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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARIO MARTINEZ ARIAS,

 Plaintiff,

 v.

A. K. JOHAL, et al.,

 Defendants.

Case No. 1:14-cv-00764 LJO DLB PC

FINDINGS AND RECOMMENDATION
REGARDING DISMISSAL OF COMPLAINT
WITHOUT LEAVE TO AMEND

THIRTY-DAY DEADLINE

Plaintiff Mario Martinez Arias (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on May 19, 2014. On May 14, 2015, the Court screened the complaint and dismissed it with leave to amend for failure to state a claim for relief under § 1983. On June 4, 2015, Plaintiff filed a First Amended Complaint (“FAC”). He names Medical Doctor A. K. Johal, Orthopedic Surgeon S. Smith, and Chief Physician and Surgeon A. Shittu as Defendants.

A. SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek

1 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
2 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
3 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
4 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

5 A complaint must contain “a short and plain statement of the claim showing that the pleader
6 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
7 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
8 do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly,
9 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual matter, accepted as true, to
10 ‘state a claim that is plausible on its face.’” Id. (quoting Twombly, 550 U.S. at 555). While factual
11 allegations are accepted as true, legal conclusions are not. Id.

12 Section 1983 provides a cause of action for the violation of Plaintiff’s constitutional or other
13 federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092
14 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Jones v.
15 Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff’s allegations must link the actions or
16 omissions of each named defendant to a violation of his rights; there is no respondeat superior
17 liability under section 1983. Iqbal, 556 U.S. at 676-77; Simmons v. Navajo County, Ariz., 609 F.3d
18 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009);
19 Jones, 297 F.3d at 934. Plaintiff must present factual allegations sufficient to state a plausible claim
20 for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).
21 The mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal, 556 U.S.
22 at 678; Moss, 572 F.3d at 969.

23 **B. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

24 Plaintiff is currently housed at Salinas Valley State Prison in Soledad, California. The events
25 giving rise to this action took place while Plaintiff was housed at North Kern State Prison (“NKSP”).

26 Plaintiff alleges the following. In 1996, Plaintiff sustained a gunshot injury that required
27 extensive surgeries and medical care. While an inmate at NKSP, Plaintiff requested care for his
28 foot. On November 2, 2012, Defendant Smith examined Plaintiff and recommended surgery to the

1 right foot. On December 4, 2012, Defendant Smith conducted surgery on Plaintiff's right foot.
2 Plaintiff had a removal of a pin in the fourth metatarsal, with a bone graft. Following surgery,
3 Defendant Smith prescribed pain medication and gave post-op orders and outpatient instructions for
4 after care of surgery. Plaintiff was advised to keep the dressing clean and dry for two weeks. No
5 antibiotics or dressing changes were ordered. An order was written for an orthopedic follow-up in
6 two weeks.

7 On December 5, 2012, Plaintiff became concerned over his foot surgery because his dressing
8 had not been changed, the prescribed pain medication was not working, and his foot started to show
9 signs of swelling. Plaintiff notified the nurse and turned in a health care slip. He was told by the
10 nurse that eventually his dressing would be changed.

11 On December 7, 2012, Plaintiff became extremely worried about his surgery and health
12 because no antibiotics had been given and his bandage had become completely crusted through with
13 blood and pus drainage, and his toes turning slightly black. Plaintiff raised the issue with the Second
14 Watch Correctional Sergeant Quintero. Sergeant Quintero observed the foot and escorted Plaintiff to
15 the medical department.

16 At the emergency appointment, Defendant Johal examined Plaintiff. She refused to clean the
17 surgery wound and change Plaintiff's dressing citing "policy"; however, Defendant Johal stated she
18 would prescribe antibiotics. No antibiotics were prescribed. Dr. Johal noted that Plaintiff would be
19 seeing Defendant Smith for his follow-up. Plaintiff alleges Dr. Johal failed to timely treat his right
20 foot and failed to follow through on her statement that she would prescribe antibiotics. Plaintiff
21 alleges he continued to suffer in pain until he was seen for his follow-up.

22 On December 21, 2012, Plaintiff was seen for his follow-up by Defendant Smith. Defendant
23 Smith removed the dressing, the stitches and the posterior splint. He noted it appeared Plaintiff had
24 an infection. The surgery wound was cleaned and the dressing changed. Because of the infection,
25 Defendant Smith ordered daily dressing changes, a medical hold, antibiotics, and pain killers.
26 Plaintiff alleges Defendant Smith violated his Eighth Amendment rights by failing to provide him
27 with adequate medical care, specifically, by failing to order antibiotics and dressing changes.
28 Plaintiff alleges he continued to suffer in pain until the infection subsided.

