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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. MITCHELL,
Plaintiff,
v.
SNOWDEN, et al.,
Defendants.

No. 2:15-cv-1167 TLN AC P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner currently incarcerated at the California Health Care Facility (CHCF) in Stockton, who brings suit under 42 U.S.C. § 1983.¹ The case is before the court on remand from the Ninth Circuit Court of Appeals, for reconsideration of equitable tolling in relation to defendants’ motion to dismiss (ECF No. 15). The Court of Appeals ruled as follows:

The district court properly concluded that the pendency of Mitchell’s prior federal action did not toll the statute of limitations. *See* Cal. Civ. Proc. Code §§ 335.1, 352.1(a) (two-year statute of limitations for personal injury claims; two-year tolling period due to incarceration); *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) (forum state’s personal injury statute of limitations and tolling laws apply to § 1983 actions); *Martell v. Antelope Valley Hosp. Med. Ctr.*, 79 Cal. Rptr. 2d 329, 334 (Ct. App. 1998) (a plaintiff’s pursuit of successive claims in the same forum does not warrant application of equitable

¹ The case is referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302(c).

1 tolling). However, Mitchell also argued that the statute of limitations
2 should be tolled because of his mental illness and multiple prison
3 transfers. These factors should have been evaluated under
4 California's equitable tolling doctrine. *See Fink v. Shedler*, 192 F.3d
911, 916 (9th Cir. 1999) (three-pronged test for equitable tolling in
California). We vacate the judgment and remand for further
proceedings.

5 ECF No. 43 at 2.

6 Pro bono counsel was appointed on remand, and plaintiff has been ably represented in
7 litigation of the equitable tolling issue. Because the parties have presented material outside the
8 pleadings, which the court has considered, defendants' motion to dismiss is treated as a motion
9 for summary judgment. See Fed. R. Civ. P. 12(d), 56.

10 For the reasons set forth below, this court recommends that defendants' motion be
11 granted.

12 II. Background

13 Plaintiff filed the operative complaint in pro se on May 5, 2015.² ECF No. 1. Upon
14 screening pursuant to 28 U.S.C. § 1915A, the court found that the complaint states cognizable
15 Eighth Amendment claims against defendant correctional officers Compton, Larios, Seaton,
16 Snowden and Vance, based on their alleged failure to protect plaintiff from assault by other
17 inmates on March 17, 2007. See ECF No. 5 at 3. This court agreed with the screening of
18 plaintiff's virtually identical prior complaint in Mitchell v. Snowden et al., Case No. 2:08-cv-
19 1658 JAM DAD P (ECF No. 12 at 3-10), which had been dismissed without prejudice for failure
20 to prosecute on April 25, 2013. Id.³ Like its predecessor, the instant complaint alleges that
21 plaintiff's assailants fractured his nose, jaw, eye socket and tibia; that plaintiff lost two molars
22 (one of which entered his lung); that plaintiff suffered brain damage and psychological trauma,
23 including post-traumatic stress disorder; and that many of plaintiff's injuries are permanent.

24 ² Unless otherwise noted, the court identifies plaintiff's filing dates according to the prison
25 mailbox rule. Under that doctrine, a document is deemed served or filed on the date it was signed
26 by the prisoner and given to prison officials for mailing. See Houston v. Lack, 487 U.S. 266
(1988) (establishing prison mailbox rule); Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.
2010) (applying the mailbox rule to both state and federal filings by incarcerated inmates).

27 ³ Dismissal of the prior action without prejudice left plaintiff free to reassert his claims in a new
28 action as of the prior action had never been filed. See Santa Clara v. Andrus, 572 F.2d 660, 665
(9th Cir. 1978).

1 Plaintiff also contends that his assailants were found guilty of assaulting him.

2 By order filed September 29, 2016, this court granted defendants' motion to dismiss
3 plaintiff's complaint as untimely and entered judgment accordingly. See ECF Nos. 35-6.
4 Plaintiff appealed. On November 1, 2017, the Court of Appeals vacated the judgment and
5 remanded the case for evaluation of plaintiff's "mental illness and multiple prison transfers . . .
6 under California's equitable tolling doctrine." ECF No. 43 at 2 (Court of Appeals Memorandum
7 Decision, Case No. 16-16848). The mandate issued on November 24, 2017. ECF No. 46.

8 The undersigned held a status conference on January 17, 2018, then set a briefing
9 schedule. ECF Nos. 48-9. Plaintiff filed an opening brief and request for judicial notice, ECF
10 No. 51; defendants filed a response, ECF No. 54; and plaintiff filed a reply, ECF No. 58.
11 Briefing was completed on June 4, 2018.

12 III. Legal Standards

13 A. Standards Governing Motion

14 Defendants' motion to dismiss was originally brought pursuant to Federal Rule of Civil
15 Procedure 12(b)(6). See ECF No. 15. To survive a motion to dismiss under Rule 12(b)(6), a
16 complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that
17 is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic
18 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court may consider facts established by
19 exhibits attached to the complaint, Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.
20 1987), and facts that may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d
21 1385, 1388 (9th Cir. 1987), including matters of public record, Mack v. South Bay Beer
22 Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986).

23 However, if "matters outside the pleadings are presented to and not excluded by the court,
24 the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).
25 "A motion to dismiss made under Federal Rule of Civil Procedure 12(b)(6) must be treated as a
26 motion for summary judgment under Federal Rule of Civil Procedure 56 if either party to the
27 motion to dismiss submits materials outside the pleadings in support or opposition to the motion,
28 and if the district court relies on those materials." Anderson v. Angelone, 86 F.3d 932, 934 (9th

1 Cir. 1996).

2 Equitable tolling is not appropriately resolved on a motion to dismiss except in those
3 “unusual cases” where “some fact, evident from the face of the complaint, support[s] the
4 conclusion that the plaintiff could not prevail, as a matter of law, on the equitable tolling issue.”
5 Cervantes v. City of San Diego, 5 F.3d 1273, 1276 (9th Cir. 1993) (citations omitted). Rather, as
6 demonstrated in the instant case, “California’s fact-intensive test for equitable tolling is more
7 appropriately applied at the summary judgment or trial stage of litigation.” Id.

8 In the instant case, this court directed the parties to submit “all the documentary evidence”
9 upon which they rely on the question of equitable tolling. See ECF No. 60 at 8 (transcript of Jan.
10 17, 2018 status conference). The undersigned noted that “even though the issue first arose in the
11 context of a motion to dismiss, I am going to be looking at extra record evidence and making
12 findings of fact if necessary to present to Judge Nunley.” Id.

