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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 EZEQUIEL MONARREZ,
12 CDCR #V-55180,

13 Plaintiff,

14 vs.

15 CALIFORNIA DEP'T OF
16 CORRECTIONS AND
17 REHABILITATION; JEFFREY BEARD;
18 C. HUBBARD; A. MURPHY;
19 INSTITUTION GANG
20 INVESTIGATORS UNIT; DOES 1
21 THROUGH 50,

22 Defendants.

Case No.: 3:16-cv-02712-JLS-MDD

ORDER:

**(1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS;
AND (2) DISMISSING COMPLAINT
FOR FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND § 1915A(b)**

23 Ezequiel Monarrez (“Plaintiff”), currently incarcerated at the California
24 Correctional Institution in Tehachapi, California, and proceeding pro se, filed a civil rights
25 complaint pursuant to 42 U.S.C. § 1983 in which he seeks to sue various prison officials
26 for constitutional violations that are alleges to have occurred at Centinela State Prison
27 (“CEN”) in 2007 and 2010. (ECF No. 1.)

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1 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when he
2 filed his Complaint; instead, he filed a Motion to Proceed In Forma Pauperis (“IFP”)
3 pursuant to 28 U.S.C. § 1915(a) (ECF No. 3).

4 **I. Motion to Proceed IFP**

5 All parties instituting any civil action, suit or proceeding in a district court of the
6 United States, except an application for writ of habeas corpus, must pay a filing fee of
7 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
8 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
9 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
11 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
12 *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d
13 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.
14 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

15 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
16 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
17 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
19 trust account statement, the Court assesses 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
21 in the account for the past six months, whichever is greater, unless the prisoner has no
22 assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
23 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
28 Misc. Fee Schedule, § 14 (eff. June 1, 2016)). The additional \$50 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 month's income, in any month in which his account exceeds \$10, and forwards those
2 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
3 136 S. Ct. at 629.

4 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate
5 Statement Report , as well as a prison certificate (ECF No. 3). *See* 28 U.S.C. § 1915(a)(2);
6 S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. These documents show that while
7 Plaintiff had an average monthly balance of \$3.27 and average monthly deposits of \$8.19
8 to his account over the 6-month period immediately preceding the filing of his Complaint,
9 he had an available balance of \$9.36 at the time he filed it. Thus, the Court assesses
10 Plaintiff's initial partial filing fee to be \$1.64 pursuant to 28 U.S.C. § 1915(b)(1), but
11 acknowledges he may be unable to pay even that small initial fee at this time. *See* 28 U.S.C.
12 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a
13 civil action or appealing a civil action or criminal judgment for the reason that the prisoner
14 has no assets and no means by which to pay the initial partial filing fee”); *Bruce*, 136 S.
15 Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-
16 valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . .
17 due to the lack of funds available to him when payment is ordered”).

18 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 3) and
19 directs the Secretary of the California Department of Corrections and Rehabilitation
20 (“CDCR”), or his designee, to collect the entire \$350 balance of the filing fees required by
21 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to the installment
22 payment provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

23 **II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

24 **A. Standard of Review**

25 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
26 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes,
27 the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which
28 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are

1 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing
2 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
3 (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that the
4 targets of frivolous or malicious suits need not bear the expense of responding.’”
5 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
6 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

7 “The standard for determining whether a plaintiff has failed to state a claim upon
8 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
9 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
10 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
11 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
12 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
13 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,
14 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
15 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

16 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
17 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
18 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
19 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
20 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
21 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
22 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

23 **B. Plaintiff’s Allegations**

24 Plaintiff alleges that in March of 2007, he was housed at CEN. (*See Compl.* at 10.)
25 While housed there, Plaintiff claims he witnessed “a friend (a Hispanic) getting stabbed
26 and brutally beaten at the front of his cell door” by another inmate. (*Id.*) Plaintiff yelled
27 to the attacker but a correctional officer standing nearby believed that Plaintiff was yelling
28 to him. (*Id.*) As a result, this correctional officer “filed false charges” against Plaintiff

1 alleging Plaintiff threatened him. (*Id.*) Following a disciplinary hearing, Plaintiff was
2 placed in the “ASU”² for six months. (*Id.*)

3 In 2008, Plaintiff was housed at Corcoran State Prison (“CSP-COR”) where he was
4 visited by his wife. (*Id.* at 11.) Plaintiff claims his wife was issued a warrant and subjected
5 to a “cavity searching” which Plaintiff claims caused his wife to develop a “urinary tract
6 infection.” (*Id.*) Because Plaintiff filed a grievance regarding the search of his wife, he
7 alleges that he was “placed into a cage for several hours without food and water,” and his
8 property was destroyed including “photos of him and his wife.” (*Id.*)

9 Finally, on December 8, 2010, Plaintiff claims he was “falsely validated as a
10 Mexican Mafia Affiliate” and as a result, he spent “six hard years in the SHU.”³ (*Id.* at
11 13.) Plaintiff alleges correctional officers validated him as a gang member in retaliation
12 for the grievances he filed following the search of his wife in 2008. (*Id.*)

13 Plaintiff claims Defendants violated his First, Fourth, Eighth and Fourteenth
14 Amendment rights, as well as various State Law claims. (*Id.* at 4.) He seeks \$6,000,000
15 in compensatory damages and \$6,000,000 in punitive damages, along with “declaratory
16 relief to be presented at later date.” (*Id.* at 7.)

