IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02203-RM-KLM

SALVADOR MAGLUTA,

Plaintiff,

v.

CHARLES DANIELS, Former Warden, FCC Florence, *et al.*,

Defendants.

DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT (Doc. 87)

Defendants Daniels, Allred, Santini, McDermott, Nehls, and Roberts move pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss all claims in Plaintiff's Fourth Amended Complaint and state therefor the following:

Introduction

Plaintiff, an inmate at the United States Penitentiary, Administrative Maximum (ADX), in Florence, Colorado, alleges in his Fourth Amended Complaint ("amended complaint") that Defendants failed to provide him timely and adequate medical care for various problems, including a painful kidney stone and diseased teeth. He also claims that he has been subject to atypical and significant hardship at the ADX as a result of the lack of medical care. These claims, as well as related claims for conspiracy, are brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1] In addition to money damages from Defendants, he also seeks injunctive, mandamus, and declaratory relief from them in their official capacities. Doc. 87 at 1, 2, 22-25.[2]

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[1] Plaintiff has also named 15 John Does in his amended complaint. Plaintiff identifies them only as unknown staff employed by the BOP at the Florence Correctional Complex (FCC). The Court should also dismiss these unnamed defendants because Plaintiff fails to provide sufficient information to permit these individuals to be identified for purposes of service of process. *Browning v. Davis*, 2013 WL 3388719 at *3 (D. Colo. July 8, 2013).

[2] Plaintiff has filed other civil actions against prison officials; the most recent one (*Magluta v. United States Federal Bureau of Prisons, et al.*, Civ. Action No. 11-cv-02381-RM-KLM (D. Colo.)) was voluntarily dismissed on October 11, 2014. Doc. 167.

Prior to his incarceration at the ADX, Plaintiff was imprisoned at USP Terre Haute in Indiana. Plaintiff was transferred to the FCC (United States Penitentiary) on March 27, 2013, and then to the ADX on September 4, 2013. *Id.* at 2. Plaintiff's claims relate to events that arose subsequent to his transfer to USP Florence and the ADX.

In addition to the bases for dismissal set forth below, Plaintiff has not exhausted his administrative remedies with respect to Claims 2, 4, 5, 6, 7, and 8. Defendants will address their affirmative defense of Plaintiff's failure to exhaust administrative remedies in a separate motion for summary judgment.

Jurisdiction

This Court has jurisdiction to adjudicate Plaintiff's claims for deprivation of constitutional rights against Defendants in their individual capacities pursuant to *Bivens*.[3] While Plaintiff cites 28 U.S.C. § 1331, this statute does not waive the government's sovereign immunity.[4] Plaintiff also cites to a section of the Administrative Procedure Act (APA), 5 U.S.C. § 701, but this statute only provides a limited waiver of the government's sovereign immunity for injunctive relief; it does not grant subject matter jurisdiction for official capacity claims. *Id.*

Standard of Review

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) should be granted where the Court lacks subject matter jurisdiction over the claims. *Basso v. Utah Power & Light Co*., 495 F.2d 906, 909 (10th Cir. 1974). "[A] party may go beyond [the] allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual

[3] To the extent that Plaintiff is attempting to sue the individual Defendants in their official capacities, those claims are also barred by sovereign immunity. *Robbins v. U.S. Bureau of Land Mgt.*, 438 F.3d 1074, 1079 (10th Cir. 2006).

[4] This section does not provide a cause of action against Defendants in their official or individual capacities and does not constitute a waiver of the government's sovereign immunity. *See High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006) ("While 28 U.S.C. § 1331 grants the court jurisdiction over all 'civil actions arising under the Constitution, laws or treaties of the United States,' it does not independently waive the Government's sovereign immunity; § 1331 will only confer subject matter jurisdiction where some other statute provides such a waiver.").

allegations." *Id.* "A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional fact under Rule 12(b)(1)." *Id.* Here, the court is not required to convert Defendant's motion to one for summary judgment because resolution of the jurisdictional question is not intertwined with the merits of the case. *See id.*

Fed. R. Civ. P. 8(a)(2) requires that a pleading contain a "'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citation omitted). This rule "does not require 'detailed factual allegations.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). But, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555); *see also Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678.

A court considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) must "accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the non-moving party." *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008) (citation omitted). To survive such a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). The Tenth Circuit has confirmed that "[t]o survive dismissal, the plaintiff must provide the grounds upon which [his] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *See, e.g., Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (citing *Twombly*, 550 U.S. at 570). Determining whether a complaint states a plausible claim for relief will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Argument

A. Plaintiff's *Bivens* claims are subject to a two-year statute of limitations.

The statute of limitations for a *Bivens* action arising in Colorado is two years. *Industrial Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 968, and n.4 (10th Cir. 1994). "Although state law establishes the statute of limitations, federal law determines when plaintiffs' federal *Bivens* claims accrued." *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004). The statute of limitations under federal law begins to run "when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." *Industrial Constructors Corp.*, 15 F.3d at 968-69. "Although an affirmative defense, the statute of limitations can be raised on a motion to dismiss if the complaint itself plainly establishes the defense." *Arnell v. Berkebile*, 2015 WL 1651044, *8 (D. Colo. April 8, 2015). If the dates contained in the complaint clearly show that the right to sue has expired, the "plaintiff has the burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041, n.4 (10th Cir. 1980) (citations omitted).

