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Re: Cardone v. State of Delaware Dept. of Corrections, et al.
C.A. No. 3370-VCN
Date Submitted: February 21, 2008

Dear Mr. Cardone and Counsel:

Petitioner Charles F. Cardone ("Cardone") brings this *pro se* action alleging deficient medical care and seeking preliminary injunctive relief against Respondent State of Delaware Department of Correction (the "DOC") and its contractor, Respondent Correctional Medical Services, Inc. ("CMS"), as well as compensatory

and punitive damages. The Court granted Cardone's motion to proceed *in forma pauperis* on December 14, 2007.[1]

The Respondents have filed separately in opposition to his application for interim injunctive relief, and Cardone has entered a reply. Additionally, the Respondents have moved to dismiss or stay this litigation in favor of an action filed in the United States District Court for the District of Delaware, or alternatively, to revoke Cardone's status as an *in forma pauperis* litigant. The Respondents have also moved to dismiss on the basis of subject matter jurisdiction.

* * *

A. *Background*

Cardone is incarcerated in the Delaware Correctional Center ("DCC") near Smyrna, Delaware. He has been in the DOC's custody since September 7, 2004. From the record, it is apparent that Cardone suffers from a number of serious

[1] Additionally, Cardone's Petition seeks to have the Court schedule an evidentiary hearing; appoint counsel; order documentation of compliance with any ruling of the Court; determine whether CMS is in breach of an agreement resulting from a United States Department of Justice investigation; order CMS to pay his attorney's fees and costs; and provide any other appropriate relief. The Court does not directly address these issues in this letter opinion.

medical problems. Cardone is anemic.[2] He has Hepatitis A, B, and C, and claims to have the Herpes Simplex Virus ("HSV"). He suffers from petit mal epilepsy,[3] urination and bladder problems, and a skin condition that causes him to itch. He has or has had problems with his eyes and hearing, with intestinal, groin, and back pain, with infections and sores (caused by scratching), with sleeping (caused by itching and urination problems), and with being underweight. He is concerned about his prostate and benign prostatic hyperplasia, or prostate enlargement, and the prospect of developing colon cancer. Cardone also complains about his constant pain, suffering, lethargy, and mental and physical anguish.

In his Petition and supporting papers, including letters to the Court—some featuring attached exhibits—Cardone challenges the adequacy of the medical care provided by the DOC and its contractor CMS.[4] According to Cardone, CMS' care is plagued by undue delay, neglect, and regular disregard for his welfare. Although Cardone has voiced concern over many aspects of his treatment and the

[2] Anemia is a condition in which the blood lacks sufficient red blood cells or hemoglobin. WEBSTER'S THIRD INT'L DICTIONARY 81 (3d ed. 1993). Additionally, anemia can result from a deficient amount of total blood volume. *Id.*

[3] Petit mal epilepsy is a type of congenital epilepsy due to dysrhythmia of the brain's electrical pulsations. *Id.* at 1690. Its symptoms include mild convulsive seizures and transient "clouding of consciousness." *Id.*

[4] CMS is under contract with the DOC to provide medical care and services to inmates.

treatment of Delaware's prisoners in general,[5] in this action, he most directly challenges the DOC and CMS' (i) failure to provide diagnostic procedures to determine the ultimate underlying causes of his medical problems (the "Diagnostic Claims") and (ii) their failure to provide him with proper medications consistently (the "Medication Claims").

[5] Cardone's filings include internal prison grievances, letters, and news media reports. For a sampling of the external complaints and outside commentary included in Cardone's filings, see Pet. 1 (stating that CMS has been cited by courts as having a "disastrous reputation"); Letter from Cardone to the Court (Dec. 3, 2007 (filed Jan. 4, 2008)) (hereinafter "Cardone's Dec. 3, 2007, Letter"), Ex. 8 (a news media article discussing a federal probe into medical care in Delaware prisons); *id.*, Ex. 9 (a news article describing a United States Department of Justice Investigation into Delaware inmate care that "found credible evidence to suggest that poor inmate care inside Delaware prisons constitutes a 'pattern or practice' of violating the rights of the states [sic] 6,800 inmates."); *id.*, Ex. 12 (letter from the Delaware ACLU to Cardone declining his request for individual representation); *id.*, Ex. 16 (copy of letter from Cardone to Jaime H. Rivera, M.D., Director of the Delaware Division of Public Health, complaining of infections, sores, and inadequate care); *id.*, Ex. 17 (letter from Cardone to CMS, with copies to Dr. Rivera and the ACLU, complaining that CMS had stopped dispensing certain medications); *id.*, Ex. 21 (letter from Cardone to Dr. Rivera complaining that CMS had not followed-up on Cardone's concerns and asking for his medical file to be audited); *id.*, Ex. 23 (letter from Cardone to the ACLU complaining that he was not receiving proper treatment for HSV and Hepitatis); *id.*, Ex. 24 (letter from Cardone to the ACLU inquiring if he had provided sufficient information for it to evaluate his case); *id.*, Ex. 25 (reply letter from the ACLU enclosing legal self-help materials); *id.*, Ex. 27 (reply letter from Dr. Rivera stating that his division does not give medical advice); *id.*, Ex. 30 (letter from Cardone to Dr. Richard Caruso complaining about intestinal pains, sleeping difficulties, and weak stream urination, as well as only receiving Metamucil); *id.*, Ex. 33 (letter from Cardone to the United States Department of Justice complaining about the Department of Justice's investigation and subsequent actions); Letter from Cardone to the Court (Jan. 1, 2008 (filed Jan. 7, 2008)) (enclosing a letter from Cardone to the ACLU complaining about inmate treatment and abuse, including wrongful beatings).

