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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 EMERY L. FRANKLIN III,

12 Plaintiff,

13 vs.

14 UNITED STATES OF AMERICA, et al.,

15 Defendants.
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1:11-cv-00173-GSA-PC

ORDER FINDING COGNIZABLE CLAIM

ORDER FOR THIS CASE TO PROCEED
AGAINST DEFENDANT UNITED
STATES UNDER THE FEDERAL TORT
CLAIMS ACT

ORDER DISMISSING ALL OTHER
DEFENDANTS AND CLAIMS FROM
THIS ACTION FOR FAILURE TO STATE
A CLAIM

24 **I. BACKGROUND**

25 Emery L. Franklin III ("Plaintiff") is a federal prisoner proceeding pro se and in forma
26 pauperis with this civil action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388
27 (1971) and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Plaintiff filed the Complaint
28 commencing this action on January 31, 2011. (Doc. 1.)

1 On February 9, 2011, Plaintiff consented to Magistrate Judge jurisdiction pursuant to 28
2 U.S.C. § 636(c) in this action, and no other parties have made an appearance. (Doc. 5.)
3 Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of
4 California, the undersigned shall conduct any and all proceedings in the case until such time as
5 reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

6 On June 13, 2013, the Court dismissed Plaintiff's Complaint for failure to state a claim,
7 with leave to amend. (Doc. 6.) On June 26, 2013, Plaintiff filed the First Amended Complaint.
8 (Doc. 7.) On May 8, 2014, the court consolidated Plaintiff's case 1:11-cv-000470-GSA-PC
9 (Franklin v. United States, et al.) with this case, based on common questions of fact, and
10 ordered Plaintiff to file an amended complaint in the consolidated action. (Doc. 16.) On May
11 21, 2014, Plaintiff filed the Second Amended Complaint, which is now before the court for
12 screening. (Doc. 17.)

13 **II. SCREENING REQUIREMENT**

14 The court is required to screen complaints brought by prisoners seeking relief against a
15 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
16 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
17 legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or
18 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
19 § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been
20 paid, the court shall dismiss the case at any time if the court determines that the action or
21 appeal fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

22 A complaint is required to contain "a short and plain statement of the claim showing
23 that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
24 not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
25 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,
26 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955
27 (2007)). While a plaintiff's allegations are taken as true, courts "are not required to indulge
28 unwarranted inferences." Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)

1 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual
2 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.
3 at 678. While factual allegations are accepted as true, legal conclusions are not. Id.

4 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to
5 state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572
6 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this
7 plausibility standard. Id.

8 **III. SUMMARY OF SECOND AMENDED COMPLAINT**

9 Plaintiff is a prisoner in the custody of the federal Bureau of Prisons (BOP), presently
10 incarcerated at the United States Penitentiary (USP)-Lompoc in Lompoc, California. The
11 events at issue in the Complaint allegedly occurred at USP-Atwater in Atwater, California,
12 when Plaintiff was incarcerated there. Plaintiff names as defendants Rufo Refendor, who was
13 employed as a Physician’s Assistant at USP-Atwater at the time of the events, and the United
14 States. Plaintiff’s factual allegations follow.

15 On April 19, 2010, while in custody of the BOP, Plaintiff had hemorrhoid surgery at
16 Mercy Medical Center in Merced, California. Prior to discharge the doctor prescribed a stool
17 softener, Pepcid, and Tylenol (non-aspirin). The next day Plaintiff was escorted to USP-
18 Atwater and saw the on-duty Physician’s Assistant, defendant Rufo Refendor. Defendant
19 Refendor reviewed Plaintiff’s hospital discharge records and said that he wasn’t going to order
20 the prescription. Plaintiff had spent five days in the hospital, had a colonoscopy and
21 hemorrhoid surgery, and had a serious need for the medication.

22 On April 21, 2010 while defecating, Plaintiff lost a lot of blood and heard a loud plump
23 in the water. He looked and the toilet water was dark red. Defendant Refendor’s deliberate
24 indifference caused Plaintiff agonizing pain, fear of dying, and loss of four pints/units of blood.
25 Plaintiff was re-admitted to the hospital on April 22, 2010 about 2 a.m.

