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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
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9 DEMITRIUS McGEE,
10 CDCR #K-27398,

Plaintiff,

11 vs.

12 CHAMBERLAIN, M.D.; JOHN DOE,
13 M.D.; JOHN DOE Ophthalmologist;
14 TRAVIS H. CALVIN, M.D.; KU, M.D.;
15 N. BARRERAS, Chief Medical Officer;
16 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 DISMISSING SECOND
AMENDED COMPLAINT
FOR FAILING TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

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19 **I. Procedural History**

20 On April 29, 2013, Demetrius McGee ("Plaintiff"), a state prisoner proceeding pro se and
21 currently incarcerated at San Quentin State Prison located in San Quentin, California, filed a
22 civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) In addition, Plaintiff filed a
23 Motion to Proceed *In Forma Pauperis* ("IFP"). (ECF No. 2.) On May 14, 2013, this Court
24 granted Plaintiff's Motion to Proceed IFP but simultaneously sua sponte dismissed his
25 Complaint for failing to state a claim upon which relief could be granted pursuant to 28 U.S.C.
26 §§ 1915(e)(2) & 1915A(b). (ECF No. 3 at 7-8.) Plaintiff was granted leave to file an amended
27 complaint in order to correct the deficiencies of pleading identified in the Court's Order. (*Id.*)
28 On June 19, 2013, Plaintiff filed his First Amended Complaint ("FAC"). (ECF No. 5.)

1 In his First Amended Complaint, Plaintiff named as Defendants N. Barreras, Samuel Ko,
2 Mohammed H. Arab, Travis H. Calvin, Dr. Miesel and E. Chamberlain as Defendants. (ECF
3 No. 5 at 1-2.) In the Court's May 14, 2013 Order, Plaintiff was informed that any claims not re-
4 alleged and Defendants not renamed would be deemed waived. (ECF No. 3 at 7) (citing *King*
5 *v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)). Because Plaintiff no longer named Defendants
6 John Doe, M.D., John Doe, Opthamologist, John Doe, M.D., Ear Nose and Throat, Daniel
7 Paramo, Matthew Cate and Domingo Uribe as Defendants, those Defendants were DISMISSED
8 from this action. (ECF No. 6 at 6.) In addition, the Court, once again, dismissed Plaintiff's First
9 Amended Complaint for failing to state a claim upon which relief could be granted pursuant to
10 28 U.S.C. §§ 1915(e)(2) & 1915A(b). (*Id.* at 6-7.) Plaintiff was granted leave to file a Second
11 Amended Complaint. (*Id.*) On February 26, 2014, Plaintiff filed his Second Amended
12 Complaint ("SAC"). (ECF No. 8.)

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

14 As the Court stated in its previous Orders, the Prison Litigation Reform Act ("PLRA")
15 obligates the Court to review complaints filed by all persons proceeding IFP and by those, like
16 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or
17 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
18 probation, pretrial release, or diversionary program," "as soon as practicable after docketing."
19 *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court
20 must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail
21 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
22 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
23 (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C.
24 § 1915A(b)).

25 "[W]hen determining whether a complaint states a claim, a court must accept as true all
26 allegations of material fact and must construe those facts in the light most favorable to the
27 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,
28 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) "parallels the language of Federal

1 Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner
2 is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the
3 petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010)
4 (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however,
5 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of*
6 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations
7 of official participation in civil rights violations are not sufficient to withstand a motion to
8 dismiss.” *Id.*

9 In Plaintiff’s Second Amended Complaint, like his previous pleadings, he alleges that he
10 was denied adequate medical care while he was housed at Centinela State Prison from 2007 to
11 2009. (ECF No. 8 at 4-11, 14-21.) However, the only claims against the named Defendants are
12 alleged to have occurred between 2007 and 2008.¹ (*Id.* at 15-21.)

13 Where the running of the statute of limitations is apparent on the face of the complaint,
14 dismissal for failure to state a claim is proper. *See Cervantes v. City of San Diego*, 5 F.3d 1273,
15 1276 (9th Cir. 1993). Because section 1983 contains no specific statute of limitations, federal
16 courts apply the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*,
17 393 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004);
18 *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of
19 limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations
20 period was extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1).

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

27
28 ¹ Plaintiff identifies a “Dr. Frazee” and “Dr. Evans” as medical care providers who were in charge
of his medical care from late 2008 to 2009. (ECF No. 8 at 33-36.) However, neither of these individuals
are named as Defendants.

1 (“Under federal law, a claim accrues when the plaintiff knows or has reason to know of the
2 injury which is the basis of the action.”).

