Case No. 15-35770

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appeal from the United States District Court for the District of Montana, Butte Division

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REPLY BRIEF OF PLAINTIFF-APPELLANT DISABILITY RIGHTS MONTANA, INC.

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INTRODUCTION

Appellees Mike Batista and Leroy Kirkegard, respectively the Director of the Montana Department of Corrections and the Warden of the Montana State Prison ("Prison") (collectively the "DOC Defendants"), fail to appreciate the standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Throughout their brief, the DOC Defendants appear to assume that Disability Rights Montana, Inc.'s ("DRM") Complaint must meet the standards applicable to a motion for summary judgment or at trial, rather than the lower threshold applicable to a motion to dismiss.

On a motion to dismiss, the facts alleged in DRM's Complaint must be accepted as true, be construed in the light most favorable to DRM, *Mason-Ealy v. City of Pomona*, 557 F. App'x 675, 677 (9th Cir. 2014), and need only "plausibly suggest an entitlement to relief." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The plaintiff need only allege enough facts "'to raise a reasonable expectation that discovery will reveal evidence' to support the allegation." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The Court's review is limited to the allegations contained in DRM's Complaint and documents incorporated into the Complaint by reference. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The DOC Defendants fail to apply these

standards and, instead, go so far as to repeatedly rely on evidence that is not in the district court record, including evidence that is hearsay and demonstrably false.

The DOC Defendants also ignore inconvenient factual allegations. One of their themes is that DRM's allegations all relate to past conduct and that there are no allegations suggesting that the threat of harm to prisoners with serious mental illness is ongoing. Yet DRM's current Complaint describes in detail the story of one prisoner with serious mental illness who was sent to the Prison two months *after* DRM filed its original complaint in March 2014 and died as a result of the DOC Defendants' policies and practices four months later. (*See* E.R.016 and E.R.121-125, ¶¶ 81-92.)

Ignoring the forest in favor of the trees, the DOC Defendants also argue that narrow subsets of DRM's allegations cannot constitute violations of the Eighth Amendment. But DRM's Complaint is about system-wide problems and a long-standing pattern of conduct that continue to pose a substantial risk of serious harm to all prisoners with serious mental illness. While many of those individual allegations constitute Eighth Amendment violations on their own, DRM's allegations must be viewed as a whole when determining whether they plausibly suggest that the DOC Defendants are deliberately indifferent. *See Tellabs*, 551 U.S. at 322-23 (when ruling on Rule 12(b)(6) motions to dismiss, "courts must

consider the complaint in its entirety" and "all the facts alleged, taken collectively").

Finally, with respect to DRM's request that this case be reassigned to a different district judge on remand, the DOC Defendants apply the wrong legal standard. The DOC Defendants repeatedly state that DRM must prove that the district judge has a personal bias in this case. That is not the law. DRM accurately stated the test in its opening brief and the unique facts of the proceedings below satisfy that test.

ARGUMENT

I. DRM's Complaint Alleges Facts Plausibly Suggesting The Existence Of Ongoing Eighth Amendment Violations By The DOC Defendants.

The DOC Defendants make three broad arguments in support of the District Court's Order. First, that DRM has not plausibly alleged deliberate indifference by the DOC Defendants. Second, that DRM has not plausibly alleged the existence of an ongoing policy or custom likely to cause a violation of the Eighth Amendment. Third, that DRM lacks standing to seek injunctive or declaratory relief because it has not alleged facts plausibly suggesting that prisoners with serious mental illness face a likelihood of substantial and immediate irreparable injury. None of those arguments withstands scrutiny.

A. DRM'S Complaint contains allegations plausibly suggesting deliberate indifference by the DOC Defendants.

The DOC Defendants argue that DRM failed to allege deliberate indifference because the Complaint supposedly does not contain allegations plausibly suggesting that the DOC Defendants are subjectively aware of, and are disregarding, a substantial risk of harm to prisoners with serious mental illness. (*See* DOC Br. at 18.) A fair reading of the Complaint shows otherwise. At least five sources of knowledge make the DOC Defendants subjectively aware of the fact that they are placing prisoners with serious mental illness at a substantial risk of serious harm.

1. The *Walker* and *Katka* cases suggest that the DOC Defendants are aware that the Prison's use of solitary confinement and behavior management plans can exacerbate prisoners' serious mental illnesses and that there may be deficiencies in its mental health care system.

