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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 MICHELLE MORIARTY, et al.  
12 Plaintiffs,  
13 v.  
14 COUNTY OF SAN DIEGO, et al.,  
15 Defendant.

Case No.: 17cv1154-LAB (AGS)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS FOR  
SUMMARY JUDGMENT; AND**

**ORDER DENYING MOTION FOR  
LEAVE TO AMEND**

**[DOCKET NUMBERS 49, 70, 79.]**

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19 This case arises from the death of Heron Moriarty while in custody in the Vista  
20 Detention Facility (“VDF”). Plaintiffs brought claims under 42 U.S.C. 1983, as well as  
21 various state law theories. The first amended complaint (“FAC,” Docket no. 23) is the  
22 operative pleading, although a number of claims and parties have been dismissed. Two  
23 motions for summary judgment are still pending, however, and Plaintiffs have filed a  
24 motion for leave to amend.

25 Two Defendants who worked at VDF, Sgt. Dale Weidenthaler and Nurse  
26 Practitioner Amanda Daniels, filed motions for summary judgment. (Docket nos. 49 and  
27 79, respectively.) Plaintiffs also seek leave to amend the FAC to add four individual  
28 Defendants in place of Doe Defendants, to bring new claims against Correctional

1 Physicians Medical Group (“CPMG”), and to add new allegations and a new theory of  
2 liability relating to their third cause of action.

3 The Court’s ruling on earlier motions to dismiss or strike is now law of the case  
4 (Docket no. 87, “Dismissal Order”) and informs the Court’s analysis.

### 5 **Factual Background**

6 In the weeks leading up to his death, Moriarty began to exhibit signs of mental  
7 illness, and had two psychiatric hospitalizations. After the first, he was placed on a “5150”  
8 hold for three days. After the second, he was put on a 14-day hold. During these episodes,  
9 he made threats to harm himself and others.

10 On May 23, 2016, during a conversation with his business partner, Moriarty  
11 threatened the life of his wife and family. The business partner’s wife called authorities.  
12 The next evening, sheriffs visited Moriarty but determined he was normal.

13 At 7:52 p.m. on May 25, 2016, Deputy Lelevier and Deputy Escobar were  
14 dispatched to an address in Jamul in response to a report of vandalism, which they learned  
15 had been committed by Moriarty; he reportedly threw a chair through his brother’s patio  
16 door and drove away. A short while later, the deputies were sent to another address two  
17 miles away, in response to a report of a man threatening suicide. En route to that call, they  
18 heard a call requesting assistance; a man had crashed into several parked cars and was  
19 standing in the street, attempting to get hit by passing cars. When they arrived and  
20 compared descriptions of the suspects, they realized Moriarty was involved in all three  
21 incidents.

22 The Deputies heard Moriarty making delusional statements, and saying he had just  
23 been released from a psychiatric hospital, though he appeared “normal,” because he was  
24 well-groomed and dressed in clean clothes. Moriarty also made remarks suggesting he  
25 would provoke the Deputies to shoot him. They took him to the Rancho San Diego holding  
26 station, where he made more remarks about provoking the Deputies to kill him, and  
27 violently kicked his cell door. The Deputies realized Moriarty was having a mental  
28 breakdown, put him in restraints, and transferred him to Central Jail. Because of a

1 temporary policy then in place (known as the Pilot Program), they did not take him for  
2 psychological clearance.

3 At Central Jail, Moriarty was asked if he was suicidal. He answered “no,” then “yes.”  
4 The sergeant on duty, Sgt. Sawyer, refused to accept him, because the Central Jail did not  
5 have a safety cell<sup>1</sup> available. Instead, the Deputies transported Moriarty to VDF. Because  
6 of the policy then in place, he was not taken for psychological evaluation and clearance  
7 before being transferred. The sergeant confirmed that a safety cell was available at VDF,  
8 and told “various VDF Deputies that Moriarty was en route and required a safety cell.”  
9 (FAC, ¶ 61.) The FAC identifies one of these as Sgt. Banks. (*Id.*, ¶ 11.)

10 The FAC alleges that if the Deputies had “followed policy” and taken Moriarty for  
11 psychological evaluation and clearance, they would have learned about his two earlier 5150  
12 holds. (FAC, ¶¶ 62, 134.) But, allegedly because of a lack of training, they did not realize  
13 what the policy for VDF was, and incorrectly thought it was the same as for Central Jail.  
14 (*Id.*, ¶¶ 62, 131.) Even assuming they had learned about Moriarty’s earlier 5150 holds, the  
15 FAC does not adequately allege what the Deputies would have learned. A 5150 hold is  
16 used for someone who is a danger to himself or a danger to others; he need not be both, as  
17 the FAC later argues. (See FAC, ¶¶ 43, 44 (alleging that someone may be subject to a 5150  
18 hold only if they have a severe mental disorder, and are “a danger to self and others”).)  
19 Moriarty, as it turned out, was both threatening towards others, and suicidal.