1. The Diagnostic Claims

The Court turns first to Cardone's assertion that the DOC and CMS have failed to provide him with adequate diagnostic procedures. Many of the materials submitted by the parties concern a colonoscopy and attendant follow-up procedures.[6] Colonoscopies can be used to diagnose colon cancer and inflammatory bowel disease, as well as to investigate declines in red blood cell levels, a sign of anemia. In his filings, Cardone complains of a delay from June 2005 until January 2007 in receiving a colonoscopy, as well as the Respondents' failure to provide proper follow-up treatment.[7]

According to the affidavit of Louise Desrosiers, M.D., a CMS doctor and one of Cardone's treating physicians, Cardone initially received a colonoscopy in August 2006.[8] The results of that procedure were compromised by "a poor preparation," which Dr. Desrosiers described as not an "uncommon occurrence."[9] Cardone underwent another colonoscopy on January 16, 2007; that procedure was

[6] A colonoscopy is an endoscopic examination of the colon. RICHARD SLOANE, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 156 (1987).
[7] In his submissions, Cardone has indicated that after the January 2007 colonoscopy, his condition worsened. *See* Cardone's Dec. 3, 2007, Letter, Ex. 30.
[8] Def. Corr. Med. Servs., Inc. Resp. to Pet'r's Mot. for TRO/Prelim. Inj. (hereinafter "CMS' Resp."), Ex. H (Affidavit of Louise Desrosiers, M.D.) (hereinafter "Desrosiers Aff."), at 1.
[9] *Id.*

performed by Richard Caruso, M.D., an independent physician in Lewes, Delaware. Neither Cardone nor the Respondents have filed a post-procedure report or similar exhibit. Cardone has, however, filed a letter that he wrote to CMS on August 6, 2007, in which he claims to recite Dr. Caruso's findings.[10] In the letter, Cardone indicated that Dr. Caruso diagnosed a "[s]ingle angiodysplasia in the cecum" and "internal hemorrhoids," noting that it was an "otherwise normal exam."[11] According to Cardone, Dr. Caruso suggested a "[s]mall bowel" follow-up procedure and wrote that if that test turned out "negative, capsule endoscopy is recommended to rule out small bowel mucosal lesions."[12]

According to Dr. Desrosiers, the only significant finding of the January 2007 colonoscopy was a "cecal AVM," which could occasionally cause bleeding but was not, in Dr. Desrosiers's opinion, the definitive cause of Cardone's anemia.[13] To investigate further, a number of other tests were performed in the spring and early summer of 2007.[14]

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[10] *See* Cardone's Dec. 3, 2007, Letter, Ex. 29.
[11] *Id.*
[12] *Id.*
[13] Desrosiers Aff. 1. An "AVM" is an arteriovenous malformation, or a malformed blood vessel. *See* SLOANE, *supra* note 6, at 429.
[14] Desrosiers Aff. 1.

On March 2, 2007, a diagnostic imaging consultation at Kent General Hospital was conducted by Martin Begley, M.D., a radiologist.[15] The exam suggested the presence of "a mass impinging on the small bowel."[16] As a result, Dr. Begley recommended that an endoscopy and an abdominal and pelvic computerized tomography scan be performed.[17] Dr. Desrosiers commented that the CT scan was ordered to investigate the possible presence of a "mass."

The CT scan was performed on May 4, 2007, by Mahendra Parikh, M.D.[18] Dr. Parikh reported finding a benign renal cyst but noted that it was an "otherwise normal enhanced CT scan of [the] abdomen and pelvis."[19] He concluded that there was "no disturbing intra-abdominal-intrapelvic mass, infiltration of fat or collection of fluid to indicate inflammatory or neoplastic process."[20] According to Dr. Desrosiers, this CT scan eliminated the presence of an impinging mass as a possible cause.[21]

[15] *See* CMS' Resp., Ex. B.
[16] Desrosiers Aff. 1.
[17] *Id.*
[18] *Id.*
[18] *See* CMS' Resp., Ex. D.
[19] *Id.*
[20] *Id.*
[21] Desrosiers Aff. 1.

Later that month, Dr. Desrosiers discussed these results with Cardone.[22] On July 24, 2007, Cardone underwent several laboratory tests.[23]

On August 1, 2007, Dr. Desrosiers faxed the results of the foregoing procedures and tests to Dr. Caruso, asking him to respond if further follow-up procedures were necessary.[24] Dr. Caruso interpreted the results, finding that they suggested that the cecal AVM was the most likely cause of Cardone's anemia.[25] Dr. Caruso recommended administering iron pills to restore Cardone's blood levels to normal before stopping their administration and monitoring his blood levels.[26]

Dr. Desrosiers stated that if Cardone's next blood tests indicated stable results, the iron pills would be discontinued and his condition monitored. Alternatively, if his blood levels dropped, an internal video study would be conducted to investigate his condition further. According to Dr. Desrosiers, the test results, Dr. Caruso's recommendations, and this course of treatment were discussed with Cardone, who expressed his understanding and assent.[27] Cardone