13 Plaintiff has filed several exhibits and requests that the court take judicial notice of them
14 as adjudicative facts. See ECF No. 51-1 et seq. Plaintiff’s request is granted. All of plaintiff’s
15 exhibits are documents previously filed in this case. This court may take judicial notice of its
16 own records and the records of other courts. See United States v. Howard, 381 F.3d 873, 876 n.1
17 (9th Cir. 2004); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Fed. R. Evid.
18 201(b) (court may take judicial notice of adjudicative facts that “can be accurately and readily
19 determined from sources whose accuracy cannot reasonably be questioned”).

20 B. Standards Governing Limitations Period and Equitable Tolling

21 The statute of limitations runs from the accrual date of plaintiff’s claim. “Although state
22 law determines the length of the limitations period, ‘federal law determines when a civil rights
23 claim accrues.’” Azer v. Connell, 306 F.3d 930, 936 (9th Cir. 2002) (quoting Morales v. City of
24 Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000). “Under federal law, a claim accrues when
25 the plaintiff knows or has reason to know of the injury which is the basis of the action.”
26 TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999).

27 “[B]ecause there is no specified statute of limitations for an action under 42 U. S.C. §
28 1983, the federal courts look to the law of the state in which the cause of action arose and apply

1 the state law of limitations governing an analogous cause of action.” Pouncil v. Tilton, 704 F.3d
2 568, 573 (9th Cir. 2012) (citation omitted). “For actions under 42 U.S.C. § 1983, courts apply the
3 forum state’s statute of limitations for personal injury actions, along with the forum state’s law
4 regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent
5 with federal law.” Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004); see also Azer, 306 F.3d at
6 935-36.

7 In California, the statute of limitations for personal injury actions is two years. See Cal.
8 Code Civ. Proc. § 335.1; Maldonado v. Harris, 370 F.3d 945, 954-55 (9th Cir. 2004). This
9 limitations period is statutorily tolled for another two years for prisoners serving less than a life
10 sentence, resulting in a total limitations period of four years. See Cal. Civ. Proc. Code § 352.1(a);
11 Johnson v. State of California, 207 F.3d 650, 654 (9th Cir. 2000).

12 Additionally, in California, “the applicable statute of limitations must be tolled while a
13 prisoner completes the mandatory [administrative] exhaustion process.” Brown v. Valoff, 422
14 F.3d 926, 943 (9th Cir. 2005). Because administrative exhaustion is statutorily required of
15 prisoner civil rights complaints under the Prison Litigation Reform Act (PLRA), see 42 U.S.C. §
16 1997e(a), this requirement provides a federal statutory basis to invoke the state’s equitable tolling.
17 See, e.g., Johnson v. Rivera, 272 F.3d 519 (7th Cir. 2001).

18 In addition, where justice demands, California courts may exercise their inherent power to
19 equitably toll the limitations period.⁴ “The equitable tolling of statutes of limitations is a
20 judicially created, nonstatutory doctrine. It is designed to prevent unjust and technical forfeitures
21 of the right to a trial on the merits when the purpose of the statute of limitations – timely notice to
22 the defendant of the plaintiff’s claims – has been satisfied. Where applicable, the doctrine will
23 suspend or extend a statute of limitations as necessary to ensure fundamental practicality and
24 fairness.” McDonald v. Antelope Valley Cmty. Coll. Dist., 45 Cal. 4th 88, 99 (2008) (citations
25 and internal quotation marks omitted).

26 “Under California law, a plaintiff must meet three conditions to equitably toll a statute of
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28 ⁴ See infra, n. 11.

1 limitations: ‘(1) defendant must have had timely notice of the claim; (2) defendant must not be
2 prejudiced by being required to defend the otherwise barred claim; and (3) plaintiff’s conduct
3 must have been reasonable and in good faith.’” Fink v. Shedler, 192 F.3d 911, 916 (9th Cir.
4 1999), as amended on denial of reh’g and reh’g en banc (Dec. 13, 1999), cert. denied, 529 U.S.
5 1117 (2000) (quoting Bacon v. City of Los Angeles, 843 F.2d 372, 374 (9th Cir. 1988)); see also
6 Addison v. State of California, 21 Cal. 3d 313, 319 (1978) (“[A]pplication of the doctrine of
7 equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable
8 and good faith conduct on the part of the plaintiff.”). “California courts apply equitable tolling
9 ‘to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer
10 no prejudice.’” Jones, 393 F.3d at 928 (quoting Lantzy v. Centex Homes 31 Cal. 4th 363, 370
11 (2003)). “Application of California’s equitable tolling doctrine ‘requires a balancing of the
12 injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important
13 public interest or policy expressed by the . . . limitations statute.’” Jones at 928 (quoting Lantzy
14 at 371).

15 Additionally, in California, equitable tolling is statutorily authorized for any period of
16 time that a party is “lacking the legal capacity to make decisions,” provided such disability
17 existed “at the time the cause of action accrued.” Cal. C. Civ. P. § 352(a) (2019). As previously
18 worded, the statute accorded tolling for the period of time that a party was “insane.” Cal. C. Civ.
19 P. § 352 (2013). “The term ‘insane’ has been defined as a condition of mental derangement
20 which renders the sufferer incapable of caring for his property or transacting business, or
21 understanding the nature or effects of his acts.” Hsu v. Mt. Zion Hospital, 259 Cal. App. 2d 562,
22 571 (Ct. App. 1968) (citations omitted). “[T]he basic question to be resolved . . . is whether the
23 allegedly insane plaintiff is sufficiently aware of the nature or effects of his acts to be able to
24 comprehend such business transactions as the hiring of an attorney and the instigation of a legal
25 action. If he is so aware, then the statute will begin to run against him.” Id. at 575.

26 IV. Facts

27 The following facts are undisputed and supported by the record. Plaintiff’s exhibits are
28 limited to matters filed in this court and reflected on the docket. For clarity, these exhibits are

1 referenced below by their docket numbers (e.g., “ECF No. #”), rather than the designations used
2 by plaintiff. Plaintiff has submitted no independent assessment of his mental impairment or
3 official record of his numerous prison transfers. Defendant also relies only on the documents
4 previously filed in this case. Although the undersigned invited the parties to request an
5 evidentiary hearing if they thought it would be helpful, neither side did so.

6 A. Mitchell I: 2008 - 2010

7 On July 8, 2008, while still at CSP-SAC, plaintiff filed his first federal action presenting
8 the matters at issue in this case. See Mitchell v. Snowden et al., Case No. 2:08-cv-1658 JAM
9 DAD P (“Mitchell I”). The complaint alleged, inter alia, that plaintiff continued to suffer a jaw
10 fracture and significant pain despite two surgeries (id. at 5),⁵ and that plaintiff received CDCR
11 mental health services at the “Enhanced Outpatient” (EOP) level of care (id. at 3).

