



## Castro v. Heath et al

2013 | Cited 0 times | N.D. New York | August 1, 2013

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

LUIS CASTRO,

Plaintiff, Civil Action No. v. 9:12-CV-1250 (MAD/DEP) HEATH, Superintendent; et al.,

Defendants.

APPEARANCES: OF COUNSEL: FOR PLAINTIFF: LUIS CASTRO, Pro Se 09-A-1553 Wallkill Correctional Facility Box G Wallkill, NY 12589 FOR DEFENDANTS: HON. ERIC T. SCHNEIDERMAN JAMES SEAMAN, ESQ. Attorney General of the Assistant Attorney General State of New York The Capitol Albany, NY 12224-0341 DAVID E. PEEBLES U.S. MAGISTRATE JUDGE

REPORT AND RECOMMENDATION Pro se plaintiff Luis Castro, a New York State prison inmate, has commenced this action pursuant to 42 U.S.C. § 1983 alleging deprivation of his civil rights under the United States Constitution. In his complaint, plaintiff alleges that medical personnel at the prison facility in which he was confined at the relevant times failed to provide him with proper treatment for an ear infection.

Currently pending before the court are two motions. Defendant Heath has moved for the entry of summary judgment dismissing plaintiff's claims, based both upon plaintiff's alleged failure to exhaust available administrative remedies before commencing suit, and on the merits. The second pending motion was brought by plaintiff, who seeks leave to file an amended complaint. For the reasons set forth below, I recommend that both motions be granted and denied in part, and that plaintiff's proposed amended complaint be accepted for filing only to the extent it asserts an Eighth Amendment deliberate medical indifference against the named defendants.

### 2 I. BACKGROUND 1

Plaintiff is a prison inmate currently being held in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). See generally Complaint (Dkt. No. 1). Although he is now confined elsewhere, at the times relevant to this action, Castro was confined at the Greene Correctional Facility ("Greene"), located in Coxsackie, New York. Id.



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On or about March 9, 2012, plaintiff awoke with an ache in his left ear. Complaint (Dkt. No. 1) at § 6, ¶ 1. The next day, he submitted a sick call slip to the facility's nursing staff seeking treatment for the condition; prison medical personnel, however, failed to respond to that request. Id. at § 6, ¶¶ 2-3. Plaintiff submitted a second sick call slip form on March 11, 2012, again requesting treatment for his ear condition. Id. at § 6, ¶ 4 and Exh. 1. Despite submission of that request, medical staff at the facility persisted in their refusal to provide treatment for plaintiff's earache. Id. at § 6, ¶ 4. On or about March 20, 2012, plaintiff filed a grievance with defendant Heath, the Greene superintendent, complaining of the medical

Because, in his motion, defendant has not challenged the factual allegations 1 contained in plaintiff's complaint, the following recitation of the facts in this case is drawn from that initial pleading.

3 staff's alleged failure to treat him. Id. at § 6, ¶ 5. Thereafter, it is alleged that the Greene medical staff denied plaintiff medical treatment as retribution for the grievance that he filed with defendant Heath. Id. at § 6, ¶ 6.

It is not clear from plaintiff's allegations whether his ear condition was ever treated. Plaintiff's complaint, however, alleges that his condition has progressed to the point of requiring surgery, and defendants' failure to treat him has resulted in pain and a partial loss of hearing. Complaint (Dkt. No. 1) at § 6, ¶¶ 7-9. II. PROCEDURAL HISTORY

On August 6, 2012, plaintiff commenced this action by the filing of a complaint and accompanying application to proceed in forma pauperis ("I FP"). Dkt. Nos. 1, 2. Plaintiff's complaint names as defendants the Greene Superintendent, Heath, and a nurse stationed at the facility, identified only as "Jane Doe #1." Complaint (Dkt. No. 1) at § 3. Liberally construed, the complaint asserts three causes of action, including (1) retaliation, in violation of the First Amendment; (2) deliberate medical indifference, in violation of the Eighth Amendment; and (3) medical negligence under New York state law. Id. at § 7. As relief, plaintiff

4 requests awards of \$20 million in compensatory damages and \$500,000 in punitive damages against each of the defendants. Complaint (Dkt. No. 1) at § 8.

In response to plaintiff's complaint, defendant Heath filed a pre-answer motion for summary judgment, on October 17, 2010, arguing that plaintiff's complaint should be dismissed based on various grounds, including that (1) plaintiff failed to exhaust his available administrative remedies, (2) the claims asserted against him in his official capacity are precluded under the Eleventh Amendment, (3) the complaint fails to allege facts plausibly suggesting the named defendant's personal involvement, (4) the New York state negligence claim is not actionable under section 1983, (5) the allegations contained in plaintiff's complaint are unduly conclusory and insufficient to state a cognizable cause of action, and (6) he is entitled to qualified immunity. Def.'s Memo. of Law (Dkt. No. 13-3). 2 Plaintiff has failed to respond in opposition to defendant's motion.



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Unlike its Rule 12(b) dismissal motion counterpart, a summary judgment motion 2 does not have the effect of automatically staying the requirement of answering a plaintiff's complaint. Compare Fed. R. Civ. P. 12(b)(6) with Fed. R. Civ. P. 56. This distinction is not significant here, however, because defendant has requested, and been granted, a stay of the deadlines to answer plaintiff's complaint pending disposition of his motion. Dkt. No. 12; Text Order Dated Oct. 18, 2012.

5 Following the filing of defendant's summary judgment motion, plaintiff submitted a letter to the court requesting leave to file an amended complaint, Dkt. No. 17, accompanied by a proposed amended complaint asserting the same claims as those set forth in his initial complaint, and adding Dr. Caulfield and Nurse Aubright, two DOCCS employees stationed at Greene, as defendants, Dkt. No. 17-1. Defendant Heath has since responded in opposition to plaintiff's motion, arguing that it is futile in light of plaintiff's failure to exhaust available administrative remedies before commencing suit, Dkt. No. 22, and plaintiff has submitted a reply in further support of his motion for leave to amend, Dkt. No. 23.

Both of the pending motions, which are now fully briefed and ripe for determination, have been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). See Fed. R. Civ. P. 72(b). III. DISCUSSION

### A. Defendant's Motion for Summary Judgment

1. Plaintiff's Failure to Oppose Defendant's Motion The court's local rules require a party seeking the entry of summary judgment to submit a statement of material facts that it contends are

6 undisputed by the record evidence. N.D.N.Y. L.R. 7.1(a)(3). The local rules also instruct the non-moving party to respond in opposition to the moving party's statement of material facts by specifically admitting or denying each of the facts listed in that statement. *Id.* The purpose underlying this rule is to assist the court in framing the issues and determining whether there exist any triable issues of fact that would preclude the entry of summary judgment. *Anderson v. Dolgencorp of N.Y.*, Nos. 09-CV-0360, 09-CV-0363, 2011 WL 1770301, at \*1 n.2 (N.D.N.Y. May 9, 2011) (Sharpe, J.). To meaningfully fulfill this purpose, it is 3 essential for the court to have the benefit of both the moving party's statement and an opposition statement from the non-moving party.

In this instance, defendant Heath has complied with local rule 7.1(a)(3), providing a statement setting forth ten facts as to which, he contends, there is no genuine triable issue. Dkt. No. 13-1. Plaintiff has failed to respond either to that statement, or to defendant's motion in general. See generally Docket Sheet. Instead, plaintiff has filed a motion for leave to amend his complaint, in support of which he includes evidence

Copies of all unreported decisions cited to in this report have been appended 3 for the convenience of the pro se plaintiff.



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7 related to defendant's argument that he failed to properly exhaust the available administrative remedies. Dkt. No. 23 at 2. Although local rule 7.1 instructs that a court "shall deem admitted any properly supported facts set forth" in a moving party's rule 7.1(a)(3) statement, I find that it is improvident to do so under these circumstances in light of the Second Circuit's oft-repeated warning to district courts that pro se litigants are owed a certain amount of special solicitude. Accordingly, I have considered all of the materials submitted by both parties now before the court as it relates to both pending motions.

2. Exhaustion of Remedies Central to both defendant's summary judgment motion and his opposition to plaintiff's request for leave to amend is the contention that, by failing to file and pursue to completion a grievance concerning the alleged failure of prison officials to provide him with adequate medical treatment, plaintiff is now precluded from bringing this action. Def.'s Memo. of Law (Dkt. No. 13-3); Def.'s Memo. of Law (Dkt. No. 22).

The Prison Litigation Reform Act of 1996 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which imposes several restrictions on the ability of prisoners to maintain federal civil rights actions, expressly

8 requires that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); see also *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) ("Exhaustion is . . . mandatory. Prisoners must now exhaust all 'available' remedies[.]"); *Hargrove v. Riley*, No. 04-CV-4587, 2007 WL 389003, at \*5-6 (E.D.N.Y. Jan. 31, 2007) ("The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under Section 1983."). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

The requirement that inmates exhaust administrative remedies before filing a lawsuit is not a jurisdictional requirement. *Richardson v. Goord*, 347 F.3d 431, 434 (2d Cir. 2003). Instead, failure to exhaust is an affirmative defense under the PLRA, and "inmates are not required to specifically plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007).

9 In the event a defendant establishes that an inmate-plaintiff has failed to complete the administrative review process prior to commencing the action, the plaintiff's complaint is subject to dismissal. See *Woodford*, 548 U.S. at 93 ("[W]e are persuaded that the PLRA exhaustion requirement requires proper exhaustion."). "Proper exhaustion" requires a plaintiff to procedurally exhaust his claims by "comply[ing] with the system's critical procedural rules." *Woodford*, 548 U.S. at 95; see also *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007) (citing *Woodford*). 4



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In New York, prisons inmates are subject to a three-step Inmate Grievance Program (“IGP”) established by the DOCCS and recognized as an “available” remedy for purposes of the PLRA. *Mingues v. Nelson*, No. 96-CV-5396, 2004 WL 324898, at \*4 (S.D.N.Y. Feb. 20, 2004) (citing N.Y. Corrs. Law § 139 (McKinney’s 2003); 7 N.Y.C.C.R. § 701.7; *Rodriguez v. Hahn*, 209 F. Supp. 2d 344, 347 (S.D.N.Y. 2002); *Mendoza v. Goord*, No. 00-CV-0146, 2002 WL 31654855, at \*2 (S.D.N.Y. Nov. 21, 2002)). First, a

While placing prison officials on notice of a grievance through less formal 4 channels may constitute claim exhaustion “in a substantive sense,” an inmate plaintiff nonetheless must meet the procedural requirement of exhausting his available administrative remedies within the appropriate grievance construct in order to satisfy the PLRA. *Macias*, 495 F.3d at 43 (quoting *Johnson v. Testman*, 380 F.3d 691, 697-98 (2d Cir. 2004) (emphasis omitted)).

10 written grievance is submitted to the Inmate Grievance Review Committee (“IGRC”) within twenty-one days of the incident at issue. 7 N.Y.C.C.R. § 5 701.5(a). The IGRC, which is comprised of inmates and facility employees, then issues a determination regarding the grievance. *Id.* §§ 701.4(b), 701.5(b). If an appeal is filed, the superintendent of the facility next reviews the IGRC’s determination and issues a decision. *Id.* § 701.5(c). The third level of the process affords the inmate the right to appeal the superintendent’s ruling to the Central Office Review Committee (“CORC”), which makes the final administrative decision. *Id.* § 701.5(d). Ordinarily, only upon exhaustion of these three levels of review may a prisoner seek relief pursuant to section 1983 in a federal court. *Reyes v. Punzal*, 206 F. Supp. 2d 431, 432 (W.D.N.Y. 2002) (citing, *inter alia*, *Sulton v. Greiner*, No. 00-CV-0727, 2000 WL 1809284, at \*3 (S.D.N.Y. Dec. 11, 2000)).

Plaintiff’s complaint, which is signed under penalty of perjury, and thus has the same force and effect as an affidavit, alleges that he filed 6

The IGP supervisor may waive the grievance timeliness requirement due to 5 “mitigating circumstances.” 7 N.Y.C.C.R. § 701.6(g)(1)(i)(a)-(b). 18 U.S.C. § 1746; see also *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) 6 (“A verified complaint is to be treated as an affidavit for summary judgment

11 three grievances related to the allegations set forth in his complaint through the grievance procedures available at Greene. Complaint (Dkt. 7 No. 1) at § 4. Additionally, in support of his motion for leave to amend, plaintiff has submitted an affidavit stating that he “pursued [his] complaint through the [g]rievance process towards CORC in Albany, which . . . was ignored[.]” Dkt. No. 23 at 2.

In contrast to these allegations, defendant Heath states in his rule 7.1(a)(3) statement that plaintiff “did not appeal to CORC regarding any grievance” related to the facts giving rise to this action. Def.’s L.R. 7.1(a)(3) Statement (Dkt. No. 13-1) at ¶ 9. Defendant further states that plaintiff “has never appealed the results of any grievance[] to CORC.” *Id.* at ¶ 10. These assertions are supported by record evidence, including an affidavit from Jeffrey Hale, the Assistant Director of the DOCCS IGP,



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in which he concludes that, following a search of the relevant CORC database, plaintiff did not appeal any of his grievances to the CORC, including ones related to the facts of this case Hale Decl. (Dkt. No. 13-2)

purposes[.]”). It is worth noting that plaintiff’s prop osed amended complaint, which is not 7 signed under penalty of perjury, and thus does not have the same force and effect as an affidavit, alleges precisely the same. Dkt. No. 17-1 at 1-2.

12 at ¶¶ 10, 11; Hale Decl. Exh. A (Dkt. No. 1302) at 4-6.

As can be seen, the record now before the court demonstrates that a genuine dispute of material fact exists as to whether plaintiff failed to exhaust the available administrative remedies at Greene before commencing suit. Accordingly, I recommend that this portion of defendant’s motion be denied without prejudice to renewal following completion of discovery in this case. 8

3. Eleventh Amendment Immunity Plaintiff’s complaint asserts causes of action against defendants in their individual and official capacities. Complaint (Dkt. No. 1) at § 8. In his motion, defendant contends that plaintiff’s claims for damages asserted against him in his official capacity are barred based on the immunity conferred upon him by the Eleventh Amendment. Def.’s Memo. of Law (Dkt. No 13-3) at 10.

The Eleventh Amendment protects a state against suits brought in federal court by “p rivate parties seeking to impose a liability which must be

In the event that the same genuine dispute exists following completion of 8 discovery, the court will likely be compelled to hold an evidentiary hearing in accordance with *Messa v. Goord*, 652 F.3d 305 (2d Cir. 2011). A recommendation that such a hearing be held at this juncture would be premature because plaintiff has not had the benefit of discovery.

13 paid from public funds in the state treasury.” *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Cory v. White*, 457 U.S. 85, 90-91 (1982); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993). This absolute immunity, which states enjoy under the Eleventh Amendment, extends to both state agencies and state officials sued for damages in their official capacities when the essence of the plaintiff’s claim seeks recovery from the state as the real party in interest . See, e.g., *Daisernia v. State of New 9 York*, 582 F. Supp. 792, 798-99 (N.D.N.Y. 1984) (McCurn, J.) (“[ A] suit which seeks a money judgment ‘which must be paid from the state treasury is barred by the Eleventh Amendment,’ even though it is nominally asserted against an individual official.” ( quoting *Edelman*, 415 U.S. at 663)); see also *Richards v. State of New York App. Div., Second Dep’ t*, 597 F. Supp. 689, 691 (E.D.N.Y. 1984) (citing, inter alia, *Cory v. White*, 457 U.S. 85, 89-91, (1982)). “To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a





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In a broader sense, this portion of defendants' motion implicates the sovereign immunity enjoyed by the State. As the Supreme Court has reaffirmed, the sovereign immunity enjoyed by the states is deeply rooted, having been recognized in this country even prior to ratification of the Constitution, and is neither dependent upon nor defined by the Eleventh Amendment. *Northern Ins. Co. of New York v. Chatham Cnty.*, 547 U.S. 189, 193 (2006).

14 suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state.” *Ying Jing Gan*, 996 F.2d 10 at 529; see also *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (“Suits against state officials in their official capacity therefore should be treated as suits against the State.”).

Plaintiff's damage claims in this action against the defendant Heath in his official capacity are, in reality, claims against the State of New York, and therefore are subject to dismissal. *Daisernia*, 582 F. Supp. at 798-99. Accordingly, I recommend that, to the extent that any of the claims asserted in plaintiff's complaint are asserted against defendant Heath in his official capacity, those claims be dismissed with prejudice.

3. Personal Involvement Defendant's third argument in support of dismissal is that plaintiff's complaint fails to allege facts plausibly suggesting that he was personally involved in any of alleged constitutional violations. Def.'s Memo. of Law (Dkt. No. 13-3) at 11-12. The only allegation against defendant Heath in plaintiff's complaint is that plaintiff sent defendant a grievance complaining

By contrast, the Eleventh Amendment does not preclude lawsuits seeking to impose individual or personal liability on state officials under section 1983. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991).

15 that the Greene medical staff was not adequately responding to plaintiff's ear infection. Complaint (Dkt. No. 1) at 5. As recent Second Circuit case law makes clear, at the pleading stage, this is sufficient to allege the personal involvement of a superintendent of a prison facility. See *Grullon v. City of New Haven*, -- F.3d ----, 2013 WL 3023464, at \*7 (2d Cir. June 19, 2013) (finding that the district court erred when it denied the plaintiff leave to file an amended complaint where it was alleged that the plaintiff sent a letter grievance to the warden of the prison facility because the plaintiff “would be entitled to have the court draw the reasonable inference . . . that the Warden in fact received the Letter, read it, and thereby became aware of the alleged conditions of which [the plaintiff] complained”). Accordingly, I recommend that this argument be rejected.

4. Plaintiff's Negligence Claim Defendant Heath next argues that plaintiff's negligence claim is not actionable in a section 1983 action. Def.'s Memo. of Law. (Dkt. No. 13-3) at 13. The court agrees. See *Moffitt v. Town of Brookfield*, 950 F.2d 880, 886 n.5 (2d Cir. 1991) (“[S]ection 1983 liability may not be premised upon negligence.”). Accordingly, to the extent that plaintiff's complaint asserts a negligence claim, I recommend that it be dismissed.



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16 5. Failure to State a Claim Defendant also argues that plaintiff's complaint contains wholly conclusory allegations that are insufficient to state a cognizable section 1983 claim. Def.'s Memo. of Law (Dkt. No. 13-3) at 13-15. This argument raises issues typically presented in the context of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. 11

A motion to dismiss a complaint, brought pursuant to Rule 12(b)(6), calls upon a court to gauge the facial sufficiency of that pleading using a standard which, though unexacting in its requirements, "demands more than an unadorned, the-defendant-unlawfully-harmed me accusation" in order to withstand scrutiny. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled

Defendant's motion is grounded in Rule 56, seeking the entry of summary judgment. Motions to dismiss and motions for summary judgment are procedurally distinct, and the burdens cast upon both the movant and opposing parties under the two rules are distinctly different. Nonetheless, because a motion to dismiss tests the sufficiency of a plaintiff's complaint, it does not appear that plaintiff will be prejudiced in the event that the court applies a Rule 12(b)(6) standard to his complaint. See, e.g., *Katz v. Molic*, 128 F.R.D. 35, 38-39 (S.D.N.Y. 1989) ("[T]hat a summary judgment motion is being treated as a motion to dismiss for failure to state a claim does not require notice to the parties.").

17 to relief." *Iqbal*, 556 U.S. 677-78 (quoting Fed. R. Civ. P. 8(a)(2)). While modest in its requirements, that rule commands that a complaint contain more than mere legal conclusions. See *id.* at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

In deciding a Rule 12(b)(6) dismissal motion, the court must accept the material facts alleged in the complaint as true and draw all inferences in favor of the non-moving party. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Twombly*, 550 U.S. at 555-56); see also *Cooper v. Pate*, 378 U.S. 546, 546 (1964); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003); *Burke v. Gregory*, 356 F. Supp. 2d 179, 182 (N.D.N.Y. 2005) (Kahn, J.). However, the tenet that a court must accept as true all of the allegations contained in a complaint does not apply to legal conclusions. *Iqbal*, 556 U.S. at 678.

To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570); see also *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008). As the Second Circuit has observed, "[w]hile *Twombly* does not

18 require heightened fact pleading of specifics, it does require enough facts to 'nudge plaintiffs' claims across the line from conceivable to plausible.'" *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting





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Twombly, 550 U.S. at 570) (alterations omitted).

When assessing the sufficiency of a complaint against this backdrop, particular deference should be afforded to a pro se litigant, whose complaint merits a generous construction by the court when determining whether it states a cognizable cause of action. Erickson, 551 U.S. at 94 (“[ A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)) (internal citation omitted)); Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008) (“[W]hen a plaintiff proceeds pro se, a court is obliged to construe his pleadings liberally.” (internal quotation marks and alterations omitted)); Kaminski v. Comm’r of Oneida Cnty. Dep’t of Soc. Servs., 804 F. Supp. 2d 100, 104 (N.D.N.Y. 2011) (Hurd, J.) (“A pro se complaint must be read liberally.”).

Because I have previously recommended dismissal of plaintiff’s negligence claim on other grounds, I have analyzed only the retaliation

19 and medical indifference claims below.

a. Retaliation A cognizable section 1983 retaliation claim lies when prison officials take adverse action against an inmate, motivated by the inmate’s exercise of a constitutional right, including the free speech provisions of the First Amendment. See Friedl v. City of New York, 210 F.3d 79, 85 (2d Cir. 2000) (“In general, a section 1983 claim will lie where the government takes negative action against an individual because of his exercise of rights guaranteed by the Constitution or federal laws.”). To state a prima facie claim under section 1983 for retaliatory conduct, a plaintiff must advance non-conclusory allegations establishing that (1) the conduct at issue was protected, (2) the defendants took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action – in other words, that the protected conduct was a “substantial or motivating factor” in the prison officials’ decision to take action against the plaintiff. Mount Healthy City Sch. Dist.

Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Dillon v. Morano, 497 F.3d 247, 251 (2d Cir. 2007); Garrett v. Reynolds, No. 99-CV-2065, 2003 WL 22299359, at \*4 (N.D.N.Y. Oct. 3, 2003) (Sharpe, M.J.). “[P]rison

20 officials’ conduct constitutes an ‘adverse action’ when it ‘would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.’” Alicea v. Howell, 387 F. Supp. 2d 227, 237 (W.D.N.Y. 2005) (quoting Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001)).

Plaintiff’s complaint in this case alleges that Greene medical personnel denied him medical treatment in retaliation for filing a grievance against them. Complaint (Dkt. No. 1) at 5. It is well-settled that filing a grievance is constitutionally protected conduct. Johnson v. Eggersdorf, 8 F. App’x 140, 144 (2d Cir. 2001); Graham v. R.J. Henderson, 89 F.3d 75, 80 (2d Cir. 1996). In addition,



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courts have found that “denial of medical evaluation, treatment, and adequate pain medication” can suffice to establish adverse action under a First Amendment retaliation analysis. *Burton v. Lynch*, 664 F. Supp. 2d 349, 366 (S.D.N.Y. 2009). Accordingly, I find that plaintiff’s complaint satisfies the first two elements of a retaliation claim.

Plaintiff’s complaint, however, alleges only that “medical personnel” denied plaintiff treatment “due to ‘Complaints’ he made against [them].” Complaint (Dkt. No. 1) at 5. This conclusory statement is insufficient to

21 demonstrate causation. More specifically, the complaint only alleges that he filed a grievance against “medical staff”; there is no indication, aside from this vague allegation, that any of the medical personnel employed at Greene knew about the grievance, or that the grievance served as motivation to deny plaintiff medical treatment. Accordingly, I recommend that plaintiff’s retaliation claim be dismissed for failure to state a claim upon which relief may be granted.

b. Deliberate Medical Indifference The Eighth Amendment prohibits punishment that is “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society[.]’ or which ‘involve the unnecessary and wanton infliction of pain[.]’” *Estelle*, 429 U.S. at 102-03 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) and *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976) (internal citations omitted)). While the Eighth Amendment “does not mandate comfortable prisons,” neither does it permit inhumane ones.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

“These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.” 22 *Estelle*, 429 U.S. at 103. Failure to provide inmates with medical care, “[i]n the worst cases, . . . may actually produce physical torture or lingering death, [and] . . . [i]n less serious cases, . . . may result in pain and suffering no one suggests would serve any penological purpose.” *Id.*

A claim alleging that prison officials have violated an inmate’s Eighth Amendment rights by inflicting cruel and unusual punishment must satisfy both objective and subjective requirements. *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir. 2009); *Price v. Reilly*, 697 F. Supp. 2d 344, 356 (E.D.N.Y. 2010). To satisfy the objective requirement in the context of a medical indifference claim, the Second Circuit has said that

[d]etermining whether a deprivation is an objectively serious deprivation entails two inquiries. The first inquiry is whether the prisoner was actually deprived of adequate medical care. As the Supreme Court has noted, the prison official’s duty is only to provide reasonable medical care . . . . Second, the objective test asks whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner. *Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2d



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Cir. 2006) (internal citations omitted).

To satisfy the subjective requirement, a plaintiff must demonstrate

23 that the defendant had “th e necessary level of culpability, shown by actions characterized by ‘wanto nness.’” *Blyden v. Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999). “In medical-treatment cases . . . , the official’s state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health.” *Salahuddin*, 467 F.3d at 280. “De liberate indifference,” i n a constitutional sense, “r equires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result.” *Id.* (citing *Farmer*, 511 U.S. at 837); see also *Leach v. Dufrain*, 103 F. Supp. 2d 542, 546 (N.D.N.Y. 2000) (Kahn, J.) (citing *Farmer*); accord, *Waldo v. Goord*, No. 97-CV-1385, 1998 WL 713809, at \*2 (N.D.N.Y. Oct. 1, 1998) (Kahn, J. adopting report and recommendation by Homer, M.J.). “Delibe rate indifference is a mental state equivalent to subjective recklessness, as the term is used in criminal law.” *Salahuddin*, 467 F.3d at 280 (citing *Farmer*, 511 U.S. at 839-40).

Plaintiff’s complaint in this case alleges that he submitted two sick- call requests to medical staff at Greene, and that those requests communicated that the pain in his ear, jaw, and cheek prevented him from eating. Complaint (Dkt. No. 1) at 4-5. It is also alleged that, despite their

24 awareness of his pain and inability to eat, defendants ignored his requests for treatment, and that as a result, his infection has progressed so far as to require surgery. *Id.* at 5-6. Mindful of the court’s obligation to liberally construe a pro se plaintiff’s complaint, I find that these allegations are sufficient to satisfy both the objective and subjective elements of an Eighth Amendment deliberate indifference claim. Accordingly, I recommend that this claim survive defendant’s motion.

6. Qualified Immunity Finally, defendant argues that he is entitled to dismissal in this case based on the doctrine of qualified immunity. Def.’s Memo. of Law (Dkt. No. 13-3) at 15-16.

“Qua lified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Sudler v. City of New York*, 689 F.3d 159, 174 (2d Cir. 2012). The law of qualified immunity seeks to strike a balance between “th e need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment,

25 distraction, and liability when they perform their duties reasonably.” *Pearson*, 555 U.S. at 231. Government officials are shielded from liability by qualified immunity when making “rea sonable mistakes” concerning the lawfulness of their conduct. *Sudler*, 689 F.3d at 174 (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001), abrogated on other grounds by *Pearson*, 555 U.S. 223)).



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Because qualified immunity is “a n immunity from suit rather than a mere defense to liability,” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the Supreme Court has “r epeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in the litigation,” *Pearson*, 555 U.S. at 231 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

The determination of whether a government official is immune from suit is informed by two factors. *Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011). Specifically, the inquiry turns on whether the facts alleged, taken in a light most favorable to the plaintiff, show that the conduct at issue violated a constitutional right, and if so, “w hether that right was ‘c learly established’ at the time of the events at issue.” *Nagle v. Marron*, 663 F.3d 100, 114 (2d Cir. 2011) (citing *Saucier*, 533 U.S. at 194, 201,

26 202); accord, *Sira v. Morton*, 380 F.3d 57, 68-69 (2d Cir. 2004). The Supreme Court has said that an officer’s “c onduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (internal quotation marks and alterations omitted). However, “[ e]ven where the law is ‘c learly established’ and the scope of an official’s permissible conduct is ‘c learly defined,’ t he qualified immunity defense also protects an official if it was ‘o bjectively reasonable’ for him at the time of the challenged action to believe his acts were lawful.” *Higazy v. Templeton*, 505 F.3d 161, 169-70 (2d Cir. 2007) (citations omitted). This “o bjective reasonableness” part of the test is met if “of ficers of reasonable competence could disagree on [the legality of the defendant’s actions].” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In this case, the complaint asserts an Eighth Amendment deliberate medical indifference claim against defendant Heath. As was discussed above, the allegations giving rise to this claim, when considered in the light most favorable to plaintiff, are sufficient to give rise to a constitutional violation. In addition, an inmate’s Eighth Amendment right to adequate

27 medical treatment was well established at the time of the alleged violation. Accordingly, the only remaining consideration in this qualified immunity analysis is whether it was objectively reasonable for defendant Heath to believe that his alleged failure to provide plaintiff medical treatment did not violate his constitutional rights under the circumstances. In support of this argument, defendant Heath has submitted no evidence or explanation that might justify his alleged failure to provide treatment. Accordingly, there is no basis from which I may conclude that he reasonably believed his conduct did not violate plaintiff’s Eighth Amendment rights, and I am therefore precluded from finding that he is entitled to qualified immunity at this juncture.

B. Plaintiff’s Motion for Leave to Amend In his motion, plaintiff seeks leave to file an amended complaint. The proposed amended complaint accompanying his motion sets forth substantially the same allegations as his original complaint, except that it adds names two new defendants, Dr. Caulfield and Nurse Albright, both employed at Greene during the times relevant to this action, and



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removes defendant Jane Doe #1. Dkt. No. 17-1 at 1. In opposition to plaintiff's motion, defendant Heath argues that the filing of the proposed amended

28 complaint would be an exercise in futility in light of the fact that plaintiff has failed to exhaust his administrative remedies. Def.'s Memo. of Law (Dkt. No. 22).

Plaintiff's motion for leave to amend in order to add new defendants implicates both Rule 15(a) and Rule 21 of the Federal Rules of Civil Procedure. Rule 21 authorizes a court, "on motion of any party or of its own initiative at any stage of the action and on such terms as are just," to order the addition of parties to an action. Fed. R. Civ. P. 21; *City of Syracuse v. Onondaga Cnty.*, 464 F.3d 297, 308 (2d Cir. 2006). That rule permits joinder "of a person, who through inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable." *Oneida Indian Nation of New York State v. Cnty. of Oneida*, 199 F.R.D. 61, 72 (N.D.N.Y. 2000) (McCurn, S.J.) (quoting, *inter alia*, *United States v. Hansel*, 999 F. Supp. 694, 697 (N.D.N.Y. 1998) (McAvoy, J.)). A decision as to whether to permit joinder under Rule 21 is informed by the same general principles as those governing motions for leave to amend under Rule 15(a). See, e.g., *Oneida Indian Nation of New York State*, 199 F.R.D. at 72-73.

Rule 15(a) of the Federal Rules of Civil Procedure provides, in

29 pertinent part, that unless amendment as a matter of right is permitted – circumstance that is not applicable here – a party may amend its pleading

"only with the opposing party's written consent or the court's leave. Fed. Riv. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* Under Rule 15(a), leave to amend ordinarily should be liberally granted absent undue delay, bad faith, dilatory tactics, undue prejudice in being served with the proposed pleading, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962); accord, *Elma RT v. Landesmann Int'l Mktg. Corp.*, No. 98-CV-3662, 2000 WL 297197, at \*3 (S.D.N.Y. Mar. 22, 2000).

Notwithstanding the familiar and well accepted principle that leave to amend should be granted freely, if a claim contained in a proposed amended complaint would be vulnerable in the face of a Rule 12(b)(6) motion, then permitting amendment would be an act of futility that should not be sanctioned. See, e.g., *Saxholm AS v. Dynal, Inc.*, 938 F. Supp. 120, 124 (E.D.N.Y. 1996); *In re Boesky Sec. Litig.*, 882 F. Supp. 1371, 1379 (S.D.N.Y. 1995). If, on the other hand, a "proposed claim sets forth facts and circumstances which may entitle the plaintiff to relief, then futility is not a proper basis on which to deny amendment." *Saxholm*, 938 F.

30 Supp. at 124 (citing *Allstate Ins. v. Administratia Asigurarilor De Stat*, 875 F. Supp. 1022, 1029 (S.D.N.Y. 1995)).



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Because I have already found that there exists a genuine dispute of material fact as to whether plaintiff failed to exhaust the available administrative remedies before commencing this action, I disagree with defendant's argument that accepting plaintiff's proposed amended complaint would be an exercise in futility. The proposed amended complaint, however, fails to allege sufficient facts plausibly suggesting a retaliation claim against any of the named defendants for the same reasons discussed above in Part III.A.5.a. of this report, and the negligence claim asserted against all defendants in the proposed amended complaint fails for the same reasons discussed above in Part III.A.4. of this report. Plaintiff's proposed amended complaint also fails to the extent that it asserts damage claims against all defendants in their official capacities for the same reasons discussed above in Part III.A.3. of this report. Accordingly, I recommend that plaintiff's proposed amended complaint be accepted for filing as it relates only to his Eighth Amendment deliberate medical indifference claim, asserted against defendants Caufield, Albright, and Heath in their individual capacities.

### 31 IV. SUMMARY AND RECOMMENDATION

Plaintiff's complaint in this action asserts a claim that is subject to the requirement that, before bringing this action, he must have first filed a grievance and pursued it to completion utilizing the IGP in place and available to DOCCS inmates. Because the record evidence reveals a dispute of fact as to whether plaintiff in fact appealed any grievance related to his claims in this action to the CORC, I am precluded from recommending dismissal of the action on that procedural basis. As it relates to plaintiff's motion for leave to file an amended complaint, the proposed amended complaint should be accepted only to the extent that it asserts an Eighth Amendment claim against the named defendants in their individual capacities.

It is therefore hereby respectfully RECOMMENDED that defendant's motion for summary judgment (Dkt. No. 13) be DENIED in part and GRANTED in part in accordance with this report, and that plaintiff's claims of retaliation and negligence, as well as his damage claims against defendant Heath in his official capacity, be DISMISSED; and it is further

RECOMMENDED that plaintiff's motion for leave to amend (Dkt. No.

32 17) be GRANTED, only to the extent that his proposed amended complaint asserts an Eighth Amendment deliberate medical indifference claim against defendants Heath, Albright, and Caufield in their individual capacities.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993).





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It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules. Dated: August 1, 2013

Syracuse, New York

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Only the Westlaw citation is currently available.

United States District Court,

N.D. New York. Janet ANDERSON, Plaintiff,

v. DOLGENCORP OF NEW YORK, INC., Defendant.

Betty Pulver, Plaintiff,

v. Dolgencorp of New York, Inc., Defendant. Nos. 1:09- cv- 360 (GLS\RFT), 1:09- cv- 363

(GLS\RFT). May 9, 2011. Beasley, Allen Law Firm, Roman A. Shaul, Esq., Elizabeth A. Cordello, Esq., of Counsel, Montgomery, AL, for the Plaintiffs. Hinman, Howard Law Firm, James S. Gleason, Esq., Dawn J. Lanouette, Esq., of Counsel, Binghamton, NY, for the Defendant. Morgan, Lewis Law Firm, Joel S. Allen, Esq., Ronald. E. Manthey, Esq., of Counsel, Dallas, TX.

MEMORANDUM- DECISION AND ORDER GARY L. SHARPE, District Judge.

I. Introduction \*1 In this consolidated action, plaintiffs Janet Anderson and Betty Pulver allege that their former employer, defendant Dolgencorp of New York, Inc. (Dollar General) deprived them of lawful overtime wages in violation of the Fair Labor Standards Act (FLSA). FN1 (See No. 09- cv- 360, 2d Am. Compl., Dkt. No. 4; No. 09- cv- 363, 2d Am. Compl., Dkt. No. 4.) Pending are Dollar General's motions for summary judgment as against each plaintiff and to strike certain evidence offered by plaintiffs in opposition to the summary judgment motions. (See No. 09- cv- 360, Dkt. Nos. 38, 50; No. 09- cv- 363, Dkt. No. 27.) For the reasons that follow, the motions are

denied.

FN1. 29 U.S.C. § 201, et seq.

