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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

LARRY D. THOMAS,

Plaintiff,

v.

V. YATES, et al.,

Defendants.

Case No. 1:16-cv-00855-AWI-BAM (PC)

FINDINGS AND RECOMMENDATIONS  
REGARDING DISMISSAL OF ACTION AS  
TIME-BARRED

FOURTEEN-DAY DEADLINE

**Findings and Recommendations**

Plaintiff Larry D. Thomas, a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983, and federal and state law claims arising out of events in 2009 that occurred at Kern Valley State Prison. On September 21, 2016, the Court screened Plaintiff's complaint and concluded that his claims were likely time-barred. Plaintiff was granted leave to amend. (ECF No. 5.) Plaintiff filed his first amended complaint on October 17, 2016, which is currently before the Court for screening. (ECF No. 6.)

**I. Screening Requirement and Standard**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. §

1 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or  
2 malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary  
3 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C.  
4 § 1915(e)(2)(B)(ii).

5 A complaint must contain “a short and plain statement of the claim showing that the  
6 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
7 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
8 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937,  
9 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65  
10 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge  
11 unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009)  
12 (internal quotation marks and citation omitted).

13 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings  
14 liberally construed and to have any doubt resolved in their favor. *Hebbe v. Pliler*, 627 F.3d 338,  
15 342 (9th Cir. 2010) (citations omitted). To survive screening, Plaintiff’s claims must be facially  
16 plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each  
17 named defendant is liable for the misconduct alleged, *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949  
18 (quotation marks omitted); *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).  
19 The sheer possibility that a defendant acted unlawfully is not sufficient, and mere consistency  
20 with liability falls short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678, 129 S.Ct.  
21 at 1949 (quotation marks omitted); *Moss*, 572 F.3d at 969.

## 22 **II. Allegations in First Amended Complaint**

23 Plaintiff is currently incarcerated at the R.J. Donovan Correctional Facility in San Diego,  
24 California. Plaintiff’s claims stem from a use of force incident that occurred on July 20, 2009,  
25 while Plaintiff was housed at Kern Valley State Prison.

26 Plaintiff alleges that he was awakened on July 20, 2009, by Defendants Cervantes and  
27 Villa to be transported to the Tehachapi Surgery Center. After Plaintiff was strip searched,  
28 Defendant Cervantes placed handcuffs on him so tightly as to cause pain and restrict Plaintiff’s

1 blood flow. Plaintiff immediately requested that Defendant Cervantes loosen the handcuffs. In  
2 response, Defendant Cervantes loosened the cuffs. However, after loosening the handcuffs,  
3 Defendant Cervantes then clicked the handcuffs to an even tighter hold on Plaintiff's wrists.  
4 Plaintiff believes that Defendant Cervantes was taking cues from Defendant Villa to put the  
5 handcuffs on extremely tight. Plaintiff again complained that the handcuffs were too tight,  
6 causing severe pain, and requested that they be loosened. Defendants Cervantes refused  
7 Plaintiff's request.

8 Defendant V. Yates intervened, checking the handcuffs and informing Plaintiff that they  
9 were fine. Plaintiff alleges that because of the refusal to loosen his handcuffs, Plaintiff had no  
10 alternative but to refuse medical transportation. Plaintiff told Defendant Yates, "If you're not  
11 going to loosen the handcuffs, then I'm refusing medical treatment and ... I no longer want[ ] to  
12 go." (ECF No. 6 at p. 14.) Plaintiff then requested that the handcuffs be removed while his  
13 hands were still outside of the food port and the waist chain dangled to the floor. Plaintiff  
14 alleges that instead of removing the handcuffs, Defendant Yates grasped the waist chain and  
15 began to pull on it. As a result, Plaintiff's forearms were pulled through the food port slot,  
16 leaving scrape marks on his forearms and causing pain to his wrists. Plaintiff further alleges that  
17 Defendant Cervantes and Defendant Villa also began to pull on the waist chain, and that  
18 Defendant Villa also put his right foot against the cell door/wall while pulling to cause Plaintiff  
19 greater pain. Plaintiff then asked Defendant Villa if he was enjoying, and his response was  
20 "Fuck yeah." (*Id.* at p. 15.) Officer Reyes eventually intervened to uncuff Plaintiff.

