UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No. 15-35770

DISABILITY RIGHTS MONTANA, INC., on behalf of all prisoners with serious mental illness confined to the Montana State Prison,

Plaintiff/Appellant,

v.

MIKE BATISTA, in his official capacity as Director of the Montana Department of Corrections and LEROY KIRKEGARD, in his official capacity as Warden of the Montana State Prison,

Defendants/Appellees.

APPELLEES' ANSWER BRIEF

On Appeal from the U.S. District Court for District of Montana, Butte Division
D.C. No. 2:15-cv-00022-SEH

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INTRODUCTION

Defendants/Appellees Mike Batista and Leroy Kirkegard (collectively, "Defendants") are Montana corrections officials with policymaking authority over the operations of the Montana State Prison ("MSP"). In their respective roles as Director of the Montana Department of Corrections and Warden of MSP, they are called upon, every day, to make difficult decisions to ensure public safety, as well as the security and humane treatment of all inmates, staff and visitors at MSP, including inmates with serious mental illness. Defendants dispute — vehemently — the allegations of Plaintiff/Appellant Disability Rights Montana ("DRM"), and in particular DRM's inaccurate characterizations of the policies and procedures at MSP relating to inmates with serious mental illness. That said, Defendants understand DRM's allegations are accepted as true for purposes of Fed. R. Civ. P. 12(b)(6). Even so, DRM's complaint was correctly dismissed by the District Court.

DRM failed to state a claim under 42 U.S.C. § 1983 because it did not provide sufficient factual matter to support the essential elements of a federal civil rights claim, including Director Batista or Warden Kirkegard's deliberate indifference, the existence of a deficient policy or custom at MSP, or the likelihood of substantial, immediate or irreparable harm from Defendants' ongoing practices and policies. These omissions are particularly telling because, before drafting its

most recent complaint, DRM was the beneficiary of extensive discovery and had been, for years, examining MSP documents and interviewing prisoners under its authority as a protection and advocacy organization. Though expressly warned by the District Court and given multiple opportunities to plead its case with the requisite degree of specificity, DRM did not do so. The District Court should be affirmed.

STATEMENT OF JURISDICITON

Defendants agree with DRM's Statement of Jurisdiction in that this Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a), and DRM has timely appealed from a final order pursuant to Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing DRM's complaint under Fed. R. Civ. P. 12(b)(6), after providing DRM direction and an opportunity to correct the deficiencies in the pleading, where the complaint lacks sufficient factual matter to support the essential elements of a claim under 42 U.S.C. § 1983.

2. Whether this case should be remanded, if at all, to a different trial judge based on DRM's disagreement with the District Court's statements and rulings, where there is no evidence of personal bias or unusual circumstances.

STATEMENT OF PERTINENT AUTHORITY

Pursuant to Circuit Rule 28-2.7, the pertinent constitutional provision, statutes, and rules are set forth verbatim and with appropriate citation in the addendum filed herewith.

STATEMENT OF THE CASE

DRM claims Director Batista and Warden Kirkegard are knowingly administering policies and practices at MSP that violate the Eighth Amendment rights of inmates with serious mental illness. DRM's alleged violations can be grouped into two general categories: (1) violations resulting from inadequate mental health treatment and (2) violations resulting from the use of locked housing and certain disciplinary practices.

DRM's characterizations of MSP's policies and procedures are wildly inaccurate. Taking the allegations as true for purposes of evaluating the sufficiency of the complaint, however, the nine alleged constitutionally offensive practices are listed in Paragraph 16 of DRM's complaint:

a. placing prisoners with serious mental illness in various forms of solitary confinement for 22 to 24 hours per day for months and years at a time;

b. placing prisoners with serious mental illness on behavior management plans that involve solitary confinement and extreme restrictions of privilege;

c. having no standards for determining whether placing a prisoner with serious mental illness in solitary confinement or on a behavior management plan will be harmful to the prisoner's mental health;

d. engaging in a pattern or refusing to properly diagnose prisoners as suffering from serious mental illness;

e. engaging in a pattern of refusing to provide prisoners with medications for serious mental illness;

f. failing to have a system in place to review and evaluate the diagnosing and prescribing practices of its mental health staff;

g. failing to have a system to classify prisoners according to their mental health needs;

h. failing to adequately consider prisoners' serious mental illnesses when making decisions about prisoners' housing and custody levels; and

i. having no system in place for auditing, evaluating or ensuring the effectiveness of its mental health care program in treating prisoners with serious mental illness.

(DRM's Excerpts of Record (hereinafter "ER"), 102-104, ¶ 16.)

Apart from alleging the existence of these nine practices, DRM's complaint provides no specific factual content that Director Batista or Warden Kirkegard were subjectively aware of an excessive risk and chose to disregard it, that the alleged practices are more than just isolated incidences of past conduct by non-policymaking employees, or that the alleged practices are in fact ongoing so as to present a risk of substantial and immediate irreparable injury. Even accepting the allegations as true, then, they fail to meet the applicable pleading standard.

DRM claims this case has "an unusual procedural history" that it attributes to the District Court's "confus[ion]" about the legal and factual issues involved. (DRM's Br., p. 23.) The only thing that may be unusual, however, is that the District Court went to great lengths to appropriately distinguish the legal and factual issues, and expressly encouraged DRM to refine its complaint to sufficiently state an Eighth Amendment claim.

DRM originally filed its case on March 31, 2014. (ER, 16.) In the original complaint, DRM brought claims against officials of the Montana Department of Public Health and Human Services ("DPHHS") as well as the Montana Department of Corrections ("DOC"). Count I of the original complaint was a procedural due process claim against DPHHS, generally alleging DPHHS did not afford sufficient process in transferring individuals from the Montana State Hospital to MSP, in violation of the Fifth and Fourteenth Amendments. (Batista & Kirkegard's Supp. Excerpts of Record (hereinafter "SER"), 141-143.)

Against the DOC Defendants, DRM brought three different claims. It alleged the treatment of seriously mentally ill prisoners at MSP violated the Eighth Amendment, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, *et seq*. ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehabilitation Act"). (SER, 143-147.) A Scheduling Order was

issued on September 16, 2014 and the parties commenced with discovery. (SER, 92-95.)

After months of discovery, on April 24, 2015, the District Court convened a status conference. (ER, 206.) Far from demonstrating "difficulty in appreciating the difference between the due process claim against the DPHHS Defendants and the Eighth Amendment claim against the DOC Defendants" (DRM's Br., 25), the District Court expressly recognized and discussed, at length, the distinct nature of the claims. (ER, 209-211.) Indeed, the District Court went through a comprehensive review of DRM's complaint, including the specific claims, allegations, and relief being sought, and all counsel agreed the District Court's understanding of the various claims was accurate. (ER, 209-211.) Precisely because it understood the claims against DPHHS and DOC were distinct, the District Court ordered they be filed as separate lawsuits. (ER, 221-224.) DRM did not contest, and has not appealed from, that decision.

At the hearing the District Court expressed particular concern about the sufficiency of DRM's claims against the DOC Defendants, and invited DRM to re-plead its Eighth Amendment claim with more precision. (ER, 227-229.) It specifically cited and discussed the standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). (ER, 228-229.) It noted DRM's complaint — as pleaded at the time — might not

contain sufficient factual matter because "there is a broadly based assertion that a practice was ongoing at some unidentified or perhaps loosely identified time in the past, but not tied to any particular individual and not tied to any period of time." (ER, 211-212.) The District Court also discussed the requirement that, in pursuing declaratory and injunctive relief, one must present sufficient factual content as to ongoing unconstitutional conduct, rather than isolated instances in the past. (ER, 215-216; 219.)

With this guidance from the District Court, and with the benefit of months of discovery, DRM filed its new complaint against Defendants on May 15, 2015. (ER, 96-130.) As instructed, the complaint was filed as a separate civil action. In the new complaint, DRM dropped its claims under the ADA, the Rehabilitation Act, and also dropped its claims against three DOC officials who had been previously named in their official capacities. (ER, 96-130.)

Despite these changes, DRM's new complaint did not meaningfully address the substantive deficiencies discussed by the District Court at the prior hearing. DRM persisted in its failure to provide specific factual content as to each of the elements of its Eighth Amendment claim. In fact, the complaint's only specific factual content related to past instances of alleged unconstitutional conduct by non-policymaking employees toward nine individual prisoners. (ER, 100-127.)

Given these continued deficiencies, Defendants filed a motion to dismiss on June 5, 2015. (SER, 59-91.) The motion was fully briefed and, on September 3, 2015, the parties presented oral argument. (SER, 59-91; 22-58; 6-21.) The District Court heard argument on Defendants' motion, and also heard argument on a motion to dismiss filed by DPHHS in DRM's now separate lawsuit against DPHHS. (ER, 27-95.)

After first hearing argument on DPHHS' motion, the District Court denied the motion from the bench. (ER, 50-53.) The District Court then heard oral argument on Defendants' motion. (ER, 53-75.) After the parties had presented their arguments and the District Court had asked its questions about DRM's Eighth Amendment claim, it ruled from the bench and granted Defendants' motion. (ER, 75-82.) Text orders were issued later in the day confirming DPHHS' motion had been denied, and Defendants' motion had been granted. (ER, 26.); (SER, 4-5.)

