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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WELBORN FREEMAN, et al.,
Plaintiffs,
v.
UNITED STATES, et al.,
Defendants.

Case No. [13-cv-02421-WHO](#)

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. Nos. 43, 65, 66

Pro se plaintiffs Welborn Freeman and Deborah Freeman were harmed when Mr. Freeman suffered complications from an aortic valve repair performed by doctors at the San Francisco Veterans Administration Medical Center. The questions I must decide on defendants’ motion to dismiss are whether the Court has subject matter jurisdiction over Mrs. Freeman’s FTCA claims, whether the Freemans adequately state FTCA and Unruh Act claims, and whether sovereign immunity bars the Freemans’ *Bivens* claim against the United States. For the reasons below, the motion to dismiss is GRANTED, in part with leave to amend and in part with prejudice. The Freemans’ request for a default judgment is DENIED.

FACTUAL BACKGROUND

On January 6, 2014, Welborn Freeman filed a First Amended Complaint (“FAC”), joined by his wife Deborah Freeman, against the United States, San Francisco Veterans Administration Medical Center (“VA Medical Center”), Does 1-100, and Dr. Mark Ratcliffe, Dr. Errol Bush, Dr. John Lee, Dr. Carlos Corvera, Dr. Howard, and Paula Price (collectively, “defendants”).¹ Dkt.

¹ The Freemans request that I render default judgment against the named individual defendants who the Freemans had not yet properly served. Opp’n 5; Plaintiffs’ Motion to Amend or Leave to Include Missing Pages, Dkt. No. 65. I cannot render judgment against individuals who have not been served, and therefore DENY this request.

1 No. 42. The Freemans assert claims for negligence, medical malpractice negligence, intentional
2 infliction of emotional distress, loss of consortium, violations of their First and Fifth Amendment
3 rights, and race discrimination in violation of California’s Unruh Act, California Civil Code § 51.
4 FAC at 1. On January 21, 2014, the United States moved to dismiss the FAC. Dkt. No. 43. As of
5 the filing of the parties’ briefs, the named individual defendants were not yet served and did not
6 join the United States’ motion.

7 This action stems from harm resulting from complications of Mr. Freeman’s aortic valve
8 repair at the VA Medical Center. FAC at 3. Dr. Errol Bush informed Mr. Freeman that he would
9 die without the procedure, but allegedly did not warn of the possible surgery risks. *Id.* at ¶ 2. Dr.
10 Ratcliffe, Dr. Bush, Dr. Lee, Paula Price, and Does 1-10 performed the aortic valve surgery on
11 November 12, 2010. *Id.* at 3 ¶ 5. For six days after the surgery, Mr. Freeman remained
12 hospitalized in excruciating pain with Mrs. Freeman by his side. *Id.* The Freemans informed Dr.
13 Bush, Dr. Lee, Paula Price, and Does 1-10 about this pain. *Id.* At some point post-surgery while
14 Mr. Freeman was on a gurney, the head nurse said “What is he doing here?” and “implied that an
15 African American didn’t belong in her hospital unit.” FAC at 6. The head nurse loudly shouted at
16 Mr. Freeman to “Shut up, shut up, shut up. Put him by the room by the door’s exit. I am going to
17 throw you out of here!” FAC at 7.

18 The Freemans allege that during the aortic valve surgery, “surgical clamps were used to
19 cut-off the blood flow to [Mr. Freeman’s] colon” and “due to the lack of blood circulation, part of
20 the colon ‘died.’” *Id.* They also allege that Mr. Freeman’s “ileum was cut during heart surgery.”
21 *Id.* at 6 ¶ 1. On November 18, 2010, Mr. Freeman “began to convulse [and] went into toxic
22 shock” and had additional surgery “to cut-out the portion of the colon that ‘died.’” *Id.* at ¶ 6.
23 After this surgery, Mr. Freeman wore a “bag” for six months until his colon could be reconnected.
24 Opp’n 60. Mr. Freeman went to the Oakland VA clinic for post-surgery treatment where the
25 Freemans allege that the physical therapist was racist, and that “[w]hite veterans were allowed to
26 use the equipment but Mr. Freeman was advised to ‘walk around Lake Merritt’ using his walker,
27 due to his limited mobility.” FAC at 16-17.

