IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSHUA D. ZOLLICOFFER a/k/a PASSION STAR,
Plaintiff,

versus

BRAD LIVINGSTON, personally and in his official capacity as Executive Director of the Texas Department of Criminal Justice ("TDCJ"); *et al.*,
Defendants.

Case No. 4:14-cv-03037

PLAINTIFF'S RESPONSE IN OPPOSITION (INCLUDING MEMORANDUM OF AUTHORITY) TO DEFENDANT LIVINGSTON'S MOTION TO DISMISS UNDER 12(b)(1) AND (6) FOR LACK OF JURISDICTION, FOR FAILURE TO STATE A CLAIM, AND ASSERTION OF QUALIFIED IMMUNITY

Plaintiff Joshua Zollicoffer a/k/a Passion Star ("Plaintiff" or "Ms. Star") respectfully asks the Court to deny Defendant Livingston's Motion to Dismiss Under 12(b)(1) and (6) for Lack of Jurisdiction, for Failure to State a Claim, and Assertion of Qualified Immunity (Docket Entry ("DE") DE 40).

In support of this response in opposition, Plaintiff submits the following memorandum of authority.

DATED: March 31, 2015

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I. THE NATURE AND STAGE OF THE PROCEEDING

This is a prisoner civil rights action. Plaintiff, a transgender woman, who has been in the custody of the Texas Department of Criminal Justice ("TDCJ") for more than 12 years, was brutally attacked and raped by men incarcerated with her and she continues to be threatened with assault, rape, and murder.[1] Despite numerous pleas for protection, TDCJ officials, until only a few days ago, had repeatedly refused to place Plaintiff in safekeeping or take other reasonable steps to eliminate the substantial risk of serious harm she faced daily as a transgender person in general population. Defendants' conduct constitutes deliberate indifference in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

Plaintiff filed her lawsuit on October 23, 2014, seeking preliminary and permanent injunctive relief, declaratory relief, and damages. (DE 1.) Plaintiff recently amended her complaint (DE 35), and Defendants Blanchard, Maldonado, Marez, and Pickett answered the First Amended Complaint (DE 53).[2] The parties filed their Joint Discovery/Case Management Plan (DE 44) and exchanged initial disclosures. On March 4, 2015, Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction against Defendants White and Livingston (DE 46).

[1] As alleged in the complaint, Plaintiff is a woman who is transgender. (DE 35 ¶¶ 1, 28.) In accordance with Plaintiff's gender identity, the complaint uses female pronouns to refer to her and requests that others do so as well. *See Shaw v. District of Columbia*, 944 F. Supp. 2d 43, 48 (D.D.C. 2013) (noting that the allegations that "Plaintiff is…a female…Plaintiff is also a 'transgender woman'" must be accepted as true for the purposes of a motion to dismiss); *see also Meriwether v. Faulkner*, 821 F.2d 408, 409 n.1 (7th Cir. 1987) (same). Ms. Star has informed TDCJ staff that she is transgender on many occasions. Defendants' refusal to acknowledge her by using female pronouns is inconsistent with PREA and TDCJ policies, as well as judicial approaches to respecting transgender litigants. *See, e.g.*, 28 C.F.R. § 115.31(a)(9); *Williams v. Paramo*, 775 F.3d 1182, 1184 n.1 (9th Cir. 2015) ("Williams identifies as a transgender woman, and we refer to her as a woman even though she is classified as male in the prison records."); *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (using female pronouns to refer to incarcerated plaintiff, a transgender woman); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (same); *see also Lopez v. River Oaks Imaging Diagnostic Grp.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (transgender plaintiff asserting an employment discrimination claim referred to by court with pronouns corresponding with her gender identity); *United States v. Manning*, ARMY 20130739 (A. Ct. Crim. App. Mar. 4, 2015), www.chelseamanning.org/wp-content/uploads/2015/03/Order_030515.pdf (ordering that reference to appellant in all legal papers before the court employ a feminine pronoun or be gender neutral); *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) (intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment via Title VII).

[2] On January 9, 2015, Defendants Ralph Bales, Joni White, Bruce Armstrong, and Fernando Fuster answered Plaintiff's original complaint. (DE 33.)

On March 26, after counsel for Defendants Brad Livingston and Joni White notified counsel for Plaintiff that Ms. Star would be placed in safekeeping, the parties notified the Court they had resolved that motion. Apart from this motion, the defendants also have moved to transfer venue (DE 52), and Plaintiff's response is due on April 2, 2015.

II. ISSUES TO BE RULED UPON AND STANDARD OF REVIEW

Defendant Brad Livingston ("Livingston" or "Defendant") seeks dismissal, asserting lack of jurisdiction, failure to state a claim, and qualified immunity. A complaint will survive a Rule 12(b)(6) motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The issue is not whether the plaintiff will ultimately prevail, but whether [s]he is entitled to offer evidence to support [her] claim." *Muhammad v. Dallas Cnty. Cmty. Supervision & Corr. Dep't*, 479 F.3d 377, 379 (5th Cir. 2007) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)).

The standard of review applicable to motions to dismiss under Rule 12(b)(1) is similar to that applicable to motions to dismiss under Rule 12(b)(6). *See Williams v. Wynne*, 533 F.3d 360, 364–65 n.2 (5th Cir. 2008). "A motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

The pleadings plainly show Livingston violated Ms. Star's constitutional right to be free from a substantial risk of serious harm, a right clearly established under the law at the time of her attack, rape, and threats. *See Bishop v. Arcuri*, 674 F.3d 456, 460–61 (5th Cir. 2012) (describing

two-element standard for qualified immunity).