Plaintiff filed his first complaint (Doc. 1) on October 5, 2015. To the extent that Plaintiff knew of or had reason to know of claims arising prior to October 4, 2013, they are time barred. Here, with respect to Claim 1, Plaintiff had knowledge of his alleged kidney problem after an x-ray was taken in March 2013 at USP Terre Haute. Doc. 87 at 5. Plaintiff conveyed this information to his then counsel, who, on August 5, 2013, "sent an urgent letter to Defendants McDermott and Daniels describing Plaintiff's constant pain and suffering, imploring FCC staff to provide immediate care and treatment." *Id.*, ¶ 73. Because Plaintiff knew or had reason to know of the issues concerning his kidney prior to October 4, 2013, any claim arising before this date is untimely. Plaintiff is only able to maintain a claim for care and treatment of his kidney arising after October 5, 2013.[5] With respect to Claim 3 for lack of "dental and oral health" care

[5] Anticipating a statute of limitations defense, Plaintiff states in his amended complaint that the limitations period should be tolled during the time that he was exhausting his administrative remedies. Doc. 87 at 21. State law governs equitable tolling. *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995). Plaintiff bears the burden of establishing that the statute of limitations is subject to equitable tolling. *Garrett v. Arrowhead Improvement Ass'n*, 862 P.2d 850, 855 (Colo. 1992). Plaintiff, however, has not alleged credible facts to support equitable tolling.

(*id.*, ¶ 15), Plaintiff was aware of these concerns as early as March 27, 2013. *Id.*, ¶ 5; *see also id.*, ¶¶ 98, 99, 104, 105, and 107.

Thus, for Claims 1 and 3 as well as for any other claim of which Plaintiff had knowledge of the factual basis prior to October 5, 2013, each should be dismissed as untimely.

B. Defendants are entitled to qualified immunity.

Government officials performing discretionary functions are shielded from liability for damages so long as their conduct does not violate clearly established statutory or constitutional rights of which every reasonable officer would have known. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011). "When qualified immunity is asserted as a defense, the plaintiff must show that '(1) the defendants' actions violated a constitutional or statutory right; and (2) the right was clearly established and reasonable persons in the defendants' position would have known their conduct violated that right.'" *Garrett v. Stratman*, 254 F.3d 946, 951 (10th Cir. 2001) (quoting *Cruz v. City of Laramie*, 239 F.3d 1183, 1187 (10th Cir. 2001)); *Al-Kidd*, 563 at 741 ("A government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear' that every reasonable official would have understood that what he is doing violates that right.") (internal quotation and citation omitted).

For a right to be clearly established, it must be clearly defined but, as the Supreme Court has repeatedly held, that "clearly established law should not be defined at a high level of generality." *White v. Pauly*, __U.S.__, 137 S. Ct. 548, 552 (2017) (internal quotation marks omitted). The qualified immunity inquiry is "fact specific," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and "must be undertaken in the specific context of the case, not as a broad general proposition," *Saucier v. Katz*, 533 U.S. 194, 201 (2001). To overcome qualified immunity, "the right the official is alleged to have violated must have been 'clearly established' a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. This rule takes account of one of the fundamental purposes of qualified immunity, which is to bar liability when it would be "difficult for an officer to

determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Saucier*, 533 U.S. at 205.

As discussed below, because Plaintiff has failed to state an Eighth Amendment claim with respect to medical or dental care, Defendants are entitled to qualified immunity. In both Claims 1 and 3, he failed to allege sufficient facts that would establish Defendants knew of a substantial risk of harm to Plaintiff if he did not receive treatment for his kidney or dental problems. Plaintiff's allegations are insufficiently specific and conclusory to establish that Defendants violated clearly established law concerning the timing of medical or dental treatment.

With respect to Claims 5 (Plaintiff "kept in a state of near-constant pain") and 7 (retaliation for Plaintiff's accessing the courts), Plaintiff asserts these claims under the First and Fifth Amendments, which are not cognizable under *Bivens* as discussed in Sections D and E, *infra*. To the extent Plaintiff is able to state a claim for an "atypical and significant hardship," he nonetheless fails to show that Defendants violated clearly established law. First, as a basis for a Fifth Amendment claim, Plaintiff fails to identify the protected liberty interest which Defendants are alleged to have violated. *Abbott v. McCotter*, 13 F.3d 1439, 1442 (10th Cir. 1994) (prisoners retain only a "narrow range of protected liberty interests"). Lawful incarceration necessarily restricts a prisoner's privileges and rights as a consequence of confinement. *Sandin v. Connor*, 515 U.S. 472, 485 (1995) (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). Second, Plaintiff is unable to identify any clearly established law concerning the conditions of confinement at the ADX that Defendants may have violated in their interaction with Plaintiff. As such, Defendants are entitled to qualified immunity to the extent Plaintiff is able to maintain a Fifth Amendment due process claim.

