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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY UDOM,
Detainee No. A023503206,

Plaintiff,

vs.

WARDEN; OFFICER TELLECHA;
SAN DIEGO CORRECTIONAL
FACILITY,

Defendants.

Civil No. 12cv0783 BTM (MDD)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[ECF No. 2];**

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT TO 28
U.S.C. § 1915(e)(2); and**

**(3) DENYING MOTION TO SUBMIT
SUPPLEMENTAL INFORMATION
TO COURT FILES WITHOUT
PREJUDICE [ECF No. 5.]**

Anthony Udom (“Plaintiff”), currently detained at the San Diego Correctional Facility located in San Diego, California, and proceeding pro se, has filed a civil action. Plaintiff has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2]. In addition, Plaintiff has filed a “Motion to Submit Supplemental Information to Court Files.” [ECF No. 5.]

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1 **I.**

2 **MOTION TO PROCEED IFP**

3 All parties instituting any civil action, suit or proceeding in a district court of the United
4 States, except an application for writ of habeas corpus must pay a filing fee of \$350. *See* 28
5 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
6 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, “[u]nlike other indigent
8 litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and
9 appeals pursuant to the PLRA [Prison Litigation Reform Act].” *Agyeman v. INS*, 296 F.3d 871,
10 886 (9th Cir. 2002). As defined by the PLRA, a “prisoner” is “any person incarcerated or
11 detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent
12 for, violations of criminal law or the terms and conditions of parole, probation, pretrial release,
13 or diversionary program.” 28 U.S.C. § 1915(h). Under this definition, “an alien detained by the
14 INS pending deportation is not a ‘prisoner’ within the meaning of the PLRA,” because
15 deportation proceedings are civil, rather than criminal in nature, and an alien detained pending
16 deportation has not necessarily been “accused of, convicted of, sentenced or adjudicated
17 delinquent for, a violation of criminal law.” *Agyeman*, 296 F.3d at 886. Thus, because Plaintiff
18 claims he was civilly detained pursuant to immigration or deportation proceedings, and not a
19 “prisoner” as defined by 28 U.S.C. § 1915(h), the filing fee provisions of 28 U.S.C. § 1915(b)
20 do not apply to him.

21 Accordingly, the Court has reviewed Plaintiff’s affidavit of assets and it is sufficient to
22 show that Plaintiff is unable to pay the fees or post securities required to maintain this action,
23 and hereby **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF
24 No. 2].

25 **II.**

26 **SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

27 Any complaint filed by a person proceeding IFP is subject to sua sponte dismissal by the
28 Court to the extent it contains claims which are “frivolous, malicious, fail to state a claim upon

1 which relief may be granted, or seek monetary relief from a defendant immune from such relief.”
2 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam)
3 (holding that “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez*
4 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection 1915(e) not only permits,
5 but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim.”)

6 Plaintiff purports to bring this claim against the San Diego Correctional Facility, a private
7 corporation, and its employees under the Administrative Procedure Act (“APA”). (*See* Compl.
8 at 1; citing 5 U.S.C. § 706.) However, the Defendants are neither an agency of the Federal
9 Government nor are they employees of the Federal Government. Therefore, any decisions made
10 by the San Diego Correctional Facility are not reviewable under the APA. *See Spokane County*
11 *Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669 (1980).

12 In addition, it appears that Plaintiff may be seeking to bring this action pursuant to the
13 Federal Torts Claim Act (“FTCA”). However, he fails to name the United States as a Defendant
14 in this action. The Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680,
15 provides that the sovereign immunity of the United States is waived for suits resulting from torts
16 “caused by the negligent or wrongful act or omission of any employee of the Government ...
17 under circumstances where the United States, if a private person, would be liable to the claimant
18 in accordance with the law of the place where the act or omission occurred.” 28 U.S.C.
19 § 1346(b). Thus, Plaintiff’s FTCA claims against the named Defendants fail because the United
20 States is the only proper defendant for an FTCA claim against a federal employee for actions
21 taken within the scope of their employment. *See Ward v. Gordon*, 999 F.2d 1399, 1401 (9th
22 Cir. 1993).