DRM devotes a great deal of discussion to its theory that the District Court "confused" its rulings. That theory fails for a number of reasons. First, the transcript of the hearing demonstrates the District Court, in fact, knew exactly what it was doing. (ER, 27-95.) Second, when later asked, in the separate DPHHS action, whether it had mixed up its rulings, the District Court unequivocally confirmed it had intended to grant Defendants' motion, and had intended to deny

DPHHS' motion. (SER, 1-3.) Rather than take the District Court at its word, DRM speculates the District Court is not telling the truth.

As set forth above, the District Court made it abundantly clear, even before Defendants filed their motion to dismiss, that DRM's allegations against the DOC Defendants might fail to satisfy the *Twombly/Iqbal* standard. Despite its warnings, DRM made no real effort to correct the deficiencies in its complaint. And although DRM cherry-picks certain statements made at oral argument, a closer examination reveals the District Court was tracking and appropriately differentiating between each motion to dismiss.

For example, during oral argument on DPHHS' motion, the District Court asked specific questions about the procedural due process claim. (ER, 45-47.) At the conclusion of that argument, it prefaced its ruling by pointing out "this case" was brought "on behalf of all prisoners who have been sentenced to the custody of . . . DPHHS" alleging "violations of their right to procedural due process under the 5th and 14th Amendments of the United States Constitution." *Id*. It went on to further reference the due process claim at issue in the DPHHS case before

concluding "the facts pleaded are sufficient to allow the case to go forward and to withstand [DPHHS'] Motion to Dismiss under Rule 12(b)(6)." (ER, 50.)[1]

After the DPHHS' motion was decided, the parties in this case presented argument. The District Court asked a number of questions, of both sides, relating specifically to the Eighth Amendment claim. (ER, 58-59; 69; 71-72.) At the conclusion of the argument, the District Court stated "[t]he claims are said to be [Eighth] Amendment violation claims and are asserted through the application of 42 United States Code Section 1983." (ER, 75.) Referencing the same concerns it had expressed at the prior hearing, the District Court noted "[e]ach case, in the view of this Court, must stand on its own facts that pleadings that assert in a general way that certain policies may have occurred at one time or another as applied to particular individuals or to unnamed individuals, that those are of little, if any, value whatsoever in determining whether a case compliant with *Iqbal* and *Twombly* has in fact been pleaded." (ER, 58.) The District Court ultimately determined this standard had not been satisfied and ruled "Defendants' Motion to Dismiss the Complaint in Cause 15-22 is granted." (ER, 82.)

[1] DRM appears to suggest that, because the District Court had granted DPHHS' prior motion to dismiss, it must have intended to do so again. However, DRM was granted leave to amend its complaint in the wake of the prior order of dismissal and, as argued by DRM, it "responded by filing an amended complaint adding new factual allegations supporting its claim against the DPHHS Defendants." (DRM's Br., 24.)

Yes, the District Court made certain references to procedural due process in discussing its ruling in this case, and it made other statements that would appear to apply to the claims against DPHHS. A written order would have been preferable. However, a review of the entire hearing transcript does not support DRM's conclusion that the District Court's decision was a mistake. This is particularly true because the District Court was specifically asked, in the DPHHS case, whether the oral rulings had been confused, and the District Court's answer could not have been clearer: "In the interest of clarification of any confusion by counsel as to the rulings the Court made at the hearing on September 3, 2015 . . . [t]his case, Cause No. CV 14-25-BU-SEH [against DPHHS], survived the motion to dismiss, Cause No. CV 15-22-BU-SEH [against DOC] was dismissed." (SER, 1-3.)

At the end of the day, this Court conducts a de novo review and may affirm on any ground supported by the record. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1141 (9th Cir. 2009). Regardless of DRM's speculation about what the District Court actually intended to do, the record supports affirmance. As set forth below, DRM's complaint was appropriately dismissed because it did not contain sufficient factual matter to state a plausible claim under § 1983.

SUMMARY OF ARGUMENT

The District Court should be affirmed because, first, DRM's complaint contains no factual allegations that a final policymaker was deliberately indifferent.

Allegations about the past conduct by "prison staff" are insufficient to state a plausible claim that Director Batista or Warden Kirkegard actually knew of and disregarded an excessive risk of harm to inmate health or safety. For example, DRM complains about the mental health treatment provided to nine inmates, but its own allegations demonstrate the diagnoses and treatment decisions of which it complains were made by a former prison psychiatrist, not Director Batista or Warden Kirkegard.

Next, no allegations plausibly suggest the existence of a deficient written policy, and sporadic, isolated past incidents are insufficient to plead a deficient custom. Indeed, of the nine alleged practices DRM claims are unconstitutional customs:

- four are unsupported by a single factual allegation specific to any inmate;
- two relate to inadequate mental health treatment which, by DRM's own admission, are practices of the past and may not be ongoing; and
- three are sparsely based on past isolated uses of discipline and locked housing by prison staff.

DRM's allegations are insufficient to plead the existence of a deficient policy or custom, much less that a current policy or custom presents a risk of immediate and irreparable harm. Thus, DRM cannot demonstrate the necessary causal nexus under § 1983, or the justiciabilty of this case to establish standing to seek injunctive or declaratory relief.

In the event the District Court is reversed, in whole or in part, the case should not be reassigned upon remand. The mere fact that DRM disagrees with certain statements and rulings by the District Court is hardly enough to demonstrate the personal bias or unusual circumstances necessary to prompt reassignment, an extraordinary measure that should rarely be invoked.

STANDARD OF REVIEW

The District Court's decision to grant Defendants' motion to dismiss under Rule 12(b)(6) is reviewed de novo. *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013). All well-pleaded facts in the complaint are accepted as true and construed in the light most favorable to the nonmoving party. *Id*.

ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS WAS CORRECTLY GRANTED BECAUSE DRM FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 1983.

DRM argues its complaint is sufficient to survive Rule 12(b)(6) scrutiny because it contains "extensive and detailed factual allegations. . . ." (DRM's Br., 34.) It is true that DRM's thirty-four page complaint could fairly be characterized as "extensive." DRM's complaint also contains detailed factual allegations concerning the experiences of nine individual inmates. However, *Twombly* and *Iqbal* require more – they require specific, factual, and nonconclusory allegations that support each of the elements of the asserted cause of action. *See Twombly*,

550 U.S. at 555; *Iqbal*, 556 U.S. at 677-678. Without such allegations, there can be no plausible claim for relief. *Id*. In other words, DRM's allegations may be "extensive and detailed," but not where it matters.

A complaint must be dismissed when it lacks sufficient factual allegations to support a cognizable legal theory. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). Although allegations of material fact are taken as true under Fed. R. Civ. P. 12(b)(6), "for a complaint to survive a motion to dismiss, the nonconclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Factual allegations must therefore be enough to raise a right to relief above the speculative level — they must nudge the claim across the line from conceivable to plausible. *Twombly*, 550 U.S. at 555. Legal conclusions are not accepted as true, and "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 677-678.

Whether a plausible claim is stated must necessarily be assessed in relation to the elements a plaintiff must prove in order to prevail. *See id*. In this regard, DRM's complaint asserts claims against Director Batista and Warden Kirkegard, in their official capacities, for alleged violations of the Eighth Amendment. (ER, 97, ¶ 1.) The official capacity claims against Director Batista and Warden Kirkegard

constitute claims against the entities they represent — the DOC and MSP, respectively. *Hartmann v. Cal. Dep't of Corrects. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013). As such, DRM must prove the elements to sustain a federal civil rights suit against these state entities.[2]

Important here, a governmental entity is not vicariously liable under § 1983 for the acts of its employees. *Flores v. Cnty. of L.A.*, 758 F.3d 1154, 1158 (9th Cir. 2014); *Monell v. Dep't of Soc. Serv. of N.Y.C.*, 436 U.S. 658, 689 (1978). Liability is imposed only when an act or failure to act which violates a federal right is the result of a policy or custom made by an official with final policymaking authority concerning the issue in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986).

To sustain its claims for injunctive and declaratory relief, therefore, DRM must prove: (1) a deficient policy or custom exists that is ongoing, (2) the deficient policy or custom, itself, is likely to cause a violation of the federal rights of DRM's members, and (3) an authorized final policymaker is acting with deliberate indifference to those rights. *Connick v. Thompson*, 131 S. Ct. 1350, 1359-1360

[2] A § 1983 claim against a state or arm of a state is generally not permitted. *Va. Off. for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-42 (2011); *Will v. Mich. Dep't of St. Police*, 491 U.S. 58, 70 (1989). However, *Ex parte Young* allows a plaintiff to circumvent the Eleventh Amendment by filing suit against a state official in his or her official capacity seeking prospective equitable relief from an ongoing violation of federal law. *Ex parte Young*, 209 U.S. 123, 167 (1908). As set forth below, because DRM's allegations do not support a plausible claim of an ongoing violation of federal law, the *Ex parte Young* exception does not apply, providing yet another ground to dismiss DRM's Complaint.