12 The complaint was screened pursuant to 28 U.S.C. § 1915A, and plaintiff was granted
13 leave to amend on June 16, 2009. ECF No. 12. After plaintiff failed to file an amended
14 complaint, two defendants were dismissed and service was ordered on other defendants on
15 January 15, 2010. ECF No. 13. Plaintiff promptly returned the information necessary for the
16 U.S. Marshal to serve process on defendants. ECF No. 14. On the same date, plaintiff filed a
17 notice of change of address to California State Prison Los Angeles County (CSP-LAC), effective
18 January 13, 2010. ECF No. 15.

19 Defendant Compton filed a motion to dismiss on June 1, 2010, on administrative
20 exhaustion grounds. ECF No. 20. The other defendants answered the complaint. ECF No. 19.)
21 Plaintiff requested and obtained several extensions of time within which to respond to defendant
22 Compton’s motion to dismiss.⁶ The first request noted plaintiff’s efforts to obtain counsel and
23 that he was still “awaiting the reply from approx. ten (10) different attorneys.” ECF No. 21. The
24 second request, made on the same grounds, was supported by exhibits demonstrating plaintiff’s
25 efforts to obtain counsel. ECF No. 28. The third request stated that plaintiff had been unable to
26

27 ⁵ Parenthetical citations to the court’s Electronic Case File (ECF) reference plaintiff’s 2008 case
28 (Mitchell I), while ECF citations without parentheses reference the instant case, Mitchell II.

⁶ See ECF Nos. 21, 24, 28-9, 31-4, 36-7, 39-41.

1 obtain counsel, that he had undergone cataract surgery on August 10, 2010, that his vision
2 remained impaired in both eyes, and that he needed additional time to obtain corrective lenses.
3 ECF No. 31.

4 Plaintiff's fourth, fifth and sixth requests for extended time to respond to defendant
5 Compton's motion to dismiss were premised on continuing delays in obtaining corrective lenses
6 and plaintiff's limited access to his legal materials after his placement in Ad Seg on October 13,
7 2010. ECF Nos. 33, 36, 37. Plaintiff explained that efforts to obtain his legal materials, e.g. by
8 submitting administrative appeals, had been futile. Id.

9 Plaintiff's sixth extension request, which was prepared November 18, 2010 and docketed
10 November 29, 2010, was his first request for extended time based on his mental illness:

11 This is taking its toll on me your Honor. I am a mentally ill
12 prisoner/patient within [CDCR] at an enhanced level, due to a serious
13 (1-21-2005) suicide attempt and subsequent suicidal ideations. [I
14 am] known by the CDCR to suffer severe/chronic physical pain
caused by injuries sustained in the matter before the court. I am again
considering suicide.

15 ECF No. 37 at 3.

16 On December 9, 2010, plaintiff dictated an affidavit to a therapist, who typed it; on
17 December 14, 2010, plaintiff signed the affidavit under penalty of perjury. ECF No. 40. That
18 affidavit provided in pertinent part:

19 Because the above-named person is on "suicide watch" due to an 11-
20 19-2010 suicide attempt, this letter is being dictated to you. Mr.
21 Mitchell is not allowed any materials related to his meeting his court
deadline/response to Defendant Compton's June 1, 2010 motion to
dismiss.

22 Mr. Mitchell has been referred to the Department of Mental Health
23 and is awaiting acceptance to the program. Once placed, Mr.
24 Mitchell will have access to his legal materials. Mr. Mitchell
requests an extension of time to address this issue.

25 Id. at 1.

26 B. Mitchell I: 2011

27 Plaintiff was granted until February 21, 2011 to file and serve his response to defendant
28 Compton's motion to dismiss; the order had to be re-served on plaintiff at his next place of

1 incarceration, the California Medical Facility (CMF). ECF No. 41. Prior to receipt of that order,
2 plaintiff filed a seventh request for extended time, explaining that, due to his suicide attempt on
3 November 19, 2010, he continued to be denied access to his legal materials and was allowed only
4 limited access to writing materials; plaintiff stated that he was permitted to write to the court on
5 this occasion only because he threatened a hunger strike. ECF No. 42. Plaintiff explained the
6 reasons for his suicide attempt as follows:

7 (P's)⁷ attempted suicide was real and (P) was rendered unconscious
8 when discovered (hanging from cell door). This attempt[ed] suicide
9 was due to (P's) ongoing severe pain mandible (jaw) fracture and the
10 denial/destruction of his legal property. On the day of his suicide
11 attempt (P) had finally been allowed to access his legal property. At
12 which time (P) discovered that a significant portion of his Legal Mat.
13 related to this matter was soaking wet and/or molded in a large plastic
14 trash bag.

15 Id. at 2.

16 Plaintiff also stated that he had been informed by his psychiatrist he might be released
17 from the Department of Mental Health (at CMF) within the next two weeks; that his legal
18 materials had been forwarded to CSP-LAC; and that he “assure[d] the court that the[re] will be no
19 further attempts to take his life or self harm.” ECF No. 42 at 5. Plaintiff was transferred to CSP-
20 LAC in February 2011. ECF No. 45.

21 On March 7, 2011, notwithstanding plaintiff's failure to file an opposition to the pending
22 motion to dismiss, the court issued findings and recommendations which were adopted May 2,
23 2011, resulting in the denial of the motion. ECF Nos. 47, 52. Plaintiff's further requests for
24 extended time (ECF Nos. 42, 48-9) were denied as moot or unnecessary (ECF Nos. 44, 51). A
25 Discovery and Scheduling Order was issued on May 27, 2011. ECF No. 56.

26 On August 30, 2011, defendants filed an ex parte motion to modify the scheduling order
27 due to plaintiff's deteriorating mental health. Defendants explained:⁸

28 Mitchell's psychiatric condition [has] deteriorated, and on August 4,
2011, he was transferred from [CSP-LAC] to Pelican Bay State

29 ⁷ Plaintiff uses “(P)” as shorthand for “plaintiff.”

30 ⁸ This description was supported by the declarations of T. McCarthy, Ph.D., PBSP/MHCB
31 Administrator, and G. Gomez, Deputy Attorney General.

1 Prison (PBSP) and placed in PBSP's Mental Health Crisis Bed
2 (MHCB) unit so that he could receive acute inpatient crisis care.
3 Because of his placement in an inpatient facility and his psychiatric
4 condition, Mitchell has not had access to his personal and legal
5 property since arriving at the PBSP MHCB unit. Mitchell cannot
6 leave the MHCB unit, which is located in the Correctional Treatment
7 Center inpatient medical facility, until he is discharged.

