IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SHAWN LEROY STEPHENS,

Plaintiff,

v.

PRESIDENT JOSEPH BIDEN *et al.*,

Defendants.

Case No. 3:23-cv-00817-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, U.S. Magistrate Judge.

Plaintiff Shawn LeRoy Stephens ("Stephens"), representing himself and proceeding in forma pauperis ("IFP"), filed this action on June 6, 2023. In his complaint, Stephens primarily invoked statutes addressing military retirement pay and Department of Veterans Affairs ("VA") disability compensation (i.e., 10 U.S.C. §§ 1414, 3914, and 7314) and Social Security benefits, but he also cited, among other things, 42 U.S.C. § 1983 ("Section 1983") and *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1] Stephens's complaint,

[1] Section 3914 is one of the "Army's retirement pay statutes." *Johnson v. United States*, 157 Fed. Cl. 8, 15 (Fed. Cl. 2021). "Section 3914 is now cited as 10 U.S.C. § 7314, which is identical to the old version aside from a cross-reference to another section of the code." *Id.* at 14 n.5. Section 1414, on the other hand, provides "for concurrent receipt of both military retired pay

when liberally construed, named eight defendants: the Portland regional office of the VA's Veterans Benefits Administration ("VBA"), Defense Finance and Accounting Service ("DFAS"), Disabled American Veterans ("DAV"), the Commissioner of the Social Security Administration (the "Commissioner" or "SSA"), Presidents Biden, Trump, and Obama, and the U.S. House of Representatives.

After Stephens filed a first amended complaint on July 18, 2023, the Court granted Stephens's motion for appointment of counsel and appointed a member of the Court's pro bono panel for the limited purpose of assisting with the drafting of a second amended complaint. Counsel initially accepted the representation but withdrew on October 27, 2023, because of a breakdown in the attorney-client relationship and unspecified ethical rules, and thus did not assist with the drafting of a second amended complaint. Stephens's second motion for appointment of counsel followed on November 20, 2023, and the Court took it under advisement on November 27, 2023.

Stephens's first amended complaint remains subject to screening and sua sponte dismissal under 28 U.S.C. § 1915(e)(2) because the Court granted Stephens leave to proceed IFP. *See Smith v. Counts*, No. 2:20-cv-02441, 2022 WL 705890, at *1 n.2 (E.D. Cal. Mar. 9, 2022) ("Because [the self-represented] plaintiff is proceeding [IFP], the second amended complaint is subject to screening under 28 U.S.C. § 1915(e)."); *Moses v. Gardner*, No. 17-5497, 2017 WL 9251805, at *2 (6th Cir. Nov. 9, 2017) ("Because the district court granted [the self-represented plaintiff] leave to proceed [IFP], her amended complaint was therefore subject to screening and sua sponte dismissal pursuant to § 1915(e)(2)."). Stephens's first amended complaint also remains subject to sua sponte dismissal to the extent the Court lacks subject matter jurisdiction

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and [VA] disability compensation for certain eligible military retirees." *Haddock v. United States*, 135 Fed. Cl. 82, 84 (Fed. Cl. 2017).

and Stephens failed to exhaust administrative remedies. *See Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1849 (2019) ("[C]hallenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them sua sponte.") (simplified); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); *Shaw v. Bank of Am. Corp.*, 946 F.3d 533, 541 (9th Cir. 2019) (noting that "administrative exhaustion is often called a jurisdictional prerequisite") (simplified); *Bass v. Soc. Sec. Admin.*, 872 F.2d 832, 833 (9th Cir. 1989) (per curiam) ("A claimant's failure to exhaust the procedures set forth in the Social Security Act, 42 U.S.C. § 405(g), deprives the district court of jurisdiction.").

As explained below, the Court concludes that it lacks subject matter jurisdiction over most of Stephens's claims, Stephens failed to exhaust certain administrative remedies, and Stephens has not stated a cognizable claim under Section 1983 or *Bivens* and appears unable to do so. For these reasons, the Court recommends that the district judge dismiss Stephens's first amended complaint and deny as moot Stephens's second motion for appointment of counsel.

LEGAL STANDARDS

I. THE IFP STATUTE

The IFP statute, which is codified at 28 U.S.C. § 1915, provides, in relevant part, that "the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Section 1915(e) "authorizes '*sua sponte* dismissals of [IFP] cases[,]'" *Hebrard v. Nofziger*, --- F. 4th ---- , 2024 WL 119673, at *4 (9th Cir. Jan. 11, 2024) (citing *Jones v. Bock*, 549 U.S. 199,

214 (2007)), and "applies to all [IFP] complaints, not just those filed by [adults in custody]." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc).

The same substantive rules apply to Federal Rule of Civil Procedure ("Rule") 12(b)(6) and § 1915(e) dismissals for failure to state a claim. *See Hebrard*, 2024 WL 119673, at *4 (citing *Lopez*, 203 F.3d at 1127-28). "To survive a motion to dismiss [under Rule 12(b)(6)], 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The Supreme Court has explained that 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.* (quoting *Twombly*, 550 U.S. at 556).

II. SELF-REPRESENTED LITIGANTS

It is well settled that courts "have a duty to read a pro se complaint liberally," *Sernas v. Cantrell*, 857 F. App'x 400, 401 (9th Cir. 2021), and that "pro se litigants should be treated with 'great leniency' when evaluating compliance with 'the technical rules of civil procedure.'" *Seals v. L.A. Unified Sch. Dist.*, 797 F. App'x 327, 327 (9th Cir. 2020) (quoting *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986)). As the Ninth Circuit has explained, there is a "good reason" that courts "afford leeway to pro se parties, who appear without counsel and without the benefit of sophisticated representation: 'Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel.'" *Huffman v. Lindgren*, 81 F.4th 1016, 1021 (9th Cir. 2023) (quoting *Lopez*, 203 F.3d at 1131).

There are, however, limits on the leeway that courts afford to self-represented litigants. For example, although a court must liberally construe a self-represented litigant's pleadings, a self-represented litigant still bears the burden of establishing subject matter jurisdiction. *See Williby v. Brin*, No. 22-16106, 2023 WL 4351522, at *1 (9th Cir. July 5, 2023) (noting that the self-represented litigant "failed to establish federal subject matter jurisdiction" and "a district court may dismiss an action sua sponte for lack of jurisdiction" (citing *Franklin v. State of Or., State Welfare Div.*, 662 F.2d 1337, 1342 (9th Cir. 1981))); *Logan v. Town of Windsor, N.Y.*, 833 F. App'x 919, 920 (2d Cir. 2021) (stating that "a pro se plaintiff still bears the burden of proving subject matter jurisdiction") (simplified). Further, although courts "construe pro se pleadings liberally, especially in civil rights cases, . . . [courts] 'may not supply essential elements of the claim that were not . . . pled[.]'" *Owen v. City of Hemet*, No. 21-55240, 2022 WL 16945887, at *1 (9th Cir. Nov. 15, 2022) (citing *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) and quoting *Litmon v. Harris*, 768 F.3d 1237, 1241 (9th Cir. 2014)); *Salazar v. Regents of Univ. of Cal.*, 812 F. App'x 410, 412-13 (9th Cir. 2020) (same); *see also Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1140 (9th Cir. 2011) (en banc) ("[A] liberal interpretation of a pro se civil rights complaint may not supply essential elements of the claim that were not initially pled[.]") (simplified).

Additionally, a court is generally not required to sift through a self-represented litigant's allegations and voluminous exhibits to "tease out" a valid claim. *See Dickens v. Illinois*, 753 F. App'x 390, 392 (7th Cir. 2018) ("[T]he district court was not required to sift through [the self-represented litigant's] many exhibits to tease out a valid claim."). Indeed, in *Sernas*, the Ninth Circuit explained that "[a]lthough courts have a duty to read a pro se complaint liberally, a district court is not required to sift through allegations to see what unidentified causes of action a

pro se [plaintiff] may have a claim for." 857 F. App'x at 401. Along similar lines, in *Orea v. Quality Loan Service Corp.*, 859 F. App'x 799, 801 (9th Cir. 2021), the Ninth Circuit held that "[t]he district court did not abuse its discretion in dismissing the [the self-represented plaintiff's] second amended complaint, which spanned more than ninety pages of text and 540 pages of exhibits, for violating [Rule] 8(a)," and noted that the "complaint was so lengthy, rambling, confusing, and disorganized that one [could not] determine who is being sued, for what relief, and on what theory." *Id.* (simplified); *see also Peralta v. Dillard*, 744 F.3d 1076, 1087 (9th Cir. 2014) (en banc) (observing that self-represented litigants' Section 1983 complaints are "often rambling and incoherent").