1 **PROCEDURAL BACKGROUND**

2 Mr. Freeman filed this action on May 29, 2013. Dkt. No. 1. On July 29, 2013, the United
3 States moved to dismiss Mr. Freeman’s complaint. Dkt. No. 5. On November 11, 2013, I granted
4 the motion in part, dismissing with prejudice Mr. Freeman’s claims for constitutional violations
5 against the United States, negligence per se, negligent infliction of emotional distress, loss of
6 consortium/society, misrepresentation/deceit/fraud, and breach of contract. Dkt. No. 34. I gave
7 Mr. Freeman leave to amend the following claims: *Bivens* action for constitutional violations
8 against specifically named individual defendants; intentional infliction of emotional distress; and
9 violations of Section 51 of the Unruh Act. Dkt. No. 34. The United States did not challenge
10 plaintiff’s claim for negligence, and that claim remained in the case. Dkt. No. 34.

11 **LEGAL STANDARD**

12 Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss a complaint
13 if the court does not have jurisdiction over it. In reviewing a “facial” jurisdictional attack, the
14 jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v.*
15 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the
16 complaint are insufficient “on their face” to invoke federal jurisdiction. *See Safe Air for Everyone*
17 *v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that
18 the allegations in the complaint are true and draws all reasonable inference in favor of the party
19 opposing dismissal. *See Wolfe*, 392 F.3d at 362.

20 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
21 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
22 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
23 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard
24 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
25 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require
26 “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to
27 relief above the speculative level.” *Twombly*, 550 U.S. at 555.

28 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the

1 court must assume that the plaintiff’s allegations are true and must draw all reasonable inferences
2 in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).
3 However, the court is not required to accept as true “allegations that are merely conclusory,
4 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536
5 F.3d 1049, 1055 (9th Cir. 2008).

6 Pro se complaints are held to “less stringent standards than formal pleadings drafted by
7 lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Where a plaintiff is proceeding pro se, the
8 Court has an obligation to construe the pleadings liberally and to afford the plaintiff the benefit of
9 any doubt. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). However, pro se
10 pleadings must still allege facts sufficient to allow a reviewing court to determine whether a claim
11 has been stated. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

12 If the Court dismisses the complaint, it must then decide whether to grant leave to
13 amend. The Ninth Circuit has “repeatedly held that a district court should grant leave to amend
14 even if no request to amend the pleading was made, unless it determines that the pleading could
15 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th
16 Cir. 2000) (citations and internal quotation marks omitted). Dismissal of a pro se complaint
17 without leave to amend is proper only if it is “absolutely clear that the deficiencies of the
18 complaint could not be cured by amendment.” *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.
19 1987) (quoting *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980)).

20 **DISCUSSION**

21 The United States moves to dismiss and asserts that: (i) Mrs. Freeman’s FTCA claims fail
22 for lack of subject matter jurisdiction; (ii) the United States is the only proper party defendant for
23 FTCA claims; (iii) sovereign immunity bars the Freemans’ *Bivens* claim; and (iv) the Freemans
24 fail to state FTCA claims and claim for violations of California’s Unruh Act. I address each
25 argument in turn.

