

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HOOMAN PANAH,
Plaintiff,
v.
STATE OF CALIFORNIA DEPT. OF
CORRECTIONS AND
REHABILITATION, et al.,
Defendants.

Case No. 14-00166 BLF (PR)

**ORDER GRANTING MOTION TO
DISMISS CLAIMS AS UNTIMELY;
DENYING MOTION FOR
SANCTIONS; SETTING BRIEFING
SCHEDULE ON REMAINING
CLAIMS**

(Docket. Nos. 162, 163)

Plaintiff, an inmate on death row at California’s San Quentin State Prison (“SQSP”), filed a civil rights complaint under 42 U.S.C. § 1983, alleging unconstitutional acts by SQSP correctional officers. Dkt. No. 1. The operative complaint in this action is Plaintiff’s second amended complaint (“SAC”) along with a supplemental complaint. Dkt. Nos. 54, 67. The Court found the SAC and supplemental stated cognizable claims, and ordered the matter served on Defendants. Dkt. No. 69. Defendants Anderson, Chappell, Ebert, Givens, Hamilton, Luna, McClelland, Odom, Robberecht, and Welton filed a motion for sanctions and motion to dismiss. Dkt. Nos. 162, 163. Plaintiff filed several opposition papers in response. Dkt. Nos. 177, 181, 184. Defendants filed a reply, Dkt. No. 179, and a sur-reply, Dkt. No. 203, with the Court’s leave. Dkt. No. 202.

1 For the reasons discussed below, Defendants motion to dismiss based on untimeliness
2 grounds is **GRANTED**. Defendants’ motion for sanctions is **DENIED**.

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4 **I. DISCUSSION**

5 **I. Procedural History**

6 Plaintiff filed this action on January 12, 2014, with the assistance of retained legal
7 counsel. Dkt. No. 1. Plaintiff claimed that Defendants CDCR, Chappell, Jackson, Luna,
8 Hamilton, Odom, and Anderson “instigated, provoked, encouraged, facilitated and/or aided
9 and abetted” an inmate named Joseph Barrett who stabbed Plaintiff on February 4, 2012,
10 during yard time on SQSP’s death row. *Id.* at 2-4.

11 On March 19, 2015, the Court partially granted Defendants’ dispositive motions.
12 Dkt. No. 22. The Court dismissed Plaintiff’s unexhausted claims against Defendants
13 Chappell, Jackson, Luna, and Hamilton, and Plaintiff’s immunity-barred claims against the
14 CDCR. *Id.* at 17, 19. The Court also found one Bane Act claim cognizable against
15 Defendant Odom and dismissed with leave to amend insufficiently pled claims against
16 Defendants Anderson and Odom. *Id.* at 21-22. The Court also noted that Plaintiff’s
17 counsel became ineligible to practice law on November 17, 2014, *id.* at 2, fn. 2, and later
18 accepted Plaintiff’s notice to continue this matter in *pro se*. Dkt. No. 25.

19 On June 17, 2015, Plaintiff filed a first amended complaint (“FAC”) with regards to
20 the February 4, 2012 incident, to include state and federal law claims against Defendants
21 Anderson and Odom. Dkt. No. 26. In a screening order, the Court found cognizable
22 Plaintiff’s Eighth Amendment and negligence per se claims against Defendants Anderson
23 and Odom, and a Bane Act claim against Defendant Odom. Dkt. No. 38 at 4-5. The Court
24 granted Plaintiff leave to amend the remainder of his insufficiently pled claims against
25 Defendants Anderson and Odom. *Id.* at 1-9.

26 On November 13, 2015, Plaintiff filed a second amended complaint (“SAC”) that
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1 consisted of 613 pages. Dkt. No. 54. The Court limited its initial review to the first 219
 2 pages of pleading without reference to any exhibits filed in support. Dkt. No. 64. The
 3 SAC attempted to name twenty-five individual defendants and seven categories of Doe
 4 defendants, and included a year’s worth of alleged harassment by prison staff preceding
 5 the original February 4, 2012 stabbing, through “taunts and slurs,” “stalking,” “bullying,
 6 oppression, thefts of an destruction of legal documents,” “destruction of electronic
 7 appliances,” and mishandling of Plaintiff’s administrative grievances. Dkt. No. 54 at 54-
 8 81. On November 18, 2016, Plaintiff filed, with the Court’s permission, a supplemental to
 9 the SAC. Dkt. No. 67.

10 The Court screened the SAC and the supplemental. Dkt. Nos. 64, 69. Pursuant to
 11 these orders, the following claims were found cognizable against the Defendants as neatly
 12 presented by Defendants in their motion to dismiss, Dkt. No. 163 at 9:

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14	1	First Amendment (retaliation)	Odom, Robberecht
15	2	First Amendment (legal mail)	Givens, McLelland, Robberecht, Welton
16	3	Sixth Amendment (legal mail)	Givens, McLelland, Robberecht, Welton
17	4	Eighth Amendment (deliberate indifference to safety)	Anderson, Ebert, Odom, Robberecht
18	5	California Constitution claims equivalent to the federal claims recognized above	Same as above
19			
20	6	Bane Act (Cal. Civil Code § 43)	Odom
21	7	Bane Act (First Amendment)	Givens, McLelland, Robberecht, Welton
22	8	Negligence Per Se	Anderson, Ebert, Odom, Robberecht
23	9	Civil Conspiracy	Anderson, Hamilton, Odom, Robberecht
24	10	Fourteenth Amendment (due process)	Chappell, Givens, Jackson, Luna, McLelland, Moore, Robberecht, Rodriguez ¹
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27 ¹ Defendants Moore and Rodriguez have not yet been served in this matter. *See* Dkt. Nos.

1 Dkt. Nos. 64, 69, 91.

2 Defendants Anderson, Chappell, Ebert, Givens, Hamilton, Luna, McLelland, Odom,
3 Robberecht, and Welton appeared by waiver of reply. Dkt. Nos. 114, 137.

4 **II. Plaintiff's Claims**

5 As Defendants have summarized, Plaintiff's claims fall into three categories. Dkt.
6 163 at 10. Claims 4, 5, and 8 against Defendant Anderson relate to her actions during the
7 February 4, 2012 stabbing. *See supra* at 3. Claim 9 against Anderson and Claims 4, 5, 6,
8 8, and 9 against Defendants Ebert, Hamilton, Odom, and Robberecht relate to Plaintiff's
9 claims of harassment for a year prior to the February 4, 2012 incident. *Id.* Claims 1, 2, 3,
10 5, 7, and 10 against Defendants Chappell, Givens, Luna, McLelland, Odom, Robberecht,
11 and Welton relate to searches of Plaintiff's cell on August 21, 2011 and October 23, 2011.
12 *Id.* The claims are summarized below.

13 **A. Stabbing Incident and Response - Defendant Anderson (Claims 4, 5, 8)**

14 Plaintiff claims that Defendant Anderson, who was the gunner in the guard tower at
15 the time, watched and failed to intervene during an attack on February 4, 2012, when he
16 was stabbed by another inmate. Dkt. Nos. 54-5 at 1, 54-9 at 2, 54-11 at 2, 54-16 at 4, 54-
17 30 at 10-13, 54-32 at 3.

18 **B. Harassment Allegations – Defendants Anderson, Ebert, Hamilton,**
19 **Odom, and Robberecht (Claims 4, 5, 6, 8, 9)**

20 Plaintiff claims that for approximately one year prior to the February 4, 2012
21 incident, he was the victim of “terroristic abuses,” including “racist, ethnic & religious
22 taunts and slurs,” and “stalking-harassment, bullying, oppression,” by Defendants Odom
23 and Robberecht. Dkt No. 54-15 at 2, 54-25 at 3. Plaintiff claims he told Defendant Ebert
24 about the harassment by Defendant Robberecht in an interview on December 5, 2011, Dkt.

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26 71, 72, 79, 80, 83, 84, 92, 99, 105, 106, 142, 145. Nevertheless, the Court will consider
27 the timeliness of the claim against them since they are a position similar to served
28 Defendants in that regard. *See infra* at 18.