II. Background FN2 FN2. Unless otherwise noted, the facts are derived directly from Dollar General's various Statements of Material Facts (SMF) and plaintiffs' responses thereto. (See No. 09- cv- 360,



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Def. SMF (Anderson), Dkt. No. 38:1; No. 09– cv– 360, Def. Common SMF, Dkt. No. 39; No. 09– cv– 360, Pls. Common SMF Resp., Dkt. No. 44:1; No. 09– cv– 360, Anderson SMF Response, Dkt. No. 46:1; No. 09– cv– 363, Pulver SMF Resp., Dkt. No. 27:1; No. 09– cv– 363, Def SMF (Pulver), Dkt. No. 29:1.) In that regard, the court notes that plaintiffs have failed in most instances to specifically admit or deny Dollar General's factual assertions as required by Local Rule 7.1(a)(3), instead choosing— in a somewhat belated fashion— to “ object” to the “ implications” of those assertions or to assert additional facts that do not directly or necessarily contradict them. (See generally, e.g., Anderson SMF Resp., Dkt. No. 46:1; see also N .D.N.Y. L.R. 7.1(a)(3) (requiring a “ non-movant's response [to] mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs” (emphasis added)).) As plaintiffs' counsel is likely aware, however, the purpose of the Rule 7.1(a)(3) response requirement is not to highlight and broadly contradict intended “ implications” of a movant's factual assertions, or to imply the inaccuracy of those assertions; it is to aid the court in isolating the relevant facts so that it may discern whether and to what extent disputes relating to those facts exist. Thus, a non-movant's failure to tailor her responsive SMFs in accordance with the Local Rules significantly impedes the court's ability to effectively and efficiently resolve these critical inquiries. © 2012 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2011 WL 1770301 (N.D.N.Y.) (Cite as: 2011 WL 1770301 (N.D.N.Y.))

Accordingly, to the extent plaintiffs have failed to properly respond to Dollar General's statements of fact, the court will, where it deems appropriate, treat those statements as admitted for purposes of this motion. *Id.* (“ The Court shall deem admitted any facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert.” ). A. Dollar General

Defendant Dollar General is a retailer of basic consumable goods, such as cleaning supplies, health and beauty aids, foods and snacks, housewares, toys, and basic apparel. (See No. 09– cv– 360, Def. Common SMF ¶ 1, Dkt. No. 39.) As of 2005, Dollar General operated approximately 7,500 stand-alone Dollar General Stores in thirty states, with an average sales volume of over \$1 million per store. (See *id.* at ¶ 2.) Each Dollar General store is staffed by a Store Manager, an Assistant Manager (ASM), a Lead Clerk, and multiple store clerks. (See *id.* at ¶ 3.) Of these employees, Store Managers occupy the highest level of supervisory authority and are the only employees paid on a salaried basis. (See *id.*) Each Store Manager reports to a District Manager (DM), each of whom oversees from fifteen to twenty-five stores. (See *id.* at ¶ 4.)

During the relevant times, Dollar General described a Store Manager's general responsibilities as “ the management of all employees in the effective planning and implementation of all store processes, including ordering, receiving, stocking, presentation, selling, staffing and support.” (No. 09– cv– 360, Shaul Aff., Ex. 11, Store Manager Job Description, Dkt. No. 45:11 (filed under seal) .) Encompassed within these broadly-defined responsibilities are the specific, “ essential” duties to: • Recruit, select and retain qualified employees according to federal and state labor laws and company policies; ensure store is properly staffed; • Provide proper training for employees; conduct performance



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evaluations; identify gaps for appropriate solutions and/or counseling, up to and including termination; • Make recommendations regarding employee pay rate

and advancement; • Communicate performance, conduct and safety expectations regularly; coordinate meetings and events to encourage safety, security and policies; • Ensure that the store is appropriately staffed and effectively opened and closed each day; • Evaluate operating statements to identify business trends (including sales, profitability, and turn), expense control opportunities, potential shrink, and errors; • Ensure that all merchandise is presented according to established practices; utilize merchandise fixtures properly including presentation, product pricing and signage; \*2 • Maintain accurate inventory levels by controlling damages, markdowns, scanning, paperwork, and facility controls; • Ensure the financial integrity of the store through strict cashier accountability, key control, and adherence to stated company security practices and cash control procedures; • Provide superior customer service leadership; • Maintain a clean, well-organized store; facilitate a safe and secure working and shopping environment; • Ensure that store is adequately equipped with tools necessary to perform required tasks; and • Complete all paperwork and documentation according to guidelines and deadlines. (Id.) The job description further outlines certain “ Working Conditions and Physical Requirements” associated with the Store Manager position. (See id.) These include: “[f]requent walking and standing” ; “[f]requent bending, stooping and kneeling to run check out station, stock merchandise, and unload trucks” ; “ occasional climbing” ;

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and “ frequent and proper lifting of up to 40 pounds [, and] occasional lifting of up to 65 pounds.” (Id.)

With respect to compensation, in addition to their weekly salaries, Store Managers are generally eligible for certain bonuses, such as annual “ Teamshare” bonuses and quarterly “ in stock” bonuses. (See No. 09– cv– 360, Def. Common SMF ¶ 13, Dkt. No. 39 .) Teamshare bonuses are tied to the financial performance of the Store Manager's individual store and the manager's individual performance as a manager. (See id.) To the extent that Assistant Managers have also been eligible for Teamshare bonuses, it appears that their eligibility never exceeded 30% of what a Store Manager could earn. (See id. at ¶ 14.) As to in-stock bonuses, they were awarded in the amount of \$250 per quarter if certain in-stock goals were met, and only to Store Managers. (See id. at ¶¶ 13, 14.)

In assessing the financial performance of a Store Manager's individual store, Dollar General considers whether and to what extent the store is meeting its quarterly and annual sales goals, minimizing inventory shrink and controllable expense, and maximizing profit. (See No. 09– cv– 360, Allen Aff., Ex. 3, Store Manager Performance Evaluation Form, Dkt. No. 41:3 (filed under seal). Relatedly, in evaluating a Store Manger's managerial and leadership skills, Dollar General examines the manager's performance in seven focus areas: sales volume, controllable expense, inventory



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shrink, merchandising/in stock, training and development, customer satisfaction, and safety awareness. (See *id.*) B. Janet Anderson

In February 2002, plaintiff Janet Anderson was hired by Dollar General as an ASM for Store No. 8576 in Burnt Hills, New York. (See No. 09– cv– 360, Def. SMF (Anderson) ¶ 1, Dkt. No. 38:1.) In April 2002, Anderson was promoted to the position of Store Manager, which she held until her resignation in November 2002. (See *id.* at ¶ 2.) According to Anderson, other than the on-the-job training she received as an ASM, she did not receive any training when she was promoted to Store Manager. (See No. 09– cv– 360, Anderson SMF Resp., Additional Facts ¶ 20, Dkt. No. 46:1.)

\*3 As a Store Manager, Anderson was paid a fixed

weekly salary of \$425.00, was eligible for the performance-based bonuses discussed above, and worked an average of fifty hours per week. (See No. 09– cv– 360, Def. SMF (Anderson) ¶¶ 6, 8, 25, Dkt. No. 38:1.) According to Anderson, she understood when she took the Store Manager position that she would be working more than forty hours per week, and that her salary was to compensate her for all hours worked since she would not be paid for overtime. (See *id.* at ¶¶ 6, 7; No. 09– cv– 360, Anderson SMF Resp. ¶ 7, Dkt. No. 46:1.) During Anderson's tenure as Store Manager, the next highest paid employee, an ASM, earned \$7.00 per hour and worked an average of thirty-one hours per week. (See *id.*)

With respect to her job functions, Anderson acknowledged in deposition that she performed all of the duties outlined in the Store Manager job description, and agreed that the description provides an accurate general summary of her position as Store Manager. (See No. 09– cv– 360, Def. SMF (Anderson) ¶ 15, Dkt. No. 38:1.) In line with that testimony, Anderson explained that she was responsible for supervising the other store employees, including an ASM, a “ Third– Key” or Lead Clerk, and the other store clerks, and for performing other managerial duties. (See *id.* at ¶ 3.)

As part of her supervisory duties, Anderson testified that she trained employees on store policy and other related issues; directed, supervised, and evaluated employees' work; coached, disciplined, and counseled employees where necessary; recommended employee pay raises and promotions to her DM (recommendations that were always accepted); and scheduled employees' hours. (See *id.* at ¶¶ 14, 16.) With respect to scheduling, Anderson managed approximately 168 to 212 labor hours per week, meaning that she allocated Dollar General's labor hour allotment amongst the employees she supervised. (See *id.* at ¶ 4.)

In addition to these supervisory tasks, Anderson also performed other duties, including interviewing and hiring employees; monitoring and evaluating weekly sales reports and store operating reports; ensuring that cash registers “ balanced” ; completing daily paperwork, such as payroll and bank deposits; managing inventory levels; ensuring that merchandise was properly staged and



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stocked, largely in accordance with Dollar General “Plan– O– Grams” FN3

; leading team meetings; and ensuring that the store was properly open and closed. (See *id.* at ¶¶ 14, 16.)

FN3. “Plan– O– Grams” are store diagrams that direct the placement of products in a store. (See No. 09– cv– 360, Def. SMF (Anderson) ¶ 23, Dkt. No. 38:1.) According to Anderson, however, because her store did not comport with the standard Plan– O– Gram layout, she relied largely on her own discretion to merchandise approximately fifteen of the store shelves. (See *id.*) Anderson also performed non-managerial tasks in her role as Store Manager. Specifically, she testified to running the cash register, stocking shelves, facing products on the shelves, helping unload delivery trucks, and cleaning the store. FN4

(See No. 09– cv– 360, Anderson SMF Resp., Additional Facts ¶¶ 4, 6, 7, Dkt. No. 46:1.) With respect to the division of her time, Anderson testified to spending at least half of her time on managerial duties. (See No. 09– cv– 360, Def. SMF (Anderson) ¶ 26, Dkt. No. 38:1.) Anderson agreed, however, that when she was performing non-managerial tasks, she would continue to monitor and manage the operation of the store. (See No. 09– cv– 360, Def. SMF (Anderson) ¶ 27, Dkt. No. 38:1.) Anderson further testified that if Dollar General would have allotted larger labor hour budgets, she would have been able to focus more time on her managerial duties and less on non-managerial tasks. (See No. 09– cv– 360, Anderson Dep. at 237:11– 16, Dkt. No. 38:4.) According to Anderson, the labor budget was allocated such that only two employees, including herself, could typically be working at one time. (See No. 09– cv– 360, Anderson SMF Resp., Additional Facts ¶¶ 5– 7, Dkt. No. 46:1.) Often, then, as Anderson testified, she would stock the shelves, unload a delivery truck, or clean the store while the only other employee working would run the cash register. (See *id.*)

FN4. In addition to her routine duties, Anderson was also sent to two other Dollar General stores for two days each to set up the stores by setting up shelving and stocking merchandise. (See No.

09– cv– 360, Anderson SMF Resp., Additional Facts ¶ 19, Dkt. No. 46:1.) \*4 In performing her duties as Store Manager, managerial or otherwise, Anderson was expected to act in accordance with Dollar General's standard policies and procedures. (See No. 09– cv– 360, Def. SMF (Anderson) ¶ 19, Dkt. No. 38:1.) Those policies and procedures, which were contained in the company's Standard Operating Procedures Manual (SOP), provided direction in how to perform certain store operations. (See *id.*) According to Anderson, however, while the SOP provided general guidance and direction, it did not cover every issue that would arise in the store on a daily basis. (See *id.*)

During her tenure as Store Manager, Anderson reported to DM Bob Seaman. (See *id.* at ¶ 12.) Mr.



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Seaman, unlike Anderson, did not have an office in or a key to Anderson's store, but would visit the store on a periodic basis. (See *id.*) According to Anderson, Mr. Seaman visited her store approximately once every five to six weeks. (See *id.*) During those visits, which typically lasted one hour, Mr. Seaman would walk through the store with Anderson and provide her with ideas and recommendations for improving the store. (See *id.*) Anderson testified that implementation of these ideas and recommendations was not mandatory, explaining that she used some of Mr. Seaman's suggestions but not others. (See *id.*) Apart from these store visits, it appears from Anderson's testimony that her communications with Mr. Seaman were relatively infrequent. According to Anderson, she spoke with Mr. Seaman on the telephone approximately six times— about once per month— and received a voice mail message from him every four or five weeks. (See *id.*) And with respect to those voice mail messages, Anderson testified that they were typically “district wide” and not specific to Anderson or her store. (See *id.*) Overall, despite Mr. Seaman's oversight, Anderson felt that she was “in charge” of her store, and further testified that Mr. Seaman did not interfere with the performance of her managerial duties. (See *id.* at ¶¶ 13, 17.)

Ultimately, as noted above, Anderson resigned from her employment with Dollar General in November 2002. (See *id.* at ¶ 2.)

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### C. Betty Pulver

Plaintiff Betty Pulver was hired as a Store Manager for Dollar General in April 2002. (See No. 09– cv– 363, Def SMF (Pulver) ¶ 1, Dkt. No. 27:1.) At the time of her hiring, Pulver understood that she would be responsible for opening and managing a new store in Hudson, New York. (See *id.*; No. 09– cv– 363, Pulver Dep. at 45– 46, Dkt. No. 27:4.) Prior to opening the Hudson store, however, and for approximately one month after being hired, Pulver worked at the Broadway store in Schenectady, New York, apparently for training purposes. (See No. 09– cv– 363, Def SMF (Pulver) ¶ 2, Dkt. No. 29:1.) Pulver testified, however, that while at the Broadway Store, the only training she received related to loading and unloading delivery trucks and stocking shelves. (See No. 09– cv– 363, Pulver SMF Resp., Additional Facts ¶ 10, Dkt. No. 29:1.) According to Pulver, she received no instruction with respect to following Plan– O– Grams or completing paperwork, and was given no experience running a cash register, making a schedule, or opening or closing the store. (See *id.*) Pulver testified that the Store Manager who was supposed to train her went on vacation a week after she started, leaving no training instructions with the ASM who was left in charge of the store. (See No. 09– cv– 363, Pulver Dep. at 50– 51, Dkt. No. 27:4.)

\*5 In May 2002, with the opening of the Hudson store behind schedule, Pulver was transferred to open a different store, the State Street store. (See No. 09– cv– 363, Def SMF (Pulver) ¶ 2, Dkt. No. 27:1.) According to Pulver, it wasn't until this transfer that she received training on completing





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paperwork, scheduling, Plan- O- Grams, etc. (See No. 09- cv- 363, Pulver Dep. at 53- 54, Dkt. No. 27:4.) Anderson testified that this training, which was conducted over the telephone, occurred over the course of one month, but did not specify the frequency or duration of each session. (See id.) Ultimately, in July 2002, Pulver was transferred to open the Hudson store, where she remained as Store Manager until her resignation in July 2003. (See No. 09- cv- 363, Def SMF (Pulver) ¶ 2, Dkt. No. 27:1.)

In “ opening” the Hudson and State Street stores, Pulver supervised crews of twenty-five employees hired

on a temporary basis to assist in setting up the stores. (See id. at ¶ 3.) Once the Hudson store was set up and ready to be opened, Pulver made recommendations as to which of the temporary employees should be hired on a permanent basis to staff the store's ASM and “ Third Key Clerk” positions. (See id.) After the necessary hiring decisions were made and the Hudson Store was opened, Pulver began performing the duties and responsibilities associated with the day-to-day operations of the store. (See, e.g., id. at ¶¶ 4, 5, 12.)

Like Anderson, Pulver agreed in deposition that the duties she regularly performed as Store Manager matched those recited in Dollar General's description of the Store Manager position. (See id. at ¶ 14.) Those duties, as with Anderson, included managing the Hudson store's labor budget of 160 to 240 labor hours per week; directing and supervising the work of the ASM, Third Key Clerk, and store clerks Pulver supervised; ordering store merchandise; ensuring that merchandise was properly staged and stocked; interviewing and hiring employees; scheduling employees; ensuring the store was appropriately staffed and properly opened and closed each day; ensuring the safety and security of the store and employees; ensuring that all store paperwork was properly completed and forwarded to the Dollar General corporate office; recommending employees for promotion (recommendations that were always accepted); implementing Dollar General directives regarding, among other things, new store policies and procedures, product recalls, and compliance with state and local laws; and training, disciplining, counseling, and, under certain circumstances, firing employees. FN5

(See id. at ¶¶ 4, 5, 12, 13, 15, 21.)

FN5. Pulver had the authority to terminate employees for certain types of misconduct, such as failing to report to work or cash register shortages, without District Manager approval. (See No. 09- cv- 363, Def SMF (Pulver) ¶ 13, Dkt. No. 29:1.) In other situations, however, such as those involving employee performance issues, Pulver was required to seek her District Manager's approval before she could terminate an employee. (See id.) According to Pulver, her termination recommendations were always

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followed. (See *id.*) In addition to these and similar duties, Pulver testified to also performing non-managerial duties, such as stocking shelves, running the cash register, cleaning the store, and unloading delivery trucks. (See No. 09– cv– 363, Pulver SMF Resp., Additional Facts ¶ 2, Dkt. No. 29:1.) Like Anderson, Pulver testified to spending at least half of her time on managerial duties. (See No. 09– cv– 363, Def SMF (Pulver) ¶ 26, Dkt. No. 27:1.) She further agreed in deposition that when she was performing nonmanagerial tasks, she was simultaneously managing the store, evaluating employees, and ensuring proper customer service. (See *id.*) And like Anderson, Pulver agreed that Dollar General's limited labor hour budget required her to spend more time on non-managerial tasks than she otherwise would have. (See No. 09– cv– 363, Pulver Dep. at 287:12– 16, Dkt. No. 27:4.)

\*6 Also like Anderson, Pulver was required to comply with Dollar General SOP, and to follow Dollar General Plan– O– Grams in merchandising her store. (See *id.* at ¶¶ 22, 23.) But also similar to Anderson, Pulver testified that the SOP did not address every situation that could arise in the store on a daily basis, requiring her to exercise discretion in those situations. (See *id.* at ¶ 22.) As to Plan– O– Grams, Pulver testified that because her store did not always comport with the Plan– O– Gram layout, she would exercise discretion in deciding what products to place on approximately ten to twenty percent of the store shelves. (See *id.* at ¶ 23.)

As with all Dollar General Store Managers, Pulver reported to a DM. (See *id.* at ¶ 10.) Similar to Anderson's experience in that regard, Pulver's DM would visit the Hudson store for between one and two hours to review store paperwork and discuss employee performance and ways to improve the store's overall performance. (See *id.*) Pulver recalls only five of these visits occurring during her tenure as Store Manager of the Hudson store, and testified that she rarely spoke to her DM on the telephone and that she could not recall receiving any voice mail messages from him. (See *id.*) Rather, Pulver was responsible for leaving weekly voicemail reports for her DM regarding her store's sales performance. (See *id.*) Like Anderson, Pulver testified that her DM did not interfere with the performance of her managerial duties. (See *id.* at ¶ 16.)

With respect to compensation, Pulver was hired at a salary of \$423.00 per week. (See *id.* at ¶ 6.) Beginning in July 2002, however, and continuing until the end of her employment in July 2003, Pulver's weekly salary was \$480.00. (See *id.*) Like Anderson, Pulver testified that she understood when she was hired that this weekly salary was to compensate her for all hours worked since she would not be paid for overtime. (See *id.* at ¶ 7.) Pulver testified to working between sixty and seventy hours per week as Store Manager of the Hudson store. (See No. 09– cv– 363, Pulver SMF Response, Additional Facts, ¶ 1, Dkt. No. 29:1.) During that time, the next highest paid employee in the Hudson store, an ASM, earned \$7.00 per hour and worked an average of thirty to thirty-five hours per week. (See No. 09– cv– 363, Def SMF (Pulver) ¶ 8, Dkt. No. 27:1.) In Pulver's view, she was “worth more” than the other store employees because she had more responsibilities, including hiring, firing, interviewing, scheduling, assigning, disciplining, and training employees in her store. (See *id.* at ¶ 9.) According to Pulver, she was “in charge” of her store. (See *id.* at ¶ 11.)

### D. Procedural Background



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On March 21 and 29, 2004, Pulver and Anderson consented to join numerous other plaintiffs in this collective FLSA action against Dollar General, alleging that Dollar General improperly classified them as exempt from the FLSA's overtime compensation requirement. (See No. 09– cv– 363, Ex. B, Pulver Consent, Dkt. No. 27:11; No. 09– cv– 360, Ex. B, Anderson Consent, Dkt. No. 38:10; No. 09– cv– 363, 2d Am. Compl., Dkt. No. 4; No. 09– cv– 360, 2d Am. Compl., Dkt. No. 4.) While the collective action was originally filed in the Northern District of Alabama, Pulver and Anderson's claims, among others, were transferred to this court, where jurisdiction and venue is proper. (See No. 09– cv– 360, Dkt. No. 1; No 09– cv– 363, Dkt. No. 1 .)

\*7 On May 11, 2009, Magistrate Judge Randolph F. Treece consolidated Anderson and Pulver's cases for discovery, pretrial proceedings, and the filing of common summary judgment briefing. In addition, Judge Treece designated Anderson's case, No. 09– cv– 360, as the lead case, directing all filings to be made to that docket. (No.

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09– cv– 363, Dkt. No. 25.)

Now pending are Dollar General's motions for summary judgment as against each plaintiff and to strike certain evidence offered by plaintiffs in opposition to the summary judgment motions. (See No. 09– cv– 360, Dkt. Nos. 38, 50; No. 09– cv– 363, Dkt. No. 27.)

III. Standard of Review The standard for the grant of summary judgment is well established and will not be repeated here. For a full discussion of the standard, the court refers the parties to its previous opinion in *Bain v. Town of Argyle*, 499 F.Supp.2d 192, 194– 95 (N.D.N.Y.2007).

### IV. Discussion A. Motion to Strike

Defendants have moved to strike certain evidence offered by plaintiffs in opposition to the current motions. (See No. 1:09– cv– 360, Dkt. No. 50.) That evidence includes documents relating to a 2004 Dollar General Survey, articles about Dollar General, Dollar General Story Newsletters, and numerous other Dollar General internal documents. Because the court has not relied on this evidence in rendering its decision, Dollar General's motion to strike is denied as moot. And to the extent the motion seeks to preclude this evidence at trial, it is denied as premature. B. The FLSA Overtime Compensation Requirement

As noted above, plaintiffs allege that Dollar General deprived them of overtime wages in violation of FLSA's overtime compensation requirement. Dollar General responds that plaintiffs, as Store Managers, were properly classified as “ executive” employees and are therefore exempt from the FLSA overtime requirement.



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Under the FLSA, an employer must pay overtime to employees working more than forty hours per week. 29 U.S.C. § 207(a)(1). However, individuals “employed in a bona fide executive ... capacity” are exempt from the FLSA's overtime requirements. 29 U.S.C. § 213(a)(1). Congress has not defined what it means to be a “bona fide executive employee,” instead delegating that responsibility to the Department of Labor (DOL), which has promulgated a body of clarifying regulations. See 29 U.S.C. § 213(a)(7); 29 C.F.R. § 541, et seq. Under the

pre- 2004 regulations, FN6

whether an employee qualifies for the executive exemption is a question of law, and is determined based on “different legal tests according to salary level.” *Donovan v. Burger King Corp.*, 675 F.2d 516, 518 (2d Cir.1982) (citation omitted). Salaried employees earning more than \$250 per week, like plaintiffs here, must satisfy the so-called “short test” to qualify for the exemption. *Id.* (citing 29 C.F.R. § 541.1(f)). To satisfy this test, the employee must be one who regularly directs the work of two or more other employees, and whose “primary duty” is management. *Id.*

FN6. Effective August 23, 2004, the DOL regulations defining the executive exemption were amended. See 69 Fed.Reg. 22,122 (Apr. 23, 2004). Because the relevant employment of each plaintiff in this case terminated before the effective date of these amendments, the court agrees with Dollar General— and plaintiffs do not appear to dispute— that the pre- 2004 regulations should be applied to plaintiffs' claims. See, e.g., *Clougher v. Home Depot U.S.A., Inc.*, 696 F.Supp.2d 285, 290 n. 6 (E.D.N.Y.2010) (applying pre- 2004 regulations to pay periods predating amendment and amended regulations to pay periods postdating amendment); *Baden- Winterwood v. Life Time Fitness, Inc.* 566 F.3d 618, 629 (6th Cir.2009) (same); *Slusser v. Vantage Builders, Inc.*, 576 F.Supp.2d 1207, 1215 n. 4 (D.N.M.2008) (“The revised FLSA regulations adopted ... in August of 2004 do not apply retroactively.”). \*8 In this case, there is no dispute that Anderson and Pulver regularly directed the work of two or more employees. (See No. 09- cv- 360, Allen Aff., Ex. 1, Joint Stipulations of Fact ¶ 4, Dkt. No. 41:1; No. 09- cv- 360, Pls. Common Response Br., Dkt. No. 44 (focusing solely on issue of primary duty).) Rather, the only issue in dispute is whether Anderson and Pulver's primary duty as Dollar General Store Managers was management.

Whether an employee's primary duty is management under the regulations is determined based on the following five factors:

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(1) time spent in the performance of managerial duties; (2) relative importance of managerial and non-managerial duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and the wages paid employees doing similar non-exempt work. *Donovan*, 675 F.2d at 521



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(citing 29 C.F.R. § 541.103). Thus, the primary duty inquiry is “necessarily fact-intensive.” *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1264 (11th Cir.2008); see 29 C.F.R. § 541.103 (2002) (“[The] determination of whether an employee has management as his primary duty must be based on all the facts in a particular case.”). And given this “deeply factual ... inquiry ... courts are often reluctant to grant summary judgment based on the executive exemption.” *Indergit v. Rite Aid Corp.*, Nos. 08 Civ. 9361 & 08 Civ. 11364, 2010 WL 1327242, at \*7 (S.D.N.Y. Mar. 31, 2010). Further, in examining the primary duty factors, courts must be mindful that “[the executive] exemption must be narrowly construed,” and that “[t]he employer has the burden of proving that the employee clearly falls within [its] terms.” *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 204 (2d Cir.2009) (citations and internal quotation marks omitted).

### 1. Time Spent on Managerial Activities

As to the first factor, the court must consider the amount of time Anderson and Pulver spent on managerial duties. “‘In the ordinary case[,] it may be taken as a good rule of thumb that ... an employee who spends over 50 percent of [her] time in management would have management as [her] primary duty.’” *Donovan*, 675 F.2d. at 520 n. 5 (quoting 29 C.F.R. § 541.03). “‘Time alone, however, is not the sole test.’” *Id.* (quoting 29 C.F.R. § 541.03). Where an employee “‘does not spend over 50 percent of [her] time in managerial duties, [she] might nevertheless have management as [her] primary duty if the other pertinent [factors] support such a conclusion.’” *Id.* (quoting 29 C.F.R. § 541.03). In general, however, how an employee spends her time working is a question of fact for a jury. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

Here, Dollar General argues that plaintiffs' deposition testimony should “end the legal analysis in its favor” because it conclusively demonstrates that plaintiffs' spent

more than half of their time on managerial activities. The court disagrees. As to Anderson, Dollar General points to the following exchange: \*9 Q: .... When you're just performing management type duties, would you say that would be half of the time? A: At least. Q: Okay. So over half? A: Yes (No. 09–cv–360, Anderson Dep. at 211:7–12, Dkt. No. 38:4.) However, when later asked how much time she spent on non-managerial duties, Anderson responded, “[e]asily half the day,” arguably implying that she may have spent more than half the day on those duties. (*Id.* at 242:5–12.) Following this response, the following exchange ensued: Q: You're not changing your testimony that you spent more time performing managerial duties than you did nonmanagerial duties, are you? A: No, I don't think so. (*Id.* at 242:22–25.) Pointing to this latter exchange, Dollar General dismisses Anderson's contention that she spent “half of her day” on managerial duties, arguing that Anderson's “testimony is unequivocal that she spent more time performing managerial duties than non-managerial duties.” (No. 09–cv–360, Def.Resp.(Anderson), at 4–5; Dkt. No. 52.)

Having reviewed the deposition transcript, and construing all reasonable inferences in Anderson's favor, the court is not persuaded that Anderson's testimony compels summary judgment. Specifically, given Anderson's arguably inconsistent responses, her less than definitive “clarification” of those responses, and the fact that her testimony was based upon what appear to be rough estimations of



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the time she spent on certain duties, the court is not satisfied that Anderson's testimony is conclusively unequivocal.

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The same is true with respect to Pulver. As to her testimony, Dollar General points to the following exchange as unequivocal proof that she spent more than half her time on managerial activities: Q: ... So you spent more than 50 percent of your time on managerial work before you even think about what you did when you were doing the nonmanagerial work and you were still supervising and operating the store, but just out and out managerial work, you spent more than have your time on it didn't you? A: Sitting down and thinking about it all, yes, maybe at the time I didn't feel like I was doing, you know. But sitting down here and talking and thinking about it, yes. (No. 09- cv- 363, Pulver Dep. at 252:24- 25, 253:2- 10, Dkt. No. 27:4.) As with Anderson's testimony, however, additional portions of Pulver's testimony weigh against characterizing this exchange as an unequivocal admission. For example, when the " time spent" issue first arose, Pulver testified as follows: Q: And if we were trying to get a handle on how much time you spent on the non-managerial duties, stocking, cleaning, waiting on customers, running a cash register, cleaning up, those would be less than half of the time? A: I wanna say no because a lot of paperwork I took home and did on my own time. The scheduling did home, on my own time. I did a lot of stocking and— Q: I'm not saying you didn't do a lot of stocking.

\*10 A: But I spent as much time— I want to say as much time doing both. I mean, I was constantly on the floor helping and stocking. Q: So you would say about 50/50 doing management/nonmanagement? A: Yes. (Id. at 247:13- 25, 248:2- 5.) Again, having construed all reasonable inferences in Pulver's favor in light of this arguably inconsistent testimony, the court disagrees with Dollar General that it is entitled to summary judgment on

the time spent issue with respect to Pulver. Accordingly, Dollar General's motions for summary judgement as to both Anderson and Pulver are denied insofar as they seek dismissal based on the time spent issue. 2. Relative Importance of M anagerial and Non- Managerial Duties

This finding, however, does not end the primary duty inquiry. As noted above, " time alone is not the sole test," and the court must proceed to an examination of the second factor— the relative importance of managerial and non-managerial duties. This factor evaluates which of plaintiffs' duties— managerial or non-managerial— were more important to the employer. See *Donovan*, 675 F.2d at 521. In gauging this relative importance, " many courts look to[, among other things,] a manager's training, evaluation, and factors affecting eligibility for bonuses and pay raises." *Mayne-Harrison v. Dolgencorp, Inc.*, No. 1:09- CV- 42, 2010 WL 3717604, at \*20 (N.D.W.Va. Sept. 17, 2010) (citing examples). As many courts have recognized, however, resolving this " difficult and intensive factual inquiry" is generally " inappropriate at summary judgment." *Indergit*, 2010 WL 1327242, at \*6





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(collecting cases).

Here, in arguing that plaintiffs' managerial duties were most important to it, Dollar General points primarily to the Store Manager job description, which lists the variety of essential job functions that are managerial in nature; plaintiffs' compensation structure, which provides for higher weekly earnings and store-performance-based bonuses; and the fact that Store Managers were evaluated on the basis of management-focused criteria.

In response, plaintiffs point to, among other things, the fact that the Store Manager job description explicitly contemplates the frequent performance of manual labor; that plaintiffs' received very little training in preparation for their role as Store Manager; that plaintiffs' weekly pay, when accounting for the number of hours worked, was comparable to other employees; and that Dollar General's restrictive labor budget forced plaintiffs to perform more non-managerial tasks than they otherwise would have. Based primarily on these facts, plaintiffs argue that a reasonable jury could find that their non-managerial duties were more important to Dollar General than their managerial duties. © 2012 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 10 Not Reported in F.Supp.2d, 2011 WL 1770301 (N.D.N.Y.) (Cite as: 2011 WL 1770301 (N.D.N.Y.))

Undoubtedly, each of the facts cited by Dollar General offers support for the conclusion that it placed significant value on the plaintiffs' performance of managerial duties. Moreover, the court is not persuaded based on plaintiffs' submissions that the second factor should conclusively weigh in their favor. Nonetheless, the court does agree with plaintiffs that summary judgment on this issue, as in most cases, is not warranted here.

\*11 As to training, for example, plaintiffs' testimony calls into question the nature and amount of critical management training plaintiffs actually received. As other courts have recognized, the extent to which an employer trains its managers is relevant in determining the value that employer places on managerial duties. See, e.g., *In re Dollar General Stores FLSA Litigation*, Nos. 5:09– MD– 1500– JG, 4:09– CV– 57– BR, 4:09– CV– 58– BR, 2011 WL 197804, at \*10 (E.D.N.C. Jan. 19, 2011) (finding that plaintiff's “ value to Dollar General [was] shown by the fact that, unlike the other employees in her store, she went through four weeks of training before she was assigned her own store” ). In this case, Anderson testified to receiving no additional training when promoted to Store Manager, and Pulver testified that the brunt of her managerial training occurred over the phone. When viewed in a light most favorable to plaintiffs, these facts cut against a finding in favor of Dollar General.

Similarly, with respect to the Store Manager job description, while Dollar General is correct that it lists numerous managerial functions as “ essential,” the accuracy of that label is at least somewhat lessened in light of both the limited managerial training plaintiffs appear to have received and the fact that the job description also explicitly contemplates the frequent performance of manual labor.

And most significantly in the court's view is the restrictiveness with which Dollar General appears to



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allot its labor budget. As noted above, both plaintiffs testified that Dollar General's limited labor budget forced them to spend more time on non-managerial duties than they otherwise would have. (See No. 09– cv– 360, Anderson Dep. at 237:11– 16, Dkt. No. 38:4; No. 09– cv– 363, Pulver Dep. at 287:12– 16, Dkt. No. 27:4.) As Anderson

explained, the labor budget operated such that she could typically only schedule herself and one additional employee to be in the store at one time, often requiring her to perform non-managerial tasks such as stocking and cleaning. (No. 09– cv– 360, Anderson Dep. at 236– 37, 238– 40, Dkt. No. 38:4.) Pulver testified to operating under similar constraints, explaining that “[w]e all complained about not getting enough hours, every store manager did.” (No. 09– cv– 363, Pulver Dep. at 161, Dkt. No. 27:4.) Pulver further testified that she “wasn't getting the help she needed” with, among other things, “[h]iring certain employees for key positions,” which “put more pressure on [her] to open and close stores everyday, rearrange [her] schedule to open and leave and then come back and leave.” (Id. at 160– 61.) Given this testimony, the court is unable to definitively conclude, especially in light of other record evidence, that no reasonable jury could find that Dollar General more highly valued plaintiffs' non-managerial duties. See, e.g., *Pierce v. Dolgencorp, Inc.*, Nos. 3:09cv079 & 4:09cv097, 2011 WL 398366, at \*9 (M.D.Pa. Feb. 3, 2011) (denying summary judgment and holding that a reasonable jury could plausibly conclude that plaintiff's managerial duties were less highly valued where employer limited employee's ability to perform managerial tasks by failing to allot more labor hours); *Plaunt v. Dolgencorp, Inc.*, Nos. 3:09cv079 & 1:09cv084, 2010 WL 5158620, at \*8 (M.D.Pa. Dec. 14, 2010) (same).

\*12 On balance, then, having considered the parties' competing arguments and reviewed the record evidence in a light most favorable to plaintiffs, the court is not convinced that Dollar General has conclusively demonstrated an entitlement to summary judgement with respect to the second factor.

### 3. Relationship Between Salary and Other Employee Wages FN7

FN7. Ordinarily, the court would next turn to an examination of the third and fourth factors— the frequency with which discretion was exercised and freedom from supervision. In this case, however, because the court discerns questions of fact with respect to the fifth factor— the relationship between plaintiffs' salary and other employees' wages— the court need not do so, for © 2012 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 11 Not Reported in F.Supp.2d, 2011 WL 1770301 (N.D.N.Y.) (Cite as: 2011 WL 1770301 (N.D.N.Y.))

even if the third and fourth factors were found to decidedly weigh in Dollar General's favor, Dollar General's failure to conclusively establish the fifth, in light of the court's findings above, weighs heavily against summary judgment. The fifth factor in the primary duty analysis compares an employee's salary to the wages of non-exempt employees performing similar work. In this case, the parties agree that the relevant comparison is between plaintiffs and their respective ASMs, each of whom, at all relevant times, earned \$7.00 per hour.



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Dollar General argues that this factor weighs conclusively in its favor because plaintiffs earned significantly more than their ASMs. In drawing that conclusion, Dollar General compares plaintiffs' weekly salaries with the weekly earning potential of their respective ASMs. With respect to Anderson, for example, Dollar General compares her \$425.00 weekly salary to her ASM's potential weekly earnings of \$280.00, and concludes that “Anderson's weekly salary was at least 151 % of the weekly earnings of her next highest paid employee.” (No. 1:09– cv– 360, Def. Mem. of Law (Anderson) at 14, Dkt. No. 38:2.) Dollar General also highlights the fact that “Anderson was eligible for up to \$10,000 per year in bonuses based upon her store's performance, where her ASM was eligible only for up to \$3,000 in bonuses.” (Id.)

As to Pulver, Dollar General relies on the same calculation, comparing Pulver's weekly salary—which ranged from \$423.00 to \$480.00—to her ASM's potential weekly earnings of \$280.00, and finding Pulver's salary to be 151% to 171% of those earnings. (No. 1:09– cv– 363, Def. Mem. of Law (Pulver) at 13, Dkt. No. 27:2.)

Plaintiffs counter that their salaries were not significantly higher than their ASMs' potential wages when considering the amount of hours they worked. As to Anderson, for instance, she testified to working an average of fifty hours per week as a Store Manager. When dividing her \$425.00 weekly salary, she contends, her effective hourly rate would have been \$8.50 an hour, only \$1.50 more per hour than her ASM. (See No. 1:09– cv– 360, Anderson Mem. of Law at 11, Dkt. No. 46.)

Converting Pulver's weekly salary to an hourly rate produces similar results. As noted above, Pulver earned \$425.00 per week in the beginning of her employment, and later earned \$480.00 per week. Thus, when considering Pulver's testimony that she worked an average of sixty to sixty-five hours a week, her effective hourly rate was between \$6.51 and \$7.08 initially, and between \$7.38 and \$8.00 once her salary increased. (See No. 1:09– cv– 363, Pulver Mem. of Law at 11, Dkt. No. 29.) Based on these figures, Pulver argues, the gap in earnings between her and her ASM is not so significant as to compel summary judgment on this issue. (Id. at 11– 12.)

As the parties' submissions reflect, there is some divergence of opinion with respect to which of these methods of calculation and comparison is the “correct” one. Compare, e.g., *Moore v. Tractor Supply Co.*, 352 F.Supp.2d 1268, 1279 (S.D.Fla.2004) (declining to reduce salary to hourly rate), with *Johnson v. Big Lots Stores, Inc.*, 604 F.Supp.2d 903, 918 (E.D.La.2009) (finding hourly rate analysis both relevant and appropriate to proper executive exemption determination). To the limited extent that courts in this Circuit have addressed the issue, however, they have not foreclosed use of the method espoused by plaintiffs, suggesting that the hours worked by an employee can be taken into account. See *Donovan*, 675 F.2d at 522 (finding that “[a]ssistant [m]anagers earning \$250 or more were paid substantially higher wages even taking their longer hours into account” (emphasis added)); *Clougher v. Home Depot U.S.A., Inc.*, 696 F.Supp.2d 285, 293 (E. D.N.Y.2010) (2010) (“[T]here is nothing in the record to render [plaintiff's] counter-argument implausible; namely, that his hourly pay rate, where properly calculated, is substantially less than comparable hourly-wage supervisors....



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Given the potential import of an hourly-wage analysis, this Court is compelled to reject [defendant's] all too pat concern for the burdens of engaging in such 'mathematical gymnastics.' " (citations omitted)).

\*13 This court likewise declines to reject plaintiffs' hourly rate conversion. In the court's view, converting plaintiffs' weekly salary into an approximate hourly wage is an appropriate way of finding a common basis with which to compare the wages paid to others. As one court

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reasoned, " [t]o ignore the fact that [a plaintiff] worked more than forty hours per week would largely frustrate the purpose of this inquiry: to determine whether the employer sought to subvert the FLSA by attaching an overtime exemption to an employee who otherwise performs the same non-exempt tasks as hourly employees." Plaunt, 2010 WL 5158620, at \*13 (" Without some standard unit, there can be no useful comparison in this already-amorphous inquiry." ). The persuasiveness of this reasoning is enhanced, in the court's view, when considering the overarching principle that " [e]xemptions from the FLSA are to be narrowly construed against the employer, and [it is] the employer [that] has the burden of establishing an exemption." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir.2010); Young, 586 F.3d at 204.

Thus, in viewing the wage and salary evidence in a light most favorable to plaintiffs— i.e., in accordance with the hourly-rate conversion— the court finds that the question of whether the difference in plaintiffs' salary was so significant as to justify their exemption is one more properly left to a jury. See Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1271 (11th Cir.2008) (finding that " [g]iven the relatively small difference between the store managers' and assistant managers' hourly rates[— two or three dollars— ] it was within the jury's province to conclude that this factor either did not weigh in [defendant's] favor or at least did not outweigh the other factors in Plaintiffs' favor" ).

And finally, with respect to Anderson, while having considered that she was, in addition to her salary, eligible for a larger bonus than was her ASM, the court is not convinced that that fact compels a contrary result. While a jury could find that this eligibility differential, in light of Anderson's higher salary, renders her compensation significant enough to justify the exemption, it could similarly find that her compensation, including the bonus eligibility, fails to meet that threshold. See Clougher, 696 F.Supp.2d at 293 (" [D]isparate compensation, even where it includes performance bonuses, stock options, and other tokens of executive employment, has never been held strictly dispositive." (citing, inter alia, Johnson, 604 F.Supp.2d at 904 (finding fact that bonuses paid to exempt workers is not strictly dispositive))). Thus, Anderson's

bonus eligibility, while relevant, does not, in the court's view, conclusively tip the scales in favor of



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summary judgment.

Accordingly, having failed to demonstrate that the fifth factor weighs definitively in its favor, and in light of the court's findings with respect to the first and second factors, Dollar General's motions for summary judgment as to the primary duty issue are denied. C. Liquidated Damages

\*14 Finally, Dollar General claims it is entitled to summary judgment on plaintiffs' claims for liquidated damages because it acted in good faith in classifying plaintiffs as exempt employees. (See No. 09- cv- 360, Def. Common Br., at 26, Dkt. No. 40.) At this juncture, the court declines to rule on this issue and denies Dollar General's motion with leave to renew at a later stage of the litigation.

V. Conclusion WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Dollar General's motion to strike certain evidence (No. 09- cv- 360, Dkt. No. 50) is DENIED; and it is further

ORDERED that Dollar General's motions for summary judgment as against Janet Anderson (No. 09- cv- 360, Dkt. No. 38) and Betty Pulver (No. 09- cv- 363, Dkt. No. 27) are DENIED; and it is further

ORDERED that the Clerk provide a copy of this Memorandum- Decision and Order to the parties.

IT IS SO ORDERED. N.D.N.Y.,2011. Anderson v. Dolgencorp of New York, Inc. Not Reported in F.Supp.2d, 2011 WL 1770301 (N.D.N.Y.) END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court,

E.D. New York. Wayne HARGROVE, Plaintiff,

v. Sheriff Edward RILEY; Nassau County Correctional Facility, et al; Nassau County University Medical Staff and Nassau County Correctional Facility, Defendants.

Civil Action No. CV-04-4587 (DGT).

Jan. 31, 2007.

Wayne Hargrove, Ossining, NY, pro se.



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Alexander V. Sansone, Troy & Troy, Lake Ronkonkoma, NY, Joseph Carney, Mineola, NY, for Defendants.

### MEMORANDUM AND ORDER

TRAGER, J.

\*1 Inmate Wayne Hargrove (“ Hargrove” or “ plaintiff” ) brings this pro se action pursuant to 42 U.S.C. § 1983 against the Nassau County Sheriff, Nassau County Correctional Facility (“ NCCF” ) and NCCF's medical staff, (collectively, “ defendants” ), seeking damages for injuries allegedly caused by defendants while he was incarcerated at NCCF. Defendants now move for summary judgment pursuant to Fed.R.Civ.P. 56 arguing, inter alia, that Hargrove's claims should be dismissed because he failed to exhaust administrative remedies, as required by the Prison Litigation Reform Act of 1995 (“ PLRA” ), 42 U.S.C. § 1997e. For the following reasons, defendants' motions for summary judgment are granted.

#### Background

On August 27, 2004, FN1

Hargrove filed a complaint, alleging that defendants violated his civil rights when they forcibly administered purified protein derivative skin tests (“ PPD test” ) to test for latent tuberculosis (“ TB” ) in April 2002, 2003 and 2004 while he was incarcerated at NCCF. Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A. Hargrove named Nassau County Sheriff Edward Reilly (“ Reilly” ), NCCF and Nassau County University Medical Staff FN2

as defendants. FN3

On November 22, 2004, after discovery, County Defendants and NHCC Defendants filed separate motions for summary judgment pursuant to Fed.R.Civ.P. 56. Both defendants properly filed a Local Rule 56.1 Statement and served Hargrove a Notice to Pro Se Litigant Opposing Motion for Summary Judgment, pursuant to Local Civil Rule 56.2.

FN1. Hargrove signed the complaint August 27, 2004. The pro se clerk's office received and filed the complaint on September 20, 2004. Under the prison mail-box rule, a pro se prisoner's complaint is deemed filed when it is delivered to prison authorities. See, e.g., Walker v. Jastrem ski, 430 F.3d 560, 562 (2d Cir.2005)(deeming pro se prisoner's § 1983 action filed on date complaint was handed to prison officials). There is no evidence in the record as to when Hargrove handed the complaint to prison officials. However, it is clear the operative date is between August 27, 2004 and September 20, 2004. As discussed, infra, both of these dates occur before Hargrove properly exhausted the administrative remedies available to him at NCCF.





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FN2. The Nassau County University Medical Staff are employed by the Nassau Health Care Corporation (“NHCC”). Pursuant to the Correctional Center Health Services Agreement between the County of Nassau and NHCC, dated September 24, 1999, NHCC provides medical services for inmates at NCCF. County Defs.’s

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Not. of Motion, Decl., at 1.

FN3. Reilly and NCCF are represented separately from NHCC. Accordingly, when a distinction is necessary, Reilly and NCCF will be referred to as “County Defendants” and Nassau County University Medical Staff and NHCC will be referred to as “NHCC Defendants.” (1)

### Tuberculosis Testing at NCCF

Upon entering NCCF, new prisoners must first go through medical intake. Aff. of Kim Edwards, (“Edwards Aff.”) ¶ 3. This standard process usually takes seventy-two hours. Edwards Aff. ¶ 4. During medical intake, NCCF tests inmates for TB. Aff. of Getachew Feleke (“Feleke Aff.”) ¶ 3. NCCF generally uses a PPD test to detect latent TB. Feleke Aff. ¶ 3. However, if an inmate has previously tested positive for TB, it is NCCF’s policy to test for TB using an x-ray instead. FN4

Feleke Aff. ¶ 3. As part of its Infectious Disease Program, NCCF re-tests inmates for TB each year, beginning after they have been housed in that facility for one year. Edwards Aff. ¶ 5.

FN4. According to WebMD, “[a] tuberculin skin test should not be done for people who have a(1) Known TB infection [or a] (2) Positive tuberculin skin test in the past. A second test may cause a more severe reaction to the TB antigens.” Jan Nissl, RN, BS, Tuberculin Skin Tests, W E B M D , h t t p : / / www.webmd.com/hw/lab\_tests/hw203560.asp (last visited Jan. 31, 2007).

(2)

### Hargrove’s Tuberculosis Testing at NCCF

On March 15, 2002, Hargrove was incarcerated at NCCF.

NHCC Defs.’ 56.1 Statement ¶ 1. Before entering the general population, Hargrove was processed through medical intake. NHCC Defs.’ 56.1 Statement ¶ 2. The NCCF Medical Intake Chart for Hargrove, dated March 15, 2002 (“3/15/02 Chart”), shows that Hargrove informed medical staff that



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he had previously been exposed to tuberculosis. NHCC Defs.' Notice of Mot., Ex. C, at 1; NHCC Defs.' 56.1 Statement ¶ 2. The 3/15/02 Chart also shows that Hargrove reported testing positive to a prior PPD test and that he had been treated for TB in 2000. NHCC Defs.' Notice of Mot., Ex. C, at 1. Hargrove alleges that he was exposed to and treated for TB in 1997. Hargrove's Aff. in Opp. to Mot. for Summary Judgment, (" Aff. in Opp."), Ex. A at 1-2. Defendants contend that Hargrove was given an x-ray during the medical intake process because of his reported positive PPD test, and that the x-ray was negative, showing no active TB infection. NHCC Defs.' 56.1 Statement ¶ 2; Edwards Aff. ¶ 3. Without specifying a date, Hargrove generally states that his " request to be x-rayed was denied." Aff. in Opp. at 3.

\*2 Pursuant to NCCF's Infectious Disease Program, after being incarcerated in NCCF for a year, Hargrove was scheduled to be re-tested for TB. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. On May 24, 2003, Hargrove was given a PPD skin test. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. This test was negative. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. According to Hargrove, he requested an x-ray instead of a PPD test because of his previous exposure to TB, but was forced to submit to the PPD test. He also alleges that defendants threatened to put him in " keep lock" or " lock up" unless he submitted to the PPD test. FN5

Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A.

FN5. Hargrove has made contradictory statements about being placed in " keep lock" or " lock up" . It is unclear whether he is alleging that defendants threatened to place him in " lock up" unless he submitted to the PPD test or whether he was actually placed in " lock up" until such time that he agreed to submit to the PPD tests. For example, in his complaint, Hargrove states that when he " refused to submit to another [PPD] test, the Correctional Authorities were brought in and placed [him] in lock up." Complaint ¶ 4. In a hearing before Magistrate Judge Bloom on © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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January 31, 2005, Hargrove stated that he took the PPD tests because he was told that he would be placed in " lock up" until he submitted to the test. Hr'g Tr. 6:1-18; 9:5-10:10. In Exhibit B to his complaint, Hargrove alleges both that he was given an unwarranted TB shot and that when he refused the same shot he was placed in " keep lock." Complaint, Ex. B. There is no evidence in the record that Hargrove was ever segregated from the general population while housed at NCCF, outside of the seventy-two hour initial medical intake period. Aff. of Sgt. Neumann (" Neumann Aff." ) at 1-2 (referring to prison records showing Hargrove's holding locations which demonstrate that he was never placed in " lock up" ); NCCF 56.1 Statement ¶ E. Whether or not Hargrove was actually placed in " lock up" is not a material fact for purposes of this motion; as explained in detail, infra, Hargrove's failure to exhaust administrative remedies under the PLRA precludes a consideration of



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the merits of his Section 1983 claim.

The following year, in June of 2004, Hargrove was scheduled to be retested. Edwards Aff. ¶ 6; NHCC Defs.' 56.1 Statement ¶ 5. Because of the contradiction between the negative May 2003 PPD test and his reported positive history, NCCF contacted the Infectious Disease Department of the Nassau County Medical Center. Edwards Aff. ¶ 6. It was suggested that Hargrove be given a two-step PPD test, administered fifteen days apart. Feleke Aff. ¶ 4; Edwards Aff. ¶ 6. Hargrove was given these two PPD skin tests in June 2004. Edwards Aff. ¶ 6; NHCC Defs.' 56.1 Statement ¶ 5. Again, Hargrove alleges that these tests were administered against his will and under threat of being placed in quarantine. Complaint, Exs. A, B; Aff. in Opp., Ex. A.

On December 3, 2004, Hargrove was seen by a physician's assistant. NHCC Defs.' 56.1 Statement ¶ 6. During this meeting, Hargrove complained of a dry cough and that the site on his forearm where the June 2004 PPD tests had been administered was red and swollen. NHCC Defs.' 56.1 Statement ¶ 6; 11/28/04 Sick Call Request.

Hargrove's December 18, 2004 chart notes a positive PPD

test and an order was placed in the chart that Hargrove not be submitted for future PPD tests. Edwards Aff. ¶ 7; NHCC Defs.' 56.1 Statement ¶ 8. See also 11/19/2004 Grievance.

Hargrove alleges that the following physical ailments were caused by the PPD tests: chronic coughing, high blood pressure, chronic back pain, lung infection, dizzy spells, blurred vision and a permanent scar on both his forearms. Complaint, Ex. C; Aff. in Opp. at 3-4.

(3)

### NCCF's Inmate Grievance Procedure

NCCF has had an inmate grievance program ("IGP") in place since 2001. Aff. of Kenneth Williams, ("Williams Aff."), at 2. NCCF's IGP is carried out in conformance with the New York State Commission of Corrections Minimum Standards and Regulations for Management of County Jails and Penitentiaries ("Minimum Standards"). Id.

The IGP is designed to resolve complaints and grievances that an inmate may have regarding the inmate's care and treatment while incarcerated at NCCF. Williams Aff. at 2. Upon entering NCCF, all inmates receive a copy of the NCCF inmate handbook, which outlines the IGP. Id.

\*3 The record does not include an actual copy of NCCF's IGP, but the NCCF's IGP is detailed in the affidavit of NCCF Investigator Kenneth Williams.



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FN6

The IGP encourages inmates to resolve their grievances informally with the staff member assigned to the inmate housing unit first. *Id.* If an acceptable resolution cannot be reached, inmates must then proceed through the formal three-step process set out in the IGP. *Id.* at 3.

FN6. Hargrove does dispute any statements made by Investigator Williams regarding the inmate grievance procedure, time limits or its availability to him. Furthermore, Hargrove does © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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not dispute that he received a handbook outlining the IGP.

The first step requires an inmate to submit his grievance form FN7

to the Inmate Grievance Unit by placing it in a locked box located in each housing area, “ within five days of the date of the act or occurrence giving rise to the grievance.”

FN8

*Id.* at 2-3. NCCF indexes all grievance forms filed by inmates in a log book and in a computer system. *Id.* at 1, 3. Once a grievance form is received by the Inmate Grievance Unit, the grievance is investigated and the inmate will receive a written determination of the outcome from the Inmate Grievance Coordinator in Section II of the grievance form. FN9

*Id.* at 3. The inmate is then given a choice to accept or appeal the decision by checking the desired selection and signing his name in Section III of the grievance form. See, e.g., 11/19/2004 Grievance form. If the inmate is not satisfied with the decision of the Inmate Grievance Coordinator, the inmate may appeal the determination to the Chief Administrative Officer. Williams Aff. at 3. Finally, if the inmate is not satisfied with the Chief Administrative Officer's determination, the inmate may appeal to the New York State Commission of Correction Citizen's Policy and Complaint Review Council (“ Council”). *Id.* at 3. The Council will then render a final determination. *Id.* at 3.

FN7. The grievance forms contain four sections to be utilized throughout all three steps of the IGP. Section I provides space for the inmate to explain his complaint and the actions he requests as relief. Section II is for the decision of the Inmate Grievance Coordinator. Section III is titled “ Acceptance/Appeal of Grievance Coordinator's decision” and contains two mutually exclusive options in which the inmate must choose one or the other: “ I have read and accept the Grievance Coordinator's decision,” or “ I have read and appeal the Grievance Coordinator's decision.” Section



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IV provides space for the decision of the Chief Administrative Officer.

FN8. Hargrove has not argued that he was unaware of this five-day deadline.

FN9. There is no evidence in the record specifying the how long an inmate has to appeal inaction by the Inmate Grievance Unit.

(4)

### Authenticity of the Grievance Forms and Other

#### Documents Submitted by Hargrove

In support of his allegations that he continuously informed defendants that he had been exposed to TB and, therefore, should not have been given PPD tests, Hargrove submitted three letters with his complaint, two of which were addressed to the Inmate Grievance Committee and one of which was addressed to “To whom this may concern.” Complaint, Exs. A-C. He also submitted five complaint letters written to Sheriff Reilly, seventeen sick call requests and nine grievance forms during discovery and with his Affidavit in Opposition to Defendants' Motion for Summary Judgment, explaining that some of the medical records and notarized letters were “missing.” Aff. in Opp, Ex. A at 2. Defendants call the authenticity of most of these documents into question, contending that Hargrove never submitted any grievance form or complaint letter before he filed his complaint. County Defs.' Mem. of Law at 16-21; County Defs.' 56.1 Statement at ¶¶ B2, C3, D3.

Kenneth Williams, an investigator at NCCF in the Inmate Grievance Unit, testified that he reviewed all of the grievance forms, complaint letters and sick call requests annexed to Hargrove's Complaint and to Hargrove's Affidavit in Opposition to Defendants' Motion for Summary Judgment. Williams Aff. at 2. Williams testified that he examined the grievance records at NCCF and searched “for any grievances by plaintiff/inmate Hargrove” and found “only two.” FN10

Williams Aff. at 1. The first grievance, dated November 19, 2004, complained that the medical staff continued “forcing [Hargrove] to take a T.B. shot while [he] keep[s] telling them that [he] has been exposed to T.B.” 11/19/2004 Grievance; Williams Aff. at 1. In response to this grievance, Hargrove's “positive” TB status was noted in his medical records and an order was placed in Hargrove's medical chart, stating that Hargrove not be subjected to future PPD tests. 11/19/2004 Grievance, Section II; © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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Williams Aff. at 1; NHCC Defs.' 56.1 Statement ¶ 8; Edwards Aff. ¶ 7. In Section III of the 11/19/2004



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Grievance, Hargrove acknowledged that he had read the Grievance Coordinator's decision, and that he chose to accept the decision instead of appealing it. 11/19/2004 Grievance. The other grievance received by the Grievance Unit, dated May 11, 2005, complained of an unrelated matter. 5/11/2005 Grievance (complaining of back problems and requesting the return of his medical shoes); Williams Aff. at 1. Thus, Williams concluded that, beside the 11/19/2004 and 5/11/2005 Grievance Forms, none of the other documents were “received by the grievance unit, and, given the locked box system, the grievance-forms were never submitted by plaintiff/inmate.” Williams Aff. at 2.

FN10. It is NCCF's procedure to forward to the attention of the Grievance Unit all official grievance forms and complaint letters-even ones not specifically addressed to the Grievance Unit. Williams Aff. at 3.

\*4 A visual examination of the grievance forms Hargrove submitted in support of his claims suggests forgery. Five of the nine grievance forms were requests to stop PPD testing. See April 19, 2002 grievance; April 28, 2002 grievance; April 20, 2003 grievance; April 28, 2003 grievance; November 19, 2004 grievance. The remaining grievance forms concerned Hargrove's requests for medical shoes. See March 18, 2002 grievance; July 6, 2002 grievance; February 20, 2003 grievance; May 11, 2005 grievance. Of the grievance forms complaining of unwanted PPD tests, the April 28, 2002 grievance form is a patent photocopy of the April 19, 2002 grievance form, and the April 28, 2003 grievance form is a patent photocopy copy of the April 20, 2003 grievance form, with only the handwritten dates changed. The only potentially authentic grievance forms relating to Hargrove's complaint about the PPD testing are dated April 19, 2002, April 20, 2003, and November 19, 2004. Of these grievance forms, only the November 19, 2004 has been authenticated by NCCF personnel. See generally Williams Aff. at 1-4.

Turning to the complaint letters addressed to Reilly, many contain notary stamps cut from the bottom of unrelated

documents and photocopied onto the bottom of the complaint letters. See County Defs.' Mem. of Law at 18-21. C.O. Thomas McDevitt and C.O. Paul Klein, both of whom perform notary services for prisoners at NCCF, have submitted sworn affidavits, stating that they kept individual Notary Log Books covering all dates relevant to this litigation. Aff. of C.O. Klein, (“Klein Aff.”), at 1; Aff. of C.O. McDevitt, (“McDevitt Aff.”), at 1. McDevitt's Notary Log Book shows that he notarized only one document for Hargrove. This document, dated May 13, 2002, was a motion related to Hargrove's criminal trial. McDevitt Aff. at 1-2. Hargrove signed the Notary Log Book acknowledging receipt of that notarized motion. McDevitt Aff. at 2. McDevitt states that he never notarized any other documents for Hargrove. McDevitt Aff. at 2. However, McDevitt's stamp and signature dated May 13, 2002 (the date of the legitimate notarization) appear on Hargrove's letter to Sheriff Reilly dated May 10, 2002. County Defs.' Not. of Motion, Ex. A.

These facts repeat themselves in regard to the documents bearing the notary stamp and signature of





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Klein. Klein had performed several legitimate notarizations for Hargrove in connection to Hargrove's criminal trial. Klein Aff. at 1-2. Hargrove signed Klein's Notary Log Book acknowledging receipt of those notarized documents. Klein Aff. at 2. However, Klein states that he never notarized any of Hargrove's letters addressed to Sheriff Reilly that bear Klein's stamp and signature. Klein Aff. at 2. On all of the documents that Hargrove submitted bearing Klein's stamp and signature, the dates and signatures of Klein match identically to the dates on which he had performed legitimate notarizations for Hargrove in connection with his criminal trial. Defendants argue it is clear that the documents bearing the stamps and signatures of McDevitt and Klein were not actually notarized by these notaries. County Defs.' Mem. of Law at 17-22.

\*5 Hargrove does not deny these allegations. Instead, he resubmits the documents that McDevitt and Klein testify they did not notarize with his Affidavit in Opposition and insists that the documents “refute[ ] the assertions put forth by the defendants.” Aff. in Opp. at 2.

### Discussion

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(1)

### Summary Judgment Standard

A motion for summary judgment is granted when “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). A court ruling on a summary judgment motion must construe the facts in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Williams v. Metropolitan Detention Center*, 418 F.Supp.2d 96, 100 (E.D.N.Y.2005). Defendants, the moving party in this action, bear the burden of demonstrating the absence of a genuine issue of material fact. *Baisch v. Gallina*, 346 F.3d 366, 371 (2d Cir.2003).

As Hargrove is proceeding pro se, his complaint must be reviewed carefully and liberally, and be interpreted to “raise the strongest argument it suggests,” *Green v. United States*, 260 F.3d 78, 83 (2d Cir.2001), particularly when civil rights violations are alleged, see, e.g., *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir.2004). Plaintiff's complaint does not specify the legal theories upon which it relies, but, in construing his complaint to raise its strongest arguments, it will be interpreted to raise claims under 42 U.S.C. § 1983. See, e.g., *Dufort v. Burgos*, No. 04-CV-4940, 2005 WL 2660384, at \*2 (E.D.N.Y. Oct. 18, 2005) (liberally construing plaintiff's complaint, which failed to specify the legal theory or theories upon which it rested, as, inter alia, a claim under 42 U.S.C. § 1983); *Williams*, 418



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F.Supp.2d at 100 (same).

(2)

### Prison Litigation Reform Act

#### a. Purpose of the Prison Litigation Reform Act

The PLRA was intended to “reduce the quantity and improve the quality of prisoner suits.”  
Woodford v. Ngo,

--- U.S. ----, 126 S.Ct. 2378, 2387 (2006) (quoting Porter v. Nussle, 534 U.S. 516, 524 (2002)). It seeks to eliminate unwarranted interference with the administration of prisons by federal courts, and thus “ ‘affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.’ ” Woodford, 126 S.Ct. at 2387 (quoting Porter, 534 U.S. at 525). See also Booth v. Churner, 532 U.S. 731, 739 (2001). Formal grievance procedures allow prison officials to reconsider their policies, implement the necessary corrections and discipline prison officials who fail to follow existing policy. See Ruggiero v. County of Orange, 467 F.3d 170, 177-78 (2d Cir.2006).

#### b. The Exhaustion Requirement

The PLRA's “invigorated” exhaustion provision, 42 U.S.C. § 1997e(a), provides the mechanism to reduce the quantity and improve the quality of prisoners' suits by requiring that prison officials have the opportunity to address prisoner complaints through internal processes before allowing a case to proceed in federal court. Woodford, 126 S.Ct. at 2382 (citing Porter, 534 U.S. at 524). Section 1997e(a) provides that:

\*6 [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under Section 1983. Woodford, 126 S.Ct. at 2383; Ruggiero, 467 F.3d at 174; Williams, 418 F.Supp.2d at 100-01. The exhaustion provision is applicable to suits seeking relief, such as money damages, that may not be available in prison administrative proceedings, as long as other forms of relief are obtainable through administrative channels. Giano v. Goord, 380 F.3d 670, 675 (2d Cir.2004); see also Woodford, 126 S.Ct. at 2382-83 (“[A] prisoner must now exhaust  
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administrative remedies even where the relief sought-monetary damages-cannot be granted by the administrative process.” ) (citing Booth, 532 U.S. at 734).

In June 2006, the Supreme Court held that the PLRA requires “ proper exhaustion” before a case may proceed in federal court. Woodford, 126 S.Ct. at 2387. “ Proper exhaustion” requires a prisoner to use “ ‘ all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).’ “ Ruggiero, 467 F.3d at 176 (citing Woodford, 126 S.Ct. at 2385 (emphasis in original)). Although the level of detail necessary to properly exhaust a prison's grievance process will vary from system to system, Jones v. Bock, 127 S.Ct. 910, 2007 WL 135890, at \*12 (Jan. 22, 2007), “ proper exhaustion” under the PLRA “ ‘ demands compliance with [that] agency's deadlines and other critical procedural rules.’ “ Ruggiero, 467 F.3d at 176 (quoting Woodford, 126 S.Ct. at 2386). Thus, the PLRA's exhaustion requirement is not satisfied by “ untimely or otherwise procedurally defective attempts to secure administrative remedies.” Ruggiero, 467 F.3d at 176 (citing Woodford, 126 S.Ct. at 2382).

(3)

Exhaustion Analysis: Hargrove did not Exhaust the Administrative Remedies Made Available by NCCF

prior to Bringing Suit

Section 1997e(a) of the PLRA applies to Hargrove's complaint; Hargrove was and continues to be confined in a correctional facility, see Berry v. Kerik, 366 F.3d 85, 87 (2d Cir.2004), and Hargrove's claim is about a “ prison condition” within the meaning of the PLRA, see Williams, 418 F.Supp.2d at 101. See also Sloane v. W. Mazzuca, No. 04-CV-8266, 2006 WL 3096031, at \*4 (S.D.N.Y. Oct. 31, 2006) (recognizing PLRA's application to complaint alleging retaliation by prison officials for plaintiff's refusal to consent to a PPD test). Accordingly, the merits of Hargrove's Section 1983 claims can only be addressed if it is first determined that Hargrove properly exhausted each claim under Section 1997e(a) of the PLRA before filing his complaint in federal court.

\*7 Hargrove has submitted both forged FN11

and authentic grievance forms in opposing defendants' motions for summary judgment. Excluding, for the moment, the forged documents, NCCF's records reflect that Hargrove did not submit his first grievance until after he filed the instant complaint. Williams Aff. at 1. Hargrove's first grievance complaining of unwanted PPD testing is dated November 19, 2004, Williams Aff. at 1, two to three months after Hargrove filed his complaint. Additionally, this first grievance, dated November 19, 2004, was submitted five months after the last PPD test was administered to him in June 2004. NHCC



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Defs.' 56.1 Statement ¶¶ 5,6. This five-month period far exceeds the five-day window provided by NCCF's IGP. Since Hargrove failed to comply with the IGP's deadlines, he did not properly exhaust the available administrative remedies. Ruggiero, 467 F.3d at 176 (“ ‘ untimely or otherwise procedurally defective attempts to secure administrative remedies do not satisfy the PLRA's exhaustion requirement.’ ” ) (quoting Woodford, 126 S.Ct. at 2382).

FN11. Based on an examination of the documents themselves, as well as the uncontradicted testimony of the notaries performing services for prisoners at NCCF, see generally Klein Aff.; McDevitt Aff., and of the investigator in the Inmate Grievance Unit, see generally Williams Aff., it appears that many of the documents submitted by Hargrove are forgeries. However, in order to view the facts in the light most favorable to Hargrove, and so as to avoid making findings of fact in a summary judgment motion, for the purposes of the exhaustion analysis, all of the documents will be considered to be authentic. However, for purposes of the sanctions analysis, the documents will be explored and the consequences of Hargrove's misrepresentations will be addressed.

Furthermore, even if the falsified grievance forms Hargrove submitted in support of his claim are considered authentic, they are still untimely. The diagnostic TB tests (whether x-ray or PPD tests) were given to Hargrove on March 15, 2002, May 24, 2003 and in June of 2004, but the grievance forms Hargrove submitted complaining of unwanted PPD tests are dated April 19, 2002, April 28, 2002, April 20, 2003, April 28, 2003 and November 19, © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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2004. None of these grievances were filed “ within five days of the of the date of the act or occurrence giving rise to the grievance.” Williams Aff. at 3. There is no evidence in the record suggesting that NCCF's IGP allows for a tolling of the five-day time limit in which to file a grievance. FN12

FN12. Even if the submitted grievances had been filed within the proscribed time period, they only show that Hargrove's grievances reached an Inmate Grievance Coordinator, the first formal step of NCCF's three-step administrative grievance process; Hargrove never appealed to the Chief Administrative Officer. By failing to take the next available step in NCCF's IGP, Hargrove failed to satisfy the mandatory exhaustion requirement. See, e.g., Williams, 418 F.Supp.2d at 101, 102 (dismissing pro se complaint where plaintiff could only show he exhausted two of the four-step process mandated by prison's administrative process).

While the letters to Reilly and sick call requests show that Hargrove attempted to bring his complaints about the PPD testing to the attention of the prison staff, see, e.g., Aff. in Opp., Exs. A-D, NCCF's IGP requires use of formal grievance forms. Thus, writing complaint letters and submitting sick call requests did not properly exhaust NCCF's available administrative remedies. See, e.g., Hernandez v. Coffey, No. 99-CV-11615, 2006 WL 2109465, at \*4 (S.D.N.Y. July 26, 2006) (holding



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letters did not satisfy plaintiff's exhaustion obligation); Williams, 418 F.Supp.2d at 101 (holding that because plaintiff's efforts to convey his medical condition through letters and conversations with the warden and medical staff did "not include the required steps of the PLRA's administrative remedy process," plaintiff failed to exhaust); Mills v. Garvin, No. 99-CV-6032, 2001 U.S. Dist. LEXIS 3333, at \*8 (S.D.N.Y. Mar. 2, 2001) ("letter writing is not the equivalent of an exhaustion of administrative remedies under the PLRA").

As Hargrove failed to properly exhaust his administrative remedies, this action is precluded by 42 U.S.C. § 1997e(a) unless Hargrove can establish excuse for his failure to exhaust.

(4)

### No Grounds to Excuse Plaintiff's Failure to Exhaust

\*8 Exhaustion is an affirmative defense that defendants have the duty to raise. Jones, 2007 WL 135890, at \* 8-11; Sloane, 2006 WL 3096031, at \*4; Williams, 418 F.Supp.2d at 101. Once argued by the defendants, a plaintiff has an opportunity to show why the exhaustion requirement should be excused or why his failure to exhaust is justified. See Ruggiero, 467 F.3d at 175; Collins v. Goord, 438 F.Supp.2d 399, 411 (S.D.N.Y.2006) ("[T]he Second Circuit has cautioned that 'while the PLRA's exhaustion requirement is 'mandatory,' certain caveats apply.' ") (internal citations omitted). Thus, before concluding that a prisoner failed to exhaust available administrative remedies as required by Section 1997e(a) of the PLRA, the following three factors must be considered: (1) whether administrative remedies were actually available to the prisoner; (2) whether defendants have either waived the defense of failure to exhaust or acted in such a way as to estop them from raising the defense; and (3) whether special circumstances, such as a reasonable misunderstanding of the grievance procedures, exist justifying the prisoner's failure to comply with the exhaustion requirement. Ruggiero, 467 F.3d at 175 (citing Hemphill v. New York, 380 F.3d 680, 686 (2d Cir.2004)). FN13

FN13. Courts in the Second Circuit have questioned what effect, if any, the Supreme Court's recent decision in Woodford requiring "proper exhaustion" may have on the three-step Hemphill inquiry. The Second Circuit has yet to address this issue. See Ruggiero, 467 F.3d at 175-76 (declining to "determine what effect Woodford has on our case law in this area ... because [plaintiff] could not have prevailed even under our pre-Woodford case law). To date, district courts have acknowledged the tension, but resolved to apply Hemphill to exhaustion claims until instructed otherwise by the Second Circuit. See, e.g., Larkins v. Selsky, 04-CV-5900, 2006 WL 3548959, at \*9, n. 4 (S.D.N.Y. Dec. 6, 2010) (citing Hemphill v. New York, 380 F.3d 680, 686 (2d Cir.2004)). © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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2006) (applying the current law of the Second Circuit to exhaustion claims); Sloane, 2006 WL 3096031, at \*5 (“ Until such time as the Court of Appeals considers the impact of Woodford, if any, on its prior rulings, this Court must follow the law of the Second Circuit. The Court will therefore apply the current law of this circuit to the exhaustion claims.” ); Collins v. Goord, 438 F.Supp.2d at 411 n. 13 (acknowledging that Woodford and Hemphill may be in tension, but deciding exhaustion claims under Hemphill inquiry); Hernandez v. Coffey, No. 99-CV11615, 2006 WL 2109465, at \*3 (S.D.N.Y. July 26, 2006) (same). Here, Hargrove does not prevail under Hemphill; therefore, there is no occasion to address the potential effect Woodford may have had in his case.

### a. Whether administrative remedies were “ available” to Hargrove

The first step in the Hemphill inquiry requires a court to determine whether administrative remedies were available to the prisoner. Hemphill, 380 F.3d at 686. The test for assessing availability is an “ objective one: that is, would a similarly situated individual of ordinary firmness have deemed them available.” Id. at 688 (internal quotation marks omitted). In making this determination, “ courts should be careful to look at the applicable set of grievance procedures.” Abney v. McGinnis, 380 F.3d 663, 668 (2d Cir.2004). Exhaustion may be considered unavailable in situations where plaintiff is unaware of the grievance procedures or did not understand it, Ruggiero, 467 F.3d at 179, or where defendants' behavior prevents plaintiff from seeking administrative remedies, FN14

Hemphill v. State of New York, 380 F.3d 680, 686 (2d Cir.2004).

FN14. Case law does not clearly distinguish between situations in which defendants' behavior renders administrative remedies “ unavailable” to the plaintiff and cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense because of their behavior. As such, there will be some overlap in the analyses.

Here, Hargrove has not claimed that NCCF's administrative grievance procedure was unavailable to him. In fact, Hargrove demonstrated his access to and knowledge of NCCF's IGP by filing proper grievances on November 19, 2004 and on May 10, 2005. Hargrove did not dispute any part of Investigator Williams's affidavit detailing the IGP and its availability to inmates since 2001. Specifically, Hargrove did not dispute, upon entering the facility, that he received a copy of the inmate handbook outlining the IGP. He has not claimed that he is unfamiliar with or unaware of NCCF's IGP. Hargrove has not alleged that prison officials failed to advance his grievances FN15

or that they threatened him or took any other action which effectively rendered the administrative process unavailable.

FN15. Although not specifically alleged, interpreting the evidence to “ raise the strongest argument,” Hargrove may be arguing that NCCF's IGP was not available to him because the Grievance Coordinator failed to respond to his grievances. In the single grievance regarding PPD tests that





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defendants concede is authentic, Hargrove writes, “[n]ow for the third time your office refused to answer my grievances so please look into this matter because the T.B. shot is [sic] effecting my health.” 11/19/04 Grievance. This language implies that Hargrove filed grievances in the past and received no response from the Inmate Grievance Coordinator. Furthermore, Hargrove wrote on one of the submitted copies of the November 19, 2004 grievance that “[t]his is the only accepte[sic] that Plaintiff got back from all grievances and letters that the Plaintiff sent to Sheriff Riley and his medical staffs about his staff making [sic] take T.B. test for 3 year[s].” County Defs.’ Not. of Motion, Ex. A, 11/19/2004 grievance.

First, it must be reiterated that filing of the initial grievances was untimely. However, even assuming arguendo that the original grievances had been timely filed, district courts in the Second Circuit have held that the “lack of a response from the [Inmate Grievance Review Committee] does not excuse an inmate’s obligation to exhaust his © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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remedies through available appeals.” Hernandez v. Coffey, 2006 WL 2109465, at \*3-5. See also Hemphill, 380 F.3d. at 686 (“Threats or other intimidation by prison officials may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system”); Acosta v. Corr. Officer Dawkins, No. 04-CV-6678, 2005 WL 1668627, at \*3 (S.D.N.Y. July 14, 2005) (inmate required to appeal lack of response to exhaust administrative remedies); Mendoza v. Goord, No. 00-CV-0146, 2002 U.S. Dist. LEXIS 22573, at \*6 (S.D.N.Y. Nov. 21, 2002) (“If, as a result of a negligent error by prison officials-or even their deliberate attempt to sabotage a prisoner’s grievance-the prisoner [does not receive a response] on his complaint, he is not thereby forestalled from appealing”). Hargrove did not assert or offer evidence suggesting that he appealed the unresponsiveness or that those appeals were not advanced.

\*9 Additionally, Hargrove’s transfer from NCCF to Sing Sing Correctional Facility (“Sing Sing”) in July 2005 did not excuse his previous failure to properly exhaust. See, e.g., Sims v. Blot, No. 00-CV-2524, 2003 WL 21738766, at \*4 (S.D.N.Y. July 25, 2003) (determining that failure to exhaust administrative remedies is not excused by transfer to another facility); Santiago v. Meinsen, 89 F.Supp.2d 435, 440-41 (S.D.N.Y.2000) (determining that plaintiff should not be “rewarded” for failing to participate in grievance procedure before being transferred). Hargrove had ample opportunity to properly file his grievances and to appeal their results as required by NCCF’s procedures while he was imprisoned at NCCF. The last PPD test Hargrove complains of was given in 2004; therefore, Hargrove had until June or July of 2004 to timely file his grievance in accordance with NCCF’s IGP. Hargrove was not transferred to Sing Sing until July 2005. County Defs.’ Mem. of Law at 2. Thus, Hargrove’s transfer cannot excuse his previous failure to properly exhaust.



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### b. Estoppel

The second step of the inquiry asks whether defendants are estopped from raising exhaustion as a defense. Specifically, “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense.” Hemphill, 380 F.3d at 686 (internal citations omitted).

Here, Hargrove has not made any statements that would permit a finding that defendants should be estopped from raising the affirmative defense of exhaustion or that defendants waived the right to raise the defense. Defendants first raised the PLRA's exhaustion requirement as an affirmative defense in their respective answers. See County Defs.' Am. Answer at 3; NHCC Defs.' Answer at 1. County Defendants raised it again in their motion for summary judgment. See County Defs.' Mem of Law at 15-23. Thus, defendants are not estopped from raising the affirmative defense now. See, e.g., Sloane, 2006 WL 3096031, at \*8 (exhaustion defense not waived where defendants first raised it in their motion to dismiss).

Additionally, defendants have not threatened Hargrove or engaged in other conduct preventing him from exhausting the available administrative remedies. Cf. Ziemba v. Wezner, 366 F.3d 161, 162 (2d Cir.2004) (holding defendants were estopped from asserting non-exhaustion because of prison officials' beatings, threats and other conduct inhibiting the inmate from filing proper grievances); Feliciano v. Goord, No. 97-CV-263, 1998 WL 436358, at \*2 (S.D.N.Y. July 27, 1998) (holding defendants were estopped from asserting non-exhaustion where prison officials refused to provide inmate with grievance forms, assured him that the incidents would be investigated by staff as a prerequisite to filing a grievance, and provided prisoner with no information about results of investigation). Hargrove has not argued otherwise. See Ruggiero, 467 F.3d at 178 (holding defendants were not estopped from asserting a failure to exhaust defense where plaintiff pointed to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies); Sloane, 2006 WL 3096031, at \*8 (finding no estoppel where plaintiff did not argue that defendants prevented him from pursuing the available administrative remedies); Hernandez, 2006 WL 2109465, © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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at \*4 (finding no estoppel where plaintiff did not argue that any threats or intimidation prevented him from pursuing his appeals). Thus, for the same reasons that administrative remedies were not deemed unavailable to Hargrove, defendants are not estopped from raising a failure to exhaust defense.

### c. Special circumstances



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\*10 Even where administrative remedies are available and the defendants are not estopped from arguing exhaustion, the court must “ consider whether ‘ special circumstances’ have been plausibly alleged that justify ‘ the prisoner’s failure to comply with administrative procedural requirements.’ ” Hemphill, 380 F.3d at 688 (quoting Giano, 380 F.3d at 676). For example, plaintiff’s reasonable interpretation of regulations differing from prison official’s interpretation has been held to constitute a “ special circumstance.” Giano, 380 F.3d at 676-77. No special circumstances have been alleged that would excuse Hargrove from availing himself of administrative remedies. See Sloane, 2006 WL 3096031, at \*8; Freeman v. Goord, No. 02-CV-9033, 2004 U .S. Dist. LEXIS 23873, at \* 9-10 (S.D.N.Y.2004) (granting motion to dismiss where “ there is no evidence in the record • • • of any ‘ special circumstances’ in this action.” )

(5)

Hargrove's Failure to Exhaust, in Addition to his Fraud on the Court, Warrants Dismissal with Prejudice

Hargrove has not sufficiently rebutted the defendants' assertion of failure to exhaust, and a liberal reading of his submissions does not reveal any grounds to excuse that failure.

Because Hargrove filed a complaint in federal court before filing a grievance, permitting his unexhausted and unexcused claim to proceed would undercut one of the goals of the exhaustion doctrine by allowing NCCF to be haled into federal court without the “ opportunity to correct

its own mistakes with respect to the programs it administers.” Woodford, 126 S.Ct. at 2385. See also Ruggiero, 467 F.3d at 178 (citing Porter, 534 U.S. at 525). Thus, his complaint must be dismissed.

In general, dismissal without prejudice is appropriate where plaintiff has failed to exhaust but the time permitted for pursuing administrative remedies has not expired. Berry v. Kerik, 366 F.3d 85, 87 (2d Cir.2004). Dismissal with prejudice is appropriate where “ administrative remedies have become unavailable after the prisoner had ample opportunity to use them and no special circumstances justified failure to exhaust.” Berry, 366 F.3d at 88. Here, Hargrove’s administrative remedies were available to him during his entire period of confinement at NCCF. He remained incarcerated in NCCF throughout the time period in which he alleges the PPD tests were given. He could have exhausted remedies for his grievances at any time. Therefore, Hargrove had ample opportunity to seek administrative remedies but failed to do so. Because there is no evidence in the record that administrative remedies are still available to Hargrove, as the five-day time period had run, and because Hargrove has alleged no special circumstances justifying his failure to exhaust, his complaint is accordingly dismissed with prejudice. Berry, 366 F.3d at 88 (upholding dismissal with prejudice where plaintiff had no justification for his failure to pursue administrative remedies while they were available.)



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\*11 Additionally, defendants' have moved for sanctions based on Hargrove's alleged submission of falsified evidence. If a party commits a fraud on the court, the court has the inherent power to do whatever is reasonably necessary to deter abuse of the judicial process. *Shangold v. The Walt Disney Co.*, No. 03-CV-9522, 2006 WL 71672, at \*4 (S.D.N.Y. January 12, 2006) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)). Fraud upon the court has been defined as “ fraud which seriously affects the integrity of the normal process of adjudication.” *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988); *McMunn v. Mem'l Sloan-Kettering Cancer Center*, 191 F.Supp.2d 440, 445 (S.D.N.Y.2002). In order for a court to grant sanctions based upon fraud, it must be established by clear and convincing evidence that a party has “ sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by ... unfairly hampering © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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the presentation of the opposing party's claim or defense.” *McMunn*, 191 F.Supp.2d at 455 (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir.1989).

After carefully reviewing the allegedly fraudulent documents, it must be concluded that Hargrove consciously falsified these documents. See, e.g., *Shangold*, 2006 WL 71672, at \*1, \*3 (finding clear and convincing evidence of fraud where plaintiffs fabricated a timeline and plot outlines to advance their claims); *McMunn*, 191 F.Supp.2d at 446 (finding clear and convincing evidence of fraud where plaintiff edited audio tapes and represented that they were unedited during discovery). The notaries performing services for prisoners at NCCF testify that they never notarized many of the documents supplied by Hargrove. See *Klein Aff.*; *McDevitt Aff.* Furthermore, a visual examination of the documents themselves makes it clear that many of the documents submitted by Hargrove are forgeries.

In considering what sanction to impose, courts consider the following five factors: (i) whether the misconduct was the product of intentional bad faith; (ii) whether and to what extent the misconduct prejudiced the plaintiffs; (iii) whether there was a pattern of misbehavior rather than an isolated instance; (iv) whether and when the misconduct was corrected; and (v) whether further misconduct is likely to occur in the future. *Scholastic, Inc. v. Stouffer*, 221 F.Supp.2d 425, 444 (S.D.N.Y.2002) (citing *McMunn*, 191 F.Supp.2d at 461).

Here, Hargrove's deception was not an isolated instance; he fabricated the dates on many grievance forms, in addition to improperly duplicating notary stamps on complaint letters to make them look authentic. *Klein Aff.* at 2; *McDevitt Aff.* at 2; County Defs.' 56.1 Statement ¶¶ C3, D3. He submitted these forgeries to defendants during discovery and again as exhibits to his Affidavit in Opposition to Defendant's Motion for Summary Judgment. A severe sanction is warranted as Hargrove's forgeries were intentional, he never corrected them once their authenticity was challenged and he continues to



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insist on their veracity. Aff. in Opp. at 1-4. Given that there is clear and convincing evidence that Hargrove has continuously and consciously perpetrated a fraud on the court through his submission of fraudulent documents and sworn

affirmations of those documents' authenticity, dismissal with prejudice is especially appropriate. See, e.g., Shangold, 2006 WL 71672, at \*5 (dismissing with prejudice where plaintiffs fabricated evidence to advance their claims); Scholastic, 221 F.Supp.2d at 439-444 (dismissing with prejudice where plaintiff produced seven pieces of falsified evidence); McMunn, 191 F.Supp.2d at 445 (dismissing with prejudice where plaintiff "lie[d] to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process").

### Conclusion

\*12 Because Hargrove did not satisfy the exhaustion requirement under the PLRA, defendants' motions for summary judgment are granted. Further, considering the fraud Hargrove perpetrated on the court, the claims are dismissed against all defendants with prejudice. The Clerk of the Court is directed to close the case.

SO ORDERED:

E.D.N.Y.,2007. Hargrove v. Riley Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,

S.D. New York. William MINGUES, Plaintiff,

v. C.O NELSON and C.O. Berlingame, Defendants.

No. 96 CV 5396(GBD).

Feb. 20, 2004.



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**Background:** Inmate brought a § 1983 action asserting, inter alia, claims of excessive force during his wife's visit with him at the correctional facility.

**Holding:** On a defense motion to dismiss, the District Court, Daniels, J., held that the record established that the action was filed after the effective date of the Prison Litigation Reform Act (PLRA). Motion granted.

### West Headnotes

Civil Rights 78 1395(7)

78 Civil Rights 78III Federal Remedies in General 78k1392 Pleading 78k1395 Particular Causes of Action 78k1395(7) k. Prisons and Jails; Probation and Parole. Most Cited Cases Record established that inmate's § 1983 action was filed after the effective date of the Prison Litigation Reform Act of 1996 (PLRA), such that the inmate's failure to exhaust his administrative remedies precluded relief; examination of the initial complaint itself, on its face, unequivocally demonstrated that the inmate's subsequent allegation in his amended complaint that he filed the complaint in April of

1996 was patently false; there was no explanation offered that could reasonably support and account for the existence of May dates on the complaint. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

### MEMORANDUM DECISION AND ORDER

DANIELS, J.

\*1 This § 1983 action was originally commenced by the plaintiff, FN1

a prisoner in New York State custody, and his wife claiming their civil rights were violated during the wife's visit with plaintiff at the correctional facility. Discovery in this matter has concluded. Previously, all claims asserted by plaintiff's wife were dismissed for failure to prosecute. Additionally, defendants' summary judgment motion was denied with respect to plaintiff's claims of excessive force, FN2

and summary judgment was granted dismissing all of plaintiff's other claims. Defendants now seek to dismiss the remaining excessive force claims on the grounds they are barred by the Prisoner Litigation Reform Act of 1996 (" PLRA" ), 42 U.S.C. § 1997e(a), as plaintiff failed to exhaust his administrative remedies.

FN1. Plaintiff and his wife were proceeding pro se when they filed the complaint and amended complaint. Thereafter, plaintiff obtained legal representation.





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FN2. In the amended complaint, plaintiff alleges he was beaten, kicked and punched. (Am.Compl. § 6). In his original complaint, he had also claimed that he was whipped.” (Compl. at 7, 8). Plaintiff testified at his deposition that he was slapped once in the face, punched about four or five times in the lower back, and a correctional officer then laid on top of him. (Mingues Dep. at 78-81). The incident, which took approximately thirty to forty seconds, caused plaintiff to suffer from back pain for an unspecified period of time. (Id. at 81, 86). © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

Subdivision (a) of § 1997e provides, “ [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” This provision became effective on April 26, 1996. *Blisset v. Casey*, 147 F.3d 218, 219 (2d Cir.1998). The PLRA's exhaustion requirement does not apply retroactively to actions pending when the Act was signed into law. *Scott v. Coughlin*, 344 F.3d 282, 291 (2d Cir.2003).

There is no dispute that plaintiff did not avail himself of the existing and available prison grievance procedure. Plaintiff, however, argues he was not required to exhaust his administrative remedies because, as alleged in his amended complaint, “ petitioners (sic) had already filed in April 10-12 of 1996,” prior to the PLRA's April 26, 1996 enactment date. FN3

(Am.Compl. § 2). In order to determine the date that the instant action was commenced, the date of the filing of the amended complaint relates back to the filing date of the original complaint. Fed.R.Civ.P. 15(c). The original complaint was signed and dated by plaintiff's wife on May 8, 1996; it was stamped received by the Pro Se Office on May 10, 1996; and plaintiff's signature is dated May 13, 1996. FN4

FN3. The amended complaint reads as follows:

That the original complaint filed under and pursuant to Title 42 section 1983 and 1985 was made and submitted before this court in April of 1996, before the application of the Prisoner Litigation Reform Act of 1996 was signed into law. The Act was signed into law April 26, 1996 and petitioners had already filed in April 10-12 of 1996. (Am.Compl. § 2).

FN4. Plaintiff's wife application for in forma pauperis relief was signed and dated May 8, 1996, and it is stamped as received by the Pro Se Office on May 10, 1996. Plaintiff's signature, on his initial application for appointment of counsel, is dated May 13, 1996, and it is stamped as

received by the Pro Se Office on May 10, 1996. Attached to plaintiff's application, is his signed Affirmation of Service, also dated May 13, 1996, wherein plaintiff declared under penalty of perjury that he served his application upon the Pro Se Office. Plaintiff alleges that “ between April 17, 1996



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until October 7, 1996,” all visitation was suspended between him and his wife and that their “ only form of communications was correspondence .” (Am.Compl. § 7).

The matter was referred to Magistrate Judge Pitman for a Report and Recommendation (“ Report” ). Although the magistrate judge found that the three earliest possible dates that the evidence demonstrates the complaint could have been filed, i.e., May 8 , 10 , and 13 of 1996, were th th th all beyond the PLRA enactment date, he nevertheless recommended that the motion to dismiss be denied based on plaintiff's allegation in the amended complaint that he filed the original complaint April 10-12 of 1996, prior to the April 26, 1996 enactment date. The magistrate judge found that, “[i]n light of the express allegation in the Amended Complaint that plaintiff commenced the action before April 26, 1996 and the absence of a clear record to the contrary, the requirement that disputed factual issues be resolved in plaintiff's favor for purposes of this motion requires that the motion be denied.” (Report at 12-13).

\*2 Defendants object to the Report's conclusion that there is a material issue of fact regarding the date the action was filed. Plaintiff's attorney did not file any objections. FN5

The Court must make a de novo determination as to those portions of the Report to which there are objections. Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1)(C). It is not required that the Court conduct a de novo hearing on the matter. *United States v. Raddatz*, 447 U.S. 667, 676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Rather, it is sufficient that the Court “ arrive at its own, independent conclusion” regarding those portions to which the objections were made. *Nelson v. Smith*, 618 F.Supp. 1186, 1189-90 (S.D.N.Y.1985) (quoting *Hernandez v. Estelle*, 711 F.2d 619, 620 (5 Cir.1983)). Accordingly, the Court, in the th exercise of sound judicial discretion, must determine the extent, if any, it should rely upon the magistrate judge's proposed findings and recommendations. *Raddatz*, 447 U.S. at 676. The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. Fed.R.Civ.P. 72(b); 28 U.S.C. § © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 3 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

636(b)(1)(C). Where there are no objections, the Court may accept the Report provided there is no clear error on the face of the record. *Nelson v. Smith*, 618 F.Supp. at 1189; see also *Heisler v. Kralik*, 981 F.Supp. 830, 840 (S.D.N.Y.1997), *aff'd sub nom. Heisler v. Rockland County*, 164 F.3d 618 (2d Cir.1998).

FN5. Plaintiff himself filed objections which was not adopted by his counsel. Plaintiff objects to the magistrate judge's finding that an issue exists as to when plaintiff filed the complaint because plaintiff asserts he gave it to prison officials to be mailed in April. Additionally, plaintiff objects to the magistrate judge's suggestion that the defendants convert their motion to one for summary judgment asserting the same theory as set forth in the present motion. Since this Court finds that the instant motion is meritorious, the propriety of plaintiff personally submitting his own objections



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need not be address as those objections are moot.

Upon a de novo review, the Report's recommendation that the motion be denied is rejected by the Court. Section 1997e (a) requires that inmates exhaust all available administrative remedies prior to the commencement of a § 1983 action concerning prison conditions, and failure to do so warrants dismissal of the action. *Porter v. Nussel*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); *Scott*, 344 F.3d at 290. The exhaustion of one's administrative remedies, however, is not a jurisdictional requirement under the PLRA. *Richardson v. Goord*, 347 F.3d 431 (2d Cir.2003). A defendant may assert a non-exhaustion claim as an affirmative defense. *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir.1999). Since it is an affirmative defense, defendants bear the burden of proof in this regard. See, *McCoy v. Goord*, 255 F.Supp.2d 233, 248 (S.D.N.Y.2003); *Arnold v. Goetz*, 245 F.Supp.2d 527, 534-35 (S.D.N.Y.2003); *Reyes v. Punzal*, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002). A motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), is an appropriate vehicle to be used by a defendant where the failure to exhaust is clear from the face of the complaint as well as any written instrument attached as an exhibit and any statements or documents incorporated by reference into the complaint. See, *Scott v. Gardner*, 287 F.Supp.2d 477, 485 (S.D.N.Y.2003) (citation omitted); *McCoy*, 255 F.Supp.2d at 249.

In the amended complaint, plaintiff alleges, in a conclusory manner, that he filed the original complaint before the effective date of the PLRA, sometime between April 10 and April 12 of 1996. th  
th FN6

On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inference in plaintiff's favor. *Resnick v. Swartz*, 303 F.3d 147, 150-51 (2d Cir.2002) (citation omitted); *Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir.1995). Dismissal is only warranted where it appears without doubt that plaintiff can prove no set of facts supporting his claims that would entitle him to relief. *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir.1999). The court's consideration is not limiting solely to the factual allegations set forth in the amended complaint. Rather, the court may also consider documents attached to the complaint as exhibits or incorporated in it by reference, matters of which judicial notice may be taken, or to documents either in plaintiff's possession or of which he has knowledge of and relied on in bringing the action. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir.1993) (citation omitted). The court is not bound to accept as true a conclusory allegation where the pleadings are devoid of any specific facts or circumstances supporting such an assertion. *DeJesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir.1996). Nor must the court “ignore any facts alleged in the complaint that undermine the plaintiff's claim.” *Roots Partnership v. Lands' End, Inc.*, 965 F.2d 1411, 1416 (7 Cir.1992) (citation omitted). th

FN6. In response to then Chief Judge Thomas P. Griesa's 1996 order dismissing this action, p l a i n t i f f i l e d a n A p p l i c a t i o n f o r Reconsideration, dated October 28, 1996, wherein he claims that “on April 12, 1996 this petitioner filed a 1983 civil suit ...” (Pl.'s Mot. for Recons. at 1).



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\*3 Plaintiff fails to allege any factual basis in support of his claim that he filed the initial complaint between April 10-12, 1996. The Court is not required to accept this statement as a well-pleaded factual allegation in light of the existing record which clearly demonstrates that such an allegation is not only factually unsupported by the clear evidence, but is factually impossible. Generally, an © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 4 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

amended complaint supersedes the original complaint, and renders it of no legal effect. In re. Crysen/Montenay Energy Co., 226 F.3d 160, 162 (2d Cir.2000). In plaintiff's amended complaint, he states that he is submitting the amended complaint in support of his original complaint. Hence, the original complaint is incorporated by reference in the amended complaint, and may be considered by the Court. Even if the initial complaint was not so incorporated, given the circumstances of this case, the Court would nevertheless consider it as it relates to the original date of filing. An examination of the initial complaint itself, on its face, unequivocally demonstrates that plaintiff's subsequent allegation in his amended complaint that he filed the complaint between April 10 th and 12 of 1996 is patently false. th

The original complaint refers to plaintiff's prison disciplinary hearing arising out of the same incident forming the basis of the present lawsuit. Generally, the disciplinary charges against plaintiff were in connection with an alleged conspiracy by him and his wife to commit grand larceny against inmate Robert Cornell. That hearing began on April 16, 1996, and concluded on April 19, 1996. (Defs.' Notice of Mot. for Summ. J. Ex. N, Transcript of Disciplinary Hr'g, conducted on April 16, 18-19, 1996). Specifically, in the original complaint, plaintiff refers to the testimony given by this fellow inmate. FN7

(Compl. at 8). That inmate testified on April 19 . (Hr'g. Tr. at 53-54, 57). Thus, plaintiff's claim that he th filed the complaint between April 10-12, 1996, is absolutely impossible as the initial complaint refers to events occurring after that time period. Merely because plaintiff boldly alleges in his amended complaint that he filed the original complaint between April 10 and 12 th th does not require this Court to turn a blind eye to plaintiff's prior pleadings demonstrating the absurdity of his claim. FN8

See, Silva Run Worlwide Ltd. v. Gaming Lottery Corp., 2001 WL 396521, \*1 (S.D.N.Y. April 19, 2001) (citations omitted) (A court should not “ accept allegations that are contradicted or undermined by other more specific allegations in the complaint or by written materials properly before the court.” ).

FN7. In the complaint, plaintiff alleges “ that at his S.H.U. hearing petitioner called as a witness Robert Cornell who stated that this petitioner Mingues nor his wife (co-petitioner) Narvaez ever took any money from him. (Compl. at 8).

FN8. At his deposition, plaintiff testified that he filed the initial complaint “ [a]pproximately around



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June of 1996.” (Mingues Dep. at 37-38).

Lawsuits by inmates represented by counsel are commenced when the complaint is filed with the court. See, Fed.R.Civ.P. 3, 5(e). For pro se litigants, who are not imprisoned and have been granted in forum pauperis relief, their complaints are deemed filed when received by the Pro Se Office. See, Toliver v. County of Sullivan, 841 F.2d 41 (2d Cir.1998). The complaint of a pro se prisoner, however, is deemed filed when he or she gives the complaint to prison officials to be mailed. Houston v. Lack, 487 U.S. 266, 270, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); Dory v. Ryan, 999 F.2d 679, 682 (2d Cir.1993), modified on other grounds, 25 F.3d 81 (2d Cir.1994). The “prison mailbox” rule is designed to combat inmate litigants' dependence on the prison facility's mail system and their lack of counsel so as to assure the timely filing of their legal papers with the court. Noble v. Kelly, 246 F.3d 93, 97 (2d Cir.2001) (citations omitted). Given the difficulty in determining when a prisoner relinquishes control of the complaint to prison personnel, the date the plaintiff signed the original complaint is presumed to be the date plaintiff gave the complaint to prison officials to be mailed. See e.g., Forster v. Bigger, 2003 WL 22299326, \*2 (S.D.N.Y. Oct.7, 2003); Hosendove v. Myers, 2003 WL 22216809, \*2 (D.Conn. Sept.19, 2003); Hayes v. N .Y.S. D.O.C. Officers, 1998 WL 901730, \*3 (S.D.N.Y. Dec.28, 1998); Torres v. Irvin, 33 F.Supp.2d 257, 270 (S.D.N.Y.1998) (cases cited therein).

\*4 In response to the Report and Recommendation, plaintiff asserts that, in April, the original complaint “was placed in the facility mail box.” (Pl.'s Objection to Report at 1). However, it is uncontested that plaintiff's wife signed the complaint on May 8 ; it was received by the Pro Se th Office on May 10 ; and plaintiff's signature is dated May th 13 . There is no explanation offered that could reasonably th support and account for the existence of these May dates on a complaint which plaintiff falsely claims to have deposited to be mailed during the period of April 10 and th April 12 . Had plaintiff mailed the complaint directly to th the court prior to April 26 , it would have been impossible th for the plaintiff's wife to have signed the document two © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 5 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

days prior to the date that the Pro Se Office stamped it received on May 10 . th FN9

Moreover, absent evidence to the contrary, applying the mailbox rule would presume that plaintiff gave his complaint to prison officials on May 13, 1996, the date he signed it. See, Johnson v. Coombe, 156 F.Supp.2d 273, 277 (S.D.N.Y.2001) (quoting Torres, 33 F.Supp.2d at 270). Even if the Court gave plaintiff the benefit of the date plaintiff's wife signed the complaint, i.e., the earliest date reflected on the filed complaint, it was still after the effective date of the PLRA. Hence, plaintiff is legally obligated to have pursued his prison grievance procedures prior to filing the instant action. The plaintiff has offered no explanation for the initial complaint's reference to events that occurred after the date he claims he filed it, the two May dates on which he and his former co-plaintiff wife signed the complaint, or the May date stamped received by the Pro Se Office. As the magistrate Judge observed:



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FN9. The benefit of the mailbox rule does not apply where the plaintiff delivers the complaint to someone outside the prison system to forward to the court. *Knickerbocker v. Artuz*, 271 F.3d 35, 37 (2d Cir.2001).

Apart from the allegation that certain events giving rise to the claims occurred on April 9, 1996, the Original Complaint contains no mention of dates in April, 1996. Mingues nowhere explains the contradiction between the signature dates on the Original Complaint and the allegations contained in Amended Complaint. (Report at 12).

New York state law provides a three tier grievance procedure applicable to plaintiff's claims of excessive force. See, N.Y. Correct. Law § 139 (McKinnney's 2003); N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7 (2003); *Mendoza v. Goord*, 2002 WL 31654855 (S.D.N.Y. Nov.21, 2002); *Rodriguez v. Hahn*, 209 F.Supp.2d 344 (S.D.N.Y.2002). Plaintiff has not denied knowledge of the grievance procedure at his institution, nor claimed that anything or anyone caused him not to file a grievance and completely pursue it through the administrative process. FN10

The magistrate judge's determination that the defendants' Rule 12(b) motion should be denied because of an "absence of a clear record" contrary to plaintiff's express allegation in the amended complaint that he

commenced the action before April 26, 1996 is erroneous. The Court could have sua sponte dismiss this action as the record is unmistakably clear that an appropriate administrative procedure was available to him, that he was required to exhaust his administrative remedies, and that he failed to do so as required by the PLRA. See, *Mojias v. Johnson*, 351 F.3d 606 (2003); *Snider v. Melindez*, 199 F.3d 108, 112-13 (2d Cir.1999). In this case, plaintiff has been afforded notice and given an opportunity to respond to the exhaustion issue and his failure remains clear.

FN10. In the original complaint, plaintiff stated he did not file a grievance, pursuant to the state's prisoner grievance procedure, "because this matter can not be dealt with by interdepartmental grievances." (Compl. at 2-3). In plaintiff's attorney's memorandum in opposition to the motion to dismiss, counsel contends that plaintiff is not required to file a grievance because the state's prison system provides extremely limited administrative remedies and money damages, which plaintiff seeks, are not available.

\*5 Accordingly, it is hereby

ORDERED that the Report and Recommendation is not adopted; and it is further

ORDERED that the defendants' motion to dismiss the complaint is granted.

S.D.N.Y.,2004. *Mingues v. Nelson* Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)





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Only the Westlaw citation is currently available.

United States District Court,

S.D. New York. Francisco MENDOZA, Plaintiff,

v. Glenn S. GOORD, et al., Defendant.

No. 00 Civ. 0146(GEL).

Nov. 21, 2002. State prison inmate brought §1983 action against corrections officials alleging use of excessive force and deliberate indifference to medical needs. The District Court, Lynch, J., adopting recommendations of United States Magistrate Judge Katz, dismissed some defendants, and subsequently dismissed deliberate indifference claim. On defendants' motion for summary judgment on excessive force claim, the Court held that inmate's failure to appeal adverse decision on grievance precluded action.

Motion granted.

West Headnotes Civil Rights 78 1319 78 Civil Rights 78III Federal Remedies in General 78k1314 Adequacy, Availability, and Exhaustion of State or Local Remedies 78k1319 k. Criminal Law Enforcement; Prisons. Most Cited Cases (Formerly 78k209)

State prison inmate's failure to appeal adverse decision in his excessive-force grievance against corrections officers, arising from single incident, precluded §1983 action against officers on ground of failure to administratively exhaust, regardless of fact that inmate never received copy of adverse decision; inmate could have filed appeal absent notification. 42 U.S.C.A.

§1997e(a); 7 N.Y.C.R.R. §701.7. Francisco Mendoza, pro se. Maria Barous Hartofilis, Assistant Attorney General, New York, N.Y. (Eliot Spitzer, Attorney General of the State of New York,) for Defendants Glenn S. Goord, et al., of counsel.

OPINION AND ORDER LYNCH, J.

\*1 Francisco Mendoza, a New York state prisoner, brought this action against a number of prison officials, alleging that the defendants used excessive force against him in an incident on April 30,



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1999, and that they exhibited deliberate indifference to his medical needs following the incident. On August 21, 2001, this Court, adopting a Report and Recommendation (“R & R”) of United States Magistrate Judge Theodore H. Katz, dismissed the action against a number of defendants who were not alleged to be personally involved in the incident in question, and on August 20, 2002, again adopting an R & R of Judge Katz, the Court granted summary judgment in favor of another officer as to whom no evidence indicated involvement in the incident, and in favor of all remaining defendants on the claim of deliberate indifference. The case appeared ready for trial on the remaining claim of excessive force, as to the merits of which genuine issues of material fact concededly exist.

At a conference on August 22, 2002, the remaining defendants sought and received permission to make a supplemental motion for summary judgment on the ground that Mendoza had failed to exhaust available administrative remedies concerning the incident, as required by 42 U.S.C. § 1997e(a). Defendants pointed out that their earlier motion for summary judgment had been made, and fully briefed, before the Supreme Court made clear in *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), that exhaustion is required even in cases that, like this one, challenge a single use of excessive force, rather than general “prison conditions” as that term is conventionally understood—thus overturning © 2013 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2002 WL 31654855 (S.D.N.Y.) (Cite as: 2002 WL 31654855 (S.D.N.Y.))

the interpretation of the statute previously prevailing in this Circuit, under which exhaustion was not required in excessive force cases. Defendants now argue that, because Mendoza has not exhausted his administrative remedies, his case must be dismissed. The motion will be granted.

**Factual Background** There is no genuine dispute about any fact material to defendants' argument. It is undisputed that Mendoza did file a grievance within the prison system on May 3, 1999, just a few days after the incident, thus commencing an effort to secure an administrative remedy for the alleged wrong. (Alexis Decl. Ex. A.) Prison files document that the grievance was denied by the Superintendent on May 25, 1999. (Id. Ex. B.) Mendoza did not file an administrative appeal of the Superintendent's decision. He does not dispute the records showing the denial of the grievance or his failure to appeal, but asserts that he never received notice of the decision. FN1

FN1. Mendoza filed a second grievance in August 1999, complaining that he never received a ruling on his earlier grievance. (Alexis Decl. Ex. C.) This grievance was also denied (Id. Ex. D), and the denial was never appealed. Mendoza claims he did not receive notice of that decision, either.

**Discussion** Established law inexorably requires dismissal of this action. The statute flatly provides that “No action shall be brought with respect to prison conditions ... by a prisoner ... until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). As noted above, the Supreme Court made clear in *Porter v. Nussle* that a claim of excessive force is an “action ... with respect to prison conditions” to which this requirement applies.



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\*2 New York's Department of Correctional Services has established an administrative process for prisoner grievances that applies to claims such as Mendoza's. The process, detailed in 7 N.Y.C.R.R. § 701.7 and described in cases such as Vasquez v. Artuz, Dkt. No. 97 Civ. 8427(AJP), 1999 WL 440631, at \*5 (S.D.N.Y. June 28, 1999), expressly provides that adverse decisions by superintendents on prisoner grievances may be appealed

to the Central Office Review Committee ("CORC"). These procedures are outlined in the state-wide Standards of Inmate Behavior handbook, which is "routinely" distributed to all inmates upon admission to a DOC facility. *People v. Jones*, 134 A.D.2d 701, 521 N.Y.S.2d 194, 196 (N.Y.App.Div.1987); see also *Young v. Coughlin*, 1988 WL 34815, Dkt. No. 86 Civ. 2845(LLS), at \*1 (S.D.N.Y. April 5, 1988). It is well established that the exhaustion requirement is not satisfied until and unless all administrative appeals have been completed. *Booth v. Churner*, 532 U.S. 731, 734–35, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). Thus, Mendoza's failure to appeal the adverse decision on his grievance constitutes a failure to exhaust his administrative remedies that dooms his claim.

Mendoza's claim that he never received a copy of the superintendent's adverse decision, which must be accepted for purposes of this motion in light of the factual dispute, is not material to this result. If, as a result of negligent error by prison officials—or even their deliberate attempt to sabotage a prisoner's grievance—the prisoner does not receive a copy of the decision on his complaint, he is not thereby forestalled from appealing to CORC. The regulations mandate a prompt decision on all grievances, 7 N.Y.C.R.R. §§ 701.7(a)(3), (b)(5) (as well as expedited review for complaints of harassment by prison personnel, *id.* § 701.11), and specifically provide that if the determination is delayed, the inmate may appeal to the next level of review, including CORC, without waiting for administrative action. *Id.* §§ 701.8, 701.11(b)(6). Thus, even accepting Mendoza's claim that he was never notified of the rejection of his grievance (or even had that rejection never occurred), the regulations clearly permit an appeal, and filing such an appeal is accordingly required by § 1997e(a) before a suit can be brought in federal court. This inescapable conclusion has been consistently and unsurprisingly reached by courts in this district. *Martinez v. Williams*, 186 F.Supp.2d 353, 357 (S.D.N.Y.2002); *Braswell v. Johnson*, Dkt. No. 99 Civ. 1376(RCC), Report and Recommendation at 12 (S.D.N.Y. March 22, 2002); *Dawkins v. Selsky*, Dkt. No. 01 Civ. 3130(CLB), Report and Recommendation at 8 (S.D.N.Y. March 1, 2002). The Second Circuit has at least implicitly approved it as well. *Gibson v. Goord*, 280 F.3d 221 (2d Cir.2002). FN2

FN2. Defendants' assertion that Gibson

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establishes "the law in this circuit" on this point (D. Mem. at 13) is perhaps overstated. The Court in *Gibson* expressly decided only that the claims raised in the cases before it addressed "prison conditions" even under the Second Circuit's pre-Porter understanding of that term. One of the



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complaints involved had been dismissed for failure to exhaust where the prisoner had filed a grievance but failed to appeal when the grievance “ elicited no response”—a s would have been permitted under the relevant Connecticut regulations. 280 F.3d at 223. But it is not clear from the opinion whether the district court's ruling that the prisoner had failed to exhaust in these circumstances was challenged on appeal. At a minimum, since it affirmed the dismissal of the complaint, the Court evidently saw no obvious flaw in that ruling. Beyond claiming that he never received a ruling on his grievance, Mendoza has made no argument that would either excuse his failure to exhaust or otherwise cast any doubt on the above analysis. His other contentions in opposition to the summary judgment motion either attempt belatedly to reargue the dismissals previously granted, or to seek (equally belatedly) further discovery that, whatever its potential bearing on the merits of his claim, is irrelevant to the procedural issue that proves dispositive of the case. Accordingly, Mendoza's excessive force claim must be dismissed for failure to exhaust administrative remedies. FN3

FN3. Defendants arguably could have sought dismissal of all of plaintiffs' claims for failure to exhaust. However, § 1997e(a)'s exhaustion requirement is not jurisdictional and may be waived. See *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir.2002); *Foult v. Charrier*, 262 F.3d 687, 697 (8th Cir.2001); *Perez v. Wisconsin Dept. of Corr.*, 182 F.3d 532, 536 (7th Cir.1999). By successfully seeking dismissal with prejudice on other grounds, the defendants who have already been dismissed from the case, and the remaining defendants with respect to the deliberate indifference claim, waived the exhaustion argument.

\*3 It must be acknowledged that Mendoza tried many avenues to seek relief from prison authorities. In addition to filing the grievance he failed to pursue to the end, Mendoza alleges that he wrote letters of complaint to various prison officials, including the Deputy Superintendent of his institution, the Commissioner of DOCS, and its inspector general. (Compl.¶ 12.) But as courts in this district have repeatedly held, however vigorously and unsuccessfully an inmate seeks redress of grievances within the prison bureaucracy, he does not exhaust his remedies as required by § 1997e(a) unless he pursues the proper channels provided by the state for remedying his situation. *Hemphill v. New York*, 198 F.Supp.2d 546, 549 (S.D.N.Y.2002); *Grey v. Sparhawk*, Dkt. No. 99 Civ. 9871(HB), 2000 WL 815916, at \*2 (S.D.N.Y. June 23, 2000). Congress has made the exhaustion of those remedies, including the administrative appeal of adverse or delayed rulings on grievances filed, a prerequisite to relief under 42 U.S.C. § 1983.

Conclusion Accordingly, the defendants' motion for summary judgment dismissing plaintiff's remaining claim for failure to exhaust his administrative remedies is granted.

SO ORDERED. S.D.N.Y.,2002. *Mendoza v. Goord* Not Reported in F.Supp.2d, 2002 WL 31654855 (S.D.N.Y.) END OF DOCUMENT

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WL 389003 (E.D.N.Y.) (Cite as: 2007 WL 389003 (E.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,

E.D. New York. Wayne HARGROVE, Plaintiff,

v. Sheriff Edward RILEY; Nassau County Correctional Facility, et al; Nassau County University Medical Staff and Nassau County Correctional Facility, Defendants.

Civil Action No. CV-04-4587 (DGT).

Jan. 31, 2007.

Wayne Hargrove, Ossining, NY, pro se.

Alexander V. Sansone, Troy & Troy, Lake Ronkonkoma, NY, Joseph Carney, Mineola, NY, for Defendants.

### MEMORANDUM AND ORDER

TRAGER, J.

\*1 Inmate Wayne Hargrove (“ Hargrove” or “ plaintiff” ) brings this pro se action pursuant to 42 U.S.C. § 1983 against the Nassau County Sheriff, Nassau County Correctional Facility (“ NCCF” ) and NCCF's medical staff, (collectively, “ defendants” ), seeking damages for injuries allegedly caused by defendants while he was incarcerated at NCCF. Defendants now move for summary judgment pursuant to Fed.R.Civ.P. 56 arguing, inter alia, that Hargrove's claims should be dismissed because he failed to exhaust administrative remedies, as required by the Prison Litigation Reform Act of 1995 (“ PLRA” ), 42 U.S.C. § 1997e. For the following reasons, defendants' motions for summary judgment are granted.

### Background

On August 27, 2004, FN1

Hargrove filed a complaint, alleging that defendants violated his civil rights when they forcibly administered purified protein derivative skin tests (“ PPD test” ) to test for latent tuberculosis (“ TB” ) in April 2002, 2003 and 2004 while he was incarcerated at NCCF. Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A. Hargrove named Nassau County Sheriff Edward Reilly (“ Reilly” ), NCCF and Nassau



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County University Medical Staff FN2

as defendants. FN3

On November 22, 2004, after discovery, County Defendants and NHCC Defendants filed separate motions for summary judgment pursuant to Fed.R.Civ.P. 56. Both defendants properly filed a Local Rule 56.1 Statement and served Hargrove a Notice to Pro Se Litigant Opposing Motion for Summary Judgment, pursuant to Local Civil Rule 56.2.

FN1. Hargrove signed the complaint August 27, 2004. The pro se clerk's office received and filed the complaint on September 20, 2004. Under the prison mail-box rule, a pro se prisoner's complaint is deemed filed when it is delivered to prison authorities. See, e.g., *Walker v. Jastremski*, 430 F.3d 560, 562 (2d Cir.2005)(deeming pro se prisoner's § 1983 action filed on date complaint was handed to prison officials). There is no evidence in the record as to when Hargrove handed the complaint to prison officials. However, it is clear the operative date is between August 27, 2004 and September 20, 2004. As discussed, *infra*, both of these dates occur before Hargrove properly exhausted the administrative remedies available to him at NCCF.

FN2. The Nassau County University Medical Staff are employed by the Nassau Health Care Corporation ("NHCC"). Pursuant to the Correctional Center Health Services Agreement between the County of Nassau and NHCC, dated September 24, 1999, NHCC provides medical services for inmates at NCCF. County Defs.'s

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Not. of Motion, Decl., at 1.

FN3. Reilly and NCCF are represented separately from NHCC. Accordingly, when a distinction is necessary, Reilly and NCCF will be referred to as "County Defendants" and Nassau County University Medical Staff and NHCC will be referred to as "NHCC Defendants." (1)

Tuberculosis Testing at NCCF

Upon entering NCCF, new prisoners must first go through medical intake. Aff. of Kim Edwards, ("Edwards Aff.") ¶ 3. This standard process usually takes seventy-two hours. Edwards Aff. ¶ 4. During medical intake, NCCF tests inmates for TB. Aff. of Getachew Feleke ("Feleke Aff.") ¶ 3. NCCF generally uses a PPD test to detect latent TB. Feleke Aff. ¶ 3. However, if an inmate has previously tested positive for TB, it is NCCF's policy to test for TB using an x-ray instead. FN4





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Feleke Aff. ¶ 3. As part of its Infectious Disease Program, NCCF re-tests inmates for TB each year, beginning after they have been housed in that facility for one year. Edwards Aff. ¶ 5.

FN4. According to WebMD, “[a] tuberculin skin test should not be done for people who have a(1) Known TB infection [or a] (2) Positive tuberculin skin test in the past. A second test may cause a more severe reaction to the TB antigens.” Jan Nissl, RN, BS, Tuberculin Skin Tests, W E B M D , [http://www.webmd.com/hw/lab\\_tests/hw203560.asp](http://www.webmd.com/hw/lab_tests/hw203560.asp) (last visited Jan. 31, 2007).

(2)

### Hargrove's Tuberculosis Testing at NCCF

On March 15, 2002, Hargrove was incarcerated at NCCF.

NHCC Defs.' 56.1 Statement ¶ 1. Before entering the general population, Hargrove was processed through medical intake. NHCC Defs.' 56.1 Statement ¶ 2. The NCCF Medical Intake Chart for Hargrove, dated March 15, 2002 (“3/15/02 Chart”), shows that Hargrove informed medical staff that he had previously been exposed to tuberculosis. NHCC Defs.' Notice of Mot., Ex. C, at 1; NHCC Defs.' 56.1 Statement ¶ 2. The 3/15/02 Chart also shows that Hargrove reported testing positive to a prior PPD test and that he had been treated for TB in 2000. NHCC Defs.' Notice of Mot., Ex. C, at 1. Hargrove alleges that he was exposed to and treated for TB in 1997. Hargrove's Aff. in Opp. to Mot. for Summary Judgment, (“Aff. in Opp.”), Ex. A at 1-2. Defendants contend that Hargrove was given an x-ray during the medical intake process because of his reported positive PPD test, and that the x-ray was negative, showing no active TB infection. NHCC Defs.' 56.1 Statement ¶ 2; Edwards Aff. ¶ 3. Without specifying a date, Hargrove generally states that his “request to be x-rayed was denied.” Aff. in Opp. at 3.

\*2 Pursuant to NCCF's Infectious Disease Program, after being incarcerated in NCCF for a year, Hargrove was scheduled to be re-tested for TB. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. On May 24, 2003, Hargrove was given a PPD skin test. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. This test was negative. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. According to Hargrove, he requested an x-ray instead of a PPD test because of his previous exposure to TB, but was forced to submit to the PPD test. He also alleges that defendants threatened to put him in “keep lock” or “lock up” unless he submitted to the PPD test. FN5

Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A.

FN5. Hargrove has made contradictory statements about being placed in “keep lock” or “lock up”. It is unclear whether he is alleging that defendants threatened to place him in “lock up” unless he submitted to the PPD test or whether he was actually placed in “lock up” until such time that he agreed to submit to the PPD tests. For example, in his complaint, Hargrove states that when he “



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refused to submit to another [PPD] test, the Correctional Authorities were brought in and placed [him] in lock up.” Complaint ¶ 4. In a hearing before Magistrate Judge Bloom on © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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January 31, 2005, Hargrove stated that he took the PPD tests because he was told that he would be placed in “lock up” until he submitted to the test. Hr'g Tr. 6:1-18; 9:5-10:10. In Exhibit B to his complaint, Hargrove alleges both that he was given an unwarranted TB shot and that when he refused the same shot he was placed in “keep lock.” Complaint, Ex. B. There is no evidence in the record that Hargrove was ever segregated from the general population while housed at NCCF, outside of the seventy-two hour initial medical intake period. Aff. of Sgt. Neumann (“Neumann Aff.”) at 1-2 (referring to prison records showing Hargrove's holding locations which demonstrate that he was never placed in “lock up”); NCCF 56.1 Statement ¶ E. Whether or not Hargrove was actually placed in “lock up” is not a material fact for purposes of this motion; as explained in detail, *infra*, Hargrove's failure to exhaust administrative remedies under the PLRA precludes a consideration of the merits of his Section 1983 claim.

The following year, in June of 2004, Hargrove was scheduled to be retested. Edwards Aff. ¶ 6; NHCC Defs.' 56.1 Statement ¶ 5. Because of the contradiction between the negative May 2003 PPD test and his reported positive history, NCCF contacted the Infectious Disease Department of the Nassau County Medical Center. Edwards Aff. ¶ 6. It was suggested that Hargrove be given a two-step PPD test, administered fifteen days apart. Feleke Aff. ¶ 4; Edwards Aff. ¶ 6. Hargrove was given these two PPD skin tests in June 2004. Edwards Aff. ¶ 6; NHCC Defs.' 56.1 Statement ¶ 5. Again, Hargrove alleges that these tests were administered against his will and under threat of being placed in quarantine. Complaint, Exs. A, B; Aff. in Opp., Ex. A.

On December 3, 2004, Hargrove was seen by a physician's assistant. NHCC Defs.' 56.1 Statement ¶ 6. During this meeting, Hargrove complained of a dry cough and that the site on his forearm where the June 2004 PPD tests had been administered was red and swollen. NHCC Defs.' 56.1 Statement ¶ 6; 11/28/04 Sick Call Request.

Hargrove's December 18, 2004 chart notes a positive PPD

test and an order was placed in the chart that Hargrove not be submitted for future PPD tests. Edwards Aff. ¶ 7; NHCC Defs.' 56.1 Statement ¶ 8. See also 11/19/2004 Grievance.

Hargrove alleges that the following physical ailments were caused by the PPD tests: chronic coughing, high blood pressure, chronic back pain, lung infection, dizzy spells, blurred vision and a permanent scar on both his forearms. Complaint, Ex. C; Aff. in Opp. at 3-4.



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(3)

### NCCF's Inmate Grievance Procedure

NCCF has had an inmate grievance program (“ IGP” ) in place since 2001. Aff. of Kenneth Williams, (“ Williams Aff.” ), at 2. NCCF's IGP is carried out in conformance with the New York State Commission of Corrections Minimum Standards and Regulations for Management of County Jails and Penitentiaries (“ Minimum Standards” ). Id.

The IGP is designed to resolve complaints and grievances that an inmate may have regarding the inmate's care and treatment while incarcerated at NCCF. Williams Aff. at 2. Upon entering NCCF, all inmates receive a copy of the NCCF inmate handbook, which outlines the IGP. Id.

\*3 The record does not include an actual copy of NCCF's IGP, but the NCCF's IGP is detailed in the affidavit of NCCF Investigator Kenneth Williams.

FN6

The IGP encourages inmates to resolve their grievances informally with the staff member assigned to the inmate housing unit first. Id. If an acceptable resolution cannot be reached, inmates must then proceed through the formal three-step process set out in the IGP. Id. at 3.

FN6. Hargrove does dispute any statements made by Investigator Williams regarding the inmate grievance procedure, time limits or its availability to him. Furthermore, Hargrove does © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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not dispute that he received a handbook outlining the IGP.

The first step requires an inmate to submit his grievance form FN7

to the Inmate Grievance Unit by placing it in a locked box located in each housing area, “ within five days of the date of the act or occurrence giving rise to the grievance.”

FN8

Id. at 2-3. NCCF indexes all grievance forms filed by inmates in a log book and in a computer system. Id. at 1, 3. Once a grievance form is received by the Inmate Grievance Unit, the grievance is investigated and the inmate will receive a written determination of the outcome from the Inmate



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Grievance Coordinator in Section II of the grievance form. FN9

Id. at 3. The inmate is then given a choice to accept or appeal the decision by checking the desired selection and signing his name in Section III of the grievance form. See, e.g., 11/19/2004 Grievance form. If the inmate is not satisfied with the decision of the Inmate Grievance Coordinator, the inmate may appeal the determination to the Chief Administrative Officer. Williams Aff. at 3. Finally, if the inmate is not satisfied with the Chief Administrative Officer's determination, the inmate may appeal to the New York State Commission of Correction Citizen's Policy and Complaint Review Council (" Council"). Id. at 3. The Council will then render a final determination. Id. at 3.

FN7. The grievance forms contain four sections to be utilized throughout all three steps of the IGP. Section I provides space for the inmate to explain his complaint and the actions he requests as relief. Section II is for the decision of the Inmate Grievance Coordinator. Section III is titled " Acceptance/Appeal of Grievance Coordinator's decision" and contains two mutually exclusive options in which the inmate must choose one or the other: " I have read and accept the Grievance Coordinator's decision," or " I have read and appeal the Grievance Coordinator's decision." Section IV provides space for the decision of the Chief Administrative Officer.

FN8. Hargrove has not argued that he was unaware of this five-day deadline.

FN9. There is no evidence in the record specifying the how long an inmate has to appeal inaction by the Inmate Grievance Unit.

(4)

Authenticity of the Grievance Forms and Other

Documents Submitted by Hargrove

In support of his allegations that he continuously informed defendants that he had been exposed to TB and, therefore, should not have been given PPD tests, Hargrove submitted three letters with his complaint, two of which were addressed to the Inmate Grievance Committee and one of which was addressed to " To whom this may concern." Complaint, Exs. A-C. He also submitted five complaint letters written to Sheriff Reilly, seventeen sick call requests and nine grievance forms during discovery and with his Affidavit in Opposition to Defendants' Motion for Summary Judgment, explaining that some of the medical records and notarized letters were " missing." Aff. in Opp, Ex. A at 2. Defendants call the authenticity of most of these documents into question, contending that Hargrove never submitted any grievance form or complaint letter before he filed his complaint. County Defs.' Mem. of Law at 16-21; County Defs.' 56.1 Statement at ¶¶ B2, C3, D3.

Kenneth Williams, an investigator at NCCF in the Inmate Grievance Unit, testified that he reviewed



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all of the grievance forms, complaint letters and sick call requests annexed to Hargrove's Complaint and to Hargrove's Affidavit in Opposition to Defendants' Motion for Summary Judgment. Williams Aff. at 2. Williams testified that he examined the grievance records at NCCF and searched “for any grievances by plaintiff/inmate Hargrove” and found “only two.” FN10

Williams Aff. at 1. The first grievance, dated November 19, 2004, complained that the medical staff continued “forcing [Hargrove] to take a T.B. shot while [he] keep[s] telling them that [he] has been exposed to T.B.” 11/19/2004 Grievance; Williams Aff. at 1. In response to this grievance, Hargrove's “positive” TB status was noted in his medical records and an order was placed in Hargrove's medical chart, stating that Hargrove not be subjected to future PPD tests. 11/19/2004 Grievance, Section II; © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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Williams Aff. at 1; NHCC Defs.' 56.1 Statement ¶ 8; Edwards Aff. ¶ 7. In Section III of the 11/19/2004 Grievance, Hargrove acknowledged that he had read the Grievance Coordinator's decision, and that he chose to accept the decision instead of appealing it. 11/19/2004 Grievance. The other grievance received by the Grievance Unit, dated May 11, 2005, complained of an unrelated matter. 5/11/2005 Grievance (complaining of back problems and requesting the return of his medical shoes); Williams Aff. at 1. Thus, Williams concluded that, beside the 11/19/2004 and 5/11/2005 Grievance Forms, none of the other documents were “received by the grievance unit, and, given the locked box system, the grievance-forms were never submitted by plaintiff/inmate.” Williams Aff. at 2.

FN10. It is NCCF's procedure to forward to the attention of the Grievance Unit all official grievance forms and complaint letters-even ones not specifically addressed to the Grievance Unit. Williams Aff. at 3.

\*4 A visual examination of the grievance forms Hargrove submitted in support of his claims suggests forgery. Five of the nine grievance forms were requests to stop PPD testing. See April 19, 2002 grievance; April 28, 2002 grievance; April 20, 2003 grievance; April 28, 2003 grievance; November 19, 2004 grievance. The remaining grievance forms concerned Hargrove's requests for medical shoes. See March 18, 2002 grievance; July 6, 2002 grievance; February 20, 2003 grievance; May 11, 2005 grievance. Of the grievance forms complaining of unwanted PPD tests, the April 28, 2002 grievance form is a patent photocopy of the April 19, 2002 grievance form, and the April 28, 2003 grievance form is a patent photocopy copy of the April 20, 2003 grievance form, with only the handwritten dates changed. The only potentially authentic grievance forms relating to Hargrove's complaint about the PPD testing are dated April 19, 2002, April 20, 2003, and November 19, 2004. Of these grievance forms, only the November 19, 2004 has been authenticated by NCCF personnel. See generally Williams Aff. at 1-4.



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Turning to the complaint letters addressed to Reilly, many contain notary stamps cut from the bottom of unrelated

documents and photocopied onto the bottom of the complaint letters. See County Defs.' Mem. of Law at 18-21. C.O. Thomas McDevitt and C.O. Paul Klein, both of whom perform notary services for prisoners at NCCF, have submitted sworn affidavits, stating that they kept individual Notary Log Books covering all dates relevant to this litigation. Aff. of C.O. Klein, (" Klein Aff." ), at 1; Aff. of C.O. McDevitt, (" McDevitt Aff." ), at 1. McDevitt's Notary Log Book shows that he notarized only one document for Hargrove. This document, dated May 13, 2002, was a motion related to Hargrove's criminal trial. McDevitt Aff. at 1-2. Hargrove signed the Notary Log Book acknowledging receipt of that notarized motion. McDevitt Aff. at 2. McDevitt states that he never notarized any other documents for Hargrove. McDevitt Aff. at 2. However, McDevitt's stamp and signature dated May 13, 2002 (the date of the legitimate notarization) appear on Hargrove's letter to Sheriff Reilly dated May 10, 2002. County Defs.' Not. of Motion, Ex. A.

These facts repeat themselves in regard to the documents bearing the notary stamp and signature of Klein. Klein had performed several legitimate notarizations for Hargrove in connection to Hargrove's criminal trial. Klein Aff. at 1-2. Hargrove signed Klein's Notary Log Book acknowledging receipt of those notarized documents. Klein Aff. at 2. However, Klein states that he never notarized any of Hargrove's letters addressed to Sheriff Reilly that bear Klein's stamp and signature. Klein Aff. at 2. On all of the documents that Hargrove submitted bearing Klein's stamp and signature, the dates and signatures of Klein match identically to the dates on which he had performed legitimate notarizations for Hargrove in connection with his criminal trial. Defendants argue it is clear that the documents bearing the stamps and signatures of McDevitt and Klein were not actually notarized by these notaries. County Defs.' Mem. of Law at 17-22.

\*5 Hargrove does not deny these allegations. Instead, he resubmits the documents that McDevitt and Klein testify they did not notarize with his Affidavit in Opposition and insists that the documents " refute[ ] the assertions put forth by the defendants." Aff. in Opp. at 2.

### Discussion

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(1)

Summary Judgment Standard





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A motion for summary judgment is granted when “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). A court ruling on a summary judgment motion must construe the facts in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Williams v. Metropolitan Detention Center*, 418 F.Supp.2d 96, 100 (E.D.N.Y.2005). Defendants, the moving party in this action, bear the burden of demonstrating the absence of a genuine issue of material fact. *Baisch v. Gallina*, 346 F.3d 366, 371 (2d Cir.2003).

As Hargrove is proceeding pro se, his complaint must be reviewed carefully and liberally, and be interpreted to “raise the strongest argument it suggests,” *Green v. United States*, 260 F.3d 78, 83 (2d Cir.2001), particularly when civil rights violations are alleged, see, e.g., *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir.2004). Plaintiff's complaint does not specify the legal theories upon which it relies, but, in construing his complaint to raise its strongest arguments, it will be interpreted to raise claims under 42 U.S.C. § 1983. See, e.g., *Dufort v. Burgos*, No. 04-CV-4940, 2005 WL 2660384, at \*2 (E.D.N.Y. Oct. 18, 2005) (liberally construing plaintiff's complaint, which failed to specify the legal theory or theories upon which it rested, as, inter alia, a claim under 42 U.S.C. § 1983); *Williams*, 418 F.Supp.2d at 100 (same).

(2)

### Prison Litigation Reform Act

#### a. Purpose of the Prison Litigation Reform Act

The PLRA was intended to “reduce the quantity and improve the quality of prisoner suits.” *Woodford v. Ngo*,

--- U.S. ---, 126 S.Ct. 2378, 2387 (2006) (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). It seeks to eliminate unwarranted interference with the administration of prisons by federal courts, and thus “ ‘affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.’ ” *Woodford*, 126 S.Ct. at 2387 (quoting *Porter*, 534 U.S. at 525). See also *Booth v. Churner*, 532 U.S. 731, 739 (2001). Formal grievance procedures allow prison officials to reconsider their policies, implement the necessary corrections and discipline prison officials who fail to follow existing policy. See *Ruggiero v. County of Orange*, 467 F.3d 170, 177-78 (2d Cir.2006).

#### b. The Exhaustion Requirement

The PLRA's “invigorated” exhaustion provision, 42 U.S.C. § 1997e(a), provides the mechanism to reduce the quantity and improve the quality of prisoners' suits by requiring that prison officials have the opportunity to address prisoner complaints through internal processes before allowing a case to proceed in federal court. *Woodford*, 126 S.Ct. at 2382 (citing *Porter*, 534 U.S. at 524). Section 1997e(a)



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provides that:

\*6 [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under Section 1983. *Woodford*, 126 S.Ct. at 2383; *Ruggiero*, 467 F.3d at 174; *Williams*, 418 F.Supp.2d at 100-01. The exhaustion provision is applicable to suits seeking relief, such as money damages, that may not be available in prison administrative proceedings, as long as other forms of relief are obtainable through administrative channels. *Giano v. Goord*, 380 F.3d 670, 675 (2d Cir.2004); see also *Woodford*, 126 S.Ct. at 2382-83 (“ [A] prisoner must now exhaust

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administrative remedies even where the relief sought-monetary damages-cannot be granted by the administrative process.” ) (citing *Booth*, 532 U.S. at 734).

In June 2006, the Supreme Court held that the PLRA requires “ proper exhaustion” before a case may proceed in federal court. *Woodford*, 126 S.Ct. at 2387. “ Proper exhaustion” requires a prisoner to use “ ‘ all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).’ “ *Ruggiero*, 467 F.3d at 176 (citing *Woodford*, 126 S.Ct. at 2385 (emphasis in original)). Although the level of detail necessary to properly exhaust a prison's grievance process will vary from system to system, *Jones v. Bock*, 127 S.Ct. 910, 2007 WL 135890, at \*12 (Jan. 22, 2007), “ proper exhaustion” under the PLRA “ ‘ demands compliance with [that] agency's deadlines and other critical procedural rules.’ “ *Ruggiero*, 467 F.3d at 176 (quoting *Woodford*, 126 S.Ct. at 2386). Thus, the PLRA's exhaustion requirement is not satisfied by “ untimely or otherwise procedurally defective attempts to secure administrative remedies.” *Ruggiero*, 467 F.3d at 176 (citing *Woodford*, 126 S.Ct. at 2382).

(3)

Exhaustion Analysis: Hargrove did not Exhaust the Administrative Remedies Made Available by NCCF

prior to Bringing Suit

Section 1997e(a) of the PLRA applies to Hargrove's complaint; Hargrove was and continues to be



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confined in a correctional facility, see *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir.2004), and Hargrove's claim is about a "prison condition" within the meaning of the PLRA, see *Williams*, 418 F.Supp.2d at 101. See also *Sloane v. W. Mazzuca*, No. 04-CV-8266, 2006 WL 3096031, at \*4 (S.D.N.Y. Oct. 31, 2006) (recognizing PLRA's application to complaint alleging retaliation by prison officials for plaintiff's refusal to consent to a PPD test). Accordingly, the merits of Hargrove's Section 1983 claims can only be addressed if it is first determined that Hargrove properly exhausted each claim under Section 1997e(a) of the PLRA before filing his complaint in federal court.

\*7 Hargrove has submitted both forged FN11

and authentic grievance forms in opposing defendants' motions for summary judgment. Excluding, for the moment, the forged documents, NCCF's records reflect that Hargrove did not submit his first grievance until after he filed the instant complaint. *Williams Aff.* at 1. Hargrove's first grievance complaining of unwanted PPD testing is dated November 19, 2004, *Williams Aff.* at 1, two to three months after Hargrove filed his complaint. Additionally, this first grievance, dated November 19, 2004, was submitted five months after the last PPD test was administered to him in June 2004. *NHCC Defs.* 56.1 Statement ¶¶ 5,6. This five-month period far exceeds the five-day window provided by NCCF's IGP. Since Hargrove failed to comply with the IGP's deadlines, he did not properly exhaust the available administrative remedies. *Ruggiero*, 467 F.3d at 176 (" 'untimely or otherwise procedurally defective attempts to secure administrative remedies do not satisfy the PLRA's exhaustion requirement.' ") (quoting *Woodford*, 126 S.Ct. at 2382).

FN11. Based on an examination of the documents themselves, as well as the uncontradicted testimony of the notaries performing services for prisoners at NCCF, see generally *Klein Aff.*; *McDevitt Aff.*, and of the investigator in the Inmate Grievance Unit, see generally *Williams Aff.*, it appears that many of the documents submitted by Hargrove are forgeries. However, in order to view the facts in the light most favorable to Hargrove, and so as to avoid making findings of fact in a summary judgment motion, for the purposes of the exhaustion analysis, all of the documents will be considered to be authentic. However, for purposes of the sanctions analysis, the documents will be explored and the consequences of Hargrove's misrepresentations will be addressed.

Furthermore, even if the falsified grievance forms Hargrove submitted in support of his claim are considered authentic, they are still untimely. The diagnostic TB tests (whether x-ray or PPD tests) were given to Hargrove on March 15, 2002, May 24, 2003 and in June of 2004, but the grievance forms Hargrove submitted complaining of unwanted PPD tests are dated April 19, 2002, April 28, 2002, April 20, 2003, April 28, 2003 and November 19, © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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2004. None of these grievances were filed "within five days of the of the date of the act or occurrence



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giving rise to the grievance.” Williams Aff. at 3. There is no evidence in the record suggesting that NCCF's IGP allows for a tolling of the five-day time limit in which to file a grievance. FN12

FN12. Even if the submitted grievances had been filed within the proscribed time period, they only show that Hargrove's grievances reached an Inmate Grievance Coordinator, the first formal step of NCCF's three-step administrative grievance process; Hargrove never appealed to the Chief Administrative Officer. By failing to take the next available step in NCCF's IGP, Hargrove failed to satisfy the mandatory exhaustion requirement. See, e.g., Williams, 418 F.Supp.2d at 101, 102 (dismissing pro se complaint where plaintiff could only show he exhausted two of the four-step process mandated by prison's administrative process).

While the letters to Reilly and sick call requests show that Hargrove attempted to bring his complaints about the PPD testing to the attention of the prison staff, see, e.g., Aff. in Opp., Exs. A-D, NCCF's IGP requires use of formal grievance forms. Thus, writing complaint letters and submitting sick call requests did not properly exhaust NCCF's available administrative remedies. See, e.g., Hernandez v. Coffey, No. 99-CV-11615, 2006 WL 2109465, at \*4 (S.D.N.Y. July 26, 2006) (holding letters did not satisfy plaintiff's exhaustion obligation); Williams, 418 F.Supp.2d at 101 (holding that because plaintiff's efforts to convey his medical condition through letters and conversations with the warden and medical staff did “not include the required steps of the PLRA's administrative remedy process,” plaintiff failed to exhaust); Mills v. Garvin, No. 99-CV-6032, 2001 U.S. Dist. LEXIS 3333, at \*8 (S.D.N.Y. Mar. 2, 2001) (“letter writing is not the equivalent of an exhaustion of administrative remedies under the PLRA”).

As Hargrove failed to properly exhaust his administrative remedies, this action is precluded by 42 U.S.C. § 1997e(a) unless Hargrove can establish excuse for his failure to exhaust.

(4)

### No Grounds to Excuse Plaintiff's Failure to Exhaust

\*8 Exhaustion is an affirmative defense that defendants have the duty to raise. Jones, 2007 WL 135890, at \* 8-11; Sloane, 2006 WL 3096031, at \*4; Williams, 418 F.Supp.2d at 101. Once argued by the defendants, a plaintiff has an opportunity to show why the exhaustion requirement should be excused or why his failure to exhaust is justified. See Ruggiero, 467 F.3d at 175; Collins v. Goord, 438 F.Supp.2d 399, 411 (S.D.N.Y.2006) (“[T]he Second Circuit has cautioned that ‘while the PLRA's exhaustion requirement is ‘mandatory,’ certain caveats apply.’ ”)(internal citations omitted). Thus, before concluding that a prisoner failed to exhaust available administrative remedies as required by Section 1997e(a) of the PLRA, the following three factors must be considered: (1) whether administrative remedies were actually available to the prisoner; (2) whether defendants have either waived the defense of failure to exhaust or acted in such a way as to estop them from raising the defense; and (3) whether special circumstances, such as a reasonable misunderstanding of the



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grievance procedures, exist justifying the prisoner's failure to comply with the exhaustion requirement. Ruggiero, 467 F.3d at 175 (citing *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir.2004)). FN13

FN13. Courts in the Second Circuit have questioned what effect, if any, the Supreme Court's recent decision in *Woodford* requiring “proper exhaustion” may have on the three-step *Hemphill* inquiry. The Second Circuit has yet to address this issue. See Ruggiero, 467 F.3d at 175-76 (declining to “determine what effect *Woodford* has on our case law in this area ... because [plaintiff] could not have prevailed even under our pre-*Woodford* case law). To date, district courts have acknowledged the tension, but resolved to apply *Hemphill* to exhaustion claims until instructed otherwise by the Second Circuit. See, e.g., *Larkins v. Selsky*, 04-CV-5900, 2006 WL 3548959, at \*9, n. 4 (S.D.N.Y. Dec. 6, © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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2006) (applying the current law of the Second Circuit to exhaustion claims); Sloane, 2006 WL 3096031, at \*5 (“Until such time as the Court of Appeals considers the impact of *Woodford*, if any, on its prior rulings, this Court must follow the law of the Second Circuit. The Court will therefore apply the current law of this circuit to the exhaustion claims.”); *Collins v. Goord*, 438 F.Supp.2d at 411 n. 13 (acknowledging that *Woodford* and *Hemphill* may be in tension, but deciding exhaustion claims under *Hemphill* inquiry); *Hernandez v. Coffey*, No. 99-CV11615, 2006 WL 2109465, at \*3 (S.D.N.Y. July 26, 2006) (same). Here, *Hargrove* does not prevail under *Hemphill*; therefore, there is no occasion to address the potential effect *Woodford* may have had in his case.

a. Whether administrative remedies were “available” to *Hargrove*

The first step in the *Hemphill* inquiry requires a court to determine whether administrative remedies were available to the prisoner. *Hemphill*, 380 F.3d at 686. The test for assessing availability is an “objective one: that is, would a similarly situated individual of ordinary firmness have deemed them available.” *Id.* at 688 (internal quotation marks omitted). In making this determination, “courts should be careful to look at the applicable set of grievance procedures.” *Abney v. McGinnis*, 380 F.3d 663, 668 (2d Cir.2004). Exhaustion may be considered unavailable in situations where plaintiff is unaware of the grievance procedures or did not understand it, Ruggiero, 467 F.3d at 179, or where defendants' behavior prevents plaintiff from seeking administrative remedies, FN14

*Hemphill v. State of New York*, 380 F.3d 680, 686 (2d Cir.2004).

FN14. Case law does not clearly distinguish between situations in which defendants' behavior renders administrative remedies “unavailable” to the plaintiff and cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense because of their behavior. As such,



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there will be some overlap in the analyses.

Here, Hargrove has not claimed that NCCF's administrative grievance procedure was unavailable to him. In fact, Hargrove demonstrated his access to and knowledge of NCCF's IGP by filing proper grievances on November 19, 2004 and on May 10, 2005. Hargrove did not dispute any part of Investigator Williams's affidavit detailing the IGP and its availability to inmates since 2001. Specifically, Hargrove did not dispute, upon entering the facility, that he received a copy of the inmate handbook outlining the IGP. He has not claimed that he is unfamiliar with or unaware of NCCF's IGP. Hargrove has not alleged that prison officials failed to advance his grievances FN15

or that they threatened him or took any other action which effectively rendered the administrative process unavailable.

FN15. Although not specifically alleged, interpreting the evidence to “raise the strongest argument,” Hargrove may be arguing that NCCF's IGP was not available to him because the Grievance Coordinator failed to respond to his grievances. In the single grievance regarding PPD tests that defendants concede is authentic, Hargrove writes, “[n]ow for the third time your office refused to answer my grievances so please look into this matter because the T.B. shot is [sic] effecting my health.” 11/19/04 Grievance. This language implies that Hargrove filed grievances in the past and received no response from the Inmate Grievance Coordinator. Furthermore, Hargrove wrote on one of the submitted copies of the November 19, 2004 grievance that “[t]his is the only accepte[sic] that Plaintiff got back from all grievances and letters that the Plaintiff sent to Sheriff Riley and his medical staffs about his staff making [sic] take T.B. test for 3 year[s].” County Defs.' Not. of Motion, Ex. A, 11/19/2004 grievance.

First, it must be reiterated that filing of the initial grievances was untimely. However, even assuming arguendo that the original grievances had been timely filed, district courts in the Second Circuit have held that the “lack of a response from the [Inmate Grievance Review Committee] does not excuse an inmate's obligation to exhaust his © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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remedies through available appeals.” Hernandez v. Coffey, 2006 WL 2109465, at \*3-5. See also Hemphill, 380 F.3d. at 686 (“Threats or other intimidation by prison officials may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system”); Acosta v. Corr. Officer Dawkins, No. 04-CV-6678, 2005 WL 1668627, at \*3 (S.D.N.Y. July 14, 2005) (inmate required to appeal lack of response to exhaust administrative remedies); Mendoza v. Goord, No. 00-CV-0146, 2002 U.S. Dist. LEXIS 22573, at \*6 (S.D.N.Y. Nov. 21, 2002) (“If, as a result of a negligent error by prison officials-or even their deliberate attempt to sabotage a prisoner's grievance-the prisoner [does not





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receive a response] on his complaint, he is not thereby forestalled from appealing”). Hargrove did not assert or offer evidence suggesting that he appealed the unresponsiveness or that those appeals were not advanced.

\*9 Additionally, Hargrove's transfer from NCCF to Sing Sing Correctional Facility (“ Sing Sing” ) in July 2005 did not excuse his previous failure to properly exhaust. See, e.g., *Sims v. Blot*, No. 00-CV-2524, 2003 WL 21738766, at \*4 (S.D.N.Y. July 25, 2003) (determining that failure to exhaust administrative remedies is not excused by transfer to another facility); *Santiago v. Meinsen*, 89 F.Supp.2d 435, 440-41 (S.D.N.Y.2000) (determining that plaintiff should not be “ rewarded” for failing to participate in grievance procedure before being transferred). Hargrove had ample opportunity to properly file his grievances and to appeal their results as required by NCCF's procedures while he was imprisoned at NCCF. The last PPD test Hargrove complains of was given in 2004; therefore, Hargrove had until June or July of 2004 to timely file his grievance in accordance with NCCF's IGP. Hargrove was not transferred to Sing Sing until July 2005. County Defs.' Mem. of Law at 2. Thus, Hargrove's transfer cannot excuse his previous failure to properly exhaust.

### b. Estoppel

The second step of the inquiry asks whether defendants are estopped from raising exhaustion as a defense. Specifically, “ whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense.” *Hemphill*, 380 F.3d at 686 (internal citations omitted).

Here, Hargrove has not made any statements that would permit a finding that defendants should be estopped from raising the affirmative defense of exhaustion or that defendants waived the right to raise the defense. Defendants first raised the PLRA's exhaustion requirement as an affirmative defense in their respective answers. See County Defs.' Am. Answer at 3; NHCC Defs.' Answer at 1. County Defendants raised it again in their motion for summary judgment. See County Defs.' Mem of Law at 15-23. Thus, defendants are not estopped from raising the affirmative defense now. See, e.g., *Sloane*, 2006 WL 3096031, at \*8 (exhaustion defense not waived where defendants first raised it in their motion to dismiss).

Additionally, defendants have not threatened Hargrove or engaged in other conduct preventing him from exhausting the available administrative remedies. Cf. *Ziemba v. Wezner*, 366 F.3d 161, 162 (2d Cir.2004) (holding defendants were estopped from asserting non-exhaustion because of prison officials' beatings, threats and other conduct inhibiting the inmate from filing proper grievances); *Feliciano v. Goord*, No. 97-CV-263, 1998 WL 436358, at \*2 (S.D.N.Y. July 27, 1998) (holding defendants were estopped from asserting non-exhaustion where prison officials refused to provide inmate with grievance forms, assured him that the incidents would be investigated by staff as a prerequisite to filing a grievance, and provided prisoner with no information about results of investigation).



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Hargrove has not argued otherwise. See Ruggiero, 467 F.3d at 178 (holding defendants were not estopped from asserting a failure to exhaust defense where plaintiff pointed to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies); Sloane, 2006 WL 3096031, at \*8 (finding no estoppel where plaintiff did not argue that defendants prevented him from pursuing the available administrative remedies); Hernandez, 2006 WL 2109465, © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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at \*4 (finding no estoppel where plaintiff did not argue that any threats or intimidation prevented him from pursuing his appeals). Thus, for the same reasons that administrative remedies were not deemed unavailable to Hargrove, defendants are not estopped from raising a failure to exhaust defense.

### c. Special circumstances

\*10 Even where administrative remedies are available and the defendants are not estopped from arguing exhaustion, the court must “consider whether ‘special circumstances’ have been plausibly alleged that justify ‘the prisoner’s failure to comply with administrative procedural requirements.’” Hemphill, 380 F.3d at 688 (quoting Giano, 380 F.3d at 676). For example, plaintiff’s reasonable interpretation of regulations differing from prison official’s interpretation has been held to constitute a “special circumstance.” Giano, 380 F.3d at 676-77. No special circumstances have been alleged that would excuse Hargrove from availing himself of administrative remedies. See Sloane, 2006 WL 3096031, at \*8; Freeman v. Goord, No. 02-CV-9033, 2004 U.S. Dist. LEXIS 23873, at \*9-10 (S.D.N.Y.2004) (granting motion to dismiss where “there is no evidence in the record . . . of any ‘special circumstances’ in this action.”)

(5)

Hargrove's Failure to Exhaust, in Addition to his Fraud on the Court, Warrants Dismissal with

### Prejudice

Hargrove has not sufficiently rebutted the defendants' assertion of failure to exhaust, and a liberal reading of his submissions does not reveal any grounds to excuse that failure.

Because Hargrove filed a complaint in federal court before filing a grievance, permitting his unexhausted and unexcused claim to proceed would undercut one of the goals of the exhaustion doctrine by allowing NCCF to be haled into federal court without the “opportunity to correct



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its own mistakes with respect to the programs it administers.” Woodford, 126 S.Ct. at 2385. See also Ruggiero, 467 F.3d at 178 (citing Porter, 534 U.S. at 525). Thus, his complaint must be dismissed.

In general, dismissal without prejudice is appropriate where plaintiff has failed to exhaust but the time permitted for pursuing administrative remedies has not expired. *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir.2004). Dismissal with prejudice is appropriate where “ administrative remedies have become unavailable after the prisoner had ample opportunity to use them and no special circumstances justified failure to exhaust.” *Berry*, 366 F.3d at 88. Here, Hargrove's administrative remedies were available to him during his entire period of confinement at NCCF. He remained incarcerated in NCCF throughout the time period in which he alleges the PPD tests were given. He could have exhausted remedies for his grievances at any time. Therefore, Hargrove had ample opportunity to seek administrative remedies but failed to do so. Because there is no evidence in the record that administrative remedies are still available to Hargrove, as the five-day time period had run, and because Hargrove has alleged no special circumstances justifying his failure to exhaust, his complaint is accordingly dismissed with prejudice. *Berry*, 366 F.3d at 88 (upholding dismissal with prejudice where plaintiff had no justification for his failure to pursue administrative remedies while they were available.)

\*11 Additionally, defendants' have moved for sanctions based on Hargrove's alleged submission of falsified evidence. If a party commits a fraud on the court, the court has the inherent power to do whatever is reasonably necessary to deter abuse of the judicial process. *Shangold v. The Walt Disney Co.*, No. 03-CV-9522, 2006 WL 71672, at \*4 (S.D.N.Y. January 12, 2006) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)). Fraud upon the court has been defined as “ fraud which seriously affects the integrity of the normal process of adjudication.” *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988); *McMunn v. Mem'l Sloan-Kettering Cancer Center*, 191 F.Supp.2d 440, 445 (S.D.N.Y.2002). In order for a court to grant sanctions based upon fraud, it must be established by clear and convincing evidence that a party has “ sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by ... unfairly hampering © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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the presentation of the opposing party's claim or defense.” *McMunn*, 191 F.Supp.2d at 455 (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir.1989).

After carefully reviewing the allegedly fraudulent documents, it must be concluded that Hargrove consciously falsified these documents. See, e.g., *Shangold*, 2006 WL 71672, at \*1, \*3 (finding clear and convincing evidence of fraud where plaintiffs fabricated a timeline and plot outlines to advance their claims); *McMunn*, 191 F.Supp.2d at 446 (finding clear and convincing evidence of fraud where plaintiff edited audio tapes and represented that they were unedited during discovery). The notaries



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performing services for prisoners at NCCF testify that they never notarized many of the documents supplied by Hargrove. See Klein Aff.; McDevitt Aff. Furthermore, a visual examination of the documents themselves makes it clear that many of the documents submitted by Hargrove are forgeries.

In considering what sanction to impose, courts consider the following five factors: (i) whether the misconduct was the product of intentional bad faith; (ii) whether and to what extent the misconduct prejudiced the plaintiffs; (iii) whether there was a pattern of misbehavior rather than an isolated instance; (iv) whether and when the misconduct was corrected; and (v) whether further misconduct is likely to occur in the future. *Scholastic, Inc. v. Stouffer*, 221 F.Supp.2d 425, 444 (S.D.N.Y.2002) (citing *McMunn*, 191 F.Supp.2d at 461).

Here, Hargrove's deception was not an isolated instance; he fabricated the dates on many grievance forms, in addition to improperly duplicating notary stamps on complaint letters to make them look authentic. Klein Aff. at 2; McDevitt Aff. at 2; County Defs.' 56.1 Statement ¶¶ C3, D3. He submitted these forgeries to defendants during discovery and again as exhibits to his Affidavit in Opposition to Defendant's Motion for Summary Judgment. A severe sanction is warranted as Hargrove's forgeries were intentional, he never corrected them once their authenticity was challenged and he continues to insist on their veracity. Aff. in Opp. at 1-4. Given that there is clear and convincing evidence that Hargrove has continuously and consciously perpetrated a fraud on the court through his submission of fraudulent documents and sworn

affirmations of those documents' authenticity, dismissal with prejudice is especially appropriate. See, e.g., *Shangold*, 2006 WL 71672, at \*5 (dismissing with prejudice where plaintiffs fabricated evidence to advance their claims); *Scholastic*, 221 F.Supp.2d at 439-444 (dismissing with prejudice where plaintiff produced seven pieces of falsified evidence); *McMunn*, 191 F.Supp.2d at 445 (dismissing with prejudice where plaintiff "lie[d] to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process").

### Conclusion

\*12 Because Hargrove did not satisfy the exhaustion requirement under the PLRA, defendants' motions for summary judgment are granted. Further, considering the fraud Hargrove perpetrated on the court, the claims are dismissed against all defendants with prejudice. The Clerk of the Court is directed to close the case.

SO ORDERED:

E.D.N.Y.,2007. *Hargrove v. Riley* Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,

S.D. New York. William MINGUES, Plaintiff,

v. C.O NELSON and C.O. Berlingame, Defendants.

No. 96 CV 5396(GBD).

Feb. 20, 2004.

Background: Inmate brought a § 1983 action asserting, inter alia, claims of excessive force during his wife's visit with him at the correctional facility.

Holding: On a defense motion to dismiss, the District Court, Daniels, J., held that the record established that the action was filed after the effective date of the Prison Litigation Reform Act (PLRA). Motion granted.

West Headnotes

Civil Rights 78 1395(7)

78 Civil Rights 78III Federal Remedies in General 78k1392 Pleading 78k1395 Particular Causes of Action 78k1395(7) k. Prisons and Jails; Probation and Parole. Most Cited Cases Record established that inmate's § 1983 action was filed after the effective date of the Prison Litigation Reform Act of 1996 (PLRA), such that the inmate's failure to exhaust his administrative remedies precluded relief; examination of the initial complaint itself, on its face, unequivocally demonstrated that the inmate's subsequent allegation in his amended complaint that he filed the complaint in April of

1996 was patently false; there was no explanation offered that could reasonably support and account for the existence of May dates on the complaint. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

MEMORANDUM DECISION AND ORDER



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DANIELS, J.

\*1 This § 1983 action was originally commenced by the plaintiff, FN1

a prisoner in New York State custody, and his wife claiming their civil rights were violated during the wife's visit with plaintiff at the correctional facility. Discovery in this matter has concluded. Previously, all claims asserted by plaintiff's wife were dismissed for failure to prosecute. Additionally, defendants' summary judgment motion was denied with respect to plaintiff's claims of excessive force, FN2

and summary judgment was granted dismissing all of plaintiff's other claims. Defendants now seek to dismiss the remaining excessive force claims on the grounds they are barred by the Prisoner Litigation Reform Act of 1996 (" PLRA" ), 42 U.S.C. § 1997e(a), as plaintiff failed to exhaust his administrative remedies.

FN1. Plaintiff and his wife were proceeding pro se when they filed the complaint and amended complaint. Thereafter, plaintiff obtained legal representation.

FN2. In the amended complaint, plaintiff alleges he was beaten, kicked and punched. (Am.Compl. § 6). In his original complaint, he had also claimed that he was whipped." (Compl. at 7, 8). Plaintiff testified at his deposition that he was slapped once in the face, punched about four or five times in the lower back, and a correctional officer then laid on top of him. (Mingues Dep. at 78-81). The incident, which took approximately thirty to forty seconds, caused plaintiff to suffer from back pain for an unspecified period of time. (Id. at 81, 86). © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

Subdivision (a) of § 1997e provides, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This provision became effective on April 26, 1996. *Blisset v. Casey*, 147 F.3d 218, 219 (2d Cir.1998). The PLRA's exhaustion requirement does not apply retroactively to actions pending when the Act was signed into law. *Scott v. Coughlin*, 344 F.3d 282, 291 (2d Cir.2003).

There is no dispute that plaintiff did not avail himself of the existing and available prison grievance procedure. Plaintiff, however, argues he was not required to exhaust his administrative remedies because, as alleged in his amended complaint, " petitioners (sic) had already filed in April 10-12 of 1996," prior to the PLRA's April 26, 1996 enactment date. FN3

(Am.Compl. § 2). In order to determine the date that the instant action was commenced, the date of the filing of the amended complaint relates back to the filing date of the original complaint.





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Fed.R.Civ.P. 15(c). The original complaint was signed and dated by plaintiff's wife on May 8, 1996; it was stamped received by the Pro Se Office on May 10, 1996; and plaintiff's signature is dated May 13, 1996. FN4

FN3. The amended complaint reads as follows:

That the original complaint filed under and pursuant to Title 42 section 1983 and 1985 was made and submitted before this court in April of 1996, before the application of the Prisoner Litigation Reform Act of 1996 was signed into law. The Act was signed into law April 26, 1996 and petitioners had already filed in April 10-12 of 1996. (Am.Compl. § 2).

FN4. Plaintiff's wife application for in forma pauperis relief was signed and dated May 8, 1996, and it is stamped as received by the Pro Se Office on May 10, 1996. Plaintiff's signature, on his initial application for appointment of counsel, is dated May 13, 1996, and it is stamped as

received by the Pro Se Office on May 10, 1996. Attached to plaintiff's application, is his signed Affirmation of Service, also dated May 13, 1996, wherein plaintiff declared under penalty of perjury that he served his application upon the Pro Se Office. Plaintiff alleges that " between April 17, 1996 until October 7, 1996," all visitation was suspended between him and his wife and that their " only form of communications was correspondence ." (Am.Compl. § 7).

The matter was referred to Magistrate Judge Pitman for a Report and Recommendation (" Report" ). Although the magistrate judge found that the three earliest possible dates that the evidence demonstrates the complaint could have been filed, i.e., May 8 , 10 , and 13 of 1996, were th th th all beyond the PLRA enactment date, he nevertheless recommended that the motion to dismiss be denied based on plaintiff's allegation in the amended complaint that he filed the original complaint April 10-12 of 1996, prior to the April 26, 1996 enactment date. The magistrate judge found that, "[i]n light of the express allegation in the Amended Complaint that plaintiff commenced the action before April 26, 1996 and the absence of a clear record to the contrary, the requirement that disputed factual issues be resolved in plaintiff's favor for purposes of this motion requires that the motion be denied." (Report at 12-13).

\*2 Defendants object to the Report's conclusion that there is a material issue of fact regarding the date the action was filed. Plaintiff's attorney did not file any objections. FN5

The Court must make a de novo determination as to those portions of the Report to which there are objections. Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1)(C). It is not required that the Court conduct a de novo hearing on the matter. *United States v. Raddatz*, 447 U.S. 667, 676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Rather, it is sufficient that the Court " arrive at its own, independent conclusion" regarding those portions to which the objections were made. *Nelson v. Smith*, 618 F.Supp. 1186, 1189-90 (S.D.N.Y.1985) (quoting *Hernandez v. Estelle*, 711 F.2d 619, 620 (5 Cir.1983)). Accordingly, the Court,



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in the th exercise of sound judicial discretion, must determine the extent, if any, it should rely upon the magistrate judge's proposed findings and recommendations. Raddatz, 447 U.S. at 676. The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. Fed.R.Civ.P. 72(b); 28 U.S.C. § © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 3 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

636(b)(1)(C). Where there are no objections, the Court may accept the Report provided there is no clear error on the face of the record. Nelson v. Smith, 618 F.Supp. at 1189; see also Heisler v. Kralik, 981 F.Supp. 830, 840 (S.D.N.Y.1997), aff'd sub nom. Heisler v. Rockland County, 164 F.3d 618 (2d Cir.1998).

FN5. Plaintiff himself filed objections which was not adopted by his counsel. Plaintiff objects to the magistrate judge's finding that an issue exists as to when plaintiff filed the complaint because plaintiff asserts he gave it to prison officials to be mailed in April. Additionally, plaintiff objects to the magistrate judge's suggestion that the defendants convert their motion to one for summary judgment asserting the same theory as set forth in the present motion. Since this Court finds that the instant motion is meritorious, the propriety of plaintiff personally submitting his own objections need not be address as those objections are moot.

Upon a de novo review, the Report's recommendation that the motion be denied is rejected by the Court. Section 1997e (a) requires that inmates exhaust all available administrative remedies prior to the commencement of a § 1983 action concerning prison conditions, and failure to do so warrants dismissal of the action. Porter v. Nussel, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); Scott, 344 F.3d at 290. The exhaustion of one's administrative remedies, however, is not a jurisdictional requirement under the PLRA. Richardson v. Goord, 347 F.3d 431 (2d Cir.2003). A defendant may assert a non-exhaustion claim as an affirmative defense. Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir.1999). Since it is an affirmative defense, defendants bear the burden of proof in this regard. See, McCoy v. Goord, 255 F.Supp.2d 233, 248 (S.D.N.Y.2003); Arnold v. Goetz, 245 F.Supp.2d 527, 534-35 (S.D.N.Y.2003); Reyes v. Punzal, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002). A motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), is an appropriate vehicle to be used by a defendant where the failure to exhaust is clear from the face of the complaint as well as any written instrument attached as an exhibit and any statements or documents incorporated by reference into the complaint. See, Scott v. Gardner, 287 F.Supp.2d 477, 485 (S.D.N.Y.2003) (citation omitted); McCoy, 255 F.Supp.2d at 249.

In the amended complaint, plaintiff alleges, in a conclusory manner, that he filed the original complaint before the effective date of the PLRA, sometime between April 10 and April 12 of 1996. th FN6

On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inference in plaintiff's favor.



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Resnick v. Swartz, 303 F.3d 147, 150-51 (2d Cir.2002) (citation omitted); Bolt Elec., Inc. v. City of New York, 53 F.3d 465, 469 (2d Cir.1995). Dismissal is only warranted where it appears without doubt that plaintiff can prove no set of facts supporting his claims that would entitle him to relief. Harris v. City of New York, 186 F.3d 243, 247 (2d Cir.1999). The court's consideration is not limiting solely to the factual allegations set forth in the amended complaint. Rather, the court may also consider documents attached to the complaint as exhibits or incorporated in it by reference, matters of which judicial notice may be taken, or to documents either in plaintiff's possession or of which he has knowledge of and relied on in bringing the action. Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir.1993) (citation omitted). The court is not bound to accept as true a conclusory allegation where the pleadings are devoid of any specific facts or circumstances supporting such an assertion. DeJesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 70 (2d Cir.1996). Nor must the court "ignore any facts alleged in the complaint that undermine the plaintiff's claim." Roots Partnership v. Lands' End, Inc., 965 F.2d 1411, 1416 (7 Cir.1992) (citation omitted). th

FN6. In response to then Chief Judge Thomas P. Griesa's 1996 order dismissing this action, plaintiff filed an Application for Reconsideration, dated October 28, 1996, wherein he claims that "on April 12, 1996 this petitioner filed a 1983 civil suit ..." (Pl.'s Mot. for Recons. at 1).

\*3 Plaintiff fails to allege any factual basis in support of his claim that he filed the initial complaint between April 10-12, 1996. The Court is not required to accept this statement as a well-pleaded factual allegation in light of the existing record which clearly demonstrates that such an allegation is not only factually unsupported by the clear evidence, but is factually impossible. Generally, an © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 4 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

amended complaint supersedes the original complaint, and renders it of no legal effect. In re. Crysen/Montenay Energy Co., 226 F.3d 160, 162 (2d Cir.2000). In plaintiff's amended complaint, he states that he is submitting the amended complaint in support of his original complaint. Hence, the original complaint is incorporated by reference in the amended complaint, and may be considered by the Court. Even if the initial complaint was not so incorporated, given the circumstances of this case, the Court would nevertheless consider it as it relates to the original date of filing. An examination of the initial complaint itself, on its face, unequivocally demonstrates that plaintiff's subsequent allegation in his amended complaint that he filed the complaint between April 10 th and 12 of 1996 is patently false. th

The original complaint refers to plaintiff's prison disciplinary hearing arising out of the same incident forming the basis of the present lawsuit. Generally, the disciplinary charges against plaintiff were in connection with an alleged conspiracy by him and his wife to commit grand larceny against inmate Robert Cornell. That hearing began on April 16, 1996, and concluded on April 19, 1996. (Defs.' Notice of Mot. for Summ. J. Ex. N, Transcript of Disciplinary Hr'g, conducted on April 16, 18-19, 1996). Specifically, in the original complaint, plaintiff refers to the testimony given by this fellow



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inmate. FN7

(Compl. at 8). That inmate testified on April 19 . (Hr'g. Tr. at 53-54, 57). Thus, plaintiff's claim that he th filed the complaint between April 10-12, 1996, is absolutely impossible as the initial complaint refers to events occurring after that time period. Merely because plaintiff boldly alleges in his amended complaint that he filed the original complaint between April 10 and 12 th th does not require this Court to turn a blind eye to plaintiff's prior pleadings demonstrating the absurdity of his claim. FN8

See, *Silva Run Worlwide Ltd. v. Gaming Lottery Corp.*, 2001 WL 396521, \*1 (S.D.N.Y. April 19, 2001) (citations omitted) (A court should not “ accept allegations that are contradicted or undermined by other more specific allegations in the complaint or by written materials properly before the court.” ).

FN7. In the complaint, plaintiff alleges “ that at his S.H.U. hearing petitioner called as a witness Robert Cornell who stated that this petitioner Mingues nor his wife (co-petitioner) Narvaez ever took any money from him. (Compl. at 8).

FN8. At his deposition, plaintiff testified that he filed the initial complaint “ [a]pproximately around June of 1996.” (Mingues Dep. at 37-38).

Lawsuits by inmates represented by counsel are commenced when the complaint is filed with the court. See, Fed.R.Civ.P. 3, 5(e). For pro se litigants, who are not imprisoned and have been granted in forum pauperis relief, their complaints are deemed filed when received by the Pro Se Office. See, *Toliver v. County of Sullivan*, 841 F.2d 41 (2d Cir.1998). The complaint of a pro se prisoner, however, is deemed filed when he or she gives the complaint to prisoner officials to be mailed. *Houston v. Lack*, 487 U.S. 266, 270, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); *Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir.1993), modified on other grounds, 25 F.3d 81 (2d Cir.1994). The “ prison mailbox” rule is designed to combat inmate litigants' dependence on the prison facility's mail system and their lack of counsel so as to assure the timely filing of their legal papers with the court. *Noble v. Kelly*, 246 F.3d 93, 97 (2d Cir.2001) (citations omitted). Given the difficulty in determining when a prisoner relinquishes control of the complaint to prison personnel, the date the plaintiff signed the original complaint is presumed to be the date plaintiff gave the complaint to prison officials to be mailed. See e.g., *Forster v. Bigger*, 2003 WL 22299326, \*2 (S.D.N.Y. Oct.7, 2003); *Hosendove v. Myers*, 2003 WL 22216809, \*2 (D.Conn. Sept.19, 2003); *Hayes v. N .Y.S. D.O.C. Officers*, 1998 WL 901730, \*3 (S.D.N.Y. Dec.28, 1998); *Torres v. Irvin*, 33 F.Supp.2d 257, 270 (S.D.N.Y.1998) (cases cited therein).

\*4 In response to the Report and Recommendation, plaintiff asserts that, in April, the original complaint “ was placed in the facility mail box.” (Pl.'s Objection to Report at 1). However, it is uncontested that plaintiff's wife signed the complaint on May 8 ; it was received by the Pro Se th Office on May 10 ; and plaintiff's signature is dated May th 13 . There is no explanation offered that could reasonably th support and account for the existence of these May dates on a complaint which



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plaintiff falsely claims to have deposited to be mailed during the period of April 10 and th April 12 . Had plaintiff mailed the complaint directly to th the court prior to April 26 , it would have been impossible th for the plaintiff's wife to have signed the document two © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 5 Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.) (Cite as: 2004 WL 324898 (S.D.N.Y.))

days prior to the date that the Pro Se Office stamped it received on May 10 . th FN9

Moreover, absent evidence to the contrary, applying the mailbox rule would presume that plaintiff gave his complaint to prison officials on May 13, 1996, the date he signed it. See, *Johnson v. Coombe*, 156 F.Supp.2d 273, 277 (S.D.N.Y.2001) (quoting *Torres*, 33 F.Supp.2d at 270). Even if the Court gave plaintiff the benefit of the date plaintiff's wife signed the complaint, i.e., the earliest date reflected on the filed complaint, it was still after the effective date of the PLRA. Hence, plaintiff is legally obligated to have pursued his prison grievance procedures prior to filing the instant action. The plaintiff has offered no explanation for the initial complaint's reference to events that occurred after the date he claims he filed it, the two May dates on which he and his former co-plaintiff wife signed the complaint, or the May date stamped received by the Pro Se Office. As the magistrate Judge observed:

FN9. The benefit of the mailbox rule does not apply where the plaintiff delivers the complaint to someone outside the prison system to forward to the court. *Knickerbocker v. Artuz*, 271 F.3d 35, 37 (2d Cir.2001).

Apart from the allegation that certain events giving rise to the claims occurred on April 9, 1996, the Original Complaint contains no mention of dates in April, 1996. Mingues no where explains the contradiction between the signature dates on the Original Complaint and the allegations contained in Amended Complaint. (Report at 12).

New York state law provides a three tier grievance procedure applicable to plaintiff's claims of excessive force. See, N.Y. Correct. Law § 139 (McKinnney's 2003); N.Y. Comp.Codes R. & Regs. tit. 7, § 701.7 (2003); *Mendoz v. Goord*, 2002 WL 31654855 (S.D.N.Y. Nov.21, 2002); *Rodriguez v. Hahn*, 209 F.Supp.2d 344 (S.D.N.Y.2002). Plaintiff has not denied knowledge of the grievance procedure at his institution, nor claimed that anything or anyone caused him not to file a grievance and completely pursue it through the administrative process. FN10

The magistrate judge's determination that the defendants' Rule 12(b) motion should be denied because of an “ absence of a clear record” contrary to plaintiff's express allegation in the amended complaint that he

commenced the action before April 26, 1996 is erroneous. The Court could have sua sponte dismiss this action as the record is unmistakably clear that an appropriate administrative procedure was



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available to him, that he was required to exhaust his administrative remedies, and that he failed to do so as required by the PLRA. See, *Mojias v. Johnson*, 351 F.3d 606 (2003); *Snider v. Melindez*, 199 F.3d 108, 112-13 (2d Cir.1999). In this case, plaintiff has been afforded notice and given an opportunity to respond to the exhaustion issue and his failure remains clear.

FN10. In the original complaint, plaintiff stated he did not file a grievance, pursuant to the state's prisoner grievance procedure, "because this matter can not be dealt with by interdepartmental grievances." (Compl. at 2-3). In plaintiff's attorney's memorandum in opposition to the motion to dismiss, counsel contends that plaintiff is not required to file a grievance because the state's prison system provides extremely limited administrative remedies and money damages, which plaintiff seeks, are not available.

\*5 Accordingly, it is hereby

ORDERED that the Report and Recommendation is not adopted; and it is further

ORDERED that the defendants' motion to dismiss the complaint is granted.

S.D.N.Y.,2004. *Mingues v. Nelson* Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Roger SULTON, Plaintiff,

v. Charles GREINER, Superintendent of Sing Sing Corr. Fac., Doctor Halko & P.A. Williams of Sing Sing Corr. Fac. Medical Department, Doctor Lofton, Defendants.

No. 00 Civ. 0727(RWS).

Dec. 11, 2000.

Roger Sulton, Wende Correctional Facility, Alden, NY, Plaintiff, pro se.

Honorable Eliot Spitzer, Attorney General of the State of New York, New York, NY, By: S. Kenneth





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Jones, Assistant Attorney General, for Defendants, of counsel.

### OPINION

SWEET, J.

\*1 Defendants Charles Greiner (“ Greiner” ), past Superintendent of Sing Sing Correctional Facility (“ Sing Sing” ) and Dr. Nikulas Halko, (“ Halko” ), P.A. Williams (“ Williams” ), and Dr. Lofton (“ Lofton” ), all of the Sing Sing Medical Department, (collectively, the “ Defendants” ), have moved to dismiss the amended complaint of pro se inmate Roger Sulton (“ Sulton” ), pursuant to Fed.R.Civ.P. 12(b)(6) and 12(h)(2) for failure to exhaust administrative remedies. For the reasons set forth below, the motion will be granted.

### Prior Proceedings

Sulton filed the complaint in this action on February 2, 2000, asserting a claim against the Defendants under Section 1983 for alleged violation of his constitutional rights under the Eighth Amendment for acting with deliberate indifference to his serious medical needs. Sulton filed an amended complaint on May 3, 2000, to identify additional defendants to his suit. Additionally, Sulton alleges negligent malpractice by the Sing Sing medical staff. Sulton seeks monetary damages. The instant motion was filed on August 9, 2000, and was marked fully submitted on September 6, 2000.

### Facts

The Defendants' motion comes in the posture of a motion to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). However, both the Defendants and Sulton have submitted materials outside the pleadings. Where a District Court is provided with materials outside the pleadings in the context of a 12(b)(6) motion to dismiss, it has two options: the court may exclude the additional materials and decide the motion on the complaint alone or convert the motion to one for summary judgment. See Fed.R.Civ.P. 12(b); Kopec v. Coughlin, 922 F.2d 152, 154 (2d Cir.1991); Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24, 25 (2d Cir.1988). The Court has determined to treat the instant motion as a motion for summary judgment. Therefore, the following facts are gleaned from the parties' submissions, with all inferences drawn in favor of the non-movant as required on a motion for summary judgment. They are not findings of fact by the Court.

Sulton is a prison inmate who was incarcerated in Sing Sing at the time of the incidents in question. Greiner was Superintendent of Sing Sing at that time. Halko was and is a doctor on medical staff at Sing Sing. Williams and Lofton are alleged to be affiliated with the Sing Sing Medical Department.

According to Sulton, on October 8, 1998, he slipped on a flight of wet stairs, where there was no “ wet



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floor” sign posted, and injured his left knee. The next day his knee was swollen and the pain “ was real bad.” That same day © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2000 WL 1809284 (S.D.N.Y.) (Cite as: 2000 WL 1809284 (S.D.N.Y.))

Sulton went to sick call and saw P.A. Williams. Williams ordered x-rays and also ordered “ no-work, feed-in cell, pain killers and a cane” for Sulton. The swelling went down, but the pain got stronger.

For four months Sulton complained to the Sing Sing medical staff about his pain. During this time his left knee would give out “ at any time.” Yet, “ nothing was done.” However, the Sing Sing Medical Department did send Sulton to the Green Haven Correctional Facility for an M.R.I. and, subsequently, knee surgery was recommended by an attending physician on April 23, 1999. A hinged knee brace was recommended for post-surgery recovery.

\*2 At some point thereafter, Sulton wrote to Greiner concerning his medical problem and he was placed on “ a call-out” to see Halko. Halko then informed Sulton that he would not be going for surgery because Correctional Physician Services FN1

(“ CPS” ) would not allow it. CPS wanted the inmate to undergo physical therapy before they would approve surgery. Sulton continued to be in pain and requested outside medical care from Williams. However, Williams could not do anything about Sulton's surgery until it was approved by CPS.

FN1. CPS is the health maintenance organization which must pre-approve any outside medical service to be provided to inmates outside of the correctional facility.

In September 1999, Sulton was transferred to Wende Correctional Facility (“ Wende” ). The medical department there provided him with physical therapy for his left knee, which was “ still in constant pain” and was prone to giving out beneath his body weight.

Sulton filed grievance # 14106-99 on November 3, 1999, and on November 24, 1999, he received a response from the Inmate Grievance Resolution Committee (the “ IGRC” ). Sulton contends that on that same date he indicated his desire to appeal their decision to the Superintendent. Sulton did not appeal his grievance to the highest level of administrative review, the Central Office Review Committee (the “ CORC” ). In a letter to Wende Superintendent Donnelly (“ Donnelly” ) dated December

17, 2000, Sulton complained that he never received a response to his appeal of the IGRC decision. However, the Defendants have submitted a response from Donnelly dated December 6, 2000, in which Donnelly stated that he concurred with the IGRC's decision.

In January 2000, “ plaintiff[s] legs gave out and the right leg took the weight of the body ... causing the plaintiff to suffer ... torn joints in the ankle area.” Surgery was performed on the ankle and he was



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placed on “ medical confinement status.” Discussion

### I. This Action Will Be Dismissed For Plaintiff's Failure To Comply With The Prison Litigation Reform Act Of 1996

In his amended complaint, Sulton alleges that he filed a grievance and, although initially the Defendants were unable to identify the grievance, by his opposition to the instant motion Sulton has identified the process he undertook to pursue his grievance.

Section 1997e(a) of the Prison Litigation Reform Act (the “ PLRA” ) provides that:

No action shall be brought with respect to prison conditions under ... 42 U.S.C. § 1983 ... or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

In enacting Section 1997e(a), Congress made exhaustion mandatory. *Salahuddin v. Mead*, 174 F.3d 271, 274-75 (2d Cir.1999). As a result, where an inmate fails to satisfy the PLRA's exhaustion requirement, the complaint must be dismissed. See, e.g., *Santiago v. Meinsen*, 89 F.Supp.2d 435, 439-40 (S.D.N.Y.2000) (citations omitted).

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In New York, the relevant administrative vehicle is the Inmate Grievance Program (“ IGP” ). See N.Y. Correct. Law § 139 (directing Commissioner of the Department of Correctional Services to establish a grievance mechanism in each correctional facility under the jurisdiction of the Department); N.Y. Comp.Codes R. & Regs., tit. 7, § 701.1 (instituting IGP). New York inmates can file internal grievances with the inmate grievance committee on practically any issue affecting their confinement. See *In re Patterson*, 53 N.Y.2d 98, 440 N.Y.S.2d 600 (N.Y.1981) (interpreting N.Y. Correct. Law § 139 broadly); N.Y. Comp.Codes R. & Regs., tit. 7, §§ 701.2(a) (inmates may file grievances about the “ substance or application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services ...” ) and 701.7 (procedures for filing, time limits, hearings and appeals).

\*3 The New York State Department of Correctional Services (“ DOCS” ) has established a grievance program with specific procedures which must be followed in order for a prisoner to exhaust his administrative remedies. See *Petit v. Bender*, No. 99 Civ. 0969. 2000 WL 303280, at 2- 3 (S.D.N.Y. March 22, 2000) (holding that prisoner \* \* failed to exhaust his administrative remedies where prisoner only partially complied with the grievance procedures established by Section 701 et seq.).



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These procedures include a requirement that an inmate appeal a Superintendent's decision to the CORC by filing an appeal with the Grievance Clerk. See N.Y. Comp.Codes R. & Regs., tit. 7, § 701.7(c)(1).

There is, however, an additional issue to be addressed in this case, which is that the administrative remedies available to Sulton do not afford monetary relief. The Second Circuit has not yet ruled on whether the PLRA's exhaustion requirement applies where the available administrative remedies available do not provide the type of relief the prisoner seeks. *Snider v. Dylaq*, 188 F.3d 51, 55 (2d Cir.1999) (“ We note that it is far from certain that the exhaustion requirement of 42 U.S.C. § 1997e(a) applies to deliberate indifference claims ... under Section 1983, where the relief requested is monetary and where the administrative appeal, even if decided for the complainant, could not result in a monetary award.” ).

There is disagreement among the district courts within this circuit as to this issue, although there is “ clear trend ... to

find exhaustion applicable even where the requested relief, money damages, cannot be awarded by the administrative body hearing the complaint.” *Santiago v. Meinsen*, 89 F.Supp.2d at 440; see *Snider v. Melindez*, 199 F.3d 108, 114 n. 2 (2d Cir.1999) (noting disagreement among courts as to applicability of exhaustion requirement where administrative remedies are unable to provide the relief that a prisoner seeks in his federal action); but cf. *Nussle v. Willette*, 224 F.3d 95, (2d Cir.2000) (holding that exhaustion not required for excessive force claim because such claim is not “ prison conditions” suit and overruling district court decisions applying exhaustion requirement to excessive force claims seeking monetary relief).

Moreover, this Court has previously held that a prisoner must exhaust his administrative remedies before seeking relief in federal court in connection with a prison conditions claim even where a prisoner seeks damages not recoverable under an established grievance procedure. *Coronado v. Goord*, No. 99 Civ. 1674, 2000 WL 52488, at 2 (S.D.N.Y. Jan. 24, 2000); \*

*Edney v. Karrigan*, No. 99 Civ. 1675, 1999 WL 958921, at 4 (S.D.N.Y. Oct. 14, \* 1999). This is the rule that will be applied here.

In his response to the motion to dismiss, Sulton indicates that he filed grievance # 14106-99 on November 3, 1999 and on November 24, 1999 he received a response IGRC and that on the same date Sulton indicated his desire to appeal their decision to the Superintendent. Sulton does not contend that he appealed his grievance to the highest level of administrative review, namely, the CORC. Instead, Sulton has asserted that Superintendent Donnelly never replied to the appeal of the IGRC decision and submits a letter dated December 17, 2000 in which Sulton complains that he never received a response from Donnelly. However, the Defendants have submitted a response from Donnelly dated December 6, 2000, in which Donnelly concurred with the decision of the IGRC



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denying Sulton relief. There is no evidence in the record that Sulton appealed the grievance to CORC.

\*4 Accordingly, because Sulton failed to exhaust his administrative remedies by appealing the grievance to the CORC, his claims of medical indifference will be dismissed pursuant to 42 U.S.C. § 1997e. See *Petit*, 2000 WL 303280, at 3. \*

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### Conclusion

Therefore, for the reasons set forth above, the Defendants' motion will be granted and the amended complaint will be dismissed without prejudice to the action being renewed once Sulton has exhausted all administrative remedies.

It is so ordered.

S.D.N.Y.,2000. *Sulton v. Greiner* Not Reported in F.Supp.2d, 2000 WL 1809284 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States Court of Appeals,

Second Circuit. Raymond GRULLON, Plaintiff–Appellant,

v. CITY OF NEW HAVEN, New Haven C.C.C. Facility,

and Warden, New Haven C.C.C. Facility,

Defendants–Appellees. Docket No. 11– 3184. Argued: Jan. 11, 2013. Decided: June 19, 2013.

Background: Pretrial detainee brought pro se § 1983 action against warden of city correctional center in his individual capacity, challenging jail conditions. The United States District Court for the District of Connecticut, Stefan R. Underhill, J., 2011 WL 2680843, dismissed for failure to state claim. Detainee appealed. Holding: The Court of Appeals, KeARSE, Circuit Judge, held that District Court erred in dismissing claim with prejudice and without leave to file amended complaint.



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Affirmed in part, vacated in part, and remanded.

West Headnotes [1] Civil Rights 78 1335 78 Civil Rights 78III Federal Remedies in General 78k1334 Persons Liable in General 78k1335 k. In general. Most Cited Cases

To establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, inter alia, the defendant's personal involvement in the alleged constitutional deprivation. 42 U.S.C.A. § 1983.

[2] Federal Courts 170B 794 170B Federal Courts 170BVIII Courts of Appeals 170BVIII(K) Scope, Standards, and Extent 170BVIII(K)3 Presumptions 170Bk794 k. Pleadings. Most Cited Cases

In reviewing the dismissal of a complaint for failure to state a claim on which relief can be granted, the Court of Appeals views the facts alleged in the complaint in the light most favorable to the appellant, construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A. [3] Federal Courts 170B 794 170B Federal Courts 170BVIII Courts of Appeals 170BVIII(K) Scope, Standards, and Extent 170BVIII(K)3 Presumptions 170Bk794 k. Pleadings. Most Cited Cases

In reviewing the dismissal of a claim for failure to state a claim, the Court of Appeals must interpret the factual allegations of a pro se complaint to raise the strongest arguments that they suggest. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A. [4] Civil Rights 78 1395(7) 78 Civil Rights 78III Federal Remedies in General 78k1392 Pleading 78k1395 Particular Causes of Action 78k1395(7) k. Prisons and jails; probation and parole. Most Cited Cases

Pretrial detainee's § 1983 complaint failed to sufficiently allege warden's personal involvement in or awareness of health, safety, and communications issues © 2013 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 --- F.3d ----, 2013 WL 3023464 (C.A.2 (Conn.)) (Cite as: 2013 WL 3023464 (C.A.2 (Conn.)))

raised by pretrial detainee, and thus failed to state cause of action for constitutional violations against warden in his individual capacity, where there were no such direct allegations, and there were no indirect allegations sufficient to permit inference that warden had acted or failed to act in ways that would subject him to personal liability. 42 U.S.C.A. § 1983. [5] Federal Civil Procedure 170A 833 170A Federal Civil Procedure 170AVII Pleadings 170AVII(E) Amendments 170Ak833 k. Liberality in allowing amendment. Most Cited Cases

When a party requests leave to amend his complaint, permission generally should be freely granted. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A. [6] Federal Civil Procedure 170A 1838 170A Federal Civil Procedure 170AXI Dismissal 170AXI(B) Involuntary Dismissal 170AXI(B)5 Proceedings 170Ak1837 Effect 170Ak1838 k. Pleading over. Most Cited Cases





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A pro se complaint should not be dismissed without the district court's granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A. [7] Federal Civil Procedure 170A 851 170A Federal Civil Procedure 170AVII Pleadings 170AVII(E) Amendments 170Ak851 k. Form and sufficiency of amendment; futility. Most Cited Cases

Leave to amend may properly be denied if the amendment would be futile. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

[8] Federal Courts 170B 817 170B Federal Courts 170BVIII Courts of Appeals 170BVIII(K) Scope, Standards, and Extent 170BVIII(K)4 Discretion of Lower Court 170Bk817 k. Parties; pleading. Most Cited Cases

A district court's denial of a request for leave to amend is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A. [9] Federal Courts 170B 812 170B Federal Courts 170BVIII Courts of Appeals 170BVIII(K) Scope, Standards, and Extent 170BVIII(K)4 Discretion of Lower Court 170Bk812 k. Abuse of discretion. Most Cited Cases

An “abuse of discretion” may consist of an erroneous view of the law, a clearly erroneous assessment of the facts, or a decision that cannot be located within the range of permissible decisions. [10] Federal Civil Procedure 170A 1838 170A Federal Civil Procedure 170AXI Dismissal 170AXI(B) Involuntary Dismissal 170AXI(B)5 Proceedings 170Ak1837 Effect 170Ak1838 k. Pleading over. Most Cited Cases

District court erred in dismissing pretrial detainee's pro se § 1983 action against warden of city correctional center in his individual capacity for failure to state claim, with prejudice and without leave to file amended complaint, where court did not, other than indicating that leave to amend could be denied if it would be futile, discuss other principles governing motions to amend, pretrial detainee had asked that he “be allowed to amend his complaint” if court found his allegations as to warden © 2013 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 3 --- F.3d ----, 2013 WL 3023464 (C.A.2 (Conn.)) (Cite as: 2013 WL 3023464 (C.A.2 (Conn.)))

insufficient, pretrial detainee submitted copy of letter he claimed he had sent to warden complaining of conditions, and, even if there were fewer than 15 days between warden's receipt of letter and pretrial detainee's filing of his complaint, that would not have affected complaint's sufficiency. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 12(b)(6), 15(a)(2), 28 U.S.C.A. [11] Civil Rights 78 1426 78 Civil Rights 78III Federal Remedies in General 78k1425 Questions of Law or Fact 78k1426 k. In general. Most Cited Cases

Personal involvement in an alleged constitutional violation, required for liability of a supervisory official in his individual capacity under § 1983, is a question of fact. 42 U.S.C.A. § 1983. [12] Federal



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Civil Procedure 170A 1828 170A Federal Civil Procedure 170AXI Dismissal 170AXI(B) Involuntary Dismissal 170AXI(B)5 Proceedings 170Ak1827 Determination 170Ak1828 k. Time of determination; reserving decision. Most Cited Cases

When a pro se plaintiff brings a colorable § 1983 claim against supervisory personnel, and those supervisory personnel respond with a dispositive motion grounded in the plaintiff's failure to identify the individuals who were personally involved, under circumstances in which the plaintiff would not be expected to have that knowledge, dismissal should not occur without an opportunity for additional discovery. 42 U.S.C.A. § 1983. [13] Prisons 310 320 310 Prisons 310II Prisoners and Inmates 310II(H) Proceedings 310k316 Exhaustion of Other Remedies 310k320 k. Pleading. Most Cited Cases

Although claims relating to prison conditions are subject to the PLRA's exhaustion requirement, failure to exhaust is an affirmative defense, and inmates are not required to specially plead or demonstrate exhaustion in their complaints. Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a). Katherine Swan, New York, NY (Guy Miller Struve, New York, NY, on the brief), for Plaintiff–Appellant. Michael K. Skold, Assistant Attorney General, Hartford, CT (George Jepsen, Attorney General of the State of Connecticut, Hartford, CT, on the brief), for Defendant–Appellee Warden. Before: KEARSE and KATZMANN, Circuit Judges, RAKOFF, District Judge FN\*

. KEARSE, Circuit Judge:

\*1 Plaintiff Raymond Grullon, who commenced this action pro se as a pretrial detainee, appeals from a judgment of the United States District Court for the District of Connecticut, Stefan R. Underhill, Judge, dismissing his complaint brought under 42 U.S.C. § 1983 against defendants City of New Haven (the “City”), the New Haven C.C.C. Facility (“NHCC” or the “Correctional Center”), and the Warden of the New Haven C.C.C. Facility (the “Warden”), alleging, inter alia, denial of visitation rights, telephone usage, and access to a law library, and deprivation of proper temperature control, ventilation, and various amenities. The district court dismissed Grullon's claims against the City and the Correctional Center pursuant to 28 U.S.C. § 1915A(b)(1) as lacking an arguable basis in fact or law. The court dismissed Grullon's claims against the Warden in his official capacity pursuant to Fed.R.Civ.P. 12(b)(1) on grounds of sovereign immunity and mootness; it dismissed the claims against the Warden in his individual capacity pursuant to Rule 12(b)(6) for lack of any allegation from which the Warden's personal involvement could be inferred. On appeal, Grullon contends that the district court erred in dismissing his individual-capacity claims against the Warden without granting leave to amend the complaint to add a plausible allegation that the Warden had been informed of the alleged denials and deprivations.

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For the reasons that follow, we conclude that Grullon should have been allowed to amend his



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complaint, and we vacate in part and remand for further proceedings.

I. BACKGROUND Grullon's complaint, the factual allegations of which we take as true for purposes of reviewing a dismissal for failure to state a claim on which relief can be granted, see, e.g., *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110– 11 (2d Cir.2010), alleged principally as follows.

In January 2010, Grullon, who was in custody in New York, was transferred to NHCC because of an outstanding arrest warrant against him in Connecticut. At NHCC, Grullon “ was not afforded a phone call, toothpaste, soap, p[e]n, [or] paper.” (Complaint at 8 (capitalization omitted).) Grullon was informed that NHCC did not have a law library and did not provide legal materials; Grullon did not otherwise have “ access to the courts, or adequate assistance by a trained advisor.” (Id. (capitalization omitted).) Grullon was “placed into a cold cell” w ith “ no ... blankets etc., sheets,” or other sleeping supplies. (Id. (capitalization omitted); see also id. at 5– A (alleging “ dismal conditions” including “ Excessive Heat”). ) Grullon was placed in a cell with another inmate and bunk beds, but with “ no ladder[ ],” and “ no way of getting up-top”; and for the top bunk there were “ no [ ]guard rails,” producing “a dangerous condition.” (Id. at 8 (capitalization omitted).) Grullon's cell had dangerously poor “ ventilation”; and the jail had an inadequate supply of food. (Id. (capitalization omitted).)

\*2 As required by the Prison Litigation Reform Act (“PLRA ”), the district court promptly reviewed the complaint, see 28 U.S.C. § 1915A (district court is required, as soon as practicable, to review a complaint by a prisoner or detainee seeking redress against a governmental entity, officer, or employee, to determine whether it contains a cognizable claim). In an Initial Review Order dated August 17, 2010, the court dismissed the action against the City pursuant to § 1915A(b)(1) on the ground that the complaint contained no allegations against the City; and it dismissed the action against the Correctional Center on the ground that the Correctional Center—an institution of the State of Connecticut—is not a suable “ person” under § 1983. The court did not immediately dismiss Grullon's action against the Warden.

The Warden thereafter moved pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss the claims against him in his official capacity, arguing that the damages claims were barred by the Eleventh Amendment and that the requests for equitable relief were moot because Grullon was no longer being detained at NHCC, having been transferred to another facility. The Warden moved pursuant to Rule 12(b)(6) to dismiss the claims against him in his individual capacity on the grounds that the complaint failed to assert a plausible claim of any constitutional violation and failed to allege the Warden's personal involvement in any of the alleged deprivations.

Grullon, in opposition to the motion, argued that one means of establishing a supervisory official's liability for a constitutional violation is to show that the official “ after learning of the violation through a report or appeal, failed to remedy the wrong.” ( Grullon Response to Defendant's Motion to Dismiss (“Grullon Response” or “ Response”) ¶ 6 (citing *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir.1986)) (capitalization omitted).) Grullon attached to his Response a copy of a letter he had written



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and addressed to the Warden, bearing the handwritten notation “ Sent 4/18/10” (“G rullon Letter” or “ Letter”). In the Letter, Grullon complained of, inter alia, the lack of a law library, thick dust clogging the vents in his cell, and inadequate volume on the telephones available to inmates. In his opposition to the motion to dismiss, Grullon requested that, if the court found the allegations in his complaint insufficient with respect to the Warden's personal responsibility, he “ be allowed to amend his complaint.” (Grullon Response ¶ 11 (capitalization omitted).)

In a Ruling on Motion To Dismiss, dated July 8, 2011, reported at 2011 WL 2680843, the district court granted the Warden's motion to dismiss all of Grullon's claims. The court ruled that as to the claims against the Warden in his official capacity, the claims for damages were barred by the Eleventh Amendment and the claims for equitable relief were moot because Grullon was no longer being detained at NHCC. See *id.* at \*2. As to the claims against the Warden in his individual capacity, the court ruled that Grullon had failed to state a claim on which relief can be granted because he did not show that

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the Warden was personally involved in the alleged constitutional deprivations. See *id.* at \*3– \*4.

\*3 With regard to the individual-capacity claims, the district court stated, inter alia, that Grullon does not mention the Warden of NHCC other than in the caption of the complaint and description of defendants. Grullon does not allege that the Warden was directly involved in or knew about the alleged unconstitutional conditions of confinement at NHCC. Nor does Grullon claim that he made the Warden aware of the objectionable conditions. *Id.* at \*3 (emphasis added). The court noted that “[i]n response to the motion to dismiss, Grullon submits a copy of a letter that he claims to have sent to the Warden on April 18, 2010 regarding certain conditions of confinement at NHCC.” *Id.* But the court stated that it could not consider the Letter on the motion to dismiss: In reviewing a motion to dismiss, ... the Court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.... This letter was not attached to the complaint or referenced in the complaint and does not constitute a matter of which the court may take judicial notice. *Id.* (internal quotation marks omitted). The court added that even if it were to take judicial notice of the Letter, the complaint would fail because “ Grullon d[id] not allege that the Warden actually received the letter or whether he took any action in response to the letter.” *Id.* at \*4. The court further stated that, in any event, a supervisory official's mere receipt of a letter complaining about unconstitutional conduct is not enough to give rise to personal involvement on the part of the official. See *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir.1997) (prison official who received letter from inmate and forwarded it to subordinate for investigation and response was not personally involved in depriving inmate of constitutional right).... Accordingly, the



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motion to dismiss is granted on the ground that Grullon did not allege the personal involvement of the Warden in the claimed unconstitutional conditions of confinement at NHCC. 2011 WL 2680843, at \*4. The district court denied Grullon's request for leave to amend his complaint to add allegations of notice to the Warden based on the Letter, ruling that there was an insufficient interval between the date of the letter and the filing of the complaint for Grullon to have exhausted his administrative remedies: It is apparent that any attempt to amend the complaint to add Grullon's claim that he sent a letter to the Warden on April 18, 2010 would be futile because Grullon did not allow the Warden sufficient time to respond to the letter before filing this case. State of Connecticut Administrative Directive 9.6(6)(A) requires an inmate to attempt to informally resolve his complaints about conditions prior to filing a formal grievance. A prison official is to respond to an informal written attempt at resolution within fifteen calendar days of receipt of the written request. If the letter to the Warden is construed as Grullon's attempt to informally resolve his complaints about various conditions at New Haven Correctional and it is assumed that the Warden received it at the earliest on April 18, 2010, the day it was written, the Warden was required to respond on or before May 3, 2010. The complaint is dated May 1, 2010. Furthermore, Grullon does not allege that he took any other steps to exhaust his administrative remedies prior to filing this lawsuit. \*4 2011 WL 2680843, at \*4 n. 2 (emphases added). Judgment was entered dismissing the complaint in its entirety, with prejudice. Grullon appealed and moved in this Court for in forma pauperis status and the assignment of counsel. We granted the motions with respect to Grullon's claims against the Warden in his individual capacity, dismissing the appeal with respect to the official-capacity claims. Our order did not mention the other defendants named in the complaint; and Grullon's brief on appeal makes no argument that the district court

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erred in dismissing claims against those defendants.

II. DISCUSSION On appeal, Grullon, now represented by counsel, pursues the claims asserted against the Warden in his individual capacity, arguing principally that the district court erred in dismissing those claims without granting leave to file an amended complaint to allege that, based on Grullon's April 2010 Letter, the Warden had sufficient notice of the conditions complained of to expose him to personal liability. The Warden urges us to uphold the district court's rulings or, in the alternative, to affirm on the basis that Grullon's "conclusory allegations are insufficient to state a plausible claim that any constitutional violations actually occurred" (Warden's brief on appeal at 6). For the reasons that follow, we conclude that Grullon's request to file an amended complaint should have been granted. A. The Sufficiency of the Complaint

[1] It is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, inter alia, the defendant's personal involvement in the alleged constitutional deprivation. See, e.g., *Back v. Hastings on Hudson Union Free School District*, 365



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F.3d 107, 122 (2d Cir.2004); Sealey v. Giltner, 116 F.3d 47, 51 (2d Cir.1997) ( “ Sealey ”); Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir.1995) ( “ Colon ”); Williams v. Smith, 781 F.2d 319, 323 (2d Cir.1986) ( “ Williams ”). We have previously held that [t]he personal involvement of a supervisory defendant may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. Colon, 58 F.3d at 873 (emphases added); see

Williams, 781 F.2d at 323– 24. Although the Supreme Court's decision in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations, we need not reach Iqbal's impact on Colon in this case, for Grullon's initial complaint did not adequately plead the Warden's personal involvement even under Colon.

\*5 [2][3] In reviewing the dismissal of a complaint for failure to state a claim on which relief can be granted, “ we view the facts alleged in the complaint in the light most favorable to the appellant[ ],” Chase Group Alliance LLC v. City of New York Department of Finance, 620 F.3d 146, 148 (2d Cir.2010), “ construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor,” id. at 150 (internal quotation marks omitted). Further, we must interpret the factual allegations of a pro se complaint “ to raise the strongest arguments that they suggest.” Harris v. City of New York, 607 F.3d 18, 24 (2d Cir.2010) (internal quotation marks omitted); see, e.g., Sims v. Blot, 534 F.3d 117, 133 (2d Cir.2008) (“courts are ... to construe a pro se litigant's pleadings and motions liberally”).

[4] Even within this framework, we agree with the district court that Grullon's complaint, as filed, did not sufficiently allege the Warden's personal involvement in or awareness of the health, safety, and communications issues raised by Grullon. There were no such direct allegations; there were no indirect allegations sufficient to permit an inference the Warden had acted or failed to act in any of the ways that would subject him to personal liability for the deprivations alleged by Grullon. We conclude that the district court did not err in dismissing Grullon's claims against the Warden in his individual capacity for lack of sufficient allegations of the Warden's personal involvement.

We reach a different conclusion with respect to the denial of Grullon's request to amend. B. The Denial of Permission To Amend

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[5][6][7] When a party requests leave to amend his complaint, permission generally should be freely granted. See, e.g., *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); Fed.R.Civ.P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”). “A pro se complaint ‘s hould not [be] dismiss[ed] without [the Court’s] granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.’” *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir.2010) (quoting *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir.1991)); see, e.g., *J.S. v. T’Kach*, 714 F.3d 99, 103 (2d Cir.2013); *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir.2009); *id.* at 184 (upholding district court’s ruling that pro se plaintiff’s complaint failed to allege that supervisors “were aware of the violations, that grievances sent to the supervisors notified them of constitutional violations, or that the supervisors acted or failed to act in a way that caused any constitutional violations,” but vacating the with-prejudice dismissal and remanding with the instruction that the plaintiff be given leave to replead because “[i]t is possible that [he] could remedy the inadequacies identified by the district court” (internal quotation marks omitted)). Leave to amend may properly be denied if the amendment would be “futil[e].” *Foman*, 371 U.S. at 182, 83 S.Ct. 227.

\*6 [8][9] A district court’s denial of a request for leave to amend is reviewed for abuse of discretion. See, e.g., *id.*; *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir.2012) (“*Anderson*”), cert. denied, — — U.S. — —, 133 S.Ct. 846, 184 L.Ed.2d 655 (2013); *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 321 (2d Cir.2010) (“*Starr*”), cert. denied, — — U.S. — —, 131 S.Ct. 901, 178 L.Ed.2d 803 (2011). “An abuse of discretion may consist of an erroneous view of the law, a clearly erroneous assessment of the facts, or a decision that cannot be located within the range of permissible decisions.” *Anderson*, 680 F.3d at 185; see, e.g., *Sims v. Blot*, 534 F.3d at 132.

[10] In the present case, although the district court properly described the standard for dismissal for failure to state a claim, the court did not—other than indicating that leave to amend could be denied if it would be futile—discuss other principles governing motions to amend, e.g., that motions to amend should be granted

freely in the interests of justice, that a pro se complaint generally should not be dismissed without granting the plaintiff leave to amend at least once, and that a pro se plaintiff’s proposed amended complaint should be construed to raise the strongest arguments it suggests.

Although Grullon had not proffered a formal proposed amended complaint, he had asked that he “be allowed to amend his complaint” if the court found his allegations as to the Warden to be insufficient (Grullon Response ¶ 11 (capitalization omitted)), and he had submitted a copy of the April 18, 2010 Letter he claims he sent to the Warden complaining of the NHCC conditions. The Letter to the Warden plus the allegations of Grullon’s initial complaint were sufficient to “give[ ] an[ ] indication that a valid claim might be stated,” *Chavis v. Chappius*, 618 F.3d at 170 (internal quotation marks omitted).



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[11] We disagree with the district court's decision to disregard the Letter on the basis that Grullon did “not allege that the Warden actually received the letter or whether he took any action in response to the letter,” 2011 WL 2680843, at \*4. “[P]ersonal involvement is a question of fact,” Williams, 781 F.2d at 323; and Sealey, the principal case invoked by the district court (and by the Warden (see Warden's brief on appeal at 9)), did not involve a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. Rather, the pertinent claim in that case was dismissed on summary judgment, see Sealey, 116 F.3d at 51, following discovery, see *id.* at 50. As the district court noted in the present case, the supervisory official in Sealey “who received [the] letter from [the] inmate [had] forwarded it to [a] subordinate for investigation and response,” 2011 WL 2680843, at \*4; see Sealey, 116 F.3d at 51. Thus the dismissal of the claim against the supervisor in Sealey was affirmed neither on the basis of the pleading nor on the ground that the supervisor had merely received the inmate's letter; rather, the dismissal was affirmed on the ground that, after discovery, the record warranted summary judgment in favor of the supervisor because it showed that he had in fact taken steps to have the prisoner's grievance resolved.

\*7 [12] Here, the district court dismissed Grullon's action with prejudice on the basis of his initial pleading, denying him leave to file an amended complaint alleging

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that he in fact sent his Letter to the Warden complaining of prison conditions. At the pleading stage, even if Grullon had no knowledge or information as to what became of his Letter after he sent it, he would be entitled to have the court draw the reasonable inference—if his amended complaint contained factual allegations indicating that the Letter was sent to the Warden at an appropriate address and by appropriate means—that the Warden in fact received the Letter, read it, and thereby became aware of the alleged conditions of which Grullon complained. It is of course possible that the Warden read the Letter and took appropriate action or that an administrative procedure was in place by which the Warden himself would not have received the Letter addressed to him; but those are potential factual issues as to personal involvement that likely cannot be resolved without development of a factual record. As we have previously held, “when a pro se plaintiff brings a colorable claim against supervisory personnel, and those supervisory personnel respond with a dispositive motion grounded in the plaintiff's failure to identify the individuals who were personally involved, under circumstances in which the plaintiff would not be expected to have that knowledge, dismissal should not occur without an opportunity for additional discovery.” *Davis v. Kelly*, 160 F.3d 917, 922 (2d Cir.1998). We conclude that the district court should not have denied leave to amend for lack of allegations as to the Warden's actual receipt of the Letter and as to his response.

Finally, the district court erred in denying leave to amend the complaint on the ground that amendment would be “futile because” the complaint was dated May 1, and assuming that the Warden received the Letter on April 18, Grullon failed to give the Warden 15 days to act “prior to



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filing this lawsuit,” 2011 WL 2680843, at \*4 n. 2. First, although the court assumed *arguendo* (quite generously) that Grullon's Letter dated April 18 would have been received by the Warden on that date, the finding that the complaint that was “dated” May 1, *id.*, was “fil[ed]” on May 1, *id.*, is contrary to the district court records. The complaint as it appears in the record was date-stamped by the district court as “F ILED 2010 MAY 18”; and the district court docket sheets state that the complaint was filed on May 18.

[13] More importantly, the court's legal framework

for assessing the sufficiency of Grullon's proposal to amend his complaint was flawed, because although claims relating to “prison conditions” are subject to the PLRA's exhaustion requirement, see, e.g., *Porter v. Nussle*, 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), “failure to exhaust is an affirmative defense,” and “inmates are not required to specially plead or demonstrate exhaustion in their complaints,” *Jones v. Bock*, 549 U.S. 199, 216, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007); see, e.g., *Giano v. Goord*, 380 F.3d 670, 675 (2d Cir.2004); *Jenkins v. Haubert*, 179 F.3d 19, 28–29 (2d Cir.1999). Thus, even if there were fewer than 15 days between the Warden's receipt of Grullon's Letter and Grullon's filing of his complaint, that would not have affected the complaint's sufficiency. For all of the above reasons, we conclude that the district court did not properly exercise its discretion in refusing to allow Grullon to amend his complaint.

\*8 We reject the Warden's contention that, without regard to the issue of personal responsibility, we should affirm the judgment dismissing the complaint with prejudice and without leave to amend on the ground that Grullon has failed to allege constitutional violations. Allegations that a prisoner or detainee was denied meaningful access to the courts, leaving him unable to assert an allegedly legitimate legal claim, see generally *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), and allegations of deliberate indifference to serious threats to the well-being or safety of a person in custody, such as unhealthy extremes in temperature, see generally *Gaston v. Coughlin*, 249 F.3d 156, 165–66 (2d Cir.2001), or unhealthy air conditions in his cell, see, e.g., *Benjamin v. Fraser*, 343 F.3d 35, 52 (2d Cir.2003), overruled on other grounds, *Caiozzo v. Koreman*, 581 F.3d 63, 71 (2d Cir.2009), have been held sufficient to withstand a motion to dismiss for failure to state a claim on which relief can be granted.

**CONCLUSION** We have considered all of the Warden's contentions on this appeal and have found them to be without merit. The judgment of the district court is vacated to the extent that it dismissed the claims against the Warden in his

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individual capacity with prejudice and without leave to file an amended complaint, and the matter is



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remanded for further proceedings not inconsistent with this opinion. In all other respects, the judgment of the district court is affirmed.

FN\* Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation. C.A.2 (Conn.),2013. Grullon v. City of New Haven --- F.3d ----, 2013 WL 3023464 (C.A.2 (Conn.)) END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court,

N.D. New York. Troy GARRETT, Plaintiff,

v. Edward REYNOLDS, Superintendent, Mohawk Corr. Facility; James A. Mance, Deputy Superintendent of Programs; John O'Reilly, FN1

Deputy Superintendent; J. Burge, First Deputy; M. Maher, DSS; R. Centore,

Correctional Officer, Defendants. FN1. In this case, the defendants maintain and the docket confirms that defendant John O'Reilly has never been served. Service must be made upon a defendant within 120 days of filing the complaint or any claims against that defendant will be dismissed. See Fed.R.Civ.P. 4(m). The original complaint, which named O'Reilly, was filed on November 26, 1999, and the amended complaint was filed on July 13, 2001. However, O'Reilly was never served. Since this defendant has never been served, this court lacks jurisdiction over him, and this court recommends the dismissal of this defendant.

No. Civ.9:99CV2065NAMGLS.

Oct. 7, 2003. Troy Garrett, Peekskill, NY, Plaintiff, pro se. Hon. Eliot Spitzer, Attorney General State of New York, Syracuse, NY, for the Defendants. Maria Moran, Asst. Attorney General, of counsel.

REPORT-RECOMMENDATION SHARPE, Magistrate J.

I. Introduction FN2 FN2. This matter was referred to the undersigned for a Report-Recommendation by the Hon.

Norman A. Mordue, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c). \*1 Plaintiff, pro se Troy Garrett filed an action under 42 U.S.C. § 1983 claiming that the



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defendants violated his civil rights when they retaliated against him for his activities as an IGRC representative by subjecting him to verbal harassment, physical abuse and subsequently, a transfer. Garrett also claims that the supervisory defendants failed to properly investigate his complaints and failed to train/supervise their employees. This court recommends denying the motion for summary judgment in part and granting it in part.

II. Procedural History On July 13, 2001, Garrett filed an amended complaint against the defendants claiming that they violated his civil rights under the First, Sixth Eighth, and Fourteenth Amendments. FN3

On September 28, 2001, the defendants filed a motion for summary judgment. On January 18, 2002, this court issued an order informing Garrett of his obligation to file a response and extended his time to respond for thirty days. On April 24, 2002, this court granted an additional sixty days to respond to the defendants' motion. Despite having been given multiple opportunities to respond, Garrett has failed to file a response.

FN3. Although Garrett claims to be raising violations under the Sixth, Eighth, and Fourteenth Amendments, the only viable claim based on this court's interpretation of the complaint is under the First Amendment for retaliation.

III. Facts FN4 FN4. The facts are taken from the defendants' statement of undisputed material facts since Garrett failed to file a response. On June 17, 1999, Garrett filed a grievance against © 2013 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2003 WL 22299359 (N.D.N.Y.) (Cite as: 2003 WL 22299359 (N.D.N.Y.))

Officer Kelley for verbal harassment. FN5

This grievance was denied by the Central Office Review Committee (CORC) on July 21, 1999. On March 19, 2000, Garrett filed a grievance claiming that defendant Burge used intimidation tactics. Defendant Reynolds investigated the grievance and it was denied based on a finding that no harassment occurred. Garrett appealed to the CORC and they denied the grievance on April 5, 2000. On April 10, 2000, defendant Centore wrote a misbehavior report against Garrett for creating a disturbance and employee harassment. On April 12, 2000, Lieutenant Manell presided over Garrett's Tier 2 disciplinary hearing and he was found guilty of both charges. He was given a 21 day recreation penalty, and loss of packages and commissary. However, his recreation penalty was suspended and deferred. Garrett appealed the determination and it was affirmed on April 19, 2000.

FN5. Not a party in this suit. On April 17, 2000, Garrett filed a grievance against Centore for harassment. Burge denied his grievance on May 4, 2000, and subsequently, the CORC denied it. On May 12, 2000, Garrett sent a letter to Burge concerning further harassment by Centore. On May 16, 2000, Garrett filed another grievance against Centore for harassment. His grievance was denied on



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May 26, 2000. After Garrett appealed, his grievance was again denied by the CORC. On June 22, 2000, the Superintendent's Office received a letter from Garrett alleging that Centore threw a piece of paper with a picture of a plunger and the words "always gets the job done" into his cell. He wrote a grievance against Centore for harassment due to the paper that he threw into his cell. Burge forwarded the grievance to the CORC on August 10, 2000. The CORC accepted the grievance on August 30, 2000, in order to investigate.

\*2 On June 23, 2000, the Inspector General's Office interviewed Garrett at the Mohawk Correctional Facility regarding his complaints of Centore. That same day, Captain Naughton filed an administrative segregation recommendation. On June 29, 2000, an administrative segregation hearing was held. On July 14, 2000, Garrett was transferred FN6

to the Mid-State Correctional Facility. FN6. The defendants suggest that Garrett has

failed to exhaust his administrative remedies concerning his transfer. They claim that he agreed to the transfer and participated in the administrative hearing which resulted in his transfer. The issue of transfer will not be addressed in this Report-Recommendation because the court has insufficient information to determine whether he exhausted his remedies. Finally, Garrett filed a claim alleging that his property was lost or damaged on October 8, 1999. However, he was paid \$75.00 for this claim and he signed a release on December 13, 1999.

### IV. Discussion A. Legal Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); accord *F.D.I.C. v. Giammettei*, 34 F.3d 51, 54 (2d Cir.1994). The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir.1999). "When a motion for summary judgment is made and supported ... an adverse party may not rest upon the mere allegations or denials of the ... pleading, but the adverse party's response, by affidavits or as otherwise provided in [Federal Rule of Civil Procedure 56(e)], must set forth specific facts showing that there is a genuine issue for trial." *St. Pierre v. Dyer*, 208 F.3d 394, 404 (2d Cir.2000). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Rexford Holdings, Inc. v. Biderman*, 21 F.3d 522, 525 (2d Cir.1994)(alternation in original) (citation omitted). However, it is well settled that on a motion for summary judgment, the court must construe the evidence in the light most favorable to the non-moving party. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir.1999).

Furthermore, in a pro se case, the court must view the submissions by a more lenient standard than that accorded





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to “ formal pleadings drafted by lawyers.” Haines v. Kerner, 404 U .S. 519, 520 (1972); see Estelle v. Gamble, 429 U.S. 97, 106 (1976); Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994)(a court is to read a pro se party's “ supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest” ). Indeed, the Second Circuit has stated that “ [i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.” Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir.1983). Any ambiguities and inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir.1990); see LaFond v. General Physics Serv. Corp., 50 F.3d 165, 171 (2d Cir.1995).

\*3 This liberal standard, however, does not excuse a pro se litigant from following the procedural formalities of summary judgment. Showers v. Eastmond, 00 CIV. 3725, 2001 WL 527484, at \*2 (S.D.N.Y. May 16, 2001). More specifically, Local Rule 7.1(a)(3) of this court specifically provides that “ any facts set forth in the [moving party's] Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.” Local Rule 7.1(a)(3) further requires that the “ non-movant shall file a Statement of Material Fact which mirrors the movant's statement in matching numbered paragraphs and which set forth a specific reference to the record where the material fact is alleged to arise.” The courts of the Northern District have adhered to a strict application of Local Rule 7.1(a)(3)'s requirement on summary judgment motions. Giguere v. Racicot, 00-CV-1178, 2002 WL 368534, at \*2 (N.D.N.Y. March 1, 2002)(interalia citing Bundy Am. Corp. v. K-Z Rental Leasing, Inc., 00-CV-260, 2001 WL 237218, at \*1 (N.D.N.Y. March 9, 2001)).

Furthermore, this Circuit adheres to the view that nothing in Rule 56 imposes an obligation on the court to conduct a search and independent review of the record to find proof of a factual dispute. Amnesty America v. Town of West Hartford, 288 F.3d 467, 470 (2d Cir.2002). As long as the local rules impose a requirement that parties provide specific record citations in support of their statement of material facts, the court may grant summary judgment on that basis. Id. at 470-71.

In this case, Garrett did not file a response to the motion for summary judgment. Consequently, this court will accept the properly supported facts contained in the defendants' 7.1 Statement (Dkt. No. 49 ) as true for purposes of this motion. FN7

With this standard in mind, the court now turns to the sufficiency of Garrett's claims.

FN7. The court notes that this does not apply to the various conclusions of law contained in the defendants' 7.1 Statement. B. Eleventh Amendment



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In Garrett's complaint, he raises claims against the defendants in their official and individual capacity. The Eleventh Amendment provides that: “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Amend. XI. Although the Amendment does not specifically prohibit suits against a state by its own citizens, the Supreme Court has consistently applied that immunity to such cases. See *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir.1999)(citing *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974)). Moreover, it is well established that Eleventh Amendment immunity applies not only when a state is a named defendant, but when liability must be paid from state coffers. See *New York City Health & Hosp. Corp. v. Perales*, 50 F.3d 129, 134 (2d Cir.1995)(citing *Edelman*, 415 U.S. at 665); *Dawkins v. State of New York*, 93-CV-1298, 1996 WL 156764, at \*2 (N.D.N.Y. Mar. 28, 1996).