C. <u>Plaintiff fails to state an Eighth Amendment claim relating to medical care.</u>

The Eighth Amendment protects inmates from "cruel and unusual punishments." U.S. Const., amend. VIII; *Garrett v. Stratman*, 254 F.3d 946, 949 (10th Cir. 2001). "The Eighth Amendment requires prison officials to care for prisoners' serious medical needs." *Taylor v. Ortiz*, 410 Fed. App'x 76, 79 (10th Cir. 2010). "A prison official violates an inmate's clearly established Eighth Amendment rights if he acts with deliberate indifference to an inmate's

serious medical needs – if he 'knows of and disregards an excessive risk to inmate health or safety.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)). In other words, a plaintiff "must establish that defendant(s) knew he faced a substantial risk of harm and disregarded that risk, 'by failing to take reasonable measures to abate it.'" *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999) (citations omitted). *See also Self v. Crum*, 439 F.3d 1227, 1231 (10th Cir. 2006) (reviewing development of legal framework). Moreover, as the Tenth Circuit held in *Robbins v. Okla.*, 519 F.3d 1242, 1250 (10th Cir. 2008), in cases seeking to impose individual liability on government employees, "it is particularly important in such circumstances that the complaint make clear exactly who is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." (emphasis in original).

A prisoner's right to medical care is bounded by the requirement to establish deliberate indifference and not a prisoner's desire for a particular course of treatment. *Callahan v. Poppell*, 471 F.3d 1155, 1160 (10th Cir. 2006). "To succeed on an Eighth Amendment claim, as opposed to a medical malpractice claim under state tort law, a plaintiff is required to identify 'acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.'" *Id.* A prisoner who merely disagrees with a diagnosis or prescribed course of treatment does not state a constitutional violation. *Perkins v. Kan. Dep't of Corrs.*, 165 F.3d 803, 809 (10th Cir. 1999). Likewise, "negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation." *Id.* at 811; *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (inadvertent failure to provide medical care does not rise to the level of deliberate indifference); *Fitzgerald v. Corrections Corp. of Am.*, 403 F.3d 1134, 1143 (10th Cir. 2005) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.") (internal quotation marks omitted).

To state an Eighth Amendment deliberate indifference claim, a prisoner must satisfy both objective and subjective components. *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). First, the deprivation must be sufficiently serious. *Kikumura v. Osagie*, 461 F.3d 1269, 1291 (10th Cir. 2006). "The objective component of the test is met if the harm suffered is 'sufficiently serious' to implicate the Cruel and Unusual Punishment[s] Clause." *Id.* A medical need is sufficiently serious if it "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000) (internal quotation omitted). "Where a prisoner claims that harm was caused by a delay in medical treatment, he must 'show that the delay resulted in substantial harm' in order to satisfy the objective prong of the deliberate indifference test." *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014) (plaintiff established dispute of fact to proceed on claim against nurse for a failure to assess plaintiff's complaints of extreme and debilitating pain that later turned out be due to kidney stones). "We have held that the substantial harm requirement may be satisfied by lifelong handicap, permanent loss, or considerable pain." *Garrett*, 254 F.3d at 950. A prisoner must experience substantial pain to constitute a substantial injury while awaiting treatment, and "not every twinge of pain suffered as a result of delay in medical care is actionable." *Kikumura*, 461 F.3d at 1292; *see also Mata v. Saiz*, 427 F.3d 745, 751, n.3 (10th 2005) (collecting cases of delayed treatment).

Second, "[t]o prevail on the subjective component, the prisoner must show that the defendants 'knew he faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it." *Callahan*, 471 F.3d at 1159; *see also Farmer*, 511 U.S. 825, 837 (1994) (holding that the subjective component is met if a prison official "knows of and disregards an excessive risk to inmate health or safety."). "[A] delay in medical care 'only constitutes an Eighth Amendment violation where the plaintiff can show that the delay resulted in substantial harm.'" *Garrett*, 254 F.3d at 950 (quoting *Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001)). "Where medical treatment has been provided, and there has been no intentional delay or interference with an inmate's care, mere failure to provide additional care beyond what is medically required will neither constitute 'an unnecessary and wanton infliction

of pain' nor be 'repugnant to the conscience of mankind.'" *Jackson v. McCollum*, 118 Fed. App'x 389, 390 (10th Cir. 2004) (quoting *Estelle*, 429 U.S. at 106).

"A prison medical professional who serves 'solely . . . as a gatekeeper for other medical personnel capable of treating the condition' may be held liable under the deliberate indifference standard if she 'delays or refuses to fulfill that gatekeeper role.'" *Mata*, 427 F.3d at 751 (quoting *Sealock*, 218 F.3d at 1209). "Moreover, an Eighth Amendment claim may arise when a prison official acts with deliberate indifference in preventing a prisoner from receiving treatment or denying him access to medical personnel capable of evaluating the need for treatment." *Key v. McLaughlin*, Civil Action No. 10-cv-00103-WJM-CBS, 2011 WL 4369115, *6 (D. Colo. Aug. 3, 2011) (quoting *Sealock*, 218 F.3d at 1211). "The Eighth Amendment may be violated if the professional 'knows that his [or her] role in a particular medical emergency is solely to serve as a gatekeeper for other medical personnel capable of treating the condition, and if he [or she] delays or refuses to fulfill that . . . role due to deliberate indifference.'" *Id.*

Claim 1 – Delay in treatment for kidney stone

Plaintiff's allegations fail to establish Defendants Allred, Daniels, McDermott, Nehls, or Santini disregarded a substantial risk of harm to Plaintiff.[6]