1 No. 54-1 at 6, by letter dated December 6, 2011, Dkt. No. 54-1 at 2-4, and in person on
2 December 7, 2011, Dkt. No. 54-24 at 11. *See also* Dkt. Nos. 54-15 at 2, 54-24 at 12-13,
3 54-28 at 13. Plaintiff does not describe Defendant Ebert’s response.

4 The Court also screened an additional claim against Defendants Anderson, Odom,
5 Hamilton, and Robberecht for civil conspiracy based on Plaintiff’s allegations that they
6 “formed an oral and/or implied agreement to commit a wrongful act, including but not
7 limited to, instigating and agitating violence against Plaintiff because of his Iranian
8 heritage, Persian, race, and Muslim faith” and “agreed to spread false stories that Plaintiff
9 was a child molester and instigated violence against Plaintiff which caused injury to
10 Plaintiff.” Dkt No. 64 at 14, *citing* Dkt. No. 54-31 at 11-12.

11 Plaintiff submitted an inmate grievance, Log No. SQ-12-00010, on December 15,
12 2011, about his conflict with Defendant Robberecht which he had reported to Defendant
13 Ebert. Ex. C to Defs.’ Request for Judicial Notice (“RJN”), Dkt. No. 163-2 at 100-101.
14 The appeal was denied on June 29, 2012. *Id.*

15 Plaintiff alleges that he submitted another inmate grievance on February 19, 2012,
16 about the response to the February 4, 2012 stabbing, and included allegations of
17 harassment against Defendant Odom. Dkt. No. 54-33 at 12-13. The appeal did not make
18 any harassment or conspiracy allegations against Defendants Anderson, Ebert, Hamilton,
19 or Robberecht. *Id.* Plaintiff alleges that he attempted to follow-up on the status of the
20 grievance several times through April 18, 2013. Dkt. Nos. 54-33 at 3-10, 54-35 at 5-6.
21 Ultimately, the grievance was not processed. Dkt. No. 22 at 5.

22 The Victims Compensation and Government Claims Board (“Board”) received a
23 government claim from Plaintiff and his mother on August 3, 2012. RJN, Ex. B; Dkt. No.
24 163-2 at 16-17. The claim included allegations on the response to Plaintiff’s February 4,
25 2012 stabbing and allegations of harassment by Defendants Odom, Robberecht, “et al.”
26 *Id.* The Board rejected the claim in a letter dated October 18, 2012. Dkt. No. 163-2 at 15.

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1 granted if the complaint does not proffer “enough facts to state a claim for relief that is
2 plausible on its face.” *Id.* at 570. To state a claim that is plausible on its face, a plaintiff
3 must allege facts that “allow[] the court to draw the reasonable inference that the defendant
4 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). From
5 these decisions, the following “two principles” arise: “First to be entitled to the
6 presumption of truth, allegations in a complaint or counterclaim may not simply recite the
7 elements of a cause of action but must contain sufficient allegations of underlying facts to
8 give fair notice and to enable the opposing party to defend itself effectively. Second, the
9 factual allegations that are taken as true must plausibly suggest an entitlement to relief,
10 such that it is not unfair to require the opposing party to be subjected to the expense of
11 discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).
12 Review is limited to the contents of the complaint, *see Clegg v. Cult Awareness Network*,
13 18 F.3d 752, 754-55 (9th Cir. 1994), including documents physically attached to the
14 complaint or documents the complaint necessarily relies on and whose authenticity is not
15 contested. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), *overruled on*
16 *other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). In
17 addition, the court may take judicial notice of facts that are not subject to reasonable
18 dispute. *See id.* at 689 (discussing Fed. R. Evid. 201(b)). Thus, the two exceptions to the
19 prohibition of considering material outside the pleadings when assessing the sufficiency of
20 the complaint are the incorporation by reference and judicial notice doctrines. *Khoja v.*
21 *Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018).

22 Defendants move for dismissal on the grounds that various claims are time-barred,
23 fail to satisfy the presentation requirements of the California Government Claims Act, and
24 state law claims fail to state actionable relief. Dkt. No. 163. They request judicial notice
25 of the following as filed under the exhibit indicated: (1) an order of the Ninth Circuit in
26 *Panah v. Chappell*, 935 F.3d 657 (9th Cir. 2019), Ex. A; (2) copies of Plaintiff’s
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1 government claim number G605950, Ex. B; (3) copies of Plaintiff’s administrative
2 grievance No. SQ-12-00010, Ex. C; (4) copies of Plaintiff’s administrative grievance No.
3 SQ-12-00151, Ex. D; and (5) the custodian of records affidavit certifying the
4 administrative grievance files under Exhibits C and D, Ex. E. Dkt. No. 163-1, hereinafter
5 “RJN.” The request is GRANTED. *See Lee*, 250 F.3d at 689; Fed. R. Evid. 201(b)(2).

6 **B. Untimely**

7 Defendants first assert that the applicable statutes of limitation bar all but Plaintiff’s
8 Eighth Amendment claims against Defendants Anderson and Odom. Dkt. No. 163 at 12.

9 Section 1983 does not contain its own limitations period. The appropriate period is
10 that of the forum state’s statute of limitations for personal injury torts. *See Wilson v.*
11 *Garcia*, 471 U.S. 261, 276 (1985), *superseded by statute on other grounds as stated in*
12 *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 377-78 (2004); *TwoRivers v. Lewis*, 174
13 F.3d 987, 991 (9th Cir. 1999); *Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir.
14 1994). In California, the general residual statute of limitations for personal injury actions
15 is the two-year period set forth at California Civil Procedure Code § 335.1 and is the
16 applicable statute in § 1983 actions. *See Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir.
17 2004); *see also Silva v. Crain*, 169 F.3d 608, 610 (9th Cir. 1999) (limitations period for
18 filing § 1983 action in California governed by residual limitations period for personal
19 injury actions in California, which was then one year and was codified in Cal. Civ. Proc.
20 Code § 340(3)); Cal. Civ. Proc. Code § 335.1 (current codification of residual limitations
21 period, which is now two years; enacted in 2002).

22 With respect to the pendant state law claims in this action, the time period for
23 presentation of a claim relating to death or personal injury in California is six months from
24 accrual of the injury. *See Cal. Gov’t. Code § 911.2*. The claims presentation requirements
25 for such claims against California public entities or employees are not tolled by
26 imprisonment. *See Cal. Civ. Proc. Code § 352.1(b); Ellis v. City of San Diego*, 176 F.3d
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1 1183, 1189 (9th Cir. 1999). Because state claims presentation requirements do not apply
2 to § 1983 claims, and in California statutory tolling for imprisonment does apply to § 1983
3 claims, pendent state law claims may be barred even when § 1983 claims are not. *See id.*
4 at 1189-90.

5 It is federal law that determines when a cause of action accrues, and the statute of
6 limitations begins to run in a § 1983 action. *McDonough v. Smith*, 139 S. Ct. 2149, 2156
7 (2019) (though federal courts often refer to common law tort principles when deciding
8 questions of accrual, such principles are meant to guide rather than control the definition of
9 § 1983 claims); *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Belanus v. Clark*, 796 F.3d
10 1021, 1025 (9th Cir. 2015); *Elliott*, 25 F.3d at 801-02. Under federal law, a claim
11 generally accrues when the plaintiff knows or has reason to know of the injury which is the
12 basis of the action. *See TwoRivers*, 174 F.3d at 991-92; *Elliott*, 25 F.3d at 802. “The
13 discovery rule requires the plaintiff to be diligent in discovering the critical facts of the
14 case.” *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017) (per curiam).
15 “A cause of action accrues ‘even if the full extent of the injury is not then known.’” *Gregg*
16 *v. State of Hawaii DPS*, 870 F.3d 883, 887 (9th Cir. 2017) (quoting *Wallace*, 549 U.S. at
17 39)). Accrual starts when the plaintiff can know that the injury was caused by defendants’
18 actions. *Id.* at 889 (finding accrual when plaintiff knew, or could know through reasonable
19 diligence, that her emotional discomfort was caused by defendant’s improper conduct in
20 therapy).