3 Here, Plaintiff seeks to hold Defendants liable for events which occurred between 2007
4 and 2008. Thus, Plaintiff would have reason to believe that his constitutional rights were
5 violated six to seven years ago. *Id.*; *see also Maldonado*, 370 F.3d at 955. However, Plaintiff
6 did not file his Complaint in this case until April 29, 2013, which exceeds California’s statute
7 of limitations. *See CAL. CODE CIV. PROC. § 335.1; Jones*, 393 F.3d at 927. Plaintiff does not
8 allege any facts to suggest how or why California’s two-year statute of limitations might be
9 tolled for a period of time which would make his claims timely. *See, e.g.*, CAL. CODE CIV. P.
10 § 352.1 (tolling statute of limitations “for a maximum of 2 years” during a prisoner’s
11 incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL. CODE CIV.
12 P. § 352.1 applies to a California prisoner’s personal injury claims unless application of the
13 statute would result in a “manifest injustice”).

14 Pursuant to *Fink*, a portion of Plaintiff’s claims against Defendants, accruing in 2007 and
15 2008, would be tolled for two years. California’s two-year statute of limitations would then
16 begin to run -- requiring Plaintiff to file this action against these Defendants no later than 2011
17 or 2012. Generally, federal courts also apply the forum state’s law regarding equitable tolling.
18 *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir. 1988). Under
19 California law, however, a plaintiff must meet three conditions to equitably toll a statute of
20 limitations: (1) he must have diligently pursued his claim; (2) his situation must be the product
21 of forces beyond his control; and (3) the defendants must not be prejudiced by the application
22 of equitable tolling. *See Hull v. Central Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328,
23 1335 (Cal. Ct. App. 1994); *Addison v. State of California*, 21 Cal.3d 313, 316-17 (Cal. 1978);
24 *Fink*, 192 F.3d at 916.

25 In his Second Amended Complaint, Plaintiff argues that he is a “life term prisoner suing
26 under federal law of deliberate indifference and not under state law of negligence” and therefore
27 California law relating to statute of limitations does not apply. (SAC at 38.) However, the
28 Ninth Circuit has specifically held that because section 1983 contains no specific statute of

1 limitation, federal courts apply the forum state's statute of limitations for personal injury actions.
2 *Jones*, 393 F.3d at 927. Accordingly, as stated above, this Court looks to California's personal
3 injury statute of limitations which is two years. Plaintiff cites to a 1968 California state court
4 decision in which there was discussion of allowing California prisoners tolling for the entire
5 term of their imprisonment. (See SAC at 28; citing *Grasso v. McDonough Power Equipment,*
6 *Inc.*, 264 Cal.App.2d 597 (1968)). However, the California law was "subsequently changed
7 effective January 1, 1995, to limit the period of tolling" to two years. *Ellis v. City of San Diego*,
8 176 F.3d 1183, 1189 (9th Cir. 1999). Therefore, there is no merit of Plaintiff's argument that
9 he is entitled to unlimited tolling in this action.

10 Thus, the Court finds that Plaintiff has failed to plead any facts which, if proved, would
11 support the equitable tolling of his claims. See *Cervantes v. City of San Diego*, 5 F.3d 1273,
12 1277 (9th Cir. 1993). Plaintiff's claims against Defendants arising in 2007 and 2008 must be
13 dismissed pursuant to 28 U.S.C. § 1915(e)(2) because it appears from the face of the pleading
14 that Plaintiff's claims are time-barred. *Cervantes*, 5 F.3d at 1277.

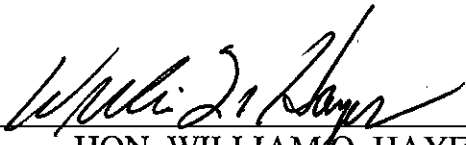
15 **III. CONCLUSION AND ORDER**

16 Plaintiff's Second Amended Complaint is **DISMISSED** for failing to state a claim
17 pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A. Moreover, because the Court finds amendment
18 of Plaintiff's claims would be futile at this time, leave to amend is **DENIED**. See *Cahill v.*
19 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of leave to amend is not an abuse
20 of discretion where further amendment would be futile); see also *Robinson v. California Bd. of*
21 *Prison Terms*, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and cannot,
22 state a claim containing an arguable basis in law, this action should be dismissed without leave
23 to amend; any amendment would be futile.") (citing *Newland v. Dalton*, 81 F.3d 904, 907 (9th
24 Cir. 1996)).

25 The Clerk of Court shall close the file.

26 DATED: _____

3/13/14



HON. WILLIAM Q. HAYES
United States District Judge