NOT FOR PUBLICATION

FILED

MAY 13 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| GLEN JONES WARD,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CORIZON, Medical/Custodial Trustee for the State of Idaho Department of Corrections,<br><br>Defendant-Appellee. | No. 19-35510<br><br>D.C. No. 1:18-cv-00471-DCN<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Idaho
David C. Nye, District Judge, Presiding

Submitted May 6, 2020**

Before: BERZON, N.R. SMITH, and MILLER, Circuit Judges.

Idaho state prisoner Glen Jones Ward appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action arising out of the denial of a special diet to address his numerous food allergies. We have jurisdiction under 28

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

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

U.S.C. § 1291. We review de novo. *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii)); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (dismissal for failure to state a claim under 28 U.S.C. § 1915A). We affirm.

The district court properly dismissed Ward's action because Ward failed to allege facts sufficient to demonstrate that he suffered a constitutional violation as a result of an official policy or custom of Corizon. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are construed liberally, plaintiff must present factual allegations sufficient to state a plausible claim for relief); *see also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (to state a § 1983 claim against a private entity that acts under color of state law, a plaintiff must show that a constitutional violation "was caused by an official policy or custom of [the private entity]").

The district court did not abuse its discretion in denying Ward further leave to amend because amendment would have been futile. *See Gordon v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010) (setting forth standard of review and explaining that leave to amend may be denied if amendment would be futile); *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (explaining that a district court's discretion to deny leave to amend is "particularly broad" when it has previously granted leave to amend).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We do not consider facts or documents that were not raised before the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

All pending motions and requests are denied.

**AFFIRMED.**

EXHIBIT-C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JUN 04 2020

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

GLEN JONES WARD,

Plaintiff - Appellant,

v.

CORIZON, Medical/Custodial Trustee for the State of Idaho Department of Corrections,

Defendant - Appellee.

No. 19-35510

D.C. No. 1:18-cv-00471-DCN
U.S. District Court for Idaho, Boise

**MANDATE**

The judgment of this Court, entered May 13, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

AUG 30 2019

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

GLEN JONES WARD,

Plaintiff - Appellant,

v.

CORIZON, Medical/Custodial Trustee for the State of Idaho Department of Corrections,

Defendant - Appellee.

No. 19-35510

D.C. No. 1:18-cv-00471-DCN
U.S. District Court for Idaho, Boise

**ORDER**

Appellant Glen Jones Ward, prison identification number 111351, has been granted leave to proceed in forma pauperis in this appeal and has completed and filed the required authorization form directing the appropriate prison officials to assess, collect, and forward to the district court the filing and docketing fees for this appeal pursuant to 28 U.S.C. § 1915(b)(1) and (2). This court hereby assesses an initial filing fee of 20 percent of the greater of (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the June 6, 2019 notice of appeal. Appellant is not responsible for payment when the funds in

appellant's prison trust account total less than $10, but payments must resume when additional deposits are made or funds are otherwise available.

The Clerk shall serve this order and appellant's completed authorization form on the Attorney General for the State of Idaho, who shall notify the appropriate agency or prison authority responsible for calculating, collecting, and forwarding the initial payment assessed in this order and for assessing, collecting, and forwarding the remaining monthly payments of the fee to the district court for this appeal. *See* 28 U.S.C. § 1915(b)(2). Each payment should be accompanied by the district court and appellate docket numbers for this appeal and a record of previous payments made for this appeal.

The Clerk shall also serve a copy of this order on the clerk and the financial unit of the district court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Cyntharee K. Powells
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

GLEN JONES WARD,

Plaintiff,

v.

CORIZON,

Defendant.

Case No. 1:18-cv-00471-DCN

**SUCCESSIVE REVIEW ORDER BY SCREENING JUDGE**

Plaintiff Glen Jones Ward is a prisoner proceeding pro se and in forma pauperis in this civil rights action. The Court previously reviewed Plaintiff's complaint pursuant to 28 U.S.C. §§ 1915 and 1915A, determined that it failed to state a claim upon which relief could be granted, and allowed Plaintiff an opportunity to amend. *See Initial Review Order, Dkt. 8.*

Plaintiff has now filed an amended complaint.[1] *Dkt. 13.* The Court retains its screening authority pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Having reviewed

[1] Plaintiff has also filed various other documents. *See Dkt. 9, 10, 11.* However, Plaintiff was previously advised that, in screening the amended complaint, the Court would consider only the amended complaint itself. *Dkt. 9* at 12 ("[A]ny amended complaint must contain all of Plaintiff's allegations in a single pleading and cannot rely upon, attach, or incorporate by reference other pleadings or documents.") (citing, among other sources, Dist. Idaho Loc. Civ. R. 15.1). Therefore, in determining whether the amended complaint states a plausible claim, the Court has not considered the allegations in any other filings submitted by Plaintiff.

the amended complaint, the Court concludes that Plaintiff has failed to remedy the deficiencies in his initial complaint, and the Court will dismiss this case with prejudice.