8 Defense counsel became aware of Mitchell's transfer to PBSP, and
9 placement in the MHCB on August 11, 2011. Defense counsel
10 noticed a deposition by video for Mitchell to occur on August 29,
11 2011, should his psychiatric condition improve. Defense counsel
12 contacted the PBSP litigation office to confirm the deposition on
13 August 26, 2011, and was told that Mitchell's psychiatric condition
14 made him unable to review his legal property or be deposed by video
15 on August 29, 2011, because he remained in the MHCB unit.
16 Mitchell is awaiting transfer to an inpatient mental health facility
17 operated by the Department of Mental Health, and will remain in the
18 MHCB unit until his transfer is completed. Defendants will update
19 the Court once Mitchell is transferred to the inpatient facility, and he
20 is able to review his property and testify in his deposition.

21 ECF No. 60 at 2) (internal citations omitted).⁹ The court vacated the previously-ordered litigation
22 deadlines, and directed defense counsel to file monthly status reports. ECF No. 61.

23 On October 3, 2011, defendants reported that plaintiff was improving, that he had been
24 placed in PBSP's EOP, might receive his legal and personal property within two weeks, and
25 could then participate in a video deposition. ECF No. 63.¹⁰ The court issued new deadlines for
26 discovery and dispositive motions (ECF No. 64), and denied as unnecessary plaintiff's
27 subsequent request for extended time (ECF Nos. 65, 66).

28 On November 10, 2011, plaintiff requested that the discovery and motion deadlines be

21 ⁹ Plaintiff independently informed the court that he had been transferred to PBSP, and that he
22 remained on suicide watch, had severe pain in his jaw, and was "forced to take very powerful
23 mind altering psychiatric medications and some medical (narcotics)." ECF No. 62 at 4.

24 ¹⁰ The attached declaration of W. Barlow, PBSP Classification and Parole Representative, stated
25 that plaintiff had been transferred to PBSP on September 28, 2011, from "a Department of Mental
26 Health (DMH) inpatient facility at the California Medical Facility." ECF No. 63-1 at 1; cf. ECF
27 No. 60 at 2 (stating that plaintiff was transferred from CSP-LAC to PBSP on August 4, 2011);
28 attached exhibits do not contradict or clarify this matter.) The attached declaration of M. Price,
Psy.D., PBSP Senior Psychologist (ECF No. 63-2 at 2), noted as follows:

Mitchell has a history of mental illness, and has had multiple Mental Health Crisis Bed Admissions and Department of Mental Health admissions in the past. He may require inpatient care in the future should his mental health condition deteriorate.

1 extended because he still had not received his legal or personal property as of November 3, 2011.
2 ECF No. 67. The court directed defendants to file a response. ECF No. 68. Defendants did not
3 object to a limited extension of time to conduct discovery, informing the court that plaintiff had
4 received his legal and personal property on November 3, 2011, and that defendants had taken
5 plaintiff's video deposition on December 5, 2011. ECF No. 70. The court extended the
6 discovery deadline to March 30, 2012, and the motion deadline to June 1, 2012. ECF No. 71.

7 C. Mitchell I: 2012

8 On April 6, 2012, plaintiff sought an extension of the discovery deadline due to
9 circumstances including his "significant mental health/medical issues [] that impede his ability to
10 learn and/or concentrate." ECF No. 77 at 1. One of plaintiff's exhibits was a "Renewal of
11 Involuntary Medication Notice" indicating that medical staff had previously sought to extend
12 authorization of involuntary psychiatric medications, on the ground that plaintiff would be a
13 danger to himself without such medications. Id. at 11. Plaintiff's request for extended time was
14 denied. ECF No. 86.

15 Plaintiff was transferred from PBSP on May 29, 2012. ECF No. 80. Although the
16 destination institution was MCSP, with a planned one-day "layover" at Deuel Vocational
17 Institution (DVI), plaintiff spent more than a week at DVI due to a medical emergency and was
18 then transferred to MCSP on June 7, 2012. ECF Nos. 80, 85. Once at MCSP, plaintiff informed
19 the court of his mental health status and that he was still waiting to receive his property and
20 access to the law library:

21 (P) continue to await the [undisclosed] surgery. And it may be done
22 at a nearby hospital. However because of (P's) severe mental illness
23 his ultimate destination is an institution that could accommodate his
24 level of care requirements. To include court order involuntary
25 medication (forced medicated) and Enhanced Outpatient Program
26 (EOP) which (P) is now endorsed for R.J. Donovan S.P. near San
27 Diego. But it is possible that I could be reendorsed to remain here
by my mental health treatment. (P) is on a drug that is helping him
and has fewer side affects. (P) apologize for all of the changes of
locations. And thank the court for tolerating (Ps) lack of expertise.
Again the psychiatric medication really helps with my writing. This
is the best of five drafts of this document sir. It will get better. I
promise.

28 ECF No. 85 at 2.

1 Defendants filed a motion for summary judgment on June 8, 2012. ECF Nos. 81-2.
2 Plaintiff filed a “notice of current status,” prepared June 18, 2012, in which he stated that he was
3 still waiting for his personal and legal property. ECF No. 87. Plaintiff noted that he had “kept his
4 promise and commitment to the court and to himself to have no further suicide attempts since 11-
5 19-10,” and had “worked diligently in his effort to achieve/maintain psychological stability so not
6 to require unnecessary hospitalization and/or circumstances that could interfere with the
7 expeditious, economically efficient and Honorable Adjudication of this matter.” Id. at 2.
8 Plaintiff noted that his “recent transfer has been a laudable CDCR progression.” Id. Plaintiff was
9 granted fourteen additional days to respond to defendants’ motion for summary judgment. ECF
10 No. 88.

11 On July 26, 2012, plaintiff again requested extended time to respond to defendants’
12 motion for summary judgment. ECF No. 89. Plaintiff explained that, although he received his
13 property at MCSP on July 9, 2012, on July 23, 2012 he was ordered to pack up his property for
14 transfer to another institution. ECF No. 89. The court granted plaintiff additional time. ECF No.
15 90. On July 31, 2012, plaintiff prepared another request for extended time, informing the court
16 that he was then at the California Institution for Men (CIM), in transit to R.J. Donovan State
17 Prison (CSP-Donovan), and still without his property. ECF No. 91. Plaintiff informed the court
18 that he arrived at CSP-Donovan on August 2, 2012, but had been without his property since May
19 30, 2012, (but see ECF No. 95 at 1, in which plaintiff acknowledges he had access to his legal
20 property from July 15 to July 27, 2012), and did not expect to receive his property until he
21 appeared before the Institutional Classification Committee (ICC) approximately two weeks later.
22 ECF No. 92. The court again granted plaintiff additional time to respond to defendants’ motion
23 for summary judgment. ECF No. 93.