21 A federal court must give effect to a state’s tolling provisions. *See Hardin v.*
22 *Straub*, 490 U.S. 536, 543-44 (1989); *Marks v. Parra*, 785 F.2d 1419, 1419-20 (9th Cir.
23 1986). In California, this includes tolling the statute of limitations during imprisonment
24 and while criminal charges are pending. The statute of limitations begins to run
25 immediately after the recognized disability period ends. *See Cabrera v. City of Huntington*
26 *Park*, 159 F.3d 374, 378-79 (9th Cir. 1998) (following California Law). It also includes
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1 the state’s equitable tolling rules. *See Butler v. NCRC*, 766 F.3d 1191, 1198 (9th Cir.
2 2014).

3 California Code of Civil Procedure section 352.1 recognizes imprisonment as a
4 disability that tolls the statute of limitations when a person is “imprisoned on a criminal
5 charge, or in execution under the sentence of a criminal court for a term of less than for
6 life.” Cal. Civ. Proc. Code § 352.1(a). Although, when read literally, section 352.1 tolls
7 the statute of limitations only for persons who are serving terms of imprisonment less than
8 for life, California courts have held that a prisoner serving a life sentence may be entitled
9 to the tolling benefit of section 352.1 (formerly section 352(a)(3)). *See Grasso v.*
10 *McDonough Power Equip.*, 264 Cal. App. 2d 597, 601 (1968). Therefore, a prisoner
11 serving a life sentence *with the possibility* of parole is entitled to California’s tolling of the
12 statute of limitations. *See Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998)
13 (following *Grasso*) (emphasis added). However, California courts have since understand
14 *Grasso*’s reading of section 352 to mean that “those sentenced to life *without* possibility of
15 parole should be excluded from the tolling provision.” *Brooks v. Mercy Hospital*, 1
16 Cal.App.5th 1, 7 (2016) (emphasis added). In accordance with state law, the Northern
17 District of California has held likewise. *See, e.g., Diaz v. Sayre*, No. C-12-5895-SI, 2013
18 WL 842933, at *4 (N.D. Cal. Mar. 6, 2013) (tolling provision applies only to inmates
19 serving other than life without parole or under a death sentence); *Merriman v. Brown*, No.
20 C-15-1715-WHA, 2015 WL 5118505, at *1 (N.D. Cal. Aug. 31, 2015) (inmate serving
21 death sentence not entitled to tolling); *Ayala v. Grant*, No. 15-cv-3037-RMW, 2016 WL
22 4191649 at *2 (N.D. Cal. Aug. 8, 2016) (same). Our sister courts’ rulings in this regard
23 are also consistent. *See, e.g., McGinnis v. Ramos*, No. 15-cv-2812-JLS(JLB), 2017 WL
24 474054, at *4 (S.D. Cal. Jan. 3, 2017) (tolling provision applies to all prisoners except
25 those subject to a life sentence without the possibility of parole); *Gomez v. Sanders*, No.
26 2:13-cv-0480-TLN-CMK, 2018 WL 3239308, at *5 (E.D. Cal. July 3, 2018) (same);

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1 *Brown v. County of L.A.*, No. CV-15-2162-DDP(FFM), 2018 WL 5907186, at *3-*4 (C.D.
2 Cal. Octo. 4, 2018) (no tolling for “de facto” life sentence where inmate was eligible for
3 parole after 145 years); *Lal v. Ogan*, No. 18-cv-00286-LJO-SAB(PC), 2019 WL 427294,
4 at *3 (E.D. Cal. Feb. 4, 2019) (no tolling for inmate who was serving a life sentence
5 without the possibility of parole under section 352.1(a)).

6 Here, as Defendants argue, Dkt. No. 163 at 9-10, Plaintiff has been sentenced to
7 death, and the Ninth Circuit affirmed his conviction and sentence in August 2019. *See*
8 *Panah v. Chappell*, 935 F.3d 657 (9th Cir. 2019); RJN, Ex. A. In opposition, Plaintiff sites
9 to one case that holds that death row prisoners are entitled to 4-years tolling. Dkt. No. 177
10 at 43. However, the single case² that he relies on is from 2011, and the Northern District
11 has since found that inmates serving death sentences are not entitled to tolling as
12 established by the caselaw cited in the preceding paragraph, of which at least two cases are
13 more current than the case relied on by Plaintiff. *See supra* at 10. Accordingly, Plaintiff is
14 clearly serving a valid state sentence for a term that is *not* “less than for life” under §
15 352.1(a) and is therefore not entitled to California’s statutory tolling provision.

16 The statute of limitations is tolled for the period a prisoner administratively
17 exhausts his underlying grievances, pursuant to the requirements of the PLRA. *See Soto v.*
18 *Unknown Sweetman*, 882 F.3d 865, 875 (9th Cir. 2018) (holding that a prisoner “is entitled
19 to tolling [of the applicable statute of limitations] while he was actively exhausting his
20 remedies” under the PLRA); *Brown v. Valoff*, 422 F.3d 926, 942-43 (9th Cir. 2005) (“the
21 applicable statute of limitations must be tolled while a prisoner completes the mandatory
22 exhaustion process”).

23 **1. Cell Search Claims 1, 2, 3, 5, 7, and 10**

24 Under Claims 1, 2, 3, 5, 7, and 10, Plaintiff asserts the violation of his rights based

26 ²² Plaintiff cites “*Reynaldo Ayala v. Robert Ayers*, 2011 U.S. Dist. LEXIS 107983 (9-22-
27 2011)”; *Ayala v. Ayers*, No. C-10-0979 JSW (PR), 2011 WL 4434541 (N.D. Cal. Sept. 22,
2011).

1 on the searches of his cell on August 21 and October 23, 2011. *See supra* at 5-6.
2 Defendants concede that while Plaintiff pursued administrative remedies under inmate
3 grievance No. SQ-12-00151, the limitations period was tolled, and began to run on August
4 13, 2012, when he exhausted the process. Dkt. No. 163 at 12, citing *Brown*, 422 F.3d at
5 943. Defendants assert that Plaintiff had two years to file Claims 1, 2, 3, and 10 under
6 federal law, *Maldonado*, 370 F.3d at 954, and six months to file Claims 5 and 7 under state
7 law, *Moore v. Twomey*, 120 Cal.App.4th 910, 914 (2004). *Id.* According to Defendants,
8 Plaintiff far exceeded this time by filing these unlawful cell search claims for the first time
9 in his SAC on November 13, 2015. *Id.*, citing Dkt. No. 54. Defendants also assert that
10 Claims 5 and 7 are not timely under the relation-back doctrine because his original January
11 12, 2014 complaint still far exceeds the six-month statutory period for state-law claims that
12 began on August 13, 2012. *Id.* Defendants assert that Claims 1, 2, 3, and 10 cannot relate
13 back because they arise from wholly different events than his original claims and depend
14 on substantially different evidence. *Id.* at 13. Therefore, Defendants Chappell, Givens,
15 Luna, McLelland, Odom, Robberecht, and Welton request dismissal of Claims 1, 2, 3, 5, 7,
16 and 10 as untimely. *Id.*

17 Federal Rule of Civil Procedure 15(c)(1)³ provides for three different situations
18 where an amendment relates back to the date of the original pleading. First, an amendment
19 relates back when “the law that provides the applicable statute of limitations allows
20 relation back.” Fed. R. Civ. P. 15(c)(1)(A). Second, an amendment relates back when it
21 “asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out–
22 or attempted to be set out–in the original pleading.” Fed. R. Civ. P. 15(c)(1)(B). Third,
23 subsection (C) provides for the amendment to relate back to change the party or the
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25 ³ Federal Rule of Civil Procedure 15(c)(1) was amended in 1991 to make clear that the rule
26 is not intended to preclude any relation back that is permissible under the applicable state
27 limitations law. *Butler v. NCRC*, 766 F.3d 1191, 1200 (9th Cir. 2014) (FRCP 15(c)(1)
“incorporates the relation back rules of the law of a state when that state’s law provides the
applicable statute of limitations and is more lenient.”).

1 naming of the party if certain conditions are met. Fed. R. Civ. P. 15(c)(1)(C).

2 California law requires the later-added claims arise on “the same general set of
3 facts” as the original pleading – that is, they seek relief for the same injuries and refer to
4 the same incident. *Austin v. Mass. Bonding & Ins., Co.*, 56 Cal.2d 596, 601 (1961);
5 *Carrier Corp. v. Detrex Corp.*, 4 Cal.App.4th 1522, 1530 (1992).