The first source of knowledge is two prior lawsuits against the Montana Department of Corrections: *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872; and *Katka v. State*, No. BDV 2009-1163 (1st Jud. Dist. Ct., Lewis and Clark Co.). The DOC Defendants contend that *Walker* is irrelevant because, in their view, it did not involve the same issues as this case. (DOC Br. at 25.) But that is not true. *Walker* involved allegations by a prisoner with serious mental illness, 68 P.2d at 881, that Prison staff were, among other things, housing him in administrative segregation, placing him on behavior modification plans ("BMPs"),

and punishing him for behavior resulting from his serious mental illness, *see id.* at 874-76, all in violation of the Eighth Amendment to the U.S. Constitution and the Montana Constitution. *See id.* at 877. The *Walker* court discussed at length "the psychological harm caused by placing inmates in a severely restricted setting for nearly 24 hours a day." *Id.* at 881. The court held that "BMPs and the living conditions in [administrative segregation] constitute an affront to the inviolable human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate's mental health condition." *Id.* at 885. The *Walker* court ordered that Prison officials modify the operations of the Prison's administrative segregation unit to correct these constitutional violations. *Id*. In short, *Walker* is directly on point.

Similarly, *Katka* involved evidence by mental health experts regarding the Prison's use of solitary confinement and inadequate mental health treatment. (E.R.30-31, ¶¶ 94.) The Montana Department of Corrections settled the case by agreeing to implement changes to its housing and treatment of prisoners with serious mental illness and its treatment of suicidal prisoners. (*Id.*)

The DOC Defendants argue that because DRM did not expressly allege that they are violating the *Walker* court's order or breaching the *Katka* settlement agreement, it must mean that all problems have been "appropriately remedied." (DOC Br. at 27.) There is no way that inference can be drawn from DRM's

Complaint. On the contrary, DRM's allegations strongly suggest the DOC Defendants may be violating the *Walker* court's order and may be in breach of the *Katka* settlement agreement – but those are issues for other litigants. DRM was not a party to those lawsuits.

Instead, DRM described those lawsuits and their outcomes to plausibly suggest that the DOC Defendants are subjectively aware that their use of solitary confinement and behavior management plans, and deficiencies in their mental health treatment system, have placed prisoners with serious mental illness at risk of harm in the past and could do so again in the future. It is fair to assume that the two top officials responsible for the policies and procedures at the Prison (*see* DOC Br. at 17) are aware of a Montana Supreme Court decision and settlement agreement that govern the administration of important aspects of their prison. Given the existence and nature of the resolution of those lawsuits, the DOC Defendants cannot claim ignorance of the serious health risk posed by the practices alleged in DRM's Complaint.

2. The DOC Defendants' request for certification by the National Commission on Correctional Health Care suggests that they know prolonged use of solitary confinement poses a substantial risk to the health of prisoners with serious mental illness.

The second source of knowledge is the DOC Defendants' effort to obtain certification from the National Commission on Correctional Health Care

("NCCHC"). NCCHC's Standards for Mental Health Services in Correctional Facilities, MH-E-07, states: "Inmates who are seriously mentally ill should not be confined under conditions of extreme isolation." (E.R.104, ¶ 19.) If a national correctional health care organization has a standard specifically recommending against a practice, it is reasonable to infer that the practice poses a risk to the health of prisoners. If the DOC Defendants sought certification from that organization, it is reasonable to infer that they are subjectively aware of both the organization's standards and the risk they warn against.

Ignoring the rules applicable to motions to dismiss, the DOC Defendants attempt to rebut DRM's allegation by pointing to an alleged press release they claim to have issued stating that they are in compliance with the NCCHC's standards. That press release, they contend, establishes that they cannot be deliberately indifferent. There are several flaws in this argument.

First, DRM and the Court cannot evaluate the contents of the alleged press release because, as of the date of the filing of this brief, the press release was not posted at the Internet web address cited by the DOC Defendants.[1] Second, even if

[1] The DOC Defendants did not include a copy of the alleged press release in Appellees' Supplemental Excerpts of Record. Instead, the DOC Defendants cite to their trial court brief (*see* DOC Br. at 27-28, citing to SER, 13, 14) which contains a citation to a page on the Montana Department of Corrections' website. Efforts to access that webpage resulted in a message from the Montana Department of Corrections stating: "PAGE NOT FOUND".

the press release were available for viewing, it is extrinsic evidence that cannot be considered on a motion to dismiss. The DOC Defendants attempt to justify their improper argument by citing to law holding that courts may consider "documents incorporated into the complaint by reference" and documents "the plaintiff refers to extensively . . . [or which] form the basis for the plaintiff's claim." (DOC Br. at 28 n.4.) None of those circumstances exist here. DRM's Complaint does not incorporate the press release by reference or in any way refer to it, and the document does not form the basis for DRM's claim. Third, any statements in the alleged press release would be double-hearsay (statements by the DOC Defendants about statements by NCCHC) and presumptively inadmissible as evidence on summary judgment or at trial, let alone as a basis for supporting a motion to dismiss.[2] *See* Fed. R. Evid. 801(c) and 802; *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1291 n.3 (11th Cir. 2009) (press release did not fall within business record exception to hearsay rule).