20 When the two Deputies arrived, they were contacted by Deputy Dwyer. Escobar did  
21 not mention the possibility that Moriarty was suicidal, but Lelevier did, telling Deputy  
22 Dwyer about it as soon as they arrived. (FAC, ¶¶ 63–64.) The restraints were removed,  
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25 <sup>1</sup> A safety cell is a cell specially designed to be suicide-proof. (Opp’n to Mot. for Summ.  
26 J., at 8 n.1 (citing Ex. 8 (Safety Cell Policy)).) The policy makes clear they are not designed  
27 for long-term confinement. Inmates are required to be evaluated at least every 24 hours to  
28 determine whether they still need to be housed there. (Ex. 8 at 3.) The watch commander  
or designee is required every eight hours to review whether continued retention in the  
safety cell is needed, and has authority to remove inmates from safety cells. (*Id.* at 3–4.)

1 and Deputies Lelevier and Escobar took Moriarty to Nurse Preechar. Escobar did not  
2 mention to her that Moriarty was suicidal, but Lelevier did, telling her that Moriarty had  
3 been turned away from Central Jail because it had no available safety cell. The FAC alleges  
4 that before being accepted into county jail, every inmate must be asked whether they are  
5 suicidal. When Nurse Preechar asked Moriarty this, he answered “no.” The FAC alleges  
6 that, based on this response, she disregarded Lelevier’s warning about Moriarty being  
7 suicidal. She did not flag him as a suicide risk, and sent him through the ordinary booking  
8 process.

9 That same afternoon, for unknown reasons Moriarty was being transferred back to  
10 Central Jail when his behavior became too bizarre and threatening. He was put on a “‘psych  
11 hold’ to be evaluated on a priority basis.” (FAC, ¶ 66.) He was then put into an ad-seg cell  
12 in VDF by himself. In the days that followed, Moriarty’s wife called VDF staff repeatedly,  
13 telling them that Moriarty was suicidal and mentally unstable, and needed to be transported  
14 to a psychiatric hospital. She supplied VDF staff with Moriarty’s psychiatric and medical  
15 information. On May 28, Moriarty was finally evaluated by a psychiatrist, Dr. Lissaur,  
16 who noted his obvious mental problems, but sent him back to his ad-seg cell. Moriarty’s  
17 behavior continued to be unstable and violent and refused to take medications.

18 On May 30, Dr. Lissaur again evaluated Moriarty. He determined that Moriarty was  
19 experiencing a bipolar/manic episode. Dr. Lissaur recommended that if Moriarty were to  
20 be released the next day, he should be taken to a hospital and that a 5150 hold should be  
21 placed on him. Dr. Lissaur sent Moriarty back to his ad-seg cell. The next morning, a  
22 psychiatric nurse, Defendant Daniels, evaluated Moriarty. He told her that he might  
23 become violent and kill anyone who entered his cell. Daniels initially sent him back to his  
24 ad-seg cell, then changed her mind and recommended that he be placed in a safety cell.  
25 However, Defendant Weidenthaler, the sergeant on duty, refused.

26 An hour later, VDF staff had a “multi-disciplinary meeting” where Nurse  
27 Practitioner Daniels, Captain Schroeder, Lt. Mitchell, and Dr. Goldstein all discussed  
28 Moriarty. Dr. Goldstein recommended sending him to the psychiatric security unit in

1 Central Jail, but the group decided to keep him in ad-seg and arrange for a 5150 hold on  
2 his release. About twelve hours later, Moriarty was found dead in his cell. He had used  
3 two T-shirts to choke himself.

4 **Motion to Amend**

5 Ordinarily, leave to amend is governed by Fed. R. Civ. P. 15(a)'s standard. Here,  
6 however, amendment would also require amending the scheduling order, implicating Fed.  
7 R. Civ. P. 16. This requires a showing of good cause. *See Coleman v. Quaker Oats Co.*,  
8 232 F.3d 1271, 1294 (9th Cir. 2000). Among other things, the Court considers the moving  
9 party's diligence. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.  
10 1992). "If that party was not diligent, the inquiry should end." *Id.*

11 As a general matter, the Court notes that the scheduling order, including discovery  
12 deadlines, has already been extended multiple times. The third amended scheduling order,  
13 issued July 24, 2018, was amended twice before Plaintiffs filed their motion for leave to  
14 amend: once on October 18, 2018, and again on January 23, 2019, when the discovery  
15 deadline was extended to February 20. The October 18 amendment granted a joint motion  
16 to continue expert-related dates because the parties were exploring mediation; it did not  
17 mention any discovery-related delays. (Docket no. 50.) The January 23 amendment was  
18 in response to a joint request made during a status conference on January 17. But based  
19 on the audio record of that conference the underlying reason was Plaintiffs' counsel's  
20 December discovery requests pertaining to CPMG.<sup>2</sup> The audio record also shows that  
21 Plaintiffs' counsel promised to file a motion for leave to amend the following week. In fact,  
22 it was filed nearly four weeks later.

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27 <sup>2</sup> The parties blamed the pendency of a motion to dismiss and a motion for summary  
28 judgment for the slow discovery. But it is not at all clear why this would hinder or delay  
discovery.

1           **Claims Against CPMG and Its Officials**

2           With regard to CPMG and the training it provided, Plaintiffs were on notice quite  
3 early that CPMG provided little training. Plaintiffs point out that they propounded  
4 discovery requesting suicide-related training materials CPMG provided to medical  
5 workers. (Mot. to Amd. at 10:25–27.) But CPMG points out it timely responded to those  
6 requests by providing orientation materials, the only responsive document. The absence  
7 of an employee handbook or other training materials was one source of early notice.