(2011); *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403-04 (1997); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

A. DRM Has Not Plausibly Alleged Deliberate Indifference By Director Batista or Warden Kirkegard.

To prevail in this § 1983 official capacity suit under the Eighth Amendment, DRM must show a final policymaker acted with deliberate indifference to inmate health or safety. *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1187-88 (9th Cir. 2002); *Connick*, 131 S. Ct. 1350, 1360. However, while DRM's complaint alleges various unconstitutional conduct by "prison staff" and "mental health staff," it is almost completely silent on how Director Batista or Warden Kirkegard were deliberately indifferent. (*See* ER, 102-104, ¶ 16, 108, ¶ 29.) In fact, in the fifteen pages of non-conclusory factual content discussing nine "Representative Examples of Prisoners With Serious Mental Illness Who Have Experienced Cruel and Unusual Punishment," Warden Kirkegard is not mentioned once, and there is only one mention of Director Batista, which merely states he heard one of the prisoner's unspecified grievances. (ER, 110-127.)

Director Batista and Warden Kirkegard are final policymakers, and it is their knowledge and subjective intent, not that of "prison staff," that determines deliberate indifference. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). Whether a particular official has final policymaking authority is a question of state law. *Id.*; *City of St. Louis*, 485 U.S. at 124; *Lytle v. Carl*, 382 F.3d 978, 982-83

(9th Cir. 2004). Under Montana law, the responsibility of operating MSP is placed upon the warden, and the responsibility of establishing policies and programs for MSP is placed upon the DOC director. Mont. Code Ann. § 53-1-204 (2015); Mont. Admin. R. 20.1.101(b).

Deliberate indifference is "a stringent standard of fault, requiring proof that a municipal [or state] actor disregarded a known or obvious consequence of his action." *Bryan Cnty.*, 520 U.S. at 410. Proof of negligence, gross negligence or medical malpractice is not sufficient to establish deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994); *Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir. 2004); *see also, Manchacu v. Yates*, No. CV 1-08-1492-DCB, 2009 WL172179, at *2 (E.D. Cal. Jan. 22, 2009).

In an official capacity suit, a policy maker must know of and disregard a substantial risk of harm to the inmate's health or safety. *Gibson*, 290 F.3d at 1187-88. This means he or she must be aware of facts from which one can draw an inference that a substantial risk of harm exists, and he or she must actually draw that inference. *Id*. An awareness of a risk of harm, alone, is not sufficient proof. *Id*.; *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011).

DRM argues "repeated notices to the DOC Defendants about the deficiencies and dangers of their treatment of prisoners with serious mental illness are more than sufficient to satisfy the subjective prong of the Eighth Amendment

analysis." (DRM's Br., 47.) However, DRM's own allegations are inconsistent with the idea of "repeated notices" to Director Batista and Warden Kirkegard, and its legal authority demonstrates an apparent misunderstanding of the deliberate indifference standard.

DRM cites *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 79 (1st Cir. 2005), claiming "high-level prison officials" were found to be deliberately indifferent in that case because "they knew of [a] continuing pattern of culpable failures by prison staff." In reality, the high-level prison officials in *Alsina-Ortiz* were dismissed because there was "no evidence whatever that [the Puerto Rico Administrator of Corrections or Sub-Director of the prison] knew in late 1997 that there was a continuing pattern by guards — specifically, of failures to report inmate medical needs — from which the defendants then averted their eyes." *Id*. at 82. The case was remanded as to the remaining prison guard defendant, but only because he had direct knowledge of the plaintiff's "plight but did nothing to secure medical care for him." *Id*. at 83.

Far from supporting its position, DRM's legal authority confirms deliberate indifference requires a showing the defendant actually knew of and disregarded a substantial risk of harm. *Id*.; *see also Gibson*, 290 F.3d at 1187-88; *Starr*, 652 F.3d at 1216-17 (defendant sheriff given notice of specific incidents in which inmates were killed or injured because of the culpable actions of his subordinates and

deliberately took no action); *Bass v. Wallenstein*, 769 F.2d 1173, 1176 (7th Cir. 1985) (evidence could support finding of deliberate indifference based on internal memo to warden detailing specific deficiencies and warden's admissions regarding his familiarity with claimed deficiencies and conscious decision to take no action). DRM has not cited a single case in which a claim of deliberate indifference was allowed to proceed on such flimsy and conclusory allegations as those presented in this case.

1. Reliance on the Expertise of Mental Health Professionals Does Not Amount to Deliberate Indifference.

DRM's inability to plead deliberate indifference is particularly stark with respect to its allegations concerning inadequate mental health care at MSP. The only factual content supporting these allegations concerns the diagnoses and treatment decisions made by a staff psychiatrist, Dr. Peter Edwards, who is no longer employed at MSP. (ER, 96-129, ¶¶ 16, 29-35, 38-39, 43-44, 47-55, 58-60, 63-68, 71, 73, 79-90.) DRM argues these allegations are sufficient under general principles of "notice pleading," but this Court has squarely determined "under a 'deliberate indifference' theory of individual liability, the [p]laintiffs must still allege sufficient facts to plausibly establish the defendant's 'knowledge of' and 'acquiescence in' the unconstitutional conduct of his subordinates." *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012).

Moreover, prison officials do not act with deliberate indifference when they rely on the expertise of medical professionals. *Smith v. Woodford*, No. C 05-3373 SI, 2008 WL276382, at **9-10 (N.D. Cal. Jan. 31, 2008) (holding prison officials "do not act with deliberate indifference in not ordering mental health care for an inmate (or not recognizing a mental illness) when the health care providers have given their professional medical opinion. . . .") Likewise, establishing a difference in medical opinion does not amount to deliberate indifference. *Id*. at *10; *see also*, *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *McCray v. Williams*, 357 F. Supp. 2d 774, 781 (D. Del. 2005).

In *Woodford*, for example, an inmate alleged the corrections director and the warden were deliberately indifferent in denying his grievance appeal. *Smith*, 2008 WL 276382, at **9-10. He had appealed his placement in security housing for misconduct he attributed to his mental health. *Id*. The court dismissed the claims, finding no deliberate indifference because the director and warden relied on the opinions of mental health staff in placing the inmate in locked housing. *Id*. The court noted: "Administrators and custodial staff are in no position to provide mental health care, and instead must turn to the mental health care staff to provide it. . . . Defendants' reliance on the information provided by the mental health staff in responding to Smith's inmate appeals did not amount to deliberate indifference." *Id*. at *10.

Similarly, in *Warclub v. Ferriter*, No. CV 12-00093-H-DLC-RKS, 2012 WL6949703, at *3 (D. Mont. Nov. 30, 2012), the court determined the prior Montana DOC director did not act with deliberate indifference when he denied a grievance requesting surgery, because he relied on the opinion of a doctor that surgery was not necessary.

The same is true here. Director Batista and Warden Kirkegard are not mental health professionals. MSP is not a mental health facility, Mont. Code Ann. § 53-21-102(10) (2015), and the Eighth Amendment does not require MSP "to solve . . . inmates' behavioral, emotional, and personality problems." *Capps v. Atiyeh*, 559 F. Supp. 894, 917 (D. Ore. 1982) (citation omitted). DRM's own complaint demonstrates that, to the extent Director Batista and Warden Kirkegard made decisions that implicated inmates' mental health, they relied on mental health staff, including the prison psychiatrist.

DRM's own legal authority shows it is improper to foist medical decisions made by medical professionals onto the shoulders of prison officials. For example, DRM cites *Steele v. Shah*, 87 F.3d 1266, 1269-70 (11th Cir. 1990) for the proposition that "discontinuation of medications [can] constitute deliberate indifference." But that case was appropriately brought against the medical professional who discontinued the medications, not the prison officials who were compelled to rely on his expertise. *Id*. Similarly, DRM sites *Waldrop v. Evans*,

871 F.2d 1030, 1033 (11th Cir. 1990) and points out the psychiatrist's refusal to restart the prisoners' Lithium prescription stated an Eighth Amendment claim. However, again, that case was brought against the doctors who provided care to the plaintiffs' mentally ill son in prison. *Id*. DRM also cites *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) for the idea that psychiatric medical care can be "so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care violates the Eighth Amendment," but that case, too, was a lawsuit against a prison psychiatrist. *Id*. at 90.

Neither Director Batista nor Warden Kirkegard are psychiatrists or mental health professionals, and should not be held to that professional standard. Indeed, even when a plaintiff is suing a professional medical provider over treatment, a difference in medical opinion does not amount to deliberate indifference. *Woodford*, 2008 WL276382, at*10; *see also*, *Jackson*, 90 F.3d at 332; *McCray*, 357 F. Supp. 2d at 781; *Harrelson v. Dupnik*, 970 F. Supp. 2d 953, 980 (D. Ariz. 2013). That rule has particular force in the mental health arena, where opinions on proper diagnosis and treatment can vary significantly.

2. No Allegations Suggest the Director or Warden Actually Knew of and Disregarded a Substantial Risk of Harm.

The failure to plead deliberate indifference was the clear focus of Defendants' motion to dismiss, but DRM devotes only brief discussion to the

subjective intent of Director Batista and Warden Kirkegard in its brief. (DRM's Br., 46-48.) This is telling.

DRM argues it alleged three particular facts in its complaint which demonstrate the director or warden knew of and disregarded a substantial risk of harm:

(1) DRM sent a letter to Director Batista before filing suit;

(2) years ago, two lawsuits were filed against the State of Montana that involved "similar practices"; and

(3) the NCCHC recommends against Defendants' practices.