26 **I. FTCA CLAIMS**

27 **A. Jurisdiction over Deborah Freeman’s Claims**

28 The United States argues that the Court lacks subject matter jurisdiction over Mrs.

1 Freeman’s FTCA claims because she failed to exhaust her administrative remedies. Def.’s Mot. 8.
2 The FTCA limits the jurisdiction of federal courts to entertain actions for damages against the
3 United States. 28 U.S.C. § 2675(a); *Valadez-Lopez v. Chertoff*, 656 F.3d 851 (9th Cir. 2011).
4 Before a claimant can assert an FTCA cause of action in federal court, a claimant must first
5 exhaust administrative remedies. 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 113
6 (1993). To exhaust administrative remedies, a plaintiff must present a claim to the appropriate
7 agency and either the claim is denied in writing or six months pass without any response from the
8 agency. 28 U.S.C. § 2675(a). Section 2675(a) requires the claimant or the claimant’s legal
9 representative to file a claim with “(1) a written statement sufficiently describing the injury to
10 enable the agency to begin its own investigation, and (2) a sum certain damages claim.”
11 *Cadwalder v. United States*, 45 F.3d 297, 301 (9th Cir. 1995) (citing *Warren v. United States*
12 *Dept. of Interior Bureau of Land Mgmt.*, 724 F.2d 776, 780 (9th Cir. 1984)). Section 2401(b) sets
13 a two-year deadline within which a claimant must present a claim “to the appropriate Federal
14 agency . . . after such claim accrues.” 28 USCS § 2401(b); *United States v. Kubrick*, 444 U.S.
15 111, 119-21 (1979) (finding that a tort claim against the United States is barred unless it is
16 presented in writing to the appropriate federal agency within two years after such claim accrues);
17 *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1033 (9th Cir. 2013). The FTCA exhaustion
18 requirement is a “clear statutory command.” *McNeil*, 508 U.S. at 113.

19 The Freemans concede that Mrs. Freeman did not file an administrative claim.² Opp’n 12.
20 However, the Freemans contend that the administrative claim is satisfied because defendants had
21 actual or constructive notice of Mrs. Freeman’s claims and because the administrative claim form
22 was ambiguous and confusing. Opp’n 12. The Freemans further argue that Mrs. Freeman should
23 be allowed to proceed in this suit so she does not “lose [her] claims because of statute of
24 limitations.” Declaration of Deborah Freeman in Support of Plaintiffs’ Motion to Dismiss
25 (“Freeman Decl.”) ¶ 3. Because Mrs. Freeman did not file her own administrative claim within
26

27 ² The Freemans filed a motion for leave to file a sur-reply, which I reviewed. Dkt No. 66. They
28 argue that Mrs. Freeman filed an administrative claim on February 18, 2014. This claim is barred
by the two-year statute of limitations. 28 U.S.C. § 2401(b).

1 two years after her claim accrued, she may proceed as a party to this suit only if Mr. Freeman’s
2 administrative claim can satisfy the jurisdictional prerequisites for her.

3 Mr. Freeman’s administrative claim did not provide actual or constructive notice of Mrs.
4 Freeman’s claims. Mr. Freeman submitted his administrative claim on Standard Form 95, a one
5 page, double-sided form (“Form 95”). Opp’n 60. In completing Form 95, Mr. Freeman indicated
6 his marital status as married, but he did not identify Mrs. Freeman by name, Mrs. Freeman did not
7 sign the form, and Mr. Freeman did not indicate loss of consortium as an injury. *Id.* Mr. Freeman
8 described the nature and extent of his damage as: “1) Negligent infliction of emotional distress, 2)
9 1 1/2 month in hospital (SF VA Med Ctr.), 3) Due to leakage – permanent stains on/in outfits
10 (designer).” *Id.* Mr. Freeman described the nature and extent of each injury which formed the
11 basis of his claim as:

Lifestyle change – unable to dress easily without pain. Fear of bag
leaking, with strong, foul odors dispelled from “bag.”
Embarrassing, pungent, humiliating odor in clothes. Subjected to
excruciating pain in colon area due to blood cut off–colon (partially
dead) removed. Confined to home except medical appointments.
(Dead Bowel).

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17 *Id.*

18 Mr. Freeman’s administrative claim did not include Mrs. Freeman and did not give notice
19 of Mrs. Freeman’s claims. Even though the merits of Mrs. Freeman’s loss of consortium claim
20 derive from Mr. Freeman’s claim, Mrs. Freeman is not relieved of the responsibility to assert her
21 own administrative claim. *See Barber*, 118 Fed. Appx. at 278; *Johnson v. United States*, 704 F.2d
22 1431, 1442 (9th Cir. 1983) (finding that a claimant’s spouse’s name on Form 95 does not put the
23 United States on notice of the spouse’s loss of consortium claim).