Plaintiff fails to satisfy the second prong of a deliberate indifference claim because Defendants did not ignore his kidney disorder but instead assessed, monitored, and treated it by providing pain relief and, ultimately, resolution of his condition, which did not result in permanent damage.[7] Plaintiff's allegations fail to establish that Defendants exhibited "an extraordinary degree of neglect." *Self*, 439 F.3d at 1232. The timing of treatment for Plaintiff's condition – the alleged delay notwithstanding – necessarily involved an element of judgment because Defendants were not able to able to perform invasive surgery themselves but instead were required to obtain specialized treatment from medical professionals outside of the ADX. *Id.* "Matters that traditionally fall within the scope of medical judgment are such decisions as

[6] Defendants named in Claim 1 assume for the sake of argument in this motion to dismiss that Plaintiff's alleged kidney disorder constitutes a sufficiently serious medical condition.
[7] Plaintiff does not allege at what point in time he was told that medical intervention would be required to treat the kidney stone. Doc. 87, ¶ 26.

whether to consult a specialist or undertake additional medical testing." *Id.* "The Eighth Amendment's prohibition on cruel and unusual punishment is not violated when a doctor simply resolves 'the question whether additional diagnostic techniques or forms of treatment is indicated.'" *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)).

Plaintiff fails to establish Defendants' deliberate indifference in light of the following facts showing that he received significant and appropriate medical care:

- Plaintiff's condition first arose in March 2013 when he was at USP Terre Haute, where medical staff treated his pain with analgesics and codeine. Doc. 87, ¶¶ 17-19.
- Defendant Allred was aware of Plaintiff's prior treatment at USP Terre Haute, reviewed Nurse Thompson's medical intake of Plaintiff, reviewed Plaintiff's medical records, and conducted his own physical examination of Plaintiff. *Id.*, ¶¶ 23, 24.
- Defendant Allred gathered sufficient data to diagnose Plaintiff's kidney stone, and further noted that it would require medical intervention to resolve. *Id.*, ¶ 26.
- Defendant Nehls conducted her own physical examination of Plaintiff on April 10, 2013, reviewed his medical records, and noted the kidney calcification and recent hematuria. *Id.*, ¶ 27.[8]
- Defendant Nehls and Allred did not ignore Plaintiff's complaints and condition but assured him that treatment would be obtained. *Id.*, ¶ 29.
- Defendants Nehls, Allred, and Santini continued to monitor and assess his condition. *Id.*, ¶ 40-41 (Nehls ordered kidney, urinary tract, bladder x-ray that was performed April 26, 2013); 42 (BOP medical provider performed and interpreted an ultrasound of Plaintiff's kidney, which showed no kidney stone); 43 (Nehls requested a CT scan of the kidney, which Allred ordered).
- Plaintiff was treated for a urinary tract infection. *Id.*, ¶ 49.
- Plaintiff does not allege that treatment could have been performed at the FCC or that Defendants should have provided alternative treatment during the interval before the surgery occurred.
- Plaintiff does not allege in other than conclusory fashion that any Defendant thwarted BOP medical providers, including Defendant Nehls, Allred, and Santini, from obtaining outside medical care for Plaintiff.
- Defendants Nehls and Allred made a second request for a CT scan, which Defendant Allred approved on September 12, 2013, and which was performed on January 24, 2014,

[8] Plaintiff alleges that Defendant Nehls inaccurately recorded his level of pain. He does not offer a motivation for this error. Nor does he allege that to the extent Defendants Allred, Santini or other provider relied upon this report, that they knew it to be false.

by an outside provider (Dr. Harlow Curtis is a diagnostic radiologist located in Pueblo, Colorado). *Id.*, ¶¶ 70, 76, 77-78.

- Defendant Allred requested a urology consult, which Defendant Santini approved on February 12, 2014. *Id.*, ¶¶ 79-81.

- The urology consult occurred May 14, 2014, and was performed by a surgeon (Dr. Christopher Harrington) a local hospital; Dr. Harrington recommended surgery. *Id.*, ¶¶ 82-84.

- Plaintiff received surgery to resolve his problem on July 15, 2014. *Id.*, ¶ 86.

Defendants Allred, Nehls, Santini. The above facts amply demonstrate that Defendants Allred, Nehls, and Santini did not ignore Plaintiff's complaints and kidney problem but attended to his concerns through medical exams, diagnostic testing, specialty consultations, and treatment by an outside medical expert. Even if the delay in obtaining outside treatment constituted negligence, Defendants' conduct cannot be said to constitute deliberate indifference in light of the medical care that was provided. Notably, Plaintiff does not allege that he could have received treatment at the FCC which was withheld or that Defendants Allred, Nehls, or Santini could have performed the surgery themselves. Given that, as an ADX prisoner, Plaintiff's outside medical care required approval, and involved logistical arrangements involving an institution with hundreds of inmates, security, transportation, and scheduling of appointments, the delay alone is not probative evidence of deliberate indifference. *See, e.g., Plummer v. McDermott*, 628 Fed. App'x 986, 988 (10th Cir. 2015) ("A myriad of things could account for the six-month delay between Mr. Plummer's demand for surgery and the operation, yet his allegations are devoid of specifics that would not only place the blame on actions by the defendants but would also demonstrate that they acted with the requisite mens rea.").