**1. Screening Requirement**

As explained in the Initial Review Order, the Court must dismiss a prisoner or in forma pauperis complaint—or any portion thereof—that states a frivolous or malicious claim, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(d)(2) & 1915A(b).

**2. Pleading Standard**

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint fails to state a claim for relief under Rule 8 if the factual assertions in the complaint, taken as true, are insufficient for the reviewing court plausibly "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[D]etailed factual allegations" are not required, but a plaintiff must offer "more than ... unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Id.* (internal quotation marks omitted). If the facts pleaded are "merely consistent with a defendant's liability," or if there is an "obvious alternative explanation" that would not result in liability, the complaint has not stated a claim for relief that is plausible on its face. *Id.* at 678, 682 (internal quotation marks omitted).

**3. Factual Allegations**

Plaintiff alleges that Defendant Corizon—the private company providing medical care to Idaho inmates under contract with the Idaho Department of Correction

("IDOC")—has engaged in "willfull and wanton neglect" by failing to provide Plaintiff with a memo for a medical diet that contains only certain foods. *Am. Compl.*, Dkt. 13, at 2. Plaintiff has GERD and therefore experiences negative effects when he eats certain foods.

Plaintiff "react[s]" to many foods, herbs, and spices: potatoes, chocolate, citrus oil, sage, mint, beans, soy, blueberries, cherries, MSG, artificial sweeteners, cashews, walnuts, peanuts, some dairy products, thyme, chamomile, alfalfa, turmeric, some fish, caffeine, apples, oranges, peas, pineapples, and artichokes. *Id.* at 3-4. Plaintiff does not describe his reactions to all these foods, but at least with respect to potatoes, Plaintiff suffers nausea, canker sores, vomiting, "throbbing," and troubled breathing if he eats them. *Id.* at 5.

Plaintiff's medical tests have been negative for food allergies, but Corizon medical providers have diagnosed him with "sensitivity" or "intolerance" to certain foods. *Id.* at 4; *Dkt. 13-1* at 1-2. Prison medical providers have prescribed medication to Plaintiff that Plaintiff states he already tried to no avail; Plaintiff also claims that the providers are treating him like a "lab rat" by experimenting with medication instead of ensuring he has a diet that excludes all the above-listed items. *Dkt 13* at 3. Plaintiff has tried gas tablets to allay his symptoms but has suffered side effects from such tablets. *Id.* Plaintiff's providers have evaluated him and determined that a special medical diet is not "medically indicated." *Dkt. 13-1* at 1.

Corizon is the only identified Defendant that can be subjected to suit in federal court.[2]

## 4. Discussion

### *A. Section 1983 Claims*

Plaintiff brings claims under 42 U.S.C. § 1983, the civil rights statute. To state a plausible civil rights claim, a plaintiff must allege a violation of rights protected by the Constitution or created by federal statute proximately caused by conduct of a person acting under color of state law. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To be liable under § 1983, "the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015). Negligence is not actionable under § 1983, because a negligent act by a public official is not an abuse of governmental power but merely a "failure to measure up to the conduct of a reasonable person." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

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[2] The "Defendant(s)" section of the caption of the amended complaint reads:

> OPPOSING PARTY(S); INCLUD(ING) <WITHOUT LIMIT(ING)>
> TO: CORIZON HEALTHCARE SERVICE(S)
> [MEDICAL/CUSTODIAL TRUSTEE]; AS/WITH: STATE OF IDAHO;
> IDAHO DEPARTMENT OF CORRECTIONS; AND ALL
> SUCCEEDING [CORPORATE/CAPTIVE/CUSTODIAL-TRUST(S)
> ASSIGN(S) <1 U.S.C. §§ 1→207 ALL: et.seq.>; OFFICER(S);
> OUTREACH(ES) <29 USC> OF: ALL MEDICAL AND SECURITY
> STAFF; AT ALL (PREVIOUS & CURRENT FACILITIES -
> CUSTODIAL TRUSTEES <ALLEGED>.

*Am. Compl.* at 1. To the extent Plaintiff intended to name the State of Idaho and IDOC as Defendants in this action, his claims against those entities are implausible. States and state entities are immune from suit in federal court under the Eleventh Amendment absent a waiver of sovereign immunity. *See Hans v. Louisiana*, 134 U.S. 1, 16-18 (1890); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Further, describing potential defendants as "all staff," "all officers," or "all successors" does not adequately identify any such defendant.