[22] CMS' Resp., Ex. E.
[23] *Id.*, Ex. F.
[24] *Id.*, Ex. G.
[25] Desrossiers Aff. 1.
[26] *Id.* at 1-2.
[27] *Id.*

strongly disagrees with this characterization and complains that instead of diagnosing the cause of his anemia, the Respondents are merely giving him two iron tablets a day.[28] He has asked to be provided with stool sample kits to test for blood in his stool, as well as a procedure to determine if he has colon cancer.[29]

Apart from the colonoscopy and related procedures, Cardone has questioned his medical treatment in regard to diagnoses of several other symptoms. He has complained of an undiagnosed groin growth.[30] He has described urination problems, which have caused him to suspect benign prostatic hyplasia or prostate cancer, and alleges that the only treatment offered for his urination difficulties has been daily Metamucil packets.[31] Cardone has also related that he is unable to achieve regular bowel movements.[32] He would like a hemorrhoidectomy.[33] He has complained of back pain and the Respondents' unwillingness to perform

[28] *See* Pet'r's Refutation Controverting CMS' Resp. (hereinafter "Cardone's Reply") 4-5. Dr. Desrosiers met with Cardone again on November 11, 2007. *See* CMS' Resp., Ex. I. According to the Respondents, Dr. Desrosiers reviewed Cardone's complaints and again discussed his treatment program with him, to which he indicated his understanding and approval. *Id.*
[29] *See* Pet. 3.
[30] Cardone's Dec. 3, 2007, Letter, Ex. 31. Cardone suspects the excrescence is either a hernia or a tumor. *Id.*
[31] *E.g.*, Letter from Cardone to the Court (Jan. 20, 2008 (filed Jan. 24, 2008)) (hereinafter "Cardone's Jan. 20, 2008, Letter B") (enclosing a letter from Cardone to CMS written on December 21, 2007).
[32] *E.g.*, Cardone's Dec. 3, 2007, Letter, Ex. 30.
[33] *See id.* (asserting that the Respondents are delaying this procedure).

diagnostic procedures to determine its cause;[34] hearing and eye problems that remain untreated;[35] and an undiagnosed skin condition that he contracted while at Sussex Correctional Institution ("SCI") that causes sores and severe itching.[36] Cardone alleges that he has HSV and that CMS has ignored his symptoms; he asks for diagnosis and proper, modern medication for treatment.[37] In addition, Cardone complains that he is not receiving proper treatment for his Hepatitis.[38] He also avers that the Respondents' failure to provide him with a bottom bunk forced him to withdraw from the DOC's Greentree program, a residential alcohol and drug treatment program.[39]

More generally, Cardone complains that his many medical grievances and sick call requests go unanswered and that the Respondents' typical response to a medical problem is procrastination or intimidation.[40] In his submissions, Cardone concedes that he has had many visits with health care providers, although he

[34] *See id.*, Ex. 2 (complaining that the Respondents are treating merely his symptoms).
[35] *See* Cardone's Jan. 20, 2008, Letter B.
[36] *See, e.g.*, Cardone's Dec. 3, 2007, Letter, Ex. 16; *see also* Letter from Cardone to the Court (Jan. 20, 2000 (filed Jan. 24, 2008)) (hereinafter "Pet'r's Jan. 20, 2008, Letter A") (enclosing letter from Cardone to CMS written on November 29, 2007, complaining that CMS doctors have been informed of his itching symptoms and have refused his request to see a skin specialist).
[37] *E.g.*, Pet. 3; Cardone's Dec. 3, 2007 Letter, Ex. 3; *id.*, Ex 19.
[38] *E.g.*, Cardone's Dec. 3, 2007, Letter, Ex. 19.
[39] *See, e.g.*, *id.*, Ex. 31.
[40] *E.g.*, Pet. 3-4; Cardone's Dec. 3, 2007, Letter, Ex. 6.

complains about the delays that often attend his sick call requests.[41] Finally, Cardone has also expressed concern about the difficulty of attracting the attention of prison guards.[42]

The Respondents offer that Cardone is receiving regular medical care. They point to CMS' medical records, cited above in the Court's discussion of procedures following Cardone's colonoscopy. The DOC also states that Cardone is a patient of the Chronic Care Clinic at DCC, where he is evaluated by medical staff on a regular basis.[43] For example, in a filing dated December 26, 2007, Cardone's then-most recent visit with the clinic documented in the record occurred on December 19, 2007.[44]

[41] *See, e.g.*, Cardone's Dec. 3, 2007, Letter, Ex. 19 ("[S]ince that visit one year ago, I have seen numerous other CMS doctors, nurse practitioners, physician's assistants . . . to name a few: Dr. Ali, Dr. Lawrence McDonald, nurse practitioner Sherel OTT . . . and several other CMS employees." (first omission in original)); *id.*, Ex. 26 ("Since Aug. 11, 2005, I have had medical visits with Drs. Dale Rodgers, Lawrence McDonald, DESROSIERS, and other "CMS" employees . . . .); Cardone's Jan. 1, 2008, Letter A (describing a November, 13, 2007 visit with Dr. Desrosiers); Cardone's Jan. 1, 2008, Letter B (complaining that two months elapsed between submitting sick call requests and a December 19, 2007, checkup with Dr. Desrosiers).
[42] *See* Pet. 2.
[43] Dep't of Corr. Resp. in Opp'n to Pet.'s Mot. for Inj. Relief and Joinder in Resp. of Corr. Med. Servs., Inc., Ex. A.
[44] *See id.*, Ex. D.