8           Another was the deposition of Nurse Practitioner Daniels on August 24, 2018.  
9 Without citing the transcript, Plaintiffs characterize her testimony as being “not clear on  
10 the issue of CPMG’s training.” (Mot. to Amd. at 10:27–28.) In fact, Daniels testified that  
11 she received all her formal training from the Sheriff’s department; the only training she  
12 received from CPMG involved shadowing another nurse. (Opp’n to Mot. to Amd., Ex. 3  
13 (Daniels Depo. Tr.) at 16:22–17:6; 98:11–16; 125:7–13.)

14           Plaintiffs also accuse Dr. Joshua of lying during his deposition, saying he was  
15 “satisfied” with CPMG’s training. (Mot. to Amd. at 10:28–11:5.) They characterize this  
16 as intentional concealment of facts that would support a claim against CPMG. The  
17 deposition occurred in a separate but similar case, *Nishimoto v. County of San Diego*,  
18 16cv1974-BEN (JMA) (S.D. Cal., filed June 9, 2017). The transcript (Mot. to Amd., Ex.  
19 7) does not bear out Plaintiffs’ characterization. Joshua was asked whether he had any  
20 criticism as medical director in 2015 with the way CPMG trained its psychiatrists and nurse  
21 practitioners. He responded by saying that it was “essentially done on the individual level  
22 as providers were coming on board . . . by the medical director.” (*Id.* at 140:17–141:1.)  
23 Joshua did not say he was satisfied; rather, he gave an arguably non-responsive answer, by  
24 saying he had been told all the new psychiatrists and nurse practitioners were given  
25 individual training. His testimony concerning the division of training responsibilities  
26 essentially agrees with Nurse Practitioner Daniels’. (*See id.* at 141:2–21.)

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1 Defendants also point to an email by Plaintiffs’ counsel dated October 17, 2018, in  
2 which he says they have a claim against CPMG in this case for failing to provide training.  
3 (Opp’n to Mot. to Amd., Ex. 4.)

4 With regard to new allegations and claims against CPMG, Plaintiffs have not been  
5 diligent, and amendment of the scheduling order to provide for this untimely amendment  
6 is **DENIED**.

7 Plaintiffs seek to add three officials of CPMG, Drs. Mannis, Rao, and Badre, for  
8 their part in CPMG’s failure to train. Because these claims are derivative of claims against  
9 CPMG, leave to add them as Defendants is **DENIED** as well. Even if they were added as  
10 nominal parties, none of the claims would apply to them. Furthermore, CPMG will be  
11 vicariously liable if and only if any of its providers are liable (just as Drs. Mannis, Rao,  
12 and Badre would be), so there is little or no effect on Plaintiffs’ substantive rights.

13 Plaintiffs’ reliance on Cal. Civ. Proc. Code 474, which allows substitution of Doe  
14 defendants, is unavailing. Even assuming, *arguendo*, this overrides Fed. R. Civ. P.  
15 16(b)(4)’s “good cause” standard as to the supplemental state law claims (which is  
16 doubtful),<sup>3</sup> Section 474 does not require any court to grant leave to amend where the  
17 plaintiff has unreasonably delayed seeking leave to amend. *A.N. v. Cty. of Los Angeles*,

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20 <sup>3</sup> The decisions Plaintiffs cite pertain to conflicts between Cal. Civ. Proc. Code § 474,  
21 which permits amendment to substitute named parties as Doe defendants within three  
22 years, and Fed. R. Civ. P. 15—particularly statutes of limitations and relation back of  
23 amendments. *See, e.g., Cabrales v. Cty. of Los Angeles*, 864 F.2d 1454, 1462–63 (9th Cir.  
24 1988), *vacated on other grounds*, 490 U.S. 1087 (1989) (applying §474 in § 1983 action).  
25 As far as the Court is aware, the only in-circuit decision considering whether § 474  
26 abrogated the requirements of Fed. R. Civ. P. 16 in § 1983 actions is an unpublished  
27 memorandum that discussed the issue without resolving it. *See Viehmeyer v. City of Santa*  
28 *Ana*, 67 Fed. Appx. 470, 472 (9th Cir. 2003). A district court decision held that Rule  
16(b)’s “good cause” standard was procedural for *Erie* purposes, though § 474 was not at  
issue there. *See Robert Half Int’l. Inc. v. Murray*, 2008 WL 2610793, at \*4 (E.D. Cal., June  
24, 2008). And at least one other Circuit has also held it is procedural. *See Gwyn v. Loon*  
*Mtn. Corp.*, 350 F.3d 212, 218 (1st Cir. 2003).

1 171 Cal. App. 4th 1058, 1066–68, as modified on denial of reh’g (Apr. 6, 2009). For  
2 reasons discussed above, Plaintiffs could and should have filed any motion for leave to  
3 substitute named parties for Does much earlier. And permitting such a late amendment  
4 would unfairly prejudice these three doctors who have had no opportunity for discovery  
5 and no time to prepare a defense. The unwarranted delay would also prejudice Defendants  
6 generally.