21 Plaintiff asserts in an elaborate ruse, Defendant Yates asserted that Plaintiff pulled the  
22 waist chain through the food port slot and, in the process, Defendant Yates' left index finger was  
23 caught in the chain. Plaintiff contends, however, that it is virtually impossible for any person to  
24 have a finger caught in the waist chain. Plaintiff alleges that Defendant Yates lied and instead  
25 grasped the waist chain, coiled it around his hand, yanked it and then began pulling, inflicting  
26 excessive force on Plaintiff. Plaintiff asserts that Defendants Yates, Cervantes and Villa pulled  
27 the waist chain in tandem so that the attached handcuffs cut into Plaintiff's wrists, broke  
28 Plaintiff's skin, restricted blood flow and caused excruciating pain.

1 Plaintiff further alleges that he was denied medical treatment for his injuries.  
2 Specifically, Plaintiff asserts that Defendant Yates ordered Officer Reyes to have medical staff  
3 complete a refusal of medical treatments services form. Defendant Mongohig, the on duty LVN,  
4 came to Plaintiff's cell to have him sign the refusal of medical treatment services from.  
5 However, Plaintiff refused to sign the form because the decision not to be transported to the  
6 Tehachapi Surgery Center was forced upon as a result of the abusive manner in which the  
7 handcuffs were placed on him. Plaintiff asserts that Defendant Mongohig failed to diagnose  
8 Plaintiff's injuries and failed to complete the necessary report of injury/unusual occurrence.  
9 Further, despite Plaintiff's complaints of severe pain, broken skin and visible welts, Defendant  
10 Mongohig allegedly denied Plaintiff medical treatment services, resulting in lingering pain and  
11 suffering.

12 Hours later, after shift change, Plaintiff was afforded the opportunity to voice his  
13 allegations of excessive force and employee misconduct to Correctional Sergeant Day.  
14 Correctional Lieutenant Blackstone was contacted and a videotaped interview was conducted.  
15 Following the interview, Defendant Gonzales, an LVN, was contacted to complete a report of  
16 injury/unusual occurrence form to document Plaintiff's injuries. Defendant Gonzales visually  
17 examined Plaintiff's injuries, but her sole purpose was to complete the form. Plaintiff asserts  
18 that Defendant Gonzales failed to diagnose and treat Plaintiff's injuries despite his complaints of  
19 pain, broken skin, and welt marks.

20 Plaintiff forwards state law claims for assault and battery, negligence, and intentional  
21 infliction of emotional distress. Plaintiff also forwards claims for excessive force and deliberate  
22 indifference to serious medical needs in violation of the Eighth Amendment to the United States  
23 Constitution. Plaintiff seeks compensatory and punitive damages, along with declaratory relief.

### 24 **III. Discussion**

25 As with his original complaint, Plaintiff's first amended complaint fails to state timely  
26 claims arising out of alleged conduct occurring in 2009, and should be dismissed. A time-barred  
27 claim may be dismissed at the screening stage when expiration of the applicable statute of  
28 limitations is apparent on the face of the complaint. *See Belanus v. Clark*, 796 F.3d 1021, 1024-

1 27 (9th Cir. 2015); *see also Cervantes v. City of San Diego*, 5 F.3d 1273, 1274-75 (9th Cir.1993)  
2 (claim may be dismissed under 12(b)(6) for failure to state a claim on the ground that it is barred  
3 by the statute of limitations “if the assertions of the complaint, read with the required liberality,  
4 would not permit the plaintiff to prove that the statute was tolled”); *Von Saher v. Norton Simon*  
5 *Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (claim may be dismissed under  
6 Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when  
7 “the running of the statute is apparent on the face of the complaint”). “A complaint cannot be  
8 dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would  
9 establish the timeliness of the claim.” *Von Saher*, 592 F.3d at 969 (quoting *Supermail Cargo,*  
10 *Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)).