(DRM's Br., 46-48.) Each of these allegations is addressed below. Each fails to plausibly allege deliberate indifference.

a. DRM's Pre-Suit Letter to Director Batista Does Not Plausibly Suggest Deliberate Indifference.

DRM's complaint alleges "[o]n February 26, 2014, DRM sent Director Batista a letter describing many of the facts alleged in this Second Amended Complaint." (ER, 126, ¶ 97.) DRM goes on to state, "[t]o DRM's knowledge, to date, the DOC Defendants have not made any modifications in their treatment of prisoners with serious mental illness." *Id*.

DRM's allegation that it is unaware of any modifications made since sending its letter only confirms DRM's lack of knowledge of current and ongoing

practices at MSP.[3] More importantly, even accepting the premise that no steps were taken to address issues raised in the letter, this falls far short of the "conscious, affirmative choice" by a final policymaker required to prove deliberate indifference. *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir.1992); *Harris v. Cnty. of King*, No. C05-1121C, 2006 WL 2711769, at *4 (W.D. Wash. Sept. 21, 2006); *Kelly v. Ariz. Dep't of Corr.*, 409 Fed. Appx. 124, 125-26 (9th Cir. 2010). As noted above, mere awareness of a risk of harm is not sufficient. *Gibson*, 290 F.3d at 1187-88. At most, the fact that a letter was sent may plausibly suggest an awareness of a risk of harm, but nothing more. In this sense, where the allegations do not permit the court to infer more than the mere possibility of misconduct, or pleads facts that are "merely consistent with" a defendant's liability, they "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Twombly*, 550 U.S. at 557.

Additionally, DRM's argument relating to the pre-suit letter is circular. The letter was essentially a blueprint for DRM's original complaint which was, in large part, cut and pasted from DRM's pre-suit letter. As such, if DRM's complaint lacks sufficient factual content to state a claim for relief under § 1983, it follows the early letter version of DRM's allegations did not provide the requisite

[3] In its brief, DRM boldly claims "the DOC Defendants failed to make any modifications" and cites Paragraph 97 of its complaint for support. (DRM's Br., 46.) That paragraph, however, merely alleges DRM's lack of knowledge as to whether any modifications have been made.

knowledge from which to infer Defendants acquiesced in unconstitutional conduct by MSP staff.

b. Two Prior Cases That Were Resolved Do Not Plausibly Suggest Deliberate Indifference.

DRM next argues Director Batista and Warden Kirkegard were deliberately indifferent because, a number of years ago, the State was sued in two previous lawsuits over "similar practices." (DRM's Br., 46-47.) A closer look at DRM's allegations reveals whatever practices were addressed in the prior cases, they were modified and the parties' disagreement was resolved.

First, *Walker v. State*, 68 P.3d 872 (Mont. 2003) and *Katka v. State*, No. ADV 2009-1163 (First Jud. Dist. Court, Lewis & Clark Cnty.) did not decide issues of cruel and unusual punishment under the Eighth Amendment. *Watson v. State of Mont.*, No. CV-04-16-H-CSO, 2006 WL1876891, at **4-6 (D. Mont. Oct. 3, 2006).

They addressed matters of state law. The Eleventh Amendment to the U.S. Constitution prohibits DRM from seeking injunctive relief on the basis of state law in an official capacity suit. *Vasquez v. Ruckauckas*, 734 F.3d 1025, 1041 (9th Cir. 1993).

Nor did the prior cases involve the same issues. *Walker* was a post-conviction relief proceeding that addressed, in part, MSP's use of behavior modification plans on an inmate over fifteen years ago. *Walker*, 68 P.3d at ¶ 1.

The Montana Supreme Court ordered certain changes to MSP practices and confirmation that the changes had been implemented:

> We reverse and remand to the District Court for entry of an order requiring MSP to conform the operations of its administrative segregation units to the requirements of this Opinion and to report, in writing to that court within 180 days as to the actions taken. The District Court may, thereafter, order inspections or further remediation as in that court's discretion is necessary under the circumstances.

Id. at ¶ 85.

DRM does not allege Defendants failed to implement the changes mandated by the *Walker* decision. (ER, 125, ¶ 93.) DRM's complaint also fails to draw any direct parallels between the practices criticized in *Walker* and the practices at issue here, other than to generally aver *Walker* concerned disciplinary practices that were applied to mentally ill inmates. *Id*.; *see also, e.g., Watson*, 2006 WL1876891, at **5-6 (finding *Walker* had no preclusive effect in prisoner's Eighth Amendment § 1983 suit).

Thus, DRM's own allegations confirm that whatever deficient practices were identified in *Walker*, they were appropriately remedied. There are no allegations to the contrary. There are no allegations, for example, that the State failed to abide by the judgment in the *Walker* case. Merely alleging the State was involved in a prior lawsuit with "similar issues" does nothing to suggest Director Batista or Warden Kirkegard knew of and disregarded a substantial risk of harm concerning the specific practices alleged in this case.

Similarly, with respect to *Katka*, DRM's own Complaint alleges the lawsuit resulted in "a 2012 settlement agreement requiring the Prison to implement changes regarding its housing and treatment of prisoners with serious mental illness and treatment of suicidal prisoners." (ER, 125-126, ¶ 94.) Again, there are no allegations the State, or Defendants, somehow breached that agreement. If anything, DRM's complaint establishes that, to the extent *Katka* provided any actual or constructive notice to Defendants of constitutionally deficient practices at MSP, those practices were remedied in the subsequent settlement agreement. (ER, 125-126, ¶ 94.) Thus, these allegations not only fail to support a claim of deliberate indifference, they directly contradict it.

c. Knowledge of NCCHC Standards Does Not Plausibly Suggest Deliberate Indifference.

DRM next argues Defendants' deliberate indifference can be inferred from the fact that Defendants "have sought certification from the NCCHC, an organization that specifically recommends against the DOC Defendants' practices." (DRM's Br., 47.) What DRM fails to mention, however, is that MSP has not only "sought" NCCHC certification, it has obtained NCCHC certification.

In fact, NCCHC certification includes the organization's express determination that the "medical and mental health care services provided at the men's prison [meets] all of the commission's [sixty-eight] standards." (SER, 13.) MSP is in "100 percent compliance with [NCCHC] standards for medical, dental

and mental health." (SER, 14.) Needless to say, it is incorrect to assert Defendants were deliberately indifferent because of their knowledge of NCCHC standards, when MSP is in "100 percent compliance" with NCCHC standards and accordingly certified.[4]

Thus, to the extent the NCCHC standards have any bearing on this lawsuit, they only affirm, compellingly, that Defendants were not deliberately indifferent and were not aware of an immediate risk of substantial harm they subsequently disregarded.

d. MSP's Grievance Procedure Does Not Plausibly Suggest Deliberate Indifference.

In its Statement of the Case, DRM appears to suggest Defendants may be deliberately indifferent because "prisoners regularly file grievances regarding the level of mental health care they receive and mental health-related practices . . . ." (DRM's Br., 22.) In the allegations relating to the nine "representative examples," however, there is just a single allegation that one inmate, James Larson, filed an

[4] Under Rule 12, the Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Mullis v. U.S. Bankr. Ct., Dist. of Nev.*, 828 F.2d 1385, 1388 (9th Cir.1987). Courts in the Ninth Circuit routinely grant judicial notice of press releases. *See Patel v. Parnes*, 253 F.R.D. 531, 546-47 (C.D. Cal. 2008). Also, a document "may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

administrative appeal to Director Batista regarding mental health services. (ER, 111, ¶ 41.) Apart from alleging Larson appealed some unidentified grievance "regarding inadequate mental health care," DRM provides no factual allegations to support its theory that Director Batista was deliberately indifferent to Larson's rights. *Id.* It does not even allege Director Batista reached a decision on Larson's grievance, or identify what that decision rendered.

DRM generally claims prisoners with serious mental illness "regularly request and grieve the level of mental health care they are provided," and notes "several prisoners have appealed the inadequacy of the mental health treatment they receive to the Prison Warden and ultimately to the DOC Director." (ER, 126, ¶ 95.) Accepting these allegations as true, however, they do nothing more than show a grievance process is in place that is utilized by prisoners with mental illness. This is certainly not a fact Defendants contest, but it does nothing to indicate deliberate indifference.

3. No Allegations Plausibly Suggest an Obvious Risk so as to Infer Deliberate Indifference.

Without allegations that either Director Batista or Warden Kirkegard actually knew of and disregarded a substantial risk of harm, DRM cites the rule that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. That rule, however, does not apply under these facts. Moreover, by making the remarkable

claim that the risk was "obvious" with respect to the complex questions raised in this case, DRM essentially seeks to impose an objective standard for the test of deliberate indifference.

Deliberate indifference is a subjective standard that only concerns what a defendant's mental attitude actually was. *Toguchi*, 391 F.3d at 1057. The Supreme Court has specifically rejected an objective measure of deliberate indifference in the Eighth Amendment context:

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. . . . This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Farmer, 511 U.S. at 837-39 (internal citations omitted).

