

1 the SAC is **DISMISSED WITH LEAVE TO AMEND**. Plaintiff is **ORDERED**
2 within 30 days after the date of this Order to either: (1) file a Third Amended
3 Complaint, or (2) advise the Court that Plaintiff does not intend to file a Third
4 Amended Complaint.

5
6 **II. ALLEGATIONS IN THE SAC**

7 The SAC is asserted against Dr. M.Z. Lameer (“Defendant”) in his individual
8 capacity. (ECF No. 22, at 3.)¹ Plaintiff alleges that Defendant acted under color of
9 state law because he was contracted as the primary physician for orthopedic
10 problems at the Prison by the California Department of Corrections and
11 Rehabilitation (“CDCR”). (*Id.*) Plaintiff alleges that under authority from the
12 CDCR, Defendant had full control of the treatment of Plaintiff’s shoulder injury
13 over the course of three years. (*Id.*) Plaintiff further alleges:

14 After referral [sic] to Dr. M.Z. Lameer who also performed required
15 surgery. [sic] I was denied timely attention for pain relief before and
16 after surgery. Dr. Lameer failed to follow-up on physical therapy
17 provided by prison staff.

18 (*Id.* at 5.)

19 Plaintiff contends that Defendant violated the Equal Protection clause of the
20 Fourteenth Amendment by failing to provide a standard level of care by a medical
21 provider due to Defendant’s “deliberate indifference.” (*Id.* at 5.) Plaintiff seeks
22 compensatory and punitive damages. (*Id.* at 6.)

23
24 **III. STANDARD OF REVIEW**

25 Federal courts must conduct a preliminary screening of any case in which a
26 prisoner seeks redress from a governmental entity or officer or employee of a
27

28 ¹ All citations to the SAC reference the page numbers generated by ECF.

1 governmental entity (28 U.S.C. § 1915A), or in which a plaintiff proceeds *in forma*
2 *pauperis* (28 U.S.C. § Section 1915(e)(2)(B)). The court must identify cognizable
3 claims and dismiss any complaint, or any portion thereof, that is: (1) frivolous or
4 malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks
5 monetary relief from a defendant who is immune from such relief. 28 U.S.C.
6 §§ 1915(e)(2)(B), 1915A(b).

7 When screening a complaint to determine whether it fails to state a claim
8 upon which relief can be granted, courts apply the Federal Rule of Civil Procedure
9 12(b)(6) (“Rule 12(b)(6)”) standard. *See Watison v. Carter*, 668 F.3d 1108, 1112
10 (9th Cir. 2012) (applying the Rule 12(b)(6) standard to 28 U.S.C. § Section
11 1915(e)(2)(B)(ii)); *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012)
12 (applying the Rule 12(b)(6) standard to 28 U.S.C. § Section 1915A). “Dismissal
13 under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable
14 legal theory or sufficient facts to support a cognizable legal theory.” *Hartmann v.*
15 *Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013) (quoting
16 *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)).

17 Rule 12(b)(6) is read in conjunction with Federal Rule of Civil Procedure
18 8(a) (“Rule 8”), which requires that a complaint contain “a short and plain
19 statement of the claim showing that the pleader is entitled to relief.” *See Li v.*
20 *Kerry*, 710 F.3d 995, 998 (9th Cir. 2013). In reviewing a motion to dismiss, the
21 court will accept factual allegations as true and view them in the light most
22 favorable to the plaintiff. *See Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017)
23 (citing *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th
24 Cir. 2011)). Although “detailed factual allegations” are not required, “[t]hreadbare
25 recitals of the elements of a cause of action, supported by mere conclusory
26 statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
27 “Conclusory allegations of law . . . are insufficient” *Park*, 851 F.3d at 918
28 (first ellipsis in original) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th

