UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

RICHARD VILLAR, Plaintiff,	:	
v.	:	C.A. No. 12-cv-424-WES
UNITED STATES OF AMERICA, et al., Defendants.	:	

REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge

This lawsuit is the third attempt by Plaintiff Richard Villar ("Villar"), a federal prisoner, to bring a *pro se* Eighth Amendment Complaint under Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971), arising from a started-but-never-finished root canal procedure that left him with a hole in one of his front teeth. In a Complaint that is clear and well documented with appropriate dental and institutional records, he contends that this hole – created to drain an abscess as a prelude to a root canal – was allowed to fester untreated for nearly a year before the tooth was finally pulled, with lingering effects for another year before the final root fragments were removed, causing him extreme pain as he journeyed through the federal detention system from a prison in New Hampshire, to a prison in Virginia, ending in a prison in Terre Haute, Indiana. Plaintiff's first two lawsuits, which sought substantially the same relief as this third action, were dismissed without prejudice one after the other by the Western District of Virginia for technical non-compliance with *in forma pauperis* filing requirements. See 28 U.S.C. § 1915(e)(2).

In this third action, originally filed in the Western District of Virginia, that court granted Plaintiff leave to proceed *in forma pauperis* and screened the Complaint, which names as

Defendants the United States of America and three persons in their individual and official capacities: Dr. Julia Buttermore (a prison dentist in Virginia) and Kimberly Dow and Stephen R. Monier (both U.S. Marshals in New Hampshire). Based on the screening, the Virginia court dismissed with prejudice all claims against the United States based on sovereign immunity and all claims against Virginia-based Defendant Buttermore based on the statute of limitations. However, it determined that it lacked personal jurisdiction over the New Hampshire-based Defendants Dow and Monier and transferred the remainder of the case to the District of New Hampshire.

All of the judges in the District of New Hampshire recused and Judge William E. Smith of the District of Rhode Island was designated to preside over the case. ECF Nos. 33, 34. By local rule, the matter was referred to me automatically for preliminary screening of Plaintiff's remaining claims against Dow and Monier. D.N.H. LR 4.3(d)(2). For the reasons explained below, while the official-capacity claims should be dismissed, I recommend that the Complaint be allowed to proceed against Defendants Dow and Monier in their individual capacities because Plaintiff's claim is not necessarily barred by the statute of limitations and it plausibly alleges deliberate indifference to serious dental and medical needs in violation of the Eighth Amendment.

I. THE COMPLAINT IN THIS ACTION[1]

As alleged in the Complaint and taken as true for purposes of this screening, Plaintiff has suffered extreme pain and been permanently disfigured as a result of a never-completed root canal procedure. Plaintiff's dental issues began in November 2007 while he was housed in the legal custody of the United States Marshals Service ("USMS") at the Merrimack County

[1] The Court assumes the reader's familiarity with the Western District of Virginia Memorandum Opinion, which includes a detailed recitation of the facts and travel of this case. ECF No. 23.

Department of Corrections in New Hampshire ("MCDOC"); he sought treatment for extreme pain in one of his upper front teeth. A physician assistant at MCDOC asked USMS to refer him to a dentist; Defendants Dow and Monier are alleged to have been the individuals tasked by USMS at MCDOC with responsibility for approving or denying dental treatment. On November 21, 2007, USMS transported Plaintiff to a private dentist, who diagnosed an abscess and determined that a root canal was required. The dentist started the root canal that day by drilling a hole in the tooth to allow the abscess to drain; he also gave specific orders for Plaintiff to take an antibiotic, to rinse the affected area and to return to finish the root canal. However, USMS never arranged for Plaintiff's return. Instead, on December 17, 2007, he learned from a nurse at MCDOC that USMS would only pay to pull or fill the tooth, but had refused to pay for a root canal.[2] Because it was a front tooth, Plaintiff did not want the tooth pulled; however, mistakenly thinking it could be saved with a filling, he asked the nurse to set up an appointment to have the tooth filled.