Courts have made comparable observations at the screening stage. For example, in *Woods v. Health Care Specialty Services*, No. 22-cv-01055, 2022 WL 17419360, at *6 (S.D. Cal. Dec. 5, 2022), the court screened the self-represented plaintiff's first amended complaint, dismissed all of the plaintiff's claims with leave to amend, and "cautioned [the plaintiff] not to simply attach and reference exhibits as a substitute for presenting factual allegations in the body of an amended complaint." *Id.* In so cautioning, the court explained that "[a] pro se litigant cannot simply dump a stack of exhibits on the court and expect the court to sift through them to determine if some nugget is buried somewhere in that mountain of papers, waiting to be unearthed and refined into a cognizable claim," and that courts "will not comb through attached exhibits seeking to determine whether a claim possibly could have been stated where the pleading itself does not state a claim," as a plaintiff "must state a claim, not merely attach exhibits." *Id.* (simplified); *Acuna v. Pollard*, No. 21-cv-01910, 2022 WL 184659, at *4 (S.D. Cal. Jan. 20, 2022) (screening a self-represented plaintiff's complaint and making the same observations).

BACKGROUND

I. FACTS[2]

Stephens's complaint, filed on June 6, 2023, spans 162 pages. (*See* ECF No. 1 at 1-162.) It includes (1) several pages from the Court's fillable form for self-represented plaintiffs' complaints and civil suit code descriptions; (2) more than 100 pages of cell phone screenshots depicting, among other things, personal, medical, military, and VA records, identification cards, and webpages; and (3) images of Stephens. (*See id.*) The Court notes that some of Stephens's screenshots are difficult to read and that Stephens's typed and handwritten notes, which are often indecipherable, rambling, confusing, or of unclear relevance, are scattered throughout his complaint.

A. Named Defendants

Stephens's complaint, when liberally construed, names the following eight defendants: the VBA's Portland regional office, DFAS, DAV, the Commissioner of the SSA, Presidents Biden, Trump, and Obama, and the U.S. House of Representatives.[3] (*See id.* at 1-3, 25, 56, 58, 91.) The Court provides brief background on the VBA's regional offices, DFAS, and DAV.

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[2] As discussed below, the Court considers Stephens's complaint and first amended complaint and portions of Stephens's other filings at the screening stage, in part because Stephens is representing himself, Stephens's complaint is more comprehensive than his first amended complaint, and the Court wishes to be thorough and ensure that it understands the bases of Stephens's claims.

[3] Stephens lists the third defendant as "SSI/SSA" (ECF No. 1 at 3), which are Social Security-related acronyms. *See West v. Bowen*, 879 F.2d 1122, 1123 n.1 (3d Cir. 1989) (using "the following acronyms . . . SSI Supplemental Security Income; [and] SSA—Social Security Administration"). The Court, however, liberally construes Stephens's complaint as naming the Commissioner, who is the proper defendant. *See Medina v. Soc. Sec. Admin.*, No. 1:23-cv-00896, 2023 WL 4357641, at *2 (E.D. Cal. June 15, 2023) ("[I]n appeals of administrative decisions of the [SSA], the proper defendant is the . . . Commissioner: in this case, Kilolo Kijakazi, the acting Commissioner. Accordingly, the Court shall correct the caption to reflect the proper Defendant."); *Munoz v. United States*, No. 10-cv-01003, 2011 WL 7146176, at *2-3 (S.D. Cal. Oct. 24, 2011) (rejecting the defendant's argument that the case should be dismissed because the

1. The VBA's Regional Offices

The staff at the VBA's regional offices make initial decisions on, among other things, claims for disability benefits, Dependency and Indemnity Compensation ("DIC"), and death pension benefits. *See Nat'l Org. of Veterans' Advocs. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1374 (Fed. Cir. 2020) (en banc) ("Veterans first file a [disability benefits] claim before [VBA] . . . staff in one of VA's regional offices, who make an initial decision on whether to grant or deny benefits.") (simplified); *Ruel v. Wilkie*, 918 F.3d 939, 940 (Fed. Cir. 2019) (noting the plaintiff, a surviving spouse of a U.S. veteran, filed a DIC claim and the regional office initially denied the claim); *Ortegon v. Wilkie*, 757 F. App'x 934, 935 (Fed. Cir. 2018) (per curiam) (noting that the regional office made the initial decision on the application that the self-represented plaintiff, an adult son of a deceased U.S. Army veteran, filed for DIC or death pension benefits).

DIC is "a tax-free monetary benefit paid to eligible survivors of veterans whose death resulted from a service-related injury or disease, and . . . [d]eath [p]ension [benefits] is a tax-free monetary benefit payable to a low-income, un-remarried surviving spouse and/or unmarried children of a deceased veteran with wartime service." *Ruel*, 918 F.3d at 940 (simplified). If a veteran's surviving child meets the definition of a "helpless child," the surviving child may be eligible to receive DIC or death pension benefits. *See Hanlin v. Nicholson*, 474 F.3d 1355, 1357 (Fed. Cir. 2007) (explaining that DIC "benefits are payable to an adult child who becomes permanently incapable of self-support prior to reaching majority age," and "[s]uch a child [is] known as a 'helpless child' under the parlance of veteran's law"); *see also Ortegon v. Shulkin*, No. 16-1889, 2017 WL 2791330, at *1 (Vet. App. June 28, 2017) ("The Secretary [of the VA]

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self-represented plaintiff named the United States, not the Commissioner, as the defendant, and choosing instead to liberally construe the complaint as naming the "proper defendant").

will pay a [death] pension [benefit] to the child of a deceased veteran of a period of war, subject to certain qualifications . . . . The definition of a 'child' for VA purposes, however, differs from that of common usage. . . . [T]he statute . . . requires that a child must be an unmarried person who is also (1) under the age of 18; or (2) a person who became permanently incapable of self-support before reaching the age of 18; or (3) between the ages of 18 and 23 and pursuing a course of study at an approved educational institution.") (citations omitted); *Ortegon*, 757 F. App'x at 935-36 & n.2 (observing that the adult son of a deceased U.S. Army veteran filed an application for "[DIC] or death pension benefits" and that U.S. Court of Appeals for Veterans Claims "affirmed the VA's [Board of Veterans' Appeals'] [f]inal [d]ecision based on the application of [the VA regulation's] definition of a 'helpless child' to [the veteran's son's] factual circumstances, finding [that the son was] not a 'helpless child' eligible to receive DIC or death pension benefits because he was not permanently disabled before reaching the age of eighteen").

2. DFAS

DFAS is an independent agency within the Department of Defense ("DOD"). *See Phillips v. Gates*, 329 F. App'x 577, 578-79 (6th Cir. 2009). DFAS and the VA are each responsible for providing various benefits to eligible veterans or their survivors. *See Haddock*, 135 Fed. Cl. at 84-85, 89-90 (noting that "[w]hile the VA and DFAS are separate agencies, each is responsible for providing its own benefits to eligible veterans," and DFAS paid in full claims of a surviving spouse for "retroactive military retired pay from being exposed to Agent Orange while serving in Vietnam"); *Haddock v. United States*, 161 Fed. Cl. 6, 11-13 (Fed. Cl. 2022) (noting that the DOD and VA "provide various benefits to retired service members who are disabled by medical conditions related to their service," and explaining that the case, which was filed by "surviving relatives of deceased Vietnam War veterans," concerned "not VA benefits, but related benefits

paid by D[O]D—specifically, [retroactive] military retired pay"); *see also Fed. Educ. Ass'n v. Fed. Labor Rels. Auth.*, 927 F.3d 514, 516 (D.C. Cir. 2019) (observing that DFAS is a "separate [DOD] component that administers the [a]gency's—and other agencies'—online payroll system").

