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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RAYMOND BALDHOSKY,  
Plaintiff,  
v.  
VIDAL SANCHEZ, et al.,  
Defendants.

Case No. 1:14-cv-00166-MJS (PC)

- FINDINGS AND RECOMMENDATIONS TO:**
- 1) GRANT DEFENDANTS' REQUEST FOR JUDICIAL NOTICE (ECF No. 24-1)
  - 2) GRANT DEFENDANTS' MOTION TO DISMISS (ECF No. 19)
  - 3) GRANT DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S SURREPLY (ECF No. 26)
  - 4) DENY PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL (ECF No. 25)

**I. PROCEDURAL HISTORY**

Plaintiff Raymond Baldhosky is a former state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action filed under 42 U.S.C. § 1983. The action proceeds on Plaintiff's medical indifference and state law medical negligence claims against Defendants Sanchez, Diwendi, Yang, Cross, Toni, Smith, Daniels, and Does 2-13, 15-17, 19-20, and 24-40, all physicians and nurses at Corcoran State Prison. (ECF No. 8.) Defendants have declined Magistrate Judge jurisdiction (ECF No. 22).

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2 Before the Court are: Defendants' Request for Judicial Notice (ECF No. 24-1),  
3 Defendants' Motion to Dismiss (ECF No. 19), Defendants' Motion to Strike Plaintiff's  
4 Surreply (ECF No. 26) and Plaintiff's Motion for Appointment of Counsel (ECF No. 25)

5 Defendants moved to dismiss Plaintiff's federal and state claims on January 14,  
6 2015 on statute of limitations grounds. (ECF No. 19). Plaintiff opposed the motion on  
7 January 30, 2015 (ECF No. 21). Defendants filed a reply and request for judicial notice  
8 on February 6, 2015. (ECF No. 24). Plaintiff filed a "Clarification Letter to the Court and  
9 Motion to Request Appointment of Counsel" (ECF No. 25), which in part addressed  
10 Defendants' Reply and thus amounted to a surreply to the motion to dismiss.  
11

## 12 **II. RELEVANT PLEADING FACTS**

13 Plaintiff, a paraplegic, claims he was harmed by a policy and practice of medical  
14 indifference and neglect while he was a prisoner at CSP. He alleges that Defendants  
15 repeatedly used catheters that were the wrong size, causing pain, significant injury, and  
16 complete failure of his urethra, and then failed to provide appropriate follow-up care  
17 after surgeries to enable use of a supra-pubic catheter.  
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## 19 **III. PROCEDURAL POSTURE**

20 Plaintiff asserts that he has exhausted his administrative remedies. He filed a 602  
21 appeal regarding the issues raised in his First Amended Complaint on August 24, 2008  
22 and received a third level denial on January 10, 2010. Defendants do not dispute these  
23 assertions.  
24

25 Plaintiff was released from prison on July 27, 2010. He originally filed suit, in case  
26 No. 1:12-cv-1200-MJS, on July 23, 2012, alleging medical indifference and state law  
27 negligence by Defendants and by medical staff at another institution.  
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2 This Court issued a screening order in No. 1:12-cv-01200–MJS on December 9,  
3 2013. In that screening order, the Court dismissed the case without prejudice, noting,  
4 among other things: “Plaintiff’s complaint alleges unrelated claims involving distinct  
5 incidents at distinct CDCR facilities, and as such, violates Rule 18(a). Such amassing of  
6 unrelated claims is not permissible and if repeated will result in dismissal of unrelated  
7 claims. If Plaintiff chooses to file an amended pleading, it should include only related  
8 claims arising at a single CDCR facility.” (ECF No. 24-1, at 9).

9  
10 On January 22, 2014 Plaintiff filed an amended complaint in action number 1:12-cv-  
11 01200-MJS asserting claims against medical staff at Corcoran’s Substance Abuse and  
12 Treatment Facility. Screening in that case has not yet been completed. Plaintiff then  
13 filed the original complaint in this action on February 7, 2014. After screening, his First  
14 Amended Complaint was permitted to proceed to service in October 2014. (ECF No. 8.)