Finally, even if the DOC Defendants have obtained certification from the NCCHC, that does not make it implausible that the DOC Defendants are violating the Eighth Amendment, because there are no allegations regarding what

[2] The DOC Defendants also cite one district court decision, *Patel v. Parnes*, 253 F.R.D. 531, 546-47 (C.D. Cal. 2008), for the proposition that courts may take judicial notice of the existence of press releases in certain circumstances. (*See* DOC Br. at 28 n.4.) Unlike here, the plaintiff in *Patel* incorporated the press release into its complaint by reference and did not object to the defendants' request that the court take judicial notice of it. *See id*. at 547.

information the NCCHC reviewed in reaching its decision. *See Ruiz v. Johnson*, 37 F. Supp. 2d 855, 901-02 (S.D. Tex. 1999), *rev'd on other grounds, U.S. v. Ruiz*, 293 F.3d 941 (5th Cir. 2001) (rejecting "NCCHC accreditation as a proxy for a certification of the constitutionality of [a prison system's] medical care" and noting that "NCCHC's evaluation focuses on the written standards, policies, protocols, bureaucracy, and infrastructure . . . ."); *see also Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004) ("[I]t is absurd to suggest that the federal courts should subvert their judgment as to alleged Eighth Amendment violations to the [American Correctional Association] whenever it has relevant standards. . . . [T]he ACA's limited inspections are not . . . binding as factual findings on the magistrate or on this court."). When discovery resumes in this case, DRM will learn what, if anything, the NCCHC knew about the policies and practices described in DRM's Complaint.

3. The DOC Defendants' receipt of grievances from prisoners with serious mental illness plausibly suggests that the DOC Defendants are subjectively aware that they are placing those prisoners at risk of harm.

The DOC Defendants' third source of knowledge is grievances they have received from prisoners with serious mental illness. DRM alleges that "[p]risoners with serious mental illness regularly . . . grieve the level of mental health care they are provided, including the negative impact of isolation, mental health staff discontinuing their needed medications and mental health staff ignoring previous

diagnoses. . . . Several prisoners have appealed the inadequacy of the mental health treatment they receive to the Prison Warden and ultimately to the DOC Director." (E.R. 125, ¶ 95.)

DRM's Complaint includes a specific example of one such prisoner, James Larson. Mr. Larson was sentenced "Guilty But Mentally Ill" and suffers from schizophrenia. (E.R.110, ¶ 37.) Nevertheless, Prison staff repeatedly placed Mr. Larson in solitary confinement and placed him on behavior modification plans for threatening self-harm. (E.R.110-111, ¶ 38.) In 2012, Prison medical staff decided that Mr. Larson was faking his mental illness and tapered off his antipsychotic medications. (E.R.111, ¶ 39.) Mr. Larson filed a grievance regarding the Prison's inadequate mental health care and exhausted his administrative remedies through an appeal to the DOC Director. (*Id.*, ¶ 41.) The DOC Defendants contend that this grievance must be disregarded because DRM did not expressly allege that Director Batista denied Mr. Larson's appeal. But it is reasonable to infer that the appeal was denied, because DRM alleges that Mr. Larson remained in solitary confinement as of the date of the Complaint and there are no allegations that Prison staff subsequently restarted his antipsychotic medications. (*Id.*, ¶¶ 39, 40.)

The fact that the DOC Defendants received those grievances plausibly suggests that they are subjectively aware that prisoners with serious mental illness

are being exposed to a substantial risk of serious harm and that they have refused to take any steps to protect them from that harm.

4. DRM's February 26, 2014 letter to Director Batista made the DOC Defendants subjectively aware of the fact that they are placing prisoners with serious mental illness at a substantial risk of serious harm and they have done nothing to protect those prisoners from that harm.

The fourth source of knowledge that the DOC Defendants cannot dispute is DRM's February 26, 2014 letter to Director Batista in which DRM set forth all of the allegations in this Complaint as well as additional information clearly alerting the DOC Defendants to the fact that their policies and practices are placing prisoners with serious mental illness at a substantial risk of serious harm. (*See* E.R. 133-171.[3]) The thirty-nine page letter states:

> Disability Rights Montana's extensive investigation of the conditions, policies and practices at MSP and [the Montana State Hospital] has revealed numerous violations of federal law and a pattern of conduct that unquestionably magnifies, instead of reduces, the severity of the mental illnesses afflicting prisoners. The policies and practices of MSP and MSH pose a threat . . . to the health and safety of prisoners with mental illness . . . . Our conclusions result from more than a year of investigation, including a review of thousands of prisoner and hospital records, interviews with dozens of prisoners with mental illness, and a December 2013 inspection of MSP by a nationally recognized expert in mental health care.