1 On December 27, 2012, Defendant Shittu discontinued the medical hold. According to the
2 exhibits Plaintiff has attached, Defendant Shittu contacted Defendant Smith, who advised him that
3 he was initially going to put Plaintiff on a medical hold as of December 21, 2012, but that at the
4 present time there was no urgent reason to have Plaintiff on medical hold and Plaintiff could be
5 transferred as scheduled. (See FAC, Ex. C.) Defendant Shittu noted that daily wound dressings
6 would be continued, and the course of antibiotics would be extended for seven more days. A routine
7 orthopedic follow-up would be ordered and the receiving institution would be notified. Plaintiff
8 claims Defendant Shittu should not have removed the medical hold and that Plaintiff should have
9 remained at NKSP until he healed. Plaintiff was transferred on January 8, 2013, which caused a
10 delay in receiving his medical care for three days due to the fact that Corcoran State Prison did not
11 receive his medical files until three days after transfer. On January 18, 2013, Plaintiff was seen by
12 Defendant Smith who stated he had not wanted Plaintiff transferred. Plaintiff claims Defendant
13 Shittu failed to provide him with adequate medical care in violation of the Eighth Amendment by
14 removing his medical hold.

15 Plaintiff seeks compensatory damages in the amount of \$500,000.00 and punitive damages in
16 the amount of \$100,000.00 against each defendant.

17 **C. DISCUSSION**

18 **1. Eighth Amendment – Deliberate Indifference to Medical Need**

19 To maintain an Eighth Amendment claim based on medical care in prison, a plaintiff must
20 show deliberate indifference to his serious medical needs. Jett v. Penner, 439 F.3d 1091, 1096 (9th
21 Cir. 2006) (citing Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)) (quotation marks
22 omitted). The two-part test for deliberate indifference requires the plaintiff to show (1) a serious
23 medical need by demonstrating that failure to treat a prisoner's condition could result in further
24 significant injury or the unnecessary and wanton infliction of pain, and (2) the defendant's response
25 to the need was deliberately indifferent. Jett, 439 F.3d at 1096 (quotation marks and citation
26 omitted). Deliberate indifference is shown by a purposeful act or failure to respond to a prisoner's
27 pain or possible medical need, and harm caused by the indifference. Id. (citation and quotation
28 marks omitted). Deliberate indifference may be manifested when prison officials deny, delay or

1 intentionally interfere with medical treatment, or it may be shown by the way in which prison
2 physicians provide medical care. Id. (citation and quotations omitted). Where a prisoner is alleging
3 a delay in receiving medical treatment, the delay must have led to further harm in order for the
4 prisoner to make a claim of deliberate indifference to serious medical needs. Berry v. Bunnell, 39
5 F.3d 1056, 1057 (9th Cir. 1994); McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992),
6 *overruled on other grounds*, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en
7 banc).

8 Plaintiff's allegations do not support a claim for violation of the Eighth Amendment as to
9 Defendant Smith. Defendant Smith operated on Plaintiff's foot. Defendant Smith ordered post-
10 operative care for Plaintiff, including prescription for pain killers, crutches and a chrono for a lower
11 bunk on a lower tier. Plaintiff was given instructions on post-surgery care. At some point after
12 surgery, the foot became infected. Plaintiff was then seen for his scheduled follow-up visit where
13 Defendant Smith then cleaned the wound and treated the infection. There are no facts alleged which
14 show Defendant Smith knew of and disregarded a substantial risk of harm to Plaintiff's objectively
15 serious medical needs. Farmer v. Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994). By Plaintiff's
16 own account, Defendant Smith never refused treatment and provided treatment for Plaintiff's
17 complaints. Plaintiff claims Defendant Smith should have ordered antibiotics and daily dressings as
18 part of his post-operative care; however, Plaintiff's mere disagreement with the course of medical
19 treatment determined to be appropriate by Defendant Smith does not support a claim for relief under
20 section 1983. Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012); Wilhelm v. Rotman, 680 F.3d
21 1113, 1122-23 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). Therefore,
22 Plaintiff fails to state a claim against Defendant Smith.

23 Plaintiff's allegations also do not support an Eighth Amendment claim against Defendant
24 Johal. Plaintiff was seen by Defendant Johal three days after surgery because of complaints of pain
25 and the appearance of his foot. Plaintiff believed his foot required immediate care because of the
26 drainage of pus and blood, and the bandage appearing to be crusted through. Plaintiff also noticed
27 swelling and some blackness to his toes. Plaintiff admits that Defendant Johal examined him and
28 provided him with medical care. He alleges Defendant Johal stated she would order antibiotics, but

1 states he never received them. Thus, it is undisputed that Defendant Johal treated Plaintiff. Plaintiff
2 complains that Defendant Johal should have done more by cleaning and changing the dressing, but
3 again, Plaintiff's mere disagreement with the course of medical treatment determined to be
4 appropriate by Defendant Johal does not support a claim for relief under section 1983. Snow, 681
5 F.3d at 987; Wilhelm, 680 F.3d at 1122-23; Jett, 439 F.3d at 1096. Plaintiff complains that he never
6 received the antibiotics, but there are no facts alleged which demonstrate that Defendant Johal
7 deliberately and wantonly withheld antibiotics. Even assuming Defendant Johal erred, a finding
8 which is not supported by the factual allegations, an Eighth Amendment claim may not be premised
9 on even gross negligence by a physician. Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.
10 1990). Therefore, Plaintiff fails to state an Eighth Amendment claim against Defendant Johal.