1 Cir. 2001)). Rather, a complaint must “contain sufficient factual matter, accepted
2 as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at
3 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has
4 facial plausibility when the plaintiff pleads factual content that allows the court to
5 draw the reasonable inference that the defendant is liable for the misconduct
6 alleged.” *Iqbal*, 556 U.S. at 662. “If there are two alternative explanations, one
7 advanced by defendant and the other advanced by plaintiff, both of which are
8 plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6).”
9 *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

10 Where a plaintiff is pro se, particularly in civil rights cases, courts should
11 construe pleadings liberally and afford the plaintiff any benefit of the doubt. *See*
12 *Wilhelm*, 680 F.3d at 1121. “[B]efore dismissing a pro se complaint the district
13 court must provide the litigant with notice of the deficiencies in his complaint in
14 order to ensure that the litigant uses the opportunity to amend effectively.” *Akhtar*
15 *v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting *Ferdik v. Bonzelet*, 963 F.2d
16 1258, 1261 (9th Cir. 1992)). A court should grant a pro se plaintiff leave to amend
17 a defective complaint “unless it is absolutely clear that the deficiencies of the
18 complaint could not be cured by amendment.” *Akhtar*, 698 F.3d at 1212.

19 20 **IV. DISCUSSION**

21 **A. The SAC Fails to Allege a Fourteenth Amendment Equal** 22 **Protection Claim**

23 “The Equal Protection Clause of the Fourteenth Amendment provides that
24 ‘[n]o State shall . . . deny to any person within its jurisdiction the equal protection
25 of the laws.’” *Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015)
26 (quoting U.S. Const. amend. XIV, § 1). “The Equal Protection Clause requires the
27 State to treat all similarly situated people equally. This does not mean, however,

28 //

1 that all prisoners must receive identical treatment and resources.” *Hartmann v. Cal.*
2 *Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1123 (9th Cir. 2013) (citations omitted).

3 To state an equal protection claim, a claimant “must allege facts plausibly
4 showing that ‘the defendants acted with an intent or purpose to discriminate against
5 [them] based upon membership in a protected class’” such as race, religion, or
6 national origin. *Id.* (alteration in original) (quoting *Thornton v. City of St. Helens*,
7 425 F.3d 1158, 1166 (9th Cir. 2005)); *see also New Orleans v. Dukes*, 427 U.S.
8 297, 303 (1975) (noting that “suspect distinctions such as race, religion, or
9 alienage” are protected classes for equal protection purposes). “Intentional
10 discrimination means that a defendant acted at least in part *because of* a plaintiff’s
11 protected status.” *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003)
12 (emphasis in original) (quoting *Maynard v. City of San Jose*, 37 F.3d 1396, 1404
13 (9th Cir. 1994)). An equal protection claim “must plead intentional unlawful
14 discrimination or allege facts that are at least susceptible of an inference of
15 discriminatory intent.” *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022,
16 1026 (9th Cir. 1998).

17 Plaintiff’s Equal Protection claim fails for three reasons. First, the SAC fails
18 to allege that Plaintiff is a member of a protected class. Second, the SAC contains
19 no allegations of discrimination. Third, the SAC does not contain any allegations
20 that Defendant acted with the intent to discriminate against Plaintiff because of
21 Plaintiff’s protected status. If Plaintiff intends to file a Third Amended Complaint
22 with an Equal Protection claim, he must correct these deficiencies or risk dismissal
23 of this claim with prejudice.

24 25 **B. The SAC Fails to State an Eighth Amendment Claim**

26 Though the SAC does not explicitly assert a claim under the Eighth
27 Amendment, it cites the Eighth Amendment’s “deliberate indifference” standard.
28 Therefore the Court also analyzes the sufficiency of the allegations under the Eighth

1 Amendment. *See Wilhelm*, 680 F.3d at 1121 (“where the petitioner is *pro se*,
2 particularly in civil rights cases, [courts should] construe the pleadings liberally and
3 . . . afford the petitioner the benefit of any doubt.”) (alteration in original) (quoting
4 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010); *see also Slayton v. Willingham*,
5 726 F.2d 631, 634 n.7 (10th Cir. 1984) (“A *pro se* litigant’s mere citation of the
6 wrong constitutional amendment does not preclude his cause of action so long as
7 the facts he alleges state a claim under an obviously applicable constitutional
8 provision.”); *Ellis v. Brady*, Case No. 16cv1419 WQH (NLS), 2017 U.S. Dist.
9 LEXIS 203458, at *15-16 (S.D. Cal. Dec. 8, 2017) (concluding that the court could
10 address plaintiff’s claim asserted under the wrong constitutional amendment, as “it
11 is the factual allegations, not the legal labels attached, which determine the issue”).