[3] Unlike the DOC Defendants' alleged press release, DRM's letter to Director Batista is expressly referenced in DRM's Complaint and expressly forms a basis for DRM's claims. (*See* E.R.126-127, ¶¶ 96-98.)

(E.R.133-134.) The letter goes on to describe in detail numerous deficiencies in the DOC Defendants' policies and practices and the substantial threat they pose to the health of prisoners with serious mental illness. (*See generally* E.R.133-171.)

There can be no legitimate dispute that, as of the date of that letter, the DOC Defendants had subjective awareness of the potential harm to which they were exposing prisoners with serious mental illness. Yet DRM's Complaint alleges that there is no evidence the DOC Defendants have made any modifications to their treatment of prisoners with serious mental illness.[4] (E.R.126, ¶ 97.) Nothing more is required to plausibly suggest deliberate indifference for purposes of a motion to dismiss. *See Starr*, 652 F.3d at 1207-08 (deliberate indifference may be found where supervisor "knowingly refuses to terminate a series of acts by others")

[4] The DOC Defendants argue that because DRM alleged "to DRM's knowledge" the DOC Defendants have not modified their treatment of the prisoners, DRM lacks factual knowledge sufficient to state a claim for relief. That is not a fair reading of DRM's allegations. To the extent the DOC Defendants quibble with the wording of DRM's allegation, DRM also alleges the DOC Defendants' "refusal to change these practices" (E.R. 126, ¶ 98) and asks the Court to declare that the constitutional violations are "ongoing." (E.R.127, ¶ B.) Moreover, as the DOC Defendants point out, discovery had been ongoing for many months prior to the filing of DRM's current Complaint. (DOC Br. at 2.) If the DOC Defendants had demonstrated to DRM that they had made meaningful modifications to their treatment of prisoners with serious mental illness, DRM could not have alleged a lack of knowledge of such modifications. The only fair reading of DRM's Complaint is that the DOC Defendants have made no such modifications to address the risk of harm to prisoners with serious mental illness and, thus, are deliberately indifferent.

(quoting *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001)).

The DOC Defendants make the specious argument that "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 knowledge from which to infer Defendants acquiesced in unconstitutional conduct by MSP staff." (DOC Br. at 24-25.) That argument ignores the limited purpose for which DRM relies on its February 2014 letter. The fact that DRM sent that letter to the DOC Defendants shows that they were subjectively "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). And given the letter's detailed statements about the serious harms being caused by the DOC Defendants' practices, it plausibly suggests that the DOC Defendants actually drew that inference.[5] *See id.* at 837, 842; *see also Bass v. Wallenstein*, 769 F.2d 1173, 1184-

[5] The DOC Defendants cite *Gillette v. Delmore*, 979 F.2d 1342 (9th Cir. 1992), for the proposition that DRM's allegations must show that they made a "conscious, affirmative choice" to ignore the serious risk of harm brought to their attention by DRM's letter. (DOC Br. at 24.) *Gillett*, however, is a case dealing with municipal liability for alleged First Amendment violations. *See* 979 F.2d at 1344, 1347. In the context of Eighth Amendment claims, it is well-established that a plaintiff may prove the mental state of the defendant through circumstantial evidence. *See Farmer*, 511 U.S. at 842. The allegations in DRM's Complaint plausibly suggest that the only explanation for the DOC Defendants' failure to change their policies and practices is a conscious, affirmative choice to ignore the serious risk of harm they pose to prisoners with serious mental illness.

85 (7th Cir. 1985) (evidence could support finding of deliberate indifference based on, among other things, assistant warden's receipt of memo and evaluation detailing deficiencies in medical care).[6]

5. DRM's first complaint in this action made the DOC Defendants' subjectively aware that they are placing prisoners with serious mental illness at a substantial risk of serious harm and they have done nothing to protect those prisoners from that harm.

Finally, DRM's original complaint against the DOC Defendants in this action eliminated any doubt that they are subjectively aware of the substantial risk of harm to which they are exposing prisoners with serious mental illness. That complaint was substantially similar to DRM's present Complaint in factual content. (*See* Compl. in Case No. 2:14-cv-25-SEH, Dkt. No. 1; E.R.016.) This Court "may take judicial notice of the records of an inferior court in other cases." *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). The fact that more than a year later the DOC Defendants have not taken steps to correct the dangers described in that complaint, plausibly suggests deliberate indifference on their part.

