

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHNNY LEE HOWZE, AKA J. L. Howze,

Plaintiff-Appellant,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, public entity,

Defendant-Appellee.

No. 18-56154

D.C. No. 2:14-cv-04067-SVW-
RAO

Central District of California, Los
Angeles

ORDER

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

Howze's petition for panel rehearing (Docket Entry No. 23) is denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 23 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHNNY LEE HOWZE, AKA J. L. Howze,

No. 18-56154

Plaintiff-Appellant,

D.C. No. 2:14-cv-04067-SVW-
RAO

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, public entity,

MEMORANDUM*

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted April 17, 2019**

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

California state prisoner Johnny Lee Howze, AKA J.L. Howze, appeals pro se from the district court's judgment dismissing his action alleging violations of Title II of the Americans with Disabilities Act ("ADA"). We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

under 28 U.S.C. § 1291. We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *Kniesel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We affirm.

∟ The district court properly dismissed Howze's ADA claim for monetary damages because Howze failed to allege facts sufficient to show that defendant intentionally discriminated against him because of his disability. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1135, 1138-40 (9th Cir. 2001) (discussing elements of a Title II claim under the ADA, and the required showing of intentional discrimination to state a Title II claim for damages); *see also Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) (the court need not accept as true allegations contradicted by documents referenced in the complaint); *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1022 (9th Cir. 2010) ("The ADA prohibits discrimination because of disability, not inadequate treatment for disability."). > ↑

Howze's request for appointment of counsel, set forth in the opening brief, is denied.

Defendant's motion to revoke Howze's in forma pauperis status (Docket Entry No. 16) is denied. Defendant's motion to take judicial notice (Docket Entry

No. 17) is denied as unnecessary:

AFFIRMED.

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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
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12 J. L. HOWZE,

13 Plaintiff,

14 v.

15 CALIFORNIA DEPARTMENT OF
16 CORRECTIONS AND
REHABILITATION, et al.,

17 Defendants.
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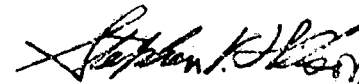
Case No. CV 14-04067 SVW (RAO)

JUDGMENT

20 In accordance with the Order Accepting Report and Recommendation of
21 United States Magistrate Judge issued concurrently herewith,

22 IT IS ORDERED AND ADJUDGED that this action is dismissed with
23 prejudice.
24

25 DATED: August 1, 2018



26 STEPHEN V. WILSON
27 UNITED STATES DISTRICT JUDGE
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 J. L. HOWZE,

12 Plaintiff,

13 v.

14 CALIFORNIA DEPARTMENT OF
15 CORRECTIONS AND
REHABILITATION, et al.,

16 Defendants.
17

Case No. CV 14-04067 SVW (RAO)

ORDER ACCEPTING REPORT
AND RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE

18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Third Amended
19 Complaint, all of the other records and files herein, and the Report and
20 Recommendation of United States Magistrate Judge ("Report"). Further, the Court
21 engaged in a *de novo* review of those portions of the Report to which Plaintiff
22 objected. The Court hereby accepts and adopts the findings, conclusions, and
23 recommendations of the Magistrate Judge. The Report sufficiently addresses the
24 bulk of the arguments raised in Plaintiff's objections. However, one argument
25 warrants further discussion.

26 In his objections, Plaintiff attaches for the first time a copy of prison medical
27 staff correspondence dated January 12, 2018, stating that Plaintiff requires "special
28 medical transport needs." See Dkt. No. 125, Ex. A. Plaintiff argues that this

1 medical correspondence establishes that the accommodations that he sought were
2 medically necessary. *See id.* at 1.

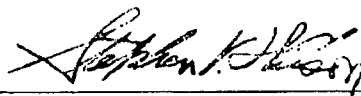
3 A district court generally is not required to consider evidence raised for the
4 first time in an objection to a magistrate judge's recommendation. In declining to
5 consider such evidence, the court actually must exercise its discretion; the court
6 cannot simply adopt the recommendation without explaining that it will not
7 consider a new matter. *See Jones v. Blanas*, 393 F.3d 918, 935 (9th Cir. 2004);
8 *Brown v. Roe*, 279 F.3d 742, 745-46 (9th Cir. 2002); *United States v. Howell*, 231
9 F.3d 615, 621-22 (9th Cir. 2000).

10 Here, the Court declines to consider the new evidence offered in opposition
11 to the motion to dismiss. Moreover, even if the Court exercised its discretion to
12 consider this new evidence, the Court's conclusions would not change. The
13 medical correspondence submitted by Plaintiff does not establish that the CDCR
14 intentionally discriminated against Plaintiff.

