

1 A complaint must contain “a short and plain statement of the claim showing that the pleader is
2 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
4 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
5 550 U.S. 544, 555 (2007)). Plaintiff must demonstrate that each named defendant personally
6 participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-677; Simmons v. Navajo County,
7 Ariz., 609 F.3d 1011, 1020-1021 (9th Cir. 2010).

8 Prisoners proceeding pro se in civil rights actions are still entitled to have their pleadings
9 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113,
10 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be facially
11 plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each
12 named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret
13 Serv., 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted
14 unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s liability” falls
15 short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

16 II.

17 COMPLAINT ALLEGATIONS

18 Plaintiff is currently housed at the Taft Correctional Institution which is managed by the
19 Management and Training Corporation (“MTC”) under a contract with the Bureau of Prisons.
20 Plaintiff suffers from an enlarged prostate and was prescribed medication to reduce inflammation and
21 pain. Prior to Plaintiff’s transfer to Taft, he was informed that he would receive the same treatment.
22 Plaintiff claims that his prostate problem has worsened due to the negligent treatment he has received
23 while incarcerated at MTC.

24 Plaintiff seeks liability for negligence, abuse of process, and equal protection violations under
25 the Alien Tort Act.

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1 **III.**

2 **DISCUSSION**

3 **A. Negligence/Breach of Duty for Medical Care**

4 Plaintiff may not state a claim for negligence against any of the mentioned individual actors
5 because a Bivens action may only be brought against a responsible federal official in his or her
6 individual capacity for monetary damages predicated on *constitutional* violations, not negligence. See
7 Serra v. Lappin, 600 F.3d 1191, 1200 (9th Cir. 2010) (“To state a claim for relief under Bivens, a
8 plaintiff must allege that a federal officer deprived him of his constitutional rights.”) (citation
9 omitted); see also Estelle v. Gamble, 429 U.S. 97, 106 (1976) (“Medical malpractice does not become
10 a constitutional violation merely because the victim is a prisoner.”); O’Neal v. Eu, 866 F.2d 314, 314
11 (9th Cir. 1988 (plaintiff must plead more than merely negligent act by federal officer in order to state a
12 claim under Bivens).

13 **B. Abuse of Process**

14 Plaintiff contends that the Defendants have violated their duty as articulated in 18 U.S.C. §
15 4042(a)(2),(3).

16 18 U.S.C. § 4042 provides, in pertinent part:

17 (a) In general—The Bureau of Prisons, under the direction of the Attorney General, shall—

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19 (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all
20 persons charged with or convicted of offenses against the United States, or held as witnesses or
21 otherwise;

22 (3) provide for the protection, instruction, and discipline of all persons charged with or
23 convicted of offenses against the United States[.]

24 This statute merely sets out, in general terms, the duties of the Bureau of Prisons and there is
25 no basis to find a private right of action by way of a complaint under Bivens. To the extent Plaintiff is
26 attempting to seek a separate and distinct claim under 18 U.S.C. § 4042, a federal prisoner may not
27 pursue a claim under § 4042 because this statute does not provide a private cause of action against
28 BOP officials. See Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969) (the only action

1 available through 18 U.S.C. § 4042 pursuant to the Federal Tort Claims Act (FTCA)). Plaintiff has
2 not and cannot state a claim under the FTCA.

3 **C. Equal Protection/Alien Tort Act**

4 Plaintiff contends that he was denied equal protection of the law based “on his membership in
5 a class of being an Alien housed in a private Institution as actually designated only for being a
6 Sentenced Deportable Alien that were denied all activities of the Bureau of Prisons for which he is
7 being segregated from U.S. citizens only for his immigration status.” (ECF No. 10 at 5.)

8 The Due Process Clause of the Fifth Amendment “subjects the federal government to
9 constitutional limitations that are the equivalent to those imposed on the states by the Equal Protection
10 Clause of the Fourteenth Amendment.” Consejo de Desarrollo Economico de Mexicali, A.C., v.
11 United States, 482 F.3d 1157, 1170 n. 4 (9th Cir. 2007). The Equal Protection Clause requires that
12 persons who are similarly situated be treated alike. City of Cleburne v. Cleburne Living Center, Inc.,
13 472 U.S. 432, 439 (1985); Hartmann v. California Dep’t of Corr. & Rehab., 707 F.3d 1114, 1123 (9th
14 Cir. 2013). An equal protection claim may be established by showing that Defendants intentionally
15 discriminated against Plaintiff based on his membership in a protected class, Hartmann, 707 F.3d
16 1021, 1030 (9th Cir. 2013), or that similarly situated individuals were intentionally treated differently
17 without a rational relationship to a legitimate state purpose, Engquist v. Oregon Department of
18 Agriculture, 553 U.S. 591, 601-602 (2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486
19 (9th Cir. 2008).

20 Plaintiff’s amended complaint does not allege that any defendant intentionally discriminated
21 against the plaintiff based on his membership in a protected class or that similarly situated individuals
22 were intentionally treated differently without a rational relationship to a legitimate state purpose.
23 Plaintiff’s vague and conclusory allegations that he was treated differently from non-American
24 citizens simply because he is a deportable alien housed at MCI, fall far short of stating an equal
25 protection claim. Plaintiff has alleged no facts from which the Court could infer that any individual
26 treated Plaintiff differently than others similarly situated. Plaintiff’s amended complaint specifically
27 states that MTC has an internal to save money without giving inmates required treatment for their
28 illness. (ECF No. 10 at 3.) Plaintiff’s allegations demonstrate that all inmates are being treated

1 similarly and therefore no equal protection claim is raised. Furthermore, the exhibits attached to
2 Plaintiff's complaint demonstrate that he his medical condition was reviewed and evaluated, and the
3 proper treatment was determined and rendered based on the procedures set forth at MCI. (ECF No.
4 10 at 3, 11-16.)

5 Similarly, a violation of the Alien Tort Statute requires 1) an alien to sue 2) for a tort 3)
6 committed in violation of a treaty of the United States or the law of nations. 28 U.S.C. § 1350; Kadic
7 v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995). Plaintiff's amended complaint is devoid of any
8 allegations that the conduct of the defendants violated the law of nations.

9 Accordingly, Plaintiff fails to state a claim for relief.

10 **D. Further Leave to Amend**

11 In light of the fact that the Court previously notified Plaintiff of the deficiencies and granted
12 leave to amend (see ECF Nos. 7 & 9), further amendment is not warranted. Lopez v. Smith, 203 F.3d
13 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-1449 (9th Cir. 1987).

14 **IV.**

15 **RECOMMENDATION**

16 Based on the foregoing, it is HEREBY RECOMMENDED that the amended complaint be
17 DISMISSED, with prejudice, for failure to state a cognizable claim for relief.

18 This Findings and Recommendation will be submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
20 being served with this Findings and Recommendation, Plaintiff may file written objections with the
21 Court. The document should be captioned "Objections to Magistrate Judge's Findings and
22 Recommendation." Plaintiff is advised that failure to file objections within the specified time may

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1 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014)
2 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: November 2, 2015


UNITED STATES MAGISTRATE JUDGE