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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAUL JORGENSON,

Plaintiff,

v.

THOMAS MOORE, M.D. et al.,

Defendants.

Case No. 1:17-cv-00817-LJO-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS ACTION
PROCEED ON PLAINTIFF’S FTCA CLAIM
AGAINST THE UNITED STATES, HIS
EIGHTH AMENDMENT BIVENS CLAIM
AGAINST THE FOUR UNKNOWN
CORRECTIONAL OFFICERS, AND HIS
STATE TORT CLAIMS FOR MEDICAL
NEGLIGENCE AND BATTERY AGAINST
DEFENDANTS HAAK, RANDHAWA, AND
EMANUEL MEDICAL CENTER, AND THAT
ALL OTHER CLAIMS AND DEFENDANTS
BE DISMISSED WITH PREJUDICE

(ECF NO. 19)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE (21) DAYS

Paul Jorgenson (“Plaintiff”) is a federal prisoner proceeding *pro se* and *in forma pauperis* in this action. Plaintiff filed the complaint commencing this action on June 19, 2017 (ECF No. 1).

On January 22, 2018, the Court issued a screening order. (ECF No. 11). The Court found that “Plaintiff’s complaint states a cognizable FTCA claim against the United States of America, but fails to state any other cognizable claims.” (*Id.* at 9). The Court gave Plaintiff the option of

1 proceeding with the complaint on the claim found cognizable by the Court, filing a First
2 Amended Complaint, or standing on his complaint, subject to the Court issuing findings and
3 recommendations to the assigned district judge consistent with the screening order. (Id. at 10).
4 On March 26, 2018, Plaintiff filed his First Amended Complaint (ECF No. 15), which the Court
5 screened in findings and recommendations to the assigned district judge. (ECF No. 16). Based
6 on additional allegations raised in Plaintiff’s objections to the findings and recommendations
7 (ECF No. 17), the Court gave Plaintiff further leave to amend his complaint (ECF No. 18).

8 Plaintiff filed his Second Amended Complaint (“SAC”) on July 12, 2018 (ECF No. 19),
9 which is now before the Court for screening.

10 For the reasons described below, the Court recommends allowing Plaintiff to proceed on
11 his FTCA claim against the United States, his Eighth Amendment Bivens claim against the four
12 unknown correctional officers, and his state tort claims for medical negligence and battery against
13 Defendants Haak, Randhawa, and Emanuel Medical Center. The Court also recommends that
14 all other claims and defendants be dismissed with prejudice.

15 Plaintiff may file objections to these findings and recommendations within twenty-one
16 days from the date of service of these findings and recommendations

17 **I. SCREENING REQUIREMENT**

18 The Court is required to screen complaints brought by prisoners seeking relief against a
19 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
20 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
21 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
22 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).
23 As Plaintiff is proceeding *in forma pauperis* (ECF No. 8), the Court may also screen the
24 complaint under 28 U.S.C. § 1915. “Notwithstanding any filing fee, or any portion thereof, that
25 may have been paid, the court shall dismiss the case at any time if the court determines that the
26 action or appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. §
27 1915(e)(2)(B)(ii).

28 A complaint is required to contain “a short and plain statement of the claim showing that

1 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
2 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
3 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
4 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
5 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting
6 Twombly, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting this
7 plausibility standard. Id. at 679. While a plaintiff’s allegations are taken as true, courts “are not
8 required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681
9 (9th Cir. 2009) (internal quotation marks and citation omitted). Additionally, a plaintiff’s legal
10 conclusions are not accepted as true. Iqbal, 556 U.S. at 678.

11 Pleadings of *pro se* plaintiffs “must be held to less stringent standards than formal
12 pleadings drafted by lawyers.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that
13 *pro se* complaints should continue to be liberally construed after Iqbal).

14 **II. SUMMARY OF PLAINTIFF’S FIRST AMENDED COMPLAINT**

15 At approximately 8:00 a.m. on the morning of November 21, 2016, four U.S.P. Atwater
16 correctional officers arrived at Plaintiff’s cell and informed him that he was going on a medical
17 trip. Plaintiff told the officer in charge that he had not requested any medical treatment either
18 verbally or in written form, and that he had a right to refuse non-emergency medical treatment.
19 Nevertheless, Plaintiff was placed in leg shackles, as well as hand-cuffs secured with a “black
20 box” and waist chain, and then taken to Emanuel Hospital Center. The restraints were never
21 completely removed during the course of Plaintiff’s hospital stay.