### 15 **III. REQUEST FOR JUDICIAL NOTICE**

16 Defendants’ reply brief responds to Plaintiff’s argument for tolling by asking the  
17 Court to take judicial notice of the First Screening Order and part of the First Amended  
18 Complaint in Baldhosky v. Hubbard, 1:12-cv-01200-MJS.

19  
20 Federal Rule of Evidence 201 authorizes the Court to judicially notice facts not  
21 subject to reasonable dispute, including court records, because they may be accurately  
22 determined from sources whose accuracy cannot reasonably be questioned. United  
23 States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Reyn’s Pasta Bella, LLC v. Visa  
24 USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006). This includes the Court’s own records.  
25 Id. Such notice is mandatory where the requesting party supplies the information to be  
26 noticed to the Court. FRE 201(c)(2).  
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2 The record in the earlier Baldhosky case appearing to be the proper subject of  
3 judicial notice and no timely request for an opportunity to be heard on the propriety of  
4 judicially noticing it having been made, FRE 201(e), Defendants' request is granted and  
5 the excerpts of the record in 1:12-cv-01200-MJS are judicially noticed.

6 **III. MOTION TO DISMISS**

7 **A. Summary of Defendants' Argument**

8  
9 Defendants have moved to dismiss on statute of limitations grounds. They note  
10 that Plaintiff's injuries against various defendants accrued between August and  
11 December of 2008, and that Plaintiff did not initiate this action until February 7, 2014.

12 They argue that even if Plaintiff is entitled to statutory tolling under CAL. CODE.  
13 CIV. P. § 352.1 because of the disability of imprisonment from the date of the accrual of  
14 his claims, plus the additional two years prescribed by California state law, Plaintiff still  
15 would have had to have filed suit by July 2012.

16  
17 They argue that both Plaintiff's federal and state claims should be dismissed  
18 because Plaintiff filed his present suit almost two years after this date. They further  
19 argue that Plaintiff's state negligence claims should be dismissed because Plaintiff did  
20 not file suit within six months of his claims being rejected by the Government Claims  
21 and Victim Compensation Board.

22 **B. Summary of Plaintiff's Opposition**

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24 Plaintiff argues, first, that he is entitled to statutory tolling under § 352.1 due to  
25 the disability of imprisonment. Second, he argues that he is entitled to equitable tolling  
26 during the pendency of his administrative appeals. Third, he argues that he is entitled to  
27 additional equitable tolling on the grounds that he originally brought the instant claims  
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2 on July 23, 2012 in Case No. 1:12-cv-01200. After the Court, in its screening order in  
3 that case, specifically instructed him to file some of his claims separately to avoid a  
4 violation of Rule 18(a), he filed the complaint in this action.

5 He concedes, however, that his state claims are untimely, and requests that all  
6 pending tort claims be dismissed with prejudice.

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8 **C. Defendants' Reply**

9 Defendants respond to Plaintiff's Opposition by first noting that if Plaintiff is  
10 entitled to statutory tolling under § 352.1, he should only be entitled to tolling until July  
11 27, 2010, the day he was released from prison.

12 They argue that his complaint in 1:12-cv-01200-MJS should not affect the  
13 running of the statute of limitations for his 2014 suit. They conclude that equitable  
14 tolling should not apply to Plaintiff's 2014 complaint because 1) he did not diligently  
15 pursue his claim and 2) they would suffer prejudice because six years passed between  
16 the start of Plaintiff's injuries and the filing of his suit.

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18 **IV. APPLICABLE LAW**

19 **A. Motions to Dismiss**

20 A motion to dismiss may be filed on the grounds that a complaint fails to state a  
21 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to  
22 dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a  
23 claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
24 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In assessing the sufficiency of a  
25 complaint, all well-pleaded factual allegations must be accepted as true, id. at 678, and  
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2 all reasonable inferences must be drawn in favor of the non-moving party, Daniels-Hall  
3 v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010).