24 Plaintiff later informed the court that he had received his property on August 13, 2012
25 (ECF No. 94), and again sought additional time to respond to defendants’ motion (ECF No. 95),
26 which the court granted (ECF No. 96).

27 On September 23, 2012, plaintiff prepared a document entitled “Plaintiff’s Notice of
28 Inability to File Opposition to Defense Motion for Summary Judgment,” which was docketed on

1 September 28, 2012, stating that plaintiff had not received a copy of the court's last order. ECF
2 No. 97. Plaintiff further stated that if he did not receive "another 'active' order," he would "send
3 in his opposition as is by Fri. 9-28-12." Id. at 2.

4 On October 30, 2012, the magistrate judge recommended the dismissal of Mitchell I due
5 to plaintiff's failure to file an opposition to defendants' motion for summary judgment and failure
6 to comply with court orders. ECF No. 98. The court noted in part: "In a document dated
7 September 23, 2012, plaintiff indicated that he would be submitting his opposition to defendants'
8 summary judgment motion on September 28, 2012. (See Dkt. No. 92 at p. 2.) To date, the court
9 has not received plaintiff's response to the summary judgment motion which is now past due."
10 ECF No. 98 at 1.

11 Plaintiff filed objections to the findings and recommendations on November 16, 2012
12 (ECF No. 100), and a request for status with exhibits (ECF No. 101, 102). The court vacated the
13 findings and recommendations on the following grounds:

14 [P]laintiff represents to the court that he in fact submitted his
15 opposition to defendants' motion for summary judgment on October
16 11, 2012, to the appropriate prison official for delivery but that it
17 never left in the prison's outgoing mail. Plaintiff has also filed with
18 this court a written acknowledgment by Correctional Officer Soriano
19 that Soriano indeed received plaintiff's legal mail and placed it "in
20 the mail bag to be mailed." (Objections (Docket No. 100), at 7.)
21 With his objections plaintiff has also submitted a log showing that
22 some of his other legal mail to this court left the prison in the weeks
23 before and after October 11, 2012, but that no mail addressed by him
24 to this court left the prison reasonably near October 11, 2012. (See
25 Documentation in Support of Objections (Docket No. 102), at 4-5.)
26 The defendants have not responded to plaintiff's explanation set forth
27 in his objections.

28 The court finds that plaintiff has made a credible showing that he
attempted to file a timely opposition to the pending motion for
summary judgment on October 11, 2012. Accordingly, the October
30, 2012 findings and recommendations recommending that this
action be dismissed will be vacated. Given the circumstances as
represented by plaintiff, plaintiff should have a copy of his
opposition to the summary judgment on hand that he can forward to
the court. Therefore, this final extension of time to file his opposition
– the last of many granted plaintiff in this case – need not be long.
Plaintiff will be granted fourteen days from his receipt of this order
in which to file his opposition to the defendants' pending motion for
summary judgment. The court will not grant another extension of
time for this purpose absent yet another showing of extraordinary
circumstances.

1 ECF No. 103 at 1-2.

2 D. Mitchell I: 2013 - 2015

3 On February 15, 2013, plaintiff again requested extended time, stating that he assumed the
4 court would give him an additional thirty days, not fourteen days. ECF No. 104. Plaintiff
5 explained, with supporting documentation, that he had been unable to copy his opposition before
6 attempting to mail it on October 11, 2012. Plaintiff asked the court to “[p]lease understand that
7 (P) really do[es] have a severe mental illness and that (Ps) mental illness really do[es] impact his
8 thinking and actions.” Id. at 4. The court found this statement insufficient to demonstrate
9 extraordinary circumstances, denied plaintiff’s extension request, and again recommended that
10 the action be dismissed. ECF No. 105

11 The district judge adopted the findings and recommendations by order filed April 25,
12 2013, and judgment was entered accordingly. ECF Nos. 111, 112. The district judge denied
13 plaintiff’s motion for reconsideration. ECF No. 125. The Court of Appeals affirmed the
14 judgment of the district court by memorandum decision filed December 9, 2014. ECF No. 126.

15 E. Mitchell II: Commenced 2015

16 Plaintiff filed the original complaint in the instant action (“Mitchell II”) on May 5, 2015
17 (docketed May 29, 2015). See ECF No. 1.

18 V. Analysis

19 A. Accrual of Plaintiff’s Claims

20 The parties do not dispute that plaintiff’s federal claims accrued on March 17, 2007, when
21 plaintiff was attacked by three other inmates at California State Prison Sacramento (CSP-SAC),
22 due to the alleged failure of defendant correctional officials to protect plaintiff. Because plaintiff
23 knew of the injuries that form the basis of this action on March 17, 2007, his claims accrued on
24 that date. See TwoRivers, 174 F.3d at 991.

25 B. Statutory Limitations Period

26 Defendants acknowledge that plaintiff exhausted his relevant administrative appeal on
27 November 17, 2007, and that the statute of limitations was tolled through that date. ECF No. 54
28 at 16; see Brown, 422 F.3d at 943. The limitations period accordingly commenced the following

1 day, on November 18, 2007. See Fed. R. Civ. P. 6(a).

2 Under California law, plaintiff then had a total of four years, or until November 18, 2011,
3 to bring his federal action. See Cal. Code Civ. Proc. § 335.1 (two-year statute of limitations for
4 personal injury actions); Cal. Civ. Proc. Code § 352.1(a) (two-year tolling due to disability of
5 imprisonment for prisoners serving less than a life term). However, plaintiff commenced this
6 action more than three years later on May 5, 2015. Accordingly, absent equitable tolling, the
7 instant action is time-barred.