Although a plaintiff is required to show a subjective awareness of the risk in all cases, it is true that "if an inmate presents evidence of very obvious and blatant circumstances indicating that the prison official knew the risk existed, then it is proper to infer that the official must have known [of the risk]." *Foster v. Runnels*, 554 F.3d 807, 814 (9th Cir. 2009); *see also Conn v. City of Reno*, 591 F.3d 1081,

1097 (9th Cir. 2009) (holding the magnitude of the risk must be "so obvious that [the defendant] must have been subjectively aware of it"), *vacated*, 131 S. Ct. 1812 (2011), *reinstated in relevant part*, 658 F.3d 897 (2011).

In *Foster*, for example, the court found "[t]he risk that an inmate might suffer harm as a result of the repeated denial of meals is obvious," and a jury could infer the officer deliberately disregarded the inmate's need for adequate nutrition because the risk is 'sufficiently obvious.'" 554 F.3d at 814. In *Simmons v. Cook*, 154 F.3d 805, 808 (8th Cir. 1998), the inmates' condition as "paraplegic and wheelchair-bound was obvious and apparent to any layperson," as was the fact that "a wheelchair could not pass through the cell doors and maneuver around the cell bunk to reach the food tray slot and the toilet had no handrails."

Here, the "very obvious and blatant circumstances" to infer Director Batista or Warden Kirkegard knew of and disregarded an excessive risk are missing from the complaint. Merely claiming Defendants were aware, generally, of risks that may be associated with solitary confinement of seriously mentally ill prisoners is not enough. There are no factual allegations suggesting a subjective awareness by Director Batista or Warden Kirkegard that the specific policies and practices in place at MSP pose an excessive risk of harm to any of the inmates at MSP.

DRM appears to argue that because other courts have found Eighth Amendment violations in the treatment of mentally ill prisoners, particularly with

the use of certain forms of locked housing, Director Batista and Warden Kirkegard must have known MSP's own practices were also constitutionally deficient. If DRM's standard were adopted, no plaintiff would ever have to worry about pleading the subjective culpable state of mind of any corrections official in cases involving the seriously mentally ill. All one would have to do is point out that other cases have addressed somewhat similar issues. This is not consistent with the *Twombly*/*Iqbal* standard, or the standard for proving deliberate indifference.

Thus, although DRM spends considerable time discussing case law from other jurisdictions and various research relating to the effect of solitary confinement on seriously mentally ill prisoners, this does not demonstrate deliberate indifference. Even accepting DRM's arguments that there is a "growing national consensus" and "growing body of scientific literature" about the harms of solitary confinement (DRM's Br., 40, 43), this at most demonstrates this complex issue is under evaluation and is in transition, which is antithetical to the very idea that it is "obvious."

DRM did not allege in its complaint, and correctly so, that Defendants were deliberately indifferent by virtue of their knowledge of case law from other jurisdictions, much less that this same case law involved circumstances sufficiently similar to put them on notice of a substantial risk of harm to inmates at MSP. Fundamentally, the use of isolation or administrative segregation with mentally ill

inmates is not a *per se* violation of the Eighth Amendment. *See, e.g.*, *Harrelson*, 970 F. Supp. 2d at 980 ("Plaintiff has failed to demonstrate the isolation policies applied to juveniles with mental health needs . . . created a risk of harm that was so 'obvious' that ignoring it amounted to deliberate indifference."). Rather, an analysis of the facts and circumstances of each case is required to determine whether an Eighth Amendment violation occurred.

Tellingly, not one of the solitary confinement cases cited by DRM involve the sufficiency of pleading deliberate indifference in a §1983 complaint. For example, Plaintiff cites *Davis v. Alava*, 135 S. Ct. 2187, 2209 (2015) for Justice Kennedy's sweeping statement that "solitary confinement . . . will bring you to the edge of madness, perhaps to madness itself." The case has nothing to do with stating a claim for relief under the Eighth Amendment — *Davis* was a habeas case that addressed alleged race-based challenges to jurors. *Id*. at 2193-96. Justice Kennedy prefaced his dicta by acknowledging it had "no direct bearing on the precise legal questions presented by this case." *Id*. at 2208 (Kennedy, J., concurring).

The other cases cited by DRM also fail to inform the analysis of adequately pleading deliberate indifference. *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1097 (W.D. Wis. 2001) involved a motion for preliminary injunction and was based upon the evaluation of specific evidence to determine whether there was a "more

than negligible chance of success on the merits." *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Correction*, No. 1:08-cv-01317-TWP-MJD, 2012 WL6738517 (S.C. Ind. Dec. 31, 2012) and *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) were trial court decisions following a full bench trial. *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999) decided Texas prison officials' motion to terminate a prior judgment finding certain aspects of its prison system unconstitutional. *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1335 (D. Ariz. 2014) involved the requested termination of an already issued injunction.

In sum, DRM's legal authority has no bearing on the District Court's dismissal under Fed. R. Civ. P. 12(b)(6). The propriety of locked housing for any inmate necessarily depends on the facts: the particular condition of the inmate, the particular form of isolation, and the particular reasons for using isolation. DRM's own authority confirms the constitutional question is, in every case, a fact-specific analysis. Thus, in issuing its ruling in this case, the District Court correctly noted "[e]ach case, in the view of this Court, must stand on its own facts that the pleadings that assert in a general way that certain policies may have occurred at one time or another as applied to particular individuals or to unnamed individuals, that those are of little, if any, value whatsoever in determining whether a case compliant with *Iqbal* and *Twombly* has in fact been pleaded." (ER, 79-80.)

B. DRM Has Not Plausibly Alleged an Ongoing Policy or Custom Likely to Cause Violations of the Eighth Amendment.

To prevail, DRM must also demonstrate an ongoing policy or custom at MSP that is constitutionally deficient. *See Hartmann*, 707 F.3d at 1127; *see also Monell*, 436 U.S. at 694. This Court has held the *Twombly/Iqbal* requirements apply to pleading a policy or custom in a *Monell* claim. *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 647 (9th Cir. 2012).

1. No Factual Allegations Show a Deficient Written Policy.

DRM claims MSP should implement a "more appropriate definition of 'serious mental illness,'" but its own allegations demonstrate there is no constitutional or statutory definition of the term. (ER, 100–102, ¶¶ 13-15.) "Serious mental illness" is not defined in applicable statutes or case law, and certainly does not constitute a constitutional standard. Though much criticized by DRM, this is exactly what the District Court was explaining when it said, quite appropriately, that "the term serious mental illness or seriously mentally ill is not a term that the Court can find to be drawn from the statutes which give rise to the [DRM's] basic claim of standing [and] . . . really tells the Court or anyone else nothing in terms of what sort of treatment should be accorded to a person said to fit into that category." (ER, 222.)

DRM's proposed definition of 'serious mental illness' is extremely broad and would encompass all individuals with intellectual disabilities and severe

personality disorders. (ER, 102, ¶ 15(C).) It would effectively define the vast majority of the MSP population as seriously mentally ill. However, the statutory scheme that grants DRM authority to act on behalf of its constituents, the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. § 10801, *et seq*., does not define "serious mental illness." Rather, PAIMI defines "individuals with mental illness" as those who have "significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State. . . ." 42 U.S.C. § 10802(4)(A). Montana statutes and case law also do not define "serious mental illness," although Montana law specifically defines "mental disorder" to exclude intellectual disabilities. Mont. Code Ann. § 53-21-102(9)(b)(iii).

DRM's complaint offers a definition of serious mental illness alleged to be "accepted by mental health professionals." (ER, 101-102, ¶ 15.) However, DRM's complaint also proves this definition is not universally accepted, by mental health professionals or otherwise, and does not establish a constitutional standard. *See, e.g.*, *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1242-43 (9th Cir. 2010). Moreover, one must remember that reliance on a licensed mental health provider — even one with whom DRM may disagree — is not deliberate indifference, *Woodford*, 2008 WL276382, at **9-10, and a difference of opinion

on the definition of a serious mental illness is not deliberate indifference to a serious medical need. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

In the District Court, DRM appeared to acknowledge the fact that Defendants have not adopted DRM's preferred definition of "serious mental illness" would not qualify as a deficient written policy. Instead, it argues Defendants' policies contain "inconsistent" definitions when it comes to subjecting prisoners with serious mental illness to the dangers of extreme isolation. (DRM's Br., 37.)

The alleged "inconsistency" is based exclusively on the fact that the MSP policy for "Mental Health Cases in Locked Housing Status" uses the term "severe mental health problems" instead of the term "serious mental illness." (SER, 15.) DRM does not explain, much less provide any specific factual allegations, that this alleged inconsistency has or ever could lead to a deprivation of inmates' federal rights. DRM does not explain or provide allegations that an inmate classified as having a "serious mental illness" at MSP would not also be classified as having "severe mental health problems," or vice versa. Parsing out one isolated phrase in one MSP policy falls far short of demonstrating any real deficiency, particularly a deficiency of constitutional import.

This conclusion is further buttressed by the well-established rule that classification decisions do not give rise to Eighth Amendment claims. *Myron v.*

Terhune, 476 F.3d 716, 718-719 (4th Cir. 2003) (stating "[b]ecause the mere act of classification does not amount to an infliction of pain, it is not condemned by the Eighth Amendment") (internal citations and quotations omitted); *Capps*, 559 F. Supp. at 909 ("misclassification itself is not a constitutional violation") (citation omitted). In summary, DRM's attempt to plead a constitutionally defective written policy fails under Rule 12(b)(6).