2. The Medication Claims

The second strand of Cardone's primary allegations charges that CMS and the DOC have failed to provide him with proper medications on a consistent and regular schedule. Although not initially raised in the Petition, this claim is supported by many of Cardone's later filings. Both Respondents were afforded an opportunity to respond to this category of allegations and have done so.

Turning first to Cardone's assembled filings, his submissions to the Court voice concern over the Respondents' medication dispensation practices generally, as well as specifically over the delivery of certain medications. In general, Cardone complains that current CMS practices cause "lapse[s]" in medication dispensation.[45] According to Cardone, CMS provides him with necessary medications for a period, but when dispensation ceases due to prescription expiration or some other reason, he is forced to seek re-issuance by the slow-moving medical grievance process.[46] Cardone also questions CMS' practice of giving inmates "substitute" medications, such as providing the antihistamine

[45] *E.g.*, Cardone's Dec. 3, 2007, Letter, Ex. 5 (noting that this is a problem "particularly when [Cardone] is housed in disciplinary segregation.").
[46] *Id.*, Ex. 13; *see id.*, Ex. 17.

Periactin instead of Benadryl.[47] He finds this practice especially disturbing because, as he relates, oftentimes the medical care provider charged with dispensing his medications cannot tell him the names of the medications given or explain their potential side effects.

With his more specific allegations, Cardone questions CMS' dispensation practices regarding five types of medications: Tylenol 3, HSV medication, Dilantin, Periactin, and Ultram. First, taking these in turn, Cardone has submitted filings indicating that he had requested Tylenol 3[48] for back pain, a medication that he asserts was give to him at SCI by Roberta Burns, M.D., for two years.[49] Although Cardone indicated that his current pain medication Ultram and his spasticity medication Baclofen were ineffectual, a nurse denied his request for Tylenol 3.[50] Second, as discussed above, Cardone has indicated that he has HSV and has requested that he be properly diagnosed and given appropriate medication

[47] *E.g.*, *id.*, Ex. 13 (asking that medication dispensation personnel be required to carry a copy of the popular *Physicians' Desk Reference*); *id.*, Ex. 17 (stating that CMS began dispensing Periactin to Cardone after CMS Drs. Rodgers and Ali informed him that Benadryl was not on the "formulary.").
[48] Tylenol 3 is a pain relief medication containing 30 mg of codeine. *See* PHYSICIANS' DESK REFERENCE 2595 (5th ed. 2002).
[49] *See* Cardone's Dec. 3, 2007, Letter, Ex. 2.
[50] *See id.*, Ex. 2.

for its treatment.[51] Finally, Cardone has complained about irregular dispensation of Periactin, Dilantin, and Ultram.

In regard to the antihistamine Periactin, a drug Cardone claims that CMS has substituted in place of Bendaryl,[52] Cardone filed a Medical Grievance Form on March 18, 2006, complaining that a medication dispensation caregiver had informed him that a Benadryl substitute—presumably Periactin—was not available during her evening (or p.m.) rounds on March 15, 2006.[53] Cardone indicated that he felt the caregiver was misrepresenting the medication's unavailability, asserting that it was dispensed during morning (or a.m.) rounds.[54] In a letter written on January 7, 2007, to be sent to CMS, with copies to Director of the Division of Public Health, Jaime Rivera, M.D., and the ACLU of Delaware, Cardone wrote that CMS had stopped providing him with Periactin on December 1, 2006.[55]

[51] *See id.*, Ex. 3; *see also id.*, Ex. 23 (asserting that Cardone has previously been diagnosed with HSV, as well as Hepatitis A, B, and C, by two Veterans Affairs hospitals).
[52] *See supra* note 47 .
[53] *See* Cardone's Dec. 3, 2007, Letter, Ex. 10. Periactin is an antihistamine and antiserstonergic agent. PHYSICIANS' DESK REFERENCE, *supra* note 48, at 2155.
[54] In several of his submissions, Cardone charges that his evening medication dispensation caregiver, referred to variously as "Betty," "Miss Betty," "Nurse Betty," or "Betty Bryant," refuses to dispense his medications properly because she was unwilling to retrieve them from the prison's main medical department, pilfers it for her own purposes, or withholds it because of their contentious relationship. Cardone's Dec. 3, 2007, Letter, Ex. 20.
[55] *Id.*

Cardone noted that at SCI, Dr. Burns had prescribed him Benadryl for two years without interruption. According to Cardone, at DCC, he did not receive his Periactin during morning or evening rounds from December 1, 2006, until approximately January 1, 2007. As a result, he developed open sores on his hands and arms from scratching. On December 27, 2006, Cardone spoke with Lawrence McDonald, M.D., a CMS physician, who assured him that going forward, his medication would be issued on a 120-day schedule instead of the 30 or 60-day schedules that CMS had previously utilized. Cardone complained that it took roughly a month, a time period during which he filed sick call requests and medical grievance forms, before a CMS doctor would see him so that he could begin receiving the medication again. Cardone wrote that he then received Periactin from approximately January 1 until January 6 during both the morning and evening medication rounds before its dispensation was halted again, just as his sores began to heal.[56]

Cardone also discussed this episode briefly in a narrative written on January 25, 2007.[57] In that account, Cardone indicated (somewhat inconsistently)

[56] *Id.*, Ex. 17.
[57] *Id.*, Ex. 20.