22 These four unknown correctional officers were the staff that provided security at the
23 Emanuel Hospital Center, and were charged with guarding Plaintiff at Emanuel Medical Center
24 from November 21 to November 23, 2016. Plaintiff was kept chained hand and foot to the
25 hospital bed. The four officers also kept the television set at the highest volume during Plaintiff’s
26 entire stay at the hospital. This high volume subjected Plaintiff to sleep deprivation.

27 After arriving at the Emanuel Medical Center on November 21, at approximately 10:00
28 a.m., Plaintiff was ordered to sign some “preliminary paperwork” by the guards and Emanuel

1 Medical Center staff. Plaintiff again advised the officer in charge that he had not requested any
2 medical treatment and also informed the Emanuel Medical Center staff that he had a right to
3 refuse non-emergency medical treatment.

4 Plaintiff was then placed supine in a CT scanner. After CT localization of a portion in
5 the right hepatic lobe of the liver for the biopsy was obtained, a lidocaine anesthetic was
6 administered and a 19-gauge guide needle was advanced into the right hepatic lobe. 20-gauge
7 lung core samples were obtained and placed in a preservative solution for later examination. The
8 procedure was negligently performed due to staff inattention and in wanton disregard of
9 Plaintiff's requests to refuse treatment. Plaintiff suffered an immediate pneumothorax collapse
10 of his right lung.

11 At the CT procedure, the attending physician was Defendant Richard B. Haak, M.D., and
12 Defendant Jaspal Randhawa was the technologist. Other personnel were involved, but Plaintiff
13 does not know their names.

14 A right pleural chest tube was implanted and introduced into the right pleural cavity.
15 Plaintiff experienced immediate dizziness, nausea, and impaired breathing. He was admitted as
16 an "in patient" and placed in a bed in a secure ward. Plaintiff was chained to the bed for three
17 days. He was placed on an external suction machine as a means to inflate his right lung. He was
18 given pain medications, but they were ineffective and he continued to experience substantial pain
19 and anxiety during his stay.

20 By late afternoon of November 23, 2016, all medical intubations were removed and
21 Plaintiff was returned to the penitentiary. Plaintiff did not give his consent for a livery biopsy, a
22 collapsed lung, the intubation of the external suction machine, or being chained to the bed.

23 Plaintiff also alleges that, under Defendant Moore, the organization and administration
24 of medical care at U.S.P. Atwater is inadequate. Records are not up to date, and procedures are
25 routinely performed without current symptomatic indication, evaluation, or past disease history.
26 Moreover, Plaintiff alleges that it was Defendant Moore who ordered that a liver biopsy be
27 performed on Plaintiff.

28 ///

1 **III. DISCUSSION**

2 **A. Federal Tort Claims Act**

3 “[T]he district courts... have exclusive jurisdiction of civil actions on claims against the
4 United States, for money damages... for injury or loss of property, or personal injury or death
5 caused by the negligent or wrongful act or omission of any employee of the Government while
6 acting within the scope of his office or employment, under circumstances where the United
7 States, if a private person, would be liable to the claimant in accordance with the law of the place
8 where the act or omission occurred.” 28 U.S.C. § 1346(b).

9 The FTCA provides that the United States shall be liable for tort claims “in the same
10 manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. §
11 2674.

12 “The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the
13 Federal Government liable to the same extent as a private party for certain torts of federal
14 employees acting within the scope of their employment.” United States v. Orleans, 425 U.S.
15 807, 813 (1976). The FTCA includes officers and employees of “any federal agency” but
16 expressly excludes “any contractor with the United States.” 28 U.S.C. § 2671. The “critical test
17 for distinguishing an agent from a contractor is the existence of federal authority to control and
18 supervise the ‘detailed physical performance’ and ‘day to day operations’ of the contractor, and
19 not whether the agency must comply with federal standards and regulations.” Carrillo v. United
20 States, 5 F.3d 1302, 1304 (9th Cir. 1993) (quoting Ducey v. United States, 713 F.2d 504, 516
21 (9th Cir.1983)). Thus, the federal government is not responsible for the negligence of the
22 employees of other entities, merely because they are working under a federal contract,
23 maintaining property owned by the federal government, or working on projects funded by the
24 federal government. See, e.g., Logue v. United States, 412 U.S. 521 (finding that the federal
25 “marshal had no authority to control the activities of the sheriff's employees,” and thus “the
26 sheriff’s employees were employees of a ‘contractor with the United States,’ and not...
27 employees of a ‘Federal Agency’”).