6 After a careful review of the papers, the Court finds federal Claims 1, 2, 3, and 10
7 are untimely and do not relate back to the original complaint, and that state-law Claims 5
8 and 7 are also barred as untimely. Once Plaintiff exhausted administrative remedies on
9 August 13, 2012, Plaintiff had two years thereafter, i.e., until August 13, 2014, to file a
10 timely § 1983 action.⁴ However, he did not file these claims until he raised them for the
11 first time in his SAC, on November 13, 2015, which was over a year after the limitations
12 period expired. Nor are Plaintiff’s pendant state law claims timely since they were filed
13 long past the six months after accrual of those claims, assuming it was as late as August
14 13, 2012.

15 Furthermore, none of these claims relate back to the original complaint under either
16 federal or state law. As Defendants point out, Plaintiff’s original complaint sought relief
17 against prison officials for injuries he sustained when another inmate stabbed him on
18 February 4, 2012. Dkt. No. 1. Claims 1, 2, 3, 5, 7 and 10, as presented for the first time in
19 the SAC, seek compensation for unlawful cell searches on August 21, and October 23,
20 2011, which took place over three to five months prior to the stabbing. *See supra* at 5-6.
21 These cell-search claims arise from wholly different events (cell searches) from the
22 February 4, 2012 stabbing and depend on substantially different evidence. Nor do they

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25 ⁴ The Court notes that the date of accrual for these claims could arguably be earlier than
26 that applied by Defendants, as they use either the date of exhaustion of administrative
27 remedies or completion of the government claims process as the start date for the running
28 of the limitations period. *See TwoRivers*, 174 F.3d at 991-92; *Elliott*, 25 F.3d at 802. But
it is unnecessary to determine the actual date of accrual because the claims are untimely
even with the generous application of the later date.

1 seek relief for the same injuries and refer to the same incident as the original pleading. As
2 such, it cannot be said that the new federal claims under the First, Sixth, and Fourteenth
3 Amendments “arose out of the conduct, transaction, or occurrence set out—or attempted to
4 be set out—in the original pleading,” which involved the violation of Plaintiff’s Eighth
5 Amendment rights that took place the following year, and thereby relate back under federal
6 law. Fed. R. Civ. P. 15(c)(1)(B). Nor can it be said that these new federal claims relate
7 back under California law because they do not arise on “the same general set of facts” as
8 the original pleading involving a stabbing or seek relief for the same injuries and refer to
9 the same incident. *See Austin*, 56 Cal.2d at 601. Lastly, the equivalent California
10 Constitutional claims under Claim 5 and state-law Claim 7 also do not relate back under
11 either federal or state law for the same reasons as the federal claims do not: these new state
12 law claims do not arise “out of the conduct, transaction, or occurrence set out” in the
13 original pleading, which was based on an incident that took place months later, Fed. R.
14 Civ. P. 15(c)(1)(B), and as such, it cannot be said that these later-added claims seek relief
15 for the same injuries and refer to the same incident alleged in the original complaint, *see*
16 *Carrier Corp.*, 4 Cal.App.4th at 1530.

17 In opposition, Plaintiff argues at length that he exhausted administrative remedies.
18 Dkt. No. 177 at 2-19. However, Defendants’ motion to dismiss does not raise exhaustion
19 as an affirmative defense. Accordingly, Plaintiff’s assertions in this regard are irrelevant.
20 It appears that Plaintiff is conflating the exhaustion of administrative remedies with the
21 timely filing of claims with the statute of limitations. He is simply mistaken. The
22 exhaustion of administrative remedies through the prison grievance process and the filing
23 of timely claims in the courts are two separate matters. Even though he may have properly
24 exhausted a claim through the prison’s grievance process, it may nonetheless be dismissed
25 as untimely if the claim was not properly presented in a complaint before the limitations
26 period expired. Accordingly, all of Plaintiff’s arguments asserting concurrently that his
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1 claims are “both fully/properly exhausted and timely filed” are simply incorrect and will
2 not be considered. *See, e.g.*, Dkt. No. 177 at 52.

3 With respect to relation back, Plaintiff asserts his original complaint alleged that
4 “[f]or approximately one year prior to the... incident,... Plaintiff was subjected to terrorist
5 threats and harassments at the encouragement and behest of Defendant Od[om] that
6 culminated in the February 4, 2012 stabbing.” Dkt. No. 177 at 3, citing Dkt. No. 1 at 5;
7 Dkt. No. 26 at 5. To the extent that Plaintiff is suggesting his cell search claims relate
8 back to the original complaint based on this allegation, he is mistaken. Dkt. No. 179 at 4.
9 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
10 claim showing that the pleader is entitled to relief.” “Specific facts are not necessary; the
11 statement need only “give the defendant fair notice of what the . . . claim is and the
12 grounds upon which it rests.”” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations
13 omitted). It cannot be said that the general allegation of “terrorist threats and harassments”
14 was sufficient to give notice to any Defendant, including Odom, that Plaintiff was
15 intending to sue SQSP staff for the search of his cell on August 21 and October 23, 2011.
16 Accordingly, these cell-search claims in the SAC do not relate back to the original
17 complaint

18 Plaintiff also asserts that he is entitled to equitable estoppel to extend the limitations
19 period. Dkt. No. 177 at 39; Dkt. No. 181 at 3, 14-19. In § 1983 actions, federal courts
20 defer to the state on the application of its limitations law, including on issues of tolling and
21 equity. *See Butler*, 766 F.3d at 1198. “Equitable estoppel... focuses primarily on actions
22 taken by the defendant to prevent a plaintiff from filing suit, sometimes referred to as
23 ‘fraudulent concealment.’” *Lukovsky v. San Francisco*, 535 F.3d 1044, 1051 (9th Cir.
24 2008). Under California law, equitable estoppel requires that:

- 25 (1) the party to be estopped must be apprised of the facts; (2)
26 that party must intend that his or her conduct be acted on, or
27 must so act that the party asserting the estoppel had a right to
28 believe it was so intended; (3) the party asserting the estoppel

1 must be ignorant of the true state of facts; and (4) the party
2 asserting the estoppel must reasonably rely on the conduct to his
3 or her injury.

4 *Lukovsky*, 535 F.3d at 1052 (quoting *Honig v. San Francisco Planning Dep't.*, 127 Cal.
5 App. 4th 520, 529 (2005)). In order to establish equitable estoppel, or “fraudulent
6 concealment” by defendants, the plaintiff must show “some active conduct by the
7 defendant above and beyond the wrongdoing upon which the plaintiff’s claim is filed.” *Id.*
8 (internal quotations and citations omitted); *see also Guerrero v. Gates*, 442 F.3d 697, 706
9 (9th Cir. 2006).

10 Plaintiff first claims that ongoing death threats should estop Defendants from
11 invoking “untimeliness defenses.” Dkt. No. 177 at 24. However, the only evidence
12 Plaintiff refers to in support of this argument are documents from 2012 and 2013, when the
13 limitations period had not yet expired. *Id.* at 25-26. Furthermore, as Defendants assert in
14 reply, none of the alleged threats were made by the Defendants asserting the statute of
15 limitations. Dkt. No. 179 at 6. Accordingly, it cannot be said that alleged death threats
16 prevented Plaintiff from timely filing these claims. *Lukovsky*, 535 F.3d at 1052.

