UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LAIRON GRAHAM, Plaintiff, v. COUNTY OF ERIE; TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF, in his Individual and Official Capacities; ROBERT KOCH, SUPERINTENDENT OF ERIE COUNTY HOLDING CENTER, in his Individual and Official Capacities; ANTHONY BILLITTIER, IV, ERIE COUNTY HEALTH COMMISSIONER, in his Individual and Official Capacities; MEAGAN MARY MILLER, RPA-C; DR. JEFFREY WILLIAM MYERS, D.O.; OTHER JANE DOES, NURSES; and OTHER JOHN DOES, ERIE COUNTY SHERIFF'S DEPUTIES, Defendants.	Case No.: 1:11-CV-0605-WMS ECF Case

PLAINTIFF LAIRON GRAHAM'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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January 20, 2012

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Plaintiff Lairon Graham ("Mr. Graham") respectfully submits this memorandum in opposition to motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure filed by (a) Defendants County of Erie, Timothy B. Howard, Erie County Sheriff, Robert Koch, Superintendent of Erie County Holding Center, and Anthony Billitier, IV, Erie County Health Commissioner (collectively, the "County Defendants") and (b) Defendants Megan Marie Miller, RPA-C, and Dr. Jeffrey Myers, D.O. (collectively, the "ECMC Defendants").

PRELIMINARY STATEMENT

While at the Erie County Holding Center, in the custody of defendant County of Erie, which was responsible for his medical care, Mr. Graham suffered a serious injury: a tear in his bicep tendon. Mr. Graham's physical appearance—a classic "Popeye" bulge deformity in his bicep and discoloration of the entire arm from internal bleeding—together with his complaints of severe pain made clear to any medical professional—and, indeed, even to many laypeople—that a torn bicep was probable and treatment urgently necessary. Mr. Graham suspected the diagnosis himself, and repeatedly complained to Erie County corrections and medical personnel that he believed he had a torn bicep and needed diagnosis, treatment, and pain relief. Notwithstanding the urgent need for treatment, however, Mr. Graham received no medical care whatsoever until approximately five days later, when he was finally sent to Erie County Medical Center ("ECMC").

Once at ECMC, Mr. Graham received the level of cursory attention that the ECMC Defendants apparently believed appropriate to a County inmate. Despite the obvious likelihood of a torn bicep based on Mr. Graham's appearance, and despite having been told by both Mr. Graham himself and the ECHC facility doctor that they suspected a torn bicep—a condition that would have required expensive and time-consuming procedures to confirm and treat—those defendants essentially told Mr. Graham that he had a bruise that would heal on its

own, gave him ibuprofen, and sent him back to ECHC with no plan or order for further diagnosis or treatment.

At ECHC Mr. Graham continued to suffer excruciating pain and disability for an additional four weeks in County custody, during which he continued to receive no treatment. He continued to complain of the lack of diagnosis or treatment, and continued to suspect and report to County corrections and medical staff that he had a torn bicep. Despite his severe pain and disability, and despite the fact that his physical condition continued to deteriorate and render any ultimate treatment more complex and risky with each passing day, Mr. Graham received no further diagnostics or treatment from the County defendants. It was not until he entered State custody that he finally received appropriate diagnostics, including an MRI, was confirmed to have a torn bicep tendon, and obtained appropriate treatment in the form of a much more complicated and risky surgery than would have been necessary had appropriate treatment been given before.

Erie County has long implemented a de facto policy and practice of delaying or failing entirely to treat serious medical conditions of detainees in its custody, thereby transferring the expense of doing so onto the detainees' families, the State, or the general public. This unconstitutional de facto policy and practice is confirmed by numerous prior incidents alleged in the Complaint. The County and its supervisory personnel have been put on notice of the existence and unconstitutional nature of their de facto policy and practice through, among other things, the investigation and report of the U.S. Department of Justice that was provided to the County in July 2009—approximately ten months before Mr. Graham's mistreatment.