[6] The DOC Defendants misrepresent DRM's discussion of *Alsina-Ortiz v. Laboy*, 400 F.3d 77 (1st Cir. 2005). They falsely assert that DRM cited that case for the proposition that "high-level prison officials *were* found to be deliberately indifferent," and then chastise DRM because the high-level prisoner officials were actually dismissed from the case. (DOC Br. at 18 (emphasis added).) In fact, DRM cited *Alsina-Ortiz* for the proposition that "officials *could* be found deliberately indifferent where they knew of [a] continuing pattern of culpable failures by prison staff." (DRM Opening Br. at 47 (emphasis added)), which is an accurate description of that court's discussion of the law. *See* 400 F.3d at 81-82.

See Farmer, 511 U.S. at 846 (plaintiff may rely on events that post-date the pleadings to establish deliberate indifference).

6. Nothing in DRM's Complaint plausibly suggests that the DOC Defendants relied on the advice of medical experts or that this dispute involves merely a difference of medical opinions.

At various points in their brief, the DOC Defendants suggest that they cannot be liable because they relied on the expertise of Prison medical staff and that DRM's claims merely involve a difference of medical opinions. (*See* DOC Br. at 20, 36-37, 44, 47.) The DOC Defendants do not cite any allegations in DRM's Complaint to support that argument (*see id*.), because those allegations do not exist. Nowhere does DRM allege that there were competing medical opinions or that the DOC Defendants relied on the advice of medical staff. If the DOC Defendants wish to present evidence to that effect, the time to do so is on summary judgment or at trial, not on a motion to dismiss.

B. DRM's allegations plausibly suggest ongoing policies and customs that continue to place prisoners with serious mental illness at a substantial risk of serious harm.

The DOC Defendants next argue that DRM's allegations fail to plausibly suggest the existence of deficient policies or customs sufficient to sustain an Eighth Amendment claim. That argument ignores the clear and extensive allegations in DRM's Complaint.

1. The DOC Defendants' written policies are deficient with respect to defining "serious mental illness".

In its opening brief, DRM explained how the DOC Defendants' written policies are inconsistent with respect to how they define and identify prisoners with "serious mental illness." In response, the DOC Defendants spend two and a half pages knocking down a straw man. (*See* DOC Br. at 35-37.) They assert that DRM argued the DOC Defendants' policies are deficient because they do not include DRM's "preferred definition" of "serious mental illness." (*Id.* at 37.) "Serious mental illness," they contend, "is not defined in applicable statutes or case law." (*Id.* at 35.)

DRM never made that argument. Instead, DRM argued that the lack of consistent written policies defining which prisoners qualify as having a "serious mental illness" – especially with respect to the placement of those prisoners in solitary confinement – logically suggests that some prisoners with serious mental illness will not receive proper treatment and will be subjected to housing conditions that will be harmful to their health. (DRM Br. 8-9.)

Moreover, while there may not be a universally accepted definition of "serious mental illness," that does not mean the term has no significance. The U.S. Supreme Court had no trouble finding that federal courts could grant prospective relief under the Eighth Amendment to prisoners with "serious mental illness." *See Brown v. Plata*, 563 U.S. 493, 503, 532 (2011) ("[p]risoners in California with

serious mental illness do not receive minimal, adequate care"; "[r]elief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness"). And there are mental illnesses that the law unquestionably recognizes as "serious". For example, the *Walker* court accepted that bi-polar disorder was a "serious mental illness." 68 P.3d at 881.

Finally, the DOC Defendants contend that any inconsistency in their definition of "serious mental illness" cannot support an inference of deliberate indifference because DRM has not alleged an example where the deficiency has actually led to harm to a prisoner. First, the law does not require DRM to allege the existence of direct evidence in which, for example, a DOC employee states that mistreatment of a prisoner is acceptable because of this defect in the DOC Defendants' policies. *See Farmer*, 511 U.S. at 842 (deliberate indifference may be proved through circumstantial evidence). It is sufficient that the existence of this deficient policy gives rise to a logical inference that prisoners with serious mental illness are likely to be exposed to a substantial risk of serious harm. Moreover, the DOC Defendants' argument avoids DRM's larger point: it is not this one deficient policy that is at issue, it is a large and wide-ranging number of deficient policies and practices that, taken as a whole, plausibly suggest the DOC Defendants are knowingly subjecting prisoners with serious mental illness to a substantial risk of

serious harm in violation of the Eighth Amendment. *See Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (Eighth Amendment claims challenging "policies and practices of statewide and systemic application [that] expose all inmates . . . to a substantial risk of serious harm [are] . . . firmly established in our constitutional law."); *Tellabs*, 551 U.S. at 322-23 (court must view complaint in its entirety); *see also Hall v. Mims*, No. CV F 11-2047-LJO-BAM, 2012 WL 1799179 (E.D. Cal. May 16, 2012) (denying motion to dismiss where plaintiffs alleged systemic deficiencies in county jail's medical and mental health care).