17 **C. Statute of Limitations**

18 “A claim may be dismissed [for failing to state a claim] on the ground that it is barred
19 by the applicable statute of limitations only when ‘the running of the statute is apparent on
20 the face of the complaint.’” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592
21 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992,
22 997 (9th Cir. 2006)). “A complaint cannot be dismissed unless it appears beyond doubt
23 that the plaintiff can prove no set of facts that would establish the timeliness of the claim.”
24 *Id.* (quoting *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995)); *see also*
25 *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276-77 (9th Cir. 1993) (where the running
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28 ² “ASU” is an acronym for “Administrative Segregation Unit.”

³³ “SHU” is an acronym for “Segregated Housing Unit.”

1 of the statute of limitations is apparent on the face of a complaint, dismissal for failure to
2 state a claim is proper, so long as Plaintiff is provided an opportunity to amend in order to
3 allege facts which, if proved, might support tolling); *see also Tahoe-Sierra Pres. Council,*
4 *Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000) (court may raise
5 the defense of statute of limitations sua sponte), *overruled on other grounds by Gonzalez*
6 *v. Arizona*, 677 F.3d 383, 389 (9th Cir. 2011) (en banc); *Hughes v. Lott*, 350 F.3d 1157,
7 1163 (11th Cir. 2003) (upholding sua sponte dismissal under 28 U.S.C. § 1915(e)(2)(B) of
8 prisoner's time-barred complaint).

9 Because section 1983 contains no specific statute of limitation, federal courts apply
10 the forum state's statute of limitations for personal injury actions. *Jones v. Blanas*, 393
11 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004);
12 *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California's statute of
13 limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations
14 period was extended to two. *Id.* (citing CAL. CIV. PROC. CODE § 335.1). The law of the
15 forum state also governs tolling. *Wallace v. Kato*, 549 U.S. 384, 394 (2007) (citing *Hardin*
16 *v. Straub*, 490 U.S. 536, 538-39 (1989)); *Jones*, 393 F.3d at 927 (noting that in actions
17 where the federal court borrows the state statute of limitation, the federal court also borrows
18 all applicable provisions for tolling the limitations period found in state law).

19 Under California law, the statute of limitations for prisoners serving less than a life
20 sentence is tolled for two years. CAL. CIV. PROC. CODE § 352.1(a); *Johnson v. California*,
21 207 F.3d 650, 654 (9th Cir. 2000), *overruled on other grounds*, 543 U.S. 499 (2005).
22 Accordingly, the effective statute of limitations for most California prisoners is three years
23 for claims accruing before January 1, 2003 (one year limitations period plus two year
24 statutory tolling), and four years for claims accruing thereafter (two year limitations period
25 plus two years statutory tolling). In addition, the limitations period for prisoners is tolled
26 while the "prisoner completes the mandatory exhaustion process." *Brown v. Valoff*, 422
27 F.3d 926, 943 (9th Cir. 2005).

28 Unlike the length of the limitations period, however, "the accrual date of a § 1983

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

9 Here, Plaintiff’s claims first accrued on March 4, 2007. (*See* Compl. at 1, 10.) Thus,
10 assuming Plaintiff is not serving a life sentence, he is entitled to 2 years of statutory tolling
11 pursuant to CAL. CIV. PROC. CODE § 352.1(a). *Johnson*, 207 F.3d at 654; *see also Jones*,
12 393 F.3d at 928 n.5 (noting that “California courts have read out of the statute the
13 qualification that the period of incarceration must be ‘for a term less than for life’ in order
14 for a prisoner to qualify for tolling”)⁴. Consequently, based on the face of Plaintiff’s own
15 pleading, it is clear Plaintiff’s claims fall outside California’s two-year statute of
16 limitations, even including all presumed periods of tolling provided by statute. *See*
17 *Wallace*, 591 U.S. at 391; *Maldonado*, 370 F.3d at 955; CAL. CODE CIV. PROC. § 335.1
18 (tolling statute of limitations “for a maximum of 2 years” during a prisoner’s incarceration);
19 *Jones*, 393 F.3d at 927; *Valoff*, 422 F.3d at 943.

