

1 **II.**

2 **PROCEDURAL HISTORY**

3 On June 20, 2016, Plaintiff, an inmate in the custody of the Federal Bureau
4 of Prisons (“BOP”) at United States Penitentiary Victorville (“USP Victorville”),
5 constructively filed¹ a Complaint alleging Defendants violated his Eighth
6 Amendment right by failing to treat him for Human Immunodeficiency Virus
7 (“HIV”). ECF Docket No. (“Dkt.”) 1, Compl. Though Plaintiff expressed his
8 personal belief he was HIV positive, it was unclear from the Complaint whether
9 Plaintiff had actually been diagnosed and whether prison officials knew about the
10 alleged diagnosis. *Id.* Thus, on September 29, 2016, the Court dismissed
11 Plaintiff’s original Complaint with leave to amend for failure to state a claim. Dkt.
12 14, Order.

13 On October 13, 2016, Plaintiff constructively filed a First Amended
14 Complaint (“FAC”) against Defendants in both their official and individual
15 capacities. Dkt. 15, FAC at 3-4. In the FAC, Plaintiff alleged Defendants failed to
16 provide him with appropriate treatment for his alleged HIV and fungal diagnosis in
17 violation of the Eighth Amendment. *Id.* at 3-6. Plaintiff, however, appeared to
18 concede he had never been diagnosed as HIV positive. *See id.* at 10, 11, 13, 15-17,
19 25. In fact, Plaintiff conceded Defendants had administered an HIV test, and the
20 results were negative. *See id.* Thus, on November 9, 2016, the Court again
21 dismissed Plaintiff’s FAC with leave to amend for failure to state a claim and
22 granted Plaintiff until November 30, 2016 to file a SAC. Dkt. 16, Order.

23 On November 29, 2016, Plaintiff filed a request for an extension of time to
24 file a SAC. Dkt. 17, Request. On December 7, 2016, the Court granted Plaintiff’s
25 request, allowing Plaintiff until January 10, 2017 to file a SAC. Dkt. 18, Order.

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¹ Under the “mailbox rule,” when a *pro se* prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively “filed” on the date it is signed. *Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir. 2010).

1 On January 25, 2017, the Court issued a Report and Recommendation
2 (“Report”) that the matter be dismissed for failure to prosecute and to comply
3 with court orders. Dkt. 19. On February 6, 2017, Plaintiff filed Objections to the
4 Report claiming he mailed a SAC on January 6, 2017. Dkt. 21. Hence, on February
5 24, 2017, the Court vacated its Report and ordered Plaintiff file a SAC no later than
6 March 24, 2017. Dkt. 22.

7 On March 23, 2017, the Court received a request for an extension of time to
8 file a SAC from Plaintiff. Dkt. 23. The Court granted Plaintiff’s request and
9 ordered the SAC filed by April 27, 2017. Dkt. 24. On May 3, 2017, the Court
10 issued a Report and Recommendation that the matter be dismissed for failure to
11 prosecute and to comply with court orders.² Dkt. 25.

12 On April 25, 2017, Plaintiff constructively filed the instant SAC.

13 III.

14 ALLEGATIONS IN THE SAC

15 In the SAC, Plaintiff alleges Defendants have failed to treat him for his
16 “serious medical issue.” Dkt. 27, SAC at 5. Plaintiff alleges he “knows his health
17 is getting worse[] as time goes on;” yet, he is not receiving any treatment. Id.
18 Plaintiff additionally claims he cannot “hold [] food [i]n his stomach,” and he must
19 “use the restroom [during] every meal.” Id. Plaintiff alleges Defendants are
20 “aware of the serious medical issue” and that he “spoke to medical about these
21 serious medical issue[s], [but] they refuse to treat the ailment.” Id. Plaintiff claims
22 “Defend[]ants can not argue they did not know about the complaints that [he]
23 made to the medical department and to them.” Dkt. 27-2 at 1.

24 As a result of his injuries, Plaintiff is seeking “declaratory, monetary, [and]
25 punitive damages” for “a total of \$1,000,000.00”; and injunctive relief to obtain
26 from an outside health care giver an independent test for HIV.” Dkt. 27 at 6.

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28 ² As Plaintiff has filed a SAC, the Court will vacate the May 3, 2017 Report and Recommendation.

1 Plaintiff requests the Court grant his “civil rights complaint facts about [his] HIV-
2 AIDS that is pending in [] this honorable court.” Dkt. 27-1 at 1.