24 The Freemans’ contention that the Form 95 is ambiguous and confusing does not relieve
25 Mrs. Freeman of the responsibility to assert her own administrative claim. Form 95’s instructions
26 state that “if the incident involves more than one claimant, each claimant should submit a separate
27 claim form.” Opp’n 60. I am unaware of authority that supports the contention that confusion in
28 filing an administrative claim is valid grounds to waive the FTCA’s exhaustion requirement. And

1 there is no authority permitting waiver of the FTCA’s exhaustion requirement to allow a claim that
2 would otherwise be barred by statute of limitations. The FTCA’s claim requirement is
3 jurisdictional, and it thus “must be strictly adhered to.” *Jerves v. United States*, 966 F.2d 517, 521
4 (9th Cir. 1992). Because the FTCA waives sovereign immunity, any such waiver must be “strictly
5 construed in favor of the United States.” *Id.*

6 The Freemans seem to rely on *Locke v. United States*, 351 F. Supp. 185 (D. Haw. 1972), to
7 support their contention that Mr. Freeman’s administrative claim satisfies the jurisdictional
8 requirements for Mrs. Freeman. In *Locke*, the husband of a decedent who died in an army hospital
9 brought suit under the FTCA on behalf of himself and his three minor children, alleging
10 negligence by the hospital. 351 F. Supp. at 188. Before initiating the suit, the husband filed an
11 administrative claim with the appropriate federal agency. *Id.* He listed only himself as the
12 claimant and did not reference his minor children. *Id.* Notwithstanding failure to comply with
13 administrative requirements, the court allowed the children’s FTCA claims because the father, as
14 the natural guardian of his unmarried minor children, was entitled to bring an action in their stead.
15 *Id.* at 187. The Freemans’ reliance on *Locke* is misplaced because the rights of minor children are
16 not at issue here, and it is well settled that a spouse must file a separate administrative claim. *E.g.*,
17 *Barber v. Kone, Inc.*, 118 Fed. Appx. 276, 278 (9th Cir. 2004) (dismissing a spouse’s loss of
18 consortium claim for failing to file a separate administrative claim and failing to exhaust
19 administrative remedies); *Johnson*, 704 F.2d at 1442 (9th Cir. 1983) (dismissing a spouse’s loss of
20 consortium claim for failing to file a separate administrative claim and failing to exhaust
21 administrative remedies).

22 Mrs. Freeman did not file her own administrative claim within two years after her claim
23 accrued, and Mr. Freeman’s administrative claim cannot satisfy the jurisdictional prerequisites for
24 her claim. Accordingly, Mrs. Freeman’s claims for loss of consortium, negligence, medical
25 malpractice, and intentional infliction of emotional distress are DISMISSED WITH PREJUDICE.

26 **B. The United States is the Only Proper Party Defendant**

27 The Freemans assert claims for negligence, medical malpractice negligence, intentional
28 infliction of emotional distress, and loss of consortium against all defendants. FAC at 1. The

1 United States argues that the FTCA only authorizes suits against the United States, and I should
2 therefore dismiss the claims against the VA Medical Center and the individual defendants. Def.’s
3 Mot. 8.

4 It is well settled that the United States is the only proper defendant in an FTCA action.
5 *E.g.*, *Kennedy v. United States Postal Serv.*, 145 F.3d 1077, 1078 (9th Cir. 1998) (affirming a
6 district court’s dismissal of plaintiff’s FTCA claims against the United States Postal Service and
7 the Postmaster General “[b]ecause the United States is the only proper defendant in an FTCA
8 action”); *McAllister v. United States*, No. 11-cv-03858-MEJ, 2013 U.S. Dist. LEXIS 82067, *4.
9 (N.D. Cal. June 10, 2013); *Bishop v. Mazda Motor of Am., Inc.*, No. 12-cv-2557-EMC, 2012 U.S.
10 Dist. LEXIS 15718, at *8-9 (N.D. Cal. Nov. 1, 2012). Accordingly, I DISMISS WITH
11 PREJUDICE the Freemans’ FTCA claims against the VA Medical Center, Does 1-100, and Dr.
12 Mark Ratcliffe, Dr. Errol Bush, Dr. John Lee, Dr. Carlos Corvera, Dr. Howard, and Paula Price.