2. Sporadic, Isolated Incidents Are Not Evidence of an Ongoing Custom or Practice.

Given the lack of factual content suggesting an unlawful written policy, DRM is left to allege an unlawful custom. In this regard, DRM must show injury resulted from a permanent and well-settled custom or practice as opposed to a "single occurrence of unconstitutional action by a non-policymaking employee." *McDade v. West*, 223 F.3d 1135, 1141 (9th Cir. 2000). Thus, "[l]iability for improper custom may not be predicated on isolated and sporadic incidents; it must be founded on practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Isolated occurrences of unconstitutional conduct by "prison staff" do not suffice.

The specific "practices" which DRM alleges to be cruel and unusual punishment are listed in Paragraph 16 of its complaint. (ER, 102-104, ¶ 16.) They concern past acts and omissions relating to nine "representative" prisoners, each

with his own unique facts and his own unique mental health condition. In the context of the thousands of prisoners housed at MSP during the covered years, DRM's allegations, even if taken as true, are not evidence of a practice or custom of sufficient duration and frequency to state a plausible claim for relief.

a. Four of the Nine Alleged Practices Are Unsupported by Any Factual Content.

Four of the nine alleged practices are not supported by a single allegation specific to any inmate.[5] In other words, there are no allegations that any one of the four alleged practices have ever led to a constitutional deprivation. There are no allegations with specific examples of the alleged practices. All that is offered is DRM's own *ipse dixit*, devoid of any factual matter, that these unconstitutional practices exist at MSP and might cause harm in the future. These speculative and conclusory allegations are precisely the kind of allegations that *Twombly* and *Iqbal* do not allow.

DRM alleges that because of a lack of certain standards DRM would like to see implemented at MSP, "it is logical to assume that some, and perhaps many,

[5] These four alleged practices are: (1) having no standards for determining whether placing a prisoner with serious mental illness in solitary confinement or on a behavior management plan will be harmful to the prisoner's mental health; (2) failing to have a system in place to review and evaluate the diagnosing and prescribing practices of its mental health staff; (3) failing to have a system to classify prisoners according to their mental health needs; and (4) having no system in place for auditing, evaluating or ensuring the effectiveness of its mental health care program in treating prisoners with serious mental illness. (ER, 103, ¶¶ 16(c), (f), (g), (i).)

prisoners with serious mental illness" will suffer injury. (SER, 49-50 (emphasis added).) The mere fact that DRM would prefer different standards, however, does not produce a logical assumption that the current practices are deficient, or that Eighth Amendment violations are likely to occur in the future. Without an allegation that the lack of a particular standard led to any of the nine "representative examples" of unconstitutional conduct, or any constitutional violation, ever, these allegations do not plausibly state a claim for relief.

b. By DRM's Own Admission, There Are No Factual Allegations of an Ongoing Custom Relating to Inadequate Mental Health Treatment.

While much of DRM's complaint concerns alleged unconstitutional disciplinary practices and, in particular, the use of locked housing on inmates with serious mental illness, it also makes allegations of a different kind — that the mental health treatment provided at MSP, including the diagnosis, medication and treatment by mental health staff, is unconstitutional. (ER, 102-123, ¶¶ 16, 25, 34-35, 39, 44, 49, 58-59, 65, 68, 73, 78, 85.) At the very least, any aspect of DRM's lawsuit concerning inadequate mental health treatment was appropriately dismissed, as confirmed by DRM's own statements at the hearing on the motion to dismiss.

The two customs alleged by DRM which relate to mental health treatment are: (1) engaging in a pattern or refusing to properly diagnose prisoners as

suffering from serious mental illness; and (2) engaging in a pattern of refusing to provide prisoners with medications for serious mental illness. (ER, 102-103, ¶16 (d), (e).)[6] Although certain factual matter is alleged concerning these two alleged practices, it is based exclusively on the alleged practice of MSP's former psychiatrist.

Specifically, it is alleged Dr. Edwards refused to diagnose six inmates with a serious mental illness during an apparent seven-year period, 2005 to 2012. (ER, 102-123, ¶¶ 16(d), 39, 58-59, 65, 68, 73, 78, 85.) DRM also alleges Dr. Edwards refused to prescribe medications for serious mental illness to six inmates over an apparent six-year period, 2006 to 2012. (ER, 102-120, ¶¶ 16(e), 39, 44, 49, 59, 68, 73.)

Dr. Edwards is no longer employed by MSP. For this reason, in amending its complaint, DRM removed specific reference to Dr. Edwards, and used the term "prison staff" instead. (*Compare*, (SER, 96-150, ¶¶ 40-43, 71, 81, 90, 108-110, 120, 125, 133.) *with* (ER, 102-123, ¶¶ 16, 29-35, 39, 42-44, 48-49, 51, 55, 58-60, 63-68, 71, 73, 78-80, 84-87.)) At the motion to dismiss hearing, DRM acknowledged it has no knowledge that Dr. Edwards' alleged offending practices continue at MSP today. (ER, 71-72.)

[6] As discussed above, the allegations concerning a lack of standards in mental health treatment are not addressed further because they are not supported by any factual matter whatsoever. (ER, 103-104, ¶¶ 16(f), (i).)

DRM's attempt to allege an MSP custom by relying on the past practices of a retired psychiatrist was specifically addressed by the District Court:

> MR. ELLINGSON: . . . . The Defendant makes much of the fact that one of the psychiatrists previously employed by the Department of Corrections is now gone. That may very well be a good thing, but the mere fact that the person is gone does not establish that the policies and practices and treatment offered by new psychiatrists will meet constitutional standards. They appear to suggest –
>
> THE COURT: What is the standard that this Court is to assume to apply if the proposition that you stated is accepted?
>
> I take it you find fault or may find fault with the practice of this now departed psychiatrist. How is the Court at this stage of the proceedings to make a determination that whatever would replace what this man did is going to be, of itself, inadequate?
>
> MR. ELLIINGSON: I don't think that the Court can make a determination at this point on that issue. And I think that it will only be after the completion of discovery and the development of facts that we will be able to come back to the Court and say this is an improvement, perhaps; or <u>even, perhaps, that this particular – the particular practices of the new psychiatrist meet constitutional muster</u>. It is, quite frankly, too early in the whole process to ask the Court to make a determination on that basis. <u>What we have are the practices of the past</u>.
>
> THE COURT: Which, at least the Defendants' position is and I don't think it's disputed, that man's gone and he's not making decisions about what happens either at the hospital or the prison anymore.
>
> MR. ELLINGSON: That is true. But his absence does not address the other policies and practices with respect to prisoners who have mental illness.

Id. (emphasis added).

Thus, DRM has acknowledged that, as it relates to alleged practices of misdiagnosing and failing to treat inmates with serious mental illness, the only allegations in the complaint "are the practices of the past." (ER, 72.) DRM specifically concedes that current practices at MSP may very well "meet constitutional muster." *Id*. Needless to say, allegations pertaining to treatment provided by a psychiatrist no longer employed by MSP is not evidence of an ongoing, system-wide practice. *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990) ("[t]he deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.").

Nonetheless, DRM argues it should be allowed to conduct discovery to make sure MSP's current mental health treatment is constitutional. In doing so, DRM puts the cart before the horse. The Supreme Court has held Fed. R. Civ. P. 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. The ability to conduct discovery must be based on more than a hunch that it might yield supportive facts. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). This is particularly true when DRM, as a protection and advocacy organization, has been granted many tools outside of litigation to determine whether MSP's current practices meet constitutional muster. *See* 42 U.S.C. § 10805. Without knowledge that current

mental health treatment practices at MSP are constitutionally deficient, DRM's complaint was correctly dismissed as to those alleged practices.

Moreover, even if DRM had information that current MSP mental health staff have a practice of "refusing to properly diagnose prisoners as suffering from serious mental illness" or "engaging in a pattern of refusing to provide prisoners with medications for serious mental illness" (ER, 102-103, ¶16 (d), (e)), it is nonetheless true that "[a] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Coleman v. L.A. Cnty. Sheriff's Dep't*, No. CV 10-4277-PSG, 2010 WL2720591, at *3 (C.D. Cal. July 8, 2010). Likewise, a mere difference of opinion between an inmate and medical staff regarding appropriate medical treatment is insufficient to constitute deliberate indifference. *Toguchi*, 391 F.3d at 1057-58; *Warclub*, 2012 WL6949703, at*3. Indeed, in every one of DRM's "representative examples," the inmate was seen and treated by mental health staff — DRM simply disagrees with the particular diagnosis and treatment provided by the now-retired psychiatrist. This is insufficient to state an Eighth Amendment claim. *See, e.g., Woodford*, 2008 WL276382, at **9-10; *see also*, *Jackson*, 90 F.3d at 332; *McCray*, 357 F. Supp. 2d at 781.

c. No Factual Matter Shows a Custom of Unconstitutional Discipline or Use of Locked Housing.

Putting aside the alleged practices concerning a lack of standards (part a., *supra*) and inadequate mental health treatment (part b., *supra*), the only three alleged practices that remain are: (1) placing prisoners with serious mental illness in various forms of solitary confinement for twenty-two to twenty-four hours per day for months and years at a time; and (2) placing prisoners with serious mental illness on behavior management plans that involve solitary confinement and extreme restrictions of privilege and (3) failing to adequately consider prisoners' serious mental illnesses when making decisions about prisoners' housing and custody levels. (ER, 102-103, ¶ 16(a), (b), (h).) Even accepting DRM's allegations as true, they do not suggest "practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino*, 99 F.3d at 918.