3 IV.

4 **STANDARD OF REVIEW**

5 As Plaintiff is proceeding in forma pauperis, the Court must screen the SAC
6 and is required to dismiss the case at any time if it concludes the action is frivolous
7 or malicious, fails to state a claim on which relief may be granted, or seeks
8 monetary relief against a defendant who is immune from such relief. 28 U.S.C. §
9 1915(e)(2)(B); 28 U.S.C. § 1915A(b); see Barren v. Harrington, 152 F.3d 1193, 1194
10 (9th Cir. 1998).

11 In determining whether a complaint fails to state a claim for screening
12 purposes, the Court applies the same pleading standard from Rule 8 of the Federal
13 Rules of Civil Procedure (“Rule 8”) as it would when evaluating a motion to
14 dismiss under Federal Rule of Civil Procedure 12(b)(6). See Watison v. Carter,
15 668 F.3d 1108, 1112 (9th Cir. 2012). Under Rule 8(a), a complaint must contain a
16 “short and plain statement of the claim showing that the pleader is entitled to
17 relief.” Fed. R. Civ. P. 8(a)(2).

18 A complaint may be dismissed for failure to state a claim “where there is no
19 cognizable legal theory or an absence of sufficient facts alleged to support a
20 cognizable legal theory.” Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007)
21 (citation omitted). In considering whether a complaint states a claim, a court must
22 accept as true all of the material factual allegations in it. Hamilton v. Brown, 630
23 F.3d 889, 892-93 (9th Cir. 2011). However, the court need not accept as true
24 “allegations that are merely conclusory, unwarranted deductions of fact, or
25 unreasonable inferences.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th
26 Cir. 2008) (citation omitted). Although a complaint need not include detailed
27 factual allegations, it “must contain sufficient factual matter, accepted as true, to
28 ‘state a claim to relief that is plausible on its face.’” Cook v. Brewer, 637 F.3d

1 1002, 1004 (9th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct.
2 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when it “allows the
3 court to draw the reasonable inference that the defendant is liable for the
4 misconduct alleged.” Cook, 637 F.3d at 1004 (citation omitted).

5 “A document filed pro se is to be liberally construed, and a pro se complaint,
6 however inartfully pleaded, must be held to less stringent standards than formal
7 pleadings drafted by lawyers.” Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir.
8 2008) (citation omitted). “[W]e have an obligation where the p[laintiff] is pro se,
9 particularly in civil rights cases, to construe the pleadings liberally and to afford the
10 p[laintiff] the benefit of any doubt.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir.
11 2012) (citation omitted).

12 If the court finds the complaint should be dismissed for failure to state a
13 claim, the court has discretion to dismiss with or without leave to amend. Lopez v.
14 Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Leave to amend should be granted
15 if it appears possible the defects in the complaint could be corrected, especially if
16 the plaintiffs are pro se. Id. at 1130-31; see also Cato v. United States, 70 F.3d 1103,
17 1106 (9th Cir. 1995). However, if, after careful consideration, it is clear a complaint
18 cannot be cured by amendment, the court may dismiss without leave to amend.
19 Cato, 70 F.3d at 1107-11; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th
20 Cir. 2009).

21 V.

22 DISCUSSION

23 **A. PLAINTIFF FAILS TO STATE AN OFFICIAL CAPACITY CLAIM** 24 **AGAINST ANY DEFENDANT**

25 **(1) APPLICABLE LAW**

26 To bring a Bivens action against Defendants in their official capacity as
27 medical staff and/or officials at USP Victorville, Plaintiff must present facts
28 demonstrating Defendants “committed the alleged constitutional violation

1 pursuant to a formal governmental policy or a ‘longstanding practice or custom
2 which constitutes the standard operating procedure’” of the governmental entity.
3 Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (quoting Jett v. Dallas
4 Indep. Sch. Dist., 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989));
5 Monell v. Dep’t of Soc. Servs. of City of New York, 436 U.S. 658, 694, 98 S. Ct.
6 2018, 56 L. Ed. 2d 611 (1978); Ting v. United States, 927 F.2d 1504, 1511 (9th Cir.
7 1991) (following the general trend of incorporating section 1983 law into Bivens
8 suits). Bivens claims brought against government actors in their official capacity
9 cannot be based on a theory of respondeat superior liability. See Iqbal, 556 U.S. at
10 676. Thus, Plaintiff must provide facts that allege more than Defendants’ personal
11 involvement; and instead, Plaintiff must present facts of a government policy,
12 practice, or custom which is: “(1) the cause in fact and (2) the proximate cause of
13 the constitutional deprivation.” Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996);
14 Gillette, 979 F.2d at 1346.

15 (2) ANALYSIS

16 Here, Plaintiff’s claims against Defendants in their official capacity fail
17 because Plaintiff does not identify a policy, practice, or custom that was “(1) the
18 cause in fact and (2) the proximate cause of the constitutional deprivation.” See
19 Trevino, 99 F.3d at 918. Thus, absent specific allegations identifying a policy,
20 practice, or custom that caused Defendants to be deliberately indifferent to a
21 serious medical need, Plaintiff fails to state a claim against any Defendant in their
22 official capacity.

