPOC MED DIRECTOR,
et al.,
Defendants.

Case No. CV 16-7523 AB (SS)

MEMORANDUM AND ORDER
DISMISSING FIRST AMENDED
COMPLAINT WITH LEAVE TO AMEND

I.

INTRODUCTION

On October 4, 2016, Victor Curry ("Plaintiff"), a federal prisoner proceeding pro se, filed a complaint alleging violations under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671, et seq. ("Complaint," Dkt. No. 3). The Court dismissed the Complaint with leave to amend due to defects in pleading.¹ (Dkt. No. 9).

¹ Magistrate judges may dismiss a complaint with leave to amend without approval of the district judge. See McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

1 Plaintiff subsequently filed the instant First Amended Complaint.
2 ("FAC," Dkt. No. 19).

3
4 Congress mandates that district courts perform an initial
5 screening of complaints in civil actions where a prisoner seeks
6 redress from a governmental entity or employee. 28 U.S.C.
7 § 1915A(a). This Court may dismiss such a complaint, or any
8 portions thereof, before service of process if it concludes that
9 the complaint (1) is frivolous or malicious, (2) fails to state a
10 claim upon which relief can be granted, or (3) seeks monetary relief
11 from a defendant who is immune from such relief. 28 U.S.C. §
12 1915A(b) (1-2); see also Lopez v. Smith, 203 F.3d 1122, 1126-27 &
13 n.7 (9th Cir. 2000) (en banc). For the reasons stated below, the
14 FAC is DISMISSED with leave to amend.

15 16 II.

17 ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

18
19 Plaintiff sues five unnamed employees and one prisoner at the
20 "Federal Prison Camp" in Lompoc, California: (1) "John Doe/Jane
21 Doe," the prison's medical director ("Medical Director");
22 (2) "Richard Roe," the warden ("Warden"); (3) "Bobby Do[e]," the
23 acting warden in the warden's absence ("Acting Warden"); (4) "Jimmy
24 Doe," the correctional officer in charge of the prison's special
25 housing unit ("SHU Lieutenant"); (5) "Perry Doe," a prison
26 disciplinary hearing officer ("Hearing Officer"); and (6) Kenyon
27 Payne ("Payne"), a fellow prisoner whom Plaintiff maintains is also
28 a "contract employee" of the Federal Bureau of Prisons ("BOP").

1 (FAC at 3-4). All six Defendants are sued in both their individual
2 and official capacities, "together with insurers by this 3rd party
3 beneficiary." (Id.).

4
5 The FAC² alleges that on an unspecified date at FPC Lompoc,
6 Payne attacked and beat Plaintiff until he lost consciousness and
7 "for some time" thereafter. (Id. at 5). No staff member intervened
8 to stop the attack, which did not end until "Payne tired on his
9 own." (Id. at 8). Plaintiff suffered "profuse" internal and
10 external bleeding and a broken jaw; permanently lost sight in one
11 eye and hearing in one ear; and to this day urinates blood and
12 endures "pain of body and mind that will not abate," including
13 migraine headaches that last "indefinitely." (Id. at 5).

14
15 Plaintiff was rushed to the hospital, where doctors
16 recommended that he remain overnight and return soon after for
17 "after-care" consultations. (Id.). However, an unidentified duty
18 officer returned Plaintiff to the SHU that very night. (Id.).

19
20 The SHU Lieutenant kept Plaintiff in the SHU instead of
21 returning him to the general population, even though he was the
22

23 ² The FAC attaches among its many exhibits a photocopy of the
24 original Complaint, which Plaintiff captions as the "Amended
25 Complaint Continued." (FAC at 11-18). Because the Court has
26 already dismissed the original Complaint as defective, the Court
27 will not address the "Amended Complaint Continued." Plaintiff
28 should not attempt to incorporate dismissed versions of his claims
by attaching copies of prior complaints as "continuations" of the
allegations in subsequent pleadings. The Court will cite to the
other exhibits where necessary as though the FAC and its attachments
were consecutively paginated.