Plaintiff continued to experience pain from the hole in his tooth. Finally, on January 10, 2008, a physician assistant at MCDOC faxed a "preapproval for medical services" form for a tooth filling to USMS, which was approved by Defendant U.S. Marshal Dow the same day. Meanwhile Plaintiff's criminal defense attorney became involved, writing a letter to Defendant U.S. Marshal Monier dated January 11, 2008. As a result, Plaintiff was referred to a different dentist from the one who started the root canal; Dr. Labranche saw Plaintiff but concluded the

[2] The Complaint is silent about the genesis of the no-root-canal directive that formed the basis for the USMS determination that Plaintiff's root canal could not be paid for under any circumstances. This Court's quick look turned up "United States Marshals Service Prisoner Health Care Standards" (rev. Nov. 2007) (downloaded on June 24, 2013, from www.usmarshals.gov/foia/Reading.../prisoner_health_care_standards.pdf). These Standards appear to provide that a prisoner's root canal may well be covered depending on the condition of the tooth and other factors that can be determined by a dentist. In referencing these Standards, I do not suggest that I find them applicable to this case; further, I did not rely on them for purposes of this screening recommendation. Rather, mindful that Plaintiff's Complaint is entitled to a deferential read in light of his *pro se* status, I found them instructive in considering whether Defendants might have been acting pursuant to settled USMS policy.

tooth could not be filled particularly where the first dentist had already drilled the hole to start the root canal. Dr. Labranche determined that the tooth could still be saved by completing the root canal and scheduled Plaintiff for another appointment to finish the job. Nevertheless, Defendant Dow still refused to pay for the root canal, reiterating that USMS would only pay for pulling or filling the tooth; she told Plaintiff that he would have to pay for the root canal himself at a cost of $860. USMS did not bring Plaintiff to the follow-up appointment and no further dental work was done while Plaintiff was in New Hampshire.

On January 24, 2008, Plaintiff's criminal defense attorney wrote a second letter to Defendant U.S. Marshal Monier, which demanded that USMS authorize completion of the root canal, stating "the root canal was actually begun . . . [i]t seems incredible that the federal government will not pay for this routine dental work and that he has been required to sit for such a long time with a hole in his tooth." The letter was ignored. Plaintiff continued to experience extreme pain. Plaintiff also notified USMS that he now had an infection in his mouth and suffered from headaches.

In February 2008, Defendant was transferred from MCDOC with the hole in his front tooth still unresolved. Over the next two months, he was transferred to detention facilities in Brooklyn, New York; Petersburg, Virginia; and Atlanta, Georgia. During this time he continued to suffer extreme pain and had difficulty eating, drinking and sleeping. He was at these locations for only brief layovers and was told he would have to wait until he arrived at a more permanent location for dental treatment.

Plaintiff arrived at United States Penitentiary-Lee ("USP-Lee") in Jonesville, Virginia, on April 17, 2008. The remaining allegations in the Complaint focus on Dr. Buttermore, the prison dentist at USP-Lee who has already been dismissed from this action. As described in more detail

in the Western District of Virginia's Memorandum Opinion (ECF No. 23), upon arrival at USP-Lee, and many times over the next four months, Plaintiff made increasingly urgent requests for dental services. Despite experiencing extreme pain, his pleas went largely ignored by Dr. Buttermore, who did not get around to treating him until October 15, 2008, after he had filed a prison grievance. By that point, the tooth had extensively decayed and was not restorable, so Dr. Buttermore pulled it. However, Dr. Buttermore's extraction was incomplete and Plaintiff suffered even more pain because some of the remaining root tissue from the tooth could not be removed without removing the bone. It was not until September 30, 2009, at a facility in Terre Haute, Indiana, that a dentist finally removed the remaining root tissue, giving Plaintiff relief. Almost two years had passed since the root canal was started in New Hampshire.