Its probative value is limited to showing a difference in medical judgment as to an acceptable course of care for a refractory medical problem. Plaintiff's dissatisfaction with the course of his medical care does not establish a claim of deliberate indifference. *See Callahan v. Poppell*, 471 F.3d at 1160. A prison doctor is "free to exercise his or her independent professsional judgment" in determining an appropriate course of treatment. *Id.*; *Rose v. Beckham*, 82 Fed. App'x 662, 665 (10th Cir. 2003) ("Rose's difference of opinion with defendants regarding the ideal type or amount of pain medication simply is insufficient to establish their deliberate

indifference to his medical needs."). In sum, Plaintiff failed to allege facts sufficient to establish Defendants Allred, Nehls, and Santini's deliberate indifference to his kidney problem.

Defendant Daniels and McDermott. Against the backdrop of medical care Plaintiff received at the ADX by Defendants and other unnamed BOP medical personnel, and subsequently from outside medical experts, Plaintiff's conclusory allegations against Defendants Daniels and McDermott fall short of establishing their deliberate indifference to a serious medical problem. Plaintiff does not allege that Defendants Daniels or McDermott were involved with decisions about Plaintiff's medical care or that they were gatekeepers who failed to fulfill that role and impeded his ability to obtain outside care sooner.[9] (Plaintiff acknowledges that Defendant Allred was the head of the Utilization Review Committee that approved outside medical care. Doc. 87, ¶ 76). Indeed, despite Plaintiff's allegations against Defendant Daniels and McDermott, Plaintiff was seen on several occasions by medical providers outside of the ADX and was ultimately provided surgery to correct his condition.

Moreover, Plaintiff's conclusory allegations against Defendants Daniels and McDermott fail to establish their requisite personal participation. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996) (analyzing claim under 42 U.S.C. § 1983); *Olson v. Stotts*, 9 F. 3d 1475, 1477 (10th Cir. 1993). Plaintiff does not allege that either Defendant Daniels or McDermott directed any BOP medical provider not to provide to care to Plaintiff.[10] Plaintiff's allegations are therefore insufficient to establish Defendants Daniels and McDermott's individual culpability. The Court should therefore dismiss Claim 1 against Defendants Daniels and McDermott as well.

Claim 3 – Failure to Provide Oral and dental care (Daniels, McDermott, Roberts)

1. *Plaintiff fails to allege sufficient facts showing a sufficiently serious harm.*

[9] "A delay in affording the prisoner medical care can result in such a violation, if the harm caused by the delay is sufficiently serious, and if the defendant's own conduct, resulting from his deliberate indifference to the risk of harm, was responsible for the delay in treatment." *Wishneski v. Dona Ana County*, 498 Fed. App'x 854, 861 (10th Cir. 2012).

[10] Defendant Daniel directed that Nurse Thompson conduct a medical intake of Plaintiff and thus did not prevent Plaintiff from receiving care upon his arrival to the FCC. Doc. 87, ¶ 20. Although Plaintiff alleges Defendant Daniel told Defendants Nehls at a later date that Plaintiff would not be allowed to leave the FCC, Defendant Daniel did not indicate why he would not. *Id.*, ¶ 54. This fact standing alone is not probative of malevolent intent.

In Claim 3, Plaintiff fails to allege that Defendants Daniels or McDermott were aware that he suffered from a sufficiently serious condition. Plaintiff's allegations regarding these Defendants are conclusory. *See, e.g.*, Doc. 87, ¶ 101. Plaintiff does not specifically allege that he told these Defendants the nature of his problem, and given that it involved a condition in his mouth, Defendants would not be able to observe a problem that involved a subjective complaint of pain.[11] Plaintiff fails to link Defendant Daniels's alleged decision concerning Plaintiff's housing location or transport to the dental clinic with knowledge that Defendant Daniel's actual knowledge of a sufficiently severe dental problem. *Id.*, ¶¶ 101, 106, 107. Plaintiff was not diagnosed with a condition that required treatment until October 31, 2013. *Id.*, ¶ 109.

2. *Plaintiff's allegations fail to establish that Defendants disregarded a substantial risk of harm.*

Plaintiff fails to allege sufficient facts to establish that Defendants Daniels, McDermott, or Roberts knew of and disregarded a substantial risk of harm. Plaintiff received the following dental care:

- Defendant Roberts assessed Plaintiff on October 31, 2013, and provided him antibiotics and recommended treatment plan. *Id.*, ¶ 109.
- Defendant Roberts extracted "tooth #3" on December 9, 2013. *Id.*, ¶¶ 112, 113.
- Defendant Roberts assessed Plaintiff again on January 23, 2014, at which time he recommended that additional teeth be extracted or restored. *Id.*, ¶ 114.
- Defendant Roberts saw Plaintiff on July 31, 2014, and assessed that Plaintiff should have additional teeth extracted. *Id.*, ¶ 120.
- Defendant Roberts extracted "teeth #1, #13, and #16" on August 7, 2014. *Id.*, ¶ 121.
- Defendant Roberts provided unspecified additional treatment to several of Plaintiff's teeth on August 7, 2014. *Id.*, ¶ 122.
- Defendant Roberts saw Plaintiff on August 28, 2014, and "performed an unknown procedure" on several of his teeth. *Id.*, ¶ 125.

