

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

PHIL ELIZALDE CAMILLO,  
CDCR # AS-4716,

Plaintiff,

vs.

BROWN, et al.,

Defendants.

Civil No. 14cv2358 LAB (RBB)

**ORDER:**

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

**AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. § 1915(e)(2)(B)(ii)  
AND 28 U.S.C. § 1915A(b)(1)**

Phil Elizalde Camillo (“Plaintiff”), a state prisoner currently incarcerated at the California Rehabilitation Center located in Norco, California, and proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983.

Plaintiff has not prepaid the \$400 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**I.**

**MOTION TO PROCEED IFP**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee. *See* 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite the plaintiff’s failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a prisoner and he is granted leave to proceed IFP, he nevertheless remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a prisoner seeking leave to proceed IFP must also submit a “certified copy of the trust fund account statement (or institutional equivalent) for . . . the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then collects subsequent payments, assessed at 20% of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and forwards them to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

In support of his IFP application, Plaintiff has submitted the certified copies of his trust account statements required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.

---

<sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account statements,  
2 as well as the attached prison certificate where he is currently incarcerated verifying his  
3 account history and available balances, and has determined that Plaintiff has no available  
4 funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing  
5 that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing  
6 a civil action or criminal judgment for the reason that the prisoner has no assets and no  
7 means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding  
8 that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s  
9 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him  
10 when payment is ordered.”).

11 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF Doc. No.  
12 2) and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the  
13 entire \$350 balance of the filing fees mandated must be garnished by the California  
14 Department of Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of  
15 the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
16 § 1915(b)(1).

## 17 **II.**

### 18 **INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)**

#### 19 **A. Standard of Review**

20 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the  
21 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP  
22 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and]  
23 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the  
24 terms or conditions of parole, probation, pretrial release, or diversionary program,” “as  
25 soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under  
26 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,  
27 which are frivolous, malicious, fail to state a claim, or which seek damages from  
28 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*

1 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*  
2 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

3 All complaints must contain “a short and plain statement of the claim showing that  
4 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are  
5 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
6 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
7 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining  
8 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that  
9 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*  
10 The “mere possibility of misconduct” falls short of meeting this plausibility standard.  
11 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

12 “When there are well-pleaded factual allegations, a court should assume their  
13 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
14 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
15 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
16 allegations of material fact and must construe those facts in the light most favorable to  
17 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
18 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

19 However, while the court “ha[s] an obligation where the petitioner is pro se,  
20 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
21 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
22 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
23 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*  
24 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

25 Here, Plaintiff alleges that his constitutional rights were violated when he was  
26 subjected to a false arrest in January of 2011. “A claim may be dismissed [for failing to  
27 state a claim] on the ground that it is barred by the applicable statute of limitations only  
28 when ‘the running of the statute is apparent on the face of the complaint.’” *Von Saher*

1 *v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting  
2 *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). However, “[a]  
3 complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove  
4 no set of facts that would establish the timeliness of the claim.” *Id.* (quoting *Supermail*  
5 *Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995)). Therefore, in a case like this  
6 one, where the running of the statute of limitations is apparent on the face of the  
7 Complaint, the Court may dismiss it for failure to state a claim, but only after the  
8 Plaintiff has been provided an opportunity to allege facts which, if proved, might support  
9 tolling. *See Cervantes*, 5 F.3d at 1276-77; *see also Tahoe-Sierra Pres. Council, Inc. v.*  
10 *Tahoe Reg’l Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000) (court may raise the  
11 defense of statute of limitations sua sponte); *Hughes v. Lott*, 350 F.3d 1157, 1163 (11th  
12 Cir. 2003) (upholding sua sponte dismissal under 28 U.S.C. § 1915(e)(2)(B) of prisoner’s  
13 time-barred complaint).

14 Section 1983 contains no specific statute of limitation; therefore, federal courts  
15 apply the forum state’s statute of limitations for personal injury actions. *Jones*, 393 F.3d  
16 at 927; *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Fink v. Shedler*, 192  
17 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of limitations was one  
18 year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations period was  
19 extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1).