III. SUMMARY OF ARGUMENT

Prison officials are constitutionally required to oversee a system of incarceration that does not cruelly and unusually punish people within its custody. In *Farmer v. Brennan*, the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment requires prison officials to protect prisoners from violence. 511 U.S. 825 (1994). In doing so, the court recognized that "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 834 (internal quotation marks omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

Despite *Farmer*, Livingston made the deliberate choice to house lesbian, gay, bisexual, and transgender ("LGBT") people—such as Ms. Star, who is particularly vulnerable to sexual and physical assault based on her transgender and perceived gay status—in conditions where inmates regularly prey on them due to inadequate protection. Though Livingston knows prisoners suffer rape and assault as a result of these conditions year after year, he took, and continues to take, no reasonable action to protect vulnerable populations, such as LGBT individuals, from sexual assault and other violent acts. The Prison Rape Elimination Act ("PREA") and the Department of Justice's PREA Standards have provided Livingston with the knowledge and the tools to eliminate sexual abuse in TDCJ, but Livingston has not implemented these standards. This is true despite Livingston's own participation in hearings and committees that recognize the vulnerability of LGBT individuals who are incarcerated. Thus, Livingston is liable for the threats of harm and resulting harm to Ms. Star because he knew that such assaults endured by prisoners were a serious, system-wide danger in Texas prisons, yet he remained deliberately indifferent to that danger. As the Executive Director of TDCJ, Livingston is one of the few people in the agency who has the ability and authority to ensure that its written policies, incorporating the PREA Standards, are followed. Livingston cannot claim qualified immunity because his failure to protect vulnerable people, such as Ms. Star, was clearly unconstitutional at the time she was brutally attacked.

IV. ARGUMENT

A. The Complaint Plausibly Alleges Livingston's Own Acts as a Supervisor Violated the Eighth Amendment.

Section 1983 provides a cause of action against "[e]very person who," under color of state law, "subjects, or causes to be subjected," another person to a deprivation of a federally-protected right. 42 U.S.C. § 1983 (2012). A supervisor may be liable under 42 U.S.C. § 1983 if "there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987). For the latter "supervisory liability" claim, "the misconduct of the subordinate must be affirmatively linked to the action or inaction of the supervisor." *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997). Further, a supervisory official is held to a mens rea standard of "deliberate indifference," which requires proof that the supervisor "disregarded a known or obvious consequence of his action." *Id.* at 551. The dual requirements of deliberate indifference and "an affirmative link" ensure that supervisory liability is not being imposed based on a theory of respondeat superior. *See City of Canton v. Harris*, 489 U.S. 378, 388, 391 (1983) (explaining that to adopt lesser standards of fault and causation "would result in *de facto respondeat superior* liability").

1. Plaintiff Suffered Serious Harm at TDCJ Facilities as Prison Officials Ignored Her Pleas for Protection.

Ms. Star, a transgender woman in the custody of TDCJ, has been housed in at least seven sex-segregated male TDCJ units since 2002. (DE 35 ¶¶ 1, 29.) In each of these seven units—Telford, Allred, Smith, Coffield, Hughes, Robertson, Clements—male inmates have identified her as a transgender woman or perceived her to be a gay man and threatened her with violence if she did not perform sexual acts for them. (*Id*. ¶¶ 29–30.) In each of these units, Ms. Star has told TDCJ staff that she feared for her safety and asked for protection. (*Id*. ¶¶ 33, 35–36, 39–40, 44–

45, 47, 49, 51, 54–55, 57, 59, 63–64, 66–67, 74, 78, 84–91, 93, 95, 99, 104–106, 114, 124.) Notwithstanding her pleas, she has been raped, forced into violent, non-consensual sexual relationships, and brutally attacked when she resisted sexual demands. (*Id.* ¶¶ 32, 34, 37, 42, 44, 50, 53, 68.) In November 2013, after repeatedly begging TDCJ staff to protect her from an inmate in the Hughes Unit who told Ms. Star that she "belonged" to him and that refusing his sexual demands was not an option, TDCJ officials moved her closer to her aggressor, who slashed her face multiple times with a razor while calling her a "snitching faggot." (*Id.* ¶¶ 56, 57, 59, 60, 62, 63–68.)

Following the razor attack, TDCJ kept her in general population of two more units where Ms. Star continued to be threatened with assault and even death—all of which were reported to TDCJ officials. (*Id.* ¶¶ 80, 113.) Like the countless times before, TDCJ officials failed to protect her. Only after her attorneys moved for preliminary relief did anyone take serious action to relieve the constant risk of harm she encountered in general population for more than a decade. Prison officials, including Livingston, violate the Eighth Amendment where they display deliberate indifference to a substantial risk of serious harm. *Farmer*, 511 U.S. at 828.

2. Plaintiff Does Not Seek to Impose Vicarious Liability upon Livingston Based upon a Respondeat Superior Theory.

Ms. Star does not assert respondeat superior claims against Livingston. "Supervisory liability" is a term of art, although it has sometimes been used interchangeably by practitioners and jurists to mean vicarious liability. Livingston erroneously suggests that Ms. Star seeks the *automatic* imposition of liability on Livingston for the acts of his subordinates (i.e., vicarious liability through the doctrine of respondeat superior). *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (finding no vicarious liability for a municipal "person" under 42 U.S.C. § 1983). In this sense, the Supreme Court in *Iqbal* reaffirmed what has been long established—

vicarious liability is inapplicable to *Bivens* or § 1983 suits. *Iqbal*, 556 U.S. at 677. Plaintiff, however, does not here seek to impose liability on Livingston based on the "right to control" the acts of his subordinates. As such, his culpability does not derive from the vicarious liability doctrine.

Rather, as used by Plaintiff, "supervisory liability" refers to the imposition of liability on a supervisor because of misconduct in his or her use of (or refusal to use) supervisory authority. Put simply, Livingston possessed the requisite state of mind—deliberate indifference—and *his* own action (or inaction) as Executive Director of TDCJ is affirmatively linked to the underlying Eighth Amendment violations committed against Ms. Star. So while Fifth Circuit law does not impose liability against government officials under § 1983 for the conduct of subordinates under a respondeat superior theory, circuit law *does* hold an official liable for constitutional violations premised on the official's *own conduct* as a supervisor—for example, his failure to train. *Morgan v. Tex. Dep't of Criminal Justice McConnell Unit*, 537 F. App'x 502, 509 (5th Cir. 2013) (citing *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 286–87 (5th Cir. 2002)). As discussed below in Section IV.A.4, Plaintiff sufficiently alleges facts that Livingston, through his own individual actions, caused Ms. Star to be subjected to a deprivation of her constitutional rights guaranteed by the Eighth Amendment.

3. *Iqbal* Does Not Insulate Livingston from Liability for His Own Conduct as a Supervisor in Causing Eighth Amendment Violations Against Ms. Star.