1 victim of the attack. Plaintiff did not receive the medical
2 treatment recommended by the hospital doctors and was not taken
3 back to the hospital for follow-up care. (Id.). The prison SHU
4 and medical staff "did not take [Plaintiff's] injuries seriously"
5 and "ignored his pleas for help." (Id.). On one occasion, SHU
6 "detail officers" attempted to place Plaintiff "in a locked
7 Recreation cage with PAYNE" and encouraged them to fight. (Id.).
8

9 While in the SHU, Plaintiff was "processed for misconduct" in
10 a disciplinary proceeding in connection with the incident. (Id.).
11 The Hearing Officer concluded, based on "false reports," that
12 Plaintiff had participated in a "mutual fight" and "ratified" the
13 loss of good time credits and "sanctions" against Plaintiff. (Id.
14 at 6). Plaintiff spoke to the Warden and an administrator about
15 the decision, and but they both "shrugged it off." (Id.).
16

17 Plaintiff was then transferred to his current prison in Ohio.
18 (Id.). FPC Lompoc Medical staff "violated every rule in the book"
19 by allowing him to be transferred in his injured condition without
20 following the hospital's "recommendation for after-care,
21 operations, medical review and analysis." (Id.). FPC Lompoc
22 Medical staff also prescribed NSAIDs (non-steroidal anti-
23 inflammatory drugs) even though Plaintiff had suffered "obvious
24 kidney damage." (Id.).
25

26 Plaintiff states that he filed claims, including a tort claim,
27 related to the incident, "knowing full well that all [Defendants]
28

1 were insured."³ (Id.). However, to "evade claims reporting
2 requirements," Defendants conspired to falsely characterize the
3 attack "in their books" as a mutual fight in violation of their
4 "medical professional ethics" and "corrections professional
5 ethics," and ignored his plea for compensation. (Id.).
6

7 Although the FAC purports to be a Bivens action, the Request
8 for Relief does not clearly include any Bivens claims at all.
9 Instead, Plaintiff states that he is seeking damages for
10 "discriminatory business practices," "personal injury,"
11 "supervisory negligence and contract breach," "medical malpractice
12 and negligence," "correctional staff conduct state law
13 violations/human rights breach," and "forgery and falsification of
14 records to conceal wrongdoing" in violation of "business
15 record/accounting laws & claim processing state laws." (Id. at 9).
16 Plaintiff seeks over \$5 million in monetary damages, (id.), and an
17 order requiring FPC Lompoc to produce videotapes of the SHU
18 recreation cages for the days when Plaintiff was signed up for
19 recreation. (Id. at 8).
20

21 **III.**

22 **DISCUSSION**

23
24 Pursuant to 28 U.S.C. § 1915A(b), the Court must dismiss
25 Plaintiff's Complaint due to defects in pleading. Pro se litigants
26

27 ³ The FAC attaches a copy of the tort claim Plaintiff submitted to
28 the BOP along with a letter from the government acknowledging its
receipt. (FAC at 48-54).

1 in civil rights cases, however, must be given leave to amend their
2 complaints unless it is absolutely clear that the deficiencies
3 cannot be cured by amendment. See Lopez, 203 F.3d at 1128-29.
4 Accordingly, the Court grants leave to amend.

5
6 **A. The Complaint Fails To Satisfy Federal Rule Of**
7 **Civil Procedure 8**

8
9 Federal Rule of Civil Procedure 8(a)(2) requires that a
10 complaint contain “‘a short and plain statement of the claim showing
11 that the pleader is entitled to relief,’ in order to ‘give the
12 defendant fair notice of what the . . . claim is and the grounds
13 upon which it rests.’” Bell Atlantic Corp. v. Twombly, 550 U.S.
14 544, 555 (2007). Rule 8(e)(1) instructs that “[e]ach averment of
15 a pleading shall be simple, concise, and direct.”