### 7 **Sgt. Banks’ Testimony**

8 During her deposition on January 8, 2019, Sgt. Banks testified that she did not tell  
9 anyone Moriarty was suicidal, only that he was in restraints. This, Plaintiffs believe, is the  
10 key to the puzzle about why Moriarty was not placed in a safety cell at VDF. They also  
11 argue that they learned for the first time that the “Pilot Program” was also in effect at VDF,  
12 which explains why he was not taken for a psychological evaluation on arrival.

13 Plaintiffs also seek leave to add Sgt. Banks as a Defendant. When Sgt. Snyder from  
14 Central Jail called to ask if a safety cell was available, he told Sgt. Banks it was needed  
15 because Moriarty was suicidal. Because she did not mention Moriarty’s suicidal ideations  
16 at the time, he was not housed in a safety cell that night.

17 These proposed amendments pertain to the first night of Moriarty’s custody,  
18 however. The Dismissal Order pointed out these and similar allegedly negligent acts on the  
19 first night of Moriarty’s confinement did not cause his death. (*See* Dismissal Order at  
20 10:15–11:5.) Moriarty was held in custody six days before his suicide, and events between  
21 his cell assignment on May 26 and his death on May 31 conclusively broke the chain of  
22 proximate causation. Well before Moriarty’s death, VDF staff had arranged for him to be  
23 evaluated multiple times. And on May 31, the multi-disciplinary group (“MDG”) made the  
24 determination to place him in ad-seg instead of in a safety cell. Plaintiffs have not pointed  
25 to anything Banks did or failed to do that proximately caused Moriarty’s death six days  
26 later. Nor have they pointed to any way that the timing of his evaluations led to his death.  
27 Leave to amend to add claims based on Sgt. Banks’ testimony or the Pilot Program at VDF  
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1 is **DENIED**. And, for the same reasons, leave to add Sgt. Banks as a Defendant is  
2 **DENIED**.

### 3 **Legal Standards for Summary Judgment**

4 Summary judgment is appropriate where “there is no genuine issue as to any material  
5 fact and . . . the moving party is entitled to summary judgment as a matter of law.” Fed. R.  
6 Civ. P. 56(a). It is the moving party’s burden to show there is no factual issue for trial.  
7 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this  
8 requirement, the burden shifts to the non-moving party to show there is a genuine factual  
9 issue for trial. *Id.* at 324. The non-moving party must produce admissible evidence and  
10 cannot rely on mere allegations. *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*,  
11 515 F.3d 1019, 1033 n.14 (9th Cir. 2008). This can be done by presenting evidence that  
12 would be admissible at trial, *see Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir.  
13 2002), or by pointing to facts or evidence that could be presented in admissible form at  
14 trial. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). But evidence that is not  
15 admissible and could not be presented at trial in admissible form is not enough to resist  
16 summary judgment. *See Orr*, 285 F.3d at 773.

17 The Court does not make credibility determinations or weigh conflicting evidence.  
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rather, the Court determines  
19 whether the record “presents a sufficient disagreement to require submission to a jury or  
20 whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251–52.  
21 Not all factual disputes will serve to forestall summary judgment; they must be both  
22 material and genuine. *Id.* at 247–49. Factual disputes whose resolution would not affect the  
23 outcome of the suit are irrelevant to the consideration of a motion for summary judgment.  
24 *Id.* at 248.

### 25 **Legal Standards for § 1983 Claims**

26 The FAC identifies the Eighth and Fourteenth Amendments to the U.S. Constitution  
27 as the basis for Plaintiffs’ § 1983 claims. Because it appears Moriarty was not a prisoner  
28 but rather a pretrial detainee, the Court analyzes the claims under the Fourteenth

1 Amendment’s Due Process clause only. *See Castro v. City of Los Angeles*, 833 F.3d 1060,  
2 1067–68 (9th Cir. 2016) (en banc). Under either clause, Plaintiffs must show that officials  
3 acted with “deliberate indifference.” *Id.* And though the Court is analyzing the claims  
4 under the Fourteenth Amendment, Eighth Amendment standards can show a minimum  
5 standard of care. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1122 (9th Cir. 2018).

6 In a case such as this, where the claim is based on failure to protect a detainee, the  
7 elements of a claim are:

- 8 (1) The defendant made an intentional decision with respect to the  
9 conditions under which the [detainee] was confined;
- 10 (2) Those conditions put the plaintiff at substantial risk of suffering  
11 serious harm;
- 12 (3) The defendant did not take reasonable available measures to  
13 abate that risk, even though a reasonable officer in the  
14 circumstances would have appreciated the high degree of risk  
15 involved—making the consequences of the defendant's conduct  
16 obvious; and
- 17 (4) By not taking such measures, the defendant caused the plaintiff’s  
18 injuries.

18 *Castro*, 833 F.3d at 1071 (citation omitted).

19 In the failure-to-protect context, the “deliberate indifference” standard is an  
20 objective one; the defendant’s conduct must be objectively unreasonable. *Gordon*, 888  
21 F.3d at 1124–25. This is not a negligence standard; merely showing that a defendant failed  
22 to exercise due care does not establish a Fourteenth Amendment violation. *Id.* at 1125.