15 In sum, the arguments raised by Plaintiff in his objections do not alter the
16 Court's conclusion regarding Plaintiff's failure to state a claim of intentional
17 discrimination under the ADA.

18 Accordingly, IT IS ORDERED that Plaintiff's Third Amended Complaint is
19 DISMISSED with prejudice.

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23 DATED: August 1, 2018



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 J. L. HOWZE,

12 Plaintiff,

13 v.

14 CALIFORNIA DEPARTMENT OF
15 CORRECTIONS AND
REHABILITATION, et al.,

16 Defendants.
17

Case No. CV 14-04067-SVW (RAO)

FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

18 This Report and Recommendation is submitted to the Honorable Stephen V.
19 Wilson, United States District Judge, under 28 U.S.C. § 636 and General Order 05-
20 07 of the United States District Court for the Central District of California.

21 **I. PROCEDURAL HISTORY**

22 On May 28, 2014, Plaintiff J. L. Howze ("Plaintiff") filed a Request to
23 Proceed *In Forma Pauperis* ("IFP"), and lodged his complaint alleging violations
24 of the Eighth Amendment under 42 U.S.C. § 1983 and the Americans with
25 Disabilities Act ("ADA"). (Dkt. No. 1, 1-1.) Plaintiff named as defendants various
26 individuals at or affiliated with California Men's Colony ("CMC") in San Luis
27 Obispo, as well as the California Department of Corrections and Rehabilitation
28 ("CDCR").

1 On June 11, 2014, after screening the Complaint, the Court denied Plaintiff's
2 IFP request, finding that his Eighth Amendment claim was frivolous, malicious, or
3 failed to state a claim upon which relief could be granted, and that granting leave to
4 amend would be futile. (Dkt. No. 2.) Plaintiff appealed the Court's determination
5 to the Ninth Circuit after his motion for reconsideration was denied. (See Dkt. Nos.
6 3-6.) On March 19, 2015, the Ninth Circuit held that the Court had acted within its
7 discretion in denying Plaintiff's IFP request on his Eighth Amendment claim, but
8 remanded the action for the Court to assess Plaintiff's ADA claim, which was not
9 addressed in the Court's order denying IFP status. (Dkt. No. 22.)

10 On September 28, 2015, Plaintiff filed a Second Amended Complaint, again
11 naming the same defendants. (Dkt. No. 43.) Defendants filed a motion to dismiss
12 the SAC. (Dkt. No. 59.) On August 10, 2016, the undersigned Magistrate Judge
13 issued an Interim Report and Recommendation ("Interim Report") recommending
14 that Defendants' motion to dismiss the SAC be granted in part and denied in part.
15 (Dkt. No. 76.) Specifically, the Interim Report recommended that Plaintiff's ADA
16 claims against the individual defendants and his prayer for punitive damages be
17 dismissed with prejudice, and his prayer for injunctive relief be dismissed without
18 leave to amend but without prejudice to pursuing such claims in the *Armstrong*
19 class action. (*Id.*) The Interim Report dismissed with leave to amend Plaintiff's
20 ADA claim for monetary damages against the CDCR. (*Id.*)

21 The Court adopted the Interim Report on February 1, 2017, and ordered
22 Plaintiff to file a Third Amended Complaint. (Dkt. No. 80.)

23 On March 31, 2017, Plaintiff filed his Third Amended Complaint ("TAC"),
24 the operative complaint in this action. (Dkt. No. 83.) In the TAC, Plaintiff seeks
25 monetary damages from the CDCR for alleged violations of the ADA and the
26 Eighth Amendment. TAC at 28.

27 On October 16, 2017, the CDCR filed a motion to dismiss the TAC
28 ("Motion"). (Dkt. No. 102.) On March 12, 2018, Plaintiff filed his opposition.

1 (Dkt. No. 115.) Defendants replied to the opposition on March 16, 2018. (Dkt. No.
2 116.)

3 For the reasons below, the undersigned Magistrate Judge recommends that
4 the Motion be granted.

5 **II. SUMMARY OF ALLEGATIONS**

6 Plaintiff suffers from benign prostatic hyperplasia (“BPH”), a condition that
7 affects Plaintiff’s ability to urinate and often forces him to resort to catheterization
8 for relief. (TAC ¶ 1; *see also* Ex. A.)¹ Plaintiff alleges that the BPH renders him
9 unable to void and has caused straining-related complications. (TAC ¶¶ 2-3.)
10 Plaintiff contends that his BPH is a disability which affects a major life activity
11 (*i.e.*, urination) within the meaning of the ADA and has rendered him handicapped
12 within the meaning of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).
13 (TAC ¶ 1.)