13 **C. Negligence**

14 An amended complaint supersedes all prior complaints. *E.g.*, *Hal Roach Studios, Inc. v.*
15 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989); *Hamilton v. Tyler*, No. 10-cv-
16 1436-RMW, 2010 U.S. Dist. LEXIS 87156, at *8 (N.D. Cal. July 30, 2010). Likewise, under
17 Civil Local Rule 10-1, “an amended pleading must reproduce the entire proposed pleading and
18 may not incorporate any part of a prior pleading by reference.” In their FAC, the Freemans do not
19 reallege facts to support a claim for negligence or medical malpractice negligence, even though
20 both are listed on the FAC’s caption and “Medical Negligence” appears on the top of the FAC at
21 page 3.³ The United States concedes that Mr. Freeman’s original complaint sufficiently alleged
22 negligence, but argues that the Freemans’ negligence and medical malpractice claims should be
23 dismissed because the FAC fails to state these claims. Def.’s Mot. 9 n.3.

24 In light of Mr. Freeman’s pro se status and the liberal pleading standard afforded to pro se
25 litigants, *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990), if Mr. Freeman

27 ³ Mr. Freeman’s original complaint lists only a negligence cause of action, not medical
28 malpractice negligence. The Freemans clarified that they mistakenly omitted their negligence
claims from their FAC. Dkt. No. 65.

1 chooses to file a second amended complaint and wishes to preserve claims for negligence and
2 medical malpractice, he must include both claims in his second amended complaint and allege
3 facts for each element. If he fails to do so, I will not consider those causes of action as part of this
4 action.

5 **D. Intentional Infliction of Emotional Distress (“IIED”)**

6 The United States argues that the Freemans’ IIED claim fails because they fail to allege
7 intent or reckless disregard, and the actions complained of do not amount to extreme and
8 outrageous conduct. Def.’s Mot. 11-12. To state an IIED claim, a plaintiff must plead facts
9 showing (i) extreme and outrageous conduct by the defendant with the intention of causing, or
10 reckless disregard of the probability of causing, emotional distress; (ii) plaintiff suffered severe or
11 extreme emotional distress; and (iii) actual and proximate causation of the emotional distress by
12 the defendant’s outrageous conduct. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001
13 (1993). To be “outrageous,” the conduct must be so extreme as to exceed all bounds of that
14 usually tolerated in a civilized community. *Id.*

15 The Freemans allege that they suffered emotional distress due to the actions of Dr.
16 Ratcliffe, who cut Mr. Freeman’s cecum and allegedly violated the standard of care in an aortic
17 valve repair, and of the head nurse, who allegedly mistreated Mr. Freeman while he was in the
18 hospital. While Mr. Freeman was on a gurney post-surgery, the head nurse said, “What is he
19 doing here?” and “implied that an African American didn’t belong in her hospital unit.” FAC at 6
20 ¶¶ 3-4. The head nurse loudly shouted at Mr. Freeman to “Shut up, shut up, shut up. Put him by
21 the room by the door’s exit. I am going to throw you out of here!” FAC at 7. The head nurse
22 “threatened to put [Mr. Freeman] out of the hospital and . . . put out [Mrs. Freeman] while white
23 wives of veterans remained.” Opp’n 8, 10. The Freemans further allege that Mr. Freeman is an
24 “African American male with weak sensitivities susceptible to racial innuendo,” and that
25 defendants’ acts “were willful, wanton, malicious, and oppressive.” FAC at 6, 11. They
26 alternatively allege that defendants “showed reckless disregard for [Mr. Freeman’s] weak
27 sensitivities and vulnerable, fragile condition” post-surgery, and that defendants “demonstrated a
28 total reckless disregard of the probability of causing extreme emotional distress by not repairing

1 the cut ileum during heart surgery.” FAC at 7, 9. The Freemans allege that they suffered “severe
2 emotional injury” and “felt humiliation, embarrassment and feared death,” and in “severe shock
3 after [the head nurse’s] outburst (harassment)” towards them. FAC at 7, 10. They allege that Mr.
4 Freeman “has been injured in mind and body as follows: 1. Loose Bowels, 2. Cut Ileum, 3.
5 Excessive Flatulence, 4. Nonexistent sexual life” and that Mr. Freeman could no longer work as a
6 teacher and had to obtain medical treatment. FAC at 10-11.