4 In resolving a 12(b)(6) motion, a court's review is generally limited to the  
5 operative pleading. Daniels-Hall, 629 F.3d at 998. However, "because the applicability  
6 of the equitable tolling doctrine often depends on matters outside the pleadings, it is  
7 'not generally amenable to resolution on a Rule 12(b)(6) motion.'" Supermail Cargo,  
8 Inc. v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995). Courts may properly consider  
9 matters subject to judicial notice and documents incorporated by reference in the  
10 pleading without converting the motion to dismiss to one for summary judgment. Lee v.  
11 City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 1986); Mack v. S. Bay Beer  
12 Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

13  
14 A statute of limitations defense may be raised in a motion to dismiss if it is  
15 apparent from the face of the complaint. Seven Arts Filmed Entm't Ltd. v. Content  
16 Media Corp., PLC, 733 F.3d 1251, 1254 (9th Cir. 2013). However, "a motion to dismiss  
17 based on the running of the statute of limitations may be granted only 'if the assertions  
18 of the complaint, read with the required liberality would not permit the plaintiff to prove  
19 that the statute was tolled. In fact, a complaint cannot be dismissed unless it appears  
20 beyond doubt that the plaintiff can prove no set of facts that would establish the  
21 timeliness of the claim.'" Supermail, 68 F.3d at 1206-1207(citations omitted); see also  
22 Jablon v Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

## 23 24 **B. Statute of Limitations**

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26 No statute of limitations is set out in 42 U.S.C Section 1983. This Court shall  
27 apply California's two year statute of limitations on a personal injury claim, such as this,  
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2 which arose in this state. CAL. CODE CIV. PROC. § 335.1; Jones v. Blanas, 393 F.3d 918,  
3 927 (9th Cir 2004); Canatella v. Van De Kamp, 486 F.3d 1128, 1132 (9th Cir. 2007);  
4 Maldonado v Harris, 370 F.3d 945, 954 (9th Cir. 2004). Under federal law, a civil rights  
5 claim like this accrues when plaintiff knows or has reason to know of the injury giving  
6 rise to the claim. Olsen v. Idaho State Bd. Of Med., 363 F.3d 916, 926 (9th Cir. 2004);  
7 Lukovsky v. City of San Francisco, 535 F.3d 1044, 1050-51.

8  
9 However, state law may toll the running of the statute of limitations on cases  
10 arising in that state and filed in Federal court. Hardin v. Straub, 490 U.S. 536, 543  
11 (1989). Federal courts apply a forum state’s law regarding tolling when not inconsistent  
12 with federal law. Id. at 537-39.

### 13 **C. Statutory Tolling**

14 California Code of Civil Procedure § 352.1(a) tolls the running of California’s  
15 statute of limitations for a maximum of two years while the Plaintiff is imprisoned for a  
16 term less than life in prison. A plaintiff is only entitled to tolling under §352.1 for the  
17 period that the disability continues, that is, as long as he remains imprisoned. See CAL.  
18 CODE CIV. P. § 352.1(a)(“*the time of that disability* is not a part of the time limited for the  
19 commencement of the action.”)(emphasis added).