14 The TAC claims that the CDCR denied Plaintiff’s reasonable requests for
15 accommodation from 2012 to the present while housed at CMC and later at Folsom
16 State Prison, including requests for single-cell housing, use of a Foley catheter
17 while being transported, and priority restroom access. (TAC ¶¶ 4-7, 14, 17;
18 Exhibits, Dkt. Nos. 83-1 to 83-4; Dkt. No. 99 (ADA-related appeal form 602s).)
19 Plaintiff further alleges that denial of these accommodations excluded him from
20 “services, programs and/or activities,” including restroom services, dental services,
21 and off-site consultation/transportation services. (TAC ¶ 14.) Looking at the
22 “array of cancellations’ &/or ‘rejections’ of [his] 1824s . . . and pointing to the
23 ‘serious physical injuries precipitated by inadequate restroom access,’” Plaintiff
24 alleges that the CDCR intentionally discriminated against him. (TAC ¶ 16.)

25 Exhibits attached to the TAC show that Plaintiff requested, but was denied,
26 single-cell housing due to his medical condition. (*See, e.g.*, TAC, Dkt. No. 83-1 at

27
28 ¹ References to page numbers in the TAC and attached exhibits are based on the
pagination provided by the Court’s electronic docket.

25, 83-3 at 1-8.) Additionally, ADA-related appeal form 602s submitted to the Court by Plaintiff show Plaintiff requested, but was denied, use of a Foley catheter while being transported and the issuance of a notice card authorizing access to a restroom at any time. (Dkt. No. 99 at 9-10, 14-15.)

The TAC nominally pleads three claims: first, that the CDCR has discriminated against Plaintiff in violation of the ADA in denying him adequate access to restroom facilities, dental services, and off-site consultation/transportation services; and second, that the CDCR has subjected Plaintiff to cruel and unusual punishment. (TAC at 13-24.) The TAC's third claim states that Plaintiff is entitled to special and consequential damages as a result of the physical injuries inflicted on him. (TAC at 24-27.) Plaintiff seeks \$2.5 million dollars in general damages and \$6.5 million in special damages. (TAC at 28.)

III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a complaint, as a matter of law, for failure to state a claim for "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (as amended) (citation omitted). To survive a Rule 12(b)(6) motion, a plaintiff must allege enough facts to state a claim that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility does not mean probability, but does require "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. A pleading that offers mere "labels and conclusions" or "a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 555.

1 In considering a motion to dismiss, a court must accept all factual allegations
 2 in the complaint as true “and construe the pleadings in the light most favorable to
 3 the nonmoving party.” *Kniesel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). *Pro*
 4 *se* pleadings, “however inartfully pleaded, must be held to less stringent standards
 5 than formal pleadings drafted by lawyers[.]” *Erickson v. Pardus*, 551 U.S. 89, 94,
 6 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (citation omitted). But the
 7 liberal pleading standard “applies only to a plaintiff’s factual allegations.” *Neitzke*
 8 *v. Williams*, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). The
 9 Court will not accept as true unreasonable inferences or legal conclusions cast in
 10 the form of factual allegations. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir.
 11 2003). In giving liberal interpretations, a court may not supply essential elements
 12 of a claim not initially pled. *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992).
 13 Courts may consider exhibits attached to a complaint in determining the sufficiency
 14 of the claims. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

15 **IV. DISCUSSION**

16 ***A. Plaintiff Fails to State a Claim for Monetary Damages Pursuant to*** 17 ***the ADA Against CDCR***

18 In its Motion, the CDCR argues that Plaintiff has failed to state a claim under
 19 the ADA that the CDCR intentionally discriminated against him. The CDCR
 20 contends that Plaintiff makes merely conclusory statements that it failed to inquire
 21 into Plaintiff’s need for the requested accommodations and, in any event, the
 22 statements are contradicted by the exhibits attached to the TAC. (Mot. at 8.) The
 23 CDCR argues that the exhibits demonstrate that it did investigate Plaintiff’s
 24 requests, but denied them because they were not medically necessary. Because it
 25 did investigate Plaintiff’s requests for accommodation, the CDCR contends that
 26 Plaintiff’s allegations of intentional discrimination fail. The Court agrees.