2. Nothing in DRM's Complaint suggests that the serious harms suffered by the nine identified prisoners are "isolated incidents".

The DOC Defendants argue that DRM's Complaint must be dismissed because it supposedly alleges only "isolated occurrences" and "past acts". (DOC Br. at 38.) Those arguments rest on a misunderstanding of the law applicable to motions to dismiss and a misrepresentation of the facts of the case.

The DOC Defendants cite case law for the propositions that a "single occurrence of unconstitutional action by a non-policymaking employee" does establish a well-settled custom or practice, and that "[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." (DOC Br. at 38 (citing

McDade v. West, 223 F.3d 1135, 1141 (9th Cir. 2000) and *Trevino v. Gates*, 99 F.3d 911, 919 (9th Cir. 1996)). While those may be accurate statements of the law, they have only limited application in the context of a motion to dismiss. The DOC Defendants have cited no law holding that allegations regarding the factually similar experiences of nine individuals over a ten-year period do not plausibly suggest a well-settled custom or practice as a matter of law. Whether a custom, practice or policy exists is a question of fact for the jury. *Trevino*, 99 F.3d at 920. The plaintiffs in *McDade* and *Trevino* failed to survive summary judgment because McDade presented evidence of only a single incident of allegedly improper conduct, 223 F.3d at 1141, and Trevino's submission was "virtually devoid" of supporting evidence. 99 F.3d at 919. On this motion to dismiss, by contrast, DRM is not required to demonstrate the truth of its allegations. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011). Thus, while *McDade* and *Trevino* may accurately state the law, their holdings have no bearing on this appeal.

The DOC Defendants further argue that four of the unconstitutional practices alleged by DRM should not be considered by the Court because, "[t]here are no allegations with specific examples of the alleged practices." (DOC Br. at 39.) The four 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 their mental health staff;
3) Failing to have a system to classify prisoners according to their mental needs; and
4) Having no system in place for auditing, evaluating or ensuring the effectiveness of their mental health care program in treating prisoners with serious mental health issues.

(DOC Br. at 39 n.5.) Those are all examples of the *absence* of policies and practices that would protect prisoners with serious mental illness from risks to their health posed by inappropriate medical decisions, punishment, and housing. Because those policies and practices do not exist, DRM cannot cite "specific examples" of them. What DRM *has* done is allege specific examples of harm that plausibly would have been prevented had such policies and practices existed, such as:

- Cory Weis would have been placed in the Prison's mental health treatment unit, as recommended by his sentencing judge, rather than solitary confinement, and would not have committed suicide (E.R.114-115), if the

DOC Defendants had standards for determining whether placing a prisoner with serious mental illness in solitary confinement would be harmful to his mental health;

- James Larson, James Patrick, Marty Hayworth, Paul Parker, Walter Taylor, would not be suffering without necessary medications (E.R.111, 112, 116, 118) if the DOC Defendants had a system for reviewing and evaluating the diagnosing and prescribing practices of Prison mental health staff;
- Cleveland Boyer would not have died (E.R.120-121) if the DOC Defendants had a system to classify prisoners according to their mental health needs; and
- None of the harm would have befallen any of the prisoners described in DRM's Complaint if the DOC Defendants had a system in place for auditing, evaluating and ensuring the effectiveness of their mental health care program in treating prisoners with serious mental illness.

Finally, the DOC Defendants argue that DRM cannot allege the existence of an ongoing unconstitutional custom or practice with respect to the mental health care provided at the Prison because one psychiatrist, Dr. Edwards, is no longer employed at the prison. Dr. Edwards' departure, however, cannot moot DRM's claim because there is nothing in the record to suggest that the improper diagnosing and prescribing practices will not continue under a new psychiatrist. It

is "well-settled 'that an action for an injunction does not become moot merely because the conduct complained of was terminated, *if there is a possibility of recurrence*, since otherwise the defendant[s] would be free to return to [their] old ways.'" *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999) (emphasis in original) (quoting *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)). This is because absent a court order awarding the requested injunctive relief, "the defendant could simply begin the wrongful activity again." *Id*. at 1238. A claim is not mooted unless "it is 'absolutely clear' that the allegedly wrongful behavior will not recur if the lawsuit is dismissed." *See Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009). Given the alleged absence of policies for reviewing and evaluating the diagnosing and prescribing practices of their mental health staff (E.R.103), there is no reason to assume those dangerous practices will not recur.

