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6 *Attorneys for Defendant State of Nevada ex rel. its*  
7 *Department of Health and Human Services, Division of Public*  
8 *of Behavioral Health, Brandon Taylor, John West, Rick Meier,*  
9 *Luiz Orozco, Nicholas Patiga, Vivian Davis, Samantha Lyons,*  
10 *Tanner Trout, and Erick McBride*

11 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

12 RENAE JOY SWAIM, as Special  
Administrator of the Estate of Clinton Lee  
13 Swaim; RENAE JOY SWAIM, an  
individual; CLINTON THOMAS SWAIM,  
14 Jr., an individual; RENAE JOY SWAIM,  
as parent and custodian of minor K.R.S.,  
15 collectively,

16 Plaintiffs,

17 vs.

18 STATE OF NEVADA *ex rel.* NEVADA  
DEPARTMENT OF HEALTH AND  
19 HUMAN SERVICES, DIVISION OF  
PUBLIC AND BEHAVIORIAL HEALTH;  
20 DAVID ATHERTON, an individual; MATT  
BOWMAN, an individual, DAIKI "SAM"  
21 BRANCH, an individual; ISAAC FLORES,  
an individual; JOEL GOMEZ, an  
22 individual; CHRIS HENRY, an individual;  
SAMANTHA LYONS, an individual;  
23 ERICK MCBRIDE, an individual; RICK  
MEIER, an individual; BRAD MITCHELL,  
24 an individual; LUIS OROZCO, an  
individual; LACEY PATIGA, an  
25 individual; NICHOLAS PATIGA, an  
individual, BRANDON TAYLOR, an  
26 individual; TANNER TROUT, an  
individual; JOHN WEST, an individual;  
27 and DOES I to X, inclusive; collectively,

28 Defendants.

CASE NO. 3:21-cv-00502-MMD-WGC

**MOTION TO DISMISS PLAINTIFS'  
COMPLAINT UNDER FRCP 12(b)(6)**

1 Defendants, Brandon Taylor, John West, Rick Meier, Luiz Orozco, Nicholas Patiga,  
2 Vivian Davis, Samantha Lyons, Tanner Trout, and Erick McBride, through counsel, move  
3 to dismiss Plaintiffs' complaint under FRCP 12(b)(6).

#### 4 **I. Introduction**

5 This court should dismiss Plaintiffs' complaint. Plaintiffs do not allege any factual  
6 allegations against Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and  
7 McBride. Nothing permits Plaintiffs to merely lump all defendants together. For this, and  
8 additional reasons, Plaintiffs' claims fail.

#### 9 **II. Plaintiffs' allegations**

10 Plaintiffs are the estate of the decedent, Mr. Swaim, and his family. ECF No. 1 at  
11 ¶¶1-5. DBH is a state administrative agency. *Id.* at ¶6. Mr. Swaim committed suicide  
12 whilst committed to a mental health facility, Lakes Crossing. *Id.* at ¶¶42-47. Plaintiffs  
13 allege claims for deliberate indifferent to serious medical needs (42 U.S.C §1983), wrongful  
14 death, negligence, and negligent hiring, training, and supervision.

15 Defendants, Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and  
16 McBride, are described as employees of Lakes Crossing in the complaint's introductory  
17 paragraphs. *Id.* at ¶¶15-17, 19, and 21-24. They are never mentioned again. Plaintiffs'  
18 allegations are all against "staff." *Id.* at ¶¶48-52.

#### 19 **III. Legal standards**

20 Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for  
21 "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To  
22 survive dismissal, a complaint must contain "a short and plain statement of the claim  
23 showing that the pleader is entitled to relief . . ." FED. R. CIV. P. 8(a)(2). While a pleading  
24 generally need not contain detailed allegations, it must allege sufficient facts to raise a  
25 right to relief above the speculative level. *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007).  
26 This obligation "requires more than labels and conclusions, and a formulaic recitation of  
27 the elements of a cause of action . . ." *Id.* Rather, to survive a motion to dismiss, a  
28 complaint must plead "enough facts to state a claim for relief that is plausible on its face."