Notably, "10 U.S.C. § 1414 became effective in 2004, and allowed for concurrent receipt of both military retired pay and VA disability compensation for certain eligible military retirees." *Haddock*, 135 Fed. Cl. at 84. Section 1414 effectively "restored . . . the right to receive some or all of the military retired pay that [veterans] previously had waived in order to receive their VA disability compensation." *Id.* The DOD delegated its responsibility to administer this program to DFAS. *Id.*

3. DAV

"DAV is a Congressionally chartered, nonprofit veterans' service organization that aids and assists veterans who were disabled during wartime service." *Cook v. Brown*, 68 F.3d 447, 448 (Fed. Cir. 1995) (citation omitted). "DAV employs both licensed attorneys and nonlicensed lay personnel to represent veterans seeking benefits before the Board [of Veterans' Appeals] or the [U.S.] Court of [Appeals for Veterans Claims]." *Id.*; *see also Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1017 n.6 (9th Cir. 2012) (en banc) (explaining that the Veterans Programs Enhancement Act of 1998 changed the name of the "United States Court of Veterans Appeals" to the "U.S. Court of Appeals for Veterans Claims"); *Smith v. McDonough*, 995 F.3d 1338, 1345 (Fed. Cir. 2021) ("Most veterans pursue their claims before the [VA] . . . , including up through the Board of Veterans' Appeals, either pro se or with non-lawyer assistance of a veterans' service organization ('VSO') or similar organization."). DAV's "[a]ttorneys and nonlawyer representatives . . . , and other organizations that the [VA] approves to assist veterans seeking benefits, are statutorily prohibited from charging veterans fees for representation before

the [VA]." *Cook*, 68 F.3d at 448 (citation omitted). "DAV personnel also do not charge veterans for representation [during an appeal] before the [U.S. Court of Appeals for Veterans Claims]." *Id.*

B. Stephens's DIC Benefits, SSA Notice of Award, and VA Appeal

Stephens is the unmarried adult son of a now-deceased U.S. Army and Vietnam veteran. (ECF No. 1 at 29, 36, 69, 90, 92, 94, 122.) Stephens receives DIC benefits because the VA reviewed evidence regarding his history of traumatic brain injuries and found that he became permanently incapable of self-support before reaching the age of eighteen (i.e., he met the definition of a "helpless child"). (*See id.* at 29, reflecting that in a letter dated February 7, 2023, the VA referred to Stephens as a "survivor of [a] [v]eteran" who served from July 7, 1967 to July 14, 1976 and "died as a result of a service-connected disability," and listing DIC as the benefits Stephens receives; *id.* at 23, suggesting that the VA reviewed medical evidence regarding Stephens's "multiple traumatic brain injuries dating back to 1978 [which] severely limit[] his ability to care for [his] daily needs," and found that Stephens was "incapable of self-support prior to his [eighteenth] birthday" and thus "entitle[d] [to DIC] as a helpless child for VA purposes"; *id.* at 36, 69, 92, noting that Stephens's father served in Vietnam; *id.* at 122, demonstrating that in a letter dated November 29, 2018, Stephens's physician noted that Stephens's "medical history . . . is significant for multiple traumatic brain injuries dating back to 1978[, which in the physician's] opinion, would make it difficult if not impossible for him to hold a normal job or pursue a career and had kept him dependent on his father for support until his father's passing in 2013").

The VA's correspondence with Stephens suggests that Stephens currently receives recurring monthly DIC benefits in the amount of $1,046.98. (*See id.* at 29, stating that Stephens's "current monthly [DIC] award amount is: $1,046.98"; *id.* at 144, listing monthly direct deposits

into Stephens's bank account from December 29, 2022 through April 30, 2023 in the amount of $1,046.98). Stephens began receiving DIC benefit payments on April 1, 2018. (*See id.* at 90, attaching an "audit of VA benefit payments that have been previously paid" and beginning with April 1, 2018).

The VA's correspondence with Stephens also suggests that Stephens believes that his DIC payment rates are incorrect and do not cover his living expenses, and that Stephens recently had an appeal pending with the VA regarding his DIC benefits. In a letter dated April 24, 2023, the VA informed Stephens that it was aware of his March 2, 2023 "correspondence to President Biden . . . concerning [his] VA [DIC] . . . payment rate, [which] . . . the White House [forwarded] to the [VA] . . . for further review." (*Id.* at 107.) The VA explained that it reviewed Stephens's case and "father's claim folder" and confirmed that Stephens was "currently in receipt of DIC as the highest benefit available to [him] based on [his] father's service with [Stephens'] status as a helpless child of the [v]eteran." (*Id.*) After noting that Stephens "expressed concerns that the rate for [DIC was] . . . too low and not sufficient to cover living expenses," the VA explained that the DIC rates are "based on the laws that govern [the] VA," that DIC benefit rates "can only be increased by legislative approval," that "cost-of-living adjustments are determined by Congress," that Stephens's records demonstrated that he had "an appeal pending with [the] VA regarding [his] DIC payment," and that Stephens would be "notified once a decision ha[d] been made."[4] (*Id.*) The VA also provided Stephens with contact information that he could use if he wanted "a detailed status update" on his appeal, and noted that "[e]ntitlement to Army pension benefits is administered by [DFAS]," an "independent

[4] Stephens suggests that DAV did not assist with his VA appeal and merely confirmed that the VA found that he was disabled and that his father died as a result of a service-connected disability. (ECF No. 1 at 91; *see also id.* at 5, referencing information Stephens received from "VSO and DAV").

federal agency . . . separate from the VA," the VA had "no authority over entitlement to [such] payments," and Stephens could contact DFAS or the Thrift Savings Plan ("TSP") directly if he wanted information regarding a TSP account. (*Id.*)

Consistent with the VA's determination that Stephens was entitled to DIC, the SSA sent Stephens a Notice of Award on May 22, 2020, stating that it determined Stephens was eligible for SSI benefits.[5] (*Id.* at 37, 56, 58, 60, ECF No. 19 at 8; ECF No. 14 at 55.) The SSA, however, explained that although it found Stephens "eligible for SSI benefits beginning March 29, 2019," SSI "[b]enefits are not payable until the month following [his] first month of eligibility," and "[b]eginning April 2018, [Stephens] became eligible for VA disability benefits [i.e., DIC,] which put [Stephens] over the income limit for the SSI program" and thus "[n]o additional benefits [were] due to [Stephens] from the SSI program." (ECF No. 19 at 8; *cf.* ECF No. 1 at 90, 145, listing the same monthly direct deposit amounts for DIC benefits that the SSA referenced in its Notice of Award).

C. Stephens's Claims

Stephens's claims appear to be based primarily on his assertion that the SSA, VBA's regional office, and DFAS erred in determining the amount of SSI, DIC, and concurrent benefits to which he is entitled. Many of Stephens's factual allegations support the Court's construal. (*See*

[5] "SSI provides monthly payments to adults and children with a disability or blindness who have income and resources below specific financial limits." *Cooper v. McDonough*, 57 F.4th 1366, 1371 (Fed. Cir. 2023) (citation omitted). "The Social Security Act conditions eligibility for SSI benefits on meeting income and resource requirements." *Scarborough v. Astrue*, 327 F. App'x 827, 830 (11th Cir. 2009) (citation omitted). Income is "anything you receive in cash or in kind that you can use to meet your needs for food and shelter," and "encompasses earned and unearned income." *Dennis H. v Comm'r, Soc. Sec. Admin.*, No. 6:17-cv-01563-MC, 2020 WL 819378, at *2 (D. Or. Feb. 19, 2020) (simplified). "Pursuant to 42 U.S.C. § 1382a(a)(2)(B), unearned income for purposes of calculating SSI eligibility includes disability benefits." *Scarbrough*, 327 F. App'x at 830 (citing 42 U.S.C. § 1382a(a)(2)(B) and 20 C.F.R. § 416.1121(a)). Unearned income also includes "veterans' compensation and pensions," 42 U.S.C. § 1382a(a)(2)(B), and "veterans benefits." 20 C.F.R. § 416.1121(a).

ECF No. 1 at 4, stating that an unnamed defendant did "not award[]" and "fail[ed] to award" unspecified benefits; *id.* at 31-32, 90, referring to the "concurrent retirement pay act," i.e., 10 U.S.C. § 1414 and a program that DFAS administers on DOD's behalf, in challenging whether Stephens's initial April 1, 2018 DIC payment should have been $3,007.00 instead of $859.63; *id.* at 37, alleging that Stephens's "civil [c]omplaint is that the [VBA's] regional [office] as well as the SSA . . . [did not] do anything [to] get[] the amount correct," and the SSA and VBA's regional office failed to "calculate[] the [DIC] payment correctly and put the [SSA SSI] matching tool on the [VBA's regional office's] VA file number"; *id.* at 56, asserting that Stephens "met all requirements for his . . . SSI," the VBA's regional office "failed to award that part of the [Social Security] benefit type," and the VBA's regional office and DFAS are in "breach of contract"; *id.* at 94, referencing that DFAS "could [have] used [two-thirds] of SSI SSA dollars").