### 21 **D. Equitable Tolling**

22 The doctrine of equitable tolling “operates independently of the language of the  
23 Code of Civil Procedure and other codified sources of statutes of limitations.” McDonald  
24 v. Antelope Valley Cmty. Coll. Dist., 194 P.3d 1026, 1031 (Cal. 2008); accord Jones,  
25 393 F.3d at 928. Equitable tolling applies where “an injured person has several legal  
26 remedies and, reasonably and in good faith, pursues one.” Elkins v. Derby, 525 P.2d  
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2 81, 84 (Cal. 1974). “Thus it may apply where one action stands to lessen the harm that  
3 is the subject of a potential action; where administrative remedies must be exhausted  
4 before a second action can proceed; or where a first action, embarked upon in good  
5 faith, is found to be defective for some reason.” McDonald v. Antelope Valley Cmty.  
6 Coll. Dist., 194 P.3d 1026, 1031-1032 (Cal. 2008)(citing Collier v. City of Pasadena,  
7 142 Cal. App. 3d 917, 923 (Cal. Ct. App. 1983). Equitable tolling is appropriate in a  
8 later suit when an earlier suit was filed and the record shows 1) timely notice to the  
9 defendant in filing the first claim, 2) lack of prejudice to the defendant in gathering  
10 evidence to defend against the second claim, and 3) good faith and reasonable conduct  
11 by the plaintiff in filing the second claim. Azer v. Connell, 306 F.3d 930, 936 (9th Cir.  
12 2002)(citing Daviton v. Columbia/HCA Healthcare Corp, 241 F.3d 1131, 1137-1138 (9th  
13 Cir. 2001)). However, equitable tolling does not generally apply where Plaintiff pursues  
14 successive claims in the same forum. See Martell v. Antelope Valley Hosp. Med. Ctr.,  
15 79 Cal. Rptr. 2d 329, 334 (Cal. Ct. App. 1998); but see Structural Steel Fabricators, Inc.  
16 v. City of Orange, 40 Cal. App. 4th 459, 463 n. 5 (Cal. Ct. App. 1995)(allowing suit  
17 against city to go forward, even though city was not originally joined in first suit against  
18 contractor) and Wood v. Elling Corp., 572 P.3d 696, 700-701(citing Bollinger v. Nat’l  
19 Fire Ins. Co. of Hartford, 25 Cal. 2d 399(1944))(finding successive claims were entitled  
20 to equitable tolling in very narrow circumstances where 1) trial court erroneously  
21 dismissed action, 2) defendants had engaged in dilatory tactics, 3) and plaintiff had at  
22 all times proceeded diligently).  
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2 **E. ANALYSIS**

3 Because Plaintiff has conceded that his state tort claims are time-barred, the  
4 court addresses only the timeliness of his federal constitutional claims. Absent  
5 equitable tolling, these claims, filed nearly six years after the latest alleged § 1983  
6 violation upon which he wishes to sue, would be untimely:  
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8 Plaintiff had until July 27, 2012 to file his claims. He was released from prison  
9 on July 27, 2010, just shy of two years after his claims accrued in August through  
10 December of 2008. Although he was entitled to tolling under § 352.1 while he was  
11 imprisoned, tolling stopped when he was released, and the statutory limitations period  
12 under § 335.1 began to run. Therefore, Plaintiff had two years from the date of his  
13 release to file his claims.<sup>1</sup> Unless the pleadings establish grounds for equitable tolling,  
14 Plaintiff's complaint, filed February 7, 2014, would be time-barred.  
15

16 Plaintiff filed his original action, which named all defendants sued here on the  
17 same claims made here, on July 23, 2012, before the statute of limitations expired.  
18 (ECF No. 24-1, at 6-7). However, plaintiff's original complaint (1:12-CV-1200-MJS) was  
19 ultimately dismissed without prejudice. (ECF No. 24-1.) The screening order instructed  
20 Plaintiff that *if* he chose to amend, he could not bring claims against all defendants in  
21 the same action.  
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23 Plaintiff's choice to bring his claims against Defendants separately, rather than  
24 by amending his pleadings in 1:12-CV-01200-MJS, is significant. Amended pleadings  
25 can relate back to original filings, provided certain requirements are met. See, e.g.,

26 <sup>1</sup> The Court notes that under Brown v. Valoff, the time during which Plaintiff was pursuing his  
27 administrative remedies is excluded from the calculation of the limitations period. 422 F.3d 926, 942-943  
28 (9th Cir. 2005). However, because Plaintiff exhausted his remedies while he was still in prison, and was  
released from prison less than two years after accrual of his claims, the exclusion of the exhaustion  
period would not extend the time he had to file.