1 *Id.* at 570. Though the party opposing a 12(b)(6) motion to dismiss is given the benefit of  
2 the doubt in that its factual allegations are accepted as true, a court will not assume the  
3 truth of legal conclusions merely because the plaintiff casts them in the form of factual  
4 allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

#### 5 **IV. Legal argument**

##### 6 **A. *Iqbal* and *Twombly* foreclose Plaintiffs' style of mass pleading**

7 All of Plaintiffs' claims, whether under federal law or state law, deserve dismissal.  
8 Even before *Iqbal* and *Twombly*, dismissal was warranted unless the plaintiff pled  
9 allegations particular to a defendant to demonstrate how that defendant violated plaintiff's  
10 rights. *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996). A plaintiff could not provide  
11 a summary and simply lump all defendants together. *Id.*

12 After *Iqbal* and *Twombly*, the requirements of pleading were amped up. Rule 8  
13 outlaws "lumping all defendants together in a complaint without distinguishing between  
14 them or specifying which defendant is targeted by which allegation." *West v. Bank of*  
15 *America, N.A.*, 2:10-cv-1966-JCM (GWF), 2001 WL 2491295, \*2 (D. Nev. June 22, 2011)  
16 (citations omitted).

17 Here, plaintiffs in their complaint conflate Taylor, West, Meier, Orozco, Patiga,  
18 Vivian Davis, Lyons, Trout, and McBride under the heading of "staff." Plaintiffs never  
19 provide factual pleading as to Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons,  
20 Trout, and McBride to alleged what each of them did wrong. The only individuals who are  
21 even described are defendants, Gomez and Bostwick. *Id.* at ¶52(i)-(m). The only individual  
22 described as failing to conduct a check of the decedent is defendant Gomez. *Id.* at ¶52(m).  
23 Otherwise, Plaintiffs have merely recited the elements of various claims and inserted all  
24 the defendants into those elements. That will not do under after *Iqbal*. Dismissal is  
25 warranted.

26 ...

27 ...

28 ...

1           **B. Plaintiffs’ deliberate indifference claim fails for several reasons**

2                   **1. No facts showing personal participation**

3           Liability under § 1983 only arises upon a showing of personal participation by a  
4 defendant in the alleged constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362  
5 (1976); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Here, Plaintiffs have not pled  
6 any facts, even if accepted as true, to make it probable that Taylor, West, Meier, Orozco,  
7 Patiga, Vivian Davis, Lyons, Trout, and McBride did anything wrong, let alone participated  
8 in any unconstitutional conduct. Accordingly, dismissal is appropriate.

9                   **2. No facts supporting the elements of deliberate indifference**

10           “[T]he elements of a pretrial detainee’s medical care claim against an individual  
11 defendant under the due process clause of the Fourteenth Amendment are: (i) the  
12 defendant made an intentional decision with respect to the conditions under which the  
13 plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering  
14 serious harm; (iii) the defendant did not take reasonable available measures to abate that  
15 risk, even though a reasonable official in the circumstances would have appreciated the  
16 high degree of risk involved—making the consequences of the defendant’s conduct obvious;  
17 and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries.” *Gordon*  
18 *v. Orange Cty.*, 888 F.3d 1118, 1125 (9th Cir. 2018).

19           Here, Plaintiffs have not pled facts as to Taylor, West, Meier, Orozco, Patiga, Vivian  
20 Davis, Lyons, Trout, and McBride to meet any of these elements. Plaintiffs’ deliberate  
21 indifference claims therefore fails. *See Iqbal*, 556 U.S. at 678 (formulaic recitation of the  
22 elements of a cause of action, supported only by conclusory allegations, are insufficient to  
23 state a claim upon which relief can be granted); *Papsan v. Allain*, 478 U.S. 265, 286  
24 (1986) (court not bound to accept a legal conclusion couched as a factual allegation as true).

25           But Plaintiffs’ claims fail for an additional reason. Even if Plaintiffs had not lumped  
26 all defendants together, Plaintiffs’ deliberate indifference claim would fail. At most,  
27 Plaintiffs allege that “staff” failed to follow policy or exercise due care. ECF No. 1 at ¶¶49-  
28 52. The “mere lack of due care by a state official’ does not deprive an individual of life,

1 liberty, or property under the Fourteenth Amendment.” *Daniels v. Williams*, 474 U.S. 327,  
2 330–31 (1986). But an alleged failure to follow policy does not establish a constitutional  
3 violation. *Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009).

### 4 **3. Qualified immunity applies**

5 Plaintiffs’ deliberate indifference claim is also barred by qualified immunity.  
6 Qualified immunity shields government actors from civil liability under 42 U.S.C. § 1983 if  
7 “their conduct does not violate clearly established statutory or constitutional rights of  
8 which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818  
9 (1982). To determine whether an officer is entitled to qualified immunity, a court must  
10 evaluate two independent questions: (1) whether the officer’s conduct violated a  
11 constitutional right, and (2) whether that right was clearly established at the time of the  
12 incident. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Since Plaintiffs pled no facts as to  
13 Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and McBride, they cannot  
14 meet either prong.