Stephens's claims are also based on military retirement pay and VA disability compensation statutes: (1) 10 U.S.C. §§ 3914 and 7314; and (2) 10 U.S.C. § 1414, which became effective in 2004 and allows for concurrent receipt of both military retired pay and VA disability compensation.[6] (*See* ECF No. 1 at 57, 64, citing the same three statutes; *id.* at 120, attaching a

[6] With respect to military retirement pay, Stephens repeatedly cites 10 U.S.C. §§ 3914 and 7314, but these statutes do not apply to Stephens because he is not an enlisted member of the Army. *See Johnson*, 157 Fed. Cl. at 14-15 & n.5 (noting that 10 U.S.C. § 3914 provides that "[u]nder regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service . . . may, upon his request, be retired," and that § 3914 is one of the "Army's retirement pay statutes" and "now cited as 10 U.S.C. § 7314, which is identical to the old version aside from a cross-reference to another section of the code"). Stephens also cites an Internal Revenue Code ("IRC") provision on the carryback and carryover of unused business credits, which is likewise inapplicable here. (*See, e.g.*, ECF No. 1 at 1); *R.H. Donnelley Corp. v. United States*, 641 F.3d 70, 73 (4th Cir. 2011) (noting that IRC § 39 addresses "carryback and carryover of unused business credits"). The same can be said about Stephens's citation to 10 U.S.C. § 1403 (ECF No. 1 at 57), which addresses how the IRC treats a member of an armed force's retirement pay. *See Tarver v. Tarver*, 557 So.

VA compensation and pension publication addressing the "rule change in 2004," which allowed for concurrent receipt of both military retired pay and VA disability compensation for certain eligible military retirees). Given the allegations detailed in the preceding paragraph, Stephens seemingly maintains that he is entitled to increased DIC payments and concurrent DIC and SSI benefits (or some unspecified form of military retirement pay) under § 1414. Stephens also makes unclear references to the Federal Employees Retirement System ("FERS"), Office of Personnel Management ("OPM"), and TSP.[7] (*See id.* at 36, 57-58, 96, referring to FERS, OPM, and TSP). Finally, the Court notes that Stephens has three married sisters and Stephens's mother and father divorced in 1983 (*id.* at 94), and the record does not reflect that Stephens was a named TSP beneficiary or address whether Stephens's father ever withdrew TSP funds or rolled TSP funds into a private account.

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2d 1056, 1060 (La. Ct. App. 1990) ("If a member, retired with a physical disability, chooses to have his retirement computed according to the length of service, he must pay federal income tax on that portion of his retirement pay which exceeds the retirement pay which he would receive if it were computed on the basis of the percentage of disability." (citing, *inter* alia, 10 U.S.C. § 1403)).

[7] OPM is the "federal agency responsible for the administration of federal retirement programs including . . . the [FERS]." *Picard v. Buoniconti*, No. 14-30115, 2023 WL 8529117, at *2 (D. Mass. Dec. 8, 2023); *Simmons v. Off. of Pers. Mgmt.*, No. 2022-2238, 2023 WL 2779097, at *1 (Fed. Cir. Apr. 5, 2023) (per curiam). The Federal Retirement Thrift Investment Board ("FRTIB") is the agency responsible for administering TSP accounts. *See Picard*, 2023 WL 8529117, at *2; *see also Wilkes v. Dep't of Veterans Affs.*, 644 F. App'x 1015, 1016 n.3 (Fed. Cir. 2016) (per curiam) (describing the FRTIB in a case where the "VA made matching contributions to [an employee's] TSP account"). Notably, the Merit System Protection Board ("MSPB") has "exclusive jurisdiction over appeals from OPM's . . . FERS final decisions," and "[t]he Federal Circuit, then, has exclusive appellate jurisdiction over MSPB final decisions." *Escoe v. U.S. Off. of Pers. Mgmt.*, No. 19-cv-00264, 2019 WL 8112900, at *2 (C.D. Cal. Nov. 5, 2019) (citing *Eisenbeiser v. Chertoff*, 448 F. Supp. 2d 106, 109 (D.D.C. 2006) and *Forano v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005)); *Tilman-Conerly v. U.S. Off. of Pers. Mgmt.*, No. 22-01617, 2023 WL 4274355, at *2 (E.D. Cal. June 29, 2023) (same), *report and recommendation adopted*, 2023 WL 5021537, at *1 (E.D. Cal. Aug. 7, 2023), *appeal docketed*, No. 23-16120 (9th Cir. Aug. 23, 2023).

II. PROCEDURAL HISTORY

Stephens filed his complaint and IFP application in this case on June 6, 2023. That same day, Stephens filed a second action, which was duplicative of this first-filed action. *See* Compl. at 2-6, 17, *Stephens v. Comm'r Soc. Sec. et al.*, Case No. 3:23-cv-00818 (D. Or. filed June 6, 2023) (naming the VBA's regional office, "SSA/SSI," President Biden, and DFAS, referring to DAV, citing 42 U.S.C. § 1983, 10 U.S.C. §§ 1043, 1414, 3914, and 7314, and the same IRC provision, and attaching and complaining about the Commissioner's May 22, 2020 letter explaining that Stephens's receipt of DIC benefits meant that he was "over the income limit for the SSI program").

On June 27, 2023, the clerk of court reassigned Stephens's second-filed action to the undersigned. *Id.*, ECF No. 14. On July 7, 2023, the Court ordered Stephens to show cause in writing by July 21, 2023, explaining why the Court should not dismiss the second-filed action, without prejudice, on the ground that it was duplicative of Stephens's first-filed action. *Id.*, ECF No. 18 (citing, *inter alia*, *Pugh v. Anderson*, No. 21-16984, 2022 WL 17223041, at *1 (9th Cir. Nov. 25, 2022) ("The district court properly dismissed [the self-represented plaintiff's] action as duplicative because it [wa]s based on the same factual allegations as those in [an earlier-filed case]."")). The Court also advised Stephens that if he agreed that his second-filed action was duplicative, he could file an amended complaint in this first-filed action on or before July 21, 2023, setting forth all his claims and allegations and, to the extent necessary, addressing any deficiencies that the previously assigned judge identified in an Order to Amend dated June 23, 2023, which focused primarily on Stephens's compliance with Rule 8's requirements. *Id.*, ECF Nos. 13, 18.

Stephens timely filed a response on July 12, 2023. *Id.*, ECF No. 20. In accordance with the Court's Order to Show Cause, Stephens informed the Court that he was "confused about

having to do two case filings," he "d[id]n't mind" proceeding "in one case," and he was willing to "consolidate . . . to one case" and proceed under "whatever case number" the Court preferred. *Id.*

In an Order of Dismissal dated July 13, 2023, the Court explained that it construed Stephens's response as a stipulation voluntarily to dismiss his duplicative second-filed action, without prejudice, pursuant to Rule 41(a)(1)(A)(i), which was self-executing and terminated Stephens's second-filed action. *Id.*, ECF No. 22. The Court explained that Stephens's case would proceed only in the first-filed action, and going forward, Stephens must file his papers in the first-filed action and use only the first-filed action's case number. *Id.* The Court also reminded Stephens that on or before July 21, 2023, he could file an amended complaint in the first-filed action. *Id.*

On July 18, 2023, Stephens timely filed a first amended complaint in this first-filed action. (ECF No. 10.) Stephens's first amended complaint repeated allegations from his initial complaint and cited the same authorities but consisted only of twelve pages (as opposed to 162 pages) of allegations, exhibits, and screenshots. (*See id.* at 1-12.) On July 26, 2023, five days after Stephens filed 267 pages of additional exhibits and allegations (*see* ECF No. 11), the Court entered an Order granting Stephens's motion for appointment of counsel (ECF No. 7) and conditionally appointing a member of the Court's pro bono panel for the limited purpose of assisting Stephens with drafting a second amended complaint within sixty days of appointment. (ECF No. 12.) The next day, counsel accepted representation as specified in the Court's Order. (ECF No. 13.)

On October 23, 2023, Stephens docketed sixty-three pages of exhibits in support of his previously filed first amended complaint. (ECF No. 14.) On October 27, 2023, counsel filed a

motion to withdraw as Stephens's attorney and supporting declaration. (ECF No. 15.) Counsel represented that he had "met personally with . . . Stephens [in August 2023 and] spoke at some length," he "spoke with [Stephens three] times on the phone thereafter," he "reviewed numerous documents and emails from . . . Stephens," the "attorney-client relationship had irreparably broken down," counsel believed that "withdrawal [was] mandatory" and "specific ethical rules in operation . . . prevent[ed] [his continued] representation of . . . Stephens in this matter," counsel informed Stephens of his intent to "move to withdraw and resign on October 11, 2023," and if the Court so ordered, counsel would "submit additional information under seal for the Court's review." (*Id.*)

Also on October 27, 2023, the Court entered an Order granting counsel's motion to withdraw. (ECF No. 16.) Stephens's second motion for appointment of counsel followed. (ECF No. 17.) The Court took Stephens's motion under advisement on November 27, 2023. (ECF No. 18.)

