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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ERNEST LEE COX, Jr.,
Plaintiff,
v.
JOHN KRPIN, et al.,
Defendants.

No. 2:18-cv-02523 TLN DB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges defendant was deliberately indifferent to his serious medical needs. Before the court is plaintiff’s motion to amend the complaint. (ECF No. 57.) For the reasons set forth below, the undersigned will recommend the motion to amend be denied.¹

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¹ On September 13, 2023, the undersigned issued findings and recommendations, which found that plaintiff’s claims in his proposed amended complaint arose from the conduct, transaction, or occurrence set out in his complaint. (ECF No. 64.) Defendant filed objections. (ECF No. 66.) Upon further review of the parties’ filings, the undersigned agrees that plaintiff’s proposed claims against Dr. Ashe rely on new facts and, therefore, do not arise from the same conduct set out in the complaint. Accordingly, the court will vacate the September 13, 2023, findings and recommendations, and proceed in accordance with this order and findings and recommendations.

1 **BACKGROUND**

2 **I. Procedural History**

3 The present action was initiated by plaintiff on September 7, 2018.² (ECF No. 1.) Upon
4 screening, plaintiff decided to proceed solely on his claim of deliberate indifference against
5 defendant, John Krpan, M.D.,³ voluntarily dismissing all other defendants and claims. (ECF No.
6 13.) Following service, defendant filed a motion to dismiss, arguing plaintiff had not pleaded
7 sufficient facts to state a cognizable Eighth Amendment claim. (ECF No. 29.) The motion was
8 granted in part and denied in part. (ECF Nos. 32, 33.) A portion of the original complaint
9 pertaining to plaintiff’s use of his continuous positive airway pressure (“CPAP”) machine was
10 dismissed, but he was permitted to proceed on the remainder of his allegations as stated in the
11 screened complaint. (*Id.*) Defendant filed an answer to the complaint on May 27, 2021. (ECF
12 No. 39.)

13 Following discovery, defendant moved for summary judgment on the ground that he was
14 not the physician who revoked plaintiff’s accommodation, as alleged by plaintiff. (ECF No. 45.)
15 Plaintiff filed an opposition to defendant’s motion for summary judgment and a cross-motion for
16 summary judgment. (ECF No. 49.) On April 4, 2023, the undersigned issued findings and
17 recommendations recommending that defendant’s motion for summary judgment be granted and
18 that plaintiff’s cross-motion for summary judgment be denied. (ECF No. 55.)

19 On April 20, 2023, plaintiff filed the instant motion to amend the complaint. (ECF No.
20 57.) Defendant filed an opposition and plaintiff filed a reply. (ECF Nos. 59, 61.) On June 27,
21 2023, the district judge adopted the April 4, 2023 findings and recommendations and referred this
22 case back to the undersigned for resolution of plaintiff’s motion to amend. (ECF No. 62.)

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25 ² Under the prison mailbox rule, a document is deemed served or filed on the date a prisoner signs
26 the document and gives it to prison officials for mailing. *See Houston v. Lack*, 487 U.S. 266, 276
(1988) (establishing the prison mailbox rule); *Campbell v. Henry*, 614 F.3d 105, 1059 (9th Cir.
2010) (applying the mailbox rule to both state and federal filings by incarcerated inmates).

27 ³ As noted in the court’s prior orders, defendant’s filings indicate his last name is “Krpan” despite
28 the spelling used in the case caption. (*See e.g.*, ECF No. 32 at 2.) The spelling “Krpan” will be
used for the defendant for the remainder of these findings and recommendations.

1 Defendant also notes that in choosing to proceed on the complaint as screened, plaintiff
2 voluntarily dismissed all other defendants and claims, and that on August 16, 2021, defense
3 counsel produced documentation to plaintiff showing that Dr. Ashe had revoked the lower bunk
4 accommodation. (Id. at 2, 3; ECF No. 59-1.)