[11] Although Plaintiff alleges that he submitted "cop outs" to prison staff (*Id.*, ¶¶ 98, 99, 104, 108, 118, 124, 127, 128) he does not allege that Defendants Daniels, McDermott, or Roberts were aware of those "copouts."

- Defendant Roberts performed additional treatment on Plaintiff's teeth on September 29, 2014. *Id.*, ¶ 126.

- Defendant Roberts saw Plaintiff on November 6, 2014, performed additional, unspecified treatment on a number of his teeth. *Id.*, ¶ 130.

- Plaintiff was seen in the dental clinic in early February 2015 (*Id.*, ¶ 131) and the again by Defendant Roberts on February 19, 2015, for an issue regarding his dentures. *Id.*, ¶ 132.

- Defendant Roberts saw Plaintiff on April 30, 2015 (*Id.*, ¶ 133) and on June 25, 2015 (*Id.*, ¶ 134); he saw another dentist on July 2, 2015. *Id.*, ¶ 135.

- Plaintiff received a root canal (from an unspecified dentist) on August 27, 2015. *Id.*, ¶ 136.

- Defendant Roberts saw Plaintiff on September 10, 2015, at which time two other teeth were extracted. *Id.*, ¶ 137.

Plaintiff is unable to establish that Dr. Roberts acted with deliberate indifference because he provided extensive dental care, that included dental clinic visits, examinations, tooth extractions, medications, and other unspecified treatment. Defendants Daniels and McDermott were not able to provide care to Plaintiff, and to the extent that they were aware of Plaintiff's ongoing dental care, they would have no basis to believe it was insufficient. That Plaintiff desired different care or more prompt care, amounts to no more than a disagreement with Defendant Roberts's and the other prison dental providers' treatment recommendations, which would have had to factor in the medical management of Plaintiff's other chronic conditions and presumably would have impacted his plan of care. Further, Plaintiff does not allege that his need for dental treatment was emergent, rather than urgent or elective, to justify denying dental care to other ADX inmates with dental needs. Plaintiff's claim against Defendant Roberts as plead may constitute one for negligence but falls short of deliberate indifference.

For these reasons, Plaintiff fails to plead a plausible claim for deliberate indifference against Defendants Daniels, McDermott, or Roberts regarding his dental care needs.

D. Plaintiff fails to state a Fifth Amendment due process claim (Claims 5 and 7).

In *Bivens*, 403 U.S. at 97, the United States Supreme Court recognized an implied cause of action for damages against federal officials alleged to have violated a prisoner's Fourth Amendment rights. The Court, however, has been reluctant to extend *Bivens* in other contexts.

Ingram v. Faraque, 728 F.3d 1239, 1243-44 (10th Cir. 2013) ("But since the Supreme Court's last decision to authorize a *Bivens* remedy in 1980, the Court has 'refused to extend *Bivens* liability to any new context or new category of defendants.'" (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (1979)). The Court extended a limited cause of action under the implied equal protection component of the Fifth Amendment's Due Process Clause. *Davis v. Passman*, 442 U.S. 228, 235 (1979) (former congressional staff member stated *Bivens* claim under the Fifth Amendment for alleged workplace gender discrimination). "Beyond these types of violations, a *Bivens* remedy should be inferred only if (1) there is no alternative, existing process for protecting a constitutional interest; and (2) if there are no special factors counseling hesitation against a judicially created remedy." *Robbins v. Wilkie*, 551 U.S. 537, 550 (2007); *see Custard v. Allred*, No. 13-cv-02296-REB-CBS, 2015 WL 328626 at 7 (D. Colo. Jan. 26, 2015), *report and recommendation adopted*, No. 13-CV-02296-REB-CBS, 2015 WL 1255492 (D. Colo. Mar. 16, 2015) (holding same); *see also Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (extension of *Bivens* remedy not appropriate where there are "special factors counseling hesitation").

> "[T]he purpose of *Bivens* is only 'to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy*' for harms caused by an individual officer's unconstitutional conduct." *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1096 (10th Cir. 2005) (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2002). "Whether a *Bivens* action exists for a given constitutional violation must be decided on a case-by-case basis." *Burton-Bey v. United States*, No. 96-3241, 1996 WL 654457, at *1 (10th Cir. Nov. 12, 1996) (citing *Beattie v. Boeing Co.*, 43 F.3d 559, 564 (10th Cir. 1994)).

Custard, 2015 WL 328626 at *6. In *Wilkie*, the Court stated,

> But we have also held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified. We have accordingly held against applying the *Bivens* model to claims of First Amendment violations by federal employers, *Bush v. Lucas*, 462 U.S. 367 … (1983), harm to military personnel through activity incident to service, *United States v. Stanley*, 483 U.S. 668 … (1987); *Chappell v.Wallace* , 462 U.S. 296 … (1983); and wrongful denials of Social Security disability benefits, *Schweiker v. Chilicky*, 487 U.S. 412… (1988). We have seen no case for extending *Bivens* to claims against

> federal agencies, *FDIC v. Meyer*, 510 U.S. 471 … (1994), or against private prisons, *Correctional Services Corp. v. Malesko*, 534 U.S. 61… (2001).