Defendants' motions to dismiss here simply do not attempt to cope with the actual allegations of the Complaint and the applicable law. The County Defendants argue that Mr. Graham's state-law claims are barred for failure to include them in his Notice of Claim—

notwithstanding that Mr. Graham clearly identified his intended defendants and claims in testimony at the County's Section 50-h examination, which New York courts have made clear sufficed to put the County on notice of those claims for purposes of the General Municipal Law notice-of-claim requirement. As to Mr. Graham's *Monell* and supervisory liability claims, the County Defendants rely entirely on their own conclusory characterization of Mr. Graham's allegations as "conclusory." In fact, far from relying on mere conclusory restatements of the legal requirements for *Monell* liability, Mr. Graham has identified specific de facto County policies and systemic constitutional abuses, and specific facts that evidence the existence of those policies and systemic abuses—and has thus far exceeded his burden at the pleading stage. And far from resting his supervisory liability claims on mere conclusory assertions of supervisors' responsibility for isolated constitutional wrongs committed on their watch, Mr. Graham has pleaded specific facts constituting those officials' deliberate indifference to systematic constitutional violations of which they were aware and for which they were responsible. Indeed, Mr. Graham's allegations here are virtually identical to those that this very Court suggested were sufficient to state the same claims against many of the same defendants in *United States* v. *Erie County*, 724 F. Supp. 2d 357, 372-73 (W.D.N.Y. 2010).

As to the ECMC defendants, it has long been well settled that a medical professional may not simply fail to exercise any medical judgment whatsoever in treating an inmate. To do so in the face of a serious medical condition obvious to any medical professional and even to many laypeople, and of specific warnings from the patient and from other medical professionals that the condition was believed to exist and require diagnosis and treatment, patently constitutes deliberate indifference in violation of the Eighth Amendment.

STATEMENT OF FACTS

On April 19, 2010, while confined in the Erie County Holding Center ("ECHC") as a pretrial detainee, Mr. Graham was attacked by another detainee and, in the course of defending himself, suffered a torn bicep. (Compl. ¶¶ 20-21.) By the following morning, the injury had caused Mr. Graham's arm to take on a deformed "Popeye" bulge appearance, and to bleed internally resulting in a purple discoloration of the entire arm—both classic signs of a torn bicep. (Compl. ¶¶ 24-25.) The injury also caused Mr. Graham excruciating pain and limited his ability to use the arm. (Compl. ¶¶ 23, 26.) Mr. Graham recognized the injury as a likely bicep tear, and during the next four days repeatedly requested medical attention from nurses with the ECHC medical department. (Compl. ¶¶ 28, 30-31.) Indeed, any competent medical professional and even any layperson with passing familiarity with weightlifting would have recognized the telltale signs of this injury. (Compl. ¶ 27.) The ECHC nurses nevertheless repeatedly denied Mr. Graham medical attention, telling him that he had only ordinary bruising that did not require treatment. (Compl. ¶¶ 30, 31, 34.)

Mr. Graham finally saw a facility doctor at ECHC on April 24, at which time the doctor noted that Mr. Graham presented a likely bicep tear and sent him to Erie County Medical Center ("ECMC") for evaluation of that possibility. (Compl. ¶ 36; Parham Decl. Ex. B.)[1] At ECMC Mr. Graham was evaluated by Defendants Miller and Myers. (Compl. ¶¶ 37, 39.) After a cursory examination and notwithstanding the obvious likelihood of a torn bicep based on the "Popeye" bulge deformity of Mr. Graham's muscle and extensive internal bleeding in his arm,

[1] Mr. Graham submits that the Court may appropriately consider the information in his Section 50-h testimony, his ECHC medical file, and the July 2009 Department of Justice letter in evaluating Defendants' motion to dismiss, as a court evaluating a Rule 12(b)(6) motion may consider "documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706, 708 (2d Cir. 2011).

those defendants diagnosed Mr. Graham with an "elbow contusion" and told him that he would recover in two weeks without additional treatment. (Compl. ¶¶ 37-40, 44.)

As the result of the ECMC Defendants' failure to diagnose and treat his injury, Mr. Graham suffered excruciating pain for those two weeks and additional weeks thereafter, during which time his bicep continued to heal in a deformed condition rendering future treatment more complicated, painful, and risky. (Compl. ¶¶ 44-46, 75, 82.) In actuality, Mr. Graham should have received immediate surgery to reconnect the bicep tendon to his forearm. (Compl. ¶ 41.)

Realizing that he was not getting better with time as the ECMC Defendants had predicted, Mr. Graham again complained to and sought medical treatment from nurses with the ECHC medical department, submitting sick call slips requesting such care on May 7, 9, and 10, 2010. (Compl. ¶¶ 47, 49, 51.) On May 10, 2010, the ECHC facility doctor determined that Mr. Graham should see an orthopedist "ASAP," but this nevertheless never happened. (Compl. ¶¶ 52-53.) In response to his numerous complaints to nurses and Sheriff's Deputies regarding the lack of medical treatment, those individuals repeatedly asked Mr. Graham how soon he was to be released, in order to determine whether medical treatment might be delayed until someone other than Defendants would become responsible for it. (50-h Transcript 80:18-81:14.)[2] This was precisely what ultimately happened, as after entering New York State custody, Mr. Graham received complicated surgery to reattach his bicep tendon using a new tendon harvested from a corpse. (Compl. ¶¶ 56-59.)