Plaintiff's sole cause of action[3] alleges that Defendants United States, Dr. Buttermore, Dow and Monier were deliberately indifferent to his serious dental and medical needs in violation of the Eighth Amendment. The Complaint invokes federal jurisdiction pursuant to Bivens and 28 U.S.C. §§ 1331, 1346(b)(1). Plaintiff seeks $80,000 in compensatory damages, $20,000 in punitive damages from each Defendant except the United States, and injunctive relief in the form of a dental implant to replace his lost front tooth.

II. PROCEDURAL HISTORY

Plaintiff filed three suits in the Western District of Virginia all containing similar claims related to the never-finished root canal on his front tooth. Dow and Monier (among others) are named as Defendants in all three suits.

[3] Plaintiff's Complaint references a Federal Tort Claims Act ("FTCA") administrative claim, alleging that staff at USP-Lee unnecessarily caused Plaintiff to lose a tooth and endure pain by not adequately treating him. By letter dated February 11, 2010, the U.S. Department of Justice denied the claim and advised Plaintiff that he had six months to file suit in federal court. However, Plaintiff's FTCA claim did not address the events in New Hampshire and no FTCA claim is included in his Complaint.

Plaintiff filed the first action, Villar v. O'Brien, No. 7:10-cv-00376 (W.D. Va.) (the "First Action"), on August 16, 2010. The Western District of Virginia dismissed the First Action without prejudice on September 30, 2010, because Plaintiff filed his inmate account statement from only one of the two detention facilities at which he was housed within six months of filing the complaint. Villar v. O'Brien, No. 7:10-cv-00376, slip op. at 1-2 (W.D. Va. Sept. 30, 2010). Plaintiff filed two motions for reconsideration, and even filed the missing account statement, but the Western District of Virginia declined to reopen, apparently because the account statement was not verified as required by 28 U.S.C. § 1915(e). In denying reconsideration, the court emphasized that "plaintiff must institute a new action instead of proceeding in a closed case," and also stated "plaintiff can refile his claims in a new and separate action with the requisite financial information at the time of his choice." The Western District of Virginia denied the second motion for reconsideration on January 24, 2011.

Plaintiff filed his second action, Villar v. United States, No. 7:11-cv-00355 (W.D. Va.) (the "Second Action"), on July 14, 2011. The court dismissed the Second Action without prejudice on October 27, 2011, because, although Plaintiff filed a certified account statement, he filed it for the period from March 2011 to August 2011 (covering six months total but only five months before the filing of the Complaint), instead of the six-month period prior to the filing of the Complaint in July 2011, as required by 28 U.S.C. § 1915(e). Villar v. United States, No. 7:11-cv-00355, slip op. at 1 (W.D. Va. Oct. 27, 2011). The Western District of Virginia again notified Plaintiff that he could file his claims in a new and separate action if he filed proper *in forma pauperis* paperwork.

Plaintiff filed this current suit (the "Third Action") on November 3, 2011, a few days after dismissal of the Second Action. Villar v. United States, Civil No. 7:11-cv-00538 (W.D.

Va.). This time around, Plaintiff got the *in forma pauperis* document requirements right and the Western District of Virginia allowed the case to proceed. The court issued a show-cause order, advising Plaintiff that the Third Action appeared to be barred by the statute of limitations as to Defendants Buttermore, Dow and Monier and requested argument why the action should not be dismissed. In response, Plaintiff argued that the Third Action should "relate back" to his First Action because it contained similar allegations. See Fed. R. Civ. P. 15(c).