11 Section 1983 contains no specific statute of limitations. Therefore, federal courts apply  
12 the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*, 393 F.3d 918,  
13 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Fink v. Shedler*,  
14 192 F.3d 911, 914 (9th Cir. 1999). California’s statute of limitations for personal injury actions  
15 is two years. Cal. Civ. Proc. Code § 335.1; *Jones*, 393 F.3d at 927; *Maldonado*, 370 F.3d at 954-  
16 55.

17 Federal law determines when a civil rights claim accrues, and “[u]nder federal law, a  
18 claim accrues when the plaintiff knows or should know of the injury that is the basis of the cause  
19 of action.” *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009) (citation omitted);  
20 *Maldonado*, 370 F.3d at 955; *Fink*, 192 F.3d at 914.

21 In actions where the federal court borrows the state statute of limitations, courts should  
22 also borrow all applicable provisions for tolling the limitations found in state law. *Jones*, 393  
23 F.3d at 927. Under California law, prisoners who at the time the cause of action accrued were  
24 either imprisoned on a criminal charge or serving a sentence of less than life for a criminal  
25 conviction benefit from a two-year statutory tolling provision for damages actions. Cal. Civ.  
26 Proc. Code § 352.1. Additionally, California law provides for equitable tolling of the statute of  
27 limitations where a plaintiff meets three conditions: “(1) defendant must have had timely notice  
28 of the claim; (2) defendant must not be prejudiced by being required to defend the otherwise

1 barred claim; and (3) plaintiff's conduct must have been reasonable and in good faith.” *Fink*, 192  
2 F.3d at 916 (citation and quotation marks omitted); *see also Addison v. State of California*, 21  
3 Cal.3d 313, 319 (1978) (citations omitted).

4 Here, it is apparent from the face of Plaintiff’s first amended complaint that his federal  
5 claims predicated on the events in 2009 are time-barred. Any claims in this action accrued on  
6 July 20, 2009, the date on which Plaintiff alleges that defendants used excessive force and failed  
7 to provide him with medical treatment. Even assuming statutory tolling of two years under  
8 section 352.1 based on Plaintiff’s incarceration, the limitations period expired no later July 20,  
9 2013. The complaint in this action was mailed to the Court on June 9, 2016, and entered into the  
10 Court’s docket on June 20, 2016, almost seven years after the incident at issue in this lawsuit,  
11 and nearly three years after expiration of the statute of limitations. (ECF No. 1 at p. 46.)

12 Additionally, the first amended complaint does not plausibly allege that Plaintiff would  
13 be entitled to equitable tolling. In his amended complaint, Plaintiff appears to explain his delay  
14 by relying on a prior action in which his *in forma pauperis* status was revoked and the case  
15 dismissed without prejudice in 2012. Plaintiff asserts that he was not in a financial position to  
16 pay the fee necessary to re-file the action until June 2016. (ECF No. 6 at pp. 11-12.)

17 The Court takes judicial notice of Plaintiff’s previous lawsuit, *Thomas v. Yates, et al.*,  
18 Case No. 1:10-cv-01234-SKO. *United States v. Howard*, 381 F.3d 873, 876 n. 1 (9th Cir. 2004)  
19 (court may take judicial notice of court records in other cases). As indicated by Plaintiff, and  
20 according to the docket in that action, Plaintiff filed a civil rights complaint on July 9, 2010,  
21 relating to the alleged excessive use of force and denial of medical care on July 20, 2009, and  
22 was granted leave to proceed *in forma pauperis*. (*Thomas v. Yates, et al.*, Case No. 1:10-cv-  
23 01234-SKO, ECF Nos. 1, 5.) On August 29, 2011, the court screened Plaintiff’s complaint and  
24 ordered him to either file an amended complaint or notify the court of his willingness to proceed  
25 only on the claims found cognizable. (*Id.* at ECF No. 10.) Plaintiff elected to proceed on the  
26 cognizable claims, and the court therefore ordered that the action proceed against Defendants  
27 Yates, Cervantes, and Villa for use excessive physical force, in violation of the Eighth  
28 Amendment; (2) Defendants Yates, Cervantes, and Villa for assault, battery, and intentional

