

1 he is attempting to show “that the Second Case was improperly dismissed.” (Objs. at 26.) Plaintiff
2 argues that res judicata does not apply because he did not have a “fair and full opportunity” to
3 litigate the Second Case, but this contention is based on his argument that the dismissal was
4 “improper” because the claims should not have been found to be untimely, and he was not given
5 an opportunity to amend the pleading to show that they were timely. (Objs. at 6, 9-11.) The
6 Second Case, however, was dismissed as untimely, the Ninth Circuit affirmed the dismissal, and
7 plaintiff’s subsequent motion to reopen the case based on an alleged erroneous ruling of law was
8 rejected. (See R&R at 3.) Plaintiff cannot now argue in this action that the dismissal of his earlier
9 case was incorrect. Nothing in the Objections alters the finding that res judicata bars plaintiff from
10 raising his claims of excessive force during his arrest and the failure to provide medical attention
11 immediately following the arrest. (See R&R at 8.)

12 Second, plaintiff is mistaken in stating that the R&R found that “the civil rights claims that
13 the plaintiff raised in these three actions filed in this court did not pertain to criminal charges in
14 Superior Court.” (Objs. at 10.) The portion of the R&R that plaintiff cites rejected plaintiff’s
15 contention that he was entitled to tolling pursuant to Cal. Gov’t Code § 945.3 for the **pendency**
16 **of his federal civil rights cases**. (See R&R at 8-9.) Plaintiff now argues in his Objections that
17 he should be entitled to tolling pursuant to Cal. Gov’t Code § 945.3 from the time of his arrest on
18 January 6, 2006, through the “pending charges in Superior Court.” (Objs. at 10.) But this
19 argument is merely another attempt to overturn the dismissal of the Second Case as untimely,
20 which plaintiff cannot do in this action.

21 Third, plaintiff’s argument that he should be entitled to equitable tolling because he suffered
22 an “unjust technical forfeiture” is not persuasive. Plaintiff cites Jones v. Blanas, 393 F.3d 918, 928
23 (9th Cir. 2004) (see Objs. at 13-14), but this case pertains to statutory tolling language that limited
24 tolling for the disability of imprisonment to individuals imprisoned on criminal charges, excluding
25 civil detainees. Because the reasons for the statutory tolling provision for incarceration applied
26 equally to civil detainees, the Ninth Circuit held that a civil detainee should be entitled to the
27 benefit of tolling for imprisonment despite being excluded by the language of the statute. Jones,

1 393 F.3d at 928-29. Here, plaintiff’s argument for equitable tolling is premised on the allegedly
2 “improper” dismissal of the Second Case, which is not similar in any respect to the inequitable
3 application of a statute to different classes of litigants.

4 Fourth, plaintiff appears to be arguing that he is pleading “new or additional facts” in this
5 action that he should have been allowed to add to the Second Case. (Objs. at 15-16.) But
6 Plaintiff does not allege any new facts. He merely sets forth his legal arguments that he is entitled
7 to tolling under Cal. Gov’t Code § 945.3 and other state law provisions.

8 Further, the R&R found that, to the extent that plaintiff is raising claims for inadequate
9 medical care **subsequent** to his arrest that he did not raise in his Second Case, Cal. Gov’t Code
10 § 945.3 is inapplicable to any such claims because the claims do not pertain to the criminal
11 charges against plaintiff. (See R&R at 9; Objs. at 7, 19.) Plaintiff does not cite any case law to
12 contradict this finding.

13 Moreover, the proposed Second Amended Complaint includes a section entitled “Facts
14 Supporting Timeliness” (ECF No. 17-1 at 8-9) that omits his earlier filed federal actions. Plaintiff
15 argues in the proposed pleading that the claims he raises here are timely because he is entitled
16 to tolling under Cal. Gov’t Code § 945.3. Plaintiff’s proposed amendments cannot alter the fact
17 that his claims are barred by res judicata, or that the claims pertaining to plaintiff’s subsequent
18 medical care are untimely. Accordingly, leave to amend is futile.

19
20 **III.**

21 **CONCLUSION**

22 Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Complaint, the
23 other records on file, the Magistrate Judge’s Report and Recommendation, plaintiff’s Objections
24 to the Report and Recommendation, and his Request to file a Second Amended Complaint. The
25 Court has engaged in a de novo review of those portions of the Report and Recommendation to
26 which objections have been made. The Court accepts the recommendations of the Magistrate
27 Judge.

1 ACCORDINGLY, IT IS ORDERED:

2 1. The Report and Recommendation is accepted;

3 2. The First Amended Complaint is dismissed without leave to amend;

4 3. Plaintiff's request for leave to amend and file a Second Amended Complaint is
5 **denied**; and

6 4. Judgment shall be entered dismissing this action.

7
8 

9 DATED: 2/13/17
10 _____

11 HONORABLE DALE S. FISCHER
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28