16
17 The FAC does not comply with the standards of Rule 8.
18 Plaintiff once again fails to clearly specify the particular claims
19 he wishes to pursue, the facts supporting each individual claim,
20 and the specific Defendants who are allegedly liable under each
21 particular claim. Many purported “claims,” such as the claims for
22 “discriminatory business practices” and “contract breach,” are
23 mentioned only in the Request for Relief and seemingly have no
24 connection to the wrongs alleged in the body of the FAC. The FAC
25 alleges no facts showing discrimination. Furthermore, not only
26 does Plaintiff fail to identify the contract he believes was
27 breached, but more importantly, breach of contract is not a
28 constitutional claim and generally is not actionable under the

1 FTCA. See Love v. United States, 915 F.2d 1242, 1246 (9th Cir.
2 1989) (actions "essentially for breach of a contractual
3 undertaking" where liability "depends wholly upon the government's
4 alleged promise" may not be brought under the FTCA). Still other
5 "claims," such as "correctional staff conduct state law
6 violations/human rights breach," or violations of "business
7 record/accounting laws & claim processing state laws" by definition
8 do not state a violation of the federal constitution. Finally, the
9 repeated, vague references to insurers, insurance laws and third
10 party beneficiaries are simply nonsensical.

11
12 The FAC also violates Rule 8 to the extent that it attaches
13 many exhibits which appear unnecessary to Plaintiff's allegations.
14 Plaintiff is advised that he is not required at this stage of the
15 litigation to submit evidence in support of the claims. For
16 example, Plaintiff improperly attaches a declaration captioned as
17 a "Statement of Injury and Loss of Victor Curry Regarding Event of
18 Civil Rights Violations and Negligence Attributable to LOMPOC Jail
19 Hospital/Med Ctr." (Id. at 19-22). "Written instruments" such as
20 "declarations . . . are not allowed as pleading exhibits unless
21 they form the basis of the complaint." United States v. Ritchie,
22 342 F.3d 903, 908 (9th Cir. 2003). A declaration "clearly does not
23 form the basis" of a complaint when, as here, "it is merely a piece
24 of evidentiary matter that does not exist independently of the
25 complaint." DeMarco v. DepoTech Corp., 149 F. Supp. 2d 1212, 1220
26 (S.D. Cal. 2001) (citations omitted)). Moreover, many of the
27 assertions in the declaration are either irrelevant or duplicative
28 of the allegations in the FAC.

1 The FAC also violates Rule 8 to the extent that it includes
2 unnecessary and irrelevant discussions of law. For example,
3 Plaintiff requests review under the Administrative Procedure Act,
4 5 U.S.C. § 706, which provides for the scope of judicial review of
5 administrative law claims, which are not at issue here. (FAC at
6 8). Additionally, the caption erroneously indicates that Plaintiff
7 is bringing this action under 42 U.S.C. § 1983 as well as Bivens.
8 Section 1983 claims must allege a violation of federal
9 constitutional or statutory rights by persons acting under color
10 of state law, and none of the Defendants is employed by the state
11 of California. Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir.
12 2006).

13
14 The FAC also improperly seeks as “injunctive relief” an order
15 from the Court requiring the BOP to provide surveillance tapes to
16 Plaintiff. Requests for production of documents and tangible
17 things are governed by Federal Rule of Civil Procedure 34 as part
18 of discovery, generally without the intervention of the Court. The
19 FAC fails to provide Defendants with fair notice of the claims in
20 a short, clear and concise statement. See Twombly, 550 U.S. at
21 555. Accordingly, the FAC must be dismissed, with leave to amend.

22
23 **B. The FAC’s Official Capacity Claims Are Improper**

24
25 A suit for damages against federal employees in their official
26 capacity is functionally a suit against the United States. Gilbert
27 v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). However, a civil
28 rights action against a federal defendant under Bivens may be

1 brought only against the offending individual officer, not the
2 United States or its agencies. Correctional Services Corp. v.
3 Malesko, 534 U.S. 61, 72 (2001). As such, no cause of action is
4 available under Bivens against individual federal employees sued
5 in their official capacities. Ibrahim v. Dept. of Homeland Sec.,
6 538 F.3d 1250, 1257 (9th Cir. 2008).