5 **C. Plaintiff's Reply**

6 In his reply, plaintiff contends that relation back is appropriate as the defendant,
7 defendant's counsel, and Dr. Ashe knew or should have known that he intended to sue the actual
8 physician who revoked his accommodation. It just happened to be Dr. Ashe, not defendant.
9 (ECF No. 61 at 5–6 (citing Myers v. Checksmart Fin., LLC, 701 F. App'x 588 (9th Cir. 2017)).)
10 As support, plaintiff states that he met with Dr. Ashe when she returned from maternity leave and
11 filed medical grievances regarding the revocation. Neither Dr. Ashe nor the medical staff who
12 responded to his grievances informed him that Dr. Ashe had revoked his accommodation. (Id. at
13 7–8.) He also asserts that defendant and Dr. Ashe share the same attorney. (Id. at 8.)

14 **II. Legal Standards**

15 A party may amend its pleading once as a matter of course no later than twenty-one days
16 after serving it, or twenty-one days after service of a responsive pleading or a motion brought
17 under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). After this period, "it
18 may only amend further after obtaining leave of the court, or by consent of the adverse party."
19 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003); Fed. R. Civ. P.
20 15(a)(2). Where a plaintiff seeks to amend the complaint after the applicable statute of
21 limitations has expired, "[a]n otherwise time-barred claim in an amended pleading is deemed
22 timely if it relates back to the date of a timely original pleading." ASARCO, LLC v. Union
23 Pacific R.R. Co., 765 F.3d 999, 1004 (9th Cir. 2014).

24 Rule 15(c) governs whether an amended complaint that changes a party or party's name
25 relates back to the original pleading and "is thus itself timely even though it was filed outside an
26 applicable statute of limitations." Krupski v. Costa Cociere S. p. A., 560 U.S. 538, 541 (2010).
27 Under the rule, a court must first consider both federal and state law to determine which affords
28 "the more permissive" relation back standard. Butler v. Nat'l Cmty. Renaissance of Cal., 766

1 F.3d 1191, 1201 (9th Cir. 2014) (citing Fed. R. Civ. P. 15(c)(1)). Under California law, “an
2 amended complaint that adds a new defendant does not relate back to the date of filing the
3 original complaint and the statute of limitations is applied as of the date the amended complaint is
4 filed, not the date the original complaint is filed.” Hawkins v. Pacific Coast. Bldg. Prods., Inc.,
5 22 Cal. Rptr. 3d 453, 457 (Cal. Ct. App. 2004) (quotation and emphasis removed). “But where an
6 amendment does not add a ‘new’ defendant, but simply corrects a misnomer by which an ‘old’
7 defendant was sued, case law recognizes an exception to the general rule of no relation back.” Id.
8 (holding that amended complaint related back because the original complaint “merely misnamed”
9 the defendant by failing to use its “proper corporate name”).

10 Under federal law, an amended complaint that changes a party or party’s name relates
11 back when the following conditions have been met: “(1) the basic claim must have arisen out of
12 the conduct set forth in the original pleading; (2) the party to be brought in must have received
13 such notice that it will not be prejudiced in maintaining its defense; [and] (3) that party must or
14 should have known that, but for a mistake concerning identity, the action would have been
15 brought against it.” Butler, 766 F.3d at 1202 (quotation omitted); Fed. R. Civ. P. 15(c)(1)(C).
16 The second and third requirements, notice and knowledge, must have been met within the service
17 period provided under Rule 4(m), which is 90 days after the complaint is filed. Fed. R. Civ. P.
18 15(c)(1)(C); Fed. R. Civ. P. 4(m); Butler, 766 F.3d at 1202.

19 “[R]elation back under Rule 15(c)(1)(C) depends on what the party to be added knew or
20 should have known, not on the amending party’s knowledge or its timeliness in seeking to amend
21 the pleading.” Krupski, 560 U.S. at 541.

22 **III. Analysis**

23 Here, plaintiff states that he mistakenly sued Dr. Krpan and wishes to amend the
24 complaint to replace Dr. Krpan with Dr. Ashe as the named defendant. (See ECF No. 57 at 5–7.)
25 The period to amend his complaint as a matter of course has passed, and plaintiff may now amend
26 the complaint only with defendant’s written consent or the court’s leave. Fed. R. Civ. P. 15(a)(1),
27 (2). Because defendant does not consent, plaintiff may only amend the complaint with the court’s
28 permission. (See ECF No. 59.) Fed. R. Civ. P. 15(a)(2).