8 C. Equitable Tolling

9 The Court of Appeals has directed this court to evaluate plaintiff’s “mental illness and
10 multiple prison transfers . . . under California’s equitable tolling doctrine. See Fink v. Shedler,
11 192 F.3d 911, 916 (9th Cir. 1999) (three-pronged test for equitable tolling in California).” ECF
12 No. 43 at 2. In light of this directive, the undersigned will assume that plaintiff is entitled to
13 equitable tolling if he satisfies Fink’s three-part test as to any periods during which mental illness
14 and prison transfers prevented timely filing.¹¹

15 ¹¹ The undersigned has previously noted that the three-part test cited in Fink is only applied by
16 California courts in circumstances involving a plaintiff’s attempt to seek relief in another forum
17 or to otherwise resolve the dispute without litigation. See ECF No. 23 at 6-8. As the California
18 Supreme Court has explained, the state courts “have adhered to a general policy which favors
19 relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he,
20 reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage.”
21 Addison v. California, 21 Cal. 3d 313, 317 (1978). The California cases that apply the equitable
22 factors recited in Fink do so in the context of a plaintiff’s prior pursuit of remedies in another
23 forum. See, e.g., Addison, supra, (federal action preceding state court action); Nichols v. Canoga
24 Indus., 83 Cal. App. 3d 956 (1978) (same); Elkins v. Derby, 12 Cal.3d 410 (1974) (workers
25 compensation administrative action preceding state court action); Jones v. Tracy School Dist., 27
26 Cal. 3d 99 (1980) (U.S. Department of Labor administrative action preceding state court action).
27 This contrasts sharply with the federal courts’ equitable tolling doctrine in the habeas corpus
28 context, under which any “exceptional circumstances” beyond a prisoner’s control, frequently
including mental illness and deprivation of legal materials, can support tolling if the applicable
equitable standard is satisfied. See Holland v. Florida, 560 U.S. 631 (2010); Bills v. Clark, 628
F.3d 1092 (9th Cir. 2010). The undersigned remains unconvinced that California’s equitable
tolling doctrine applies to this case in the first instance, because plaintiff did not file the instant
lawsuit after pursuing alternative remedies in a different forum. Nonetheless, in light of this
court’s obligation to follow the mandate of the Court of Appeals, the equitable factors recited in
Fink will be applied to plaintiff’s assertion that his untimeliness was caused by mental illness and
prison transfers that deprived him of his legal property.

1 1. Circumstances Proffered in Supporting of Tolling

2 a. Prior Federal Litigation

3 The Court of Appeals affirmed this court’s prior conclusion “that the pendency of
4 Mitchell’s prior federal action did not toll the statute of limitations.” ECF No. 43 at 2 (citing,
5 inter alia, Martell v. Antelope Valley Hosp. Med. Ctr., 67 Cal. App. 4th 978, 985 (1998)
6 (equitable tolling does not apply to successive claims pursued in the same forum)). See also ECF
7 No. 23 at 6-10 (setting forth this court’s prior analysis of the matter).¹² Plaintiff’s current efforts
8 to obtain tolling in Mitchell II based solely on the pendency of Mitchell I are therefore
9 unavailing.¹³ Mitchell I cannot support equitable tolling of the limitations period for Mitchell II,
10 as a matter of law and pursuant to the law of the case doctrine. See Richardson v. United States,
11 841 F.2d 993, 996 (9th Cir.), amended, 860 F.2d 357 (9th Cir.1988) (under law of the case
12 doctrine, “a court is ordinarily precluded from reexamining an issue previously decided by the
13 same court, or a higher court, in the same case.”).

14 b. Multiple Prison Transfers

15 Plaintiff was repeatedly deprived of his legal property during the period October 13, 2010
16 (when plaintiff was initially placed in Ad Seg at CSP-LAC without his legal property) through
17 August 13, 2012 (when plaintiff received his legal property after being settled at CSP-Donovan).
18 This period encompasses plaintiff’s multiple prison transfers, including his transfers in February
19 2011 from CSP-LAC to CMF and then back to CSP-LAC; in August 2011 to PBSP; in late May-
20 early June 2012 to MCSP, via DVI; then in late July-early August 2012 to CSP-Donovan, via
21 CIM. Plaintiff’s transfer and classification history establishes a pattern of disrupted access to
22 necessary legal materials that made it unreasonably difficult for him to pursue litigation during

23 _____
24 ¹² Accord, Jamison v. Garza, 2017 WL 3226472, at *4-5, 2017 U.S. Dist. LEXIS 120021, at *11-
25 2 (E.D. Cal. July 31, 2017) (Case No. 1:16-cv-0318 BAM PC) (and cases cited therein);
26 Porter v. Los Angeles County, 2016 WL 8732091, at *5, 2016 U.S. Dist. LEXIS 155161, at *11-2
27 (C.D. Cal. Aug. 9, 2016) (and cases cited therein), report and recommendation adopted, 2016 WL
28 8738109 (C.D. Cal. Nov. 4, 2016).

¹³ Plaintiff’s reliance on Donoghue v. Orange County, 848 F.2d 926, 930-31 (9th Cir. 1987) is
misplaced. See ECF No. 51 at 18. Donoghue authorized equitable tolling on similar claims
brought in different forums; not, as in the instant case, on successive claims brought in the same
forum.

1 this period. Accordingly, the court finds that plaintiff was effectively denied access to his legal
2 property from October 13, 2010 through August 13, 2012, a period of 670 days, due to multiple
3 prison transfers. Pursuant to the Ninth Circuit's mandate, tolling may be available for this period
4 if plaintiff satisfies the Fink criteria.

5 c. Mental Illness

6 Plaintiff first sought this court's accommodation for his mental illness in late 2010, when
7 he sought an extension of time in Mitchell I. ECF Nos. 37 (request filed on November 29, 2010),
8 40 (supporting affidavit filed on December 14, 2010). Both filings informed the court of
9 plaintiff's attempted suicide on November 19, 2010 at CSP-LAC. Plaintiff was transferred to
10 CMF to receive specialized mental health care, then transferred back to CSP-LAC. On August
11 30, 2011, defendants informed the court that plaintiff's psychiatric condition had again
12 deteriorated and that he had been transferred to PBSP's Mental Health Crisis Bed (MHCB) unit
13 on August 4, 2011. ECF No. 60. On October 3, 2011, defendants reported that plaintiff's mental
14 health was improving (ECF No. 63) and, on December 5, 2011, plaintiff participated in his video
15 deposition (see ECF No. 70). However, plaintiff was not transferred from PBSP until May 29,
16 2012 and, on April 6, 2012, he again sought extended time based on his deteriorated mental
17 condition. ECF No. 77. On June 18, 2012, plaintiff filed a status report informing the court that
18 his mental health had improved. ECF No. 87. Plaintiff's subsequent filings in Mitchell I did not
19 seek accommodations based on a deterioration in his mental health, but asked only that the court
20 consider plaintiff's chronic mental illness when considering whether to grant him additional time
21 to respond to defendants' motion for summary judgment.