[2] The transcript of Mr. Graham's examination pursuant to New York General Municipal Law § 50-h is attached as Exhibit A to the Parham Declaration submitter herewith, and cited herein as "50-h Transcript __."

As the Court is aware, the County as well as the supervisory defendants, Howard, Koch, and Billittier, have previously been the subject of a federal government investigation that concluded that they have engaged in systematic violations of the rights of detainees and inmates at ECHC to receive constitutionally adequate medical care. In particular, the U.S. Department of Justice informed those Defendants in July 2009 of such conclusions after an extensive investigation that uncovered numerous specific instances of misconduct, including instances where, like here, ECHC personnel delayed the provision of medical treatment for serious conditions until responsibility could be shifted to the inmate's family or others upon his or her release. (Compl. ¶ 66.) In his Complaint herein, Mr. Graham cites the Department of Justice letter reporting the results of its investigation to Defendants, and alleges specific prior instances of such misconduct. (*Id*.) The Department of Justice investigation also uncovered serious inadequacies in staffing, training, and supervision of medical staff at ECHC that had resulted in a pattern of constitutional violations like those suffered by Mr. Graham here. (Compl. ¶ 68.) Mr. Graham's complaint alleges those specific inadequacies. (*Id*.) Indeed, in Mr. Graham's case, the nurses to whom he complained patently lacked sufficient training and competence to identify a serious medical issue when it presented itself. (Compl. ¶¶ 30-31, 34.)

STANDARD ON THIS MOTION

In determining whether a complaint states a claim, the Court construes the "complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in plaintiffs' favor . . . in order to determine 'whether they plausibly give rise to an entitlement of relief.'" *Selevan* v. *New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009) (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009)); *accord United States* v. *Erie County*, 724 F. Supp. 2d 357, 368 (W.D.N.Y. 2010) (Skretny, C.J.). As the Supreme Court has made clear, "plausible" does not mean "probable." *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell*

Atl. Corp. v. *Twombly*, 550 U.S. 544, 570 (2007)); *accord Ruotolo* v. *City of New York*, 514 F.3d 184, 188 (2d Cir. 2008). Though the County Defendants appear to suggest otherwise (County Defs' Mem. 5 & n.13), the Second Circuit has also made clear that "plausibility" does not require a plaintiff to plead his claims with any greater factual particularity than traditionally required under the "notice pleading" standard of Fed. R. Civ. P. 8. *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706, 715, 718 (2d Cir. 2011). Rather, the "facial plausibility" standard requires only that the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1950.

ARGUMENT

I. MR. GRAHAM HAS SATISFIED NEW YORK'S "NOTICE OF CLAIM" REQUIREMENTS AS TO ALL STATE-LAW CLAIMS.

New York General Municipal Law § 50-e(1)(a) provides that, as a condition precedent to bringing a common-law tort action against a municipality, a plaintiff must timely serve a notice of claim that identifies the claimant, nature of the claim, and time, place, and manner in which the claim arose. "The purpose of the statute is to enable authorities to investigate, collect evidence, and evaluate the merit of a claim." *Coleman* v. *City of Niagara Falls*, Case No. 09CV157S, 2010 U.S. Dist. LEXIS 73089, at *20 (W.D.N.Y. July 20, 2010). As the New York Court of Appeals has held, in determining the sufficiency of a notice of claim, "courts should focus on the purpose served by a Notice of Claim," i.e., enabling the municipal authorities to investigate the claim. *Brown* v. *City of New York*, 95 N.Y.2d 389, 392-93, 718 N.Y.S.2d 4, 6, 740 N.E.2d 1078, 1080 (2000).

General Municipal Law § 50-h provides further that after service of a notice of claim, the municipality has the right to conduct an examination of the claimant. It is well settled that where a Section 50-h examination has been conducted, the sufficiency of the notice of claim

should be assessed with reference not only to information provided in the notice itself, but also "look[ing] to evidence adduced at the § 50-h hearing." *Goodwin* v. *N.Y.C. Hous. Auth.*, 42 A.D.3d 63, 68, 834 N.Y.S.2d 181, 185 (1st Dep't 2007). As the Court of Appeals set forth in *D'Alessandro* v. *N.Y.C. Transit Auth.*, 83 N.Y.2d 891, 893, 613 N.Y.S.2d 849, 850, 636 N.E.2d 1382, 1383 (1994), the proper inquiry asks whether, considering the information provided at the Section 50-h examination, the municipality was prejudiced by any failure to include information in the Notice of Claim.