1 In this instance, plaintiff has moved to amend the complaint after the applicable statute of
2 limitations expired. “For actions under 42 U.S.C. § 1983, courts apply the forum state’s statute of
3 limitations for personal injury actions, along with the forum state’s law regarding tolling,
4 including equitable tolling, except to the extent any of these laws is inconsistent with federal
5 law.” Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). The applicable statute of limitations
6 under California law is two years. Id. However, if a plaintiff “is, at the time the cause of action
7 accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court
8 for a term less than for life, the time of that disability is not a part of the time limited for the
9 commencement of the action, not to exceed two years.” Cal. Civ. Proc. Code § 352.1(a). “[T]he
10 period of incarceration must be ‘for a term less than for life’ in order for a prisoner to qualify for
11 tolling.” Jones, 393 F.3d at 927 n.5. In this case, plaintiff is serving a life sentence,⁴ meaning
12 that the statute of limitations for his claim expired in October 2019. Id. The court must therefore
13 decide whether the amended complaint relates back to the original complaint.

14 California law forbids relation back in this case because plaintiff seeks to add a new
15 defendant. Hawkins, 22 Cal. Rptr. 3d at 457. Therefore, the Federal Rules of Civil Procedure
16 provide the more lenient standard, and the undersigned will apply the standard provided under
17 Rule 15(c)(1). Butler, 766 F.3d at 1201. For the reasons stated below, plaintiff’s proposed
18 amended complaint does not relate back because he cannot satisfy the same conduct or
19 knowledge requirements.

20 **A. Same Conduct**

21 An amended complaint “may ‘relate[] back’ to the date of the original complaint where it
22 ‘asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or
23 attempted to be set out—in the original pleading.’” Echlin v. PeaceHealth, 887 F.3d 967, 978
24 (9th Cir. 2018) (quoting Fed. R. Civ. P. 15(c)(1)(B)) (alteration in original). “The claims must

25 ⁴ According to California Department of Corrections and Rehabilitation records, plaintiff is
26 serving a sentence of life without the possibility of parole. See <https://apps.cdcr.ca.gov/ciris/>.
27 This court may take judicial notice of such information. Louis v. McCormick & Schmick
28 Restaurant Corp., 460 F. Supp. 2d 1153, 1155 n.4 (C.D. Cal. 2006) (court may take judicial notice
of state agency records); Pacheco v. Diaz, No. 1:19-cv-0774 SAB (PC), 2019 WL 5073594, at *2
(E.D. Cal. Sept. 4, 2019) (court may take judicial notice of the California Department of
Corrections and Rehabilitation’s inmate locator system).

1 ‘share a common core of operative facts such that the plaintiff will rely on the same evidence to
2 prove each claim.’” Id. (quoting Williams v. Boeing Co., 517 F.3d 1120, 1133 (9th Cir. 2008)).

3 An amended complaint will not relate back if it must introduce new facts to support the new
4 claim or claims. Id.

5 The original complaint named Dr. Krpan and “Mule Creek State Prison, its several
6 Wardens, Captains and Yard [and] Security and Escort Officers” as defendants. (See ECF No. 1.)
7 It alleged that Dr. Krpan wrongfully revoked plaintiff’s lower bunk accommodation without
8 contacting plaintiff or reviewing his medical file, in violation of his due process and Eighth
9 Amendment rights. (Id. at 9, 11–12.) The original complaint also alleged that MCSP, through
10 the defendant officers, maintains a policy of observing inmates with medical accommodations, in
11 order to determine if they are malingering the conditions that necessitated the accommodations;
12 according to plaintiff, the officers then report their observations to inmates’ primary care
13 physicians so that their accommodations will be revoked. (Id. at 2–3.) Plaintiff alleged Dr.
14 Krpan revoked his accommodation pursuant to this policy, by relying on correctional staff’s
15 observations of plaintiff, instead of plaintiff’s medical records. (Id. at 9, 11–12.)

16 Plaintiff’s proposed amended complaint alleges that Dr. Ashe, not Dr. Krpan, committed
17 deliberate indifference by revoking his lower bunk accommodation. (ECF No. 57 at 21.) He
18 asserts an additional claim against Dr. Ashe under the Americans with Disabilities Act (“ADA”)
19 and Rehabilitation Act (“RA”) for revoking his accommodation and “for failing to accommodate
20 plaintiff’s disabilities in violation of the Retaliation Clause of Title II of the ADA/RA.” (Id.) The
21 proposed amended complaint also alleges Dr. Ashe informed plaintiff that he needed to prove he
22 was a sleepwalker in order to reinstate his accommodation. Further, she allegedly delayed
23 restoring plaintiff’s accommodation for eight months to punish him “for filing complaints.” (Id.
24 at 29–31.)