20 Finally, Plaintiff’s claims could be considered timely if, in his Complaint, he alleges
21 facts sufficient to show the limitations period may be *equitably* tolled. *See Cervantes*, 5
22 F.3d at 1276-77. Generally, federal courts also apply the forum state’s law regarding
23 equitable tolling. *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374
24 (9th Cir. 1988). Under California law, however, Plaintiff must meet three conditions to
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27 ⁴ Because Plaintiff does not provide any specific documentation or factual allegations relating to his
28 attempts at exhaustion of his administrative remedies, the Court cannot consider any tolling for the time
period Plaintiff was going through the process. *Valoff*, 422 F.3d at 943

1 equitably toll the statute of limitations: (1) he must have diligently pursued his claim; (2)
2 his situation must be the product of forces beyond his control; and (3) Defendants must not
3 be prejudiced by the application of equitable tolling. *See Hull v. Central Pathology Serv.*
4 *Med. Clinic*, 28 Cal. App. 4th 1328, 1335 (Cal. Ct. App. 1994); *Addison v. State of*
5 *California*, 21 Cal. 3d 313, 316-17 (Cal. 1978); *Fink*, 192 F.3d at 916.

6 As currently pleaded, however, the Court finds Plaintiff has failed to plead any facts
7 which, if proved, would support any plausible claim for equitable tolling. *See Cervantes*,
8 5 F.3d at 1277; *Iqbal*, 556 U.S. at 679; *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir.
9 1993) (plaintiff carries the burden to plead facts which would give rise to equitable
10 tolling); *see also Kleinhammer v. City of Paso Robles*, 385 Fed. App'x 642, 643 (9th Cir.
11 2010).

12 Accordingly, the Court finds the running of the statute of limitations is apparent on
13 the face of Plaintiff's Complaint, and therefore he has failed to state a claim upon which
14 section 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); § 1915A(b)(1);
15 *Von Saher*, 592 F.3d at 969.

16 ***D. Leave to Amend***

17 Because Plaintiff is proceeding without counsel, and he has now been provided
18 with notice of his Complaint's deficiencies, the Court will grant him leave to amend. *See*
19 *Rosati v. Igbino*, 791 F.3d 1037, 1039 (9th Cir. 2015) ("A district court should not
20 dismiss a pro se complaint without leave to amend [pursuant to 28 U.S.C.
21 § 1915(e)(2)(B)(ii)] unless 'it is absolutely clear that the deficiencies of the complaint
22 could not be cured by amendment.'" (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th
23 Cir. 2012)); *Cervantes*, 5 F.3d at 1277 (noting that a time-barred action may not
24 ordinarily be dismissed at pleading without leave to amend unless "some fact, evident
25 from the face of the complaint, support[s] the conclusion that the plaintiff could not
26 prevail, as a matter of law, on the equitable tolling issue").

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1 **III. Conclusion and Order**

2 Based on the foregoing, the Court:

3 1) **GRANTS** Plaintiff’s Motion to Proceed In Forma Pauperis (ECF No. 3).

4 2) **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
5 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing monthly
6 payments from the account in an amount equal to twenty percent (20%) of the preceding
7 month’s income and forwarding those payments to the Clerk of the Court each time the
8 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS**
9 **MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO**
10 **THIS ACTION.**

11 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
12 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

13 4) **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
14 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1), and
15 **GRANTS** him forty-five (45) days leave from the date of this Order in which to file an
16 Amended Complaint which cures the deficiencies of pleading noted. Plaintiff’s Amended
17 Complaint must be complete by itself without reference to his original pleading.
18 Defendants not named and any claim not re-alleged in his Amended Complaint will be
19 considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner*
20 *& Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the
21 original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims
22 dismissed with leave to amend which are not re-alleged in an amended pleading may be
23 “considered waived if not repled”).

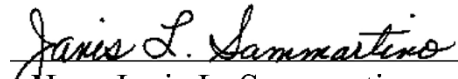
24 If Plaintiff fails to file an Amended Complaint within 45 days, the Court will enter
25 a final Order dismissing this civil action based both on Plaintiff’s failure to state a claim
26 upon which § 1983 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and
27 1915A(b)(1), and his failure to prosecute in compliance with a court order requiring
28 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does

1 not take advantage of the opportunity to fix his complaint, a district court may convert the
2 dismissal of the complaint into dismissal of the entire action.”).

3 5) The Clerk of Court is directed to mail Plaintiff a civil rights form complaint
4 for his use in amending.

5 **IT IS SO ORDERED.**

6 Dated: February 23, 2017

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8 Hon. Janis L. Sammartino
9 United States District Judge
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