7 “Behavior may be considered outrageous if a defendant (1) abuses a relation or position
8 which gives him power to damage the plaintiff’s interest; (2) knows the plaintiff is susceptible to
9 injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that
10 the acts are likely to result in illness through mental distress.” *Pulver v. Avco Fin. Servs.*, 182 Cal.
11 App. 3d 622, 637 (1986). Failure to follow a standard of care, in and of itself, is not extreme and
12 outrageous conduct. *Van Horn v. Hornbeak*, No. 08-cv-1622, 2009 U.S. Dist. LEXIS 16134, at
13 *16 (E.D. Cal. Feb. 18, 2009); *see also Berkley v. Dowds*, 152 Cal. App. 4th 518, 537 (Cal. Ct.
14 App. 2007) (“[M]edical diagnosis and treatment advice will not be considered outrageous unless
15 they are intentionally false and given in bad faith.”). Therefore Dr. Ratcliffe’s alleged violation of
16 the standard of care in Mr. Freeman’s aortic valve repair does not amount to outrageous conduct.

17 The Freemans’ IIED claim against the head nurse also fails because their allegations do not
18 amount to actionable extreme and outrageous conduct. Courts have found racial slurs and epithets
19 sufficient to constitute outrageous conduct for IIED. *See Robinson v. Hewlett-Packard Corp.*, 183
20 Cal. App. 3d 1108, 1129-30 (1986) (finding summary judgment on IIED claim inappropriate
21 because use of racial slurs may constitute outrageous conduct); *Agarwal v. Johnson*, 25 Cal. 3d.
22 932, 947 (1979), *disapproved on other grounds by White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999)
23 (evidence that a racial epithet was used against and humiliated an employee was enough to support
24 a finding of outrageousness). But the Freemans do not allege that the head nurse or any other
25 defendants used racial slurs or epithets. Merely rude or insensitive behavior does not rise to the
26 level of extreme and outrageous conduct required for intentional infliction of emotional distress.
27 *Schneider v. TRW, Inc.*, 938 F.2d 986, 992 (9th Cir. 1991) (finding a supervisor who yelled and
28 screamed at an employee amounts to rude and insensitive acts but not outrageous conduct).

1 Furthermore, the Freemans do not sufficiently allege severe or extreme emotional distress
2 *as a result* of the head nurse’s actions. Although I draw all reasonable inferences and resolve all
3 doubt in the Freemans’ favor, I am not required to accept as true allegations that are unwarranted
4 deductions of fact or unreasonable inferences. *Usher*, 828 F.2d at 561; *In re Gilead Scis. Sec.*
5 *Litig.*, 536 F.3d at 1055. It is unreasonable to infer that Mr. Freeman suffered loose bowels, a cut
6 ileum, excessive flatulence, nonexistent sexual life, and could no longer work from severe
7 emotional distress allegedly inflicted by the head nurse’s actions, rather than from the alleged
8 complications of his aortic valve repair. Accordingly, I DISMISS this claim with leave to amend.

9 **II. BIVENS CLAIMS**

10 The Freemans assert a *Bivens* cause of action for violations of their First and Fifth
11 Amendment rights against all defendants. FAC at 12. The United States argues that sovereign
12 immunity bars *Bivens* claims against the United States, the VA Medical Center, and the individual
13 defendants named in their official capacity. Def.’s Mot. 12. The Freemans clarify in their
14 opposition that their *Bivens* claim is against the individual defendants named in their individual
15 capacity. Opp’n 21.

16 As I noted in a prior order, a *Bivens* action for violations of constitutional rights cannot be
17 asserted against the United States. Dkt. No. 34 at 4. Nor can it be asserted against the VA
18 Medical Center or individual defendants named in their official capacity. *Starr v. Baca*, 652 F.3d
19 1202, 1206 (9th Cir. 2011) (“A *Bivens* action seeks to hold federal officers individually liable for
20 constitutional violations.”). Accordingly, the Freemans’ *Bivens* action against the United States
21 and the VA Medical Center are DISMISSED WITH PREJUDICE.