25 Plaintiff also seeks to sue “Mule Creek prison and its DOE officers” over a policy of
26 officers observing inmates believed to be malingering conditions for which they received
27 accommodations, and for sharing those observations with the inmates’ primary care physicians
28 for the purpose of having accommodations revoked. (Id. at 22.) Plaintiff alleges Dr. Ashe

1 revoked his accommodation based on correctional staff's reports that he was exercising. (Id. at
2 26, 30.) According to plaintiff, Dr. Ashe could not have personally witnessed him exercising
3 because she could not view his exercise area from the medical clinic and must have obtained this
4 information from correctional staff. (Id.)

5 The proposed amended complaint does not rely on the same operative facts as the original
6 complaint. PeaceHealth, 887 F.3d at 978. This is not an instance in which a complaint described
7 the conduct that caused the plaintiff's injury, but simply misattributed that conduct to the wrong
8 person or entity. Cf. Krupski, 560 U.S. at 554. Plaintiff accuses Dr. Ashe of different conduct
9 than Dr. Krpan. The complaint alleged that Dr. Krpan was not familiar with plaintiff's medical
10 history, but nonetheless revoked his lower bunk accommodation. By contrast, the proposed
11 amended complaint alleges that Dr. Ashe was familiar with his medical history, but nonetheless
12 revoked his accommodation. It also alleges that when asked to restore plaintiff's accommodation,
13 Dr. Ashe asked him for documentation of sleepwalking. But in the original complaint, it is not
14 alleged that plaintiff asked Dr. Krpan to restore his accommodation or that Dr. Krpan asked him
15 for supporting documentation. Similarly, plaintiff claims that Dr. Ashe retaliated against him
16 when she delayed restoring his accommodation, but he made no such allegations against Dr.
17 Krpan. (ECF No. 57 at 21, 31.) As such, the proposed amended complaint necessarily introduces
18 new factual allegations.

19 For these reasons, the claims articulated in the proposed amended complaint do not arise
20 from the same conduct alleged in the original complaint. Butler, 766 F.3d at 1202.

21 **B. Applicable notice period**

22 Rule 15(c)(1)(C) requires a prospective defendant to have received notice of the action no
23 later than ninety days from the date that the complaint was filed. Fed R. Civ. P. 15(c)(1)(C); Fed.
24 R. Civ. P. 4(m). However, this service period is tolled while the court conducts the screening
25 required by 28 U.S.C. § 1915A. Moore v. Duran, No.: 3:23-cv-0194 GPC DDL, 2023 WL
26 2435650, at *2 n.1 (S.D. Cal. March 9, 2023) (citing Butler, 766 F.3d at 1204 n.8); 28 U.S.C. §
27 1915A(b); 42 U.S.C. § 1997e(c), (g)(2). The court issued an order directing service on April 27,
28 2020. (ECF No. 14.) Accordingly, in this case, the notice and knowledge requirements must

1 have been met between April 27, 2020 and July 26, 2020 for plaintiff's proposed amended
2 complaint to relate back.

3 **C. Notice Requirement**

4 The notice required under 15(c)(1)(C)(i) "need not be formal." Krupski, 560 U.S. at 554
5 n.5 (quoting Fed. R. Civ. P. 15, 1966 advisory committee's note). "[N]otice may be imputed to
6 the new party through shared counsel." Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998).

7 There is no indication that Dr. Ashe had actual notice of this action. Plaintiff never states
8 that he told Dr. Ashe he had sued defendant for revoking his lower bunk accommodation. (See
9 generally ECF No. 57.) Rather, he alleges that, prior to filing this action, he told her that
10 defendant had revoked his accommodation and that she failed to correct him. (ECF No. 61 at 7.)
11 He also implies that Dr. Ashe was aware of healthcare grievances he filed, in which he stated that
12 defendant had revoked the accommodation. (Id. at 8.) According to plaintiff, based on these
13 communications, Dr. Ashe "knew of plaintiff's complaint's [sic] before the Original Complaint
14 was filed." (Id.) However, the question under Rule 15(c)(1)(C)(i) is whether Dr. Ashe received
15 notice that plaintiff had filed this lawsuit. See Fed. R. Civ. P. 15(c)(1)(C)(i) (prospective
16 defendant must have "received such notice of the action . . ."). While plaintiff's statements
17 suggest Dr. Ashe knew he was dissatisfied over losing his lower bunk accommodation, they do
18 not establish that she ever learned about this lawsuit.

19 There is also no indication that Dr. Ashe obtained notice of this action from defendant.
20 Plaintiff has not offered any proof that defendant notified Dr. Ashe about the lawsuit, and
21 defendant appears to have had limited opportunity to inform Dr. Ashe about the lawsuit during
22 the relevant period. During defendant's time at MCSP, he appears to have worked with Dr. Ashe
23 for only one week, in November 2017. (ECF No. 45-3 at 163.) His employment at MCSP ended
24 in October 2018, meaning that he did not work with Dr. Ashe during the service period between
25 April 27 and July 26, 2020. (Id. at 171.)

26 Regarding constructive notice through counsel, plaintiff is correct that California law
27 tasks the Attorney General's Office with representing state employee defendants sued in the
28 course of their duties. See Cal. Gov. Code § 12511; see also id. § 11040(a). Defendant is

1 represented by the Attorney General’s Office in this matter. (See ECF Nos. 19, 45, 59.) The
2 undersigned assumes that the Attorney General’s Office would have represented Dr. Ashe in this
3 action, and that its notice of this action can be imputed to Dr. Ashe. Jacobsen, 133 F.3d at 320;
4 Cal. Gov. Code § 12511. However, the court does not need to reach this question to resolve
5 plaintiff’s motion to amend, because even if Dr. Ashe received constructive notice, plaintiff
6 cannot show that Dr. Ashe knew or should have known she was the proper defendant on or before
7 July 26, 2020.

8 **D. Knowledge Requirement**

9 “[T]he question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably
10 should have understood about the plaintiff’s intent in filing the original complaint against the first
11 defendant.” Krupski, 560 U.S. at 553–54. “Under the constructive notice doctrine, a court may
12 impute knowledge to a defendant or set of defendants because they have the same attorney(s)
13 when there is some showing that the attorney(s) knew that the additional defendants would be
14 added to the existing suit.” Scott v. Vill. of Spring Valley, 577 F. App’x 81, 82 (2d Cir. 2014)
15 (quoting Gleason v. McBride, 869 F.2d 688, 693 (2d Cir.1989)) (internal quotation marks
16 omitted).

17 Plaintiff has not established that Dr. Ashe, through counsel, knew or should have known
18 during the applicable period that plaintiff intended to sue her. Even assuming defendant’s
19 counsel learned during the service period that Dr. Ashe revoked the accommodation, such
20 information would not necessarily have put counsel on notice that plaintiff intended to sue Dr.
21 Ashe. (ECF No. 45-3 at 171.) The original complaint focuses on correctional staff’s alleged
22 policy of reporting malingering inmates to their primary care physicians, Dr. Krpan’s alleged
23 reliance on these reports, and plaintiff’s belief that Dr. Krpan’s alleged actions were
24 inappropriate. (ECF No. 1 at 2, 4–5, 7–9, 11–12.) It also emphasizes Dr. Krpan’s unfamiliarity
25 with plaintiff’s medical records. (Id. at 9, 11.) At the same time, the original complaint indicates
26 that Dr. Ashe had been plaintiff’s physician since 2016 and was familiar with his medical history.
27 (Id. at 7.) These allegations do not signal an intent to sue whoever was responsible for revoking
28 the accommodation, regardless of their reasons for doing so; they reflect plaintiff’s intent to sue

1 his physician for revoking his accommodation without a proper medical basis. Thus, even if
2 defendant's counsel knew that Dr. Ashe revoked the accommodation, counsel could have
3 reasonably believed that plaintiff intended to sue Dr. Krpan, not Dr. Ashe, based on a mistaken
4 belief that Dr. Krpan had revoked plaintiff's accommodation without a proper basis. Given Dr.
5 Ashe's familiarity with plaintiff's medical history, counsel did not have grounds to assume that
6 Dr. Ashe lacked a medical basis for the revocation, that plaintiff's allegations against Dr. Krpan
7 also applied to Dr. Ashe, or that plaintiff would have sued Dr. Ashe under a different legal theory
8 than the one pleaded in the original complaint.