27 Title II of the ADA “prohibit[s] discrimination on the basis of disability[.]”
 28 *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002), and applies to inmates in

1 state prisons. *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210-11, 118 S.
 2 Ct. 1952, 141 L. Ed. 2d 215 (1998). Title II provides that “no qualified individual
 3 with a disability shall, by reason of such disability, be excluded from participation
 4 in or be denied the benefits of the services, programs, or activities of a public entity,
 5 or be subjected to discrimination by such entity.” 42 U.S.C. § 12132.

6 “To state a claim under Title II of the ADA, the plaintiff must allege: ‘(1) he
 7 is an individual with a disability; (2) he is otherwise qualified to participate in or
 8 receive the benefit of some public entity's services, programs, or activities; (3) he
 9 was . . . excluded from participation in or denied the benefits of the public entity's
 10 services, programs, or activities, or was otherwise discriminated against by the
 11 public entity; and (4) such exclusion, denial of benefits, or discrimination was by
 12 reason of [his] disability.’” *Simmons v. Navajo County, Arizona*, 609 F.3d 1011,
 13 1021 (9th Cir. 2010) (alteration in original) (citation omitted).

14 “To recover monetary damages under Title II of the ADA, a plaintiff must
 15 prove intentional discrimination on the part of the defendant.” *Duvall v. Cty. of*
 16 *Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001) (citing *Ferguson v. City of Phoenix*,
 17 157 F.3d 668, 674 (9th Cir. 1993)), *as amended on denial of reh'g* (Oct. 11, 2001).
 18 To prove intentional discrimination, a plaintiff must show that a defendant acted
 19 with deliberate indifference. “Deliberate indifference requires both knowledge that
 20 a harm to a federally protected right is substantially likely, and a failure to act upon
 21 that likelihood.” *Id.* at 1139. Once a public entity has received a request for
 22 accommodation, the entity should investigate to determine what constitutes a
 23 reasonable accommodation. *Id.* In order to satisfy the second element of the
 24 deliberate indifference test, “a failure to act must be the result of conduct that is
 25 more than negligent, and involves an element of deliberateness.” *Id.* Denial of a
 26 requested accommodation without investigation may be sufficient to show
 27 intentional discrimination. *Button v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of*
 28

1 Nevada, 289 F. App'x 964, 968 (9th Cir. 2008) (*citing Duvall*, 260 F.3d at 1139-
2 41.)

3 Even assuming that Plaintiff has satisfied the first element of the deliberate
4 indifference test, Plaintiff's allegations fall short of the requirement that the CDCR,
5 with deliberateness, failed to act. Exhibits attached to the TAC contradict
6 Plaintiff's allegations that the CDCR failed to inquire into Plaintiff's requests for
7 single-cell housing, use of a Foley catheter while being transported, and priority
8 restroom access. Instead, the exhibits show that the CDCR investigated Plaintiff's
9 accommodation requests, including consulting with medical professionals, but
10 ultimately denied them as medically unnecessary or not appropriate.

11 For example, Plaintiff submitted a Reasonable Modification or
12 Accommodation Request seeking single-cell housing. TAC, Dkt. No. 83-1 at 26,
13 Dkt. No. 83-3 at 7-8. The prison facility's Reasonable Accommodation Panel
14 (RAP) denied the request because Plaintiff's BPH was not a qualifying condition
15 for single-cell housing. *See* TAC, Dkt. No. 83-1 at 25. Plaintiff appealed the
16 denial. As part of his appeal, the Chief Medical Executive interviewed Plaintiff,
17 during which Plaintiff described why he required single-cell housing. TAC, Dkt.
18 No. 83-3 at 5. After this interview, the CDCR denied Plaintiff's appeal, again
19 determining that single-cell housing was not a medically necessary accommodation.
20 *Id.* Plaintiff appealed this denial. In deciding this subsequent appeal, the CDCR
21 reviewed Plaintiff's appeal file and health records related to Plaintiff's history of
22 BPH. TAC, Dkt. No. 83-3 at 1. The health records noted that Plaintiff currently
23 self-catheterized without complication and that Plaintiff's Comprehensive
24 Accommodation Chrono had been updated to assign Plaintiff to bottom-bunk status
25 to accommodate frequent restroom usage. *Id.* The CDCR again denied Plaintiff's
26 requested accommodation, noting that prison policies did not consider single-cell
27 housing to be a medically necessary accommodation. *Id.* Additionally, Plaintiff's
28 requests for a Foley catheter during transportation and issuance of a notice card

1 were determined not to be medically necessary. Dkt. No. 99 at 9 (“Your medical
2 condition does not necessitate a Foley catheter fitting; in addition, restroom access
3 is provided, as needed, during medical transport. The issuance of a Notice Card is
4 not a provided service.”)