The Western District of Virginia screened the Complaint on the merits and dismissed all claims against the United States and Virginia-based Dr. Buttermore with prejudice. ECF No. 23 at 10. It found the claims against the United States barred by sovereign immunity, particularly where the Complaint did not purport to invoke the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), and was out of time for a viable FTCA claim under 28 U.S.C. § 2401(b). ECF No. 23 at 7-8. The court further found that Plaintiff's Complaint was based solely on Bivens, and dismissed the United States as an improper defendant. See FDIC v. Meyer, 510 U.S. 471, 483-86 (1994). Turning to Dr. Buttermore, the court noted that a Bivens action adopts the statute of limitations of the forum state (where the actionable conduct occurred) for general personal injury cases. Blanck v. McKeen, 707 F.2d 817, 819 (4th Cir. 1983) (citing Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975)). Since Virginia's statute of limitations is two years, and Plaintiff's claims accrued no later than November 2008, the court concluded that Plaintiff waited too long by filing the Third Action in November 2011. ECF No. 23 at 9. The Western District of Virginia rejected Plaintiff's relation-back argument, finding that nothing in Fed. R. Civ. P. 15(c) permits an amendment in an active case to relate back to a filing in a previously-filed, closed action.[4] Id. The court also observed that even if it tolled the limitations period for the

[4] Plaintiff's claims against Dr. Buttermore were timely under Virginia law in the First Action, and may have been viable if the Western District of Virginia had granted either of Plaintiff's motions for reconsideration. Instead, the

time Plaintiff's two prior actions were pending as allowed by Virginia law, see VA Code § 8:01-229(E)(1), Plaintiff was still too late. Since the Western District of Virginia found no other conceivable basis in the record to toll the statute of limitations, the court dismissed Plaintiff's claims against Dr. Buttermore as time barred. ECF No. 23 at 9-10.

Having dismissed the only Virginia-based defendant in the case, the Western District of Virginia transferred the case to the District of New Hampshire. Plaintiff's remaining claims against Defendants Dow and Monier are now ripe for screening. Id. at 10.

III. STANDARD OF REVIEW

Because Villar is proceeding *in forma pauperis*, his Complaint is subject to preliminary screening under 28 U.S.C. §§ 1915(e)(2), 1915A. These statutes authorize federal courts, at any time, to dismiss actions in which a plaintiff seeks to proceed without prepayment of fees if the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. See id.; Denton v. Hernandez, 504 U.S. 25, 32-33 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989). The legal standard for dismissing a complaint for failure to state a claim pursuant to §§ 1915(e)(2) and 1915A is the same standard used when ruling on a Rule 12(b)(6) motion to dismiss. Davis v. Prison Health Servs., 679 F.3d 433, 437 (6th Cir. 2012); Rondeau ex rel. Rondeau v. New Hampshire, 201 F.3d 428, at *1 (1st Cir. 1999). "To survive 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.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Fed. R. Civ. P. 12(b)(6). "Specific facts are not

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Western District of Virginia informed Plaintiff that he could file a new suit, the Second Action. By the time Plaintiff filed the Second Action, six months after the denial of his second motion for reconsideration in the First Action, Plaintiff's claims against Dr. Buttermore were time barred. Plaintiff did not appeal the denial of reconsideration in the First Action, and that case is not before this Court.

necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic Corp., 550 U.S. at 555).

In making this determination, this Court accepts Plaintiff's well-pled allegations as true and "scrutinize[s] the complaint in the light most favorable to [him]." Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999). Although this Court construes pleadings of a *pro se* plaintiff "liberally," Estelle v. Gamble, 429 U.S. 97, 106 (1976), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678-79.

IV. DISCUSSION

A. The Statute of Limitations

As the Western District of Virginia aptly noted, a Bivens action adopts the statute of limitations that the forum state uses for general personal injury cases. Barrett ex rel. Estate of Barrett v. United States, 462 F.3d 28, 38 (1st Cir. 2006); Schomaker v. United States, 07-CV-164-PB, 2008 WL 2065918 (D.N.H. May 13, 2008). Here the applicable law comes from New Hampshire because this case has been transferred to New Hampshire, and Plaintiff's claims against Defendants Dow and Mornier arise solely out of conduct that occurred in New Hampshire. See Mem. Op., ECF No. 23 at 10. Closely-related questions of tolling the statute of limitations are also governed by New Hampshire law, including application of the New Hampshire savings statute. West v. Conrail, 481 U.S. 35, 39-40 n.6 (1987); Wilson v. Garcia, 471 U.S. 261, 269 (1985); Harris v. United States, 422 F.3d 322, 331 (6th Cir. 2005).