9 The available facts also show that defendant could have reasonably but mistakenly
10 believed that he was the proper defendant and that plaintiff intended to sue him. The original
11 complaint alleges that defendant revoked plaintiff's accommodation while Dr. Ashe was on
12 maternity leave, and medical records confirm that defendant met with plaintiff while Dr. Ashe
13 was on leave. (ECF No. 1 at 7; ECF No. 45-3 at 163.) More than two years passed between
14 defendant's consultation with plaintiff in late 2017 and the court's order directing service in April
15 2020. (ECF No. 45-3 at 163; ECF No. 14.) This delay could have reasonably affected
16 defendant's recollection about the 2017 consultation or actions he may have taken as plaintiff's
17 temporary primary care physician. See Natural Res., Inc. v. Wineberg, 349 F.2d 685, 692 (9th
18 Cir. 1965) (“[T]he fact cannot be denied that memory tends to dim, recollection to grow faint, and
19 impressions to vanish, with the passage of time.”). It is therefore not established that defendant
20 recognized plaintiff's intent to sue Dr. Ashe. Absent this understanding, defendant had no reason
21 to alert counsel to plaintiff's mistake during the service period.

22 As further suggestion that defendant and defendant's counsel did not realize that Dr. Ashe
23 was the proper defendant until well after the service period, defendant did not argue he was the
24 wrong defendant in his motion to dismiss (ECF No. 29). Had counsel known then that defendant
25 did not revoke plaintiff's accommodation, counsel “could have filed a motion to dismiss under
26 Federal Rule of Civil Procedure 12(b)(6) and included matters outside the pleadings proving
27 [defendant] was not the proper party,” which the court “would have treated . . . as a motion for
28 summary judgment.” EEOC v. AutoNation USA Corp., No. CV 05-1575 PHX ROS, 2007 WL

1 9724419, at *3 n.1 (D. Ariz. May 3, 2007); Fed. R. Civ. P. 12(d). Instead, the motion to dismiss
2 focused on the sufficiency of plaintiff’s pleadings and did not reference Dr. Ashe or her role in
3 treating plaintiff. (ECF No. 29.)

4 Plaintiff alleges, without evidence, that defendant’s counsel deliberately failed to identify
5 Dr. Ashe as the proper defendant until moving for summary judgment in December 2021, for the
6 purpose of running the statute of limitations. (ECF No. 61 at 4, 8.) However, as discussed above,
7 the applicable statute of limitations was two years because plaintiff is serving a life sentence.
8 Jones, 393 F.3d at 927 n.5. As such, the statute of limitations expired in October 2019, before the
9 court directed service. (See ECF No. 1 at 8; ECF No. 14.)

10 For the foregoing reasons, plaintiff has not met Rule 15(c)(1)’s knowledge requirement
11 and his proposed amended complaint does not relate back to the original complaint. As a result,
12 the claims therein are barred under the statute of limitations and the undersigned recommends that
13 the court deny plaintiff’s motion to amend. In light of this recommendation, the undersigned
14 declines to reach defendant’s arguments that plaintiff sought leave to amend in bad faith, that
15 amendment is futile, and that granting leave to amend would cause undue delay and prejudice to
16 defendant. (ECF No. 59 at 11–15.)

17 CONCLUSION

18 For the reasons stated above, IT IS HEREBY ORDERED that the court’s September 13,
19 2023 findings and recommendations (ECF No. 64) are vacated.

20 In addition, IT IS RECOMMENDED that:

- 21 1. Plaintiff’s motion to amend (ECF No. 57) be denied; and
- 22 2. The Clerk of the Court be directed to close this case.

23 These findings and recommendations will be submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
25 after being served with these findings and recommendations, either party may file written
26 objections with the court. The document should be captioned “Objections to Magistrate Judge's
27 Findings and Recommendations.”

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The parties are advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: December 12, 2023



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

DB:15
DB/DB Prisoner Inbox/Civil Rights/S/cox2523.vac.fr.ls