Iqbal did not eviscerate supervisory liability as Livingston suggests. (DE 40 at 6.) Plaintiff Javaid Iqbal, a Pakistani Muslim, was arrested and detained in severely restrictive conditions following the attacks of September 11, 2001. *Iqbal*, 556 U.S. at 666. He filed a *Bivens* action[3]

[3] A *Bivens* action seeks to hold federal officials individually liable for constitutional violations. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

against his jailors and various officials, including Attorney General John Ashcroft and FBI Director Robert Mueller, alleging purposeful discrimination on the basis of race, religion, and national origin. *Id.* The Court held that Iqbal's complaint failed to plead sufficient facts to state a claim against Ashcroft and Mueller for intentional discrimination. *Id.* at 687. The Court stated that "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." *Id.* at 676. Thus, Iqbal's First and Fifth Amendment equal protection intent-based *Bivens* claims against federal supervisory officials required Iqbal to "plead and prove that the defendant acted with discriminatory purpose." *Id.*

Livingston's sweeping and wholly unsupported contention that supervisors cannot be held liable post-*Iqbal* fails. Iqbal's case was dismissed because the complaint failed to "meet the standard necessary to comply with Rule 8." *Id.* at 683. In proceeding to assess the sufficiency of his factual allegations, the Court necessarily affirmed that even high-level officials *may be held liable* for their own individual actions as a supervisor, even where the constitutional injury occurred at the hands of subordinates. *See id.*

Moreover, unlike Plaintiff's Eighth Amendment claims against Livingston for his own acts as a supervisor under § 1983, Iqbal asserted intent-based First and Fifth Amendment *Bivens* claims against federal officials. *See Iqbal*, 556 U.S. at 676. ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.") The claims pressed in *Iqbal* are inapposite to those presented here because *deliberate indifference*—not purposeful discrimination—continues to be the state of mind requirement for supervisory liability against state officials whose actions are affirmatively linked to an Eighth Amendment violation. *See Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011) ("In order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the

supervisor act[ed], or fail[ed] to act, with *deliberate indifference* to violations of others' constitutional rights committed by their subordinates.") (quoting *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008)); *Starr v. Baca*, 652 F.3d 1202, 1206–07 (9th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 2101 (2012); *Martone v. Livingston*, No. 4:13-cv-3369, 2014 WL 3534696, at *7 (S.D. Tex. July 16, 2014) ("Plaintiff has adequately alleged that the TDCJ Defendants acted, or failed to act, with deliberate indifference to constitutional violations as necessary for supervisory liability to attach under § 1983."). Thus, Livingston's contention that *Iqbal* abolished "failure to train and supervise claims"[4] is belied by clearly established law. *See, e.g.*, *Carr v. Montgomery Cnty.*, No. H-13-2795, 2014 WL 4983547, at *9 (S.D. Texas Oct. 6, 2014) (Miller, J.). Livingston has not cited any authority to the contrary.[5]

4. Livingston's Own Deliberately Indifferent Conduct as a Supervisor Caused TDCJ Officials to Violate Ms. Star's Eighth Amendment Rights.

Plaintiff has sufficiently pled supervisory liability claims of deliberate indifference against Livingston. *See Iqbal*, 556 U.S. at 678. The factual allegations plausibly suggest Livingston acquiesced to the unconstitutional conduct of his subordinates and was thereby deliberately indifferent to the danger posed to Ms. Star.

a. Livingston disregarded a known or obvious consequence of his actions.

In 2003, Congress unanimously passed PREA, which was signed into law by then-President

[4] Livingston has not challenged Plaintiff's deficient policy, practice, and custom theory, which also caused the violation of Plaintiff's constitutional rights. (DE 40 at 3 (stating that "failure to supervise and train . . . are the theories, the only theories, of liability which form the basis of plaintiff's complaint against Brad Livingston").) In an abundance of caution, however, Plaintiff addresses arguments related to this theory.

[5] Livingston appears to quote a single case other than *Iqbal*, but fails to include a citation for the case. (DE 40 at 6 ("'[U]nder *Iqbal*, . . . [a] defendant is not liable . . . if the defendant's failure to act deprived the plaintiff of his or her constitutional right . . . Plaintiff's claim, based on [defendant's] "failure to take corrective measures," is precisely the type of claim *Iqbal* eliminated.'").

George W. Bush. (DE 35 ¶ 126.) Over the next nine years, the National Prison Rape Elimination Commission ("NPREC")[6] held hearings, heard testimony, and proposed standards to eliminate sexual abuse in our nation's confinement facilities. (*Id.*) Notably, Livingston *participated in* NPREC's public hearings, *submitted comments on* proposed standards, and *provided documents* that NPREC used in preparing its recommendations. (*Id.*) Through NPREC, Livingston had specific knowledge of the reported findings, including the following:

- "Sexual abuse is not an inevitable feature of incarceration." (*Id.*)
- "Leadership matters because corrections administrators can create a culture within facilities that promotes safety instead of one that tolerates abuse." (*Id.*)
- "[M]en and women with non-heterosexual orientations and transgender individuals" are particularly vulnerable. (*Id.*)
- "[F]ull adoption of PREA standards by all of the nation's prisons and jails is necessary to achieve the elimination of sexual abuse in confinement facilities." (*Id.*)

Livingston is also currently the Chair of the Standards Committee for the American Correctional Association ("ACA") and has been a member since at least January 19, 2007.[7] The Standards Committee promulgates model standards for various types of correctional facilities, which address "all aspects of operations, including safety, security, order, care, programs, justice, and administration."[8] At the January 31, 2014 meeting, ACA Executive Director James

[6] Congress established the bipartisan NPREC, as part of PREA, to investigate the problem of sexual abuse of people in government custody and propose standards to eliminate such sexual abuse. The final standards became effective June 20, 2012, when they were published in the Federal Register. *See* 28 C.F.R. Part 115 (DE 35 ¶ 126 n.6).

[7] ACA Committee on Standards (noting Brad Livingston as Chair of Standards Committee), www.aca.org/aca_pro d_imis/ACA_Member/Standards_and_Accreditation/Standards_Committee.aspx (last visited Mar. 30, 2015); http://www.aca.org/ACA_PROD_IMIS/docs/Standards%20and%20Accreditation/sac_January_2007.pdf (last visited Mar. 30, 201) (noting Livingston as an absent member); http://www.aca.org/ACA_PROD_IMIS/docs/Standards%20and%20Accreditation/sac_August_2007.pdf (last visited Mar. 30, 2015) (noting Livingston's presence). The Court can take judicial notice of Livingston's position on the ACA and other information cited in this paragraph, which is available from public sources and whose accuracy cannot reasonably be questioned. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (recognizing court can take judicial notice of documents when addressing motion to dismiss); *Sons v. Medtronic Inc.*, 915 F. Supp. 2d 776, 781 (W.D. La. 2013) (taking judicial notice of material on public websites when considering Rule 12(b)(6) motion).