7
8 Furthermore, the United States is the only proper defendant
9 in an action under the FTCA. 28 U.S.C. § 2679(b)(1). While a
10 government official in his official capacity may stand in proxy for
11 the United States, "in suits against either federal officials in
12 their official capacities or the United States pursuant to the
13 FTCA, the United States is the real defendant" Armstrong
14 v. Sears, 33 F.3d 182, 187 (2d Cir. 1994). To the extent that
15 Plaintiff is in fact attempting to assert a claim under the FTCA,
16 he should name the United States directly as a Defendant.
17 Accordingly, the official capacity claims in the FAC are improper.

18
19 **C. The FAC Fails To Allege Personal Participation By The Warden,**
20 **Acting Warden, SHU Lieutenant, Or Medical Director**

21
22 The FAC contains few, if any, allegations involving the
23 Warden, Acting Warden, SHU Lieutenant, or Medical Director. To the
24 extent that the FAC attempts to state a claim against any of these
25 Defendants, their liability appears to be based on the theory that
26 they are responsible for acts committed by their subordinates.
27 (Id. at 4-6). However, there is no supervisory liability under
28 Bivens.

1 As the Court previously explained, in a civil rights action,
2 "each Government official, his or her title notwithstanding, is
3 only liable for his or her own misconduct." Starr v. Baca, 652
4 F.3d 1202, 1220 (9th Cir. 2011).⁴ "A plaintiff must plead that
5 each Government-official defendant, through the official's own
6 individual actions, has violated the constitution." Ashcroft v.
7 Iqbal, 556 U.S. 662, 676 (2009) (italics omitted). To be held
8 liable, a supervising officer has to personally take some action
9 against the plaintiff or "set in motion a series of acts by others
10 . . . which he knew or reasonably should have known, would cause
11 others to inflict the constitutional injury" on the plaintiff.
12 Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991)
13 (internal quotation marks and citation omitted; emphasis added).
14 For example, a supervisor may be held liable if he or she
15 "implement[s] a policy so deficient that the policy 'itself is a
16 repudiation of constitutional rights' and is 'the moving force of
17 a constitutional violation.'" Crowley v. Bannister, 734 F.3d 967,
18 977 (9th Cir. 2013) (quoting Hansen v. Black, 885 F.2d 642, 646
19 (9th Cir. 1989)).

20
21 Accordingly, to state a Bivens claim against supervisors such
22 as the Warden, Acting Warden, the SHU Lieutenant or the Medical
23 Director, Plaintiff must allege facts showing that the Defendant
24 either personally participated in the violation or committed some
25 specific act as a supervisor with a direct causal connection to the

26 _____
27 ⁴ Actions under 42 U.S.C. § 1983 and Bivens are identical except
28 for the replacement of a state actor under Section 1983 with a
federal actor under Bivens, and may be cited interchangeably. Van
Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991).

1 constitutional violation committed by subordinates. The primary
2 allegations against the Warden are that he is the "CEO" of the
3 prison, (FAC at 5), and that even though Plaintiff told him about
4 the unfair results of the disciplinary proceeding, the Warden did
5 nothing to "nullify or reverse" the Hearing Officer's decision
6 resulting in the loss of Plaintiff's good time credits.⁵ (Id. at
7 6). The only allegation against the Acting Warden is the vague
8 assertion, unsupported by any facts, that he "had personal
9 knowledge that the treatment prescribed for [Plaintiff] by
10 [hospital doctors] was not being followed and did nothing." (Id.
11 at 4). The only specific allegation against the SHU Lieutenant is
12 that he kept Plaintiff in the SHU after his return from the
13 hospital. (Id. at 5). Similarly, Plaintiff does not allege any
14 facts showing what the Medical Director personally did that caused
15 him harm, or even suggesting that the Medical Director was aware
16 of Plaintiff's medical condition. Plaintiff must show that these
17 Defendants personally participated in the harms he suffered, or
18 show how what they did or did not do as a supervisor directly led
19 to those harms. Vague allegations that these Defendants, by virtue
20 of their positions, had the power to right the wrongs committed by
21 their subordinates are insufficient to state a claim. Plaintiff
22 must correct these defects in any amended complaint.