On December 8, December 15, and December 18, 2023, respectively, Stephens filed twelve-, fifteen-, and two-page notices regarding his case and DIC and SSI benefits. (ECF Nos. 19-21.)

DISCUSSION

As discussed, Stephens's first amended complaint remains subject to screening and sua sponte dismissal under 28 U.S.C. § 1915(e)(2) because he is proceedings IFP. *See Smith*, 2022 WL 705890, at *1 n.2 (same); *Moses*, 2017 WL 9251805, at *2 (addressing "sua sponte dismissal pursuant to § 1915(e)(2)"). Stephens's first amended complaint also remains subject to sua sponte dismissal to the extent the Court lacks subject matter jurisdiction and Stephens failed to exhaust administrative remedies. *See Davis*, 139 S. Ct. at 1849 ("[C]hallenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must

consider them sua sponte.") (simplified); *Henderson*, 562 U.S. at 434 ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); *Shaw*, 946 F.3d at 541 (noting that "administrative exhaustion is often called a jurisdictional prerequisite") (simplified); *Bass*, 872 F.2d at 833 (noting that a claimant's failure to exhaust administrative remedies under the Social Security Act "deprives the district court of jurisdiction").

As explained below, the Court concludes that it lacks subject matter jurisdiction over many of Stephens's claims, Stephens failed to exhaust certain administrative remedies, and Stephens has not stated (and appears unable to state) a cognizable claim under Section 1983 and *Bivens*. The Court therefore recommends that the district judge dismiss Stephens's first amended complaint on these grounds and deny as moot Stephens's second motion for appointment of counsel.

I. SCOPE OF REVIEW

A plaintiff's amended complaint typically supersedes his initial complaint for screening purposes. *See Michel v. Weiss*, No. 2:21-cv-01640, 2022 WL 17104879, at *2 (E.D. Cal. Nov. 22, 2022) ("After filing the complaint, plaintiff proceeded to file first and second amended complaints. . . . Because an amended complaint supersedes the original complaint, . . . the court will proceed with screening the second amended complaint."), *findings and recommendation adopted*, 2023 WL 1824197, at *1 (E.D. Cal. Feb. 8, 2023); *see also Dang v. Samsun Elecs. Co., Ltd.*, 673 F. App'x 779, 780 (9th Cir. 2017) (explaining that an "amended complaint supersedes the original, the latter being treated thereafter as non-existent" (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967), *overruled on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc))). Furthermore, a plaintiff's separately filed exhibits are not

typically considered part of the operative complaint. *See Patrick v. Cnty. of L.A.*, No. 2:22-cv-02846, 2022 WL 17218070, at *7 n.2 (C.D. Cal. Aug. 29, 2022) (reflecting that the court allowed the self-represented plaintiff's separately filed exhibits, but warned that "[a]nything filed separately from [an] amended complaint [would] not be considered as part of the amended complaint").

Stephens filed a first amended complaint and attempted to address deficiencies that the previously assigned judge identified in the now-dismissed duplicative action. Stephens's first amended complaint, however, was far less inclusive than his initial complaint. Given Stephens's good faith attempt to cure and comply with the Court's Orders and medical history, the Court considers both of Stephens's complaints at the screening stage. The Court also does so in the interest of thoroughness and to ensure that it has a sufficient understanding of Stephens's claims and subject matter jurisdiction. For the same reasons, the Court considers portions of other filings, such as Stephens's December 8, 2023 notice, which includes the SSA's May 22, 2020 Notice of Award (i.e., a matter on which Stephens's complaints rely and incorporate by reference). (*See* ECF Nos. 1, 10, 19 at 8.)

Although the Court considers these matters for these purposes, the Court emphasizes that a self-represented litigant's separately filed notices and exhibits do not substitute for presenting factual allegations in the body of a complaint, and that the Court is not required to sift through such materials to tease out a valid claim. *See Sernas*, 857 F. App'x at 401 ("Although courts have a duty to read a pro se complaint liberally, a district court is not required to sift through allegations to see what unidentified causes of action a pro se [plaintiff] may have a claim for."); *Dickens*, 753 F. App'x at 392 ("[T]he district court was not required to sift through [the self-represented litigant's] many exhibits to tease out a valid claim."); *Orea*, 859 F. App'x at 801

("The district court did not abuse its discretion in dismissing the [the self-represented plaintiff's] second amended complaint, which spanned more than ninety pages of text and 540 pages of exhibits, for violating [Rule] 8(a)."); *Woods*, 2022 WL 17419360, at *6 (cautioning the plaintiff "not to simply attach and reference exhibits as a substitute for presenting factual allegations in the body of an amended complaint," and stating that "[a] pro se litigant cannot simply dump a stack of exhibits on the court and expect the court to sift through them to determine if some nugget is buried somewhere in that mountain of papers, waiting to be unearthed and refined into a cognizable claim").

II. THE VETERANS' JUDICIAL REVIEW ACT

A. Applicable Law

The Veterans' Judicial Review Act ("VJRA") "generally precludes district court jurisdiction over claims relating to or affecting veterans' benefits decisions, 'even if the [plaintiff] dresses his claim as a constitutional challenge, . . . [or] challenged some other wrongful conduct that, although unrelated to the [VA's] ultimate decision on his claim, affected his or her benefits proceeding[.]'" *Johnson v. Navaratnasingam*, No. 21-35968, 2022 WL 3681300, at *1 (9th Cir. Aug. 25, 2022) (quoting *Veterans for Common Sense*, 678 F.3d at 1022-25). As the Ninth Circuit has explained, the U.S. Court of Appeal for Veterans Claims and Federal Circuit have "exclusive jurisdiction over questions that relate to [or affect] benefits administered by the [VA]." *Id.* (citing *Veterans for Common Sense*, 678 F.3d at 1022-25 and 38 U.S.C. § 511).

In *Manning v. Department of Veterans Affairs*, No. 21-15501, 2022 WL 1714292, at *1 (9th Cir. May 27, 2022), for example, the Ninth Circuit held that the "[t]he district court properly dismissed for lack of subject matter jurisdiction under the [VJRA the self-represented plaintiff's] claim alleging that the [VA] . . . wrongfully denied him benefits . . . and failed to schedule an

appointment with a pulmonary specialist," because "the VJRA precludes district court jurisdiction over claims relating to or affecting the provision of benefits to veterans, including claims alleging 'administrative negligence in scheduling appointments.'" *Id.* (citing 38 U.S.C. § 511(a) and quoting *Tunac v. United States*, 897 F.3d 1197, 1202, 1205-06 (9th Cir. 2018)).

Similarly, in *Johnson*, the self-represented plaintiff's action "concern[ed] veteran's disability benefits," and the Ninth Circuit held that "[t]he district court properly dismissed [the] action for lack of subject matter jurisdiction because the [U.S.] Court[] of Appeal for Veterans Claims and the Federal Circuit have exclusive jurisdiction over questions that relate to benefits administered by the [VA]." *Johnson*, 2022 WL 3681300, at *1. The Ninth Circuit added that "[t]o the extent [the plaintiff] intended to allege claims unrelated to benefits decisions, dismissal was proper because [he] failed to allege facts sufficient to state any claim." *Id.* (citing *Ashcroft*, 556 U.S. at 678).

In *Kendall v. United States*, 845 F. App'x 679, 680 (9th Cir. 2021), the Ninth Circuit likewise held that "[t]he district court properly dismissed [the self-represented plaintiff's] action for lack of subject matter jurisdiction because the [U.S.] Court[] of Appeals for Veterans Claims and the Federal Circuit have exclusive jurisdiction over questions that relate to benefits administered by the [VA]." *Id.* (citing *Veterans for Common Sense*, 678 F.3d at 1022-25 and 38 U.S.C. § 511). Although the Ninth Circuit affirmed the dismissal for lack of subject matter jurisdiction and under 28 U.S.C. § 1915(e)(2)(B)(ii), the Ninth Circuit "instruct[ed] the district court [on remand] to amend the judgment to reflect that the dismissal . . . [was] without prejudice." *Id.*

In *Chatman v. U.S. Department of the Navy*, 846 F. App'x 543, 543-44 (9th Cir. 2021), the Ninth Circuit once again held that "[t]he district court properly dismissed for lack of

jurisdiction under the [VJRA the self-represented plaintiff's] claims alleging a denial of benefits and negligence," noting that "the VJRA precludes district court jurisdiction over claims relating to or affecting the provision of benefits to veterans[.]" *Id.* (citing *Veterans for Common Sense*, 678 F.3d at 1022-25). The Ninth Circuit also held that the district court properly dismissed the plaintiff's "§ 1983 claims because [the] defendants [were] not state actors." *Id.* In support of this holding, the Ninth Circuit noted that for a plaintiff "[t]o state a claim under § 1983, [the] plaintiff must . . . show that the alleged deprivation was committed by a person acting under color of state law," and that "federal government actors cannot be liable under § 1983." *Id.* (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988) and citing *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997)); *see also El Malik v. United States*, 800 F. App'x 560, 561 (9th Cir. 2020) (explaining that resolution of the disabled veteran's "claims would require the district court to 'determine whether the VA acted properly in handling [the plaintiff's] request for benefits,' and thus, [38 U.S.C.] § 511(a) bars jurisdiction over those claims" (quoting *Tunac*, 897 F.3d at 1202)).