12 “The government has an ‘obligation to provide medical care for those whom
13 it is punishing by incarceration,’ and failure to meet that obligation can constitute
14 an Eighth Amendment violation cognizable under § 1983.” *Colwell v. Bannister*,
15 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103-
16 05 (1976)). “To maintain an Eighth Amendment claim based on prison medical
17 treatment, an inmate must show deliberate indifference to serious medical needs.”
18 *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quotations omitted). A
19 plaintiff must allege sufficient facts to satisfy a two-prong test: (1) an objective
20 standard—the existence of a serious medical need; and (2) a subjective standard—
21 deliberate indifference. *Colwell*, 763 F.3d at 1066.

22 A “serious medical need” exists if “failure to treat a prisoner’s condition
23 could result in further significant injury or the ‘unnecessary and wanton infliction of
24 pain.’” *Jett*, 439 F.3d at 1096 (citing *Estelle*, 429 U.S. at 104). Neither result is the
25 type of “routine discomfort [that] is ‘part of the penalty that criminal offenders pay
26 for their offenses against society.’” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th
27 Cir. 1992) (alteration in original) (quoting *Hudson v. McMillian*, 503 U.S. 1, 9
28 (1992)), *overruled in part on other grounds by WMX Techs., Inc. v. Miller*, 104

1 F.3d 1133 (9th Cir. 1997) (en banc). “The existence of an injury that a reasonable
2 doctor or patient would find important and worthy of comment or treatment; the
3 presence of a medical condition that significantly affects an individual’s daily
4 activities; or the existence of chronic and substantial pain are examples of
5 indications that a prisoner has a ‘serious’ need for medical treatment.” *McGuckin*,
6 974 F.2d at 1059-60.

7 The subjective “deliberate indifference” prong “is satisfied by showing (a) a
8 purposeful act or failure to respond to a prisoner’s pain or possible medical need
9 and (b) harm caused by the indifference.” *Jett*, 439 F.3d at 1096. Deliberate
10 indifference may be manifested “when prison officials deny, delay or intentionally
11 interfere with medical treatment,” or in the manner “in which prison physicians
12 provide medical care.” *McGuckin*, 974 F.2d at 1059. However, deliberate
13 indifference is met only if the prison official “knows of and disregards an excessive
14 risk to inmate health or safety; the official must both be aware of facts from which
15 the inference could be drawn that a substantial risk of serious harm exists, and he
16 must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The
17 defendant “must purposefully ignore or fail to respond to the plaintiff’s pain or
18 possible medical need for deliberate indifference to be established.” *See McGuckin*,
19 974 F.2d at 1060. Thus, neither an inadvertent failure to provide adequate medical
20 care, nor mere negligence or medical malpractice (*see Estelle*, 429 U.S. at 105-06),
21 nor a mere delay in medical care (without more) (*Shapley v. Nev. Bd. of State*
22 *Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1984)), nor a difference of opinion
23 over proper medical treatment (*Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)),
24 is sufficient to constitute an Eighth Amendment violation. Even gross negligence is
25 insufficient to establish deliberate indifference to serious medical needs. *See Wood*
26 *v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

27 Here, the SAC does not contain sufficient factual allegations to satisfy the
28 subjective requirement of the Eighth Amendment—that is, there are no allegations

1 that Defendant Lameer plausibly acted with deliberate indifference to Plaintiff's
2 health. If Plaintiff intends to file a Third Amended Complaint with an Eighth
3 Amendment claim, he must correct this deficiency or risk dismissal of this claim
4 with prejudice.