23 Should Plaintiff seek to hold Defendant San Diego Correctional Facility liable for alleged
24 civil rights violations pursuant to *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S.
25 388 (1971), this claims would also fail. *Bivens* established that “compensable injury to a
26 constitutionally protected interest [by federal officials alleged to have acted under color of
27 federal law] could be vindicated by a suit for damages invoking the general federal question
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1 jurisdiction of the federal courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S.
2 478, 486 (1978).

3 To state a private cause of action under *Bivens*, Plaintiff must allege: (1) that a right
4 secured by the Constitution of the United States was violated, and (2) that the violation was
5 committed by a federal actor. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624
6 (9th Cir. 1988). *Bivens* provides that “federal courts have the inherent authority to award
7 damages against federal officials to compensate plaintiffs for violations of their constitutional
8 rights.” *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000).
9 However, a *Bivens* action may only be brought against the responsible federal official in his or
10 her individual capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988).

11 However, *Bivens* does not provide a remedy for alleged wrongs committed by a private
12 entity alleged to have denied Plaintiff’s constitutional rights under color of federal law.
13 *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (“[T]he purpose of *Bivens* is
14 to deter *the officer*,’ not the agency.”) (quoting *Meyer*, 510 U.S. at 485); *Malesko*, 534 U.S. at
15 66 n.2 (holding that *Meyer* “forecloses the extension of *Bivens* to private entities.”).
16 Accordingly, Plaintiff cannot bring claims of civil rights violations against the San Diego
17 Correctional Facility.

18 In addition, the Supreme Court recently held that a prisoner cannot bring a *Bivens* action
19 against an employee of a private entity for damages pursuant to alleged Eighth Amendment
20 violations. *See Minneci v. Pollard*, 132 S.Ct. 617, 626 (2012).

21 In *Minneci*, the Supreme Court held that

22 [W]here “a federal prisoner seeks damages from privately employed personnel working
23 at a privately operated federal prison, where the conduct allegedly amounts to a violation
24 of the Eighth Amendment, and where that conduct is a kind that typically falls within the
25 scope of traditional state tort law (such as the conduct involving improper medical care
at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a
Bivens remedy in such a case.”

26 *Id.*

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1 Thus, while Plaintiff may be able to raise his Eighth Amendment claims against the
2 private employees as a tort claim in state court, his claim is not cognizable as a *Bivens* action in
3 this Court.

4 Plaintiff has also brought a “Motion to Submit Supplemental Information to Court Files.”
5 [ECF No. 5.] In this Motion, Plaintiff seeks to add additional factual claims against a party who
6 is not currently named as a Defendant in this matter. Because the Court finds that dismissal of
7 the entire action is warranted for the reasons set forth above, the Court will DENY Plaintiff’s
8 Motion to supplement the Complaint without prejudice. Plaintiff’s Amended Complaint, should
9 he choose to file one, must be complete in itself and set forth all of his claims.

10 **III.**

11 **CONCLUSION AND ORDER**

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff’s Motion to Submit Supplemental Information to Court Files [ECF No.
14 3] is **DENIED** without prejudice.

15 2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
16 **GRANTED**.

17 **IT IS FURTHER ORDERED** that:

18 3. Plaintiff’s Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
19 § 1915(e)(2)(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this
20 Order is filed in which to file a First Amended Complaint which cures the deficiencies of
21 pleading noted above. Plaintiff’s Amended Complaint must be complete in itself without
22 reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and
23 any claim not re-alleged in the Amended Complaint will be considered waived. *See King v.*
24 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). If Plaintiff fails to file an Amended Complaint
25 within 45 days, the Court will prepare a final Order dismissing this action.

26 DATED: July 5, 2012

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28 BARRY TED MOSKOWITZ, Chief Judge
United States District Court