that dispensation of Periactin also occurred on December 17, 2006, but only for that day, before continuing to write that the medication dispensation caregiver brought the medication for a few days but stopped dispensing it again on January 6, 2007.[58] Cardone reported that dispensation recommenced on January 16 or 17, but was halted again around January 23.[59]

Cardone's submissions also challenge the Respondents' dispensation of the antiepileptic drug Dilantin. In a prison Medical Grievance Form dated November 26, 2006, Cardone complained that when he was transferred to a new housing unit on November 12, 2006, his evening 300 mg Dilantin pills remained in his old housing unit and that he had not received that necessary medication since his transfer.[60] According to Cardone, upon his inquiry, an evening medication dispensation caregiver told him that he did not receive Dilantin in the evening.[61]

[58] *Id.* The same caregiver is referred to in *supra* note 54. It is in this narrative that Cardone asserts that the caregiver revealed to him that she wrote "out of medication" on his Medication Administration Record charts when she did not provide him with medication. When asked why he was given the medications during the morning rounds if they were unavailable, Cardone alleges that the caregiver responded that the morning medication dispensation caregiver returned to the prison's main medical department to retrieve them. When asked why she could not do the same, the caregiver was unresponsive.
[59] In a letter written to CMS on November 29, 2007, Cardone noted that discontinuing Benadryl or Periactin causes him to suffer from itching and, as a result, sleeplessness. Cardone's Jan. 1, 2007, Letter A.
[60] Cardone's Dec. 3, 2007, Letter, Ex. 13.
[61] *Id.*

Cardone states that CMS has been giving him Dilantin since November of 2005 and that the caregiver who answered his question about the medication's cessation had been giving it to him for almost that length of time.[62] He also reports that he has received Dilantin for over twenty years in order to treat petit mal seizures. Subsequently, in a narrative penned on January 7, 2007, Cardone noted that on December 12, 2006, evening dispensation of Dilantin was recommenced.[63]

Lastly, Cardone has complained that he has been denied Ultram pain medication on occasion.[64] Cardone's submissions do not provide much detail on this score.[65]

In response to Cardone's filings, the Respondents have submitted his Medication Administration Records (the "MARs") for 2007.[66] The Respondents point to the MARs to show that Cardone is receiving his medications. Unaided by

[62] *Id.*, Ex. 13.
[63] *Id.*, Ex. 17; s*ee id.*, Ex. 20.
[64] *Id.*, Ex. 20.
[65] Cardone does, however, again allege improper conduct by his evening medication dispensation caregiver. *Id.* ("I felt Ms. Betty . . . was either taking my ULTRAM for her own use or just not giving me my meds because we have a history of arguing concerning my medications and the fact that an a.m. pill dispenser will give me my prescribed meds and then when Ms. Betty delivers my meds, 12 hours later, the ultram is not in my cup, I ask her about it and she would say, 'you (I) don't get it.'").
[66] *See* Letter from DOC to the Court (Feb. 14, 2008 (filed Feb. 14, 2007)) (hereinafter "DOC Supplemental Letter"), Enclosure (the MARs); Letter from CMS to the Court (Feb. 15, 2007 (filed Feb. 15, 2007)) (citing the MARs).

testimony or affidavit, the Court declines to offer any definitive interpretation of the MARs; instead, it provides only the tentative, generalized discussion of their contents that is necessary to resolve the pending motions.[67] Overall, the MARs tend to demonstrate that Cardone has received his medications, although not without some gaps. In January, April, May, July, August, and October of 2007, the MARs indicate that Cardone received his medications without substantial interruption. The MARs for other months, however, reveal less regular dispensation.

In February 2007, the MARs show gaps in the dispensation of Periactin and Ultram.[68] Although Cardone's Periactin prescription, written by Dr. McDonald, had a "stop" date of March 28, 2008, one MAR chart notes "D/C 2/21/07," presumably indicating that Periactin dispensation would be discontinued after that date. Indeed, Periactin was last given to Cardone in February on the twenty-first of that month. Cardone also stopped receiving Ultram on February 19; his

[67] The MARs present numerous interpretive difficulties: many of the markings on the charts are illegible; the exact meaning of initialing is unclear—presumably, initialing indicates that a medication was dispensed; initials are potentially indistinguishable from other abbreviations, which may have been used to indicate that a medication was not dispensed or was unavailable; the MARs for many months have separate entries for the same medication; the proper dosages of the medications, as well as scheduled dispensation times, are difficult to discern.

[68] Ultram is a tramadol hydrochloride tablet. PHYSICIANS' DESK REFERENCE, *supra* note 48, at 2600.

prescription for that medication, written by Dale Rodgers, M.D., a CMS physician, expired on February 18, 2007.

These gaps in dispensation continued into March 2007. Cardone did not begin receiving Ultram and Periactin again until the ninth of that month. Cardone received a new prescription for Ultram on that date, written by Dr. Derosiers and good until June 9, 2007. Though Cardone still had an active prescription for Periactin, the March 2007 MARs indicate that dispensation of that medication had been discontinued by Dr. Rodgers. Apparently, dispensation recommenced with a prescription by Dr. Desrosiers that began on March 9, 2007, and was to end on June 9, 2007.