22 Considering these facts under the standards set forth in Cal. Code Civ. Proc. § 352(a), the
23 court finds that plaintiff was unable to care for himself or his affairs, and lacked the capacity to
24 pursue this action, due to his mental illness from approximately November 19, 2010 (the date of
25 plaintiff's suicide attempt) until June 18, 2012 (when plaintiff informed the court that his mental
26 health had improved). However, plaintiff has not demonstrated that he lacked the legal capacity
27 to make decisions *at the time the cause of action accrued*, as required for tolling under Cal. Code
28 Civ. Proc. § 352(a). This consideration does not affect the ultimate timeliness determination,

1 however, because the period of plaintiff’s mental incapacity (November 19, 2010 to June 18,
2 2012) is subsumed within the longer period during which plaintiff was deprived of his legal
3 materials (October 13, 2010 through August 13, 2012). The latter basis for tolling is not subject
4 to the statutory requirement that the impediment existed at the time of accrual.

5 Accordingly, whether or not plaintiff’s mental illness constitutes a separate ground for
6 tolling under California law, this court must examine whether plaintiff is entitled to tolling for the
7 period October 13, 2010 through August 13, 2012.

8 2. Application of *Fink* Factors

9 In California, a statute of limitations may be equitably tolled if (1) defendants received
10 timely notice of plaintiff’s claims; (2) defendants will not be prejudiced if required to defend
11 plaintiff’s claims; and (3) plaintiff’s conduct in pursuing the claim has been “reasonable and in
12 good faith.” Fink, 192 F.3d at 916.

13 a. Notice to Defendants

14 “The timely notice requirement essentially means that the first claim must have been filed
15 within the statutory period. Furthermore the filing of the first claim must alert the defendant in
16 the second claim of the need to begin investigating the facts which form the basis for the second
17 claim. Generally this means that the defendant in the first claim is the same one being sued in the
18 second.” Collier v. City of Pasadena, 142 Cal. App. 3d 917, 924 (1983).¹⁴

19 Defendants concede they received timely notice of plaintiff’s claims in the instant action
20 because initially presented in Mitchell I, which was timely filed within the statutory period. See
21 ECF No. 54 at 18. This concession satisfies the first factor identified in Fink to support equitable
22 tolling.

23 b. Prejudice to Defendants

24 Plaintiff contends that defendants would not be prejudiced if required to proceed in
25 Mitchell II because “the facts are the same and the defendants are virtually the same” as presented
26

27 ¹⁴ This phrasing of the standard supports the court’s understanding that these criteria are to be
28 applied in in circumstances where plaintiff filed his lawsuit outside the limitations period because
he was first pursuing other avenues of relief.

1 in Mitchell I. ECF No. 58 at 7. His position is supported by California law:

2 The second prerequisite essentially translates to a requirement that
3 the facts of the two claims be identical or at least so similar that the
4 defendant’s investigation of the first claim will put him in a position
5 to fairly defend the second. Yet the two ‘causes of action’ need not
6 be absolutely identical. The critical question is whether notice of the
7 first claim affords the defendant an opportunity to identify the
8 sources of evidence which might be needed to defend against the
9 second claim.

7 Collier, 142 Cal. App. 3d at 925.

8 Defendants contend that they would be prejudiced in gathering evidence to defend against
9 plaintiff’s claims if required to proceed in the instant action. While conceding that the claims and
10 parties are virtually identical in Mitchell I and Mitchell II, defendants emphasize that the events at
11 issue occurred more than twelve years ago, that memories have grown stale and that material
12 witnesses, including approximately twenty inmate witnesses to the incident,¹⁵ may no longer be
13 available. See ECF No. 54 at 18-9. Defendants rely on the following reasoning by the Ninth
14 Circuit:

15 Fairness to the defendant requires that a case be brought when
16 memories have not been affected by time, when all pertinent
17 witnesses can still be called, and when physical evidence has not
18 been destroyed or dispersed. In addition to these evidentiary
19 concerns, the public has an interest in avoiding the cultivation of stale
20 grievances and grudges. Statutes of limitations are not legalistic
21 gimmicks but embody the experience of Anglo-American law that it
22 is sound public policy to set a specific time within which a given
23 legal action may be brought.

20 Jones v. Blanas, 393 F.3d at 928.

21 The court appreciates that the passage of time always prejudices the defense of a lawsuit
22 to some degree; the question is to what degree, within what timeframe. Here it is significant that
23 defendants prepared and filed a detailed motion for summary judgment in Mitchell I that included
24 thirty-four pages of undisputed facts and eight declarations. See Mitchell I (ECF No. 81).

25 Defendants argue that the motion was submitted more than six years ago and remained
26 unresolved due to plaintiff’s failure to prosecute, leaving defendants unsure whether any claims

27 ¹⁵ See the operative complaint in Mitchell II, ECF No. 1 at 5:4-5 (“approx. 20 other inmate/
28 patients were present”).

1 would have survived summary judgment and therefore precluding any trial preparation.
2 Nevertheless, defendants’ preparation and memorialization of their motion for summary judgment
3 in Mitchell I enables them to timely identify the sources of evidence, including all inmate
4 witnesses, needed for their defense in the instant action.

5 Focusing on the 670 days for which tolling might be appropriate on grounds of plaintiff’s
6 mental illness and pattern of prison transfers, although it is a close call, the court finds on balance
7 that defendants are “adequately protected from stale claims and deteriorated evidence.” Collier,
8 142 Cal. App. 3d at 925. Accordingly, at least as to the initial tolling period of 670 days, court
9 finds that the second factor under Fink weighs slightly in plaintiff’s favor.

10 c. Plaintiff’s Conduct

11 The third and final requirement for equitable tolling under California law requires that
12 “plaintiff’s conduct must have been reasonable and in good faith.” Fink, 192F.3d at 916
13 (quoting Bacon, 843 F.2d at 374). “The third prerequisite of good faith and reasonable conduct
14 on the part of the plaintiff is less clearly defined in the cases,” Collier, 142 Cal. App. 3d at 926, as
15 acknowledged by the California Supreme Court, see McDonald, supra, 45 Cal. 4th at 102 n.2, and
16 several California Courts of Appeal, see e.g. Hopkins v. Kedzierski, 225 Cal. App. 4th 736, 747
17 (2014). Nevertheless, “[w]hile the case law is not entirely clear, it appears that the weight of
18 authority supports [the] conclusion that whether a plaintiff has demonstrated the elements of
19 equitable tolling presents a question of fact.” Hopkins, 225 Cal. App. 4th at 755 (collecting
20 cases).

21 Despite plaintiff’s limited access to his legal materials and diminished mental capacity
22 during the period October 13, 2010 through August 13, 2012, plaintiff continued to communicate
23 with the court to ensure that his case remained open. Plaintiff filed six changes of addresses,
24 twelve requests for extended time, two “offers of settlement” and a request for appointment of
25 counsel. The court finds these efforts demonstrate that plaintiff acted as reasonably as he could
26 during this period and therefore in good faith, thus satisfying the third and final factor supporting
27 equitable tolling under Fink.