While Virginia's applicable statute of limitations is two years, the New Hampshire statute of limitations that controls the ripeness of the claims against Defendants Dow and Monier is

three years. See N.H. Rev. Stat. § 508:4 (statute of limitations for personal actions); Schomaker v. United States, 334 F. App'x 336, 338 (1st Cir. 2009) (applying § 508:4 to Bivens claim). As alleged in the Complaint, Plaintiff was aware of Defendants Dow and Mornier's actionable conduct between December 2007 and February 2008. At first blush, the Complaint appears to be barred by the statute of limitations because Plaintiff did not file the Third Action until November 2011, well over three years after Dow and Mornier's refusal to authorize completion of the root canal. See Barrett ex rel. Estate of Barrett, 462 F.3d at 38-39 (statute of limitations on a Bivens claim begins to run when plaintiff knows or has reason to know of existence and cause of injury which is basis of his action).

Nevertheless, Plaintiff's claims against Defendants Dow and Monier are not time barred because of the New Hampshire savings statute. In New Hampshire, the savings statute extends the clock for filing an action for one year after a related prior suit is dismissed without prejudice. N.H. Rev. Stat. § 508:10 ("[i]f judgment is rendered against plaintiff in an action brought within the time limited therefor . . . and the action is not barred by the judgment, a new action may be brought thereon in one year after the judgment."). Critically, a plaintiff can rely on § 508:10 more than once, as long as the same defendants are named and the successive petitions arise out of the same set of operative facts as the first action. Roberts v. General Motors Corp., 673 A.2d 723, 727-29 (N.H. 1996); see Veale v. Keene Publishing Corp., 181 F.3d 81, at *1 (1st Cir. 1999); Cote v. Vetter, 30 F.3d 126, at *1 (1st Cir. 1984). In other words, a plaintiff can use a dismissal in a first suit to file a second suit, and then use the dismissal in the second suit to file a third suit within one year of dismissal of the second suit, even if the second suit was filed after the statute of limitations would have normally expired. Roberts, 673 A.2d at 727-29.

In this case, Plaintiff filed the First Action on August 16, 2010, well within the three-year statute of limitations for claims against Defendants Dow and Monier that accrued between December 2007 and February 2008. The Western District of Virginia dismissed the First Action without prejudice on September 30, 2010. Plaintiff filed the Second Action on July 14, 2011, within a year of dismissal of the First Action, and the court dismissed the Second Action without prejudice on October 27, 2011. Both of the court's dismissals advised Plaintiff that he could bring a new suit based on the same claims. Plaintiff then filed the Third Action just a few days later on November 3, 2011.

The allegations of the First, Second and Third Actions arise out of the same facts and Defendants Dow and Monier are named in all three suits. Plaintiff has been diligent, filing two motions for reconsideration in the First Action and promptly filing the Third Action after the Second Action was dismissed on a technicality. Plaintiff also faced significant challenges in collecting prison account statements because he had been transferred to different locations in the federal prison system. Under these circumstances, at least at the screening stage, Plaintiff's Complaint in this Third Action is not necessarily barred by the statute of limitations. N.H. Rev. Stat. § 508:10; Roberts, 673 A.2d at 727-29 (successive suits under savings statute permissible when plaintiff did not bring them for purposes of hindrance, delay or to gain strategic advantage).