20 The law of the forum state also governs tolling. *Wallace v. Kato*, 549 U.S. 384,  
21 394 (2007) (citing *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989)); *Jones*, 393 F.3d at  
22 927 (noting that in actions where the federal court borrows the state statute of limitation,  
23 the federal court also borrows all applicable provisions for tolling the limitations period  
24 found in state law). Under California law, the statute of limitations for prisoners serving  
25 less than a life sentence is tolled for two years. CAL. CIV. PROC. CODE § 352.1(a);  
26 *Johnson v. California*, 207 F.3d 650, 654 (9th Cir. 2000), *overruled on other grounds*,  
27 543 U.S. 499 (2005). Accordingly, the effective statute of limitations for most California  
28 prisoners is three years for claims accruing before January 1, 2003 (one year limitations

1 period plus two year statutory tolling), and four years for claims accruing thereafter (two  
2 year limitations period plus two years statutory tolling). *Avery v. Moreno*, Civil Case No.  
3 2:12-CV-3083 KJN P, 2014 WL 413025 at \*10 (E.D. Cal. Jan. 31, 2014).

4 Unlike the length of the limitations period, however, “the accrual date of a § 1983  
5 cause of action is a question of federal law that is not resolved by reference to state law.”  
6 *Wallace*, 549 U.S. at 388; *Hardin*, 490 U.S. at 543-44 (federal law governs when a  
7 § 1983 cause of action accrues). “Under the traditional rule of accrual . . . the tort cause  
8 of action accrues, and the statute of limitation begins to run, when the wrongful act or  
9 omission results in damages.” *Wallace*, 549 U.S. at 391. Put another way, “[u]nder  
10 federal law, a claim accrues when the plaintiff knows or has reason to know of the injury  
11 which is the basis of the action.” *Maldonado*, 370 F.3d at 955; *TwoRivers v. Lewis*, 174  
12 F.3d 987, 991 (9th Cir. 1999).

13 Plaintiff’s Complaint was filed on September 29, 2014, but his claims are alleged  
14 to arise in January of 2011. Thus, Plaintiff alleges the wrongful acts that caused him  
15 harm occurred more than three years before he initiated this suit. This date of accrual  
16 exceeds California’s statute of limitations. Plaintiff may be entitled to tolling during his  
17 current incarceration if he was incarcerated prior to January of 2013 when the statute of  
18 limitations ran. *See* CAL. CODE CIV. PROC. § 335.1 (tolling statute of limitations “for a  
19 maximum of 2 years” during a prisoner’s incarceration).

20 Therefore, the Court finds Plaintiff’s Complaint is subject to sua sponte dismissal  
21 because it is clear from the face of his pleading that his claims are barred by the statute  
22 of limitations. *See Von Saher*, 592 F.3d at 969.

23 Because Plaintiff is proceeding without counsel, and it is not “absolutely clear that  
24 no amendment can cure” the defects of pleading set forth above, the Court will grant him  
25 an opportunity to amend. *See Lucas v. Dept. of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995);  
26 *Lopez*, 203 F.3d at 1131; *Cervantes*, 5 F.3d at 1276-77.

27 ///

28 ///

1 **III.**

2 **CONCLUSION AND ORDER**

3 Based on the foregoing, **IT IS HEREBY ORDERED** that:

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

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

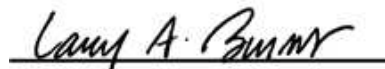
13 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey  
14 Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S  
15 Street, Suite 502, Sacramento, California 95814.

16 **IT IS FURTHER ORDERED** that:

17 4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which  
18 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).  
19 However, Plaintiff is **GRANTED** forty-five (45) days leave from the date of this Order  
20 in which to file an Amended Complaint which cures all the deficiencies of pleading  
21 noted above. Plaintiff's Amended Complaint must be complete in itself without  
22 reference to his original pleading. *See* S.D. CAL. CIVLR. 15.1. Defendants not named  
23 and all claims not re-alleged in the Amended Complaint will be considered waived. *See*  
24 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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

26 DATED: October 10, 2014

27 

28 **HONORABLE LARRY ALAN BURNS**  
United States District Judge