23 \\

24 \\

25 \\

26 ⁵ As explained in Part E immediately below, the Hearing Officer's
27 decision to revoke good time credits is not actionable.
28 Accordingly, the Warden's failure to reverse the Hearing Officer's
decision is also not actionable.

1 **D. The FAC Fails To State A Claim Against The Hearing Officer**

2
3 Plaintiff alleges that the Hearing Officer, relying on
4 information in "false reports," "ratified" the loss of Plaintiff's
5 good time credits. A challenge to the loss of good time credits
6 is not a cognizable civil rights claim unless the decision revoking
7 the credits has been invalidated. In Heck v. Humphrey, 512 U.S.
8 477 (1994), the Supreme Court held that a prisoner-plaintiff's
9 civil rights complaint must be dismissed if judgment in favor of
10 the plaintiff would undermine the validity of his conviction or
11 sentence, unless the plaintiff can demonstrate that the conviction
12 or sentence has already been invalidated. Id. at 486-87. In
13 Edwards v. Balisok, 520 U.S. 641 (1997), the Supreme Court extended
14 the Heck rule to civil rights claims that, if successful, would
15 imply the invalidity of deprivations of good-time credits in prison
16 disciplinary proceedings. Id. at 643-47; see also Blueford v.
17 Prunty, 108 F.3d 251, 255 (9th Cir. 1997) (affirming dismissal
18 without prejudice of prisoner plaintiff's "claims arising from his
19 challenge to the prison's disciplinary proceeding, because they
20 could fairly be construed as a challenge for loss of good time
21 credit"). Accordingly, the FAC must be dismissed, with leave to
22 amend.

23
24 **E. Plaintiff Fails To State A Civil Rights Claim Against Payne**

25
26 It is unclear exactly what claim or claims Plaintiff may be
27 attempting to allege against Payne. As the Court previously
28 explained, to state a claim under Bivens, a plaintiff must allege

1 that a person acting under color of federal law deprived him of a
2 right secured by the federal constitution or statutory law. Bivens,
3 403 U.S. at 392. As discussed in depth in the Court's Order
4 dismissing the original Complaint with leave to amend, a private
5 actor may be deemed to be acting under color of law only in very
6 specific circumstances not present here. Kirtley v. Rainey, 326
7 F.3d 1088, 1093-95 (9th Cir. 2003) (describing "public function,"
8 "joint action," "governmental coercion or compulsion" and
9 "government nexus" tests pursuant to which actions by a private
10 actor may be attributed to the government for purposes of a civil
11 rights claim).

12
13 Plaintiff now contends that Payne was a "contract employee of
14 [the] BOP." (FAC at 3). However, the FAC does not state what
15 Payne's purported employment was or allege that Payne was acting
16 in the course of his employment when he attacked Plaintiff. Even
17 if it had, courts have routinely found that prisoners who harm
18 other prisoners do not act under color of state or federal law.
19 See, e.g., Jackson v. Foster, 372 F. App'x 770, 771 (9th Cir. 2010)
20 ("The district court properly dismissed [prisoner-plaintiff's]
21 excessive force claim because inmate Doakes did not act under color
22 of state law under any formulation of the governmental actor
23 tests."); Bolton v. Washington, 2013 WL 1163938, at *6 (W.D. Wash.
24 Feb. 15, 2013) (a prisoner is not a government "employee" acting
25 under color of law). Accordingly, to the extent that Plaintiff is
26 attempting to sue Payne personally for civil rights violations, the
27
28

1 FAC must be dismissed, with leave to amend.⁶ Plaintiff may not
2 assert any claim against Payne unless he has a proper factual and
3 legal basis.