23 The fourth element, causation, requires actual and proximate cause. *Leer v. Murphy*,  
24 844 F.2d 628, 634 (9th Cir. 1988). Even in analyzing § 1983 claims, the Court looks to  
25 traditional tort law to determine causation, including whether intervening causes have  
26 broken the chain of proximate causation. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831,  
27 837 (9th Cir. 1996).

1            “In order for a person acting under color of state law to be liable under section 1983  
2 there must be a showing of personal participation in the alleged rights deprivation: there is  
3 no respondeat superior liability under section 1983.” *Jones v. Williams*, 297 F.3d 930, 934  
4 (9th Cir. 2001).

### 5 **Defendant Weidenthaler’s Motion for Summary Judgment**

6            Defendant Weidenthaler argues he is entitled to qualified immunity as to the § 1983  
7 claims, and also seeks summary judgment as to the § 1983 claims and state-law negligence  
8 claim.

9            The motion points out that Weidenthaler was initially told that Moriarty was not  
10 suicidal when he arrived at VDF, and that he was given no more information about  
11 Moriarty until May 27, when Lt. McNeeley told him that Moriarty had told the nurse at  
12 Central jail that he was suicidal. After that, Weidenthaler was given no more information  
13 about Moriarty until May 31, when Deputy Guillory called him. Deputy Guillory told him  
14 that Nurse Practitioner Daniels wanted Moriarty housed in a safety cell for homicidal  
15 ideation. According to Weidenthaler, he thought Moriarty was homicidal, not suicidal, and  
16 therefore not required to be housed in a safety cell. As the Court’s Dismissal Order pointed  
17 out, whether Defendants knew or should have known that Moriarty was a danger to others  
18 is not at issue, and would not give rise to liability here. The key is whether they knew or  
19 reasonably should have known Moriarty was a danger to himself.

20            Weidenthaler agrees that prison officials’ duty to protect suicidal inmates is clearly  
21 established. *See Castro*, 833 F.3d at 1068–71 (giving standard for pretrial detainee’s claim  
22 for deliberate indifference to serious medical need); *Estate of Vargis v. Binnewies*, 2017  
23 WL 2289357, at \*4 (E.D. Cal., May 25, 2017) (discussing duty to protect pretrial detainee  
24 known to be at heightened risk for suicide). His qualified immunity argument, rather, is  
25 that he could reasonably have believed that his conduct was reasonable under the  
26 circumstances, because he did not know Moriarty was suicidal. *See Rudebusch v. Hughes*,  
27 313 F.3d 506, 514 (9th Cir. 2002) (holding that qualified immunity standard encompasses  
28 both mistakes of fact and mistakes of law); *Estate of Ford v. Ramirez-Palmer*, 301 F.3d

1 1043, 1049–50 (9th Cir. 2002) (noting that officers who reasonably but mistakenly fail to  
2 appreciate the degree of risk of harm to inmates are entitled to qualified immunity).  
3 Weidenthaler bears the burden of establishing this. *See Neely v. Feinstein*, 50 F.3d 1502,  
4 1509 (9th Cir. 1995).

5 The qualified immunity standard requires the Court to examine a defendant’s  
6 conduct, not as a broad general concept, but in light of the specific conduct of the case.  
7 *See Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016) (citation omitted). The  
8 dispositive question is whether the violative nature of the defendant’s particular actions  
9 was clearly established. *Id.* (citation omitted). “That is, existing precedent must have  
10 ‘placed beyond debate the unconstitutionality of’ the officials’ actions, as those actions  
11 unfolded in the specific context of the case at hand.” *Id.* (quoting generally *Taylor v.*  
12 *Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam)). If the constitutionality of an official’s  
13 action was unclear or debatable, he is entitled to qualified immunity. *Id.* For purposes of  
14 the § 1983 claim, the reasonableness of a defendant’s actions are judged in light of what  
15 he knew at the time. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

16 Throughout their briefing, Plaintiffs attempt to bundle all mental problems together,  
17 and to treat deliberate indifference to some other problem with deliberate indifference to a  
18 risk of suicide. That approach is erroneous. The fact that a person is homicidal or psychotic,  
19 or is suffering from mental problems more generally does not mean that officials are  
20 constitutionally required to anticipate and guard against suicide. *See Taylor*, 135 S. Ct. at  
21 2044–45 (holding prison officials not liable for failing to discover and address the  
22 “particular vulnerability to suicide” of an inmate with a long history of mental and  
23 substance abuse problems). And it is the heightened risk of suicide—not Moriarty’s general  
24 mental condition—that is at issue here. *See Vivanco v. Cal. Dept. of Corr. & Rehab.*, 2019  
25 WL 2764397, slip op. at \*6 (E.D. Cal., July 2, 2019) (citing *Conn v. City of Reno*, 591 F.3d  
26 1081, 1095 (9th Cir. 2010), *vacated* 563 U.S. 915 (2011), *opinion reinstated in relevant*  
27 *part*, 568 F.3d 897 (9th Cir. 2011)) (distinguishing between a “generalized risk” of suicide  
28 and “the heightened risk required to establish deliberate indifference”). *See also Rocha v.*

1 *Kernan*, 2019 WL 294031, slip op. at \*6 (C.D. Cal., Mar. 13, 2019) (citing *Simmons v.*  
2 *Navajo Cty., Ariz.*, 609 F.3d 1011, 1018 (9th Cir. 2010), *overruled on other grounds by*  
3 *Castro*, 833 F.3d 1060). The Court’s Dismissal Order addresses in greater detail the effect  
4 of a 5150 hold, and general evidence of mental problems. In brief, while Weidenthaler  
5 either knew or objectively should have known that Moriarty was experiencing serious  
6 mental health problems, the real question is whether he knew—or whether any reasonable  
7 officer in his position would have known— that Moriarty was suicidal.