11 Plaintiff's allegations also do not support an Eighth Amendment claim against Defendant
12 Shittu. Defendant Shittu removed the medical hold on Plaintiff on December 27, 2012, after
13 Plaintiff had received his follow-up with Defendant Smith and given treatment for his infection.
14 According to the exhibits, Defendant Shittu did this in consultation with Defendant Smith. Plaintiff
15 however claims there is some question as to whether Defendant Shittu consulted with Defendant
16 Smith based on orders written by Defendant Johal and statements made by Defendant Smith during a
17 post-care consultation. Regardless, there are no facts alleged which would show that Defendant
18 Shittu knew of and disregarded a substantial risk of harm to Plaintiff's objectively serious medical
19 needs. As Plaintiff admits, he continued to receive medical care for his foot, and he received
20 medical care upon transfer to the new institution. The medical care was delayed by three days
21 because of the transfer, but this fact is not evidence that Defendant Shittu made his decision in
22 conscious disregard for Plaintiff's medical condition.

23 2. Medical Malpractice – State Law

24 Plaintiff also alleges that Defendants committed medical malpractice. Section 1983 does not
25 provide a cause of action for violations of state law. See Hydrick v. Hunter, 500 F.3d 978, 987 (9th
26 Cir. 2007); Galen v. County of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007); Ove v. Gwinn, 264
27 F.3d 817, 824 (9th Cir. 2001). Pursuant to 28 U.S.C. § 1367(a), however, in any civil action in
28 which the district court has original jurisdiction, the district court “shall have supplemental

1 jurisdiction over all other claims in the action within such original jurisdiction that they form part of
2 the same case or controversy under Article III,” except as provided in subsections (b) and (c).
3 “[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction over state law
4 claims under 1367(c) is discretionary.” Acri v. Varian Assoc., Inc., 114 F.3d 999, 1000 (9th
5 Cir.1997). “The district court may decline to exercise supplemental jurisdiction over a claim under
6 subsection (a) if ... the district court has dismissed all claims over which it has original jurisdiction.”
7 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that “if the federal claims are dismissed
8 before trial ... the state claims should be dismissed as well.” United Mine Workers, *supra*, 383 U.S.
9 at 726.

10 In this case, the complaint does not present a federal claim for relief. However, even if
11 Plaintiff presented a cognizable federal claim and the Court exercised supplemental jurisdiction over
12 his state law claims, his state law claims would not offer relief. “To establish a medical malpractice
13 claim, the plaintiff must allege in the complaint: (1) defendant’s legal duty of care toward plaintiff;
14 (2) defendant’s breach of that duty; (3) injury to plaintiff as a result of that breach - proximate or
15 legal cause; and (4) damage to plaintiff.” Rightley v. Alexander, No. C-94-20720 RMW, 1995 WL
16 437710, at *3 (N.D. Cal. July 13, 1995) (citing to Hoyem v. Manhattan Beach School Dist., 22
17 Cal.3d 508, 514 (1978)); 6 B. E. Witkin, Summary of California Law, Torts § 732 (9th ed. 1988).
18 “[M]edical personnel are held in both diagnosis and treatment to the degree of knowledge and skill
19 ordinarily possessed and exercised by members of their profession in similar circumstances.”
20 Hutchinson v. United States, 838 F.2d 390, 392-93 (9th Cir. 1988) (internal citations omitted). Here,
21 Plaintiff fails to identify Defendant’s legal duty of care, how Defendant breached that duty, the
22 injury suffered by Plaintiff, and the damage caused to Plaintiff.

23 **D. CONCLUSION AND RECOMMENDATION**

24 Plaintiff’s complaint fails to state a claim upon which relief may be granted under section
25 1983. Plaintiff was previously provided with notice of the deficiencies and opportunity to amend,
26 and based on the nature of the deficiencies at issue, further leave to amend is not warranted. Akhtar
27 v. Mesa, 698 F.3d 1202, 1212-13 (9th Cir. 2012); Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir.
28 2000). Therefore, the Court HEREBY RECOMMENDS that the First Amended Complaint be

1 DISMISSED WITH PREJUDICE for failure to state a claim.

2 This Findings and Recommendation is submitted to the District Judge assigned to this case
3 pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the Local Rules of
4 Practice for the United States District Court, Eastern District of California.

5 Within thirty (30) days after being served with a copy, Plaintiff may file written objections
6 with the Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings
7 and Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28
8 U.S.C. § 636 (b)(1)(C). Plaintiff is advised that failure to file objections within the specified time
9 may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
10 1991).

11
12 IT IS SO ORDERED.

13 Dated: April 27, 2016

/s/ Sandra M. Snyder
14 UNITED STATES MAGISTRATE JUDGE