28 The United States is not liable under the FTCA for constitutional tort claims. FDIC v.

1 Meyer, 510 U.S. 471, 478 (1994). The FTCA “makes the United States liable ‘in the same
2 manner and to the same extent as a private individual under like circumstances.’” United States
3 v. Olson, 546 U.S. 43, 46 (2005) (emphasis removed) (quoting 28 U.S.C. § 2674). “The law of
4 the place in § 1346(b) has been construed to refer to the law of the state where the act or omission
5 occurred. Thus, any duty that the United States owe[s] to plaintiff[] must be found in California
6 state tort law.” Delta Sav. Bank v. United States, 265 F.3d 1017, 1025 (9th Cir. 2001) (internal
7 citations and quotation marks omitted).

8 Administrative exhaustion is a required element of a claim under the FTCA. Gillespie
9 v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980) (“The timely filing of an administrative claim is
10 a jurisdictional prerequisite to the bringing of a suit under the FTCA, and, as such, should be
11 affirmatively alleged in the complaint.”) (internal citation omitted).

12 28 U.S.C. § 2675(a), provides in part:

13 An action shall not be instituted upon a claim against the United
14 States for money damages for injury or loss of property or personal
15 injury or death caused by the negligent or wrongful act or omission
16 of any employee of the Government while acting within the scope
17 of his office or employment, unless the claimant shall have first
18 presented the claim to the appropriate Federal agency and his claim
19 shall have been finally denied by the agency in writing and sent by
certified or registered mail. The failure of an agency to make final
disposition of a claim within six months after it is filed shall, at the
option of the claimant any time thereafter, be deemed a final denial
of the claim for purposes of this section.

20 28 U.S.C. § 2675(a).

21 This is a jurisdictional prerequisite to pursuing a tort claim against federal employees in
22 a district court. Brady v. United States, 211 F.3d 499 (9th Cir. 2000) (stating that a claimant
23 under the Federal Tort Claims Act must comply with 28 U.S.C. § 2675(a) before a district court
24 can exert jurisdiction over the claim). “Because the requirement is jurisdictional, it ‘must be
25 strictly adhered to. This is particularly so since the FTCA waives sovereign immunity. Any such
26 waiver must be strictly construed in favor of the United States.’” Brady, 211 F.3d at 502 (quoting
27 Jerves v. United States, 966 F.2d 517, 521 (9th Cir.1992)).

1 Exhaustion under the Prison Litigation Reform Act does not satisfy the requirement to
2 exhaust under the FTCA. Compare 28 C.F.R. §§ 542.13-15 (Bureau of Prisons administrative
3 grievance procedures) with 28 C.F.R. §§ 543.30-32 (administrative exhaustion procedures for
4 the FTCA within the Bureau of Prisons).

5 The Court recommends allowing Plaintiff's FTCA claim to proceed past the screening
6 stage against the United States. Plaintiff has alleged that a doctor that works for the federal
7 government ordered that Plaintiff receive a procedure that he did not need and to which he did
8 not consent. The officers also kept Plaintiff chained while at the hospital, and kept the television
9 set on full volume in order to deprive Plaintiff of sleep.

10 That said, the Court is not deciding that such facts constitute a cognizable FTCA claim.
11 It is not clear to the Court that Plaintiff's submission of claims as described in the Second
12 Amended Complaint satisfied the exhaustion requirement for the FTCA. It is not clear whether
13 the individuals involved in his alleged forced medical treatment were federal officers or federal
14 contractors. Plaintiff's allegations that certain guards forced him to sign preliminary paperwork
15 is vague as to who did what. Plaintiff also does not articulate exactly what underlying torts are
16 being asserted against the United States. Instead, he alleges generally that "[t]he United States
17 of America is being sued ... for the acts and omissions of its employees which proximately
18 caused Plaintiff continuing physical injury, pain, and emotional distress." (ECF No. 19, p. 3).
19 Accordingly, the Court is only finding that this claim is not frivolous and should proceed past
20 screening for further litigation with the participation of the United States.