28 ///

1 3. Extension of Limitations Period Due to Equitable Tolling

2 For the foregoing reasons, the court finds that equitable tolling is warranted under Fink for
3 the period October 13, 2010 through August 13, 2012. “[T]he effect of equitable tolling is that
4 the limitations period *stops running* during the tolling event, and begins to run again only when
5 the tolling event has concluded. As a consequence, the tolled interval, no matter when it took
6 place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the
7 entire length of time during which the tolling event previously occurred.” Lantzy, 31 Cal.4th at
8 370-371 (fn. omitted) (original emphasis).

9 Application of equitable tolling from October 13, 2010 through August 13, 2012 extends
10 the limitations period for 670 days, thus extending the filing deadline from November 18, 2011 to
11 September 18, 2013.

12 4. No Further Equitable Tolling Is Warranted

13 Plaintiff did not commence the instant action until May 5, 2015, a year-and-a-half after
14 the deadline as extended by the above equitable tolling analysis. Accordingly, the instant action
15 is timely only if equitable tolling further extends beyond September 18, 2013 and through at least
16 May 5, 2015.

17 Plaintiff’s evidence of mental impairment and chronic deprivation of legal materials due
18 to prison transfers, which has been outlined above, does not extend into this period. While
19 plaintiff periodically reminded the court during this time of his ongoing mental illness, he has not
20 submitted any evidence that supports a conclusion he was unable to initiate a new lawsuit
21 between September 18, 2013 and May 5, 2015 due to either mental illness or prison transfers. To
22 the contrary, the record demonstrates that plaintiff was capable of litigating during this period and
23 chose to pursue post-judgment relief in Mitchell I – which does not support equitable tolling, see
24 Martell, 67 Cal. App. 4th at 985 – rather than refile his claims in a new action.

25 Moreover, the Fink factors are not satisfied as to the period of September 18, 2013 to May
26 5, 2015. While defendants remained on notice of plaintiff’s claims, satisfying the first prong, the
27 prejudice to their ability to defend has necessarily increased as time continues to pass. On the one
28 hand, as discussed above, defendants had made a record in Mitchell I of the evidence supporting

1 their position and plaintiff's. This consideration weighs against a finding of prejudice for the
2 reasons previously explained. On the other hand, defendants' access to the previously-identified
3 evidence cannot be assumed to have persisted indefinitely, and the weight of this factor shifts to
4 defendants over time. However, defendants have not specifically identified evidence that become
5 unavailable during this period, and the court therefore hesitates to find that the prejudice factor
6 shifts in their favor as to the period of September 18, 2013 to May 5, 2015. However, even if this
7 factor continued to lie in plaintiff's favor, he would not be entitled to further equitable tolling
8 unless he had acted reasonably in pursuing his claims during the relevant period. Plaintiff cannot
9 satisfy his burden as to this dispositive factor.

10 When the extended limitations period expired (absent further tolling) on September 19,
11 2013, judgment had already been entered against plaintiff in Mitchell I. That dismissal was
12 without prejudice, and there was therefore no bar to plaintiff promptly re-filing his claims in a
13 new complaint if he wished to pursue them during the five months then remaining on the
14 limitations "clock." See Santa Clara v. Andrus, 572 F.2d 660, 665 (9th^h Cir. 1978) (dismissal
15 without prejudice permits filing of a new action). Re-filing previously drafted claims requires no
16 research, investigation, or access to materials other than the prior complaint (or memory of its
17 contents). Rather than following this course, however, plaintiff filed both a motion to alter or
18 amend the judgement and a notice of appeal. Mitchell I, ECF Nos. 115, 118. The motion to alter
19 or amend the judgment was denied on December 10, 2013. ECF No. 125. The district court's
20 judgment was affirmed by the Court of Appeals on December 9, 2014. Mitchell I, ECF No. 126.

21 While it may at first glance seem reasonable for plaintiff to have waited to file a new
22 lawsuit until after exhausting all efforts to revive the first one, careful review of the record does
23 not support that conclusion. First, plaintiff's conduct in Mitchell I demonstrates a pattern of
24 unreasonable delay even *after his mental capacity and access to legal materials were restored*.
25 That is why the case was dismissed, and why the dismissal was upheld on appeal. Plaintiff's
26 attempts to re-open or overturn the judgment, both before and after expiration of the extended
27 limitations period, represent a continuation of the same pattern of litigation conduct.

28 In Fink itself, the Ninth Circuit found that a prisoner did not act reasonably within the

1 meaning of California’s equitable tolling doctrine by attempting to add new claims to a
2 previously-filed lawsuit rather than timely filing a separate lawsuit. Fink, 192 F.3d at 916. In the
3 present case the claims were the same as in plaintiff’s previously-filed lawsuit, but the futility of
4 plaintiff’s actions in light of the procedural posture of the case is equivalent to that in Fink. In
5 Bacon v. City of Los Angeles, the Ninth Circuit found that plaintiff’s pattern of excessive delay
6 in a prior state court action was unreasonable and defeated equitable tolling for the subsequently-
7 filed federal action. Bacon, 843 F.2d at 375. Plaintiff’s “stringing out” of Mitchell I, like the
8 conduct of the Bacon plaintiff (id.), is inconsistent with the “‘reasonable and good faith’ effort to
9 pursue [plaintiff’s] claims in an alternate forum or case” that Fink requires. Fink, 192 F.3d at
10 916. Accordingly, as in Bacon, plaintiff’s history of excessive litigation delay in his preceding
11 case defeats his bid for equitable tolling.

12 In sum, plaintiff has not established by competent evidence that his mental illness or any
13 other factor beyond his control prevented filing of the instant case between September 18, 2013
14 and May 5, 2015. Nor has he demonstrated the reasonable efforts necessary to support tolling
15 under Fink and Bacon during that period. Accordingly, the initial 670-day period of equitable
16 tolling that the court finds appropriate does not save the complaint from untimeliness.

17 VI. Conclusion

18 For the reasons set forth above, IT IS HEREBY RECOMMENDED that:

19 Defendants’ motion to dismiss (ECF No. 15), reconsidered on remand pursuant to order of
20 the Ninth Circuit Court of Appeals (ECF No. 43), be GRANTED.

21 These findings and recommendations are submitted to the United States District Judge
22 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one (21)
23 days after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that

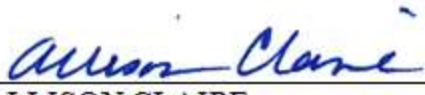
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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: May 28, 2019

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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