4
5 **F. The FAC Fails To State A Claim For Deliberate Indifference To**
6 **Serious Medical Needs**

7
8 To state an Eighth Amendment claim based on a prisoner's
9 medical treatment, the prisoner must demonstrate that the defendant
10 was "deliberately indifferent" to his "serious medical needs."
11 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also West
12 v. Atkins, 487 U.S. 42, 49 (1988). To establish a "serious medical
13 need," the prisoner must demonstrate that "failure to treat a
14 prisoner's condition could result in further significant injury or
15 the 'unnecessary and wanton infliction of pain.'" Jett, 439 F.3d
16 at 1096 (citation omitted); see also Morgan v. Morgensen, 465 F.3d
17 1041, 1045 (9th Cir. 2006) (the existence of a serious medical need
18 is determined by an objective standard).

19
20 To establish "deliberate indifference" to such a need, the
21 prisoner must demonstrate: "(a) a purposeful act or failure to
22 respond to a prisoner's pain or possible medical need, and (b) harm
23 caused by the indifference." (Id.) (emphasis added). Deliberate
24 indifference "may appear when prison officials deny, delay or
25 intentionally interfere with medical treatment, or it may be shown

26 _____
27 ⁶ Even if Plaintiff could assert a Bivens claim against Payne in
28 his individual capacity, which he cannot, prevailing on such a
claim would have no practical benefit if Payne is indigent because
Plaintiff would be unable to collect damages.

1 by the way in which prison physicians provide medical care.” (Id.)
2 (citations omitted). The defendant must have been subjectively
3 aware of a serious risk of harm and must have consciously
4 disregarded that risk. See Farmer v. Brennan, 511 U.S. 825 (1994).
5 An “isolated exception” to the defendant’s “overall treatment” of
6 the prisoner does not state a deliberate indifference claim. Jett,
7 439 F.3d at 1096.

8
9 The FAC fails to state a deliberate indifference claim against
10 any of the Defendants. The FAC does not adequately allege facts
11 showing that the Medical Director personally knew about Plaintiff’s
12 serious medical need and deliberately chose to ignore it, either
13 by seriously delaying or denying care, thereby putting Plaintiff
14 at risk of injury. Accordingly, the FAC must be dismissed, with
15 leave to amend.

16
17 **G. The FAC Fails To State A Claim Under The FTCA**

18
19 To state a claim against the United States under the FTCA,
20 Plaintiff must show, among other things, that the person who
21 committed the tort was a “federal employee[] acting within the
22 scope of [his] employment.” Balser v. Dep’t of Justice, Office of
23 U.S. Tr., 327 F.3d 903, 908 (9th Cir. 2003) (citing 28 U.S.C.
24 §§ 1346(b)(1), 2674). Because it does not appear that Payne was a
25 federal employee, no FTCA action can be brought based on wrongs
26 that Payne allegedly committed. Therefore, to the extent that the
27 FAC seeks damages for personal injury caused by Payne, the FAC
28 fails to state an FTCA claim.

1 The FAC also fails to state an FTCA claim based on the actions
2 of the other Defendants, even though they are federal employees.
3 The FAC does not specifically name the United States as a defendant,
4 even though the United States is the only proper defendant under
5 the FTCA. Jachetta, 653 F.3d at 904. Plaintiff does not even
6 clearly state that he is asserting an FTCA claim. Nor does he
7 identify which specific torts he is alleging, what the wrongful
8 conduct was, and who committed the wrongful, tortious act.
9 Accordingly, the FAC must be dismissed, with leave to amend.