In June 2007, the MARs seem to indicate gaps in the dispensation of Periactin, Dilantin, and Ultram. During the evening rounds, Cardone did not receive Periactin from the first until the sixth of the month, despite having active prescriptions for the medication. The June 2007 MARs also show that Cardone did not receive Dilantin during morning rounds on June 20 and 21, as well as during evening rounds on June 6. Cardone also had valid prescriptions for Dilantin from March 9, 2007, until June 6, 2007, and from June 6, 2007, until October 6, 2007. Cardone received Ultram in the morning rounds only from June 1 through

June 5, and on June 11; he received the medication during the evening rounds from June 1 until June 10. His prescription for Ultram, written by Dr. Desrosiers, was valid from May 18, 2007, until September 15, 2007. This irregularity may be explained by a note on the Ultram portion of the MARs that appears to say "duplicative": Cardone received tramadol, the primary ingredient in the trade-named drug Ultram, from June 7 until June 30 during both morning and evening rounds, with the exception of possible gaps on June 21 and 22.

The September MARs, though somewhat confusing, also show gaps in dispensation. Although it appears that Cardone received Dilantin throughout the month, there may have been dosage gaps from September 1 until September 19.[69] Cardone received Periactin regularly in September; however, Ultram dispensation was stopped around September 20, despite the fact that he had active prescriptions for that medication.

In November 2007, the MARs indicate lapses in Dilantin and Periactin dispensation: neither drug was given to Cardone until about halfway through the

[69] This uncertainty stems from the Court's inability to discern whether the September MARs simply have two entries for the same Dilantin dosages, in which case there was likely no gap, or whether the MARs contain multiple entries for Dilantin to denote multiple dose administrations, in which case there was likely a gap.

month. Cardone had an active prescription for Dilantin that did not expire until December 18, 2007; he had an active prescription for Periactin that expired on October 3, 2007, but apparently received it throughout October as a "KOP," or "keep on person" medication. Ultram dispensation was regular in November.

In December, Cardone also experienced some gaps in dispensation according to the MARs. He did not receive Dilantin, Periactin, or Ultram from around the twenty-sixth until the end of the month, and he did not receive Dilantin during the afternoon rounds on the first two days of December. Cardone had valid prescriptions for all three medications in December.

B. *Litigation History*

According to the Respondents, Cardone has filed numerous civil rights actions in the United States District Court for the District of Delaware.[70] CMS

[70] The Respondents cite the following actions: *Cardone v. DE Corrections*, C.A. No. 00-118 RRM; *Cardone v. Williams*, C.A. No. 02-1609 KAJ; *Cardone v. Kearney*, C.A. No. 03-514 KAJ; *Cardone v. Hammond*, C.A. No. 05-536; *Cardone v. Baker*, C.A. No. 05-600; *Cardone v. Carroll*, C.A. No. 06-127 KAJ; *Cardone v. Carroll*, C.A. No. 06-151 JJF; *Cardone v. Banks*, C.A. No. 0-152 JJF MPT; *Cardone v. Ryan*, C.A. No. 06-177; *Cardone v. Carrol*, C.A. No. 06-646 GMS; and *Cardone v. Corr. Med. Servs.*, C.A. No. 06-151 (the "Federal Action"). The DOC states that Cardone has filed nine cases in the United States District Court for the District of Delaware as an *in forma pauperis* litigant. Resp't Del. Dep't of Corr.'s Joinder in Corr. Med. Servs., Inc.'s Mot. to Dismiss or Stay and, in the Alternative, Del. Dep't of Corr's Mot. to Remove Pet'r. Charles F. Cardone's *In Forma Pauperis* Status [Re: Docket # 38] (hereinafter "DOC's Mot. to Dismiss or Stay").

offers that four of these actions were dismissed as frivolous; the DOC asserts that at least three were. Specifically, the DOC argues that *Cardone v. Williams*,[71] *Cardone v. Ryan*,[72] and *Cardone v. Carroll*,[73] were dismissed as frivolous. According to the DOC, Cardone is currently appealing the decision in *Cardone v. Williams*.

In their motions to dismiss or stay, the Respondents rely upon an action that Cardone commenced in the United States District Court for the District of Delaware on March 6, 2006, styled *Cardone v. Correctional Medical Services*, that was brought pursuant to 42 U.S.C. § 1983 (the "Federal Action") and presented claims that are similar to those before this Court.[74] After the Respondents' motions were filed, however, the Federal Action was dismissed with prejudice on March 12, 2008, for failure to file documents timely as ordered.[75]

[71] DOC's Mot. to Dismiss or Stay, Ex. C (the docket in that action describing its dismissal as frivilous).
[72] *Id.*, Ex. D (the docket in that action and a June 15, 2006, order dismissing the action without prejudice as frivolous).
[73] *Id.*, Ex. E (the docket in that action and an October 11, 2007, order dismissing the action as frivolous).
[74] *See* Resp't Corr. Med. Servs., Inc. Mot. to Dismiss or Stay, Ex. A (the complaint in the Federal Action).
[75] Letter from James Drnec, Esquire, to the Court (Mar. 24, 2008 (filed Mar. 24, 2008)).