[8] *Id.*

Gondles reminded Livingston and the rest of the Standards Committee that the ACA adopted PREA standards in 2012.[9] The PREA standards—specifically designed to combat the presence of sexual abuse in prisons—were incorporated into TDCJ's policy. (DE 35 ¶ 161.)

Inmate surveys published by the Bureau of Justice Statistics ("BJS") on sexual victimization report that for at least the last half-decade people incarcerated at TDCJ facilities report some of the highest levels of sexual abuse in the country (*id.* ¶ 134)—an obvious and insufficiently-addressed problem.

- Of 146 prisons surveyed in 2007, five of the ten prisons with the highest reported levels of sexual abuse were run by TDCJ, including the Clements Unit. (*Id.* ¶ 135.)
- Of 167 prisons surveyed in 2008–2009, TDCJ's Hughes Unit reported the highest rate of inmate-on-inmate sexual victimization in the country at 8.6%. (*Id.* ¶ 136.)
- Of 233 prisons surveyed in 2011–2012, TDCJ's Clements Unit ranked eighth in the country with reported sexual assault at 6.8% (one of only eleven prisons designated "high-rate" because sexual victimization was at least twice the national rate of 1.7% for male prisons). (*Id.* ¶ 137.)

In addition, TDCJ's Office of the Inspector General ("OIG") documented the prevalence of the systemic failures left unaddressed by Livingston. From September 2012 through August 2013, the OIG documented 378 allegations of inmate abuse meeting the elements of Texas Penal Code 22.011 (Sexual Assault) and 22.021 (Aggravated Sexual Assault): 14 from Hughes, 18 from Robertson, and 24 from Clements—three units where Ms. Star has been housed since 2011. (*Id.* ¶ 138.)

Livingston not only consciously disregarded these alarming statistics, he has been confronted with numerous complaints and lawsuits by LGBT incarcerated people related to sexual and physical assault in TDCJ facilities. (*Id.* ¶ 133.) And in 2011, the Department of Justice's Review

[9] Standards Committee Meeting Minutes, ACA Winter Conference, Jan. 31, 2014, http://www.aca.org/ACA_PROD_IMIS/Docs/Standards%20and%20Accreditation/SC%20Minutes_Tampa_Jan2014.pdf (last visited Mar. 25, 2015).

Panel on Prison Rape conducted a PREA-mandated hearing requesting testimony from three correctional institutions with a high prevalence of victimization. (*Id.* ¶ 139.) The Review Panel on Prison Rape summoned Livingston to account for the alarming statistics concerning widespread sexual assault occurring at TDCJ facilities.[10] (*Id.*) Livingston can hardly feign surprise about the systemic problems with sexual abuse across TDCJ facilities, especially in light of the panel's responses to his testimony observed:

- TDCJ's "**practice does not appear to conform to [its] policies**." (*Id.* (emphasis added).)
- A significant number of **complaints came from inmates who self-identified as gay** and **recommended prison administrators provide "training** to staff on the vulnerability of homosexual inmates and to take steps to protect them from sexual assault." (*Id.* (emphasis added).)

According to a 2012 survey conducted by the Texas Criminal Justice Coalition, more than half the correctional officers surveyed do not believe that they receive adequate training, and nearly two-thirds do not believe the training they have received has prepared them for the challenges of their job. (*Id.* ¶ 151.)

Given his knowledge of these problems, a jury easily may infer that Livingston deliberately turned a blind eye to widely known and serious systemic problems, indifferent to the harms that resulted for the most vulnerable of the prison population he was charged with protecting. The law does not require Livingston to predict that Ms. Star, in particular, would be threatened with violence. Plaintiff need only show that Livingston was aware that sexual abuse was a widespread danger to offenders generally, or to particularly vulnerable populations—such as LGBT people like Ms. Star. *Farmer*, 511 U.S. at 843–44. Protestations by Livingston that he was not "aware of

[10] *See* Prison Rape Elimination Act Testimony, Brad Livingston (Apr. 26–27, 2011) ("The agency recognizes the seriousness of sexual assault and other forms of sexual abuse in prison[.]"), at http://ojp.gov/reviewpanel/pdfs_apr11/testimony_livingston.pdf; U.S. Dep't of Justice Office of Justice Programs, Review Panel on Prison Rape, Hearings on Rape and Staff Misconduct in U.S. Prisons (Amended Version) (Livingston Testifying) (Apr. 27, 2011), at http://ojp.gov/reviewpanel/pdfs_apr11/transcript_042711.pdf.

any housing complaints of Plaintiff" (DE 40 at 5) are irrelevant because Livingston knew and tolerated the rampant sexual abuse occurring at TDCJ facilities.[11]

As the Supreme Court noted:

> If, for example, prison officials were aware that inmate rape was so common and uncontrolled that some potential victims dared not sleep but instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station, it would obviously be irrelevant to liability that officials could not guess beforehand precisely who would attack whom.

Farmer, 511 U.S. at 843–44 (internal quotation marks and citation omitted); *see also Blackmon v. Garza*, 484 F. App'x 866, 873 (5th Cir. 2012) ("[A] jury could reasonably conclude that the heat-related risks to [a prisoner] were obvious."). Livingston knew that LGBT and gender non-conforming people are particularly vulnerable to sexual abuse while incarcerated. (DE 35 ¶¶ 125, 130.) Ms. Star is one such person.

Livingston displayed deliberate indifference to the information he received through NPREC's findings (*id.* ¶ 126); by inmate surveys revealing TDCJ systemic deficiencies of rape and sexual violence (*id.* ¶¶ 135–38); through hearings by DOJ's Review Panel on Prison Rape investigating sexual abuse at TDCJ facilities (*id.* ¶ 139); from websites and in publications of various correctional associations, including the Department of Justice, the National Institute of Corrections, and the American Jail Association (*id.* ¶ 127)[12] and regular discussion by organizations and the press (*id.* ¶ 128). Moreover, TDCJ's own written policies acknowledge the vulnerability of LGBT inmates by recommending taking an inmate's sexual orientation and

[11] Moreover, the Court cannot consider such an assertion when addressing Livingston's Rule 12(b)(6) motion, which is limited to the allegations in the First Amended Complaint and matter incorporated therein, or subject to judicial notice.

[12] For example, the American Jail Association has reported that "[m]ore than any other group, male-to-female transgender inmates (trans women) who are housed with men are at risk for sexual victimization and harassment in jails and prisons," and the National Institute of Corrections noted that while incarcerated, "men and women with nonheterosexual orientations, transgender individuals, and people with intersex conditions were highly vulnerable to sexual abuse." (DE 35 ¶ 127.)

gender identity into account when assigning housing, including placement in safekeeping, to reduce the risk of sexual abuse. (*Id.* ¶ 129.) TDCJ's internal training documents acknowledge that LGBT people are vulnerable to sexual abuse while incarcerated and have a greater potential for being victimized than other people in custody. (*Id.*) Yet, despite this knowledge, Livingston did not take reasonable steps to prevent sexual violence.

The specific factual allegations above are hardly threadbare recitals of elements of a cause of action supported by conclusory statements. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Rather, the First Amended Complaint is replete with well-pleaded factual allegations regarding Livingston's deliberate indifference and this Court "should assume their veracity." *Iqbal*, 556 U.S. at 679. Plaintiff has more than nudged her claim of supervisory liability against Livingston from conceivable to plausible.

b. Plaintiff alleges Livingston's conduct caused Ms. Star serious harm.

Livingston erroneously maintains that Ms. Star must allege direct participation in the unconstitutional Eighth Amendment injury against Ms. Star. (DE 40 at 5–6.) Livingston's argument, however, contradicts firmly established Fifth Circuit law on supervisory liability. *See, e.g.*, *Brown v. Bolin*, 500 F. App'x 309, 314 (5th Cir. 2012) ("Supervisory liability can also be established without direct participation in the alleged events[.]"). Rather, supervisory liability may exist "without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation."[13] *Cozzo*, 279 F.3d at 289 (quoting

[13] The policy does not need to be the official written policy, but can be an accepted practice and custom. *See, e.g.*, *Cozzo*, 279 F.3d at 289 ("An official policy is: 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated . . . ; or 2. A persistent, widespread practice of . . . officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [the entity's] policy.").

Thompkins, 828 F.2d at 304); *see also Brown v. Callahan*, 623 F.3d 249, 253–54 (5th Cir. 2010) (discussing the "two theories" of supervisory liability: (1) failing to train or supervise and (2) ratifying or condoning a custom or policy).

Here, Plaintiff has pled sufficient facts to allege that Livingston, with deliberate indifference to the objective risk of harm to inmates like Ms. Star who are vulnerable to sexual and physical abuse in TDCJ, adopted, ratified, and/or condoned a practice and custom that was the moving force behind the injuries to Ms. Star, and failed to train and supervise TDCJ employees on the known mechanisms to prevent the risk of harm. Plaintiff has alleged that Livingston, notwithstanding knowledge that the training and supervision in TDCJ are inadequate and that the practice and custom in TDCJ do not protect LGBT people, condoned and ratified deficient training, supervision, practices, and customs. As discussed herein, Livingston was aware of the pattern and practice of sexual abuse of LGBT people as a result of, *inter alia*, previous lawsuits, reports from the BJS and TDCJ's OIG, his participation in the development of PREA, information disseminated by leading correctional associations, non-governmental organizations and the media, and TDCJ's own written (if inadequately implemented) policies. (DE 35 ¶¶ 126–41.) Significantly, in 2011, DOJ's Review Panel on Prison Rape requested that Livingston testify and address the high level of abusive sexual contact that disproportionately affected inmates identifying as "homosexual." (*Id.* ¶ 139.)

Plaintiff has also alleged a causal connection between Livingston's failure to supervise and train TDCJ officers, the widespread and pervasive practice and custom in TDCJ, and the deprivation of Plaintiff's rights. Livingston cannot deny knowledge of PREA, NPREC, and the PREA standards; indeed, he has incorporated many of the provisions into TDCJ's Safe Prisons/PREA Plan. (*Id.* ¶¶ 129, 161.) But, as DOJ's Review Panel on Prison Rape observed,

TDCJ's "practice does not appear to conform to [its] policies." (*Id.* ¶ 139.) In sharp contrast to its written policies, the custom and practice condoned by Livingston in TDCJ:

- Allows gay men and transgender women to be forced into coerced sexual relations with stronger or more powerful people in custody—frequently gang members—or face physical assault if they complain or resist. Inmates vulnerable to sexual abuse are forced to remain in the general population where they are at a high risk of sexual and physical assault and denied adequate protection or safekeeping. (*Id.* ¶¶ 140, 146; *cf. id.* ¶ 157 ("Texas Safe Prisons requires that safekeeping status be available for incarcerated people in all general population custody levels 'who require separate housing from general population because of threats to their safety due to a history of homosexual behavior, a potential for victimization, or other similar reasons.'").)

- Fails to screen inmates appropriately or use available information to separate vulnerable inmates from likely aggressors, and ignores that LGBT inmates and inmates who have been sexually abused are substantially vulnerable to future abuse. (*Id.* ¶¶ 147–48; *cf.* 28 C.F.R. § 115.41 (requiring that inmates be screened for vulnerability and separated from likely aggressors, taking into account "whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming"; "whether the inmate has previously experienced sexual victimization"; and "the inmate's own perception of vulnerability").)

- Provides insufficient supervision to protect inmates from sexual abuse due to, *inter alia*, failure to recruit and retain qualified employees and the lack of video surveillance. (DE 35 ¶¶ 149–50; *cf.* 28 C.F.R. § 115.13 (requiring "adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse").)

- Provides perfunctory and inadequate training on preventing sexual abuse and responding to allegations of threatened sexual abuse. (DE 35 ¶ 151.) PREA training is considered a joke for many TDCJ employees, who believe that sexual assault of LGBT people is funny. (*Id.*) High turnover rates and the influx of new staff means that many staff have not been trained or had only basic training. (*Id.* ¶¶ 151–52; *cf.* 28 C.F.R. § 115.31 (requiring training on the "zero-tolerance policy" for sexual abuse; the dynamics of sexual abuse; how to detect and respond to signs of threatened and actual sexual abuse; how to prevent, detect, report, and respond to allegations; and how to communicate effectively and professionally with inmates, including LGBT, intersex, or gender-nonconforming inmates).)