Here, Mr. Graham concededly served two pro se Notices of Claim on the County. (Targia Decl. ¶ 3 & Ex. 1.) The County also examined Mr. Graham concerning both Notices of Claim on January 28, 2011. (Parham Decl. Ex. A.) The County Defendants argue that the Notices of Claim were so defective that they did not suffice to preserve any cause of action against them. (Targia Dec. ¶¶ 8(b), 9.) This is not so. The Notices of Claim taken together with Mr. Graham's testimony at the Section 50-h hearing properly gave the County notice of what claims he intended to file and against which defendants.

The County Was on Proper Notice That It Was Itself an Intended Defendant.

Although Defendants' point heading in their brief and their attorney's Declaration suggest that they mean to assert that Mr. Graham's Notices of Claim did not sufficiently identify the County itself as an intended defendant, they do not argue the point but, rather, argue only that "individual defendants" were not named. (*See* County Defs.' Mem. 3-4.) Assuming the County does mean to assert such an argument, aside from the fact that one Notice (though prepared pro se on a form that identified the State of New York as the intended defendant) expressly identified the ECHC Medical Department, a subdivision of the County, as a Defendant (Targia Decl. Ex. 1, at 1) and was served on the County (Targia Decl. ¶ 3), the County also construed it as directed at the County and noticed a Section 50-h examination, at which Mr. Graham testified that he was

making a claim against the County of Erie itself. (50-h Transcript 13:16-18.) To hold that the Notice was not sufficiently directed at the County itself would be to render that entire process a nullity, contrary to the clear purpose of General Municipal Law Article 4. Indeed, Section 50-e expressly provides that a defect in service of the Notice of Claim is waived if the municipality conducts an examination of the claimant under Section 50-h, and that any defect in the form of the Notice of Claim that was made in good faith may be waived provided the municipality was not prejudiced. Gen. Mun. Law § 50-e(3)(c), (6).

The County Was on Notice of Mr. Graham's Respondeat Superior Claims. Mr. Graham's Notices of Claim identified by name certain individuals whose identities he knew—Defendants Miller and Myers (Targia Decl. Ex. 1, at 3); and Mr. Graham also identified individual defendants that he intended to sue, including the John Doe Sheriff's Deputies and Jane Doe nurses, by description at his Section 50-h examination, and described the facts underlying his claims against those individuals both in the Notices and at the examination. (*See* Targia Decl. Ex. 1; 50-h Transcript 27:24-41:18, 78:14-81:23.) Because the County is liable for the negligence of all of those individuals under respondeat superior, the County's argument that the Notice insufficiently identified the Defendants is wrong. *See* N.Y. County Law § 53(1) (County liable for torts of its "officers, agents, servants and employees"); *Bardi* v. *Warren County Sheriff's Dep't*, 194 A.D.2d 21, 23-24, 603 N.Y.S.2d 90, 91-92 (3d Dep't 1993) (county vicariously liable for acts of Sheriff and Deputy Sheriffs); *Douglas* v. *County of Oswego*, 151 Misc. 2d 239, 241-42, 573 N.Y.S.2d 236, 238 (Sup. Ct. Oswego County 1991) (county vicariously liable for negligence of county jail medical staff).

The County Was on Notice of Mr. Graham's Negligent Training and Supervision Claims. The Notice of Claim was also sufficient on its face to put the County on notice of Mr. Graham's claims of negligent training and supervision. On its face the Notice of

Claim asserted that Mr. Graham intended to file a claim against the "Medical Department" of ECHC. (Targia Decl. Ex. 1, at 1.) As Judge Siragusa and Magistrate Judge Payson of this Court has previously noted, that is identical to saying that Mr. Graham intended to file a claim against the County, because neither ECHC nor its Medical Department is an independent entity that can be sued separately from the County. *See Tulloch* v. *Erie County Holding Center*, 10-CV-0207S, 2010 U.S. Dist. LEXIS 64349, at *5 (W.D.N.Y. June 24, 2010); *Bennett* v. *Erie County Holding Cent. Med. Dep't*, No. 03-CV-6393P, 2006 U.S. Dist. LEXIS 15318, at *14 (W.D.N.Y. Mar. 31, 2006). Finally, Mr. Graham stated explicitly that he intended to sue the ECHC "Medical Department," i.e. the County, for "negli[gence]." As Magistrate Judge Scott of this Court noted in *Coleman*, a claim like negligent supervision need not be set forth with "literal nicety or exactness" where the notice sets forth a "negligence" claim against the municipality itself, because "the underlying facts do not suggest any other possible negligence claim to be asserted against [the municipality itself]." *Coleman*, 2010 U.S. Dist. LEXIS 73089, at *21.[3] Moreover, Mr. Graham's testimony at his Section 50-h examination brought out facts that support a theory of negligent training or supervision, as Mr. Graham identified a systematic incompetence of ECHC medical staff and a systematic reluctance to provide medical care that could be delayed. (50-h Transcript 80:18-81:14.)

