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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11
12 WILLIAM STICKLE,
13 Plaintiff,

2:08-CV-01874-RRC

ORDER

14 vs.

15 SOLTANIAN, et al.,
16 Defendants.
17 _____/

**DISMISSING FIRST AMENDED
COMPLAINT WITHOUT
PREJUDICE FOR FAILURE TO
STATE A CLAIM**

18 Plaintiff, a state prisoner proceeding pro se, has filed a First Amended Complaint in this 42
19 U.S.C. § 1983 action.¹ The Court finds that Plaintiff has failed to state a claim against any of the
20 named defendants.

21 The Court is required to screen complaints brought by prisoners seeking relief against a
22 government entity or an officer or employee of a government entity. 28 U.S.C. § 1915A(a). The
23 Court must dismiss a complaint or portion thereof if the complaint is frivolous or malicious, fails to
24 state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is
25 immune from such relief. 28 U.S.C. § 1915A(b). "Under § 1915A, when determining whether a
26 complaint states a claim, a court must accept as true all allegations of material fact and must
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¹Plaintiff has also submitted an Application to Proceed In Forma Pauperis. The Court, however, in its May 13, 2009, order, has already granted Plaintiff such status.

1 construe those facts in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443,
2 447 (9th Cir. 2000). In a May 13, 2009, order, the Court dismissed Plaintiff's original complaint for
3 failure to state a claim upon which relief may be granted.

4 To maintain a § 1983 action based on deficient prison medical treatment in violation of the
5 Eight Amendment, a prisoner must allege "acts or omissions sufficiently harmful to evidence
6 deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104-06 (1976).
7 This standard is met if a prisoner establishes "(a) a purposeful act or failure to respond to a prisoner's
8 pain or possible medical need and (b) harm caused by the indifference." Jett v. Penner, 439 F.3d
9 1091, 1096 (9th Cir. 2006). Deliberate indifference may be shown "when prison officials deny,
10 delay or intentionally interfere with medical treatment, or it may be shown by the way in which
11 prison physicians provide medical care." Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir.
12 1988). Mere negligence or medical malpractice, however, does not violate a prisoner's Eighth
13 Amendment rights. Toguchi v. Chung, 391 F.3d 1051, 1060-61 (9th Cir. 2004). A prison official
14 acts with deliberate indifference only if he or she knows of and consciously disregards an excessive
15 risk to an inmate's health and safety. Id. at 1057.

16 Plaintiff filed the present action against Dr. Soltanian, Dr. Brett Williams, Dr. Hoshimoto,
17 Dr. Hawkins, PA Todd, and RN Wehlers, claiming that they acted with deliberate indifference to his
18 medical needs.

19 In 2007, Dr. Soltanian performed surgery on Plaintiff's upper leg. Dr. Soltanian did not
20 prescribe Plaintiff antibiotics, and Plaintiff's leg became infected. Plaintiff alleges that Dr.
21 Soltanian knew "how easy it would be" for Plaintiff's wound to become infected because Plaintiff
22 suffers from a variety of blood diseases. Plaintiff does not allege, however, that Dr. Soltanian
23 actually knew he was putting Plaintiff at risk by not prescribing him antibiotics immediately after
24 the surgery or that Dr. Soltanian ever refused him antibiotics or other care at a later date. "If a
25 prison official should have been aware of the risk, but was not, then the official has not violated the
26 Eight Amendment." Toguchi, 391 F.3d at 1057 (internal quotation marks and brackets omitted); see
27 also Estelle, 429 U.S. at 107 ("But the question of whether an X-ray or additional diagnostic
28 techniques or forms of treatment is indicated is a classic example of a matter for medical judgment.
[It] . . . does not represent cruel and unusual punishment."). Therefore, because Plaintiff has not

1 alleged that Dr. Soltanian knew he was putting Plaintiff at risk, Plaintiff has not stated a cognizable
2 claim for relief against Dr. Soltanian.

3 Plaintiff also saw Dr. Hoshimoto after his surgery. Plaintiff alleges that Dr. Hoshimoto did
4 not prescribe him antibiotics as well, but he does not allege that Dr. Soltanian knew of the infection
5 or that Plaintiff ever requested antibiotics or other care from him. Thus, for the same reason
6 identified above, Plaintiff has failed to state a claim.

7 As for the other four defendants, Plaintiff complains of their inactions in relation to his
8 medical care. None of the allegations, however, explain what harm, if any, the defendants' failure to
9 act caused Plaintiff, as would be required to state a valid claim for relief. Jett, 439 F.3d at 1096.

10 Liberally construed then, the Court finds that Plaintiff's complaint fails to state a cognizable
11 claim against any of the named defendants. Within 30 days, Plaintiff may submit a Second
12 Amended Complaint to cure the deficiencies noted above. The Clerk will mail Plaintiff a court-
13 approved form to use for filing this complaint. If Plaintiff fails to use the court-approved form, the
14 Court may strike the amended complaint and dismiss this action without further notice.

15 Plaintiff must clearly designate on the face of the document that it is the "Second Amended
16 Complaint." The amended complaint must be retyped or rewritten in its entirety on the court-
17 approved form and may not incorporate any part of the original Complaint or First Amended
18 Complaint by reference. Plaintiff may include only one claim per count.

19 Any amended complaint supersedes an original complaint. Ferdie v. Bandelet, 963 F.2d
20 1258 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir.
21 1990). After amendment, the Court will treat the original Complaint and First Amended Complaint
22 as nonexistent. Ferdie, 963, F.2d at 1262. Plaintiff has already been given one opportunity to
23 amend his complaint. If Plaintiff's Second Amended Complaint does not state a cognizable claim
24 for relief, it will be dismissed with prejudice. In other words, it will be dismissed without leave to
25 amend.

26 Accordingly, IT IS HEREBY ORDERED that:

27 1. The Complaint is dismissed for failure to state a claim. Plaintiff has 30 days from the
28 date this Order is signed to file a Second Amended Complaint in compliance with this Order.

2. If Plaintiff fails to file an amended complaint within 30 days, the Clerk of Court must,

1 without further notice, enter a judgment of dismissal of this action with prejudice that states that the
2 dismissal counts as a "strike" under 28 U.S.C. § 1915(g).

3 3. The Clerk of Court must mail Plaintiff a court-approved form for filing a civil rights
4 complaint by a prisoner.

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6 DATED: September 10, 2009.

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8 /s/ Richard R. Clifton

9 RICHARD R. CLIFTON
10 UNITED STATES CIRCUIT JUDGE
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