23 **B. PLAINTIFF FAILS TO ALLEGE AN EIGHTH AMENDMENT** 24 **DELIBERATE INDIFFERENCE CLAIM AGAINST ANY** 25 **DEFENDANT**

26 (1) APPLICABLE LAW

27 Prison officials or private physicians under contract to treat inmates “violate
28 the Eighth Amendment if they are ‘deliberately indifferent to a prisoner’s serious

1 medical needs.’” Peralta v. Dillard, 744 F.3d 1076, 1081 (9th Cir. 2014) (quoting
2 Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)
3 (alterations omitted)); Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 128
4 L. Ed. 2d 811 (1994). To assert a deliberate indifference claim, a prisoner plaintiff
5 must show the defendant: (1) deprived him of an objectively serious medical need,
6 and (2) acted with a subjectively culpable state of mind. Wilson v. Seiter, 501 U.S.
7 294, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

8 “A medical need is serious if failure to treat it will result in ‘significant injury
9 or the unnecessary and wanton infliction of pain.’” Peralta, 744 F.3d at 1081
10 (quoting Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)). “A prison official is
11 deliberately indifferent to [a serious medical] need if he ‘knows of and disregards
12 an excessive risk to inmate health.’” Id. at 1082 (quoting Farmer, 511 U.S. at 837).
13 The “official must both be aware of facts from which the inference could be drawn
14 that a substantial risk of serious harm exists, and he must also draw the inference.”
15 Farmer, 511 U.S. at 837.

16 Deliberate indifference “requires more than ordinary lack of due care.”
17 Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting Farmer, 511
18 U.S. at 835). “Deliberate indifference ‘may appear when prison officials deny,
19 delay, or intentionally interfere with medical treatment, or it may be shown by the
20 way in which prison physicians provide medical care.’” Id. (quoting Hutchinson v.
21 United States, 838 F.2d 390, 394 (9th Cir. 1988)). In either case, however, the
22 indifference to the inmate’s medical needs must be substantial – negligence,
23 inadvertence, or differences in medical judgment or opinion do not rise to the level
24 of a constitutional violation. Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir.
25 2004) (negligence constituting medical malpractice is not sufficient to establish an
26 Eighth Amendment violation).

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1 If Plaintiff chooses to file a Third Amended Complaint, Plaintiff must clearly
2 designate on the face of the document that it is the “Third Amended Complaint,”
3 it must bear the docket number assigned to this case, and it must be retyped or
4 rewritten in its entirety, preferably on the court-approved form. Plaintiff shall not
5 include new defendants or new allegations that are not reasonably related to the
6 claims asserted in the SAC. In addition, the Third Amended Complaint must be
7 complete without reference to the SAC or any other pleading, attachment, or
8 document.

9 An amended complaint supersedes the preceding complaint. Ferdik v.
10 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the Court will
11 treat all preceding complaints as nonexistent. Id. Because the Court grants
12 Plaintiff leave to amend as to all his claims raised here, any claim raised in a
13 preceding complaint is waived if it is not raised again in the Third Amended
14 Complaint. Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012).

15 2. Alternatively, Plaintiff may voluntarily dismiss the action without
16 prejudice, pursuant to Federal Rule of Civil Procedure 41(a). **The Clerk of Court**
17 **is directed to mail Plaintiffs a blank Notice of Dismissal Form, which the**
18 **Court encourages Plaintiffs to use.**

19 The Court advises Plaintiff that it generally will not be well-disposed toward
20 another dismissal with leave to amend if Plaintiff files a Third Amended Complaint
21 that continues to include claims on which relief cannot be granted. “[A] district
22 court’s discretion over amendments is especially broad ‘where the court has
23 already given a plaintiff one or more opportunities to amend his complaint.’”
24 Ismail v. County of Orange, 917 F. Supp.2d 1060, 1066 (C.D. Cal. 2012) (citations
25 omitted); see also Ferdik, 963 F.2d at 1261. Thus, **if Plaintiff files a Third**
26 **Amended Complaint with claims on which relief cannot be granted, the Third**
27 **Amended Complaint will be dismissed without leave to amend and with**
28 **prejudice.**

1 **Plaintiff is explicitly cautioned that failure to timely file a Third**
2 **Amended Complaint will result in this action being dismissed with prejudice**
3 **for failure to state a claim, prosecute and/or obey Court orders pursuant to**
4 **Federal Rule of Civil Procedure 41(b).**

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6 Dated: May 30, 2017



HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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