[3] The County Defendants' assertion that this claim is untimely because it is based on facts that occurred before Mr. Graham's injury (County Defs.' Mem. 14) is obviously wrong. The statute of limitations runs from the date Mr. Graham's causes of action for negligent training and supervision accrued, which was the date that this tortious conduct caused him injury. *See Kronos, Inc.* v. *AVX Corp.*, 81 N.Y.2d 90, 94, 612 N.E.2d 289, 292, 595 N.Y.S.2d 931, 934 (1993) ("[A]s a general proposition, a tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual."; internal citations omitted); *see also Schultes* v. *Kane*, 50 A.D.3d 1277, 1278, 856 N.Y.S.2d 684, 686 (3rd Dep't 2008) (same); *see also Cunningham* v. *Ins. Co. of N. Am.*, 521 F. Supp. 2d 166, 171-72 (E.D.N.Y. 2006).

II. MR. GRAHAM HAS PLEADED FAR MORE THAN ADEQUATE FACTS TO SUPPORT HIS *MONELL* AND SUPERVISORY LIABILITY CLAIMS.

The County Defendants' effort to obtain dismissal of Mr. Graham's *Monell* and supervisory liability claims rests almost entirely on those defendants' characterization of Mr. Graham's allegations as "conclusory." (County Defs.' Mem. 4.) Because the characterization is wrong, the argument is wrong. Indeed, Mr. Graham's allegations of supervisory and municipal liability are virtually identical to those that this Court suggested were sufficient to state a claim against some of the same defendants in *United States* v. *Erie County*, 724 F. Supp. 2d at 372-73. (*Compare* Compl. ¶¶ 63-68, *with* Compl. in *United States* v. *Erie County*, Case No. 1:09-cv-00849-WMS-JJM, ¶ 23 & Ex. B, at 28-34 (W.D.N.Y.) (attached as Parham Decl. Ex. C).)[4]

Mr. Graham has alleged that Defendants Howard, Koch, and Billittier are supervisory-level County employees responsible for policy-making concerning provision of health care to County detainees and supervision and training of medical staff providing such health care. (Compl. ¶¶ 9-11.) Mr. Graham has alleged that the County implements, and those Defendants have approved and failed to correct, de facto policies, customs, and practices of (a) providing inadequate staff to address inmates' serious medical problems, (b) inadequately training and supervising staff to prevent violations of detainees' right to constitutionally adequate medical care, and (c) delaying or denying medical treatment to inmates and thereby transferring the cost of providing such treatment to inmates' families, the State, and the public. (Compl. ¶¶ 63-65, 67.) And far from having made mere conclusory assertions that these de facto policies, customs, and practices exist, Mr. Graham has alleged specific facts, including prior incidents and

[4] To the extent that any facts recounted within the Department of Justice letter attached as Exhibit B to the complaint in *United States* v. *Erie County* were not incorporated into Mr. Graham's Complaint here, those facts may nevertheless be considered here as the letter itself is subject to judicial notice and was relied on by Mr. Graham in bringing suit. *Litwin*, 634 F.3d at 708.

the results of the Department of Justice investigation, that support the inference that such policies exist and that these Defendants were aware of, but failed to correct, them. (Compl. ¶¶ 66(a)-(j), 68(a)-(c).)

Mr. Graham's allegations are more than sufficient to state claims against the County and the supervisory defendants.

De Facto Policy or Custom. In *Monell* v. *New York Department of Social Services*, 436 U.S. 658, 693-701 (1978), the Supreme Court recognized that plaintiffs may sue municipalities for independent, non-derivative Section 1983 liability where injuries were caused by unconstitutional policies, practices, or customs. Plaintiff need not plead the existence of a formal, written policy that is unconstitutional. Rather, *Monell* liability against a municipality may be grounded in a de facto policy or custom. *Erie County*, 724 F. Supp. 2d at 371 (citing *Pembaur* v. *City of Cincinatti*, 475 U.S. 469, 480 (1986)).

A de facto policy or custom may be inferred where widespread unconstitutional practices are allowed to persist, or where the municipality and its policymaking officials are deliberately indifferent to a known or obvious risk of constitutional violations. *See City of Canton* v. *Harris*, 489 U.S. 378, 388-89, 390 n.10 (1989) (*Monell* liability lies where a municipal policy, custom, or practice is maintained with deliberate indifference to the known or obvious risk of constitutional violations); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (sufficient to allege "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law."); *Reynolds* v. *Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007) (*Monell* policy or custom requirement is satisfied where "a local government is faced with a pattern of misconduct and does nothing"); *Patterson* v. *County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004) ("It is sufficient to show, for example, that a [constitutional violation by] municipal officials was

so persistent or widespread as to constitute a custom or usage with the force of law."); *Uhlein* v. *Seymour*, No. 7:03-Civ-1147, 2006 U.S. Dist. LEXIS 16742, at *19-20 (N.D.N.Y. Apr. 6, 2006) (existence of municipal policy or custom may be shown by "a practice so consistent and widespread that it constitutes a 'custom or usage'" or "a failure by policymakers to train or supervise subordinates to such an extent that it amounts to 'deliberate indifference'" to constitutional rights).

Here, Mr. Graham has adequately pleaded the existence of a de facto policy or custom so as to render the County liable under *Monell*. The Complaint alleges widespread and persistent constitutional violations at ECHC, and that the County and its policymaking supervisory personnel have had knowledge of their existence but have taken no action to remedy them. As such, Mr. Graham has sufficiently pled deliberate indifference, which itself establishes a de facto "policy or custom." *See, e.g.*, *Selinger* v. *City of New York*, No. 08 Civ. 2096, 2009 U.S. Dist. LEXIS 55207, at *23 (S.D.N.Y. June 30, 2009) ("Plaintiff's allegations are sufficient to survive a motion to dismiss because alleged 'municipal inaction such as the persistent failure to discipline subordinates who violate civil rights could give rise to an inference of an unlawful municipal policy of ratification of unconstitutional conduct'"; internal citation omitted).

Indeed, this Court found such a claim adequately stated based on essentially the same allegations of deliberate indifference and the existence of de facto unconstitutional policies in *United States* v. *Erie County*. 724 F. Supp. 2d at 372-73. Like plaintiff there, here Mr. Graham has pleaded the existence of staffing inadequacies, inadequate training and supervision to prevent constitutional violations, and the existence of knowledge by the County of a pattern of systematic violations of detainees' constitutional right to be free from deliberate indifference to serious medical needs. (Compl. ¶¶ 63-68.) And like in *United States* v. *Erie County*, here Mr.

Graham relies on far more than mere conclusory assertions that some unconstitutional policy exists, but instead has identified the unconstitutional de facto policies and, furthermore, alleged constituent facts in the form of multiple prior incidents and failings noted in the Department of Justice's July 2009 letter, which render plausible the existence of a systemic problem rising to the level of a de facto policy of deliberate indifference to constitutional violations. (*See* Compl. ¶¶ 66, 68.) *See United States* v. *Erie County*, 724 F. Supp. 2d at 372-73 (stating that virtually the same allegations "plausibly give rise to an entitlement to relief.").

Defendants cite no cases requiring a contrary result. Rather, Defendants rely entirely on wholly inapposite cases holding that a plaintiff fails to state a *Monell* claim where he or she merely recites the existence of a policy without alleging facts from which a de facto policy or deliberate indifference could be inferred. *See Kamholtz* v. *Yates County*, No. 08-CV-6210, 2008 U.S. Dist. LEXIS 97985, at *22-25 (W.D.N.Y. Dec. 3, 2008) (cited by County Defs.' Mem. 6-7) (dismissing *Monell* claim where plaintiff merely stated that a de facto policy of committing retaliatory conduct existed, alleged no facts from which such a policy could be inferred, and relied on nothing but the Sheriff's position in the chain of command to establish his knowledge of any misconduct); *Pierce* v. *Chautauqua County*, No. 06-CV-644C(F), 2007 U.S. Dist. LEXIS 72960, at *23-25 (W.D.N.Y. Sept. 28, 2007) (cited by County Defs.' Mem. 7) (dismissing *Monell* claim where only fact alleged in support of existence of alleged unconstitutional policy was single alleged constitutional violation committed against plaintiff); *Bowen* v. *County of Allegany*, No. 03-CV-272S, 2004 U.S. Dist. LEXIS 29510, at *9-12 (W.D.N.Y. July 14, 2004) (cited by County Defs.' Mem. 6 nn.18-19, 9-10 & nn.27-28) (dismissing claim where only allegation in support of *Monell* claim was that defendants failed to train or supervise, but plaintiff alleged no facts supporting an inference that they did so and only a single specific incident of

misconduct); *Houghton* v. *Cardone*, 295 F. Supp. 2d 268, 276-77 (W.D.N.Y. 2003) (cited by County Defs.' Mem. 7-8, 11) (same).

Supervisors' Personal Involvement. As this Court has noted, "[p]ersonal involvement need not be active participation. It can be found 'when an official has actual or constructive notice of unconstitutional practices and demonstrates gross negligence or deliberate indifference by failing to act.'" *Beatty* v. *Davidson*, 713 F. Supp. 2d 167, 174 (W.D.N.Y. 2010) (Skretny, C.J.) (citing *Meriwether* v. *Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989)).

Indeed, it is well settled that a supervisory corrections official may be held individually liable for deliberate indifference if he fails to remedy known unlawful conditions or staffing inadequacies, fails to make adequate medical care available to inmates, or maintains or fails to correct policies that make medical care inadequate. *See Alsina-Ortiz* v. *LaBoy*, 400 F.3d 77, 81-82 (1st Cir. 2005) (supervisory officials liable for failing for underlings' failure to provide needed medical care where officials knew of prior pattern of culpable conduct and failed to remedy it); *Sulton* v. *Wright*, 265 F. Supp. 2d 292, 300 (S.D.N.Y. 2003) (supervisory official liable for failure to correct known deficiencies in medical tracking system); *Brown* v. *Coughlin*, 758 F. Supp. 876, 889 (S.D.N.Y. 1991) (high-level supervisors have personal duty to ensure adequate medical services); *Langley* v. *Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (supervisory officials could be held liable based on knowledge of deficiencies in facility's provision of medical care); *see also Santiago* v. *Miles*, 774 F. Supp. 775, 790-91 (W.D.N.Y. 1991) (Superintendent and Deputy Superintendent of facility had sufficient personal involvement for liability where they knew of ongoing constitutional violations but failed to remedy them).

The very same allegations that render Mr. Graham's *Monell* claim plausible also support his claims of supervisory liability here. Mr. Graham plausibly alleges that Defendants Howard, Koch, and Billittier were aware of the results of the Department of Justice investigation

communicated to them in July 2009 and so were certainly aware of staffing inadequacies and systematically inadequate medical care, yet failed to take action to remedy those known constitutional deficiencies. (Compl. ¶¶ 66, 68, 84-92.) Those allegations more than establish sufficient personal involvement to state a claim for deliberate indifference.

Defendants again cite no cases to the contrary. Rather, Defendants rely entirely on wholly inapposite cases holding that the assertion of supervisory position, without anything more, does not allege sufficient personal involvement or sustain a claim of deliberate indifference. *See, e.g.*, *Miller* v. *City of Ithaca*, No. 3:10-cv-597, 2010 U.S. Dist. LEXIS 99531, at *37 (N.D.N.Y. Sept. 22, 2010) (cited by County Defs.' Mem. 6 n.17) (insufficient personal involvement alleged where complaint stated vaguely that defendants in general "participated in the discriminatory/retaliatory acts alleged herein" but failed to say how particular defendants participated and in what acts); *Kamholtz*, 2008 U.S. Dist. LEXIS 97985, at *22-25 (cited by County Defs.' Mem. 6-7) (dismissing *Monell* claim where plaintiff relied on nothing but Sheriff's position in chain of command to establish his knowledge of any misconduct).

Unlike those cases, Mr. Graham does not rely here on the mere conclusory assertion that supervisory position alone entails responsibility for all evils committed under Defendants' watch. Rather, unlike the plaintiffs in any case cited by Defendants, here Mr. Graham has plausibly alleged the existence of systematic constitutional deficiencies in the provision of medical care at ECHC, Defendants' awareness of those systematic deficiencies from, in particular, the Department of Justice's July 2009 letter, and Defendants' failure to take action to remedy those specific known deficiencies.[5]

[5] Mr. Graham agrees with the County Defendants (County Defs.' Mem. 2-3) that his "official capacity" claims against Defendants Howard, Koch, and Billittier are merely restatements of his *Monell* claims against the County.

III. MR. GRAHAM HAS PLEADED THE ECMC DEFENDANTS' DELIBERATE INDIFFERENCE.

The ECMC defendants argue that Mr. Graham has not adequately pleaded deliberate indifference because he does not allege a specific intent to do him harm (ECMC Defs.' Mem. 4) and therefore has alleged only misdiagnosis of his condition, which could not constitute more than run-of-the-mill negligence. (ECMC Defs.' Mem. 4-5.) Defendants are wrong, as Mr. Graham has clearly alleged reckless and wanton treatment by defendants.