B. Plaintiff's Bivens Claims Against Dow and Monier In Their Official Capacities

Plaintiff names Defendants Dow and Monier in their official as well as their individual capacities. It is well settled that a Bivens action will not lie against employees of a federal agency sued in their official capacity, F.D.I.C. v. Meyer, 510 U.S. 471 (1994), Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000). Such a suit is barred by the doctrine of sovereign

immunity because it is a suit against the United States. Mack v. United States, 814 F.2d 120 (2d Cir. 1987); Komongnan v. U.S. Marshals Serv., 471 F. Supp. 2d 1, 4 (D.D.C. 2006); see also Trapp v. U.S. Marshals Serv., 139 F. App'x 12, 14 (10th Cir. 2005); Murphy v. U.S. Marshal's Serv., CIV. A. 92-0162-R, 1992 WL 503429 (W.D. Va. Nov. 25, 1992). Plaintiff's Bivens claims against Defendants Dow and Monier in their official capacities should be dismissed for lack of subject matter jurisdiction. Komongnan v. U.S. Marshals Serv., 471 F. Supp. 2d 1, 4 (D.D.C. 2006); Petrazzoulo v. U.S. Marshals Serv., 999 F. Supp. 401, 407 (W.D.N.Y. 1998).

C. The Merits of Plaintiff's Eighth Amendment Claim

The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.[5] Farmer v. Brennan, 511 U.S. 825, 832 (1994). The failure of correctional officials to provide inmates with adequate medical care may offend the Eighth Amendment if their acts or omissions are sufficiently harmful to evidence deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97 (1976).

To succeed on an Eighth Amendment claim based on inadequate or delayed medical care, a plaintiff must satisfy both an objective and subjective inquiry: he must show, first, that the deprivation alleged was objectively, sufficiently serious, and second, that prison officials possessed a sufficiently culpable state of mind, namely one of deliberate indifference to an inmate's health or safety. Leavitt v. Corr. Med. Servs., Inc., 645 F.3d 484, 497-98 (1st Cir. 2011).

[5] Plaintiff describes himself in the Complaint in this action as a "prisoner," but does not indicate whether he was a pretrial detainee or convicted prisoner during his time at the MCDOC. One of the letters from Plaintiff's defense attorney to Defendant Monier, which is attached to the Complaint, states Plaintiff had already been tried and found guilty and was awaiting sentencing. This status is confirmed by the electronic docket in United States v. Villar, 1:06-cr-00085-PB (D.N.H.). Plaintiff's status does not affect the analysis at this screening stage because the standard applied under the Fourteenth Amendment (governing medical treatment of pre-trial detainees) is the same as the Eighth Amendment standard for convicted inmates. See Leavitt v. Corr. Med. Servs., Inc., 645 F.3d 484, 497-98 (1st Cir. 2011).

For the objective inquiry, a plaintiff must demonstrate a "serious" deprivation of a medical need; a medical need is considered serious if it is one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Id. Seriousness may be determined by the effect of a delay. Id. The subjective inquiry into deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. (quoting Farmer, 511 U.S. at 837). This standard encompasses a narrow band of conduct: subpar care amounting to negligence or even malpractice does not give rise to a constitutional claim. Rather, the treatment provided must have been so inadequate as to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. Leavitt, 645 F.3d at 497-98. Deliberate indifference in this context may be shown by the denial of needed care as punishment and by decisions about medical care made recklessly with actual knowledge of impending harm that is easily preventable. Id.

Turning to the Complaint in this case, Plaintiff colorably alleges that his condition was objectively serious. He claims he felt extreme pain, especially after the first dentist drilled a hole in his tooth intended as temporary drainage, which impacted his ability to eat and sleep and caused serious risk of infection. Berry v. Peterman, 604 F.3d 435, 440 (7th Cir. 2010) ("Tooth decay can constitute an objectively serious medical condition because of pain and the risk of infection."); see also Chance v. Armstrong, 143 F.3d 698 (2d Cir. 1998) (plaintiff alleged objectively serious medical condition based on extreme pain, teeth deterioration and inability to eat properly); Weeks v. Hodges, 871 F. Supp. 2d 811, 820 (N.D. Ind. 2012) ("serious dental pain accompanied by other symptoms can constitute an objectively serious medical condition").