1 infliction of emotional distress under California law; (3) Defendant Yates for negligence under  
2 California law; and (4) Defendants Mongohig and Gonzales for deliberate indifference to  
3 Plaintiff's medical needs, in violation of the Eighth Amendment. (*Id.* at ECF Nos. 11, 12.) The  
4 court dismissed all other claims and ordered service of the complaint. (*Id.* at ECF No. 12.)  
5 Following service of the complaint, Defendants Cervantes, Yates, Villa and Mongohig moved to  
6 revoke Plaintiff's *in forma pauperis* status, declare him a three-strike litigant, and dismiss the  
7 action without prejudice to re-filing upon payment of the filing fee. (*Id.* at ECF No. 22.) On  
8 June 27, 2012, the court granted Defendants' motion to revoke Plaintiff's *in forma pauperis*  
9 status and dismissed the action without prejudice. (*Id.* at ECF No. 30.) Thereafter, Plaintiff did  
10 not refile the action until June 2016.

11         Having considered Plaintiff's explanation, the Court finds that Plaintiff has not met the  
12 conditions necessary to invoke the doctrine of equitable tolling. Although Defendants had initial  
13 notice of the claims, it is not reasonable to conclude that Defendants had *timely* notice between  
14 2012 and 2016 that Plaintiff still intended to pursue those claims. It also is not reasonable to  
15 conclude that Plaintiff's failure to pursue such claims within that four-year period was  
16 reasonable and/or in good faith or that Defendants would not be significantly prejudiced by  
17 having to defend the otherwise barred claims. *Fink*, 192 F.3d at 916. *Ervin v. Los Angeles Cty.*,  
18 848 F.2d 1018, 1020 (delay of year and a half in filing federal civil rights claim was neither  
19 reasonable nor in good faith). Thus, the first amended complaint reflects that the applicable  
20 statute of limitations on Plaintiff's federal claims expired well before Plaintiff filed this action in  
21 2016.

22         Plaintiff's state law claims fare no better. Pursuant to California law, an action on such  
23 claims must have been commenced no more than six months after the notice of rejection of the  
24 government tort claim is mailed. *See* Cal. Gov't Code § 945.6(a)(1). According to the first  
25 amended complaint, the Victim Compensation and Government Claims Board issued its notice  
26 of rejection of Plaintiff's state law claims on February 25, 2010, which was more than six years  
27 before the instant action was filed. (ECF No. 6 at p. 23 and Ex. B). Even assuming statutory  
28 tolling of two years, Plaintiff's state law claims are untimely and, for the reasons discussed

1 above, he is not entitled to equitable tolling for those claims. *Fink*, 192 F.3d at 916.

2 **III. Conclusion and Recommendation**

3 Based on the foregoing, IT IS HEREBY RECOMMENDED that this action be  
4 DISMISSED, with prejudice, as time-barred.

5 These Findings and Recommendations will be submitted to the United States District  
6 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
7 **fourteen (14) days** after being served with these Findings and Recommendations, Plaintiff may  
8 file written objections with the Court. The document should be captioned “Objections to  
9 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file  
10 objections within the specified time may result in the waiver of the “right to challenge the  
11 magistrate’s factual findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.  
12 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

13  
14 IT IS SO ORDERED.

15 Dated: November 7, 2017

15 /s/ Barbara A. McAuliffe  
16 UNITED STATES MAGISTRATE JUDGE