- Condones a culture of degradation and disrespect for LGBT people, pursuant to which it is common for TDCJ staff to call inmates "faggot" and "punk," to speak to them in a derogatory manner, to suggest that gay incarcerated people enjoy being raped, and to allow other incarcerated people to target LGBT people for abuse because of their sexual orientation and/or gender identity. (DE 35 ¶ 153; *cf.* 28 C.F.R. § 115.31(a)(9) (requiring training on "[h]ow to communicate effectively and professionally with . . . lesbian, gay, bisexual, transgender, intersex, or gender

nonconforming inmates").)

- Allows for perfunctory and incomplete investigation of inmate complaints about sexual abuse, ignoring or refusing to actively investigate grievances and other complaints and retaliating against persons who file grievances to deter future complaints. (DE 35 ¶ 155; *cf.* 28 C.F.R. §§ 115.34, .71 (requiring correctional officers to gather and preserve direct and circumstantial evidence of sexual abuse; take immediate action to protect inmates from a substantial risk of imminent sexual abuse; and take an active role in the investigation, interviewing alleged victims, suspected perpetrators, and witnesses, and reviewing prior complaints and reports of sexual abuse involving the suspected perpetrator).)

- Uses the threat of isolation, including so-called "protective custody," and other forms of retaliation to deter safety-related complaints. (DE 35 ¶¶ 147–62.) Inmates who complain about threats of sexual abuse are routinely placed in isolation. (*Id.* ¶ 159; *cf.* 28 C.F.R. § 115.43 (prohibiting the use of involuntary segregated housing unless a determination has been made that there is no available alternative means of separation from likely abusers and, in any case, only "until an alternative means of separation from likely abusers can be arranged").)

As alleged in the First Amended Complaint, these widespread and pervasive practices directly affected Ms. Star in multiple facilities.

In addition, Livingston has failed to train or supervise TDCJ employees about PREA, TDCJ's written policies, and the other known mechanisms to prevent sexual and related violence. Specifically, Plaintiff alleges that Livingston failed to train and supervise TDCJ officers, *inter alia*, on the vulnerability of LGBT inmates like Ms. Star and TDCJ's "zero-tolerance" policy for sexual abuse and sexual harassment (DE 35 ¶ 151); how to prevent, detect, and respond to signs of threatened and actual sexual abuse (*id.* ¶¶ 151–52); the need to screen and separate vulnerable inmates from likely aggressors (*id.* ¶ 148); adequate staffing and supervision to prevent abuse (*id.* ¶ 150); appropriate investigation into complaints about threats of abuse and actual abuse, including by gathering and preserving evidence, interviewing alleged victims, perpetrators and witnesses and reviewing prior complaints and reports of sexual abuse (*id.* ¶ 156); limitations on the use of isolation with respect to people at risk of sexual abuse (*id.* ¶ 159); and professional and respectful interactions with LGBT incarcerated people. (*Id.* ¶ 153).

It is the failure to train and supervise TDCJ employees and the widespread and pervasive practices and customs (indeed the very culture) that is the moving force behind the violation of Ms. Star's constitutional rights. Livingston has been called to answer for the deficiencies before, yet they still persist. If TDCJ's written policies to prevent sexual abuse were the *de facto* custom and practice in TDCJ, or had Livingston trained and supervised his employees on the implementation of these policies, Ms. Star would not have suffered through more than twelve years of horrific abuse. (*Id.* ¶ 162.) Despite knowledge that the training and supervision, along with the culture, of TDCJ do not protect LGBT people from sexual abuse and related violence, Livingston has failed to take reasonable steps to protect LGBT people in TDCJ, and thus, through his own actions, violated Ms. Star's rights.

B. Livingston Is Not Entitled to Qualified Immunity.

To overcome a defense of qualified immunity, a plaintiff must satisfy two inquiries: (1) whether the plaintiff has alleged facts that make out a violation of a constitutional right and (2) whether the defendant's conduct was objectively unreasonable in light of "clearly established" law at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). A plaintiff need only assert facts that, if true, would allow the court to "draw the reasonable inference that the defendant is liable" for the harm alleged to defeat a defense of qualified immunity. *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).[14]

Livingston's argument that he is entitled to dismissal based on his qualified immunity defense is anemic, at best. Livingston's argument consists of three sentences:

Here, the plaintiff has pled nothing more than that Livingston failed to properly train

[14] In defining the qualified immunity test, the Supreme Court explained: "[W]e provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

> and supervise, and that as Executive Director of TDCJ, he knew or should have known of risks to gay and transgender inmates. Thus negligence pleading is simply not enough under the heightened pleading requirements of *Iqbal*. As a result, plaintiff's claims against Livingston in his individual capacity should be dismissed as a matter of law.

(DE 40 at 8.) Thus, Livingston's qualified immunity argument amounts to an attack on Plaintiff's pleading of the intent element of her claim—contending that negligence is not enough. Plaintiff, however, has pled facts satisfying the deliberate indifference standard.

1. Plaintiff Alleged Facts that Show Livingston Is Not Entitled to Qualified Immunity.

Livingston does not challenge the sufficiency of Plaintiff's allegations that she faced a "substantial risk of serious harm."[15] Neither does Livingston argue that Plaintiff's right to be protected from sexual assault and related violence at the hands of other prisoners was not clearly established.[16] Instead, he simply challenges that Plaintiff has alleged sufficient facts to show deliberate indifference. Again, Livingston is wrong. *See* Section IV.A., *supra.*

Under clearly established law, a plaintiff must allege that the officer was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]," drew the inference, and nevertheless disregarded the risk. *Farmer*, 511 U.S. at 837; *accord Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003). "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842. "[E]vidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-

[15] Nor could he, as Plaintiff has clearly alleged that she has been threatened with rape and physical assault in seven different TDCJ units (DE 35 ¶¶ 29–30), has been assaulted (*id.* ¶¶ 34, 37, 42, 50, 53, 68), and continues to fear for her life and safety. *See, e.g.*, *Johnson v. Johnson*, 385 F.3d 503, 527 (5th Cir. 2004) (It is "abundantly clear that an official may not simply send the inmate into the general population to fight off attackers."); *see also Howard v. Waide*, 534 F.3d 1227, 1237 (10th Cir. 2008) (claims that gay inmate was threatened, sexually assaulted, and prostituted by other inmates were "sufficiently serious to constitute a violation under the Eighth Amendment").