5
6 **V. CONCLUSION**

7 For the reasons stated above, the Court **DISMISSES** the SAC **WITH**
8 **LEAVE TO AMEND**. Plaintiff is **ORDERED** within 30 days after the date of this
9 Order to either: (1) file a Third Amended Complaint, or (2) advise the Court that
10 Plaintiff does not intend to file a Third Amended Complaint.

11 The Third Amended Complaint must cure the pleading defects discussed
12 above and shall be complete in itself without reference to the SAC. *See* L.R. 15-2
13 (“Every amended pleading filed as a matter of right or allowed by order of the
14 Court shall be complete including exhibits. The amended pleading shall not refer to
15 the prior, superseding pleading.”). This means that Plaintiff must allege and plead
16 any viable claims in the Third Amended Complaint again. Plaintiff shall not
17 include new defendants or new allegations that are not reasonably related to the
18 claims asserted in the Second Amended Complaint.

19 In any amended complaint, Plaintiff should confine his allegations to those
20 operative facts supporting each of his claims. Plaintiff is advised that pursuant to
21 Federal Rule of Civil Procedure 8(a), all that is required is a “short and plain
22 statement of the claim showing that the pleader is entitled to relief.” **Plaintiff**
23 **strongly is encouraged to utilize the standard civil rights complaint form when**
24 **filing any amended complaint, a copy of which is attached.** In any amended
25 complaint, Plaintiff should identify the nature of each separate legal claim and make
26 clear what specific factual allegations support each of his separate claims. Plaintiff
27 strongly is encouraged to keep his statements concise and to omit irrelevant details.
28 It is not necessary for Plaintiff to cite case law, include legal argument, or attach

1 exhibits at this stage of the litigation. Plaintiff also is advised to omit any claims for
2 which he lacks a sufficient factual basis.

3 **The Court explicitly cautions Plaintiff that failure to timely file a Third**
4 **Amended Complaint, or timely advise the Court that Plaintiff does not intend**
5 **to file a Third Amended Complaint, will result in a recommendation that this**
6 **action, or portions thereof, be dismissed with prejudice for failure to prosecute**
7 **and/or failure to comply with court orders pursuant to Federal Rule of Civil**
8 **Procedure 41(b).**

9 If Plaintiff no longer wishes to pursue this action in its entirety or with
10 respect to particular Defendants or claims, he voluntarily may dismiss all or any
11 part of this action by filing a Notice of Dismissal in accordance with Federal Rule
12 of Civil Procedure 41(a)(1). **A form Notice of Dismissal is attached for**
13 **Plaintiff's convenience.**

14 Plaintiff is advised that this Court's determination herein that the allegations
15 in the Complaint are insufficient to state a particular claim should not be seen as
16 dispositive of the claim. Accordingly, although the undersigned Magistrate Judge
17 believes Plaintiff has failed to plead sufficient factual matter in the pleading,
18 accepted as true, to state a claim for relief that is plausible on its face, Plaintiff is
19 not required to omit any claim or defendant in order to pursue this action.

20 However, if Plaintiff decides to pursue a claim in an amended complaint that the
21 undersigned previously found to be insufficient, then pursuant to 28 U.S.C. § 636,
22 the undersigned ultimately may submit to the assigned District Judge a
23 recommendation that such claim may be dismissed with prejudice for failure to

24 //

25 //

26 //

27 //

28 //

1 state a claim, subject to Plaintiff's right at that time to file objections. *See* Fed. R.
2 Civ. P. 72(b); C.D. Cal. L.R. 72-3.

3
4 **IT IS SO ORDERED.**

5
6 DATED: Feb. 4, 2019

7
8 
9 _____
10 MARIA A. AUDERO
11 UNITED STATES MAGISTRATE JUDGE

12 Attachments:

13 Form Civil Rights Complaint

14 Form Notice of Dismissal

15

16

17

18

19

20

21

22

23

24

25

26

27

28