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2 Merritt v. Cty. of Los Angeles, 875 F.3d 765, 768 (9th Cir. 1989); Cal. Code Civ. P. §  
3 474. New actions, however, do not relate back to previous actions. See, e.g., James  
4 v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002)(plaintiff assumes the risk  
5 that a statute of limitations bars him from reasserting previously dismissed claims).  
6 Because there is no inherent relationship between Plaintiff’s first action and the present  
7 one, he may not rely on the filing date of the earlier case to claim the current action is  
8 timely.  
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10 Moreover, as stated above, equitable tolling does not apply to successive  
11 actions filed in the same forum, at least where the three factors enunciated in Wood,  
12 *supra*, are absent. Wood, 572 P.2d at 759 (noting that “decisions of this court have  
13 made it clear that the concurrence of the three factors ... is essential to application of  
14 the rule [for equitable tolling]”) Equitable tolling thus spares second actions where the  
15 first was erroneously filed in the wrong venue or in state court, but not in the same  
16 court. See Martell, 67 Cal. App. 4th at 334 (finding second complaint in same forum  
17 untimely because “under equitable tolling, the statute of limitations in one forum is tolled  
18 as a claim is being pursued in *another forum*”)(emphasis added). Here, Plaintiff has  
19 filed both his cases in the same forum. He has not provided evidence that, under  
20 Wood, the trial court erroneously dismissed his case or that defendants engaged in  
21 dilatory tactics. Thus, he is not entitled to equitable tolling. His second action is  
22 therefore untimely.  
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#### 25 **4. Conclusion**

26 For the foregoing reasons, the Court finds that Plaintiff is not entitled to equitable  
27 tolling. Therefore, his complaint, filed February 7, 2014, is untimely. The Court  
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2 recommends that Defendants' Motion to Dismiss be GRANTED as to both plaintiff's  
3 state and constitutional claims.

4 **IV. MOTION TO STRIKE PLAINTIFF'S SURREPLY**

5 Defendant moves to strike Plaintiff's surreply to the motion to dismiss. (ECF No.  
6 28.)

7  
8 Absent leave of court, no briefing on Defendant's motions is permitted beyond  
9 the opposition and reply. The Court did not grant Plaintiff leave to file a surreply and  
10 does not desire any further briefing on the motions. The surreply has not been  
11 considered in these findings and recommendations.

12 Accordingly, Defendant's motion to strike Plaintiff's surreply should be granted,  
13 and Plaintiff's surreply (ECF No. 25) should be stricken from the record.

14 **V. MOTION TO APPOINT COUNSEL**

15 Plaintiff does not have a constitutional right to appointed counsel in this action,  
16 Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require an  
17 attorney to represent plaintiff pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. United  
18 States District Court for the Southern District of Iowa, 490 U.S. 296, 298 (1989).  
19 However, in certain exceptional circumstances the Court may request the voluntary  
20 assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

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22 Without a reasonable method of securing and compensating counsel, the court  
23 will seek volunteer counsel only in the most serious and exceptional cases. In  
24 determining whether "exceptional circumstances exist, the district court must evaluate  
25 both the likelihood of success of the merits [and] the ability of the [plaintiff] to articulate  
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2 his claims pro se in light of the complexity of the legal issues involved.” Id. (internal  
3 quotation marks and citations omitted).

4 In the present case, the court does not find the required exceptional  
5 circumstances. Even if it is assumed that plaintiff is not well versed in the law and that  
6 he has made serious allegations which, if proved, would entitle him to relief, his case is  
7 not exceptional. This court is faced with similar cases almost daily. Further, at this  
8 stage in the proceedings, the court cannot make a determination that plaintiff is likely to  
9 succeed on the merits, and based on a review of the record in this case, the court does  
10 not find that plaintiff cannot adequately articulate his claims. Id.

11  
12 Accordingly, the court will recommend that Plaintiff’s motion for the appointment  
13 of counsel be denied without prejudice.

14 **VI. CONCLUSION AND ORDER**

15 Accordingly, the Court HEREBY RECOMMENDS that:

- 16 1. Defendants’ request for judicial notice (ECF No. 24-1) be GRANTED;
- 17 2. Defendants’ Motion to Dismiss (ECF No. 19) be GRANTED;
- 18 3. Defendants’ Motion to Strike Plaintiff’s Surreply (ECF No. 26) be  
19 GRANTED;
- 20 4. Plaintiff’s Motion for Appointment of Counsel (ECF No. 25) be DENIED.

21  
22 These Findings and Recommendations are submitted to the United States  
23 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).  
24 Within **fourteen** (14) days after being served with these Findings and  
25 Recommendations, any party may file written objections with the Court and serve a  
26 copy on all parties. Such a document should be captioned “Objections to Magistrate  
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Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: March 16, 2015

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE