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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
89 Robert Joseph Benge,
10 Plaintiff,

No. CV 18-00349-PHX-MTL (CDB)

11 vs.

ORDER12 Corizon Health LLC, et al.,
13 Defendants.
1415 Plaintiff Robert Joseph Benge, who was formerly confined in the Arizona
16 Department of Corrections (ADC),¹ brought this pro se civil rights action under 42
17 U.S.C. § 1983 against Corizon Health LLC; Dr. Julia Barnett; Nurse Practitioners (NP)
18 Carrie Smalley and Melanie Louzon; Associate Deputy Wardens Brenda Burgess and
19 David Summers; and Lieutenant Anita Hudson. (Docs. 20, 30, 46.) Before the Court are
20 Benge's Emergency Motion for Preliminary Injunction (Doc. 38) and Hudson, Summers,
21 and Burgess's ("ADC Defendants") Motion to Dismiss (Doc. 29). The Court will deny
22 both Motions.23 **I. Background**24 In Count One of his First Amended Complaint, Benge alleged an Eighth
25 Amendment medical care claim. (Doc. 20 at 7.) He asserted that, following a neck
26 injury in March 2014, NP Louzon failed to address Benge's shoulder and neck pain,
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¹ Benge was released from custody in August 2019 and now resides in Thomasville, North Carolina. (Docs. 63, 65, 69.)

1 failed to order tests, and ultimately discontinued pain medication despite his repeated
2 requests for medical assistance and multiple incidents of losing consciousness. (*Id.*)
3 Eventually, Bengé had an MRI, which showed severe spinal cord compression, and he
4 was admitted to the hospital and underwent emergency spinal cord surgery. (*Id.* at 7–8.)
5 Bengé alleged that when he returned to the prison, NP Smalley discontinued his
6 morphine pain medication “cold turkey,” which caused him to suffer withdrawal
7 symptoms, and Smalley and Dr. Barnett then refused to prescribe him any other pain
8 medication pursuant to a Corizon/ADC policy that prohibited pain medication even for
9 verified medical needs. (*Id.*)

10 In Count Two, Bengé alleged an Eighth Amendment failure-to-protect claim. (*Id.*
11 at 14.) Bengé alleged that he suffered the neck injury discussed above in March 2014
12 after he was assaulted by intoxicated prisoners. (*Id.*) He alleged that he was assaulted
13 again by intoxicated prisoners in April and June 2014. (*Id.* at 6.) Bengé stated that he
14 submitted grievances informing officials that he did not feel safe and that he had been
15 assaulted numerous times by intoxicated prisoners. (*Id.* at 14.) Bengé claimed that from
16 January 2014 to November 2015, he repeatedly informed Burgess, Summers, and Hudson
17 about the manufacture, sale, and consumption of prison made alcohol, or hooch;
18 however, Defendants failed to take anything more than cosmetic and short-term measures
19 in response to Bengé’s concerns. (*Id.* at 14–15.)

20 In April 2019, the parties filed their pending Motions. Bengé filed an Emergency
21 Motion for Preliminary Injunction seeking various forms of relief related to medical care,
22 including orders for Defendants to bring him to a neurosurgeon and nephrologist; orders
23 for a back MRI and physical therapy; and orders for a wheelchair, cane, and ice. (Doc.
24 38.) ADC Defendants filed a Motion to Dismiss under Federal Rule of Civil Procedure
25 12(b)(6), arguing that Bengé’s claims in Count Two are barred by the applicable statute
26 of limitations. (Doc. 29.)

27 **II. Preliminary Injunction**

28 A former prisoner’s claim for injunctive relief becomes moot following his release

1 from custody. *See Alvarez v. Hill*, 667 F.3d 1061, 1063–64 (9th Cir. 2012) (former
2 prisoner’s declaratory and injunctive relief claims moot following release from custody);
3 *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995) (“[a]n inmate’s release from prison
4 while his claims are pending generally will moot any claims for injunctive relief relating
5 to the prison’s policies unless the suit has been certified as a class action”) (citing
6 *Preiser v. Newkirk*, 422 U.S. 395, 402–03 (1975)). Because Benge is no longer in
7 custody, his request for injunctive relief in the form of specific medical care is moot, and
8 his Emergency Motion for Preliminary Injunction will be denied.

9 **III. Statute of Limitations**

10 **A. Governing Standard**

11 When the statute of limitations forms the basis of a motion to dismiss for failure to
12 state a claim, the motion can be granted if the running of the statute is apparent on the
13 face of the complaint, and “the assertions of the complaint, read with the required
14 liberality, would not permit the plaintiff to prove that the statute was tolled.” *Jablon v.*
15 *Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *see also TwoRivers v. Lewis*, 174
16 F.3d 987, 991 (9th Cir. 1999.) Although courts will not normally look beyond the
17 pleadings in resolving a Rule 12(b)(6) motion, *Lee v. City of Los Angeles*, 250 F.3d 668,
18 688 (9th Cir. 2001), a “court may consider material that the plaintiff properly submitted
19 as part of the complaint or, even if not physically attached to the complaint, material that
20 is not contended to be inauthentic and that is necessarily relied upon by the plaintiff’s
21 complaint.” *Id.*

22 Section 1983 does not include its own statute of limitations. *TwoRivers*, 174 F.3d
23 at 991. Therefore, federal courts apply the statute of limitations governing personal
24 injury claims in the forum state. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985); *TwoRivers*,
25 174 F.3d at 991. In Arizona, the limitations period for personal injury claims is two
26 years. *TwoRivers*, 174 F.3d at 991; *see also* Ariz. Rev. Stat. § 12-542 (providing that
27 actions for personal injury must be commenced within two years after the cause of action
28 accrues).

1 Although the statute of limitations applicable to § 1983 claims is borrowed from
2 state law, federal law continues to govern when a § 1983 claim accrues. *Wallace v. Kato*,
3 549 U.S. 384, 388 (2007); *TwoRivers*, 174 F.3d at 991. Under federal law, a claim
4 accrues “when the plaintiff knows or has reason to know of the injury which is the basis
5 of the action.” *TwoRivers*, 174 F.3d at 991; *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir.
6 1996.) The Court must apply any state rule for tolling to actions brought under § 1983.
7 *Hardin v. Straub*, 490 U.S. 536, 544 (1989); *Johnson v. State of Cal.*, 207 F.3d 650, 653
8 (9th Cir. 2000); *TwoRivers*, 174 F.3d at 992. And in prisoner § 1983 cases, “the
9 applicable statute of limitations must be tolled while a prisoner completes the mandatory
10 exhaustion process.” *Brown v. Valoff*, 422 F.3d 926, 942–43 (9th Cir. 2005).

11 **B. Discussion**

12 ADC Defendants argue that Benge’s failure-to-protect claim arose on March 18,
13 2014, the date he was assaulted, or, at the latest, in November 2015, based on his
14 allegation that ADC Defendants failed to protect him from January 2014 to November
15 2015. (Doc. 29 at 5.) ADC Defendants submit that Benge was therefore required to file
16 his lawsuit by November 2017; however, he did not initiate this action until February 1,
17 2018. (*Id.*)² ADC Defendants therefore contend that the claims in Count Two must be
18 dismissed as time-barred. (*Id.*)

19 Benge opposes the Motion on the grounds that the Court already determined that
20 he stated a failure-to-protect claim against ADC Defendants; he did not learn that his
21 spinal cord injury was irreversible until June 2016; and the statute of limitations was
22 tolled while he was exhausting his administrative remedies. (Doc. 36 at 2–9.) In their
23 Reply, Defendants assert that Benge had reason to know of his injury the day of his
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25 ² ADC Defendants rely on an incorrect date. Benge initiated this action on
26 January 26, 2018. (Doc. 1 at 21.) See *Houston v. Lack*, 487 U.S. 266, 270–71 (1988)
27 (under the prison mailbox rule, a legal document is deemed “filed” when handed by the
28 prisoner to a prison official for mailing, and that date is determined by the date the
prisoner signs the document rather than the date it is filed with the clerk of court); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (applying the prison mailbox rule to § 1983 lawsuits by pro se prisoners).

1 assault in March 2014, so that is the date the statute of limitations began the run. (Doc.
2 37 at 2–3.)

3 Bengé’s failure-to-protect claim is not based on one isolated incident in March
4 2014. Rather, his claim is based on allegations of repeated assaults, injuries as a result of
5 those assaults, and repeated failures by ADC Defendants to respond to Bengé’s
6 grievances and notices that intoxicated prisoners presented a threat to his safety. (Doc.
7 20.) Because Bengé specifically alleged that from January 2014 to November 2015,
8 ADC Defendants failed to protect him, the statute of limitations did not begin to run until
9 November 2015. (*Id.* at 14.) *See O’Loghlin v. Cnty. of Orange*, 229 F.3d 871, 875 (9th
10 Cir. 2000) (holding that the continuing violation doctrine is meant “to prevent a
11 defendant from using its earlier illegal conduct to avoid liability for later illegal conduct
12 of the same sort”); *see also Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (“[t]he
13 continuing violation theory applies to § 1983 actions”).

14 As mentioned, the two-year statute of limitations must be tolled for the period that
15 Bengé was completing the mandatory administrative remedies at the prison. *Brown*, 422
16 F.3d at 942–43. In his First Amended Complaint, Bengé specifically alleged that he
17 initiated administrative remedies for his failure-to-protect claim and that he appealed his
18 request for administrative relief to the highest level. (Doc. 20 at 14.) Indeed, Bengé’s
19 claim is based in part on allegations that he submitted grievances informing ADC
20 Defendants of the risk of harm to his safety. (*Id.*) Despite these allegations, and despite
21 the fact that Bengé argued in his opposition to ADC Defendants’ Motion that tolling for
22 exhaustion applies, ADC Defendants wholly failed to the address the tolling requirement.

23 To dismiss a claim as untimely on a Rule 12(b)(6) motion, it must “appear[]
24 beyond doubt that the plaintiff can prove no set of facts that would establish the
25 timeliness of the claim.” *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th
26 Cir. 1995). That is not the case here. In his First Amended Complaint, Bengé did not
27 indicate the dates of his administrative grievances and responses thereto, and he was not
28 required to do so at the pleading stage. *Jones v. Bock*, 549 U.S. 199, 216 (2007)

1 (prisoners are not required to specially plead or demonstrate exhaustion in their
2 complaints). Thus, it is unclear how long the statute of limitations must be tolled in this
3 case, and the Court cannot conclude based on the face of the First Amended Complaint
4 that Benge's failure-to-protect claim is time-barred. Consequently, ADC Defendants'
5 Motion to Dismiss will be denied.

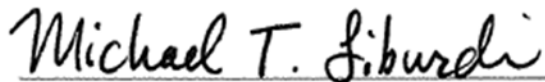
6 **IT IS ORDERED:**

7 (1) The reference to the Magistrate Judge is withdrawn as to ADC Defendants'
8 Motion to Dismiss (Doc. 29) and Plaintiff's Emergency Motion for Preliminary
9 Injunction (Doc. 38.)

10 (2) Plaintiff's Emergency Motion for Preliminary Injunction (Doc. 38) is
11 **denied as moot.**

12 (3) ADC Defendants' Motion to Dismiss (Doc. 29) is **denied.**

13 Dated this 4th day of October, 2019.

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17 Michael T. Liburdi
18 United States District Judge
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