17 Secondly, Plaintiff asserts the SQSP law library “induced” his untimeliness by
18 advising him that he had one year to comply with the Government Claims Act, and that
19 Defendants cannot benefit from misleading him about the state’s six month limitations
20 period. Dkt. No. 177 at 39. Plaintiff also claims that the SQSP law library “provided
21 literature telling [him] that he had 2-years, plus 2 years of ‘disability’ tolling to bring suit,”
22 and that the law library’s actions are attributable to Defendants. *Id.* at 43. He repeats this
23 assertion in his supplemental opposition. Dkt. No. 181 at 3. Defendants assert in reply
24 that none of the alleged bad legal advice was provided by them. Dkt. No. 179 at 6; Dkt.
25 No. 181 at 3. Indeed, Plaintiff’s assertion that the law library’s actions are “attributable” to
26 Defendants is conclusory and without any factual support. Furthermore, Defendants point
27 out that the Claim Board’s rejection explicitly explained “you have only six months from
28 the date this notice was personally delivered or deposited in the mail to file a court action

1 on this claim. See Government Code Section 945.6.” Dkt. No. 179 at 6, citing Dkt. No.
2 163-2 at 15. Accordingly, Plaintiff cannot assert that he was ignorant of this fact when he
3 was in possession of the Board’s decision. Furthermore, Defendants point out that the
4 SQSP library also provided Plaintiff with the actual statutory text – California Code of
5 Civil Procedure section 352.1 – which has been interpreted to mean that tolling does not
6 apply to a prisoner serving a death sentence. Dkt. No. 179 at 6-10, citing Dkt. No. 54-24 at
7 4⁵; Dkt. No. 203 at 2. Accordingly, based on these facts, it cannot be said that Plaintiff has
8 established equitable estoppel against Defendants where there is no indication that
9 allegedly false information regarding the statute of limitations came from them. *See*
10 *Lukovsky v. San Francisco*, 535 F.3d 1044,

11 Plaintiff also asserts that Defendants at one point “engaged in thefts of Panah’s and
12 Barnett’s legal files to deny them the ability to file a competent, fully inclusive FAC.”
13 Dkt. No. 177 at 4. However, the FAC was filed on June 17, 2015, which was still after the
14 limitations period had expired on August 13, 2014. *See supra* at 13. Furthermore, as
15 Defendants assert, Plaintiff was certainly “aware of the true state of facts” rather than
16 ignorant of the loss of his legal files, and therefore unable to satisfy the third element for
17 equitable estoppel. *See Lukovsky*, 535 F.3d at 1052. Moreover, this alleged basis is the
18 same as Plaintiff’s cause of action, *i.e.*, the cell search that resulted in the deprivation of his
19 property. *See supra* at 5-6. As such, it is not sufficient to establish equitable estoppel as
20 Plaintiff must show some active conduct by Defendants that is “above and beyond the
21 wrongdoing upon which the plaintiff’s claim is filed, to prevent the plaintiff from suing in
22 time.” *Lukovsky*, 535 F.3d at 1052, *citing Guerrero*, 442 F.3d at 706.

23 Lastly, Plaintiff claims that Defendants’ counsel had a duty to plead untimeliness in
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25 ⁵ On the same page of his SAC wherein he cites section 352.1, Plaintiff asserts that a Ninth
26 Circuit case “Dennis Ervine v. (Woodford?)” held that tolling applied to a death row
27 prisoner. Dkt. No. 54-24 at 4. However, a search in Westlaw yields no result for such a
28 case.

1 2014 when Defendants first moved for dismissal, and having “slept on her rights,” counsel
2 should be barred from benefitting by dismissal six years thereafter. Dkt. No. 177 at 44.
3 He repeats this assertion in his supplemental opposition. Dkt. No. 181 at 2-3. But as
4 Defendants point out in reply and sur-reply, Plaintiff filed his operative pleadings adding
5 new claims and Defendants after 2014. Dkt. No. 179 at 8, citing Dkt. No. 54, 67; Dkt. No.
6 203 at 6. Therefore, Defendants had no basis to raise the statute of limitations at the time
7 they filed their initial dispositive motion. *Id.* Furthermore, Defendants’ failure to raise a
8 statute-of-limitations defense in an initial pleading does not preclude them from raising it
9 later absent prejudice to Plaintiff. *See Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984)
10 (citing *Healy Tibbits Construction Co. v. Insurance Co. of North America*, 679 F.2d 803
11 (9th Cir. 1982) (holding defendant’s failure to raise the statute of limitations defense in
12 initial pleading did not preclude him from making a motion for summary judgment based
13 on that defense)). Here, no prejudice has been claimed by Plaintiff. Based on the
14 foregoing, Plaintiff has failed to establish any basis for equitable estoppel.

15 Lastly, Plaintiff cannot avoid the untimeliness bar by blaming his counsel for failing
16 to include all the claims herein in the original complaint. In this respect, Plaintiff appears
17 to be asserting equitable tolling. This Court must give effect to California’s tolling
18 provisions, including its equitable tolling rules. *See Butler*, 766 F.3d at 1198. Defendants
19 assert that the California Supreme Court has considered the plight of litigants who receive
20 bad legal advice, then fail to file within applicable limitations, and held that the “loss of the
21 cause of action must fall upon a plaintiff who obtains that advice, rather than upon a
22 wholly uninvolved defendant.” Dkt. No. 163 at 18, citing *Gutierrez v. Mofid*, 39 Cal.3d
23 892, 922 (1985). The state high court provided several justifications for this result: (1)
24 “[s]tatutes of limitation are designed to promote justice by preventing surprises through the
25 revival of claims that have been allowed to slumber until evidence has been lost, memories
26 have faded, and witnesses have disappeared” and in this way “[l]imitations statutes afford
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1 repose by giving security and stability to human affairs”; (2) “the right to be free of stale
2 claims comes to prevail over the right to prosecute them”; and (3) “the plaintiff is
3 generally charged with the lapses of attorneys acting in his behalf” and his “remedy is a
4 suit for legal malpractice against his counsel.” *Id.* at 898-900. The Ninth Circuit has also
5 deferred to *Gutierrez* in affirming the dismissal as untimely a *pro se* plaintiff’s personal
6 injury action and rejecting her equitable tolling argument. *Baker v. California Highway*
7 *Patrol*, 601 Fed.Appx. 556 (9th Cir. 2015) (citing *Gutierrez v. Mofid*, 39 Cal.3d 892, 218
8 (1985). Accordingly, Plaintiff is not entitled to equitable tolling based on counsel’s
9 actions. His remedy in this respect is a suit for legal malpractice against counsel. *See*
10 *Gutierrez*, 39 Cal.3d at 900.

11 Based on the foregoing, the Court finds that Claims 1, 2, 3, 5, 7, and 10 are
12 untimely and must be dismissed. Defendants’ motion in this regard is granted.

13 Plaintiff also asserts Claim 10 against unserved Defendants Moore and Rodriguez.
14 *See supra* at 3, fn. 1. Because Defendants Moore and Rodriguez are in positions similar to
15 served Defendants with regard to the untimeliness of Claim 10, the motion to dismiss is
16 granted as to these Defendants as well. *See Abagninin v. AMVAC Chemical Corp.*, 545
17 F.3d 733, 742 (9th Cir. 2008) (holding district court properly granted motion for judgment
18 on the pleadings as to unserved defendants where such defendants were in a position
19 similar to served defendants against whom claim for relief could not be stated).

20 **2. Harassment Claims 4, 5, 8, and 9**

21 Plaintiff claims that for approximately one year before the February 4, 2012
22 incident, he was harassed by Defendants Odom and Robberecht. *See supra* at 4. Plaintiff
23 claims he told Defendant Ebert about the harassment by Defendant Robberecht in
24 December 2011. *Id.* Plaintiff does not state Defendant Ebert’s response. *Id.*

25 Defendants assert that Plaintiff’s harassment-based Claims 4, 5, 8, and 9 against
26 Defendants Ebert and Robberecht are untimely. Dkt. No. 163 at 13. Defendants concede
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1 that Plaintiff grieved these claims in inmate grievance No. SQ-12-00010, which completed
2 the exhaustion process on June 29, 2012, and tolled the limitations period. *Id.* at 14.
3 Defendants also concede that Plaintiff further tolled his state-law claims while he pursued
4 the government-claims process through October 18, 2012. *Id.* Defendants assert that
5 Plaintiff had two years to file Claim 4 under federal law, and six months to file Claims 5,
6 8, and 9 under state law. *Id.* at 14. Defendants point out that although Plaintiff initially
7 filed suit against Defendant Odom on January 12, 2014, he did not state claims against
8 Defendants Robberecht or Ebert at that time. *Id.*; Dkt. No. 1. They also point out that
9 despite knowing well their identifies and the basis for suit against them, Plaintiff waited
10 until November 13, 2015, to add Defendants Robberecht and Ebert to this lawsuit for the
11 very first time in the SAC. Dkt. No. 163 at 14; Dkt. No. 54. Defendants also assert that
12 Plaintiff cannot make Claims 5, 8, and 9 timely using the relation-back doctrine because
13 his original January 12, 2014 complaint still far exceeds the six-month statutory period for
14 state-law claims that began on October 18, 2012. Dkt. No. 163 at 14. Defendants further
15 assert that Claim 4 does not relate back because, in addition to a common nucleus of
16 operative facts, federal and California law impose additional albeit different hurdles for
17 adding new parties to previously filed claims, and although Plaintiff is entitled to the most
18 lenient of the two standards, he satisfies neither. *Id.* at 14-15. Based on the foregoing,
19 Defendants Ebert and Robberecht request dismissal of Claims 4, 5, 8, and 9 against them.

20 After a careful review of the papers, the Court finds Claims 4, 5, 8, and 9 against
21 Defendants Ebert and Robberecht are untimely and do not relate back to the original
22 complaint. Generously giving Plaintiff the latest date of accrual as October 18, 2012,
23 when his government-claims process was completed, he had two years thereafter to file
24 timely federal claims, *i.e.*, by October 18, 2014, and six months until April 18, 2013, to file
25 timely state-law claims against Defendants Ebert and Robberecht for their alleged
26 harassment. However, he did not file any claim against them until he named them in the
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1 SAC on November 13, 2015, which was long after the statute of limitations expired on his
2 federal and state law claims.

3 In opposition to Defendants’ statute of limitations defense, Plaintiff sets forth the
4 arguments discussed in the prior section, asserting that his claims relate back to the
5 original complaint. *See supra* at 14. Plaintiff alleged in the original complaint that for
6 approximately one year prior to the herein incident, he was “subjected to terrorist threats
7 and harassment at the encouragement and behest of Defendant Odom.” Dkt. No. 1 at 5.
8 That allegation involved the general claim of harassment. Therefore, the issue here is
9 whether Plaintiff can add new parties, *i.e.*, Defendants Ebert and Robberecht, to his
10 previously filed claim of harassment against Defendant Odom. As Defendants point out,
11 Plaintiff is entitled to the most lenient of the standards between federal and California law.
12 Dkt. No. 163 at 14, citing *Butler*, 766 F.3d at 1200. In addition to the requirement that
13 there be a common nucleus of operative facts discussed in the previous section, *see supra*
14 at 12-13, federal and California law impose additional and different hurdles for adding new
15 parties to previously filed claims. As discussed below, Plaintiff fails under either standard.

16 The California test contains three additional factors: (1) Plaintiff must use Code of
17 Civil Procedure section 474 to benefit from the relation-back doctrine and add new
18 defendants by substituting them for an existing fictitious Doe defendant named in the
19 original complaint; (2) he must be “genuinely ignorant” of the new defendants’ identifies
20 when he filed his original complaint; and (3) the delay must not prejudice the new
21 defendants. *Woo v. Superior Court*, 75 Cal.App.4th 169, 176 (1999). Comparatively, the
22 federal rules permit Plaintiff to add new defendants to previously filed claims if the new
23 defendants: (1) received such notice of the action that they will not be prejudiced in
24 defending on the merits; (2) knew or should have known that the action would have been
25 brought against them, but for a mistake concerning the proper party’s identify; and (3)
26 Plaintiff fulfills these requirements within 120 days after the original complaint is filed, as
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1 prescribed by Federal Rule of Civil Procedure 4(m). Fed. R. Civ. P. 15(c)(1)(C). “Rule
2 15(c)(1)(C)(ii) asks what the prospective defendant knew or should have known during the
3 Rule 4(m) period, not what the plaintiff knew or should have known at the time of filing
4 her original complaint.” *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 548 (2010);
5 *Butler*, 766 F.3d at 1203.

6 First, Plaintiff fails to satisfy the California test for relation-back because he added
7 Defendants Ebert and Robberecht as entirely new parties in the SAC and made no
8 statement of his intent to substitute them for existing fictitious Doe defendants named in
9 the original complaint. *Woo*, 75 Cal.App.4th at 176. The Court notes that the original
10 complaint named “DOES 1-50” as defendants, but nowhere in the complaint does he allege
11 that a Doe Defendant was specifically involved in the harassment by Defendant Odom.
12 Dkt. No. 1 at 4, 5, 9, 10, 12-13. Furthermore, he cannot show that he was “genuinely
13 ignorant” of Defendants Ebert and Robberecht’s identities because, as Defendants point
14 out, Plaintiff interacted with them, met with them, corresponded with them, and grieved
15 claims against them in 2011 and 2012, well before initiating this lawsuit in 2014. For
16 example, Plaintiff claims he communicated several times to Defendant Ebert in December
17 2011 about Defendant Robberecht’s harassment. *See supra* at 4. Clearly, Plaintiff was
18 aware before he filed the original complaint on January 12, 2014, of Defendant Ebert and
19 Robberecht’s involvement in the alleged harassment. Nor can Plaintiff blame his retained
20 counsel for the failure to raise these claims against Defendants Ebert and Robberecht in the
21 original complaint when Plaintiff was aware of their identities and involvement from the
22 beginning. *See, e.g., Miller v. Thomas*, 121 Cal.App.3d 440, 444 (1981).

23 Likewise, Plaintiff also fails to satisfy the federal standard for relation back of his
24 claims against Defendants Ebert and Robberecht because he cannot show that he would
25 have sued them from the outset but for a mistake concerning their identifies. Fed. R. Civ.
26 P. 15(c)(1)(C). As discussed in the preceding paragraph, Plaintiff had personal
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1 interactions with them well before filing the instant action. Nor is there any evidence that
2 Defendants Ebert and Robberecht had notice of the action within the 120 days prescribed
3 by Rule 4(m) after the original complaint was filed: the original complaint was filed on
4 January 12, 2014, while the SAC was filed twenty-two months later, on November 13,
5 2015, well beyond the 120 days. Dkt. Nos. 1, 54. Accordingly, Claims 4, 5, 8, and 9
6 against Defendants Ebert and Robberecht in the SAC do not relate back to the original
7 complaint.

8 For the same reasons discussed above, Plaintiff is not entitled to equitable estoppel
9 on these claims because he has failed to establish that Defendants Ebert and Robberecht
10 acted to prevent Plaintiff from filing suit against them. *See supra* at 14-16; *Lukovsky*, 535
11 F.3d at 1052. Accordingly, the Court finds that Claims 4, 5, 8, and 9 against Defendants
12 Ebert and Robberecht are untimely and must be dismissed. Defendants' motion in this
13 regard should be granted.

14 **3. State Law Claims 5, 6, 8, and 9**

15 State law Claims 5, 6, 8, and 9 are based on Defendant Anderson's response to the
16 February 4, 2012 stabbing, and Defendants Anderson, Odom, and Hamilton's alleged
17 participation or acquiescence in Plaintiff's harassment for a year prior to the stabbing
18 incident. *See supra* at 4. Plaintiff attempted to grieve these allegations against Defendant
19 Anderson and harassment allegations against Defendant Odom in an administrative appeal
20 submitted on February 19, 2012, which he then attempted to pursue through April 18,
21 2013. *Id.* Defendants point out that the grievance contains no allegations of harassment or
22 conspiracy against Defendants Anderson or Hamilton. Dkt. No. 163 at 16. Nevertheless,
23 Defendants concede Plaintiff's harassment and conspiracy claims against Defendants
24 Anderson and Hamilton are tolled during Plaintiff's pursuit of the government-claims
25 process through October 18, 2012. *Id.* Even so, whether using the accrual date of either
26 April 18, 2013 or October 18, 2012, Defendants assert Plaintiff's claims fall outside of the
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1 six-month limitations period under the California Government Claims Act because he did
2 not file this suit until January 12, 2014. *Id.* Therefore, Defendants Anderson, Hamilton,
3 and Odom request dismissal of state law Claims 5, 6, 8, and 9.

4 In his supplemental opposition, Plaintiff asserts that he had three years to submit
5 state law claims from the date of the “crime.” Dkt. No. 181 at 3, 13, 16. 19-20.
6 Defendants point out in their sur-reply that the Claim Board’s decision dated October 18,
7 2012, explicitly stated the following:

8 Subject to certain exceptions, you have only six months from the date this
9 notice was personally delivered or deposited in the mail to file a court
10 action on this claim. See Government Code Section 945.6. You may seek
11 the advice of an attorney of your choice in connection with this matter. If
you desire to consult an attorney, you should do so immediately.

12 Dkt. No. 163-2 at 15, Defs.’ RJN, Ex. B. Accordingly, Plaintiff was clearly informed that
13 he had six-months to file suit.

14 Plaintiff’s belief that he had three years to file state-law claims is wrongly based on
15 a form from the California Victim Compensation Board, which states that victims of
16 crimes have three years to seek indemnification from the Board for pecuniary loss. Dkt.
17 No. 181 at 20. As Defendants point out, Plaintiff’s eligibility for such compensation from
18 the Board is separate from this lawsuit. Dkt. No. 203 at 3, citing Cal. Gov. Code § 13951,
19 *et seq.* Moreover, even assuming he was entitled to such compensation as a victim,
20 Plaintiff had to file such a claim within three years of the “crime.” According to the
21 Government Claims Form filed by Plaintiff, the date of the incident was “February 4, 2012
22 & related conspiracies.” Dkt. No. 163-2 at 15-16. Therefore, he had three years, i.e., until
23 February 4, 2015, to file these claims. However, Plaintiff raised these state-law claims for
24 the first time in his SAC on November 13, 2015, which was over nine months after the so-
25 called three years limitations period had expired. Accordingly, this argument is without
26 merit.

1 The Court finds these pendant state law claims are clearly untimely. Plaintiff had
2 six months from the accrual of the injury to file pendant state law claims in California. *See*
3 Cal. Gov't. Code § 911.2. Assuming the date of accrual was April 18, 2013, when
4 Plaintiff attempted to exhaust administrative remedies, Plaintiff had six months thereafter,
5 *i.e.*, until October 18, 2013, to file a timely state claim. However, Plaintiff did not file this
6 action until January 12, 2014, nearly three months later. As such, even if the claims as
7 raised in the SAC related back to the original complaint, they are still untimely.
8 Accordingly, Defendants' motion to dismiss state law Claims 5, 6, 8, and 9 should be
9 granted.

10 **4. Continuing-Violation Doctrine**

11 In his supplemental opposition, Plaintiff asserts a series of threats and intimidations
12 that took place “starting from at least 2011 through the end of 2013; a two year lengthy
13 time span.” Dkt. No. 181 at 5-13. Defendants construe these arguments as an attempt to
14 invoke the continuing-violation theory of delayed accrual, and assert his efforts fall short.
15 Dkt. No. 203 at 4.

16 The continuing violation doctrine is an exception to the discovery rule of accrual
17 which allows a plaintiff to seek relief for events outside of the limitations period. *See Bird*
18 *v. Dep't of Human Servs.*, 935 F.3d 738, 746 (9th Cir. 2019) (citing *Knox v. Davis*, 260
19 F.3d 1009, 1013 (9th Cir. 2001)). The Ninth Circuit has recognized two applications of
20 the continuing violations theory: (1) the “related acts” continuing violation theory, also
21 referred to as the “serial acts” theory, and (2) the maintenance of a discriminatory system
22 both before and during the limitations period, also referred to as the systematic branch of
23 the continuing violations doctrine. *Id.* Here, Plaintiff's allegation that he was subjected to
24 repeated threats indicates that the applicable theory is the first, *i.e.*, “related acts” or “serial
25 acts.” Prior to 2002, the “related acts” continuing violation theory allowed plaintiff to seek
26 relief for events outside of the limitations period if a series of violations are related closely
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1 enough to constitute a continuing violation and that one or more of the acts falls within the
 2 limitations period. *See Bird*, 935 F.3d at 746. But the Supreme Court limited the related
 3 acts continuing violation theory in *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,
 4 114 (2002), holding that “‘discrete . . . acts are not actionable if time barred, even when
 5 they are related to acts alleged in timely filed charges’ because ‘[e]ach discrete . . . act
 6 starts a new clock for filing charges alleging that act.’” *Bird*, 935 F.3d at 747 (citing
 7 *Morgan*, 536 U.S. at 113). *See also Carpinteria Valley Farms, Ltd. v. County of Santa*
 8 *Barbara*, 344 F.3d 822, 829 (9th Cir. 2003) (“Although *Morgan* was a Title VII case... we
 9 have applied *Morgan* to bar § 1983 claims predicated on discrete time-barred acts, not-
 10 withstanding that those acts are related to timely filed claims.”). In *Bird*, the Ninth
 11 Circuit’s concluded that after *Morgan*, “little remains of the continuing violations
 12 doctrine.” 935 F.3d at 748. “Except for a limited exception for hostile work environment
 13 claims – not at issue here – the serial acts branch is virtually non-existent.” *Id.*

14 Under the foregoing precedent, the Court finds Plaintiff’s continuing-violation
 15 theory fails to save any of the challenged claims from being untimely. Each alleged
 16 discrete act must be timely in order be actionable. Here, the last discrete “act” alleged by
 17 Plaintiff occurred on November 21, 2013. Dkt. No. 203 at 4, citing Dkt. No. 181 at 13, 15.
 18 This act was by a non-party Officer Brown, who, on November 21, 2013, delivered a
 19 chrono memorializing a November 8, 2012 classification hearing. *Id.* Plaintiff asserts that
 20 the delivery of this chrono by Officer Brown “was a new and separate threat, with the
 21 warning highlighted, reemphasizing the death threats.” Dkt. No. 181 at 13. This
 22 “warning” to which Plaintiff refers is the ICC’s explanation of the “Grade A R/M #4”
 23 exercise yard’s “no warning shot policy,” which he claims the ICC had never previously
 24 given him in the past 17 years of his incarceration at SQSP. Dkt. No. 181 at 12; Dkt. No.
 25 54-44 at 5. Plaintiff therefore construes this recent explanation as a “death threat.” *Id.*
 26 However, the Court agrees with Defendants that the mere act of delivering this chrono by
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1 Officer Brown bears no indicia of wrongfulness. Officer Brown signed and dated the
2 chrono at Plaintiff's request, without highlighting, embellishing, or editorializing. Dkt.
3 No. 54-44 at 4-5. The chrono itself merely memorialized a routine classification hearing
4 on November 8, 2012, that Plaintiff attended; Officer Brown was not involved in that
5 hearing. *Id.* at 5. Accordingly, there is no support for the assertion that this action
6 constitutes a discrete actionable event where Officer Brown's action did not violate
7 Plaintiff's rights under state or federal law. *Id.* But even if Officer Brown's action was
8 actionable, Plaintiff had six months thereafter, *i.e.*, until May 21, 2014, to file a timely
9 claim. However, he did not raise any claim against Officer Brown in the original
10 complaint nor in the SAC on November 13, 2015. Accordingly, any claim against Officer
11 Brown at this point would be untimely. Furthermore, the previous discrete act Plaintiff
12 alleges before Officer Brown's delivery is the November 8, 2012 ICC hearing. Dkt. No.
13 181 at 12. Any state claim based on the ICC's action on that date had to be filed within six
14 months, *i.e.*, no later than May 8, 2013, but Plaintiff did not file this action until January
15 2014, well past that deadline. In addition, Officer Brown's 2013 delivery of the November
16 8, 2012 chrono has nothing to do with the searches of Plaintiff's cell on August 21 and
17 October 23, 2011, or harassment claims against Defendant Odom, and there is no
18 discussion or reference to these claims in the November 8, 2012 chrono. Accordingly,
19 these discrete acts alleged by Plaintiff do not save any of the state claim claims discussed
20 previously from being untimely under the continuing-violation doctrine.

21 Nor do either of these discrete acts save the federal claims from being untimely.
22 Plaintiff raised the cell-search claims and the harassment claims against additional
23 Defendants for the first time in his SAC on November 13, 2015. Federal claims based on
24 the November 8, 2012 ICC hearing had to be filed by November 8, 2014. They were not.
25 On the other hand, Officer Brown's act on November 21, 2013, of delivering the chrono to
26 Plaintiff was within the two years limitations period of the SAC, but Plaintiff included no
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1 claim against Officer Brown based on his actions, nor could he have. As discussed above,
2 there was no indicia of wrongdoing in Officer Brown’s actions on that day; he merely
3 delivered the chrono from the ICC hearing on November 8, 2012. *See supra* at 26.
4 Accordingly, none of the federal claims discussed previously are rendered timely under the
5 continuing-violation doctrine.