* * *

Cardone contends that the Respondents have failed to provide him with proper medical care, particularly in regard to diagnoses and medication dispensation. In response, the DOC and CMS argue that because Cardone is receiving both ongoing medical care and proper medications, he cannot show a likelihood of success on the merits or that irreparable harm will occur in the absence of relief being afforded and thus cannot demonstrate entitlement to interlocutory injunctive relief. In addition, the DOC asserts that it has not prevented Cardone from receiving access to medical care, and therefore, granting an injunction against the DOC would not remedy Cardone's alleged wrongs and consequently would be inappropriate.[76]

Beyond these substantive arguments, the Respondents have also moved to dismiss or stay this action in favor of the previously pending Federal Action. Although CMS has informed the Court that the Federal Action was dismissed with prejudice, it argues that the motion still has merit. In their motions to dismiss or stay, the Respondents also offer that because Cardone has sought compensatory

[76] The DOC has also stated that it has "no involvement in the administration of medication to Cardone." *See* DOC Supplemental Letter. For a discussion touching upon this contention, *see infra* note 85.

and punitive damages, the Court lacks subject matter jurisdiction to adjudicate this matter. Finally, relying on 10 *Del. C.* § 8804, the Respondents contend that Cardone's status as an *in forma pauperis* litigant should be revoked because he has had at least three actions dismissed as "frivolous." Accordingly, they ask the Court to set aside its order granting Cardone *in forma pauperis* status and to require him to pay the filing fee for this action immediately, as well as any other associated fees and costs.

* * *

A. *Cardone's Petition for Interim Injunctive Relief*

Turning first to Cardone's petition for a preliminary injunction, to obtain interlocutory injunctive relief, a plaintiff must satisfy a well-established standard.[77] The moving party must demonstrate (1) that it has a reasonable probability of success on the merits, (2) that irreparable harm will occur without the court's intervention, and (3) that the harm the moving party will suffer if his motion is denied outweighs the harm the nonmoving party will suffer if relief is granted.[78] The burden on the moving party is rigorous; the relief accomplished by a

[77] *Cox v. Crawford-Emery*, 2007 WL 4327775, at *3 (Del. Ch. Nov. 30, 2007).
[78] *Id.*

preliminary injunction is extraordinary.[79] This judicial reluctance is heightened in cases where the plaintiff seeks mandatory instead of prohibitory injunctive relief: in such cases, the moving party must "clearly establish the legal right he seeks to protect or the duty he seeks to enforce,"[80] a standard requiring more than a reasonable probability of success on the merits.[81] The decision to grant or deny interim interlocutory relief is within the discretion of the court.[82] Before addressing the merits of Cardone's application, a few words about prisoner medical care, the Eighth Amendment, and 42 U.S.C. § 1983 are necessary.[83]

1. Section 1983—Prisoner Medical Care and the Eighth Amendment

In *Estelle v. Gamble*,[84] the United States Supreme Court announced the test for determining whether an inmate's medical care (or lack thereof) constitutes

[79] For a court to enter a preliminary injunction, it must prejudge a case's merits without a fully developed record. *Id.*
[80] *Bertucci's Rest. Corp. v. New Castle County*, 836 A.2d 515, 519 (Del. Ch. 1990) (quotation omitted).
[81] *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. 1990).
[82] *Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *23 (Del. Ch. Aug. 4, 2006); *see also, e.g., Cherry Hill Constr., Inc. v. James Julian, Inc.*, 608 A.2d 725 (Del. 1991) (TABLE); *Pomilio v. Caserta*, 215 A.2d 924, 925 (Del. 1965); *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1211 (Del. Ch. 2001); *Beaver Blacktop, Inc. v. Dep't of Transp.*, 1990 WL 131352, at *3 (Del. Ch. Sept. 10, 1990); *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 601-602 (Del. Ch. 1974).
[83] Because the parties have not raised the question of exhaustion of administrative remedies, the Court does not address it.
[84] 729 U.S. 97 (1976).

cruel and unusual punishment under the Eighth Amendment, thereby giving rise to an actionable claim under 42 U.S.C. § 1983.[85] Interpreting the Eighth

[85] The Eighth Amendment, through its incorporation into the Fourteenth Amendment, applies to the states. *See Robinson v. California*, 370 U.S. 660, 667 (1962). Section 1983 of Title VII of the Civil Rights Act of 1964 creates a cause of action for certain constitutional violations. Set out in pertinent portion, Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id. To establish a prima facie case under Section 1983, a plaintiff must, in addition to alleging conduct that deprives him of a constitutional right or a right conferred by federal statute, allege that the conduct complained of occurred "under color of state law." *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). Acting under color of law requires a defendant to have "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quotation omitted). Conduct that satisfies the Fourteenth Amendment's state action requirement will also satisfy Section 1983's under color of law requirement. *Id.* In the usual case, a state employee acts under color of state law "while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id.* at 49-50. As discussed below, inmates rely on prison officials to treat their medical needs, and as a result, the state has a constitutional responsibility through the Eighth Amendment to provide medical care to inmates. Many states employ physicians to meet this responsibility, and the physicians who treat inmates do so under color of state law. *See id.* at 55. Although CMS and its physicians are not state employees, their actions in providing medical care to inmates are under color of state law: "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *Id.* at 56. The Supreme Court has held that such a contractual relationship is sufficient to make both the state and any private party that voluntarily assumes the contractual obligation to provide

Amendment, the *Estelle* Court noted that punishments discordant with '"the evolving standards of decency that mark the progress of a maturing society"' have been held repugnant to the Constitution.[86] Reasoning that an incarcerated person must rely on prison authorities for his or her medical care and that their failure to provide medical care could, in some instances, result in torture or a lingering death—the Eighth Amendment's historical objects of prohibition—the Court concluded that the Eighth Amendment requires prisoners be given medical care.[87]

The Court, however, carefully circumscribed the circumstances under which the Eighth Amendment would be implicated. Justice Marshall wrote, "This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment."[88] Instead, under *Estelle*, to establish a cognizable Eight Amendment violation, and through extension, a colorable Section 1983 claim, "an inmate must allege (i) a serious medical need and (ii) acts or omissions by prison officials that

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medical care to prisoners amenable to a Section 1983 claim. *See id.* ("The State bore an affirmative obligation to provide adequate medical care to [the inmate]; the State delegated that function to [the physician]; and [the physician] voluntarily assumed that obligation by contract.").