22 The Freemans are allowed to amend their complaint to include a *Bivens* action against
23 named individuals, in their individual capacity, who are responsible for the alleged constitutional
24 violations. If the Freemans file an amended complaint, they must explain the basis for their claims
25 and allege specific facts explaining how each individual defendant violated their constitutional
26 rights. To bring a claim based on the First Amendment, the Freemans must also allege that a
27 defendant “took action that would chill or silence a person of ordinary firmness from future First
28 Amendment activities.” *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006)

1 (internal quote and citation omitted). Moreover, the Freemans must allege, and eventually prove,
 2 that a defendant’s “desire to cause the chilling effect was a but-for cause of the defendant’s
 3 action.” *Id.* at 1232; *see also Mendocino Env’tl. Ctr. v. Mendocino Cty.*, 14 F.3d 457, 464 (9th Cir.
 4 1994) (“The defendant’s intent is an element of the claim.”); *Gibson v. United States*, 781 F.2d
 5 1334, 1342 (9th Cir. 1987) (holding that plaintiffs may bring a *Bivens* claim under the First
 6 Amendment where plaintiffs allege that defendants acted with the impermissible motive of
 7 curbing protected speech).

8 **III. UNRUH ACT**

9 The United States argues that the claim for violations of California’s Unruh Act should be
 10 dismissed for failure to allege facts that defendants discriminated against the Freemans. Def.’s
 11 Mot. 14. Section 51 provides that “all persons” are “entitled to the full and equal accommodations
 12 advantages, facilities, privileges, or services in all business establishments of every kind
 13 whatsoever.” CAL. CIV. CODE § 51. As the Ninth Circuit noted, “The Unruh Act forbids business
 14 establishments to deny any person ‘full and equal accommodations, advantages, facilities,
 15 privileges, or services’ on account of race, and has been limited to cases ‘where the plaintiff was
 16 in a relationship with the offending organization similar to that of the customer in the customer-
 17 proprietor relationship.’” *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir. 2001)
 18 (quoting *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 873–74 (9th Cir.1996)). To
 19 establish a violation of the Unruh Act that is independent of a claim under the Americans with
 20 Disabilities Act, a plaintiff must “plead and prove intentional discrimination in public
 21 accommodations in violation of the terms of the Act.” *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661
 22 (2009) (internal quotation marks omitted). The California Supreme Court has clarified that the
 23 Unruh Act requires allegations of a defendant’s “willful, affirmative misconduct.” *Greater L.A.*
 24 *Agency on Deafness, Inc. v. CNN, Inc.*, 2014 U.S. App. LEXIS 2492 (9th Cir. Feb. 5, 2014);
 25 *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005).

26 The Freemans allege that Mr. Freeman did not “observe [] any white veteran with an aortic
 27 valve repair in the Intensive Care Unit . . . dying from the possibility of sepsis poisoning,” did not
 28 witness any medical staff “apologizing to white patrons . . . for a botched surgery,” “did not notice

1 any white veterans being transferred from the [ICU] in excruciating pain,” and “did not witness
2 nor notice any white veterans waiting 10 to 14 hours for medical treatment or being in
3 excruciating pain for six days.” FAC at 13-14. The Freemans allege that the head nurse “tried to
4 inflict extreme emotional distress on [the Freemans], causing Mr. Freeman to shake
5 uncontrollably. FAC at 15. The Freemans further allege that the head nurse moved Mr. Freeman
6 in a room near an exit and shouted at Mrs. Freeman to leave the room, that Mr. Freeman “did[
7 [not] witness any white veterans at SFVA put out of their assigned rooms and placed near the
8 exit,” that “no one yelled at [a moaning white veteran],” that Mr. Freeman did not witness a white
9 veteran’s spouse put out of the room. FAC at 15-16.

10 Aside from allegations stemming from events at the San Francisco VA Medical Center, the
11 Freemans also allege “segregative practices at the Oakland VA clinic.” FAC at 16. They allege
12 that the Oakland VA clinic’s physical therapist, Ms. Kelly, is racist and that “[w]hite veterans
13 were allowed to use the equipment but Mr. Freeman was advised to ‘walk around Lake Merritt’
14 using his walker, due to his limited mobility.” FAC at 16-17.