8 Plaintiffs rely primarily on Weidenthaler’s deposition testimony in an effort to show  
9 he knew Moriarty was suicidal. They point to evidence around the time of Moriarty’s  
10 arrival at VDF, showing that he had been sent from Central Jail to be housed in a safety  
11 cell, and that he had made a suicide threat on arrival. There is some evidence Weidenthaler  
12 either knew or objectively should have known that Moriarty was suicidal before he was  
13 brought to VDF, and that he was mentally unstable throughout his time there. But the issue  
14 here is whether Weidenthaler knew or objectively should have known that Moriarty was  
15 suicidal days after his admission to VDF and should have been housed in a safety cell for  
16 that reason.

17 Weidenthaler testified that Deputy Guillory told him that, on Moriarty’s arrival at  
18 VDF, nurses had determined he was not suicidal. (Depo. Tr. of Weidenthaler (Ex. 3 to  
19 Opp’n to Mot for Summ. J.), at 85:23–25.) Weidenthaler agrees he was told that Moriarty  
20 was sent to VDF specifically to be housed in a safety cell. He was also told that Moriarty  
21 had told a nurse at Central Jail that he was suicidal. (*Id.* at 92:25–96:2.) Plaintiffs argue  
22 that Weidenthaler testified there was a policy that a suicide threat could not be retracted  
23 (*id.* at 94:6–24.) In fact, however, he testified that he did not know, but that would have  
24 been his working assumption unless medical staff told him otherwise. (*Id.* at 94:22–24.)

25 Plaintiffs point to the report of their correctional procedures expert, who opined that  
26 Weidenthaler’s refusal to follow Nurse Practitioner Daniels’ recommendation to move  
27 Moriarty to a safety cell was unreasonable and inconsistent with the practices of a trained  
28 jail sergeant, because he knew Moriarty had earlier told a nurse at Central Jail that he was

1 suicidal. (Opp'n to Mot. for Summ. J., Ex. 19 (report of Richard Lichten), at 8.) The  
2 expert's report is not directly relevant to the qualified immunity question, because it gives  
3 the expert's position on Weidenthaler's actions, and does not speak to what Weidenthaler  
4 could have believed. Furthermore, there is no evidence that the other actions the expert  
5 believes Weidenthaler should have taken (*e.g.*, more consultation and better documentation  
6 of decisions) would have made any difference here, particularly because the MDG later  
7 reviewed Moriarty's placement.

8 Plaintiffs also contend Weidenthaler had bad motives or acted unadvisedly or  
9 unreasonably. For example, they cite evidence he acted as he did so that he could go home  
10 early, instead of staying to handle the administrative matters himself or handing it over to  
11 the next sergeant on duty. Plaintiffs also point to evidence that overruling a psychiatric  
12 nurse's cell placement recommendation is unusual and only done in extraordinary  
13 circumstances, and that refusing to house a homicidal inmate in a safety cell might be  
14 contrary to local policy. Even accepting, *arguendo*, that Weidenthaler was motivated  
15 mainly by a selfish desire to leave work early and that his decision was high-handed or  
16 contrary to VDF policy, this would not transform an otherwise constitutionally permissible  
17 act into a constitutional violation.

18 The parties disagree over whether Weidenthaler had discretion under local policy to  
19 decline safety cell placement for homicidal inmates, and the policy itself is not particularly  
20 clear on this point. Non-medical VDF personnel decide where inmates are housed, and  
21 have discretion whether to retain them in safety cells. But it is unclear how the VDF's  
22 policy would have applied here. The fact that the policy could mean what Weidenthaler  
23 thought it meant lends some support to his qualified immunity claim. But while local policy  
24 informs the analysis generally, compliance with the Constitution, not local policy, is the  
25 key issue. *See Bibeau v. Pac. Northwest Research Foundation Inc.*, 188 F.3d 1105, 1113  
26 (9th Cir. 1999) (holding that violation of a duty arising under state law was insufficient to  
27 show that the defendant violated clearly established constitutional rights). And violation of

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1 a policy intended to deal with homicidal inmates does not speak directly to whether  
2 Weidenthaler was deliberately indifferent to the risk of harm to a suicidal inmate.

3 For purposes of the qualified immunity analysis, the issue is not whether  
4 Weidenthaler's actions were reasonable, but whether he reasonably could have believed  
5 his conduct was constitutional. Here, Weidenthaler has met his burden of showing that he  
6 could have. Even accepting that he had reason to believe Moriarty was suicidal days earlier,  
7 Weidenthaler was told in the interim that Moriarty had been determined not to be suicidal.  
8 Weidenthaler knew Nurse Practitioner Daniels, a psychiatric nurse, had recommended that  
9 Moriarty be housed in a safety cell, and he personally overruled that recommendation. But  
10 he also knew the basis for Nurse Practitioner Daniels' recommendation was that Moriarty  
11 was homicidal, not that he was suicidal. (Jt. Stmt. of Undisputed Facts, ¶ 10.) Her  
12 examination notes confirm that she believed that Moriarty was homicidal but not suicidal,  
13 and Plaintiffs agree this is what she believed.