15 Plaintiffs have pled no facts to meet overcome the first prong, violation of a  
16 constitutional right. The requirement is an individualized one, i.e., whether the officer’s  
17 conduct violated a constitutional right. *Pearson*, supra. Because Plaintiffs have not pled  
18 any facts as to Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and  
19 McBride’s conduct, they have not plausibly alleged that any particular official violated the  
20 constitution.

21 Under the clearly established prong, Plaintiffs have the burden of pleading facts to  
22 demonstrate that, given the case law at the time of the incident, a reasonable person in  
23 Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and McBride’s position  
24 would have understood that their conduct presented “such a substantial risk of harm to  
25 [Swaim] that the failure to act was unconstitutional.” *Sandoval v. San Diego Cty.*, 985 F.3d  
26 657, 687 (9th Cir. 2021) (quoting *Horton by Horton v. City of Santa Maria*, 915 F.3d 592,  
27 600 (9th Cir. 2019)). Plaintiffs have not pled facts as the individual conduct of Taylor, West,  
28 Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and McBride. Absent factual pleading,

1 there is no way for Plaintiffs to show that it is plausible that person in their unique position  
2 would have understood of a substantial risk of harm to Swaim amounting to a  
3 constitutional violation based on case law at the time.

#### 4 **4. No action for money damages under Nevada's constitution**

5 Finally, Plaintiffs have alleged a cause of action for money damages for deliberate  
6 indifference under Nevada's Constitution. There is no basis in Nevada law for such a  
7 claim. A private litigant can assert a claim based on Nevada law only if "the [Nevada]  
8 Legislature intended to create a private judicial remedy." *Baldonado v. Wynn Las Vegas,*  
9 *LLC*, 124 Nev. 951, 959, 194 P.3d 96, 101 (2008). The Legislature has not created a private  
10 right of action to enforce the Nevada Constitution against Nevada officials in their  
11 individual capacity.

#### 12 **C. Plaintiffs' state law claims fail**

13 As explained in part IV(A) above, Plaintiff has not pled any facts supporting the  
14 elements of any claim for relief against Taylor, West, Meier, Orozco, Patiga, Vivian Davis,  
15 Lyons, Trout, and McBride. Accordingly, Plaintiffs' state law claims fail just as their federal  
16 one does. Taylor, West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and McBride  
17 write separately to explain that Plaintiffs' fourth claim for relief fails for an additional  
18 reason as a matter of law.

19 Plaintiffs' fourth claim is for negligent training, hiring, selection, and supervision.  
20 In *Paulos v. FCH1, LLC*, 136 Nev. 18, 456 P.3d 589 (2020) the Nevada Supreme Court  
21 foreclosed such a claim. In *Paulos*, the court affirmed summary judgment because LVMPD  
22 had met both prongs of the Berkovitz-Gaubert test: (1) "LVMPD's decision to hire and train  
23 Officer Baca involved an element of choice under prong one of the Berkovitz-Gaubert test";  
24 and (2) "a decision on whether to train officers about getting suspects off the hot asphalt  
25 during summer months once it is reasonably safe to do so is subject to policy analysis, thus  
26 meeting prong two of the test." *Paulos*, 136 Nev. at 26, 456 P.3d at 596.

27 Courts in this District have likewise barred claims based on the theory alleged by  
28 Plaintiffs. For example, in *Est. of Wilson by Wilson v. Las Vegas Metro. Police Dep't*, the

1 court wrote that “[d]ecisions about whether to hire and how to properly train and supervise  
2 an officer involve individual judgment on the part of the policymakers or supervisors and  
3 are based on considerations of social, economic, or political policy.” No. 2:18-cv-01702-APG-  
4 VCF, 2020 WL 6930099, at \*9 (D. Nev. Nov. 24, 2020) (citing Paulos, 456 P.3d at 596).  
5 Accordingly, this Court should dismiss Plaintiffs’ fourth claim for relief with prejudice.

6 **V. Conclusion**

7 For these reasons, this Court should dismiss Plaintiffs’ complaint against Taylor,  
8 West, Meier, Orozco, Patiga, Vivian Davis, Lyons, Trout, and McBride.

9 DATED this 14th day of March, 2022.

10  
11 AARON D. FORD  
12 Attorney General

13 By: /s/ Steve Shevorski  
14 Steve Shevorski (Bar. No. 8256)  
15 Chief Litigation Counsel  
16 *Attorneys for Defendant State of Nevada ex rel.*  
17 *its Department of Health and Human Services,*  
18 *Division of Public and Behavioral Health*  
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 14th day of March, 2022. I further certify that the participants in this case are registered electronic filing systems users and will be served electronically.

/s/ Sunny Southworth  
Traci Plotnick, an employee of the  
Office of the Attorney General

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