Regardless, even if DRM's allegations regarding improper mental health treatment were somehow moot as a result of Dr. Edwards' departure,[7] that would

[7] In their effort to attribute all wrongdoing to Dr. Edwards, the DOC Defendants misstate the record with respect to the dates of his employment. They assert that Dr. Edwards is accused of engaging in improper practices from 2005 to 2012. (*See* DOC Br. at 41.) DRM's Complaint does not allege those years of employment for any Prison psychiatrist. In fact, in answers to interrogatories, the DOC Defendants stated that Dr. Edwards was employed at the Prison from April 2012 to September 2014. A different psychiatrist was employed before that time. DRM recognizes that this discussion of extrinsic evidence and disputed facts takes the Court far from the standard analysis of a motion to dismiss, but it highlights the DOC

not lead to the dismissal of DRM's claim, which also rests on the DOC Defendants' dangerous policies regarding the housing and punishment of prisoners with serious mental illness.

3. The reasonable inference from DRM's Complaint is that the DOC Defendants' dangerous policies, customs and practices will cause serious harm to prisoners with serious mental illness in the future.

The DOC Defendants briefly argue that DRM's complaint fails to show a "causal nexus" between the alleged dangerous policies, customs and practices of the DOC Defendants and an ongoing risk of future harm to prisoners with serious mental illness.[8] (*See* DOC Br. at 47.) That argument does not withstand minimal scrutiny. For example, DRM has alleged that the DOC Defendants are 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. (E.R.102, ¶ 16.a.) As discussed in DRM's opening brief, that practice has been widely condemned by

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Defendants' disregard for the applicable rules.

[8] The DOC Defendants mistakenly frame the issue as whether any Prison policy or custom will cause "violations of the Eighth Amendment in the future." (DOC Br. at 47). While the harm to prisoners with serious mental illness may occur in the future, DRM's claim is that the Eighth Amendment violation is occurring *now*. Prison officials violate the Eighth Amendment if they are deliberately indifferent to a present risk of future harm. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("That the Eighth Amendment protects against future harm . . . is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

courts and experts as hazardous to the mental health of prisoners with serious mental illness. (*See* Opening Br. at 40-46.) Similarly, DRM alleges that the DOC Defendants – despite the Montana Supreme Court's holding in *Walker*, 68 P.3d at 885 – continue to place prisoners with serious mental illness on behavior management plans and have no standards for determining whether that practice will be harmful to the prisoner's mental health. (E.R. 103, ¶ 16.c.) Because DRM alleges that the DOC Defendants have not modified these practices, it is reasonable to infer that they will continue to expose prisoners with serious mental illness to a substantial risk of serious harm in the future. Thus, DRM's Complaint plausibly suggests a "causal nexus" between today's dangerous practices and the ongoing risk of future harm.

C. DRM has standing to seek injunctive and declaratory relief because its Complaint plausibly suggests a likelihood of substantial and immediate irreparable injury.

Continuing their theme that DRM's Complaint somehow relates only to "past acts," the DOC Defendants also argue that DRM does not have standing because its allegations do 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." (DOC Br. at 48.) On the contrary, DRM's Complaint identifies six living prisoners with serious mental illness, all of whom have already suffered serious injury, and – like

all existing and future prisoners with serious mental illness – are likely to suffer substantial, immediate, and ongoing injury if the conditions at the Prison are allowed to continue. That is all DRM is required to plead. *See Helling*, 509 U.S. at 35; *Parsons*, 754 F.3d at 676.

The DOC Defendants also cite 18 U.S.C. § 3626(a)(1)(A) and *Gomez v. Vernon*, 255 F.3d 1118, 1128-29 (9th Cir. 2001), for the proposition that DRM's request for injunctive relief "must also be viewed in conjunction with the requirements of the Prison Litigation Reform Act." (DOC Br. at 50.) Both the statute and *Gomez*, however, address the proper *scope* of injunctive relief. Neither has anything to do with standing to bring a legal claim. *See generally* 18 U.S.C. § 3626(a)(1)(A); *Gomez*, 255 F.3d at 1128-29.