\*4 In this case, Garrett raises claims against the defendants in their official and individual capacities. Since the Eleventh Amendment bars official capacity claims against these state officers, this court recommends dismissal of Garrett's claims against the defendants in their official capacity. C. Retaliation

In this case, Garrett claims that during the course of his appointment as an IGRC representative, he has been subjected to repeated acts of harassment, both verbal and

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physical, threatened with physical assaults, placed into disciplinary confinement in the SHU, and transferred. FN8 The Second Circuit has held that retaliation against a prisoner for pursuing a grievance is actionable under § 1983. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir.1996). Moreover, the Second Circuit has recognized both the near inevitability of decisions and actions by prison officials to which prisoners will take exception and the ease with which claims of retaliation may be fabricated. Thus, prisoners' claims of retaliation are examined with skepticism and particular care. See *Flaherty v. Coughlin*, 713 F.2d 10 (2d Cir.1983).

FN8. This case turns on the interpretation of the complaint. Garret's complaint is not a model of clarity and as noted, he has failed to file a response to the motion for summary judgment. Nonetheless, a careful reading of Garrett's opening paragraph under the title “ Facts” compels this court to interpret this complaint as one claiming retaliation for his activities and status as an IGRC representative. In order for a plaintiff to prevail on a First Amendment retaliation claim, a plaintiff must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected; (2) that the defendant took adverse action against the plaintiff; and, (3) that there was a causal connection between the protected speech and the adverse action. See *Dawes v. Walker*,

FN9



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239 F.3d 489, 492 (2d Cir.2001) (citation omitted) overruled on other grounds, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). If Garrett makes these showings, DOCS may evade liability if it demonstrates that it would have disciplined or transferred him “ ‘ even in the absence of the protected conduct.” ’ *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir.2003) (citations omitted).

FN9. Dawes' complaint was dismissed pursuant to Fed.R.Civ.P. 12(b)(6). An inmate has a constitutional right to be protected from retaliation based upon his activities as an IGRC representative. *Alnutt v. Cleary*, 913 F.Supp. 160, 170 (W.D.N.Y.1996). However, a claim brought under “ 42 U.S.C. § 1983 is not designed to rectify harassment or verbal abuse.” *Gill v. Hoadley*, 261 F.Supp 2d 113, 129

(N.D.N.Y.2003)(citing *Alnutt*, 913 F.Supp at 165-66)). Ordinarily, a claim for verbal harassment is not actionable under 42 U.S.C. § 1983. *Aziz Zarif Shabazz v. Picco*, 994 F.Supp. 460, 474 (S.D.N.Y.1998). Moreover, “ verbal harassment or profanity alone, unaccompanied by an injury no matter how inappropriate, unprofessional, or reprehensible it might seem, does not constitute the violation of any federally protected right and therefore is not actionable under 42 U.S.C. § 1983.” *Aziz Zarif Shabazz*, 994 F.Supp. at 474.

In this case, Garrett claims that defendant Centore harassed him for his activities as an IGRC representative. Garrett also claims that he was removed as an IGRC representative when he was transferred. In addition, Garrett claims that defendants Reynolds, Mance, Burger and Maher failed to properly investigate his allegations against Centore. Garrett claims that these defendants failed to properly investigate his claims in retaliation for his activities as an IGRC representative.

\*5 More specifically, Garrett claims that Reynolds and Mance recalled IGRC passes for one day in order to interfere with an investigation inquiry into a correctional officer's conduct involving inmates who were left in the yard during inclement weather. Finally, Garrett claims that his property was destroyed while he was in the SHU. FN10 Garrett filed grievances against Centore in April, May, and June of 2000. One of his complaints involved Centore throwing a folded piece of paper into his cell which had a picture of a plunger with the words “ always gets the job done” on it. On June 23, 2000, he was placed in administrative segregation in the SHU. Three weeks later he was transferred. FN11

FN10. However, the defendants provide the court with documents which show that he was paid \$75.00 in settlement of this claim. FN11. The defendants maintain that Garrett failed to exhaust this claim. At this juncture, it is unclear whether or not he exhausted this claim. As such, this court cannot, as a matter of law, recommend dismissal because the court has insufficient information to determine this issue.

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Viewing the facts in the light most favorable to Garrett, the non-moving party, this court cannot, as a matter of law, find that Garrett fails to state a claim for which relief can be granted. He claims that he was retaliated against for his activities as an IGRC representative. As noted, verbal harassment alone will not constitute a violation of a prisoner's constitutional rights but in this case, it appears that he was transferred for his activities as an IGRC representative. The defendants rely on numerous grievances which were denied by the CORC to show that their actions were proper. They also claim that Garrett has failed to show injury, however, at this juncture of the litigation with virtually no discovery in this case, this court cannot recommend dismissal as a matter of law. D. Personal Involvement

It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995)(citation omitted). Since there is no respondeat superior liability, the defendant must be shown to have personal involvement in the alleged deprivation of rights. *Al- Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065 (2d Cir.1989). Supervisory officials cannot be held liable under § 1983 solely for the acts of their subordinates. See *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-695 (2d Cir.1978). However, a supervisory official can be held liable for constitutional violations if he or she: (1) directly participated in the violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) created a custom or policy fostering the violation after learning of it; or (4) was grossly negligent in supervising subordinates who caused the violation. *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir.1997) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986)).

Garrett contends that defendants Reynolds and Mance allowed staff members under their supervision to violate his rights. More specifically, Mance refused to properly investigate Garrett's complaints. Garrett also claims that defendant Burge refused to grant his request for redress against defendant Centore. Finally, Garrett claims that the defendants collectively failed to properly train and supervise their employees.

\*6 The defendants contend that the claims against the supervisory defendants should be dismissed for lack of personal involvement. However, this court finds this contention without merit since it appears that all of the defendants were involved in the investigation process of Garrett's complaint and he accuses all of them of continuing the alleged constitutional violation by failing to properly investigate the grievances he filed. Accordingly, this court recommends denying the defendants' motion for summary judgment based on the lack of personal involvement.

WHEREFORE, for the foregoing reasons, it is hereby RECOMMENDED, that Garrett's claims against the defendants in their official capacity under the Eleventh Amendment should be dismissed since these claims are barred; and it is further

RECOMMENDED, that defendant O'Reilly be dismissed since he was never served; and it is further



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RECOMMENDED, that the defendants' motion for summary judgment be denied in all other respects; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation upon the parties by regular mail.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within TEN days. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. Roldan v. Racette, 984 F.2d 85 (2d Cir.1993); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e). N.D.N.Y.,2003. Garrett v. Reynolds Not Reported in F.Supp.2d, 2003 WL 22299359 (N.D.N.Y.) END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court, N.D. New York.

Jerome WALDO, Plaintiff,

v. Glenn S. GOORD, Acting Commissioner of New York State Department of Correctional Services; Peter J. Lacy, Superintendent at Bare Hill Corr. Facility; Wendell Babbie, Acting Superintendent at Altona Corr. Facility; and John Doe, Corrections Officer at Bare Hill

Corr. Facility, Defendants. No. 97-CV-1385 LEK DRH.

Oct. 1, 1998.

Jerome Waldo, Plaintiff, pro se, Mohawk Correctional Facility, Rome, for Plaintiff.

Hon. Dennis C. Vacco, Attorney General of the State of New York, Albany, Eric D. Handelman, Esq., Asst. Attorney General, for Defendants.

DECISION AND ORDER

KAHN, District J.



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\*1 This matter comes before the Court following a Report-Recommendation filed on August 21, 1998 by the Honorable David R. Homer, Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and L.R. 72.3(c) of the Northern District of New York.

No objections to the Report-Recommendation have been raised. Furthermore, after examining the record, the Court has determined that the Report-Recommendation is not clearly erroneous. See Fed.R.Civ.P. 72(b), Advisory

Committee Notes. Accordingly, the Court adopts the Report-Recommendation for the reasons stated therein.

Accordingly, it is

ORDERED that the Report-Recommendation is APPROVED and ADOPTED; and it is further

ORDERED that the motion to dismiss by defendants is GRANTED; and it is further

ORDERED that the complaint is dismissed without prejudice as to the unserved John Doe defendant pursuant to Fed.R.Civ.P. 4(m), and the action is therefore dismissed in its entirety; and it is further

ORDERED that the Clerk serve a copy of this order on all parties by regular mail.

IT IS SO ORDERED. HOMER, Magistrate J.

### REPORT-RECOMMENDATION AND ORDER FN1

FN1. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

The plaintiff, an inmate in the New York Department of Correctional Services (“ DOCS” ), brought this pro se action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that while incarcerated in Bare Hill Correctional Facility (“ Bare Hill” ) and Altona Correctional Facility (“ Altona” ), defendants violated his rights under the Eighth and Fourteenth Amendments. FN2

In particular, plaintiff alleges that prison officials maintained overcrowded facilities resulting in physical and emotional injury to the plaintiff

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and failed to provide adequate medical treatment for his injuries and drug problem. Plaintiff seeks declaratory relief and monetary damages. Presently pending is defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b). Docket No. 18. For the reasons which follow, it is recommended that the motion be granted in its entirety.

FN2. The allegations as to Bare Hill are made against defendants Goord, Lacy, and Doe. Allegations as to Altona are made against Goord and Babbie.

### I. Background

Plaintiff alleges that on August 21, 1997 at Bare Hill, while he and two other inmates were playing cards, an argument ensued, and one of the two assaulted him. Compl., ¶ 17. Plaintiff received medical treatment for facial injuries at the prison infirmary and at Malone County Hospital. Id. at ¶¶ 18-19. On September 11, 1997, plaintiff was transferred to Altona and went to Plattsburgh Hospital for x-rays several days later. Id. at ¶ 21.

Plaintiff's complaint asserts that the overcrowded conditions at Bare Hill created a tense environment which increased the likelihood of violence and caused the physical assault on him by another inmate. Id. at ¶¶ 10-11. Additionally, plaintiff contends that similar conditions at Altona caused him mental distress and that he received constitutionally deficient medical treatment for his injuries. Id. at ¶¶ 21-22. The complaint alleges that Altona's lack of a drug treatment program and a dentist or specialist to treat his facial injuries constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. Id. at ¶¶ 22, 27-28.

### II. Motion to Dismiss

\*2 When considering a Rule 12(b) motion, a court must assume the truth of all factual allegations in the complaint and draw all reasonable inferences from those facts in favor of the plaintiff. *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir.1996). The complaint may be dismissed only when “ it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Staron v. McDonald's Corp.*, 51 F.3d 353, 355 (2d Cir.1995) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). “ The issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test.” *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir.1995) (citations omitted). This standard receives especially careful application in cases such as this where a pro se plaintiff claims violations of his civil rights. *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.), cert. denied, 513 U.S. 836, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994).

### III. Discussion



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### A. Conditions of Confinement

Defendants assert that plaintiff fails to state a claim regarding the conditions of confinement at Bare Hill and Altona. For conditions of confinement to amount to cruel and unusual punishment, a two-prong test must be met. First, plaintiff must show a sufficiently serious deprivation. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)); *Rhodes v. Chapman*, 452 U.S. 347, 348 (1981)(denial of the “minimal civilized measure of life's necessities”). Second, plaintiff must show that the prison official involved was both “aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]” and that the official drew the inference. *Farmer*, 511 U.S. at 837.

#### 1. Bare Hill

In his Bare Hill claim, plaintiff alleges that the overcrowded and understaffed conditions in the dormitory-style housing “resulted in an increase in tension, mental anguish and frustration among prisoners, and dangerously increased the potential for violence.” Compl., © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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¶ 11. Plaintiff asserts that these conditions violated his constitutional right to be free from cruel and unusual punishment and led to the attack on him by another prisoner. The Supreme Court has held that double-celling to manage prison overcrowding is not a per se violation of the Eighth Amendment. *Rhodes*, 452 U.S. at 347-48. The Third Circuit has recognized, though, that double-celling paired with other adverse circumstances can create a totality of conditions amounting to cruel and unusual punishment. *Nami v. Fauver*, 82 F.3d 63, 67 (3d Cir.1996). While plaintiff here does not specify double-celling as the source of his complaint, the concerns he raises are similar. Plaintiff alleges that overcrowding led to an increase in tension and danger which violated his rights. Plaintiff does not claim, however, that he was deprived of any basic needs such as food or clothing, nor does he assert any injury beyond the fear and tension allegedly engendered by the overcrowding. Further, a previous lawsuit by this plaintiff raised a similar complaint, that double-celling and fear of assault amounted to cruel and unusual punishment, which was rejected as insufficient by the court. *Bolton v. Goord*, 992 F.Supp. 604, 627 (S.D.N.Y.1998). The court there found that the fear created by the double-celling was not “an objectively serious enough injury to support a claim for damages.” *Id.* (citing *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir.1997)).

\*3 As in his prior complaint, plaintiff's limited allegations of overcrowding and fear, without more, are insufficient. Compare *Ingalls v. Florio*, 968 F.Supp. 193, 198 (D.N.J.1997) (Eighth Amendment overcrowding claim stated when five or six inmates are held in cell designed for one, inmates are required to sleep on floor, food is infested, and there is insufficient toilet paper) and *Zolnowski v.*



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County of Erie, 944 F.Supp. 1096, 1113 (W.D.N.Y.1996) (Eighth Amendment claim stated when overcrowding caused inmates to sleep on mattresses on floor, eat meals while sitting on floor, and endure vomit on the floor and toilets) with Harris v. Murray, 761 F.Supp. 409, 415 (E.D.Va.1990) (No Eighth Amendment claim when plaintiff makes only a generalized claim of overcrowding unaccompanied by any specific claim concerning the adverse effects of overcrowding). Thus, although overcrowding could create conditions which might state a violation of the Eighth Amendment, plaintiff has not alleged sufficient facts to support such a finding here. Plaintiff's conditions of confinement claim as to Bare

Hill should be dismissed.

### 2. Altona

Plaintiff also asserts a similar conditions of confinement claim regarding Altona. For the reasons discussed above, plaintiff's claim that he suffered anxiety and fear of other inmates in the overcrowded facility (Compl., ¶¶ 21-22) is insufficient to establish a serious injury or harm.

Plaintiff's second claim regarding Altona relates to the alleged inadequacies of the medical treatment he received. The government has an "obligation to provide medical care for those whom it is punishing by incarceration." Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The two-pronged Farmer standard applies in medical treatment cases as well. Hemmings v. Gorkczyk, 134 F.3d 104, 108 (2d Cir.1998). Therefore, plaintiff must allege facts which would support a finding that he suffered a sufficiently serious deprivation of his rights and that the prison officials acted with deliberate indifference to his medical needs. Farmer, 511 U.S. at 834.

Plaintiff alleges that the medical treatment available at Altona was insufficient to address the injuries sustained in the altercation at Bare Hill. Specifically, plaintiff cites the lack of a dentist or specialist to treat his facial injuries as an unconstitutional deprivation. Plaintiff claims that the injuries continue to cause extreme pain, nosebleeds, and swelling. Compl., ¶¶ 22 & 26. For the purposes of the Rule 12(b) motion, plaintiff's allegations of extreme pain suffice for a sufficiently serious deprivation. See Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir.1996).

Plaintiff does not, however, allege facts sufficient to support a claim of deliberate indifference by the named defendants. To satisfy this element, plaintiff must demonstrate that prison officials had knowledge of facts from which an inference could be drawn that a "substantial risk of serious harm" to the plaintiff existed and that the officials actually drew the inference. Farmer, 511 U.S. at 837. Plaintiff's complaint does not support, even when liberally construed, any such conclusion. Plaintiff offers © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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no evidence that the Altona Superintendent or DOCS Commissioner had any actual knowledge of his medical condition or that he made any attempts to notify them of his special needs. Where the plaintiff has not even alleged knowledge of his medical needs by the defendants, no reasonable jury could conclude that the defendants were deliberately indifferent to those needs. See *Amos v. Maryland Dep't of Public Safety and Corr. Services*, 126 F.3d 589, 610-11 (4th Cir.1997), vacated on other grounds, 524 U.S. 935, 118 S.Ct. 2339, 141 L.Ed.2d 710 (1998).

\*4 Plaintiff's second complaint about Altona is that it offers "no type of state drug treatment program for the plaintiff." Compl., ¶ 22. Constitutionally required medical treatment encompasses drug addiction therapy. *Fiallo v. de Batista*, 666 F.2d 729, 731 (1st Cir.1981); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 760-61 (3d Cir.1979). As in the *Fiallo* case, however, plaintiff falls short of stating an Eighth Amendment claim as he "clearly does not allege deprivation of essential treatment or indifference to serious need, only that he has not received the type of treatment which he desires." *Id.* at 731. Further, plaintiff alleges no harm or injury attributable to the charged deprivation. Plaintiff has not articulated his reasons for desiring drug treatment or how he was harmed by the alleged deprivation of this service. See *Guidry v. Jefferson County Detention Ctr.*, 868 F.Supp. 189, 192 (E.D.Tex.1994) (to state a section 1983 claim, plaintiff must allege that some injury has been suffered).

For these reasons, plaintiff's Altona claims should be dismissed.

### B. Failure to Protect

Defendants further assert that plaintiff has not established that any of the named defendants failed to protect the plaintiff from the attack by the other inmate at Bare Hill. Prison officials have a duty "to act reasonably to ensure a safe environment for a prisoner when they are aware that there is a significant risk of serious injury to that prisoner." *Heisler v. Kralik*, 981 F.Supp. 830, 837 (S.D.N.Y.1997) (emphasis added); see also *Villante v. Dep't of Corr. of City of N.Y.*, 786 F.2d 516, 519 (2d

Cir.1986). This duty is not absolute, however, as "not ... every injury suffered by one prisoner at the hands of another ... translates into constitutional liability." *Farmer*, 511 U.S. at 834. To establish this liability, *Farmer's* familiar two-prong standard must be satisfied.

As in the medical indifference claim discussed above, plaintiff's allegations of broken bones and severe pain from the complained of assault suffice to establish a "sufficiently serious" deprivation. *Id.* Plaintiff's claim fails, however, to raise the possibility that he will be able to prove deliberate indifference to any threat of harm to him by the Bare Hill Superintendent or the DOCS Commissioner. Again, plaintiff must allege facts which establish that these officials were aware of circumstances from which the inference could be drawn that the plaintiff was at risk of serious harm and that they actually inferred this. *Farmer*, 511 U.S. at 838.



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To advance his claim, plaintiff alleges an increase in “unusual incidents, prisoner misbehaviors, and violence” (Compl., ¶ 12) and concludes that defendants' continued policy of overcrowding created the conditions which led to his injuries. Compl., ¶ 10. The thrust of plaintiff's claim seems to suggest that the defendants' awareness of the problems of overcrowding led to knowledge of a generalized risk to the prison population, thus establishing a legally culpable state of mind as to plaintiff's injuries. Plaintiff has not offered any evidence, however, to support the existence of any personal risk to himself about which the defendants could have known. According to his own complaint, plaintiff first encountered his assailant only minutes before the altercation occurred. Compl., ¶ 17. It is clear that the named defendants could not have known of a substantial risk to the plaintiff's safety if the plaintiff himself had no reason to believe he was in danger. See *Sims v. Bowen*, No. 96-CV-656, 1998 WL 146409, at \*3 (N.D.N.Y. Mar.23, 1998)(Pooler, J.) (“I conclude that an inmate must inform a correctional official of the basis for his belief that another inmate represents a substantial threat to his safety before the correctional official can be charged with deliberate indifference”); *Strano v. City of New York*, No. 97-CIV-0387, 1998 WL 338097, at \*3-4 (S.D.N.Y. June 24, 1998) (when plaintiff acknowledged attack was “out of the blue” and no prior incidents had occurred to put defendants on notice of threat or danger, defendants could not be held aware of any substantial risk © 2010 Thomson Reuters. No Claim to Orig. US Gov.

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of harm to the plaintiff). Defendants' motion on this ground should, therefore, be granted.

### IV. Failure to Complete Service

\*5 The complaint names four defendants, including one “John Doe” Correctional Officer at Bare Hill. Defendants acknowledge that service has been completed as to the three named defendants. Docket Nos. 12 & 13. The “John Doe” defendant has not been served with process or otherwise identified and it is unlikely that service on him will be completed in the near future. See Docket No. 6 (United States Marshal unable to complete service on “John Doe”). Since over nine months have passed since the complaint was filed (Docket No. 1) and summonses were last issued (Docket entry Oct. 21, 1997), the complaint as to the unserved defendant should be dismissed without prejudice pursuant to Fed.R.Civ.P. 4(m) and N.D .N.Y.L.R. 4.1(b).

### V. Conclusion

WHEREFORE, for the reasons stated above, it is

RECOMMENDED that defendants' motion to dismiss be GRANTED in all respects; and

IT IS FURTHER RECOMMENDED that the complaint be dismissed without prejudice as to the



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unserved John Doe defendant pursuant to Fed.R.Civ.P. 4(m) and N.D.N.Y.L.R. 4.1(b); and it is

ORDERED that the Clerk of the Court serve a copy of this Report-Recommendation and Order, by regular mail, upon parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Roldan v.

Racette, 984 F.2d 85, 89 (2d Cir.1993); Small v. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

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United States District Court, S.D. New York. ELMA RT and NAGYKOROS CANNING FACTORY

RT, Plaintiffs,

v. LANDESMANN INTERNATIONAL MARKETING CORPORATION, Landesmann International Marketing Services GmbH, Mark Landesmann, individually, and

Tamas Batizi, individually, Defendants.

No. 98 CIV. 3662 LMM.

March 22, 2000.

MEMORANDUM AND ORDER

MCKENNA, D.J.

\*1 Plaintiffs Elma RT (“ Elma” ) and Nagykoros Canning Factory RT (“ Nagykoros” ), both Hungarian





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companies, brought this suit against defendants Landesmann International Marketing Corporation (“ LIMC” ), Mark Landesmann (“ Landesmann” ), Landesmann International Marketing Services GmbH (“ LIMS” ) and Tamas Batizi (“ Batizi” ), based on contracts for the sale of apple juice concentrate by plaintiffs to defendants. LIMC is a Delaware corporation with its principal place of business in New York, and Landesmann is LIMC's sole owner and CEO. LIMS is an Austrian corporation with a place of business in the United States, and Batizi is LIMS's managing director. The citizenship of Landesmann and Batizi is not specifically alleged, but the former is alleged to have been born in Austria but to reside in the United States, while the latter is alleged to be located in Austria.

Plaintiffs assert both federal question and diversity subject matter jurisdiction. Federal question subject matter jurisdiction is supplied by a claim under the Racketeer and Corrupt Organizations Act (“ RICO” ). On the face of the

amended complaint, however, diversity subject matter jurisdiction is not available, since both of the plaintiffs are alien corporations and at least one of the defendants, LIMS, is an alien as well. *Lloyds Bank PLC v. Norkin*, 817 F.Supp. 414, 417 (S.D.N.Y.1993) (collecting cases).

In their amended complaint, plaintiffs allege that LIMC committed breach of contract, fraud, and conversion. Plaintiff Nagykoros also seeks consequential damages against LIMC. In addition, plaintiffs jointly claim that defendants violated RICO, 18 U.S.C. § 1962(c).

Defendants move to dismiss plaintiffs' amended complaint on three grounds. First, they argue it is actually a supplemental complaint, which was served without leave of the court, in violation of Fed.R.Civ.P. 15(d) (“ Rule 15(d)” ). Second, they claim the RICO and conversion counts fail to state a claim under Fed.R.Civ.P. 12(b)(6) (“ Rule 12(b)(6)” ). Finally, they argue that the RICO count fails to plead fraud with particularity under Fed.R.Civ.P. 9(b) (“ Rule 9(b)” ). For the reasons set forth below, the Court denies defendants' motion to dismiss the complaint under Rule 15(d), but grants the motion to dismiss the conversion and RICO claims under Rule 12(b)(6). Because the RICO count is dismissed, the Court need not address whether that claim is pleaded with sufficient particularity under Rule 9(b).

### I. Background

#### A. Plaintiff Elma

The following background is based upon plaintiffs' amended complaint, which is based partially on information and belief.

On November 14, 1997, Landesmann entered into a contract with Elma whereby Elma agreed to provide LIMC with thirty containers (approximately six hundred tons) of apple juice concentrate.



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Landesmann agreed to pay fifty percent of the contract price upon dispatch, and the remaining fifty percent within thirty-five days of the © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 2 Not Reported in F.Supp.2d, 2000 WL 297197 (S.D.N.Y.) (Cite as: 2000 WL 297197 (S.D.N.Y.))

Bill of Lading.

\*2 Pursuant to the contract, Elma delivered thirty containers of concentrate to LIMC, which accepted them without objection. LIMC made the initial payment for one-half the total amount owed. However, LIMC made no further payments to Elma. Instead, on February 9, 1998 (approximately the day on which the remaining payments were due) Landesmann informed Elma that LIMC was rejecting all thirty containers on quality grounds. Landesmann further demanded replacement of the concentrate and immediate reimbursement for all payments already made by LIMC, including shipping costs.

In response, Elma directed LIMC not to dispose of the concentrate. In addition, Elma requested: 1) an independent laboratory be named for testing of the concentrate, with costs to be split equally between ELMA and LIMC; 2) proof that the concentrate was handled properly in transit and subsequent storage; and 3) that LIMC disclose the location of the concentrate.

Landesmann, however, agreed to permit inspection only under the following conditions: 1) LIMC retain the sole right to name any testing facility; 2) Elma bear sole responsibility for payment of the testing costs; 3) the testing facility be allowed to disclose the results only to LIMC; and 4) the identity and location of the inventory not be disclosed to Elma. Elma objected to these demands, but agreed to replace the concentrate. Landesmann notified Elma by letter that he would accept replacement only if it was tendered in the New York/New Jersey area, instead of in Hungary, the location specified in the contract. In addition, Landesmann demanded full reimbursement for all expenses and costs, including financing. Finally, he demanded that Elma arrange, test, and send a substantial portion of the replacement cargo within three business days of receiving Landesmann's letter. When Elma refused these demands, Landesmann resold the concentrate.

B. Plaintiff Nagykoros

The facts alleged by Nagykoros are similar to those

alleged by Elma. In November of 1997, LIMC entered into three separate contracts with Nagykoros whereby Nagykoros agreed to provide LIMC with fifty containers of apple juice concentrate. Fifty percent of the contract price was to be paid after dispatch and transfer of possession, and the remaining fifty percent was to be paid within forty-five days after arrival. Pursuant to the agreement, Nagykoros delivered the fifty containers to LIMC, which received them without objection. LIMC then paid for one-half of the amount due on the first ten containers delivered. On February 4, 1998, however, Landesmann notified Nagykoros that LIMC was rejecting all fifty containers of concentrate



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on quality grounds.

Nagykoros directed Landesmann not to dispose of the concentrate, and informed him that, under Hungarian law, Nagykoros would suffer severe consequential damages if the contract was not fulfilled. Nagykoros also requested information to enable the stock of concentrate to be properly examined, suggested a neutral quality control agency for testing, and offered to pay for the testing if Landesmann's claim proved justified. Landesmann refused to permit inspection and testing of the apple juice concentrate unless: 1) the quality control agency be ordered that it was working on defendants' behalf; 2) Nagykoros prepay the control agency; and 3) the control agency keep the location of the inventory confidential.

\*3 After weeks of inconclusive attempts between the parties to negotiate, Nagykoros informed Landesmann that if the parties did not reach a settlement of some kind, the Hungarian Ministry of Agriculture would fine Nagykoros approximately \$150,000, and Nagykoros would possibly default on bank loans. Landesmann, however, proceeded to resell the concentrate.

## II. Discussion

### A. Rule 15(d)

Defendants argue that plaintiffs' amended complaint alleges events which occurred after the original complaint was filed, and therefore is actually a supplemental complaint which, to be filed, requires leave of the Court under Rule 15(d). While plaintiffs dispute that theirs is a © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 3 Not Reported in F.Supp.2d, 2000 WL 297197 (S.D.N.Y.) (Cite as: 2000 WL 297197 (S.D.N.Y.))

supplemental complaint, the Court need not decide which party is correct. Even assuming the complaint is properly labeled “supplemental,” there is no compelling reason why this mislabeling should be fatal. Absent undue delay, bad faith, dilatory tactics, undue prejudice in being served with the proposed pleading, or futility, motions to serve a supplemental pleading will be freely granted. See *Forman v. Davis*, 371 U.S. 178, 182 (1962). The fact that a complaint is improperly labeled as “amended” instead of “supplemental” should not prevent the Court from considering the merits of the pleading. See *Sorel v. G & U, Inc.*, 103 F.R.D. 69, 73 (S.D.N.Y.1984). Thus, plaintiffs' motion to dismiss on this ground is denied.

### B. Rule 12(b)(6) Standards

On a motion to dismiss under Rule 12(b)(6), a court must accept the truth of and draw all reasonable inferences from the well-pleaded factual allegations. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir.1993). The Court's task is to “assess the legal feasibility of the complaint [and] not ... assay the weight of the evidence which might be offered in support thereof.” *Geisler v. Petrocelli*, 616



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F.2d 636, 639 (2d Cir.1980); see also *Riccuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 124 (2d Cir.1991). A complaint should only be dismissed “if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir.1994)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

### C. Conversion

Plaintiffs allege that defendants committed conversion by refusing to pay the balance due for the concentrate, not accepting replacement, not allowing return of the rejected concentrate, and proceeding to re-sell the concentrate without plaintiffs' consent. Defendants in turn move under Rule 12(b)(6) to dismiss plaintiffs' conversion claim, arguing that it merely reasserts their breach of contract claim. This motion is granted.

Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to

the exclusion of the owner's rights. *Vigilant Ins. Co. of America v. Housing Auth. of El Paso, Texas*, 87 N.Y.2d 36, 44 (1995). Under New York law, it is well established that an action for conversion cannot be validly maintained where a plaintiff seeks damages merely for breach of contract. See *Fraser v. Doubleday & Co.*, 587 F.Supp. 1284, 1288 (S.D.N.Y.1984). To sustain a conversion claim, a plaintiff must allege acts that constitute unlawful or wrongful behavior separate from a violation of contractual rights. See *id.*; see also *In re Chateaugay Corp.*, 10 F.3d 944, 958 (2d Cir.1993) (holding that a tort claim will not arise where plaintiff is essentially seeking enforcement of the bargain); *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995) (holding that a defendant may be liable in tort where it breaches a duty of reasonable care distinct from its contractual obligations, and where it engages in tortious conduct separate and apart from its failure to fulfill its contractual obligations).

\*4 To determine whether an action for conversion (or any other tort) exists in addition to an action for breach of contract, a court must first ask whether “the alleged obligation to do or not to do something that was breached could not have existed but for a manifested intent.” *W. Page Keeton, et al., Prosser & Keeton on the Law of Torts* § 92 (5th ed.1984). In other words, the Court must determine whether defendants had a duty separate from any duties imposed by defendants' contractual obligations. If no such duty exists, then contract is the only theory upon which liability can rest. *Id.*

In the present case, defendants' duty to return the concentrate, accept replacement, and refrain from resale exists solely because of the contract between the parties. Outside the contract, there was no pre-existing obligation imposed by law which required defendants to honor plaintiffs' requests. This is apparent by the fact that if plaintiffs are successful on their breach of contract claim, they will be fully compensated for the balance due on the concentrate delivered to defendants, and therefore, no



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additional damages would be available to them under a theory of conversion. FN1

See Fraser, 587 F.Supp. at 1288. Plaintiffs' argument that defendants' conduct amounted to conversion because it violated the Uniform Commercial Code (" U.C.C." ) does not sway the Court otherwise. Indeed, this argument actually lends credence to the conclusion that any remedies they may be owed exist © 2010 Thomson Reuters. No Claim to Orig. US Gov. Works. Page 4 Not Reported in F.Supp.2d, 2000 WL 297197 (S.D.N.Y.) (Cite as: 2000 WL 297197 (S.D.N.Y.))

under a breach of contract claim alone, since the U.C.C. governs contract, not tort, disputes.

FN1. Punitive damages may be awarded for conversion, but the defendants must allege that defendants acted with malice or reckless disregard of plaintiffs' rights. See Ashare v. Mirkin, Barre, Saltzstein & Gordon, 435 N.Y.S.2d 438, 441 (Sup.Ct.1980), modified on appeal to delete punitive damages, 441 N.Y.S.2d 408 (2d Dep't.1981), aff'd, 54 N.Y.2d 891 (1981). Plaintiffs have failed to allege malice or reckless disregard of their rights.

For the reasons stated above, plaintiffs' conversion claim is dismissed.

### D. RICO

Plaintiffs also allege that defendants' conduct violated RICO. To state a claim for damages under 18 U.S.C. § 1962(c), a complaint must specifically allege:

- (1) the existence of an enterprise which affects interstate or foreign commerce;
- (2) that the defendants were " employed by" or " associated with" the enterprise;
- (3) that the defendants participated in the conduct of the enterprise's affairs; and
- (4) that the participation was through a pattern of racketeering activity.

Clifford v. Hughson, 992 F.Supp. 661, 665 (S.D.N.Y.1998) (quoting Town of West Hartford v. Operation Rescue, 915 F.2d 92, 100 (2d Cir.1990)).

Defendants argue that plaintiffs have failed to properly

allege the existence of an " enterprise." Additionally, defendants argue that the amended complaint fails to allege the predicate acts FN2

and " continuity" needed to show a " pattern of racketeering activity." They therefore move to dismiss plaintiffs' RICO claim under Rule 12(b)(6). Since the Court finds that plaintiffs have failed to



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allege “continuity,” the RICO claim is dismissed.

FN2. The predicate acts alleged in this case are mail and wire fraud.

Plaintiffs must allege “continuity” as a prerequisite for the existence of a “pattern of racketeering activity.” See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 230 (1989). In other words, the predicate acts must be related, and must constitute or threaten long-term criminal activity. *Id.* Such continuity can be either “closed” or “open-ended.” *Id.* Plaintiffs apparently concede that closed-ended continuity is not present in this case.

FN3 Therefore, the issue before the Court is whether the requirements of open-ended continuity have been satisfied.

FN3. Closed-ended continuity is established by proving a series of related predicate acts extending over a substantial period of time. *H.J. Inc.*, 492 U.S. at 230 (holding that predicate acts extending over a few weeks or months and threatening no future criminal conduct did not satisfy the requirement of continuity). The time period involved here, four months, clearly cannot be called “substantial.” \*5 Open-ended continuity requires the threat of long-term

racketeering activity. *Id.* This threat is indicated when the predicate acts themselves involve a distinct threat of such future racketeering activity, are part of the regular way of doing business for an ongoing entity (be it a criminal association or legitimate business), or are a regular means of conducting or participating in an ongoing RICO enterprise. *Id.* Ordinarily, however, courts will not find a threat of future racketeering in “cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful, such as frauds in the sale of property ....” *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir.1995).

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In the present case, plaintiffs have inadequately pleaded open-ended continuity. In conclusory fashion, they allege only that “the fraudulent activities of the Enterprise continue to this day.” (Compl.¶ 250). However, they offer no specificity as to what the fraudulent activities involve. Moreover, they have not claimed that the alleged “enterprise” depends on the commission of fraudulent acts “in the conduct of its day to day affairs,” a factor courts have often looked to in determining whether fraudulent activity constitutes an entity’s “regular way of doing business.” See, e.g., *Mead v. Schaub*, 757 F.Supp. 319, 323 (S.D.N.Y.1991). Furthermore, plaintiffs fail to allege that defendants pursued an “inherently unlawful” goal. Under the facts alleged in the complaint, the only endeavor that could be attributed to defendants’ actions is the desire to resell goods for a profit, which is the lawful goal of nearly every business. As noted above, unless an “inherently unlawful” pursuit is involved, continuity is not ordinarily inferred.





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For all the above reasons, the Court dismisses plaintiffs' RICO claim. FN4

FN4. Because the Court grants defendants' motion to dismiss the RICO claim for lack of “continuity,” it is unnecessary to decide whether plaintiffs have alleged the existence of an “enterprise” distinct from defendants or the predicate acts needed to establish a “pattern of racketeering activity.” It is also unnecessary to decide whether the alleged predicate acts were pleaded with sufficient particularity under Rule 9(b). While the Court declines to opine as to the validity of these arguments, it appears likely that, in addition to the complaint's shortcomings in alleging continuity, it is also deficient in the other areas challenged by defendants.

### III. Conclusion

For the foregoing reasons, defendants' motion to dismiss the amended complaint pursuant to Rule 15(d) is denied. However, defendants motion to dismiss plaintiffs' conversion and RICO claims under Rule 12(b)(6) is granted.

With the dismissal of the RICO claim, the Court does not have federal subject matter jurisdiction, and, for the reason set forth above, it does not have diversity subject matter jurisdiction. The Court declines, pursuant to 28 U.S.C. § 1367(c)(3), to exercise supplemental jurisdiction over plaintiffs' remaining claims. Accordingly, the amended complaint is dismissed.

The Court grants plaintiffs leave to file a second amended complaint within 30 days of the date hereof.

SO ORDERED

S.D.N.Y.,2000. Elma RT v. Landesmann Intern. Marketing Corp. Not Reported in F.Supp.2d, 2000 WL 297197 (S.D.N.Y.)

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