As this Court has explained, "[d]eliberate indifference requires that officials act 'with a sufficiently culpable state of mind[]' that is 'more than negligence, but less than conduct undertaken for the very purpose of causing harm.'" *Beatty*, 713 F. Supp. 2d at 174 (citing and quoting *Hathaway* v. *Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994)). "This state of mind equates to recklessness as it is referred to in the criminal context." *Id*. (citing *Salahuddin* v. *Goord*, 467 F.3d 263, 280 (2d Cir. 2006)). Thus, contrary to defendants' assertion, Mr. Graham need not allege that defendants had the specific intent to inflict pain on him. (ECMC Defs.' Mem. 4.)

Here, Mr. Graham alleges that when the ECMC defendants saw him, he exhibited the "Popeye" bulge deformity to his bicep and discoloration of his arm from internal bleeding that are classically characteristic of a torn bicep tendon and obvious and readily recognizable as such to any competent medical professional. (Compl. ¶¶ 25, 37, 40, 78.) Mr. Graham further alleges that he himself, as well as the ECHC personnel who sent him to ECMC, informed the ECMC defendants that they suspected a torn bicep. (Compl. ¶ 37; Parham Decl. Ex. B.) Finally, Mr. Graham alleges that despite knowing from his physical appearance and the information provided by himself and ECHC medical personnel that he likely suffered from a torn bicep, the ECMC Defendants conducted no diagnostics calculated to diagnose that condition, and instead basically told him he had a bruise and sent him back to ECHC. (Compl. ¶¶ 37, 42.)

"[W]hen the need for medical care is obvious, medical care that is so cursory as to amount to no treatment at all may constitute deliberate indifference." *Adams* v. *Poag*, 61 F.3d 1537, 1543-44 (11th Cir. 1995); *see also Collington* v. *Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998) (deliberate indifference claim lies "if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances"); *Hughes* v. *Joliet Correctional Cent.*, 931 F.2d 425, 428 (7th Cir. 1991) (deliberate indifference claim lies where defendants treated plaintiff "not as a patient, but as a nuisance," and "were insufficiently interested in his health to take even minimal steps to guard against the possibility that the injury was severe"); *Rosen* v. *Chang*, 811 F. Supp. 754, 760-61 (D.R.I. 1993) (deliberate indifference claim stated where defendant conducted "grossly incompetent and recklessly inadequate examination").

Indeed, where a risk is obvious, a jury may infer knowledge of the risk from that fact alone. *Beatty*, 713 F. Supp. 2d at 174. The inference of Defendants' knowledge of Mr. Graham's serious condition, and therefore of the wantonness and extreme recklessness of their conduct in failing to do anything to address it, is rendered even more plausible where, as here, the risk was directly communicated to the Defendants both by Mr. Graham and by medical professionals at ECHC. (Compl. ¶ 37; Parham Decl. Ex. B.)

Mr. Graham has clearly pleaded Defendants' knowledge that he likely suffered from a torn bicep tendon and their failure, in the face of that knowledge, to take any steps to diagnose or treat that condition. That is enough to plead Defendants' deliberate indifference. *See Smith* v. *Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (plaintiff permitted to prove that treatment "so deviated from professional standards that it amounted to deliberate indifference"); *Rogers* v. *Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986) ("Whether an instance of medical misdiagnosis

resulted from deliberate indifference or negligence is a factual question requiring exploration by expert witnesses.").

For precisely the same reasons, Mr. Graham has adequately pleaded a state-law claim for punitive damages. As the ECMC Defendants themselves concede, punitive damages are available where defendants' conduct was "wantonly negligent." (ECMC Defs.' Mem. 9 (citing cases).) As set forth above, Mr. Graham has alleged wanton and reckless conduct by those defendants, and so has certainly sufficiently alleged a claim for punitive damages.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss in their entirety.

In the alternative, to the extent that the Court might find the allegations of Mr. Graham's Complaint lacking, he asks that he be allowed to supplement those allegations in an amended complaint with additional prior incidents in which ECHC inmates were denied medical care, as well as additional factual allegations supported by documents appearing in his medical file (*e.g.*, Parham Decl. Ex. B) and testimony at his Section 50-h examination. The Second Circuit has made clear that when a motion to dismiss under Rule 12(b)(6) is granted, leave to amend should ordinarily be given, particularly where the plaintiff alleges civil rights violations. *Ricciuti* v. *N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991); *Chille* v. *United Airlines*, 192 F. Supp. 2d 27, 30 (W.D.N.Y. 2001).

Dated: January 20, 2012

Respectfully submitted,

s/ Matthew A. Parham

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