B. Analysis

The Court concludes that the VJRA precludes the Court's jurisdiction over most of Stephens's claims because it is evident that his claims relate to or affect VA benefits and proceedings.

In evaluating whether VJRA precludes the Court's jurisdiction over any of Stephens's claims, the Court's inquiry does not turn on how Stephens styled his claims or whether Stephens challenges conduct that is unrelated to the VA's ultimate decision on a claim for benefits. *See Johnson*, 2022 WL 3681300, at *1 (noting that the VJRA inquiry does not turn on how the plaintiff "dresses his claim," or whether the claims are unrelated to VA's "ultimate decision on [the] claim" because the challenged conduct may still "affect [the VA] benefits proceeding")

(citation omitted). That said, Stephens appears to base his claims almost exclusively on the amount of SSI and monthly DIC benefits that he receives and whether 10 U.S.C. § 1414 allows for his concurrent receipt of both DIC and SSI benefits (or some unspecified form of military retirement pay).[8]

Notably, however, the VBA's regional office makes initial decisions on claims for DIC and death pension benefits, and the Board of Veterans' Appeals, U.S. Court of Appeals for Veterans Claims, and Federal Circuit are responsible for reviewing such decisions. *See Ruel*, 918 F.3d at 940 (noting the plaintiff, a surviving spouse of a U.S. veteran, filed a DIC claim and the regional office initially denied the claim); *Ortegon*, 2017 WL 2791330, at *1 ("The Secretary [of the VA] will pay a [death] pension [benefit] to the child of a deceased veteran of a period of war, subject to certain qualifications . . . . The definition of a 'child' for VA purposes, however, differs from that of common usage. . . . [T]he statute . . . requires that a child must be an unmarried person who is also (1) under the age of 18; or (2) a person who became permanently incapable of self-support before reaching the age of 18; or (3) between the ages of 18 and 23 and pursuing a course of study at an approved educational institution.") (citations omitted); *Ortegon*, 757 F. App'x at 935-36 & n.2 (noting that the VBA's regional office made the initial decision on an application from a self-represented plaintiff, who was the adult son of a deceased U.S. Army veteran and "dependent on the [v]eteran's Social Security and VA benefits," the U.S. Court of Appeals for Veterans Claims affirmed the Board of Veterans' Appeals' "final decision" that the

[8] As the Court previously explained, Stephens repeatedly cites 10 U.S.C. §§ 3914 and 7314 with respect to military retirement pay, but these statutes do not apply to Stephens's situation. *See Johnson*, 157 Fed. Cl. at 14-15 & n.5 (noting that 10 U.S.C. § 3914 provides that "[u]nder regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service . . . may, upon his request, be retired," and that § 3914 is one of the "Army's retirement pay statutes" and "now cited as 10 U.S.C. § 7314, which is identical to the old version aside from a cross-reference to another section of the code").

son was "not a 'helpless child' eligible to receive DIC or death pension benefits," and the plaintiff sought review in the Federal Circuit); *see also Ortiz v. Markey*, No. 2:21-cv-1221, 2021 WL 4206677, at *3 (E.D. Cal. Sept. 16, 2021) (holding that the court lacked subject matter jurisdiction over the plaintiff's claims and noting that "[i]n the VJRA, 'Congress placed responsibility for reviewing decisions made by VA Regional Offices and the Board of Veterans' Appeals in a new Article I court, and the U.S. Court of Appeals for Veterans Claims, which has exclusive jurisdiction to review decisions of the Board of Veterans' appeals,'" and "[d]ecisions by the U.S. Court of Appeals for Veterans Claims, in turn, are reviewed exclusively by the U.S. Court of Appeals for the Federal Circuit" (quoting *Tunac*, 897 F.3d at 1202)), *findings and recommendation adopted*, 2022 WL 1645772, at *1 (E.D. Cal. May 24, 2022).

Stephens acknowledges that he availed himself of this review process with respect to his claims relating to or affecting his VA-administered benefits. Indeed, Stephens's screenshots include an April 24, 2023 letter from the VA. (ECF No. 1 at 107.) In this letter, the VA explained that it reviewed Stephens's case and "father's claim folder" and confirmed that Stephens was "currently in receipt of DIC as the highest benefit available to [him] based on [his] father's service with [Stephens'] status as a helpless child of the [v]eteran." (*Id.*) After noting that Stephens "expressed concerns that the rate for [DIC was] . . . too low and not sufficient to cover living expenses," the VA explained that the DIC rates are "based on the laws that govern [the] VA," that DIC benefit rates "can only be increased by legislative approval," that "cost-of-living adjustments are determined by Congress," that Stephens's records demonstrated that he had "an appeal pending with [the] VA regarding [his] DIC payment," and that Stephens would be "notified once a decision ha[d] been made." (*Id.*) The VA also provided Stephens with contact information that he could use if he wanted "a detailed status update" on his appeal, and noted

that "[e]ntitlement to Army pension benefits is administered by [DFAS]," an "independent federal agency . . . separate from the VA," the VA had "no authority over entitlement to [such] payments," and Stephens could contact DFAS or TSP directly if he wanted information on a TSP account. (*Id.*)

In addition to the VA's letter, Stephens also alleges in his first amended complaint that on or about July 17, 2023, he participated in a "video visit with a DC Appeals judge federal for [the] US VA regional benefits [office]" and discussed that "what [the VA] paid [him] was incorrect" and "now in [this Court]." (ECF No. 10 at 3.) Stephens adds that he "did not appeal [this appellate judge's] decision." *Id.*

Given these facts, the Court finds that the VJRA precludes the Court's jurisdiction over most of Stephens's claims because it is evident that the claims relate to or affect the provision of VA benefits. The Court therefore recommends that the district judge dismiss Stephens's action on this ground. *See Chatman*, 846 F. App'x at 543-44 (holding that "[t]he district court properly dismissed for lack of jurisdiction under the [VJRA] . . . [the self-represented plaintiff's] claims alleging a denial of benefits and negligence," and explaining that "the VJRA precludes district court jurisdiction over claims relating to or affecting the provision of [VA] benefits") (simplified).

Stephens's reliance on *Bivens* is unavailing here. Stephens fails plausibly to allege any constitutional basis for a *Bivens* claim, let alone one that the Supreme Court or Ninth Circuit have previously recognized. Notably, the Ninth Circuit has been hesitant to extend *Bivens* given the VJRA's comprehensive remedial structure. *See Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995) ("For the reasons set forth in the district court's well-reasoned order, *Hicks v. Small*, 842 F. Supp. 407, 409-12 (D. Nev. 1993), we affirm the dismissal of [the plaintiff's] action under

Rule 12(b)(6). The district court correctly held that a *Bivens* action was inappropriate in light of the comprehensive, remedial structure of the VJRA."); *Hicks*, 842 F. Supp. at 412 (noting that the plaintiff alleged a "First and a Fifth Amendment violation in his *Bivens* cause of action" and the plaintiff's "claims essentially challenge the reduction of [the plaintiff's VA] benefits on a constitutional basis," and holding that "in light of the comprehensive, exclusive remedial structure provided by the VJRA[,] a *Bivens* cause of action [was] inappropriate"); *Lietz v. Wilpher*, No. 19-35593, 2022 WL 1955742, at *1 (9th Cir. June 6, 2022) (describing the analysis for assessing whether a *Bivens* claim exists, noting that "the comprehensive, remedial structure of the [VJRA] . . . is a special factor that counsel[ed] hesitation against extending *Bivens* to [that] context" and "[g]iven the VJRA's comprehensive nature, that Congress did not include a cause of action for [the plaintiff's] retaliation claim [against VA staff members] suggest[ed] that his inability to obtain damages was not inadvertent on the part of Congress, but instead raise[d] the inference that Congress expected the Judiciary to stay its *Bivens* hand," and thus "declin[ing] to recognize a *Bivens* cause of action for [the plaintiff's] First Amendment retaliation claim") (simplified).