Plaintiff has also plausibly alleged the procedure was medically necessary, as the first dentist he saw prescribed a root canal and the second recommended completing it. See Petrazzoulo, 999 F. Supp. at 407. Further, the presence of a hole in a tooth is something even a layperson can grasp as a serious situation. Leavitt, 645 F.3d at 497-98. Indeed, the facts alleged in this Complaint stir up uncomfortable comparisons to the Dustin Hoffman dental torture scene in the 1976 thriller "Marathon Man."

The Complaint also contains factual allegations sufficient to suggest that Defendants Dow and Monier possessed a subjectively culpable state of mind. While, as a general matter, the right to be free from cruel and unusual punishment does not include the right to the treatment of one's choice, and courts are reluctant to second guess medical judgments, see Bradshaw v. Corr. Med. Servs., Inc., 6 F. App'x 45, 46 (1st Cir. 2001), that is not what Plaintiff has alleged. Plaintiff's Complaint plausibly claims that Defendants Dow and Monier refused to follow a course of dental treatment prescribed by two dentists. This is not a case where a plaintiff and a dentist disagreed over the course of medical treatment – to contrary, Plaintiff and both dentists agreed Plaintiff should have a root canal. The failure of prison staff to adhere to a doctor's orders can constitute deliberate indifference. Berry, 604 F.3d at 441 (dental treatment claim allowed to proceed because a choice of easier and less efficacious treatment for objectively serious medical condition can still amount to deliberate indifference, particularly when non-trivial delay in treating serious pain aggravates plaintiff's tooth pain); Weeks, 871 F. Supp. 2d at 821 (delay in following dentist's recommendation for tooth removal constituted deliberate indifference).

The Complaint allegations are sufficient to permit the inference that the refusal to pay for a root canal was based on the cost of the procedure. Plaintiff initially went to the dentist with the

blessing of USMS – only after the dentist drilled a hole to start the root canal, Defendants Dow and Monier became much less accommodating, invoking an unspecified policy that seems to have been based on the cost of the root canal. Defendant Dow and Monier's refusal to authorize dental treatment based on cost might also give rise to an Eighth Amendment violation. See Chance, 143 F.3d at 703-04 (complaint survived motion to dismiss when plaintiff alleged dentists chose tooth extraction over less invasive procedure based on monetary incentives); Weeks, 871 F. Supp. 2d at 821 ("a prison official that conditions medical treatment on a prisoner's ability to pay may be deliberately indifferent"); Stokes v. Beth, 07-C-0496, 2008 WL 1969744, at *4-5 (E.D. Wis. May 2, 2008) (Eighth Amendment claim allowed to go forward when plaintiff forced to choose between pulling tooth and enduring pain, when he did not have funds to pay for the tooth to be repaired); Tvelia v. New Hampshire Dep't of Corr., CIV. 03-537-M, 2004 WL 180037 (D.N.H. Jan. 27, 2004) (on preliminary injunction motion, Judge Muirhead finds likelihood of success on the merits because "to . . . tell defendant he could not have the needed root canals until March 'depending on the (prison) budget' is constitutionally unacceptable").

Plaintiff's Bivens claims against Defendants Dow and Mornier based on the Eighth Amendment are sufficiently well pled to permit the Complaint to go forward against them. This Court takes no position on the merits of Plaintiff's claims.

V. CONCLUSION

In light of the foregoing, based on 28 U.S.C. §§ 1915(e)(2)(B)(i-iii) & 1915A, I recommend that Plaintiff's Bivens claims against Defendants Dow and Monier in their official capacities claims should be dismissed, but that, otherwise, this action should be allowed to proceed against Defendants Dow and Monier in their individual capacities. I further recommend

that the Clerk be ordered to take appropriate steps to enable Defendants Dow and Monier to be served. D.N.H. LR 4.3(d)(2).

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen (14) days after the date of service. See Fed. R. Civ. P. 72(b). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
June 27, 2013