10
11 **H. The FAC Fails To State A Claim For Alleged Violations Of**
12 **"Records" And "Insurance" Laws Or Against Unnamed "Insurers"**

13
14 Plaintiff continues to allege that prison officials violated
15 "express and implied insurance law" and committed "records
16 violations." (FAC at 5). The FAC states that "to evade claims
17 reporting requirements," Defendants ignored "his pleas for
18 compensation for permanent injury," even though "they have
19 occurrence term or claims-made term Commercial Liability Coverage
20 and property/premises insurance as well as bonding and coverage on
21 all individuals and offices involved." (Id. at 6). In the prayer
22 for relief, Plaintiff states that "ALL DAMAGES are sought against
23 insurances [sic] by this 3rd party beneficiary AFTER LIABILITY IS
24 FOUND" (Id. at 8).

25
26 As discussed above, under Bivens, a plaintiff may bring an
27 action only where his "federally protected rights have been
28 invaded." Bivens, 403 U.S. at 392. Plaintiff does not allege

1 violations of his federal constitutional or statutory rights with
2 respect to these unidentified "express and implied insurance" laws
3 and "records violations." Even if he could, which he cannot,
4 Plaintiff does not attempt to explain how these purported
5 violations of "records and insurance laws" harmed him personally.
6

7 Finally, Plaintiff's repeated assertions that Defendants are
8 sued "together with insurers by this 3rd party beneficiary" are
9 both unclear and improper. (FAC at 3-4). No insurers are named
10 in this action, and even if they were, they are likely not
11 government actors subject to suit under Bivens or, through the
12 United States, the FTCA. Additionally, Plaintiff is not a "third
13 party beneficiary" of the unidentified policies he that he imagines
14 exist. "For a party to sue as a third party beneficiary, the third
15 party must show the contract was specifically intended to be for
16 that party's direct benefit." Klamath Water Users Ass'n v.
17 Patterson, 15 F. Supp. 2d 990, 994 (D. Or. 1998) (emphasis added).
18 Plaintiff does not, and apparently cannot, allege that the parties
19 entered into some unidentified contract with the specific intention
20 of benefitting him personally. Accordingly, the FAC must be
21 dismissed, with leave to amend.
22

23 **I. The FAC Fails To State Claims Under 18 U.S.C. §§ 241, 242,**
24 **4041, Or 4042 Or The Ninth Amendment**

25
26 Plaintiff alleges that Defendants violated 18 U.S.C. § 241,
27 which prohibits conspiracies to deprive an individual of his or her
28 federal constitutional or statutory rights, and § 242, which

1 prohibits the deprivation of rights under the color of law on
2 account of a person's race, color, or alienage. (FAC at 4). Both
3 sections 241 and 242 are criminal statutes that do not provide for
4 a private right of action. See Allen v. Gold Country Casino, 464
5 F.3d 1044, 1048 (9th Cir. 2006) (neither 18 U.S.C. § 241 nor § 242
6 provides a private right of action). Accordingly, Plaintiff cannot
7 assert claims under these statutes.

8
9 The FAC also states that Defendants "jointly and severally"
10 breached 18 U.S.C. §§ 4041 and 4042. (FAC at 4). Those statutes
11 respectively provide that the BOP shall be run by a director serving
12 directly under the Attorney General (§ 4041), and list the
13 responsibilities of the BOP (§ 4042). Section 4041 is not relevant
14 to this action because apart from any other deficiencies such a
15 claim might have, there is no dispute that the BOP has a director.
16 Furthermore, courts have repeatedly found that "section 4042 does
17 not create a private right of action against federal officials" in
18 civil rights actions. Harper v. Williford, 96 F.3d 1526, 1527
19 (D.C. Cir. 1996); see also Williams v. United States, 405 F.2d 951,
20 954 (9th Cir. 1969) ("[§ 4042] does not impose a duty on any
21 officials who may be responsible to the Bureau of Prisons, and does
22 not establish a civil cause of action against anyone in the event
23 the Bureau's duty is breached."); Martinez v. United States, 812
24 F. Supp. 2d 1052, 1061 (C.D. Cal. 2010) (same) (citing Williams).
25 Accordingly, Plaintiff cannot state a claim under these statutes.