DRM alleges approximately 300 out of 1,500 prisoners in the current MSP population suffer from mental illness. (ER, 104, ¶ 17.) With this in mind, DRM alleges nine inmates were improperly subjected to solitary confinement over an apparent nine-year period, 2005 to 2014. (ER, 102-124, ¶¶ 16(a), 38, 42-44, 48, 50, 54, 60, 63, 71, 80, 91.) DRM alleges four inmates were improperly subjected to behavior management plans during an apparent eight-year period, 2006 to 2014. (ER, 102-123, ¶¶ 16(b), 8, 43-44, 50, 55, 71, 87.) DRM alleges one inmate was

assigned housing and custody levels without giving adequate consideration to his serious mental illness. (ER, 117, ¶ 63.)

Even adopting the premise that the nine inmates were subject to locked housing and behavior management plans in violation of the Eighth Amendment, there is no indication these cases involve anything more than isolated incidents. Although any number of constitutional violations is too many, one cannot allege an improper custom by pointing to nine or less examples over the course of a nine year period in which thousands of prisoners have been housed at MSP. *See Trevino*, 99 F.3d at 918.

In the District Court, DRM argued that requesting system-wide relief was permitted under the "almost identical" case of *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014). (SER, 43.) *Parsons* could hardly be less similar. In *Parsons*, a class was certified based on substantial evidence of severe understaffing for psychiatric care, including prison staff's own statements regarding "abysmal staffing." *Id*. at 668, 680. *Parsons* is only helpful to the extent it provides an example of a case in which real, specific evidence supported the claim of an ongoing unconstitutional custom.

This is not such a case. DRM has no factual basis to support the proposition that an ongoing policy or custom at MSP places prisoners with mental illness at

risk of serious harm. DRM's factual allegations pertain to isolated incidents of past conduct that are unique to the particular facts of each case.

3. No Factual Allegations Show a Causal Nexus.

DRM does not provide factual allegations from which to make a reasonable inference that any MSP policy or custom will cause violations of the Eighth Amendment in the future. *Harry A. v. Duncan*, 351 F. Supp. 2d 1060, 1069 (D. Mont. 2005) ("A policy is the moving force behind a constitutional violation if it caused the violation."). To prove an ongoing custom or practice has or is likely to cause an Eighth Amendment violation, DRM must identify an ongoing risk to its members of "significant injury or the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

DRM's complaint does not adequately identify or allege such an ongoing risk. DRM complains about the past treatment of nine individual prisoners, but there are no allegations plausibly suggesting any current policy or custom will result in further significant injury or the unnecessary and wanton infliction of pain. *Iqbal*, 556 U.S. at 678. Again, "mere disagreement between a prisoner-patient and prison medical personnel over the need for or course of medical treatment is not a sufficient basis for an Eighth Amendment violation." *Watson*, 2006 WL1876891, at *9. DRM's allegations concerning an alleged causative link between MSP's policies and procedures and any future harm are, at best, speculative.

C. DRM Lacks Standing to Seek Injunctive and Declaratory Relief.

DRM lacks standing to raise a claim for injunctive or declaratory relief because it failed to plausibly allege that prisoners will be subject to substantial and immediate irreparable injury if the relief requested is not granted.

In addition to an Article III standing analysis, a separate and additional jurisdictional requirement for a party seeking equitable relief must be shown — the likelihood of substantial and immediate irreparable injury. *Haynie v. Harris*, No. C 10-1255 SI, 2014 U.S. Dist. LEXIS 28293 *12 (N.D. Cal. Mar. 4, 2014); *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Haynie*, 2014 U.S. Dist. LEXIS 28293 *13 (citation omitted) (internal quotation and punctuation omitted). Similarly, a claim for declaratory relief is not ripe for "adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Hodgers-Durgin v. V. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999).

A plaintiff must demonstrate standing for each form of relief requested, and standing must be evident on the face of the complaint in order to survive a motion to dismiss. *Aiken v. Nixon*, 236 F. Supp. 2d 211, 221 (N.D. N.Y. 2002). Here, DRM's complaint does not identify any individual prisoner who will likely suffer

substantial and immediate irreparable injury if relief is not granted, and it likewise fails to identify any "ongoing risks" of violations of federal rights. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 535, 645 (2002). Since DRM cannot establish standing on behalf of an individual member of its association to warrant equitable relief, DRM itself lacks standing. *Haynie*, 2014 U.S. Dist. LEXIS 28293, at **22-26.

To satisfy the requirement of irreparable injury, a plaintiff must demonstrate a "real or immediate threat that they will be wronged again – a 'likelihood of substantial and immediate irreparable injury.'" *O'Shea v. Littleton*, 414 U.S. 488, 466 (1974). This requirement must be viewed in conjunction with the general rule that injunctive relief is "to be used sparingly, and only in a clear and plain case." *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (internal quotation omitted). Further, when a government agency is involved, the government must be granted the "widest latitude in the dispatch of its own internal affairs." *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."). "When a state agency is involved, these considerations are, if anything, strengthened because of federalism concerns." *Gomez*, 255 F.3d at 1128. "Accordingly, injunctive relief is appropriate only when 'irreparable injury' is threatened. . . ." *Id.*

Additionally, the "substantial and immediate irreparable injury" standard for injunctive relief "must also be viewed in conjunction with the requirements of the Prison Litigation Reform Act . . . ." *Id.* at 1128-29 (citing 18 U.S.C. § 3626). The PLRA limits the prospective relief which can be granted in prisoner cases:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A); *see also Tischler v. Billings Women's Prison*, Cause No. CV-07-173- BLGRFCCSO, 2008 WL 2233501, at **1-2 (D. Mont. Mar. 24, 2008) *report and recommendation adopted*, Cause No. CV-07-173-BLGRFCCSO, 2008 WL 2233500 (D. Mont. May 27, 2008).

Here, DRM's broad request for injunctive relief — requesting prisoners at MSP with serious mental illness "receive constitutionally adequate mental health care" — underscores DRM's inability to provide specific factual matter as to the likelihood of any future harm. DRM alleges past incidents of alleged misconduct against nine individual inmates, but "[p]roof of past violations will not do; nor is it sufficient simply to establish that some violations continue." *Brown v. Plata*, 563 U.S. 493, 567 (2011). DRM has even gone so far as to admit it has no knowledge

of whether certain alleged practices at MSP are in fact ongoing. DRM has no standing because this is not a justiciable case, which constitutes yet another ground to affirm the District Court. *See id.*; *see also Hodgers-Durgin*, 199 F.3d at 1044.

II. DRM'S MERE DISAGREEMENT WITH THE DISTRICT COURT DOES NOT EVIDENCE PERSONAL BIAS OR UNUSUAL CIRCUMSTANCES WARRANTING REASSIGNMENT.

Reassignment on remand is "an extraordinary power and should rarely be invoked." *United States v. Winters*, 174 F.3d 478, 487 (5th Cir. 1999) (citing *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997)). "Absent proof of personal bias on the part of the district judge, remand to a different judge is proper only under unusual circumstances." *United States v. Reyes*, 313 F.3d 1152, 1159 (9th Cir. 2002) (citing *Medrano v. City of L.A.*, 973 F.2d 1499, 1508 (9th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993)). Such unusual circumstances warranting reassignment on remand rarely exist. *Glen Holly Entm't Inc. v. Tektronix, Inc.*, 352 F.3d 367, 381 (9th Cir. 2003).

An appellate court's authority to reassign a case to a different judge on remand is based upon the statutory power to "require such further proceedings to be had as may be just under the circumstances." *Liteky v. United States*, 510 U.S. 540, 554 (1994) (citing 28 U.S.C. § 2106 (2012)). Subject to the general rule that reassignment is only appropriate when the personal bias of the District Court is

demonstrated, this Circuit considers the following factors in deciding whether "unusual circumstances" require reassignment:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected;
>
> (2) whether reassignment is advisable to preserve the appearance of justice; and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Reyes, 313 F.3d at 1159.

DRM has presented no evidence of the District Court's personal bias, and the three factors outlined above do not weigh in its favor. DRM disagrees with the District Court's evaluation of the sufficiency of DRM's complaint, but this is not the kind of rare case in which the extraordinary power of reassignment is warranted. As aptly stated by the United States Supreme Court, "[j]udicial rulings alone almost never constitute a valid basis for finding bias or partiality" for purposes of reassigning a different judge on remand. *Liteky*, 510 U.S. at 555 (citation omitted); *see also Hull v. Mun. of San Juan*, 356 F.3d 98, 104 (1st Cir. 2004) ("views formed by a judge in considering a case are normally not a sound basis . . . for directing that a different judge be assigned on remand").

A. The District Court's Prior Statements and Rulings Do Not Demonstrate Personal Bias or an Inability to be Impartial.

Assuming *arguendo* the District Court's rulings were erroneous, this at most establishes an entitlement to reversal and remand. DRM does not explain how an incorrect ruling might demonstrate the District Court would have "substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous." *Reyes*, 313 F.3d at 1159. Nor does DRM explain how reassignment is necessary "to preserve the appearance of justice." *Id*.