21 **B. Eighth Amendment Claim Under Bivens Against Defendant Moore**

22 Plaintiff also asserts that Defendant Thomas Moore, Hospital Administrator at the United
23 States Penitentiary, is liable under the Eighth Amendment of the United States Constitution,
24 citing Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Plaintiff alleges
25 that under Defendant Moore at U.S.P. Atwater, the organization and administration of the
26 medical care system at the penitentiary is inadequate. Medical records are not maintained up to
27 date and treatment is performed despite being contraindicated by any current symptomatic
28 indication, evaluation, or past disease history. Defendant Moore failed to interview or examine

1 Plaintiff, and yet ordered that a liver biopsy be performed on Plaintiff.

2 A Bivens action is the federal analog to suits brought against state officials under 42
3 U.S.C. § 1983. Hartman v. Moore, 547 U.S. 250, 126 S.Ct. 1695 (2006). The basis of a Bivens
4 action is some illegal or inappropriate conduct on the part of a federal official or agent that
5 violates a clearly established constitutional right. Baiser v. Department of Justice, Office of U.S.
6 Trustee, 327 F.3d 903, 909 (9th Cir. 2003). “To state a claim for relief under *Bivens*, a plaintiff
7 must allege that a federal officer deprived him of his constitutional rights.” Serra v. Lappin, 600
8 F.3d 1191, 1200 (9th Cir. 2010) (citing Schearcz v. United States, 234 F.3d 428, 432 (9th Cir.
9 2000). A Bivens claim is only available against officers in their individual capacities. Morgan
10 v. U.S., 323 F.3d 776, 780 n.3 (9th Cir. 2003); Vaccaro v. Dobre, 81 F.3d 854, 857 (9th Cir.
11 1996). “A plaintiff must plead more than a merely negligent act by a federal official in order to
12 state a colorable claim under *Bivens*.” O’Neal v. Eu, 866 F.2d 314, 314 (9th Cir. 1988).

13 Plaintiff must allege facts linking each named defendant to the violation of his rights.
14 Iqbal, 556 U.S. at 676; Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1020–21 (9th Cir.
15 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297
16 F.3d 930, 934 (9th Cir. 2002). The factual allegations must be sufficient to state a plausible claim
17 for relief, and the mere possibility of misconduct falls short of meeting this plausibility standard.
18 Iqbal, 556 U.S. at 678–79.

19 The Eighth Amendment protects prisoners from inhumane methods of punishment and
20 from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir.
21 2006). Although prison conditions may be restrictive and harsh, prison officials must provide
22 prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v.
23 Brennan, 511 U.S. 825, 832–33 (1994) (internal citations and quotations omitted). Prison
24 officials have a duty to take reasonable steps to protect inmates from physical abuse. Id. at 833;
25 Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). The failure of prison officials to protect
26 inmates from attacks by other inmates may rise to the level of an Eighth Amendment violation
27 where prison officials know of and disregard a substantial risk of serious harm to the plaintiff.
28 See, e.g., Farmer, 511 U.S. at 847; Hearns, 413 F.3d at 1040.

1 To establish a violation of this duty, the prisoner must establish that prison officials were
2 “deliberately indifferent to a serious threat to the inmate’s safety.” Farmer, 511 U.S. at 834. The
3 question under the Eighth Amendment is whether prison officials, acting with deliberate
4 indifference, exposed a prisoner to a sufficiently “substantial risk of serious harm” to his future
5 health. Id. at 843 (citing Helling v. McKinney, 509 U.S. 25, 35 (1993)). The Supreme Court has
6 explained that “deliberate indifference entails something more than mere negligence...[but]
7 something less than acts or omissions for the very purpose of causing harm or with the knowledge
8 that harm will result.” Farmer, 511 U.S. at 835.

