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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DEREK MATTHEWS,
Plaintiff,
v.
DEMITA PINCHBACK, et al.,
Defendants.

No. 2:22-cv-1329 DJC KJN P

ORDER

Plaintiff, a state prisoner proceeding through counsel, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On July 21, 2023, the Magistrate Judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff filed objections to the findings and recommendations.¹

¹ In the objections, Plaintiff argues for the first time that the court should consider the medical challenges of plaintiff's prior counsel in evaluating whether equitable tolling should apply. (ECF No. 54 at 4, n. 1.) Plaintiff cites ECF Nos. 21, 21-1 and ECF No. 32 (filed under seal) in support of this new argument. (*Id.*) Plaintiff fails to explain how prior counsel's health challenges in 2022 contributed to prior counsel's voluntary dismissal of Plaintiff's previous case, 2:20-cv-2515, and the re-filing of plaintiff's claims four months later in the instant action. Plaintiff also cites no authority in support of the

1 The Court has reviewed the file and finds the findings and recommendations to
2 be supported by the record and by the Magistrate Judge's analysis. The findings and
3 recommendations filed July 21, 2023, (ECF No. 53), are adopted in full. Accordingly,
4 IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, ECF No. 20, is GRANTED
5 as follows:

6 1. Defendant Pinchback's Motion to Dismiss Plaintiff's First Cause of Action
7 against Defendant Pinchback as barred by the statute of limitations is GRANTED; and

8 2. Defendant Pinchback's Motion to Dismiss Plaintiff's Fourth through Seventh
9 Causes of Action against Defendant Pinchback is GRANTED with leave to amend.

10 Plaintiff must file an amended complaint addressing only the pleading defects
11 regarding his state law claims within thirty days of the entry of this order.

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14 IT IS SO ORDERED.

15 Dated: November 17, 2023


16 Hon. Daniel J. Calabretta
17 UNITED STATES DISTRICT JUDGE

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25 argument that equitable tolling is available based on prior counsel's health problems.
26 The Court declines to consider this new and unsupported argument for equitable
27 tolling raised in plaintiff's objections. See *United States v. Howell*, 231 F.3d 615, 631-
28 22 (9th Cir. 2000) (district judge did not abuse discretion in refusing to consider
factual allegations not presented to the magistrate judge); see also *Brown v. Roe*, 279
F.3d 742, 744-45 (9th Cir. 2002) (stating that a district court has discretion, but is not
required, to consider evidence or claims presented for the first time in objections to a
report and recommendation).