In light of the foregoing, the Court recommends that the district judge dismiss Stephens's *Bivens* claim(s) relating to or affecting the VA's decision or proceedings regarding Stephens's benefits.

The Court also finds that that to the extent Stephens intended to allege claims unrelated to his VA benefits, the district judge should dismiss Stephens's action because he fails to allege facts sufficient to state any claim and appears unable to do so. *See Johnson*, 2022 WL 3681300, at *1 ("To the extent [the plaintiff] intended to allege claims unrelated to [VA] benefits

decisions, dismissal was proper because [the plaintiff] failed to allege facts sufficient to state any claim").

Stephens invokes Section 1983 but does not name any state actors as defendants. Thus, the Court recommends that the district judge dismiss Stephens's Section 1983 claims. *See Chatman*, 846 F. App'x at 543-44 (holding that the district court "properly dismissed for lack of jurisdiction under the [VJRA] . . . [the plaintiff's] claims alleging a denial of benefit and negligence" and "properly dismissed[the plaintiff's] § 1983 claims because [the] defendants [were] not state actors," and noting that "federal government actors cannot be liable under § 1983") (citations omitted); *Wilson v. United States*, 566 F. App'x 913, 915 (Fed. Cir. 2014) (per curiam) ("[The self-represented plaintiff's] complaint seeks money damages from the 'United States' for alleged civil rights violations pursuant to 42 U.S.C. § 1983. But § 1983 only provides a damages remedy against individuals to redress injuries "when they occur under color of *state* law.' . . . [The plaintiff's] complaint against the *federal government* alleges no facts that would bring his complaint within the reach of the statute." (quoting *Davis v. Passman*, 442 U.S. 228, 248 (1979))).

Additionally, Stephens appears to name federal officials in their official capacities as defendants, such as Presidents Biden, Trump, and Obama, but does not identify any basis for waiver of sovereign immunity. Thus, Stephens fails to demonstrate that the Court has jurisdiction over such claims. *See Wise v. Dir. of Fed. Bureau of Investigations*, No. 21-02269, 2022 WL 705826, at *1 (E.D. Cal. Mar. 9, 2022) ("Defendant FBI is a federal agency, and Defendants Director of the FBI, Attorney General of the United States Department of Justice, and President Joseph Biden are all federal officials whom [the self-represented plaintiff] appears to have sued in their official capacity. The complaint does not identify any basis for a waiver of sovereign

immunity. Therefore, [the] [p]laintiff has failed to demonstrate that the Court has jurisdiction over his claims."), *findings and recommendation adopted*, 2022 WL 4388366, at *1 (E.D. Cal. Sept. 22, 2022).

Stephens also fails to allege a cognizable claim against DAV or under the other authorities he cites. With respect to DAV, Stephens does not allege that DAV engaged in any wrongful conduct. Rather, Stephens suggests that DAV merely confirmed that the VA found that he was disabled and his father's death was service connected and did not assist with his VA appeal. (*See* ECF No. 1 at 91.) Stephens also makes notes on a copy of the civil suit code descriptions suggesting that this is an action is related to a negotiable instrument; an action under the Employee Retirement Income Security Act, Medicare Act, Americans with Disabilities Act, and IRC; a product liability action premised on a breach of contract theory; and a railroad employee or survivor's action for personal injury or wrongful death under the Federal Employers' Liability Act. (ECF No. 1 at 10-13; ECF No. 1-1 at 1.) Stephens's factual allegations, however, fail to raise or even suggest a legally cognizable theory of liability under these authorities. Thus, the Court recommends that the district judge dismiss Stephens's action on these grounds.

III. THE FEDERAL TORT CLAIMS ACT

A. Applicable Law

"Despite the narrow review procedures mandated by the VJRA, federal [district] courts retain jurisdiction to hear certain claims brought by individual veterans pursuant to the Federal Tort Claims Act ('FTCA')." *Franson v. U.S. Dep't of Veterans Affs., Portland VAMC/CEOC*, No. 3:19-cv-01983-AC, 2020 WL 428154, at *2 (D. Or. Jan. 7, 2020) (citing *Tunac*, 897 F.3d at 1203), *findings and recommendation adopted*, 2020 WL 423388, at *1 (D. Or. Jan. 27, 2020).

In *Franson*, for example, the district court explained that a veteran "may seek redress in the district court for injuries sustained as a result of a VA medical professional's breach of his or her duty of care, but may not seek remedy for administrative negligence in the provision of benefits, as such negligence must be addressed through the VJRA." *Id.* (citations omitted). The district court further explained that even if the self-represented plaintiff's claims could "be construed as claims arising under the FTCA rather than claims concerning benefits decisions, they must fail for two reasons." *Id.* One reason was the plaintiff's failure to exhaust his administrative remedies under the FTCA:

> [A] plaintiff must first exhaust all administrative remedies, and "[t]he timely filing of an administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA, and, as such, should be affirmatively alleged in the complaint." *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). [The plaintiff] alleges he "tried for nearly two years to work within the VA system," but stops short of affirmatively alleging he timely filed administrative notice of his claims with the VA. Thus, insofar as [the plaintiff] asserts claims []sounding in tort, those claims should be DISMISSED.

Id.

"The FTCA's exhaustion requirement is jurisdictional and may not be waived." *D.L. ex rel. Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir. 2017). "A district court may dismiss a [self-represented plaintiff's] complaint for failure to allege compliance with the FTCA's administrative exhaustion requirement if it clearly appears that the deficiency cannot be overcome by amendment." *Tritz v. U.S. Postal Serv.*, 721 F.3d 1133, 1140 (9th Cir. 2013) (citing *Gillespie*, 629 F.2d at 640).

B. Analysis

Stephens does not allege that he complied with the FTCA's administrative exhaustion requirement. Although Stephens's complaints refer to tort claims, such as negligence, any tort claim would necessarily relate to or affect the VA's decisions and proceedings regarding

Stephens's claims for VA-administered benefits. The VJRA precludes the Court's jurisdiction over these claims. The VA's correspondence with Stephens also fails to reflect that Stephens filed a tort claim notice with the VA, let alone one outside the purview of the VJRA. Thus, to the extent Stephens intended to bring tort claims against the United States under the FTCA, the Court finds that Stephens failed to allege compliance with the FTCA's administrative exhaustion requirement, and that it clearly appears that Stephens cannot overcome this deficiency by amendment. Accordingly, the Court recommends that the district judge dismiss Stephens's action on this ground.

IV. THE SOCIAL SECURITY ACT

A. Applicable Law

"A claimant's failure to exhaust the procedures set forth in the Social Security Act . . . deprives the district court of jurisdiction." *Bass*, 872 F.2d at 833 (citations omitted). In *Ewbank v. Saul*, 829 F. App'x 789, 789-90 (9th Cir. 2020), the Ninth Circuit held that the district court properly dismissed for lack of subject matter jurisdiction the self-represented plaintiff's claim that the "SSA discriminated against him in violation of the Rehabilitation Act because [the plaintiff] failed to exhaust his administrative remedies as to this claim." *Id.* The Ninth Circuit noted that the "Social Security Act only grants the court jurisdiction to review final decisions of the Commissioner." *Id.* (citing 42 U.S.C. § 405(g) and *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008)).

Similarly, in *Calderon-Lopez v. Berryhill*, 747 F. App'x 569, 569-70 (9th Cir. 2018), the Ninth Circuit held that the district court properly dismissed the self-represented plaintiff's two consolidated cases and a related case for lack of subject matter jurisdiction. *Id.* The Ninth Circuit explained that the plaintiff's consolidated actions challenged the Commissioner's termination of his disability benefits, but he failed to exhaust his administrative remedies with respect to these

actions. *Id.* at 570. The Ninth Circuit added that its decision did "not limit [the plaintiff's] opportunity to reapply for disability benefits or to petition the [SSA] for reopening," and that the district court properly dismissed the plaintiff's separate and related action against individual SSA employees because "the Social Security Act only grants federal courts jurisdiction to review final decisions of the Commission" and "the [FTCA] does not grant jurisdiction as to individual defendants in cases arising under the Social Security Act." *Id.* (citing, *inter alia*, *Klemm*, 543 F.3d at 1144 and *Hooker v. U.S. Dep't of Health & Human Servs.*, 858 F.2d 525, 529-30 (9th Cir. 1988))).