9 The deliberate indifference standard involves both an objective and a subjective prong.
10 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” Id. at 834.
11 Second, subjectively, the prison official must “know of and disregard an excessive risk to inmate
12 health or safety.” Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir. 1995).
13 To prove knowledge of the risk, however, the prisoner may rely on circumstantial evidence; in
14 fact, the very obviousness of the risk may be sufficient to establish knowledge. Farmer, 511 U.S.
15 at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

16 Plaintiff’s allegations against Defendant Moore fail to raise a constitutional claim under
17 these legal standards. The allegations of poor paperwork management are vague. To the extent
18 he is being sued in his supervisory capacity based on being the Hospital Administrator and Chief
19 Medical Officer at Atwater, that role does not establish a claim because Bivens liability only
20 extends to direct deprivation of constitutional rights—not supervisory liability. See Terrell v.
21 Brewer, 935 F.2d 1015, 1018 (9th Cir. 1990) (respondeat superior theory of liability inapplicable
22 to Bivens actions).

23 To the extent that Plaintiff is alleging that it was Defendant Moore who ordered that a
24 liver biopsy be performed, Plaintiff provides very little detail. There are no allegations
25 suggesting that Defendant Moore knew of and disregarded a risk to Plaintiff’s health. In fact,
26 Plaintiff appears to be alleging it was negligence (through poor record keeping) that caused
27 Defendant Moore to order the biopsy, and “[a] plaintiff must plead more than a merely negligent
28 act by a federal official in order to state a colorable claim under *Bivens*.” O’Neal v. Eu, 866 F.2d

1 314, 314 (9th Cir. 1988).

2 **C. Eighth Amendment Claim Under Bivens Against Four Unknown**
3 **Correctional Officers**

4 Plaintiff also brings a Bivens claim against the four unknown correctional officers who
5 transported Plaintiff to Emanuel Hospital Center, ordered him to sign preliminary paper work,
6 kept him chained hand and foot to his hospital bed, and kept the television at the highest volume
7 (resulting in sleep deprivation). Plaintiff alleges that these four officers “purposefully engaged
8 in these torturous acts to punish Jorgenson for needing emergency medical treatment.” (ECF No.
9 19, p. 4.) Plaintiff alleges that, despite his protests, four unknown correctional officers
10 transported him to Emanuel Hospital Center, and ordered him to sign preliminary paper work.
11 They also kept him chained hand and foot to the hospital bed and kept the television set in the
12 ward on the highest volume twenty-four hours a day from November 21, through November 23,
13 2016.

14 Based on these allegations and applying the legal standards set out above, this Court
15 recommends allowing an Eighth Amendment Bivens claim against these officers to proceed past
16 the screening stage. However, as with Plaintiff’s FTCA claim, the Court is only finding that this
17 claim is not frivolous and should proceed past screening for further litigation with the
18 participation of the four unknown officers.

19 **D. State Law Claims**

20 In addition to bringing a claim under the FTCA, Plaintiff sues certain medical
21 professionals at Emanuel Medical Center for medical malpractice, negligent failure to obtain
22 informed consent, and battery. Specifically, he alleges that Defendant Richard B. Haak, M.D.
23 was the attending physician at the Emanuel Medical Center, and that Defendant Jaspal Randhawa
24 assisted Defendant Dr. Haak. Plaintiff also names Emanuel Medical Center as a defendant
25 because of “the acts and omissions of its employees.”

26 Pursuant to 28 U.S.C. § 1367(a), in any civil action in which the district court has original
27 jurisdiction, the district court “shall have supplemental jurisdiction over all other claims in the
28 action within such original jurisdiction that they form part of the same case or controversy under

1 Article III [of the Constitution],” with specific exceptions. “Pendent jurisdiction over state claims
2 exists when the federal claim is sufficiently substantial to confer federal jurisdiction, and there is
3 a ‘common nucleus of operative fact between the state and federal claims.’” Brady v. Brown, 51
4 F.3d 810, 816 (9th Cir. 1995) (quoting Gilder v. PGA Tour, Inc., 936 F.2d 417, 421 (9th
5 Cir.1991)). “[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction
6 over state law claims under 1367(c) is discretionary.” Acri v. Varian Assoc., Inc., 114 F.3d 999,
7 1000 (9th Cir. 1997). The Supreme Court has cautioned that “if the federal claims are dismissed
8 before trial,... the state claims should be dismissed as well.” United Mine Workers of America
9 v. Gibbs, 383 U.S. 715, 726 (1966).