14 Plaintiffs correctly point out that Weidenthaler had no particular medical or  
15 psychological expertise, and had to rely on the advice of others who did. As a layman,  
16 Weidenthaler was not responsible for making a diagnosis or attempting to confirm or rebut  
17 Daniels'. Once a psychiatric nurse gave him to understand that Moriarty was not at that  
18 time a suicide risk, he could reasonably have believed it, and no clearly established law  
19 would have told him otherwise. In light of this, he could reasonably have believed that he  
20 was not ignoring a serious risk of suicide. That is enough to entitle him to qualified  
21 immunity as to the federal constitutional claim.

22 Plaintiffs' other evidence is likewise insufficient to counter Weidenthaler's position.  
23 For example, they cite a general warning that watch commander McNeeley gave  
24 Weidenthaler several days earlier. But a warning to "watch out" for Moriarty would only  
25 have raised generalized concerns; it cannot reasonably be construed as a warning that  
26 Moriarty was, or might be, suicidal. There is no evidence that Weidenthaler would have  
27 known, based on what he was told or what happened days earlier, on May 25, that Moriarty  
28 was suicidal on May 31.

1 If Moriarty had acted on his homicidal ideations, and if housing him in a safety cell  
2 rather than an ad-seg cell would have reduced the risk,<sup>4</sup> Weidenthaler would probably be  
3 liable. But that did not happen. Instead, a different risk—one he had less reason to be aware  
4 of—tragically played out. Even if he was negligent in failing to appreciate that risk or  
5 failing to take the steps Plaintiffs’ expert suggests he should have, he has shown that he  
6 could reasonably have thought he was acting lawfully.

7 The Court finds Weidenthaler has met his burden of establishing qualified immunity.  
8 There is, however, sufficient evidence to support the negligence claims against him.

### 9 **Daniels’ Motion for Summary Judgment**

10 Defendant Daniels seeks summary judgment on the § 1983 claims as well as the  
11 negligence claim. She does not seek qualified immunity.

12 Daniels interacted with Moriarty on May 31, when she performed a psychiatric  
13 evaluation and determined he was homicidal and needed to be placed in a safety cell. She  
14 herself had no authority to order him placed in a safety cell, however, and could only  
15 recommend it. She later participated in the MDG meeting where it was decided Moriarty  
16 should be returned to ad-seg. She did not mention that Sgt. Weidenthaler had overruled her  
17 safety cell placement recommendation.

18 Plaintiffs’ opposition misunderstands the “deliberate indifference” standard for  
19 § 1983 claims, treating it as a heightened negligence standard. They admit Daniels did not  
20 realize Moriarty was at risk for suicide, but instead argue that the “main inquiry” was  
21 whether her actions (including her failure to appreciate Moriarty’s high risk of suicide)  
22 were objectively reasonable. (Opp’n to Mot. for Summ. J., at 13:21–26.) They agree she  
23 “did not think Moriarty posed a risk of suicide.” (Opp’n to Mot. for Summ. J.at 14:7–9.)  
24 But they claim she ignored obvious signs, which they catalog.

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28 <sup>4</sup> The ad-seg cell he was housed in was a type of isolation cell, albeit one that could pose a  
risk to suicidal inmates. (See Opp’n to Mot. for Summ. J.at 14:7–9.)



1 Plaintiffs cite *Gordon*, 888 F.3d 1118, as announcing that the new standard is  
2 objective reasonableness. They have misapplied *Gordon* and its predecessor *Castro*,  
3 however, in part because objective unreasonableness is only one part of the test:

4 Based thereon, the elements of a pretrial detainee's medical care claim against  
5 an individual defendant under the due process clause of the Fourteenth  
6 Amendment are: (i) the defendant made an intentional decision with respect  
7 to the conditions under which the plaintiff was confined; (ii) those conditions  
8 put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant  
9 did not take reasonable available measures to abate that risk, even though a  
10 reasonable official in the circumstances would have appreciated the high  
11 degree of risk involved—making the consequences of the defendant's conduct  
12 obvious; and (iv) by not taking such measures, the defendant caused the  
13 plaintiff's injuries.

14 *Gordon*, 888 F.3d at 1125. They also confuse the objective reasonableness standard with a  
15 negligence standard, which both *Castro* and *Gordon* made clear does not apply here.  
16 Neither *Castro* nor *Gordon* called into question Supreme Court decisions such as *Estelle*  
17 *v. Gamble*, 429 U.S. 97 (1976) or *Farmer v. Brennan*, 511 U.S. 825 (1994). These  
18 decisions rely on the longstanding proposition that inadvertent misdiagnosis or negligent  
19 medical care does not amount to deliberate indifference. *See, e.g., Estelle* at 106 (holding  
20 that negligence in diagnosing a condition does not amount to a constitutional violation).  
21 The Ninth Circuit continues to cite and rely on them for this proposition. *See Edmo v.*  
22 *Corizon, Inc.*, \_\_\_ F.3d \_\_\_, 2019 WL 3978329, at \*20 (9th Cir. Aug. 23, 2019).