26 Plaintiff requests monetary damages as relief.

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1 **IV. PLAINTIFF’S CLAIMS**

2 **A. Eighth Amendment Medical Claim -- Bivens Action**

3 The basis of a Bivens action is some illegal or inappropriate conduct on the part of a
4 federal official or agent that violates a clearly established constitutional right. Baiser v.
5 Department of Justice, Office of U.S. Trustee, 327 F.3d 903, (9th Cir. 2003). A Bivens action
6 is the federal analog to suits brought against state officials under 42 U.S.C. § 1983. Hartman v.
7 Moore, 547 U.S. 250, 126 S.Ct. 1695 (2006). A Bivens claim is only available against officers
8 in their individual capacities, Morgan v. U.S., 323 F.3d 776, 780 n.3 (9th Cir. 2003); Vaccaro
9 v. Dobre, 81 F.3d 854, 857 (9th Cir. 1996), and Plaintiff must allege facts linking each named
10 defendant to the violation of his rights, Iqbal, 556 U.S. at 676; Simmons v. Navajo County,
11 Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing, 588 F.3d at 1235; Jones v. Williams,
12 297 F.3d 930, 934 (9th Cir. 2002). “A plaintiff must plead more than a merely negligent act by
13 a federal official in order to state a colorable claim under Bivens.” O’Neal v. Eu, 866 F.2d 314,
14 314 (9th Cir. 1988). The factual allegations must be sufficient to state a plausible claim for
15 relief, and the mere possibility of misconduct falls short of meeting this plausibility standard.
16 Iqbal, 556 U.S. at 678-78; Moss, 572 F.3d at 969.

17 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
18 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d
19 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976)).
20 The two-part test for deliberate indifference requires the plaintiff to show (1) “‘a serious
21 medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in
22 further significant injury or the unnecessary and wanton infliction of pain,’” and (2) “‘the
23 defendant’s response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting
24 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX
25 Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations
26 omitted)). Deliberate indifference is shown by “a purposeful act or failure to respond to a
27 prisoner’s pain or possible medical need, and harm caused by the indifference.” Id. (citing
28 McGuckin, 974 F.2d at 1060). Deliberate indifference may be manifested “when prison

1 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by
2 the way in which prison physicians provide medical care.” Id. Where a prisoner is alleging a
3 delay in receiving medical treatment, the delay must have led to further harm in order for the
4 prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin at
5 1060 (citing Shapely v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir.
6 1985)).

7 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
8 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the
9 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but
10 that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S.
11 825, 837, 114 S.Ct. 1970 (1994)). “If a prison official should have been aware of the risk, but
12 was not, then the official has not violated the Eighth Amendment, no matter how severe the
13 risk.” Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir.
14 2002)). “A showing of medical malpractice or negligence is insufficient to establish a
15 constitutional deprivation under the Eighth Amendment. Id. at 1060. “[E]ven gross negligence
16 is insufficient to establish a constitutional violation.” Id. (citing Wood v. Housewright, 900
17 F.2d 1332, 1334 (9th Cir. 1990)).

18 “A difference of opinion between a prisoner-patient and prison medical authorities
19 regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon, 662 F.2d 1337,
20 1344 (9th Cir. 1981) (internal citation omitted). To prevail, plaintiff “must show that the course
21 of treatment the doctors chose was medically unacceptable under the circumstances . . . and . . .
22 that they chose this course in conscious disregard of an excessive risk to plaintiff’s health.”
23 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted).

24 **Discussion**

25 Plaintiff has demonstrated that he had a serious medical need because he suffered pain
26 after hemorrhoid surgery. However, Plaintiff fails to allege facts showing that Defendant was
27 deliberately indifferent to those needs. Plaintiff fails to show that Defendant acted or failed to
28 act while knowing about and deliberately disregarding a substantial risk of harm to Plaintiff.

1 Plaintiff alleges, at most, a difference of opinion between Plaintiff and a medical official about
2 his treatment, which does not state an Eighth Amendment medical claim. Therefore, Plaintiff
3 fails to state a cognizable claim for inadequate medical care under the Eighth Amendment.