II. This Case Should Be Reassigned To A Different District Judge On Remand.

With respect to DRM's request that this case be reassigned to a different district judge upon remand, the DOC Defendants misstate the applicable rule. The DOC Defendants assert that DRM must demonstrate "the personal bias of the District Court" *in addition* to the three factors stated in *United States v. Reyes*, 313 F.3d 1152, 1159 (9th Cir. 2002). The three-factor *Reyes* test, however, applies "*[a]bsent* proof of personal bias on the part of the district judge." *Id.* (emphasis added); *see also United States v. Rivera*, 682 F.3d 1223, 1237 (9th Cir. 2012) (ordering reassignment even though "[w]e have no reason to question the district

judge's ability to proceed impartially"); *In re Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986) (ordering reassignment to preserve the appearance of justice despite not doubting the trial judge's "ability to act fairly").

The District Court's expressed skepticism of DRM's claim (*see* DRM Opening Br. at 50-51), combined with its admitted inability "to get the Court's mind around" important aspects of DRM's case (E.R.228), and its adamant refusal to correct its obvious error in mixing-up the rulings intended for the DOC Case and the DPHHS Case,[9] all suggest that the District Court would have substantial difficulty in putting its previously expressed views out of its mind. *See United States v. Hernandez-Meza*, 720 F.3d 760, 769 (9th Cir. 2013) (ordering reassignment where district judge persisted in reasoning that was contradicted by the record despite "counsel's repeated attempts to point out the error"); *Reyes*, 313 F.3d at 1160 (ordering reassignment due, in part, to district judge's "adamancy" in adhering to an incorrect rule of law). And given the significant public policy issues inherent in this case, it is important to avoid any potential for perceived unfairness in the judicial process in order to preserve the appearance of justice.

[9] In their effort to defend the District Court's obvious error, the DOC Defendants accuse DRM of "speculat[ing] that the District Court is not telling the truth" about its intended ruling. (DOC Br. at 9.) The DOC Defendants' brief is completely silent about the fact that their fellow state agency, the Montana Department of Public Health and Human Services, filed a 16-page brief arguing that the District Court had committed the same error pointed out by DRM. (*See* E.R.185-200.)

See United States v. Nickle, __ F.3d __, Nos. 14-30204, 14-30299, 2016 WL 1084759, at *7 (9th Cir., Mar. 21, 2013) (ordering reassignment to preserve the appearance of justice where it was "unlikely the district judge would be able to put out of his mind his already-developed notions"); *United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (ordering reassignment where court had "little faith" the district judge would be able to put out of his mind previously expressed views).

The DOC Defendants argue that reassignment would entail "needless waste and duplication" because the case had been pending in the District Court for more than a year, "a great deal of discovery has already been completed," and the District Court has presided over the parallel proceedings in the DPHHS Case. (DOC Br. at 59.) None of those arguments has merit. The District Court has taken no actions in the proceedings with respect to discovery, and the only substantive ruling by the District Court in this case is the Order on appeal. Thus, whichever judge receives this case on remand will have the same learning curve with respect to understanding the law as instructed by this Court's decision.[10] As for the DPHHS Case, the parties stipulated to the dismissal of that action on March 31,

[10] The DOC Defendants cite *United States v. Lyons*, 472 F.3d 1055 (9th Cir. 2007), and *Hernandez v. City of El Monte*, 138 F.3d 393, 403 (9th Cir. 1998), to support their "waste and duplication" argument. Neither case supports their position. In *Lyons*, the district judge had already presided over a jury trial in the case. *See* 472 F.3d at 1064. In *Hernandez*, the plaintiffs had "not shown *any* need for reassignment under the first two factors" of the test. 138 F.3d at 403 (emphasis added).

2016, so there are no arguably related proceedings pending before the District Court. (*See* PACER Docket for Case No. 14-26-BU-SEH, Dkt. # 101.) Under the unique circumstances of this case, reassignment is appropriate upon remand.

CONCLUSION

DRM's Complaint alleged extensive and detailed facts supporting its claim that the DOC Defendants are violating the Eighth Amendment by knowingly administering policies and practices at the Montana State Prison that place prisoners with serious mental illness at a significant risk of serious harm. Accordingly, the judgment of the District Court dismissing DRM's case should be reversed, and this case assigned to a different trial judge on remand.

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Respectfully submitted,

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CERTIFICATE PURSUANT TO FED. R. APP. P. 32(a)(7)(B)(ii)

This appellate brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B)(ii) because this brief contains 6,655 words, excluding the part of the brief exempted by Fed. R. App. P. 32(1)(7)(B)(iii).

This appellate brief complies with the typeface requirements of Circuit Rule 32(b) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

April 11, 2016 /s/ Jeffrey A. Simmons

CERTIFICATE OF SERVICE

I, Jeffrey A. Simmons, an attorney, hereby certify that on April 11, 2016, I caused true and correct copies of the foregoing **Reply Brief of Plaintiff-Appellee** to be served on Appellee's counsel via the Court's ECF system.

/s/ Jeffrey A. Simmons