

1 **I. Procedural History**

2 Plaintiff is a state prisoner proceeding in forma pauperis with appointed counsel in
3 this civil rights action brought pursuant to 42 U.S.C. § 1983. He has consented to
4 Magistrate judge jurisdiction. (ECF No. 5.) No other parties have appeared.

5 On November 15, 2016, while Plaintiff was proceeding pro se, the Court screened
6 his first amended complaint (“FAC”) and found that it stated cognizable claims against
7 Defendant Does 1-3, medical professionals at Kern Valley State Prison (“KVSP”), and
8 Does 4-18, members of the Headquarters Utilization Management Committee (“HUMC”)
9 employed by the California Department of Corrections and Rehabilitation (“CDCR”) for
10 failing to treat Plaintiff for diagnosed Hepatitis C virus (“HCV”) in violation of the Eighth
11 Amendment. (ECF No. 10.)

12 The Court opened discovery for the limited purpose of identifying the names of
13 the Doe Defendants. (Id.) Plaintiff was directed to inform the Court of the documents
14 needed from CDCR or the prison to identify the Doe Defendants. (Id.)

15 On March 3, 2017, Plaintiff, through his newly appointed counsel, filed a request
16 for the issuance of a subpoena duces tecum directed to Plaintiff’s current institution,
17 High Desert State Prison (“HDSP”), to produce portions of Plaintiff’s medical record, and
18 another to CDCR for a complete roster of HUM Committee members from January 1,
19 2010 to January 7, 2015. (ECF No. 13.) On April 25, 2017, the Court granted in part
20 Plaintiff’s request for the names of the HUMC members, and issued a subpoena for the
21 names of the individuals currently serving on the HUMC since they had been sued in
22 their official capacities. (On April 26, 2017, Plaintiff informed the Court he had received
23 his medical record from HDSP, and so requested that that subpoena be voided. (ECF
24 No. 16.) His latter request was granted. (ECF No. 17.))

25 On June 12, 2017, the CDCR, as a party in interest, filed a motion to quash the
26 subpoena for the names of the HUMC members. (ECF No. 20.) Plaintiff did not file an
27 opposition; rather, on July 7, 2017, he filed a motion for leave to file a second amended
28

1 complaint (“SAC”), stating therein that the proposed SAC would render the CDCR’s
2 motion to quash moot. (ECF No. 21.) The CDCR filed an opposition. (ECF No. 22.)
3 Plaintiff filed a reply. (ECF No. 23.) Both matters are submitted and will be addressed
4 here without oral argument. Local Rule 230(l).

5 **II. Motion to Amend**

6 **A. Legal Standard**

7 A party may amend its pleading once as a matter of course at any time before a
8 responsive pleading is served and up to twenty-one days after service of a responsive
9 pleading. Fed. R. Civ. P. 15(a)(1)(B). Otherwise, a party may amend only by leave of
10 the court or by written consent of the adverse party, and leave shall be freely given when
11 justice so requires. Fed. R. Civ. P. 15(a)(2). In this case, Plaintiff has already amended
12 once, pursuant to the Court’s screening order. (See ECF No. 6.) Therefore, Plaintiff may
13 not file a SAC without leave of court. Furthermore, as Plaintiff is a prisoner proceeding in
14 forma pauperis, under 28 U.S.C. § 1915A(a), the Court is required to screen his
15 complaint prior to service.

16 Local Rule 220 requires that an amended complaint be complete in itself without
17 reference to any prior pleading. As a general rule, an amended complaint supersedes
18 the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967).

19 “Rule 15(a) is very liberal and leave to amend ‘shall be freely given when justice
20 so requires.’” AmerisourceBergen Corp. v. Dialysis West, Inc., 465 F.3d 946, 951 (9th
21 Cir. 2006) (quoting Fed. R. Civ. P. 15(a)). In determining whether to grant leave to
22 amend, courts generally consider four factors: (1) bad faith, (2) undue delay, (3)
23 prejudice to the opposing party, and (4) futility of amendment. In re Korean Airlines Co.,
24 Ltd., 642 F.3d 685, 701 (9th Cir. 2011) (citing Kaplan v. Rose, 49 F.3d 1363, 1370 (9th
25 Cir. 1994)) (quotation marks omitted); also Foman v. Davis, 371 U.S. 178, 182 (1962);
26 Waldrip v. Hall, 548 F.3d, 729, 732 (9th Cir. 2008); AmerisourceBergen Corp. v. Dialysis
27 West, Inc., 465 F.3d 946, 951 (9th Cir. 2006); Eminence Capital, LLC, 316 F.3d at 1052.

1 In evaluating whether a proposed amendment is futile, the Court must determine
2 whether the amendment would withstand a motion to dismiss under Federal Rule of Civil
3 Procedure 12(b)(6), and in making this evaluation, the Court is confined to review of the
4 proposed amended pleading. Nordyke v. King, 644 F.3d 776, 788 n.12 (9th Cir. 2011)
5 (citing Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (*reh'g en banc*
6 Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012)).

7 Prejudice to the opposing party carries the greatest weight, and absent prejudice,
8 or a strong showing of any of the remaining factors, there exists a presumption in favor
9 of granting leave to amend. Eminence Capital, LLC, 316 F.3d at 1052 (quotation marks
10 omitted).

11 **B. Allegations in Plaintiff's FAC**

12 At the time the FAC was filed, Plaintiff was incarcerated at KVSP in Delano,
13 California and infected with genotype 1 HCV. He sued Does 1 through 3, physicians and
14 primary care providers ("medical staff") employed by the California Department of
15 Corrections and Rehabilitation ("CDCR") at KVSP, and Does 4 through 18, members of
16 the Headquarters Utilization Management Committee ("HUMC") employed by CDCR
17 (collectively, "Defendants"). He alleged: Does 1 through 3 were each directly
18 responsible for Plaintiff's medical care. Does 4 through 18 were responsible for the
19 implementation of CDCR policies regarding inmate medical care. Defendants violated
20 Plaintiff's right to be free from inhumane conditions of confinement under the Eighth
21 Amendment by refusing to prescribe Plaintiff Harvoni (or a similar medication) even
22 though it has been shown to be 99% effective in curing patients with HCV. Although not
23 directly involved in Plaintiff's treatment, Does 4 through 18 violated Plaintiff's rights by
24 promulgating a policy dictating that inmates may receive treatment for HCV only after
25 their disease has advanced to at least stage 3. Plaintiff alleges that individuals at stage
26 3 have already begun to experience cirrhosis of the liver and/or liver failure.

1 The undersigned found Plaintiff's complaint stated cognizable claims against
2 Does 1-3 in their personal capacities and Does 4-18 in their official capacities.

3 **C. Allegations in Proposed SAC**

4 Plaintiff is now incarcerated at HDSP. He names as Defendants Drs. Schaeffer
5 and Akanno of KVSP (in their individual capacities), Dr. Bzoskie of HDSP (in his
6 individual and official capacity), and Does 1-6. Plaintiff also sues the HUMC (in its official
7 capacity) and Does 7-20, current or former members of the HUMC (in their individual
8 capacities.)

9 The underlying allegations regarding HCV and the available treatment options
10 remain as described in the Court's previous screening Orders and need not be repeated
11 herein. Otherwise, Plaintiff's essential allegations may be summarized as follows:

12 On May 21, 2014, Plaintiff was seen by Dr. Schaeffer for an annual exam.
13 Although Dr. Schaeffer knew of Plaintiff's illness through of review of his medical history,
14 she did not order treatment for his HCV. On January 7, 2015, Plaintiff underwent an in-
15 depth medical assessment in which his medical history, tests, and symptoms were
16 discussed and lab tests were ordered. On February 25, 2015 Plaintiff saw a nurse to
17 discuss his test results. It was determined that Plaintiff was ineligible for HCV treatment.
18 On March 8, 2015, Plaintiff was seen by a nurse practitioner regarding an appeal he filed
19 concerning his HCV treatment. He was again denied treatment. On May 28, 2015,
20 Plaintiff saw Dr. Akanno for a wellness visit and tests were again ordered. Plaintiff
21 brought up his HCV symptoms with Dr. Akanno, however he was again refused
22 treatment. On June 15, 2015, Dr. Akanno reviewed Plaintiff's test results, and Plaintiff
23 was again denied treatment. On December 21, 2015, after he was transferred to HDSP,
24 Plaintiff was seen by Dr. Bzoskie, who also failed to prescribe Plaintiff medication to treat
25 his HCV. Does 1-6 are other medical professionals, currently unknown to Plaintiff, who
26 were involved in his treatment or denial thereof at either KVSP or HDSP.

1 Does 7-20 are members of the HUMC. This committee is responsible for
2 developing policies and procedures to ensure statewide adherence to a utilization
3 management program. As members of the HUMC, these Defendants develop California
4 Correctional Health Care Services (“CCHCS”) policies. The HUMC members know that
5 HCV constitutes a serious medical need that, left untreated, can lead to permanent liver
6 damage and death. Despite this, these Defendants set forth a policy which has the
7 intended effect of denying Plaintiff access to effective treatments for his HCV.

8 Plaintiff alleges four causes of action: 1) a claim for damages against Defendants
9 Schaeffer, Akanno, and Bzoskie and doctor Does 1-6 for cruel and unusual punishment
10 in violation of the Eighth and Fourteenth Amendments; 2) a claim for damages against
11 HUMC members Does 7-20 for cruel and unusual punishment in violation of the Eighth
12 and Fourteenth Amendments; 3) a claim for injunctive relief against the HUMC, Dr.
13 Bzoskie, and Does 1-6; and 4) a claim for damages for negligence against all
14 Defendants.

15 **D. Discussion**

16 Plaintiff argues that amendment is appropriate because he now has the benefit of
17 counsel who can identify additional claims arising from Plaintiff’s allegations.

18 The CDCR, as a party in interest, argues that Plaintiff’s motion to amend should
19 be denied as futile with regard to the second, third, and fourth causes of action because
20 the claims would be subject to dismissal for failure to state a claim, Eleventh Amendment
21 immunity, qualified immunity, and failure to exhaust administrative remedies.

22 At the pleading stage, Plaintiff’s allegations that Defendants were deliberately
23 indifferent to a substantial risk to Plaintiff’s health when they refused to prescribe
24 medication to treat his HCV and/or enacted blanket policies intended to deny treatment
25 to an inmate in Plaintiff’s position are more than sufficient to state a claim under the
26 Eighth Amendment. While the HUMC itself is immune from suit under the Eleventh
27 Amendment, Wolfson v. Brammer, 616 F.3d 1045, 1065-66 (9th Cir. 2010), dismissal of
28

1 the entire SAC on these grounds is not warranted. As Plaintiff's allegations at the
2 pleading stage are sufficient to allege constitutional violation, and there are insufficient
3 facts from which the Court can determine that the HUMC members' actions were
4 reasonable under clearly established law, a finding of qualified immunity cannot be made
5 at this time. Mattos v. Agarano, 661 F.3d 433, 440 (9th Cir. 2011) ("The doctrine of
6 qualified immunity protects government officials 'from liability for civil damages insofar as
7 their conduct does not violate clearly established statutory or constitutional rights of
8 which a reasonable person would have known.'") (quoting Pearson v. Callahan, 555 U.S.
9 223, 231 (2009)).

10 The CDCR argues that since Plaintiff does not plead compliance with California's
11 Tort Claims Act, his state law negligence claim is barred for failure to exhaust
12 administrative remedies. The state Tort Claims Act requires that a tort claim against a
13 public entity or its employees be presented to the California Victim Compensation and
14 Government Claims Board ("the Board") no more than six months after the cause of
15 action accrues. Cal. Govt. Code §§ 905.2, 910, 911.2, 945.4, 950-950.2 (West 2009).
16 Presentation of a written claim, and action on or rejection of the claim are conditions
17 precedent to suit. State v. Super. Ct. of Kings Cty. (Bodde), 90 P.3d 116, 124 (2004);
18 Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995).

19 Plaintiff seeks leave to amend his complaint to plead facts showing that he has
20 complied with the Act. (ECF No. 23 at 4.) That request will be granted. Accordingly,
21 Defendant's challenge based on non-compliance with the California Tort Claims Act will
22 be denied without prejudice.

23 The Court will proceed to screening Plaintiff's SAC.

24 **E. Screening of SAC**

25 The Court is required to screen complaints brought by prisoners seeking relief
26 against a governmental entity or an officer or employee of a governmental entity. 28
27 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner
28

1 has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon
2 which relief may be granted, or that seek monetary relief from a defendant who is
3 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). Under section 1983, Plaintiff
4 must demonstrate that each defendant personally participated in the deprivation of his
5 rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

6 Again, inasmuch as the substance and legal standards underlying Plaintiff’s
7 claims remain unchanged, the Court will not repeat the analyses contained in its
8 previous screening. For the reasons set forth in that order (ECF No. 13), Plaintiff is
9 entitled to proceed on his Eighth Amendment medical indifference claims against Drs.
10 Schaeffer, Akanno, and Bzoskie for denying Plaintiff treatment for his HCV. Plaintiff may
11 proceed against these Defendants in their individual capacities only.

12 Likewise, Plaintiff will be permitted to proceed against Does 7-20 in their individual
13 capacities for implementing a policy that they knew or should have known would place
14 an inmate in Plaintiff’s situation at risk of suffering serious harm.

15 However, as the CDCR correctly points out, the Eleventh Amendment precludes
16 suits against the HUMC itself. Therefore, that claim will be dismissed without leave to
17 amend. Furthermore, Plaintiff’s general allegations against Does 1-6 are insufficient to
18 link these Defendants to the alleged violations. Leer v. Murphy, 844 F.2d 628, 634 (9th
19 Cir. 1988) (plaintiff may not attribute liability to a group of defendants, but must “set forth
20 specific facts as to each individual defendant’s” deprivation of his rights.) Plaintiff will be
21 granted leave to amend his claims against Does 1-6.

22 The proposed SAC omits Plaintiff’s original claim against the HUMC members in
23 their official capacities. The Court assumes this is error since, to the extent Plaintiff
24 seeks injunctive relief in the form of a change in policy, only those committee members
25 currently serving or serving at the time the injunctive relief is granted (if it is granted)
26 would be able to effectuate such a change. It is possible that the HUMC members who
27 implemented the offending policy are no longer serving, or that the members currently
28

1 serving will not be serving at the conclusion of this case. Suing these members in their
2 official capacities allows for their replacements to be automatically substituted into the
3 lawsuit should they step down or otherwise relinquish their positions of power. Hafer v.
4 Melo, 502 U.S. 21, 25 (1991) (because a suit against a state official in his or her official
5 capacity is treated as a suit against the state, in which the “real party in interest . . . is
6 the governmental entity and not the named official,” when such named official leaves
7 office, “[his or her] successor automatically assumes [his or her] role in the litigation.”)
8 Plaintiff will thus be given leave to amend his complaint to re-plead his claim against the
9 HUMC members in their official capacities.

10 And, as explained above, Plaintiff will also be given an opportunity to amend his
11 complaint to plead compliance with the Tort Claims Act with regard to his negligence
12 claim.

13 **III. Motion to Quash**

14 **A. Legal Standard**

15 Rule 45(c)(3)(A)(iii) mandates quashing a subpoena if it “requires disclosure of
16 privileged or other protected matter, if no exception or waiver applies[.]” Jennings v.
17 Moreland, No. CIV S-08-1305 LKK, 2012 WL 761360, at *1 (E.D. Cal. Mar. 6, 2012).

18 In civil rights cases brought under section 1983, questions of privilege are
19 resolved by federal law. Kerr v. United States Dist. Ct. for the N. Dist. of Cal., 511 F.2d
20 192, 197 (9th Cir. 1975). “State privilege doctrine, whether derived from statutes or court
21 decisions, is not binding on federal courts in these kinds of cases.” Kelly v. City of San
22 Jose, 114 F.R.D. 653, 655–56 (N.D. Cal. 1987). “Federal common law recognizes a
23 qualified privilege for official information.” Sanchez v. City of Santa Ana, 936 F.2d 1027,
24 1033 (9th Cir. 1990) (citing Kerr, 511 F.2d at 198.) The discoverability of official
25 documents should be determined under the “balancing approach that is moderately pre-
26 weighted in favor of disclosure.” Kelly, 114 F.R.D. at 661. The party asserting the
27 privilege must properly invoke the privilege by making a “substantial threshold showing”
28

1 that the privilege should apply. Id. at 669-70.

2 **B. CDCR's Arguments**

3 The CDCR moves to quash the subpoena seeking names of the HUMC members
4 on three grounds: 1) the information sought is irrelevant; 2) it is protected by the official
5 information privilege; and 3) it is protected by the deliberative process privilege. As to the
6 first point, the CDCR argues that since the HUMC works as a unit, no single HUMC
7 member can appropriately respond to Plaintiff's request for injunctive relief and so the
8 identities of each member are irrelevant. On the second point, CDCR argues that the
9 identities of the HUMC committee members, all private citizens, must be protected to
10 ensure their safety and encourage their open and candid participation in the committee.
11 To their third point, CDCR argues that "it is clear" Plaintiff seeks the names of the
12 individual HUMC members in order to obtain information regarding their individual
13 advisory or "pre-decisional" opinions as well as information about the HUMC decision-
14 making process.

15 **C. Discussion**

16 The CDCR argues that the names of the individual HUMC members are irrelevant
17 since no single person can effectuate policy. However, as the CDCR itself pointed out,
18 HUMC as a unit is immune from suit. If Plaintiff is foreclosed from proceeding against the
19 HUMC members, he would be foreclosed from pursuing a 1983 claim for promulgation
20 an unconstitutional policy. Regardless, Plaintiff has indicated an intent to amend his
21 complaint to include claims against the HUMC members in their individual capacities.
22 Each member's name is therefore relevant.

23 CDCR's arguments regarding privilege are not persuasive. "[A] party moving to
24 quash a subpoena on the grounds of confidentiality or privilege [is required] to provide
25 detailed, case-specific reasons why a complete bar to the disclosure of relevant material
26 is the only viable option in responding to the subpoena." Jennings, 2012 WL 761360 at
27 *2. The CDCR has not done that here. The CDCR claims generally that disclosing the

1 names of HUMC members could subject them to harassment, threats from inmates, or
2 other adverse actions, thereby chilling them from effectively performing their duties.
3 However, a party resisting disclosure on privilege grounds “must *specifically* describe
4 how disclosure of the requested documents in that particular case . . . would be harmful.”
5 Chism v. Cty. of San Bernadino, 159 F.R.D. 531, 535 (C.D. Cal. Dec. 23, 1994)
6 (emphasis added). A general assertion that HUMC members would be chilled from
7 performing their job functions if their identities were disclosed is insufficient.
8 Furthermore, as explained above, the HUMC members are properly named as
9 Defendants in this action, and thus, the need to identify and serve them outweighs any
10 interest of the CDCR in keeping their identities secret.

11 Finally, the deliberative process privilege exempts from discovery information
12 reflecting opinions, recommendations, and deliberations comprising part of a process by
13 which government decisions and policies are formulated. FTC v. Warner Comm's., Inc.,
14 742 F.2d 1156, 1161 (9th Cir.1984). The purpose of the privilege is to shield from public
15 scrutiny any ideas, thoughts, or opinions that are expressed in the process of formulating
16 governmental policies. Assembly of California v. United States Dep't of Commerce, 968
17 F.2d 916, 920 (9th Cir. 1992). The key inquiry in determining whether particular
18 information is “deliberative” is whether disclosure of the information would expose the
19 decision-making process in such a way as to discourage candid discussion within the
20 agency and thereby undermine the agency's ability to perform its functions. Carter v.
21 United States DOC, 307 F.3d 1084, 1090 (9th Cir. 2002). At this stage in the litigation,
22 Plaintiff seeks not evidence of the HUMC deliberations, but rather the names of the
23 HUMC members. He seeks not to challenge the deliberative process, but the conclusion
24 reached. The deliberative process privilege does not apply.

25 For the foregoing reasons, the CDCR’s motion to quash will be denied, and the
26 CDCR will be directed to respond as ordered in ECF No. 15 within ten days.

1 (Among the relief sought in Plaintiff's SAC is a possible preliminary injunction
2 request. (ECF No. 21-3 at 11.) He has not, however, even addressed, much less
3 demonstrated compliance with, the prerequisites to such relief Winter v. Natural
4 Resources Defense Council, Inc., 555 U.S. 7, 20 (2008), so the Court will not analyze
5 the issue at this juncture of the pleadings.)

6 **IV. Conclusion and Order**

7 Based on the foregoing, it is HEREBY ORDERED that:

- 8 1. The CDCR's motion to quash the subpoena duces tecum (ECF No. 20) is
9 DENIED;
- 10 2. The CDCR is ordered to serve a response to the subpoena duces tecum on
11 Plaintiff's counsel within ten (10) days of this order;
- 12 3. Plaintiff's motion to amend (ECF No. 21) is GRANTED;
- 13 4. The Clerk of Court is directed to file the document filed at ECF No. 21-3 as a
14 separate docket entry entitled "SECOND AMENDED COMPLAINT"; and
- 15 5. Plaintiff is DIRECTED to file a third amended complaint identifying, to the
16 extent possible, the Doe Defendants by name and curing the deficiencies
17 noted herein within thirty (30) days of receiving the CDCR's response to the
18 subpoena duces tecum.

19
20 IT IS SO ORDERED.

21 Dated: September 19, 2017

22 /s/ Michael J. Seng
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28