4 **B. Federal Tort Claims Act (FTCA)**

5 An action pursuant to the FTCA is a civil action against the United States, “for injury or
6 loss of property, or personal injury or death caused by the negligent or wrongful act or
7 omission of any employee” of the federal government while acting within the scope of his
8 office or employment. 28 U.S.C. § 1346(b). The FTCA, 28 U.S.C. §§ 1346(b), 2671-2680,
9 waives the sovereign immunity of the United States for certain torts committed by federal
10 employees. FDIC v. Meyer, 114 S.Ct. 996, 1000 (1994). As a jurisdictional prerequisite, the
11 FTCA bars claimants from bringing suit in federal court until they have exhausted their
12 administrative remedies. McNeil v. United States, 508 U.S. 106, 113 (1993). Pursuant to 28
13 U.S.C. § 2675(a), an action shall not be instituted upon a claim against the United States for
14 money damages for an employee’s negligence unless the claimant has first presented the claim
15 to the appropriate federal agency and his claim was finally denied by the agency in writing and
16 sent by certified or registered mail. 28 U.S.C. § 2675(a). A lawsuit filed prior to the
17 exhaustion of a claimant’s administrative claim is premature and must be dismissed. Id.

18 **Discussion**

19 In the Second Amended Complaint, Plaintiff alleges that he exhausted his available
20 administrative remedies:

21 “5/5/2010 filed Form 95 with Western Region. 8/19/2010 it was
22 denied. 8/21/10 I appealed. 8/27/2010 it was denied. 5/18/10
23 BP8 denied. 5/22/10 I filed a BP9. It was denied 6/21/10. I
24 appealed 7/1/10 through a BP10. It was denied 7/23/10. I
25 appealed to Central Office with a BP11. I received an April 20,
26 2011 denial May 6, 2011.” (Second Amended Complaint at 4
27 ¶II-C.)

28 As such, it appears on the face of the complaint that Plaintiff timely filed an administrative
claim to a federal agency as required by 28 U.S.C. § 2675. Id. (“The timely filing of an

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1 administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA,
2 and, as such, should be affirmatively alleged in the complaint.”) (internal citation omitted).

3 The elements of a negligence claim in this forum are duty, breach of duty, proximate
4 cause, and damages. Minch v. Department of California Highway Patrol, 140 Cal.App.4th 895,
5 900-01 (Cal. App. 2006). Plaintiff alleges that defendant Rufo Refendor owed him a duty to
6 provide him with adequate medical care and breached that duty when he refused to order the
7 medication the doctor at Mercy Medical Center had prescribed to Plaintiff after he had
8 hemorrhoid surgery there. Plaintiff alleges that as a result of defendant Refendor’s negligence,
9 Plaintiff was returned to the hospital and suffered agonizing pain, fear of dying, and loss of four
10 pints of blood.

11 Based on these allegations, the Court finds that Plaintiff states a cognizable claim for
12 negligence under the FTCA against the United States for the conduct of defendant Refendor.¹

13 **IV. CONCLUSION AND ORDER**

14 The court finds that Plaintiff states a cognizable claim in the Second Amended
15 Complaint against defendant United States of America under the FTCA. However, Plaintiff
16 fails to state any other cognizable claims in the Second Amended Complaint. In this action, the
17 Court previously granted Plaintiff two opportunities to amend the complaint, with guidance by
18 the Court. Plaintiff has now filed three complaints without alleging facts against defendant
19 Rufendor which state a claim under Bivens. The Court finds that the deficiencies outlined
20 above are not capable of being cured by amendment, and therefore further leave to amend
21 should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1127
22 (9th Cir. 2000).

23 Accordingly, IT IS HEREBY ORDERED that:

- 24 1. This case now proceeds against defendant United States under the Federal Tort
25 Claims Act;

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28 ¹ “[T]he United States is the only proper defendant in an FTCA action.” Kennedy v. U.S. Postal Service, 145 F.3d 1077, 1078 (9th Cir. 1998).

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- 2. All other claims and defendants are DISMISSED from this action for failure to state a claim;
- 3. Defendant Rufo Refendor is DISMISSED from this action for Plaintiff's failure to state any claims against him; and
- 4. Service of process shall be initiated by separate order.

IT IS SO ORDERED.

Dated: March 17, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE