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SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEMITRIUS McGEE,
CDCR #K-27398,

Plaintiff,

vs.

CHAMBERLAIN, M.D.; JOHN DOE,
M.D.; JOHN DOE Ophthalmologist;
TRAVIS H. CALVIN, M.D.; KU, M.D.;
N. BARRERAS, Chief Medical Officer;
JOHN DOE, M.D.; MOHAMMED K.
ARAB, M.D.; DANIEL PARAMO,
Warden; MATTHEW CATES, Director
CDCR; DOMINGO URIBE, Warden;
Does 1-20,

Defendants.

Civil No. 13cv1020 WQH (JMA)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
(ECF No. 2)**

AND

**(2) DISMISSING COMPLAINT
FOR FAILING TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

Demitrius McGee ("Plaintiff"), a state prisoner proceeding pro se and currently incarcerated at the Richard J. Donovan Correctional Facility ("RJD") has filed a civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP"). (ECF No. 2.)

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1 **I. Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee
5 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
6 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, "[u]nlike other indigent
7 litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and
8 appeals pursuant to the PLRA [Prison Litigation Reform Act]." *Agyeman v. INS*, 296 F.3d 871,
9 886 (9th Cir. 2002). As defined by the PLRA, a "prisoner" is "any person incarcerated or
10 detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent
11 for, violations of criminal law or the terms and conditions of parole, probation, pretrial release,
12 or diversionary program." 28 U.S.C. § 1915(h). Because Plaintiff is currently incarcerated, he
13 is a prisoner as defined by 28 U.S.C. § 1915(h), and therefore subject to the PLRA's
14 requirements and limitations. *Agyeman*, 296 F.3d at 886.

15 Under 28 U.S.C. § 1915, as amended by the PLRA, a prisoner seeking leave to proceed
16 IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent)
17 for the prisoner for the six-month period immediately preceding the filing of the complaint." 28
18 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
19 trust account statement, the Court must assess an initial payment of 20% of (a) the average
20 monthly deposits in the account for the past six months, or (b) the average monthly balance in
21 the account for the past six months, whichever is greater, unless the prisoner has no assets. *See*
22 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner
23 must collect subsequent payments, assessed at 20% of the preceding month's income, in any
24 month in which the prisoner's account exceeds \$10, and forward those payments to the Court
25 until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

26 Plaintiff has submitted a certified copy of his trust account statement pursuant to 28
27 U.S.C. § 1915(a)(2) and S.D. Cal. Civ. L.R. 3.2. *Andrews*, 398 F.3d at 1119. The trust account
28 statement shows that Plaintiff has no currently available funds with which he could satisfy any

1 initial partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a
2 prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
3 judgment for the reason that the prisoner has no assets and no means by which to pay [an] initial
4 partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a
5 “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay
6 ... due to the lack of funds available”).

7 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2), and
8 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
9 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
10 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

11 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A**

12 The PLRA also obligates the Court to review complaints filed by all persons proceeding
13 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
14 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
15 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
16 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
17 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
18 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
19 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
20 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
21 2010) (discussing 28 U.S.C. § 1915A(b)).

22 “[W]hen determining whether a complaint states a claim, a court must accept as true all
23 allegations of material fact and must construe those facts in the light most favorable to the
24 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,
25 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal
26 Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner
27 is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the
28 petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010)

1 (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however,
2 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of the*
3 *Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of
4 official participation in civil rights violations are not sufficient to withstand a motion to dismiss.”
5 *Id.*

6 **A. Statute of Limitations**

7 Plaintiff alleges that his civil rights were violated when he was housed at Centinela State
8 Prison (“CEN”) from 2007 to 2009. (ECF No. 1 at 1.) Where the running of the statute of
9 limitations is apparent on the face of the complaint, dismissal for failure to state a claim is
10 proper. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993). Because section
11 1983 contains no specific statute of limitation, federal courts apply the forum state’s statute of
12 limitations for personal injury actions. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004);
13 *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Fink v. Shedler*, 192 F.3d 911, 914 (9th
14 Cir. 1999). Before 2003, California’s statute of limitations was one year. *Jones*, 393 F.3d at
15 927. Effective January 1, 2003, the limitations period was extended to two years. *Id.* (citing
16 CAL. CIV. PROC. CODE § 335.1).

17 Unlike the length of the limitations period, however, “the accrual date of a § 1983 cause
18 of action is a question of federal law that is not resolved by reference to state law.” *Wallace v.*
19 *Kato*, 549 U.S. 384, 388 (2007); *Hardin v. Staub*, 490 U.S. 536, 543-44 (1989) (federal law
20 governs when a § 1983 cause of action accrues). “Under the traditional rule of accrual ... the tort
21 cause of action accrues, and the statute of limitation begins to run, when the wrongful act or
22 omission results in damages.” *Wallace*, 549 U.S. at 391; *see also Maldonado*, 370 F.3d at 955
23 (“Under federal law, a claim accrues when the plaintiff knows or has reason to know of the
24 injury which is the basis of the action.”).

25 Here, Plaintiff seeks to hold Defendants liable for events which occurred between 2007
26 and 2008. Thus, Plaintiff would have reason to believe that his constitutional rights were
27 violated five to six years ago. *Id.*; *see also Maldonado*, 370 F.3d at 955. However, Plaintiff did
28 not file his Complaint in this case until April 29, 2013, which exceeds California’s statute of

1 limitation. See CAL. CODE CIV. PROC. § 335.1; *Jones*, 393 F.3d at 927. Plaintiff does not allege
2 any facts to suggest how or why California's two-year statute of limitations might be tolled for
3 a period of time which would make his claims timely. See, e.g., CAL. CODE CIV. P. § 352.1
4 (tolling statute of limitations "for a maximum of 2 years" during a prisoner's incarceration); *Fink*
5 *v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL. CODE CIV. P. § 352.1 tolls a
6 California prisoner's personal injury claims accruing before January 1, 1995 for two years, or
7 until January 1, 1995, whichever occurs later, unless application of the statute would result in
8 a "manifest injustice.").

9 Pursuant to *Fink*, a portion of Plaintiff's claims against Defendants, accruing in 2007 and
10 2008, would be tolled for two years. California's two-year statute of limitations would then
11 begin to run -- requiring Plaintiff to file this action against these Defendants no later than 2011.
12 Generally, federal courts also apply the forum state's law regarding equitable tolling. *Fink*, 192
13 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir. 1988). Under California
14 law, however, a plaintiff must meet three conditions to equitably toll a statute of limitations: (1)
15 he must have diligently pursued his claim; (2) his situation must be the product of forces beyond
16 his control; and (3) the defendants must not be prejudiced by the application of equitable tolling.
17 See *Hull v. Central Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328, 1335 (Cal. Ct. App.
18 1994); *Addison v. State of California*, 21 Cal.3d 313, 316-17 (Cal. 1978); *Fink*, 192 F.3d at 916.
19 Here, however, Plaintiff has failed to plead any facts which, if proved, would support the
20 equitable tolling of his claims. See *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir.
21 1993). Thus, Plaintiff's claims against Defendants arising in 2007 and 2008 must be dismissed
22 pursuant to 28 U.S.C. § 1915(e)(2) because it appears from the face of the pleading that
23 Plaintiff's claims are time-barred. *Cervantes*, 5 F.3d at 1277.

24 **B. Eighth Amendment medical care claims**

25 The Court also finds that Plaintiff's Complaint is subject to sua sponte dismissal pursuant
26 to 28 U.S.C. § 1915(e)(2) because it fails to adequately state an Eighth Amendment claim.
27 Plaintiff alleges that Defendants were deliberately indifferent to his serious medical needs in
28 violation of his Eighth Amendment rights. Where an inmate's claim is one of inadequate

1 medical care, the inmate must allege “acts or omissions sufficiently harmful to evidence
2 deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).
3 Such a claim has two elements: “the seriousness of the prisoner’s medical need and the nature
4 of the defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.
5 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.
6 1997). A medical need is serious “if the failure to treat the prisoner’s condition could result in
7 further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974
8 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). Indications of a serious medical need include
9 “the presence of a medical condition that significantly affects an individual’s daily activities.”
10 *Id.* at 1059-60. By establishing the existence of a serious medical need, an inmate satisfies the
11 objective requirement for proving an Eighth Amendment violation. *Farmer v. Brennan*, 511
12 U.S. 825, 834 (1994).

13 In general, deliberate indifference may be shown when prison officials deny, delay, or
14 intentionally interfere with a prescribed course of medical treatment, or it may be shown by the
15 way in which prison medical officials provide necessary care. *Hutchinson v. United States*, 838
16 F.2d 390, 393-94 (9th Cir. 1988).

17 While Plaintiff has demonstrated that he has serious medical needs, throughout his
18 Complaint he sets forth allegations that he was routinely provided medical care and medication
19 for his medical needs. While Plaintiff alleges that some of this treatment rose to the level of
20 negligence and some of this treatment he disagreed with, none of these claims rise to the level
21 of a constitutional violation. A mere difference of opinion between an inmate and prison
22 medical personnel regarding appropriate medical diagnosis and treatment are not enough to
23 establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

24 Moreover, before it can be said that a inmate’s civil rights have been abridged with regard
25 to medical care, however, “the indifference to his medical needs must be substantial. Mere
26 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”
27 *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S.
28 at 105-06); *see also Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

1 Thus, Plaintiff's Eighth Amendment inadequate medical care claims are dismissed for
2 failing to state a claim upon which relief can be granted.

3 **III. CONCLUSION AND ORDER**

4 **IT IS HEREBY ORDERED** that:

5 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is
6 **GRANTED**.

7 2. The Secretary of California Department of Corrections and Rehabilitation, or his
8 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
9 owed in this case by collecting monthly payments from the account in an amount equal to twenty
10 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
11 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
12 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
13 **ASSIGNED TO THIS ACTION.**

14 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey Beard,
15 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
16 Sacramento, California 95814.


17 4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which relief
18 may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). However, Plaintiff is
19 **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First
20 Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's
21 Amended Complaint must be complete in itself without reference to the superseded pleading.
22 *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the
23 Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565,
24 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which
25 relief may be granted, it may be dismissed without further leave to amend and may hereafter
26 be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-
27 79 (9th Cir. 1996).

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5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

DATED: 5/14/13


HON. WILLIAM O. HAYES
United States District Judge