DRM's only case citation on this issue does not support reassignment. In *Reyes*, the district court rejected the defendants' plea agreements, imposed greater sentences, then refused to allow the defendants to withdraw their guilty pleas. *Id*. at 1157-58. It blatantly disregarded the Federal Rules of Criminal Procedure's mandate to "afford the defendant the opportunity to . . . withdraw the plea." *Id*. This Court reversed and ordered reassignment on remand due to the district judge's adamant refusal to follow established precedent, his delay and ultimate refusal to authorize transcript expenditures, and his statements that the defendants attempted to "manipulate the system" in their motion to withdraw guilty pleas. *Id*. at 1159-60. In stark contrast to *Reyes*, the statements and rulings complained of here were, at the very least, reasonable and supported, and fall far short of demonstrating an inability or lack of desire to adjudicate this matter fairly.

The common thread in those rare cases granting reassignment is "the district court's expressions of frustration with an attorney or party [which] somehow appea[r] to affect his or her handling of the substantive issues in the case." *Cal. v. Montrose Chem. Corp.*, 104 F.3d 1507, 1522 (9th Cir. 1997). For example, in *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1034 (9th Cir. 2012), reassignment was necessary because the district judge had said the case was "unnecessary," a "waste of time," "not worth a dime," and "should never have been filed." Under those circumstances, the district court would likely not be able to put the views "he repeatedly expressed" out of his mind. *Id.*; *see also United States v. Rivera*, 682 F.3d 1223, 1225, 1230, 1234-1235, 1237 (9th Cir. 2012) (reassigning case after the district judge condemned the criminal defendant's "manipulative" and "shameful" use of his family members as a sentencing prop and a "charade.").

Disagreement with a trial court decision or result is something seen in almost every appeal. Such disagreement does not create the unusual and rare case necessitating reassignment. In *Wyler Summit Partnership v. Turner Broadcasting*, 235 F.3d 1184, 1195-96 (9th Cir. 2000), for instance, this Court reversed a grant of summary judgment while voicing its displeasure with the district court's practice of adopting counsel's proposed order verbatim "because it raises the possibility that there was insufficient independent evaluation of the evidence and may cause

the losing party to believe that its position has not been given the consideration it deserves." Further, the adopted order was "conclusory to a fault, lack[ed] sufficient analysis, and [was] flatly wrong. . . ." *Id.* Nonetheless, this Court found the record did "not demonstrate the type of 'unusual circumstances' that require us to remand the case to a different judge." *Id.*

Here, the District Court did not express frustration with DRM or its counsel; it simply stated its reasoning on the substantive legal issues before it. *Hull*, 356 F.3d at 104. There is no indication that, in the event of a remand, the District Court is unable or unwilling to fairly preside over the adjudication of this case. *Montrose Chem. Corp.*, 104 F.3d at 1522. The appearance of justice would not be promoted by reassignment, it would be denigrated by allowing DRM to effectively shop its case around to a different judge, without adequate justification.

Contrary to DRM's argument, there is nothing unusual or remotely nefarious about the District Court's statements and rulings in this case. For example, DRM complains about the District Court's decision to separate the DPHHS and DOC actions, but DRM has not alleged error in this regard on appeal. And for good reason. In ordering the cases be separated, the District Court expressly recognized the distinct nature of each set of claims and appropriately exercised its inherent authority to manage its docket and "ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery

and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly." *See United States v. Grace*, 526 F.3d 499, 508-09 (9th Cir. 2008).

DRM next complains about the District Court's statement that DRM's prior complaint "may have been crafted in such a way as to maximize what might be characterized as the shock effect of the pleadings." (DRM's Br., 5, 50). However, the District Court's statement was made in the context of a larger discussion about the need for specificity in the complaint in order to state a plausible claim. (ER, 212.) The District Court's general observation was more than justified in light of the conclusory nature of DRM's allegations.

DRM also takes issue with certain observations by the District Court concerning the term "serious mental illness." (DRM's Br., 33, 50-51.) However, the District Court correctly noted the term is not defined in applicable statutes or case law and does not constitute a recognized constitutional standard. (ER, 222.) Once again, while DRM apparently disagrees with this assessment, its remedy is through an appeal. *See Wyler Summit P'ship*, 235 F.3d at 119; *Winters*, 174 F.3d at 487.

DRM next argues the District Court was wrong to caution that prospective relief cannot be afforded to deceased inmates. (ER, 215-216; 228.) However, it is accurate that DRM would not have standing to assert a claim for equitable relief on

behalf of deceased prisoners who are not subject to any likelihood of substantial and immediate irreparable injury. *Haynie*, 2014 U.S. Dist. LEXIS 28293, at *12; *Gomez*, 255 F.3d at 1129. Regardless, there is no indication this consideration formed any part of the District Court's rationale on Defendants' motion to dismiss. The District Court's correct observation at the prior status conference does nothing to suggest bias or the need for reassignment.

DRM also suggests the District Court may be biased because DRM's *pro hac vice* counsel was not allowed to argue by telephone at the hearing on Defendants' motion to dismiss. (DRM's Br., 27, 51.) However, the District Court was simply applying the applicable local rule. D. Mont. L.R. 83.1(d)(5) (2015). DRM's local counsel argued the motion, and *pro hac vice* counsel was allowed to appear via telephone. (ER, 172-181.) The local rule expressly requires that "[l]ocal counsel must participate actively in all phases of the case . . . to the extent necessary for local counsel to be prepared to go forward with the case at all times . . ." D. Mont. L.R. 83.1(d)(5). The District Court may suspend or modify a local counsel's duties only "in extraordinary circumstances." *Id*. Application of the local rule in no way suggests partiality or personal bias. *Reyes*, 313 F.3d at 1159 (citing *Medrano*, 973 F.2d at 1508). Indeed, there is no indication the District Court would have ruled any differently if Defendants' counsel had sought leave to argue by telephone.

Lastly, DRM argues the District Court "adamantly refused to correct its clear error when ruling on the DOC Defendants' motion to dismiss." (DRM's Br., 34, 48.) As set forth in Defendants' Statement of the Case, DRM's argument is based on speculation. It also fails to articulate any proof the District Court is personally biased against DRM. DRM cherry-picks portions of the hearing transcript to advance its theory that the District Court mixed up its rulings, but a review of the entire transcript refutes this theory. The District Court expressly and correctly distinguished the two cases during the hearing. (ER, 46, 49-50; 75.) To the extent certain statements made by the District Court during the course of the hearing may have been confusing, this is far from sufficient to demonstrate bias, or any other unusual rare circumstance necessitating reassignment.

B. Reassignment Would Entail Needless Waste and Duplication.

DRM essentially glosses over the third factor in the analysis —"whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Reyes*, 313 F.3d at 1159.

Where a plaintiff fails to show the need for reassignment under the first two factors of *Reyes*, "even the minor degree of waste or duplication caused by reassignment would be out of proportion to any gain in preserving the appearance of fairness." *Hernandez v. City of El Monte*, 138 F.3d 393, 403 (9th Cir. 1998) (considerations of waste and duplication outweighed any gain in preserving the

appearance of fairness, notwithstanding the fact that the case was dismissed at an early stage in the proceedings).

DRM argues "this case is still at the pleadings stage," but the statement is misleading. DRM filed its initial complaint against DOC nearly two years ago, and a great deal of discovery has already been completed. (SER, 96-150.) This alone demonstrates that any gain to be had from reassignment is outweighed by needless waste and duplication. *See United States v. Lyons*, 472 F.3d 1055 (9th Cir. 2007) (where a procedural history spanning over one year is involved and the issues are complex, it would be undue waste and duplication to reassign to a different judge).

In addition, the District Court continues to preside over DRM's case against DPHHS. The Court advised and the parties have agreed the cases involve common questions of fact and present the potential for overlap in discovery. (ER, 226.) DRM can hardly dispute this point, given its decision to bring its claims against DPHHS and DOC as a single lawsuit. Taking into account the District Court's considerable knowledge of this case, and the fact that the District Court continues to preside over DRM's companion case against DPHHS, the degree of waste and duplication caused by reassignment to a new judge is out of proportion to any gain in preserving the appearance of fairness. This, in conjunction with the fact that no

circumstances suggest personal bias or unusual circumstances, demonstrate the extreme remedy of reassignment is not warranted.

CONCLUSION

DRM has failed to state a plausible claim under § 1983. Putting aside mere conclusions, there are no factual allegations that a final policymaker was deliberately indifferent, or that an ongoing policy or custom exists at MSP that is likely to violate the Eighth Amendment rights of DRM's members. DRM's complaint was correctly dismissed under Fed. R. Civ. P. 12(b)(6), and the District Court should be affirmed.

DATED this 28th day of March, 2016.

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/s/Thomas J. Leonard
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CERTIFICATE OF COMPLIANCE

I certify that:

_X_ This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,640, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

_X_ This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, font size 14, Times New Roman.

DATED this 28th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 28, 2016.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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/s/Thomas J. Leonard

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no known related cases pending in this Court.

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CERTIFICATE FOR BRIEF IN PAPER FORMAT
Ninth Circuit Case No.14-35004

I, Thomas J. Leonard, certify that this brief is identical to the version submitted electronically on _____.

DATED this ___ day of March, 2016.

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