[16] Any argument to the contrary must fail because Livingston's obligation to protect inmates like Ms. Star was well-established throughout the duration of her confinement, and continues to be so. *See Farmer*, 511 U.S. at 828; *Johnson*, 385 F.3d at 532 ("It is clearly established that all prison inmates are entitled to reasonable protection from sexual assault.").

documented, or expressly noted by prison officials in the past, and [] circumstances suggest[ing] that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it . . . could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." *Id.* at 842–43 (internal quotation marks omitted); *see also Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."); *Adames*, 331 F.3d at 512 ("In order to prove that an official is subjectively aware of a risk to inmate health or safety, a plaintiff inmate need not produce direct evidence of the official's knowledge. A plaintiff can rely on circumstantial evidence indicating that the official must have known about the risk.").

Deliberate indifference may also be shown through a pattern of violations and inadequacy of training that is "obvious and obviously likely to result in a constitutional violation." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009) (citing *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003)). An official cannot escape liability "if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Farmer*, 511 U.S. at 843 n.8.

Here, notwithstanding that Livingston was aware of the risks Plaintiff faced, he has acted with deliberate indifference in violation of the Eighth Amendment. The risk of serious harm, including sexual and physical assault, to LGBT people in custody is well known. TDCJ's own policies, as well as PREA, put Livingston on notice about the increased vulnerability incarcerated LGBT people face and the necessary mechanisms to protect vulnerable people from sexual assault in custody—including TDCJ's Safekeeping program. Furthermore, Livingston knows that TDCJ, the institution he runs, has a widespread and pervasive problem with sexual

abuse and other violence directed towards LGBT inmates like Ms. Star. BJS and OIG data confirm the problem and Livingston and his subordinates have defended numerous related lawsuits. *See, e.g.*, *Johnson v. Doe*, 582 F. App'x 512 (5th Cir. 2014); *Morris v. Livingston*, 739 F.3d 740 (5th Cir. 2014); *Blackmon*, 484 F. App'x 866. DOJ's Review Panel on Prison Rape summoned Livingston to explain the high prevalence of sexual assault in TDCJ's facilities and the chasm between TDCJ's written policies and the practice and custom actually in place.

Although Livingston may not yet have met Ms. Star face-to-face, he cannot credibly claim surprise that a transgender woman or someone perceived to be an effeminate gay man—who has reported the persistent threats of violence against her, who has a documented history of being assaulted, and who as a result of seeking safety has now been labeled by gang members as a "snitch"—would be at substantial risk of serious harm in TDCJ's general population. As pled, if Livingston had not condoned TDCJ's custom and practice of tolerating the assault of LGBT people and had he trained and supervised TDCJ employees adequately on the known mechanisms to prevent sexual assault, Livingston *would* have protected Ms. Star from the harm she faced, even without needing to know her name. In failing to take objectively reasonable steps to protect inmates like Ms. Star, Livingston demonstrated his deliberate indifference to the substantial risk of serious harm she faced daily for more than a decade. Plaintiff has clearly alleged sufficient facts to establish that Livingston acted with deliberate indifference.

Finally, there can be no serious debate that Livingston's conduct was objectively unreasonable in light of *clearly established* law at the time of the events pled in the First Amended Complaint. It has been well-established for decades that a prison official cannot stand by while an inmate is threatened, assaulted, and raped. *See Farmer*, 511 U.S. at 833; *Johnson*, 385 F.3d at 532. Livingston is not entitled to qualified immunity on his personal capacity claims.

2. The Heightened Pleading Standard Does Not Apply.

Defendant also argues that Plaintiff must satisfy a heightened pleading standard. Currently, the allegations in the First Amended Complaint are sufficiently detailed to support the inferences and arguments advanced in this response and to defeat Livingston's qualified immunity affirmative defense. But to the extent that the Court concludes that the First Amended Complaint itself is not sufficiently detailed to support the statements and inferences in this response, the Court should permit Plaintiff leave to file a Rule 7 Reply.

Contrary to Livingston's suggestion (DE 40 at 7), a plaintiff "need not anticipate a qualified immunity defense" in her initial complaint. *Fisher v. Dallas Cnty.*, 299 F.R.D. 527, 532 (N.D. Tex. 2014). In *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995), the Fifth Circuit *en banc* provided an appropriate scheme governing pleadings in suits against public officials under 42 U.S.C. § 1983 where qualified immunity is raised as an affirmative defense. First, a plaintiff is not required to "fully anticipate the defense in his complaint at the risk of dismissal under Rule 12." *Id.* at 1430. Second, after the defendant pleads a defense of qualified immunity, a trial court may in its discretion require a Rule 7 reply "tailored to the assertion of qualified immunity." *Id.* at 1433; *see also Kostic v. Texas A&M University*, 11 F. Supp. 3d 699, 712 (N.D. Tex. 2014) (explaining that, before the defendant affirmatively pled the defense, the plaintiff "had no need to plead allegations negating . . . immunity because avoiding such immunity is not an element of a claim"). The "heightened pleading standard" espoused in *Elliot v. Perez* for claims under § 1983 against public officials in their personal capacity applies "once a defendant asserts the defense." *Floyd v. City of Kenner*, 351 F. App'x 890, 893 (5th Cir. 2009). Livingston has yet to file an answer to the First Amended Complaint. Rather, he raises his qualified immunity defense for the first time in a motion filed under Rule 12(b). Thus, to the extent a heightened standard applies in response to Livingston's qualified immunity claim, it was only triggered *after* the First Amended

Complaint was filed.

Moreover, even if the *Shultea* heightened pleading standard applies, Plaintiff has met that standard. Under the heightened pleading standard, a plaintiff "must speak to the factual particulars of the alleged actions, at least when those facts are known to the plaintiff and are not peculiarly within the knowledge of defendants." *Schultea*, 47 F.3d at 1432. As discussed above, Plaintiff has adequately pled that Livingston violated her clearly established right to be protected from rape and other violence while in the custody of TDCJ and specifically—addressing the only part of the defense raised by defendant—has alleged that Livingston acted with the requisite intent, deliberate indifference.