15 Construing the pleadings liberally and drawing all reasonable inferences in favor of the
16 Freemans, these allegations still do not amount to “affirmative willful misconduct” of racial
17 discrimination by the defendants. The Freemans have alleged that the head nurse was cruel and
18 that Mr. Freeman did not use the equipment at the Oakland VA clinic due to his limited mobility.
19 However, there are no factual allegations that show that racial discrimination motivated the actions
20 of the head nurse or other defendants. Therefore, the Freemans fail to show how the medical
21 staff’s treatment of Mr. Freeman amounts to willful, affirmative racial discrimination. I
22 previously gave Mr. Freeman leave to amend his Unruh Civil Rights Act claim “to describe
23 specifically the basis for his contention that defendants discriminated against him because of his
24 race when they performed his aortic valve repair surgery.” Dkt. No. 34 at 7. Although Mr.
25 Freeman has failed to do so, in light of his pro se status, this claim is DISMISSED with leave to
26 amend.

27 **IV. THE FREEMANS’ MOTION TO STRIKE**

28 The Freemans move to strike the exhibits attached to the declaration of Sonia Dunk in

1 support of the motion to dismiss. Opp'n 11. A court "may strike from a pleading an insufficient
2 defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f).
3 The function of a motion to strike under Rule 12(f) is to avoid the expenditure of time and money
4 that must arise from litigating spurious issues by dispensing of those issues before trial. *See*
5 *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S.
6 517 (1994) (citation omitted). Motions to strike "are generally disfavored because they are often
7 used as delaying tactics and because of the limited importance of pleadings in federal practice."
8 *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001). In most cases, a motion to
9 strike should not be granted unless "the matter to be stricken clearly could have no possible
10 bearing on the subject of the litigation." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp. 2d
11 1048, 1057 (N.D. Cal. 2004).

12 The Freemans object that the exhibits are hearsay, unreliable, and violate the right of
13 confrontation. Opp'n 11. However, the exhibits are relevant at this juncture to show that Mr.
14 Freeman exhausted his administrative remedies and can properly assert a FTCA cause of action in
15 federal court. At this point, I have not considered, and need not consider, the Veterans
16 Administration's determinations on Mr. Freeman's claim. Therefore, the Motion to Strike is
17 DENIED.

18 CONCLUSION

19 For the reasons above, I DENY the Motion to Strike, DENY plaintiffs' request to render a
20 default judgment, and GRANT the motion to dismiss.

21 **The following claims are DISMISSED WITH PREJUDICE:**

- 22 (i) Mrs. Freeman's FTCA claims for loss of consortium, negligence, medical malpractice,
23 and intentional infliction of emotional distress;
- 24 (ii) the FTCA claims against the VA Medical Center, unnamed and named individual
25 defendants; and
- 26 (iii) the *Bivens* claim against the United States and the VA Medical Center.

27 **The following claims are DISMISSED WITH LEAVE TO AMEND:**

- 28 (i) Mr. Freeman's FTCA claims for negligence, medical malpractice, and intentional

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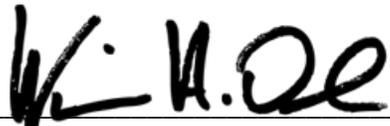
infliction of emotional distress;
(ii) a *Bivens* action for alleged constitutional violations against specifically named individual defendants in their individual capacity; and
(iii) a claim for violation of Section 51 of the Unruh Act.

An amended complaint, if any, shall be filed within **twenty (20)** days of the date of this Order. Mr. Freeman is advised to allege specific facts in support of his claims for relief. His complaint has been dismissed twice, and the Court is unlikely to allow leave to amend a third time. He is also advised that if he names individual defendants, he must properly serve them.

Finally, Mr. Freeman is again advised to contact the Legal Help Center, located on the 15th floor, Room 2796, of the courthouse at 450 Golden Gate Avenue, San Francisco, California, 94102 if he has any questions about how to proceed with this case.

IT IS SO ORDERED.

Dated: March 19, 2014



WILLIAM H. ORRICK
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WELBORN FREEMAN,
Plaintiff,

Case Number: CV13-02421 WHO
CERTIFICATE OF SERVICE

v.

UNITED STATES et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 19, 2014, I SERVED a true and correct copy of the attached, by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the U.S. Mail.

Welborn Freeman and
Deborah Freeman
276 Lee Street #101
Oakland, CA 94610

Dated: March 19, 2014


Richard W. Wieking, Clerk
By: Jean Davis, Deputy Clerk