5 In sum, the TAC’s allegations that the CDCR failed to inquire as to the need
6 for the requested accommodations are contradicted by the record before the Court.
7 Because Plaintiff’s allegations in the TAC are insufficient to state a claim of
8 intentional discrimination under the ADA, dismissal is warranted.

9 **B. Leave to Amend is Not Warranted**

10 If the Court finds that a complaint, or a portion thereof, should be dismissed
11 for failure to state a claim, it has discretion to dismiss the complaint with or without
12 leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1126-30 (9th Cir. 2000) (en banc).
13 Leave to amend should be granted if it appears possible that the complaint’s defects
14 may be corrected, especially if a plaintiff is *pro se*. *Id.* at 1130-31; *Cato v. United*
15 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (pro se litigants must be granted leave to
16 amend unless it is clear that the deficiencies could not be cured by amendment). If
17 after careful consideration it is clear that a complaint’s deficiencies cannot be cured,
18 dismissal without leave is appropriate. *Cato*, 70 F.3d at 1105-06; *see also Chaset v.*
19 *Fleer/Skybox Int’l*, 300 F.3d 1083, 1088 (9th Cir. 2002) (there is no need to prolong
20 litigation by permitting amendment if the pleading’s “basic flaw” cannot be cured).

21 Additionally, leave to amend need not be granted where a party has
22 previously been given opportunities to cure pleading deficiencies but has failed to
23 do so. *See Brown v. Fitzpatrick*, 667 F. App’x 267, 267 (9th Cir. 2016) (“The
24 district court did not abuse its discretion in dismissing [the *pro se* plaintiff’s]
25 amended complaint without leave to amend after providing [the plaintiff] with one
26 opportunity to amend.”); *Fosselman v. Hidalgo*, 599 F. App’x 310, 310 (9th Cir.
27 2015) (“The district court did not abuse its discretion in denying [the plaintiff]
28 further leave to amend after his first amended complaint failed to cure the

1 deficiencies.”); *Chodos v. West Publ’g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (“It
2 is generally our policy to permit amendment with extreme liberality, although when
3 a district court has already granted a plaintiff leave to amend, its discretion in
4 deciding subsequent motions to amend is particularly broad.” (citation omitted)
5 (internal quotation marks omitted)).

6 Plaintiff was informed previously of the appropriate standards for stating an
7 actionable ADA claim and allowed to cure the deficiencies by filing an amended
8 complaint. Despite having been given an opportunity to cure these deficiencies,
9 Plaintiff has failed to do so in the TAC. Accordingly, it is recommended that leave
10 to amend not be granted. *See Fitzpatrick*, 667 F. App’x at 267; *Fosselman*, 599 F.
11 App’x at 310; *Chodos*, 292 F.3d at 1003.

12 **C. *Plaintiff’s Eighth Amendment Claim is No Longer in Issue***

13 In the TAC, Plaintiff attempts to revive the Eighth Amendment claim on
14 which the Court denied Plaintiff leave to proceed IFP because it was frivolous or
15 lacked merit—a discretionary act that the Ninth Circuit affirmed on appeal. (*See*
16 *Dkt. Nos. 2, 22; see also, e.g., TAC at 19-24.*) As previously explained in the
17 Interim Report adopted on February 1, 2017, the “law of the case” precludes
18 Plaintiff from proceeding on this claim. *See Interim Report at 10-11.*
19 Accordingly, this claim is dismissed.

20 **D. *Claims Arising from Plaintiff’s Incarceration at Folsom State Prison***

21 Finally, to the extent the TAC alleges facts and claims arising from
22 Plaintiff’s incarceration at Folsom State Prison, the Court previously informed
23 Plaintiff that any claims against Folsom State Prison must be raised in the Eastern
24 District of California. *See Interim Report at 10.*

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1 **V. RECOMMENDATION**

2 For the reasons stated above, IT IS RECOMMENDED that the District Court
3 issue an Order: (1) accepting and adopting this Final Report and Recommendation;
4 (2) granting Defendant's Motion to Dismiss; and (3) dismissing with prejudice and
5 without leave to amend the Third Amended Complaint.

6
7 DATED: May 14, 2018

Rozella A. Oliver

8 ROZELLA A. OLIVER
9 UNITED STATES MAGISTRATE JUDGE

10 **NOTICE**

11 Reports and Recommendations are not appealable to the Court of Appeals,
12 but may be subject to the right of any party to file objections as provided in Local
13 Civil Rule 72 and review by the District Judge whose initials appear in the docket
14 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
15 should be filed until entry of the Judgment of the District Court.