C. Injunctive Relief Against Livingston

1. Plaintiff's Claim for Injunctive Relief Against Livingston Is Not Moot Because a Substantial Risk of Serious Harm to Plaintiff Remains

Defendant argues that Plaintiff's claims against him were rendered moot because she was transferred from the Hughes and Robertson Units to the Clements Unit. As of this filing, Ms. Star has been moved again—to Telford. "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) (internal quotation marks omitted). It is precisely Livingston's ability to transfer Plaintiff from unit to unit that makes it crucial for Plaintiff to name Livingston as a Defendant in her claim for injunctive relief.[17] The very nature of Plaintiff's problem is institutional, so transferring Plaintiff does not in and of itself provide a remedy. There is no doubt that Ms. Star's claim for injunctive relief is still very much alive and that it is still possible for this Court to grant her effectual relief.

[17] Plaintiff acknowledges that transferring her to Clements rendered it impossible for the unit level defendants at Robertson, or Hughes, to grant her injunctive relief, as she is no longer in their custody. Accordingly, she does not assert official capacity claims against these defendants in her First Amended Complaint.

Transferring Ms. Star to the Clements Unit certainly did not remedy the risk of serious harm she faced. Even though Defendant's counsel has stated that Plaintiff will soon be been placed in safekeeping, resolving the recent motion for emergency relief, it has yet to be seen whether this new placement is constitutionally sufficient, or if Plaintiff will continue to suffer from the same threats and acts of violence she faced in the preceding seven units. It also remains unclear whether placement in safekeeping is temporary, solely for the duration of the litigation, or permanent. Defendant retains his ability to return Plaintiff to general population in Telford or any other unit at any time without notice. While the parties are working to finalize their understandings about the timeframe for Plaintiff's new placement, it would be premature to dismiss Plaintiff's claim against Livingston in his official capacity before that is done because the "capable of repetition, yet evading review" exception to mootness cannot be ruled out. A dispute falls into this category if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (cited in *Turner v. Rogers*, 131 S.Ct. 2507, 2515 (2011)); *see also Murphy v. Hunt*, 455 U.S. 478, 482 (1982) ("[T]here must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party.").

Ultimately, it is Defendant's obligation to ensure that Plaintiff's custody arrangements, including her new custody arrangement, satisfy his obligation under the Eighth Amendment. As long as Plaintiff remains incarcerated, these issues must be more fully resolved.

2. Prospective Injunctive Relief Against Livingston Is Proper Under *Ex Parte Young.*

Sovereign immunity does not protect Livingston against suits seeking prospective injunctive

relief from him in his official capacity. The Eleventh Amendment grants states and their agencies immunity from suit in federal courts. *See* U.S. CONST. amend. XI. This immunity, however, is subject to a number of exceptions. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). The doctrine of *Ex Parte Young* establishes that federal courts have the power to require state officials to comply with the Constitution. 209 U.S. 123 (1908); *see also Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1039 (5th Cir. 1998) ("The rule of *Ex Parte Young* empowers the federal courts to grant the prospective injunctive relief sought by the plaintiffs if the rules challenged . . . violate federal law."). If a plaintiff "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," the Eleventh Amendment does not bar suit. *Verizon Maryland, Inc.*, 535 U.S. at 645.

Here, Plaintiff has clearly alleged an ongoing violation of federal law in the form of Defendant's deliberate indifference to the substantial risk of serious harm to her. The appropriate defendants for prospective injunctive relief are those who "are clothed with some duty in regard to the enforcement of the laws of the state." *Ex Parte Young*, 209 U.S. at 156. Fifth Circuit authority provides that *Ex Parte Young* applies when the state official has "some connection" with the unconstitutional action. *Hamilton v. Foti*, 372 F. App'x 480, 485 (5th Cir. 2010) (citing *Okpalobi v. Foster*, 244 F.3d 405, 414–15 (en banc) (5th Cir. 2001) (The *Ex Parte Young* exception also applies to a state official who is "specifically charged with the duty" to enforce an unconstitutional policy or practice and is "threatening to exercise that duty.").[18]

[18] Plaintiff consents to withdraw the fourth demand in her prayer for relief. (DE 35 at 50 (requesting "[e]xpungement of any disciplinary violation on Plaintiff's record connected to Defendants' failure to protect Plaintiff").) While Plaintiff no longer requests expungement of these records, she still asks that Defendants not be allowed to deny her protection in the future because of disciplinary infractions that she received in the past as a result of TDCJ officials' failure to protect her. For example, Plaintiff received a disciplinary infraction for fighting to defend herself after she asked TDCJ staff to protect her from an inmate who then attacked her. She has also received a disciplinary infraction and was punished for refusing to enter a cell with an inmate who she knew planned to assault her.

Livingston is an appropriate defendant in this suit because he has the duty and power to remedy the ongoing violations of Plaintiff's constitutional rights. As Plaintiff recently detailed in her motion for a temporary restraining order and a preliminary injunction (DE 46), to the extent Plaintiff faces a substantial risk of serious harm, it is Livingston ultimately who has the power to place and keep her in safekeeping or ensure her safety by alternative means.

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion.

In the alternative, if the Court believes the pleadings are deficient in any way, Plaintiff would respectfully ask for leave to amend her complaint or, in the case of Livingston's qualified immunity defense, file a Reply after permitting an opportunity to depose Livingston concerning, *inter alia*, his personal knowledge of the dangers attributed to him in this response.

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

I, CHRISTINA N. GOODRICH, certify that I have electronically submitted for filing, a true copy of the foregoing Plaintiff's Response in Opposition (including Memorandum of Authority) to Defendant Livingston's Motion to Dismiss under Rule 12(b)(1) and (6) for Lack of Jurisdiction, for Failure to State a Claim, and Assertion of Qualified Immunity on Behalf of Plaintiff Joshua D. Zollicoffer a/k/a Passion Star in accordance with the Electronic Case Filing System of the Southern District of Texas, on March 31, 2015.

/s/ Christina N. Goodrich
CHRISTINA N. GOODRICH

CERTIFICATE OF SERVICE

On March 31, 2015, I electronically submitted the foregoing document to the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. I hereby certify that I have served the following counsel of record electronically through the Court's ECF system.

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