Id. at 550. The Tenth Circuit has noted that whether a *Bivens* claim may be brought for a procedural due process claim is "open to question." *Burton-Bey v. U.S.*, No. 96-3241, 1996 WL 654457, *1 (10th Cir. Nov. 12, 1996). In the prison context, *Bivens* has not been extended to due process claims over placement in a special housing unit or loss of a prison job. *Williams v. Klein*, 2015 WL 3746306, *2 (D. Colo. June 12, 2015).

This Court should not create a *Bivens* remedy under the Fifth Amendment's due process clause for Plaintiff's allegations of denial or delay of medical care given the availability of relief for such a claim under the Eighth Amendment. (Plaintiff has not specifically identified in his amended complaint why his claim would arise under the Fifth Amendment, rather than just the Eighth Amendment.)

Alternative, existing processes exist for protecting Plaintiff's due process rights in federal prison. *See Barnes v. Allred*, 482 F. App'x 308, *1 (10th Cir. Aug. 26, 2012) (BOP has a four-step grievance procedure). Plaintiff, as he did, could seek injunctive relief under the mandamus statute, or relief through the prisoner grievance system. In fact, Plaintiff has submitted his complaints through the prison's administrative process. *See, e.g., National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989) (*Bivens* remedy will not be allowed when other "meaningful safeguards or remedies for the rights of persons situated as [is the plaintiff] are available") (internal citations omitted). The Supreme Court and the Tenth Circuit have refused to create *Bivens* remedies for procedural due process violations when, as here, procedural safeguards exist to protect due process rights. *Schweiker*, 487 U.S. at 412 (no *Bivens* claim for alleged due process violations when remedies available to safeguard rights); *Hilst v. Bowen*, 874 F.2d 725, 727-78 (10th Cir. 1989) (same).

Special factors also counsel against creating a *Bivens* remedy in this context. "[L]awfully incarcerated persons retain only a narrow range of protected liberty interests." *Hewitt v. Helms*, 459 U.S. 460, 467 (1983), *overruled in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). Given that narrow range, and the specific alleged deprivations at issue here, creating one more way for prisoners to sue prison employees will unnecessarily hinder prison management

and add to the Court's burden of prisoner litigation. Given these considerations, this Court has refused to create a *Bivens* remedy for Fifth Amendment violations. *See Allmon v. Lappin*, No. 11-cv-005490-MSK-CBS, 2011 WL 4501941, *4 (D. Colo. March 19, 2013) (granting summary judgment for defendants on plaintiff's First Amendment and Fifth Amendment claims).

Even if a Fifth Amendment procedural due process claim was cognizable under *Bivens*, Plaintiff nevertheless fails to state such a claim. The Fifth Amendment protects persons from a deprivation of property without due process of law. U.S. Const. amend. V. In order to state a claim for a violation of the Fifth Amendment's due process clause, Plaintiff must show a deprivation of a property interest and an inadequate post-deprivation remedy. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Camuglia v. The City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006) (procedural due process violation requires a showing of a (1) protected property interest; (2) lack of an appropriate level of process). Plaintiff has not made the requisite showing here.

For these reasons, Plaintiff fails to state a cognizable claim for denial of his due process rights under the Fifth Amendment. The Court should enter judgment for Defendants on this claim.

E. <u>Plaintiff fails to state a First Amendment claim for retaliation (Claims 7 and 8)</u>

Bivens has not been extended to provide monetary relief for violation of a person's First Amendment rights. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("[W]e have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment."); *Bush v. Lucas*, 462 U.S.367, 390 (1983) (declining to extend *Bivens* to a claim under the First Amendment). The Supreme Court has not extended *Bivens* to new contexts since 1980. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *Reichle v. Howards*, 566 U.S. 658, ___, 132 S. Ct. 2088, 2093 (2012) (declining to extend *Bivens* to a First Amendment claim for retaliatory arrest).

With respect to Claims 7 and 8, Plaintiff fails to set forth the elements or legal basis for a *Bivens* claim under the First Amendment. Doc. 87 at 24. Accordingly, for the reasons set forth above, they should be dismissed for failure to state a claim.

F. Plaintiff fails to state a claim for conspiracy (Claims 2, 4, 6, and 8)

In order to state a claim for conspiracy, Plaintiff must plead facts sufficient to establish both a deprivation of a constitutional right and a conspiracy.[12] *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443, 1449 (10th Cir. 1990). A conspiracy requires an agreement among one or more persons for an unlawful purpose. *Big Cats of Serenity Springs, Inc. v. Walker*, 843 F.3d 853, 869 (10th Cir. 2016) (joint action insufficient; claim requires agreement between two or more parties and intent to achieve an unlawful act); *Rice v. Sixteen Unknown Federal Agents*, 658 Fed. App'x 959, 961 (11th Cir. 2016) (showing that defendants "reached an understanding to violate [plaintiff's] rights"); *Solomon v. Petray*, 795 F.3d 777, 789 (8th Cir. 2015) (conspiracy claim requires that (1) defendant conspired with others to deprive plaintiff of a constitutional right; (2) an overt act by one of the defendants in furtherance of the conspiracy; and (3) the overt act injured plain-tiff). "[A] plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants because conclusory allegations of conspiracy are insufficient to state a valid [*Bivens*] claim." *Brooks v. Gaenzle*, 614 F.3d 1213, 1228 (10th Cir. 2010) (citation omitted).