26
27 The FAC further alleges that Plaintiff's "unenumerated common
28 law jural rights embodied at [the] 9th amendment were taken absent

1 due process of the law." (FAC at 5). While these allegations are
2 unclear, to the extent that Plaintiff is attempting to state a
3 claim directly under the Ninth Amendment, the FAC fails to state a
4 claim. The Ninth Amendment provides that "[t]he enumeration in the
5 Constitution, of certain rights, shall not be construed to deny or
6 disparage others retained by the people." U.S. Const. amend. IX.
7 However, "the ninth amendment has never been recognized as
8 independently securing any constitutional right, for purposes of
9 pursuing a civil rights claim." Strandberg v. City of Helena, 791
10 F.2d 744, 748 (9th Cir. 1986); see also Jenkins v. C.I.R., 483 F.3d
11 90, 93 (2d Cir. 2007) ("The Ninth Amendment is not an independent
12 source of individual rights"). To the extent that Plaintiff
13 is attempting to raise a due process claim, he does not identify
14 the "jural rights" of which he was allegedly deprived or who
15 deprived him of those rights, or explain what process he was due.
16 Accordingly, the FAC must be dismissed, with leave to amend.

17
18 **IV.**

19 **CONCLUSION**

20
21 For the reasons stated above, the Complaint is dismissed with
22 leave to amend. If Plaintiff still wishes to pursue this action,
23 he is granted **thirty (30) days** from the date of this Memorandum and
24 Order within which to file a Second Amended Complaint. In any
25 amended complaint, Plaintiff shall **cure the defects** described
26 above. **Plaintiff shall not include new defendants or new**
27 **allegations that are not reasonably related to the claims asserted**
28 **in the original Complaint.** The Second Amended Complaint, if any,

1 shall be complete in itself and shall bear both the title "Second
2 Amended Complaint" and the case number assigned to this action. It
3 shall not refer in any manner to the original Complaint. Plaintiff
4 shall limit his action only to those Defendants who are properly
5 named in such a complaint, consistent with the authorities
6 discussed above.

7
8 In any amended complaint, Plaintiff should confine his
9 allegations to those operative facts supporting each of his claims.
10 Plaintiff is advised that pursuant to Federal Rule of Civil
11 Procedure 8(a), all that is required is a "short and plain statement
12 of the claim showing that the pleader is entitled to relief."
13 **Plaintiff is strongly encouraged to utilize the standard civil**
14 **rights complaint form when filing any amended complaint, a copy of**
15 **which is attached.** In any amended complaint, Plaintiff should make
16 clear the nature and grounds for each claim and **specifically**
17 **identify the Defendants** he maintains are liable for that claim.
18 Plaintiff shall not assert any claims for which he cannot allege a
19 proper factual basis.

20
21 **Plaintiff is explicitly cautioned that failure to timely file**
22 **a Second Amended Complaint, or failure to correct the deficiencies**
23 **described above, will result in a recommendation that this action**
24 **be dismissed with prejudice for failure to prosecute and obey Court**
25 **orders pursuant to Federal Rule of Civil Procedure 41(b). Plaintiff**
26 **is further advised that if he no longer wishes to pursue this**
27 **action, he may voluntarily dismiss it by filing a Notice of**
28 **Dismissal in accordance with Federal Rule of Civil Procedure**

1 **41(a)(1). A form Notice of Dismissal is attached for Plaintiff's**
2 **convenience.**

3
4 DATED: April 26, 2017

5
6 /s/
SUZANNE H. SEGAL
7 UNITED STATES MAGISTRATE JUDGE

8
9 **THIS MEMORANDUM IS NOT INTENDED FOR PUBLICATION NOR IS IT INTENDED**
10 **TO BE INCLUDED IN OR SUBMITTED TO ANY ONLINE SERVICE SUCH AS WESTLAW**
11 **OR LEXIS.**