As explained in the Initial Review Order, to state a plausible § 1983 claim against Corizon, Plaintiff must plausibly allege that the execution of an official policy or unofficial custom inflicted the injury of which the plaintiff complains, as required by *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978). *See also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (applying *Monell* to private entities performing a government function). Under *Monell*, the requisite elements of a § 1983 claim against a municipality or private entity performing a state function are the following: (1) the plaintiff was deprived of a constitutional right; (2) the municipality or entity had a policy or custom; (3) the policy or custom amounted to deliberate indifference to plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino Cnty.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001).

A policy or custom "may not be proved through reference to a single unconstitutional incident unless proof of the incident includes proof that it was caused by an existing unconstitutional policy." *Rogan v. City of Los Angeles*, 668 F. Supp. 1384, 1395 (C.D. Cal. 1987) (internal quotation marks and alteration omitted). An unwritten policy or custom must be so "persistent and widespread" that it constitutes a "permanent and well settled" practice. *Monell*, 436 U.S. at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon 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).

Prisoners have an Eighth Amendment right to adequate medical care, and prison officials or prison medical providers can be held liable if their "acts or omissions [were] sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "[D]eliberate indifference entails something more than mere negligence, [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835.

A prison official or prison medical provider acts with "deliberate indifference ... only if the [prison official or provider] knows of and disregards an excessive risk to inmate health and safety." *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (internal quotation marks omitted), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc). "Under this standard, the [defendant] must not only 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Farmer*, 511 U.S. at 837).

Plaintiff has failed to plausibly allege that the diagnosis and treatment decisions of his prison medical providers were the result of a policy or custom of Corizon, rather than the result of the individual medical providers' independent medical judgments. A medical provider's action does not mean that the entity has a policy or practice requiring that action. The provider's action might be *consistent* with such a policy, but mere consistency is not enough to state a claim under § 1983. *Bell Atlantic Corp. v. Twombly*,

550 U.S. 544, 557 (2007) (holding that where a complaint pleads facts that are "merely consistent with" a defendant's liability, the complaint "stops short of the line between possibility and plausibility of 'entitlement to relief'"). Rather than Corizon having a policy or custom of denying medical diets, the "obvious alternative explanation" is that Plaintiff's medical providers each exercised their medical judgment in determining that Plaintiff did not require a medical diet. *Id.* at 682 (internal quotation marks omitted).

Further, the amended complaint plausibly alleges only that Plaintiff disagrees with his medical providers' assessment that a special diet is not medically indicated. Such disagreements do not establish deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Thus, Plaintiff has not stated a plausible claim for relief under § 1983 claim.

***B. Claims Based on Other Statutes***

Plaintiff also cites numerous other federal and state statutes, without providing allegations that support a reasonable inference that Corizon is liable under any of those statutes. He offers precisely the type of "[t]hreadbare recitals...supported by mere conclusory statements," that the Court need not accept as true under Rule 8 or under §§ 1915 and 1915A. *Iqbal*, 556 U.S. at 678. Additionally, Plaintiff's reliance on the criminal code is misplaced. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (no private right of action under federal criminal statute); *Yoakum v. Hartford Fire Ins. Co.,* 923 P.2d 416, 421 (Idaho 1996) (no private right of action under state criminal statute); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *Johnson*

*v. Craft*, 673 F. Supp. 191, 193 (D. Miss. 1987) ("The decision to prosecute a particular crime is within the authority of the state, and there appears to be no federal constitutional right to have criminal wrongdoers brought to justice.").

**5. Conclusion**

For the foregoing reasons, the Amended Complaint is subject to dismissal for failure to state a claim upon which relief may be granted.

Although pro se pleadings must be liberally construed, "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Because Plaintiff has already been given the opportunity to amend and still has failed to state a plausible claim for relief, the Court will dismiss the Amended Complaint with prejudice and without further leave to amend. *See Knapp v. Hogan*, 738 F.3d 1106, 1110 (9th Cir. 2013) ("When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply *cannot* state a claim.").

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## ORDER

**IT IS ORDERED:**

1. The Amended Complaint fails to state a claim upon which relief may be granted. Therefore, for the reasons stated in this Order and the Initial Review Order (Dkt. 8), this entire case is DISMISSED with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1).

2. All pending motions (Dkt. 11 and 12) are DENIED AS MOOT.

DATED: May 29, 2019

David C. Nye
Chief U.S. District Court Judge

Additional material from this filing is available in the Clerk's Office.