Here, Plaintiff's allegations amount to no more than "bare assertions" and a "formulaic recitation" of the elements of a conspiracy claim. *Iqbal*, 556 U.S. at 681. Plaintiff fails to plead more than conclusory allegations that Defendants formed an agreement among themselves or others to deprive Plaintiff of his constitutional rights. For example, in paragraph 92, Plaintiff merely alleges that "Defendants conspired to keep, and did keep Plaintiff in a state of near-constant excruciating pain from the kidney stones, the kidney infection, and the continued presence of the stent." Doc. 87 at 15. Plaintiff fails to provide any non-conclusory facts to establish a basis for the claim, such as the nature of the conspiracy, the source of the factual basis, or when and how it was formed. Absent factual allegations that establish the nature of the conspiracy itself, the claim is fatally deficient. *See, e.g., id.*, ¶ 2 ("Defendants acted individually and as part of a conspiracy with their fellow Defendants."); ¶ 88 ("Defendants collectively

[12] *Bivens* and suits brought pursuant to 42 U.S.C. § 1983 are generally viewed as equivalent causes of action, and thus § 1983 cases are generally applicable in the *Bivens* context. *Hartman v. Moore*, 547 U.S. 250, 254, n.2 (2006).

agreed that in the wake of Plaintiff's surgery, they would deny Plaintiff pain-killing medication."; ¶ 101 ("Defendant Daniels conspired with Defendant McDermott and numerous John Doe defendants…"); ¶ 146 ("Defendants Daniels, Allred, Santini, McDermott, and Nehls… conspired with each other to and succeeded in acting with deliberate indifference to Plaintiff's serious medical needs regarding his kidney."); ¶ 147 ("Defendants' conspiracy to act with deliberate indifference…"); ¶ 152 ("Defendants Daniels, McDermott, and Roberts…conspired with each other to and succeed in acting with deliberate indifference to Plaintiff's serious medical needs regarding his oral and dental health."); ¶ 153 ("Defendants' conspiracy to act with deliberate indifference…"); ¶ 158 ("Defendants Daniels, Allred, Santini, McDermott, Nehls, and Roberts… conspired to and succeeded in keeping Plaintiff in a state of near-constant pain during the timeframe described in this complaint."); ¶ 164 ("Defendants Daniels, McDermott, Allred, Santini, Nehls, and Roberts conspired to undertake and did successfully did undertake the illegal and unconstitutional actions described in this complaint in retaliation for Plaintiff filing a lawsuit against Defendant Daniels and other employees of the Bureau of Prisons."). Moreover, as shown above, Plaintiff has failed to plead a deprivation of a constitutional right. Finally, Defendants are entitled to qualified immunity, which insulates them from a claim of conspiracy as well.

Plaintiff's barebones and conclusory allegations are insufficient to state a claim for conspiracy to deprive him of his constitutional rights and these claims should be dismissed for failure to state a claim.

G. <u>Availability of relief pursuant to the APA</u>

Plaintiff asserts that he is entitled to relief from all Defendants pursuant to the APA. (Doc. 87 at 2 and n. 4). It is not clear whether Plaintiff is seeking more than injunctive relief under the APA. Only injunctive relief is available. 5 U.S.C. § 702 ("An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." (emphasis added)). The APA does not waive the government's sovereign immunity for money damages. *Robbins v. U.S.*

Bureau of Land Mgt., 438 F.3d 1074, 1080 (10th Cir. 2006) (recognizing the government's waiver is only for nonmonetary relief). Thus, to the extent that Plaintiff seeks other than injunctive relief against Defendants in their official capacities under the APA, that relief should be denied and the claim dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because this Court lacks subject matter jurisdiction over the claim.

In his prayer for relief, Plaintiff seeks injunctive relief requiring Defendants to provide "the proper and timely delivery of all medically necessary health care, dental care, and mental health treatments to plaintiff." Doc. 87 at 25. The federal government has waived its sovereign immunity pursuant to 5 U.S.C. § 702; however, Plaintiff may not obtain injunctive relief from Defendants in their individual capacities, but only in a federal official's official capacity. *See Lawrence v. Oliver*, 602 Fed. App'x 684, 688, n.5 (10th Cir. Feb. 3, 2015) (citing *Simmat v. U.S. Bureau of Prisons*, 413 F. 3d 1225, 1231-33 (10th Cir. 2005)).

Similarly, Plaintiff is only entitled to mandamus relief to the extent that he is seeking to compel a federal official to perform a duty that is "ministerial, clearly defined, and peremptory as opposed to duties within the officer's discretion." *Simmat*, 413 F.3d at 1235 (internal quotation and citation omitted). Accordingly, Plaintiff's request for injunctive and mandamus relief is limited to his properly exhausted claims and only to the extent that he can prove prison officials deprived him of medical or dental care to which he is constitutionally entitled.

Conclusion

Plaintiff's Fourth Amended Complaint should be dismissed because he fails to state an Eighth Amendment claim for deliberate indifference to a serious medical need. He fails to state a First Amendment claim for retaliation as well as a Fifth Amendment claim under the due process clause for atypical and significant hardship. Defendants are entitled to qualified immunity to the extent that their actions did not violate clearly established law.

WHEREFORE Defendants respectfully request that Plaintiff's fourth amended complaint be dismiss.

Respectfully submitted this 10th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing Plaintiff's counsel:

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