23 Each of Daniels' actions fails to satisfy at least one of the *Gordon* elements. When  
24 diagnosing Moriarty, her failure to appreciate that he was suicidal was not an "intentional  
25 decision," as the first element requires. *See Castro*, 833 F.3d at 1070 (pointing out that  
26 accidents cannot satisfy this element). Nor can it be said that she failed to take steps to  
27 abate an obvious risk of misdiagnosing him, as required for the third element. She reviewed  
28 two recent sets of notes by Dr. Lissaur, who had examined Moriarty several times and who  
most recently determined he was experiencing a bipolar/manic episode. She also examined  
Moriarty herself, and her notes from that examination are attached to the motion. (Mot. for

1 Summ., J., Ex. C.) At the time, she did not have access to Moriarty’s full records, however.  
2 Plaintiffs’ opposition claims that Daniels “intentionally failed to appreciate” Moriarty’s  
3 risk of suicide. (Opp’n at 14:1-2.) There was no evidence, however, that Daniels  
4 knowingly or intentionally misdiagnosed Moriarty. Nor do Plaintiffs point to steps she  
5 could or should have taken to abate any obvious risk of misdiagnosing him.

6 It is also uncontested that Daniels had no authority to order Moriarty placed in a  
7 safety cell, and that she could only make such a recommendation—which she did. Before  
8 the MDG met, she made no intentional decision with respect to Moriarty’s placement.

9 Plaintiffs also argue that Daniels could and should have brought the matter to Watch  
10 Commander McNeeley’s attention either before the MDG meeting or at the meeting, and  
11 present evidence that if she had done so, he would have ordered Moriarty placed in a safety  
12 cell. The evidence is in conflict regarding exactly what was said and what happened at the  
13 meeting, which McNeeley and Daniels both attended. Daniels says she thought the other  
14 committee members knew her recommendation had been overruled and that the MDG was  
15 merely considering alternatives. Plaintiffs point to conflicting evidence suggesting that  
16 other committee members, including McNeeley, did not know, and that she should have  
17 mentioned it.

18 The flaw in Plaintiffs’ argument is that Daniels believed Moriarty was homicidal,  
19 not suicidal, and was not deliberately indifferent to a substantial risk that he was suicidal.  
20 Rather, she believed he needed to be in a safety cell because he was homicidal and  
21 psychotic. Plaintiffs do not dispute this, and in fact they adopt this position in their briefing.  
22 As it turned out, had she recommended during the MDG meeting that Moriarty be housed  
23 in a safety cell for homicidal ideations, there is evidence the request would have been  
24 granted and Moriarty’s suicide attempt might have been forestalled. But as with  
25 Weidenthaler, this fortuitous result would have stemmed from efforts to protect against a  
26 different and known risk, *i.e.*, the risk that Moriarty would attempt to harm someone else.  
27 Neither she nor Weidenthaler knew Moriarty was suicidal. Daniels was therefore not acting  
28 with deliberate indifference to a substantial risk of suicide.

1 Plaintiffs also argue that Daniels should have taken other steps, such as sending him  
2 to the psychiatric security unit at Central Jail instead of treating him at VDF,<sup>5</sup> but these are  
3 premised on an assumption that she knew he was suicidal.

4 Daniels is therefore entitled to summary judgment on the § 1983 claims. As for the  
5 negligence claims, however, there is enough conflict in the evidence to create a triable issue  
6 of fact.

7 **Conclusion and Order**

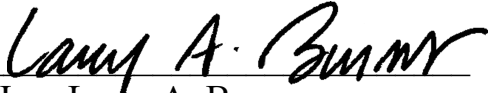
8 The motion for leave to amend (Docket no. 70) is **DENIED**.

9 Defendant Weidenthaler's motion for summary judgment (Docket no. 49) is  
10 **GRANTED IN PART AND DENIED IN PART**. Because he is entitled to qualified  
11 immunity as to the federal claims, the § 1983 claims against him are **DISMISSED WITH**  
12 **PREJUDICE**. As to the negligence claims against him, the motion is **DENIED**.

13 Defendant Daniels' motion for summary judgment (Docket no. 79) is **GRANTED**  
14 **IN PART AND DENIED IN PART**. Because she was, at most, negligent in failing to  
15 recognize that Moriarty was suicidal, and because she acted on the basis of her belief that  
16 he was not suicidal, she is entitled to summary judgment on the § 1983 claims against her,  
17 and these are **DISMISSED WITH PREJUDICE**. But the motion is **DENIED** as to the  
18 negligence claims against her.

19 **IT IS SO ORDERED.**

20  
21 Date: September 24, 2019

22   
23 Hon. Larry A. Burns  
24 Chief United States District Judge

25  
26 <sup>5</sup> In support of this alternate course of action, Plaintiffs cite Exhibit 3 to their Motion for  
27 Leave to Amend (Docket no. 70-1, at 3.) This is an email by Dr. Joshua, and Defendants  
28 have correctly pointed out that it is inadmissible hearsay. Although Plaintiffs claim there  
is evidence CPMG director Dr. Rao agreed with this, they did not cite anything, not even  
inadmissible evidence.