6 **C. Remaining Arguments Regarding State Law Claims 5, 7, 8 and 9**

7 Defendants claim the Government Claims Act requires Plaintiff file a government
8 claim before litigating under state law, but that he did not submit one seeking relief for
9 mail interference or the cell searches conducted on August 21 and October 23, 2011. Dkt.
10 No. 163 at 19-20. Defendants also assert that Claims 5, 8, and 9 fail to state actionable
11 relief. Dkt. No. 163 at 21-23. The Court has already determined that these state law
12 claims are all clearly untimely, as discussed above. *See supra* at 22. Plaintiff has failed to
13 show otherwise in opposition. Accordingly, the Court need not discuss these additional
14 grounds for dismissal.

15 **IV. Motion for Sanctions**

16 Before filing their motion to dismiss, Defendants filed a motion for sanctions,
17 requesting the Court dismiss Plaintiff’s claims against them because Plaintiff refuses to
18 respond to basic contention discovery and comply with the Court’s multiple orders
19 compelling the same. Dkt. No. 162 at 5. In response, Plaintiff does not dispute that he
20 failed to respond to Defendants’ written discovery in a timely manner. Dkt. No. 169.
21 Rather, he provides twenty-four “justifications” for his failure to comply. *Id.* at 3-4. In
22 reply, Defendants address each explanation and asserts that this “laundry list of excuses”
23 do not hold up under scrutiny. Dkt. No. 172 at 1, 7.

24 Federal Rule of Civil Procedure 37 permits the district court, in its discretion, to
25 enter a default judgment against a party who fails to comply with an order compelling
26 discovery. Fed. R. Civ. P. 37(b)(2)(c); *Computer Task Group v. Brotby*, 364 F.3d 1112,
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1 1115 (9th Cir. 2004). “In deciding whether a sanction of dismissal or default for
2 noncompliance with discovery is appropriate, the district court must weigh five factors:
3 ‘(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to
4 manage its docket; (3) the risk of prejudice to the [opposing party]; (4) the public policy
5 favoring disposition of cases on their merits; and (5) the availability of less drastic
6 sanctions.’” *Id.* (Citations omitted). Before imposing such a substantial remedy, the
7 district court should first implement lesser sanctions, warn the offending party of the
8 possibility of dismissal, consider alternative lesser sanctions and determine that they are
9 inappropriate. *Id.* at 1116. *See, e.g., Leon v. IDX Systems*, 464 F.3d 951, 960-61 (9th Cir.
10 2006) (finding dismissal appropriate where party acted in bad faith in despoiling evidence
11 under five part test). “Only ‘willfulness, bad faith, and fault’ justify terminating
12 sanctions.” *Connecticut General Life v. Providence*, 482 F.3d 1091, 1096 (9th Cir. 2007)
13 (quoting *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003)).

14 Here, the Court finds that although the first and second factors weigh in favor of
15 granting the motion, the remaining factors weigh against it, especially in light of the fact
16 that Defendants’ motion to dismiss has resolved all but one claim against two remaining
17 Defendants. This matter has been whittled back down to the Eighth Amendment claim
18 against the two original Defendants Anderson and Odom, and it would prejudice Plaintiff
19 to dismiss this claim as he would have no other avenue to pursue a remedy for an incident
20 that occurred over eight years ago. Furthermore, the public policy favoring disposition of
21 this remaining claim on the merits weighs against granting the motion for terminating
22 sanctions. Lastly, there are less drastic sanctions available, including the imposition of
23 monetary sanctions pursuant to 28 U.S.C. § 1927. *Fink v. Gomez*, 239 F.3d 989, 991 (9th
24 Cir. 2001). Moreover, adequate procedural due process requires that Plaintiff be afforded
25 at least notice of the type of sanctions the Court is considering and an opportunity to
26 respond. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1113-14 (9th Cir. 2005). Here,
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1 Plaintiff was generally advised that the failure to comply with the Court’s order “may
2 result in the imposition of sanctions” with a citation to Rule 37(d). Dkt. No. 148 at 2.
3 Plaintiff was not specifically advised that a potential sanction for his failure to comply
4 would be dismissal of the claims. Having now been made aware of this potential sanction,
5 perhaps Plaintiff will be more diligent in complying with Defendants’ discovery in a
6 timely manner.

7 Based on the foregoing, Defendants’ motion for terminating sanctions is DENIED
8 without prejudice. Dkt. No. 162. This matter shall now proceed on the merits of the
9 remaining Eighth Amendment claim against Defendants Anderson and Odom. Plaintiff is
10 now advised that should he continue to fail to comply to Defendants discovery requests on
11 that remaining claim in a timely manner, the Court will reconsider a motion from
12 Defendants for terminating sanctions against Plaintiff pursuant to Rule 37(b)(2)(A)(v).

13 14 **II. CONCLUSION**

15 For the forgoing reasons, the Court orders as follows:

16 1. Defendants’ motion to dismiss is **GRANTED**. Dkt. No. 163. The
17 following federal claims are **DISMISSED with prejudice** as untimely: Claim 1 (First
18 Amendment retaliation) against Defendants Odom and Robberecht; Claims 2 and 3 (First
19 and Sixth Amendment legal mail) against Defendants Givens, McLelland, Robberecht,
20 Welton; Claim 4 (Eighth Amendment safety) against Defendants Ebert and Robberecht;
21 and Claim 10 (Fourteenth Amendment due process) against Defendants Chappell, Givens,
22 Jackson, Luna, McLelland, and, Robberecht. The following state law claims are
23 **DISMISSED with prejudice** as untimely: Claim 5 (California Constitutional claims
24 equivalent to the federal claims found cognizable); Claims 6 and 7 (Bane Act) against
25 Defendants Odom, Givens, McLelland, Robberecht, Welton; Claim 8 (negligence per se)
26 against Defendants Anderson, Ebert, Odom, and Robberecht; and Claim 9 (civil
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1 conspiracy) against Anderson, Hamilton, Odom, and Robberecht.

2 2. Because the Court has found Claim 10 under the Fourteenth Amendment to
3 be untimely in its entirety, the claim is also barred as untimely against unserved
4 Defendants Moore and Rodriguez. *See supra* at 18. Accordingly, Claim 10 against
5 Defendants Moore and Rodriguez is also **DISMISSED with prejudice**.

6 3. Defendants' motion for sanctions is **DENIED without prejudice**. Dkt. No.
7 162. Should Plaintiff fail to comply with Defendants' discovery requests going forward,
8 the Court will reconsider a motion from Defendants for terminating sanctions on the
9 remaining claims.

10 4. The only timely claim that remains is Plaintiff's Eighth Amendment claim
11 against Defendants Anderson and Odom. This action shall proceed solely on the deliberate
12 indifference to safety claim against Defendants Anderson and Odom based on the February
13 4, 2012 stabbing. The Clerk shall terminate all other Defendants from this action.

14 5. No later than **ninety-one (91) days** from the date this order is filed,
15 Defendants Anderson and Odom shall file a motion for summary judgment or other
16 dispositive motion with respect to the remaining claims in this action.

17 a. Any motion for summary judgment shall be supported by adequate
18 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
19 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
20 qualified immunity found, if material facts are in dispute. If any Defendant is of the
21 opinion that this case cannot be resolved by summary judgment, he shall so inform the
22 Court prior to the date the summary judgment motion is due.

23 b. **In the event Defendants file a motion for summary judgment, the**
24 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
25 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). *See***
26 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

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6. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **twenty-eight (28) days** from the date Defendants' motion is filed.

Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).


7. Defendants *shall* file a reply brief no later than **fourteen (14) days** after Plaintiff's opposition is filed.

8. All other provisions in the Court's Order of Service, Dkt. No. 69, shall remain in effect.

This order terminates Docket Nos. 162 and 163.

IT IS SO ORDERED.

Dated: September 29, 2020


BETH LABSON FREEMAN
United States District Judge

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Order Granting Defs' MTD; Denying M. for Sanctions; Sched. Brief.
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