In *Ingram v. Comm'r of Soc. Sec.*, 401 F. App'x 234, 234-35 (9th Cir. 2010), the Ninth Circuit likewise affirmed the district court's dismissal of the self-represented plaintiff's action against the Commissioner and an SSA employee "alleging improper [SSI] withholding and improper assignment of a representative payee." *Id.* The Ninth Circuit noted that (1) "[t]he district court properly dismissed [the plaintiff's] constitutional claims because the United States has not expressly waived its sovereign immunity," (2) the plaintiff could not "pursue a *Bivens* action related to a social security benefits determination," (3) the district court "properly dismissed the claims arising under the Social Security Act for lack of subject matter jurisdiction because [the plaintiff] failed to exhaust his administrative remedies before seeking judicial review," and (4) "[e]ven if [the plaintiff] had properly asserted [state tort] claims against the United States, [i.e., the correct party], the district court would have no jurisdiction to consider them because [he] failed to exhaust administrative remedies under the [FTCA]." *Id.* at 235 (citations omitted).

B. Analysis

Stephens implies that he is seeking to challenge the Commissioner's May 22, 2020 Notice of Award. In this letter, the Commissioner informed Stephens that he was "eligible for

SSI benefits beginning March 29, 2019," SSI "[b]enefits are not payable until the month following [his] first month of eligibility," and "[b]eginning April 2018, [Stephens] became eligible for VA disability benefits [i.e., DIC,] which put [Stephens] over the income limit for the SSI program" and thus "[n]o additional benefits [were] due to [Stephens] from the SSI program." (ECF No. 19 at 8.)

Stephens suggests that the Commissioner's Notice of Award is incorrect and negatively impacted the amount of SSI and recurrent DIC and SSI or military retirement pay he receives. Absent from Stephens's filings, however, is any indication that he exhausted administrative remedies under the Social Security Act or FTCA. Stephens also may not pursue a *Bivens* action related to a social security benefits determination. Accordingly, the Court recommends that the district judge dismiss Stephens's action on these grounds. *See Ingram*, 491 F. App'x at 235 (same and construing "the dismissal for failure to exhaust administrative remedies as without prejudice").

V. OPM, FERS, AND TSP

Stephens's filings make vague and often incoherent references to OPM, FERS, and TSP. The Court lacks jurisdiction over OPM's FERS final decisions and Stephens does not allege any cognizable claim related to a TSP account or with respect to any specifically identified TSP funds.

A. Applicable Law

OPM is the "federal agency responsible for the administration of federal retirement programs including . . . the [FERS]." *Picard*, 2023 WL 8529117, at *2; *Simmons*, 2023 WL 2779097, at *1. The MSPB has "exclusive jurisdiction over appeals from OPM's . . . FERS final decisions," and "[t]he Federal Circuit, then, has exclusive appellate jurisdiction over MSPB final decisions." *Escoe*, 2019 WL 8112900, at *2 (citations omitted).

The FRTIB, on the other hand, is the agency responsible for administering TSP accounts. *Picard*, 2023 WL 8529117, at *2; *see also Wilkes*, 644 F. App'x at 1016 n.3 (describing the FRTIB in a case where the "VA made matching contributions to [an employee's] TSP account"). The Federal Circuit has observed that district courts have jurisdiction over claims for funds from federal TSP accounts. *See Ogburn v. United States*, No. 2022-2297, 2023 WL 1846172, at *1-2 (Fed. Cir. Feb. 9, 2023) (per curiam) (affirming the U.S. Court of Federal Claims' dismissal of the former service member and TSP contributor's complaint for lack of subject matter jurisdiction and finding "no error in the [underlying] court's analysis" that "district courts, which the Court of Federal Claims is not, have exclusive jurisdiction over causes of action for funds from federal-government TSP accounts").

B. Analysis

Even assuming Stephens intended to challenge or suggests that he challenged any of OPM's FERS final decisions, the MSPB has exclusive jurisdiction over such decisions, and the Federal Circuit (not this Court) then has exclusive appellate jurisdiction over MSPB final decisions. Further, even assuming Stephens intended to assert a claim for federal TSP account funds and the Court would have jurisdiction over such a claim, Stephens makes only vague and incoherent references to a TSP account. Additionally, Stephens does not appear to allege that he is aware of any or a specific amount of unaccounted for TSP funds, or that he (or one of his married sisters) was a named TSP beneficiary. Nor does Stephens address whether his father ever withdrew TSP funds as part of his 1983 divorce or at any point thereafter, or rolled funds into a private account. In sum, Stephens has failed to state a claim relating to a TSP account.

For these reasons, the Court recommends that the district judge dismiss Stephens's action.

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VI. LEAVE TO AMEND

The Court concludes that (1) it lacks subject matter jurisdiction over most of Stephens's claims, (2) it is clear that Stephens failed to exhaust administrative remedies under the FTCA and Social Security Act, (3) Stephens's Section 1983 and *Bivens* claims fail as a matter of law, and (4) it clear that Stephens cannot cure the deficiencies identified and discussed herein. The Court also emphasizes that Stephens had an opportunity to amend his complaint and filed hundreds of pages of supporting documents, which the Court has considered.

Consequently, the Court recommends that the district judge enter judgment dismissing Stephens's action without leave to amend but without prejudice to refile in an appropriate jurisdiction. *See Duarte v. Kijakazi*, No. 21-16019, 2023 WL 2755329, at *1 (9th Cir. Apr. 3, 2023) ("The district court did not err in dismissing [the plaintiff's amended complaint] without leave to amend because [the plaintiff] failed to exhaust her administrative remedies pursuant to 42 U.S.C. § 405(g), and therefore the district court lacked subject matter jurisdiction over [the plaintiff's] claims."); *see also Strubel v. SAIF Corp.*, 848 F. App'x 745, 746 (9th Cir. 2021) ("The district court properly dismissed [the self-represented plaintiff's] action for lack of subject matter jurisdiction. . . . However, a dismissal for lack of subject matter jurisdiction should be without prejudice. . . . We affirm the dismissal, and instruct the district court to amend the judgment to reflect that the dismissal of this action is without prejudice.") (citation omitted).

VII. MOTION FOR APPOINTMENT OF COUNSEL

Given the above recommendations, the Court further recommends that the district judge deny as moot Stephens's second motion for appointment of counsel. *See Taleff v. Taleff*, No. 18-cv-01294, 2018 WL 6418541, at *3 (S.D. Cal. Dec. 6, 2018) (denying as moot the self-represented plaintiffs' motion for appointment of counsel because the court determined that "subject matter jurisdiction [was] lacking for any cognizable claim arising out of the [amended

complaint]"); *Broeg v. Puckett*, No. 2:17-cv-00184-SU, 2017 WL 3391672, at *2 (D. Or. July 12, 2017) (recommending that the district judge deny the self-represented plaintiff's motion for appointment of counsel "due to lack of subject-matter jurisdiction"), *findings and recommendation adopted*, 2017 WL 3391655, at *1 (D. Or. Aug. 3, 2017); *Wilson v. United States*, 566 F. App'x 913, 916 (Fed. Cir. 2014) (per curiam) (affirming "the Claims Court's decision to deny [the self-represent plaintiff's] motion to appoint counsel and to dismiss his [Section 1983] complaint for lack of subject matter jurisdiction"); *see also Ryan v. Whiteriver Unified Sch. Dist. No. 20*, No. 19-08020, 2019 WL 13252615, at *1-2 & n.1 (D. Ariz. June 6, 2019) (reflecting that the district denied the self-represented plaintiff's motions for appointment of counsel despite her assertion of mental impairments and motion for reconsideration, finding an inadequate nexus between the plaintiff's mental impairments and ability to articulate her claims given that she made "proper arguments" in certain filings, took actions that "demonstrate[d] that she understood [one of] the Court's prior Order[s]," and "signifie[d] that she [was] aware of the legal issues related to a motion for appointment of counsel," and noting that the court had "attempted to assist [the] [p]laintiff in finding pro bono counsel; however, the pro bono counsel notified the [c]ourt that she could not represent [the] [p]laintiff because they were unable to agree regarding the case").

CONCLUSION

For the reasons stated, the Court recommends that the district judge DISMISS this action without leave to amend but without prejudice, DENY Stephens's second motion for appointment of counsel (ECF No. 17), and enter judgment.

SCHEDULING ORDER

The Court will refer its Findings and Recommendation to a district judge. Objections, if any, are due within fourteen (14) days from service of the Findings and Recommendation. If no

objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 26th day of January, 2024.

Stacie F. Beckerman

HON. STACIE F. BECKERMAN
United States Magistrate Judge