10 “Assault and battery are defined in the California Penal Code. Assault is the ‘unlawful
11 attempt, coupled with a present ability, to commit a violent injury on the person of another.’
12 Cal.Penal Code § 240. ‘A battery is any willful and unlawful use of force or violence upon the
13 person of another.’ Cal.Penal Code § 242. ‘Harmful or offensive contact, intentionally done, is
14 the essence of battery, while apprehension of that contact is the basis of assault.’ 5 B.E. Witkin,
15 Summary of Cal. Law, Torts § 383 (10th ed.2005) (citations omitted).” Tekle v. United States,
16 511 F.3d 839, 855 (9th Cir. 2007).

17 Under California civil law, the elements of assault are: “(1) that defendant intended to
18 cause harmful or offensive contact, or the imminent apprehension of such contact, and (2) that
19 plaintiff was put in imminent apprehension of such contact.” Brooks v. United States, 29
20 F.Supp.2d 613, 617 (N.D.Cal.1998) (citing Restatement (Second) of Torts § 21). “Physical
21 injury is not a required element of either assault or battery. The tort of assault is complete when
22 the anticipation of harm occurs.” Kiseskey v. Carpenters' Tr. for So. California, 144 Cal. App.
23 3d 222, 232 (Cal. Ct. App. 1983).

24 Under California civil law, the elements of a battery are: “(1) the defendant intentionally
25 did an act that resulted in harmful or offensive contact with the plaintiff’s person, (2) the plaintiff
26 did not consent to the contact, and (3) the contact caused injury, damage, loss or harm to the
27 plaintiff.” Tekle, 511 F.3d at 855. Accord Piedra v. Dugan, 123 Cal. App. 4th 1483, 1495 (Cal.
28 Ct. App. 2004).

1 To state a claim for medical negligence or malpractice under California law, Plaintiff
2 must establish “(1) the duty of the professional to use such skill, prudence, and diligence as other
3 members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a
4 proximate causal connection between the negligent conduct and the resulting injury; and (4)
5 actual loss or damage resulting from the professional's negligence.” Sampson v. Ukiah Valley
6 Med. Ctr., No. 15-CV-00160-WHO, 2017 WL 2834001, at *3 (N.D. Cal. June 30, 2017) (quoting
7 Machado v. Cal. Dep't of Corrs. and Rehab., 12-cv-6501-JSC, 2013 WL 5800380, at *5 (N.D.
8 Cal. Oct. 28, 2013)).

9 Plaintiff has alleged that medical professionals Haak and Randhawa administered a
10 medical procedure without consent, and did so in a negligent manner. The Court recommends
11 allowing claims for medical negligence and battery to proceed against Defendants Haak and
12 Randhawa. Given the connection with the claim against the United States, the Court recommends
13 exercising supplemental jurisdiction over these claims. However, if the claim against the United
14 States is dismissed, the Court may dismiss these related claims without prejudice. The Court
15 also recommends allowing a claim to proceed against Emanuel Medical Center to the extent it is
16 liable under a theory of vicarious liability.

17 As with the claim above, the Court is not deciding that the facts alleged state a viable
18 claim for relief under the law. Plaintiff's allegations pose legal questions, such as the scope of
19 vicarious liability, which may be challenged by defendants in this lawsuit after they are served.
20 The Court is only recommending that Plaintiff's claims for medical malpractice and battery
21 proceed past screening as to Defendants Haak, Randhawa, and Emanuel Medical Center.

22 **IV. RECOMMENDATIONS**

23 The Court recommends allowing Plaintiff to proceed on his FTCA claim against the
24 United States, his Eighth Amendment Bivens claim against the four unknown correctional
25 officers, and his state tort claims for medical negligence and battery against Defendants Haak,
26 Randhawa, and Emanuel Medical Center. The Court recommends that all other claims and
27 defendants be dismissed with prejudice.

28 The Court does not recommend granting further leave to amend because Plaintiff filed

1 his Second Amended Complaint after receiving ample legal guidance from the Court, and further
2 leave to amend appears to be futile.

3 These findings and recommendations are submitted to the district judge assigned to the
4 case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **twenty-one (21) days**
5 after being served with these findings and recommendations, Plaintiff may file written objections
6 with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings
7 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
8 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th
9 Cir. 2014) (quoting Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10
11 IT IS SO ORDERED.

12 Dated: July 19, 2018

13 /s/ Eric P. Gray
14 UNITED STATES MAGISTRATE JUDGE
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