[86] *Estelle*, 429 U.S. at 102 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

[87] *Id.* at 102-104.

[88] *Id.* at 105.

indicate deliberate indifference to that need."[89] Deliberate indifference occurs when a prison official "knows that a prisoner faces a substantial risk of serious harm and fails to take reasonable steps to avoid the harm."[90] Mounting what would be a successful malpractice action is not sufficient:

> [A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.[91]

Moreover, "a prisoner has no right to choose a specific form of medical treatment, so long as the treatment provided is reasonable."[92] As the United States District Court for the District of Delaware has explained,

> An inmate's claims against members of a prison medical department are not viable under § 1983 where the inmate receives continuing care, but believes that more should be done by way of diagnosis and treatment and maintains that options available to medical personnel were not pursued on the inmate's behalf.[93]

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[89] *Blackston v. Corr. Med. Servs., Inc.*, 499 F. Supp. 2d 601, 605 (D. Del. 2007).
[90] *Id.*
[91] *Estelle*, 429 U.S. at 106.
[92] *Blackston*, 499 F. Supp. 2d at 605 (quotation omitted).
[93] *Id.* (citing *Estelle*, 429 U.S. at 107).

In *Estelle*, the Supreme Court stated that the question of whether "additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. . . . [and] does not represent cruel and unusual punishment."[94] In sum, an inmate's disagreement with prison health care providers over the proper course of treatment does not rise to the level of a constitutional violation.[95] Mindful of these principles, the Court turns to Cardone's petition.

2. The Diagnostic Claims

Addressing the Diagnostic Claims first, Cardone has not shown that interlocutory injunctive relief is appropriate. To prevail on an application for a preliminary injunction, the moving party must, among other things, demonstrate a reasonable probability of success on the merits.[96] Although not explicitly framed as a Section 1983 claim, Cardone's submissions are best read as an effort to bring a Section 1983 challenge based on the Eighth Amendment.[97] To be successful under

[94] *Estelle*, 429 U.S. at 107.
[95] *See Blackston*, 499 F. Supp. 2d at 605.
[96] As discussed above, a plaintiff seeking mandatory injunctive relief is charged with a heavier burden, but because Cardone has failed to meet even the less rigorous "probability of success" standard, the Court need not consider any greater showing that would be required in this instance.
[97] *See* Cardone's Dec. 3, 2007, Letter, Ex. 30 (stating that his action is based on the Eighth Amendment). The Supreme Court has identified two constitutionally grounded sources of liability for inadequate inmate medical care depending upon whether the complaining prisoner is a pre-trial detainee or a convicted inmate. As discussed above, *Estelle* held that the Eighth

Section 1983 in this context, a petitioner must demonstrate a serious medical need and acts or omissions by prison officials that indicate deliberate indifference to that need. It is well-settled that an inmate cannot state a viable Section 1983 claim where he challenges prison medical care merely as being suboptimal.[98] Instead, a prisoner must show that he is facing a risk of substantial harm and that prison medical care providers have failed to take reasonable steps to avoid that harm. Thus, where an inmate is receiving ongoing medical care, unless that care is unreasonable, complaints that prison doctors are not doing enough in regard to diagnoses or treatments will rarely, if ever, satisfy Section 1983.

In this case, the record indicates that Cardone is receiving ongoing medical treatment related to the colonoscopy procedure. By his own admission, Cardone

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Amendment provides recourse for convicted prisoners. *See Estelle*, 429 U.S. at 104; *accord Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006). Liability for a pretrial detainee's inadequate care is premised on the Due Process Clause, with the operative inquiry being whether the deficient treatment constitutes punishment of the detainee. *Bell v. Wolfish*, 441 U.S. 520, 532-35 (1979); *accord Butler*, 465 F.3d at 344. Under the Due Process Clause "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell*, 441 U.S. at 535. Lower courts have held that under both the Eighth Amendment and the Due Process Clause, liability is predicated on the deliberate indifference standard articulated in *Estelle*. *See, e.g.*, *Butler*, 465 F.3d at 344; *cf. County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.") (citation omitted).

[98] *Blackston*, 499 F. Supp. 2d at 605.

has met with doctors and medical personnel on multiple occasions: his filings indicate that he has seen "numerous . . . CMS doctors, nurse practitioners, physician's assistants . . . and several other CMS employees."[99] The Respondents' filings indicate that Cardone was seen recently by medical personnel on December 19. He has received two colonoscopies, a diagnostic imaging consultation, a CT scan, and laboratory tests. In her affidavit, Dr. Desrosiers outlined her intended course of treatment for Cardone going forward.[100] According to Dr. Desrosiers, Dr. Caruso has concurred in her evaluation and treatment plan. Without specific evidence to the contrary, the Court is unable to deem the medical judgment of two physicians, one an independent consulting physician outside of CMS' employ, unreasonable. In essence, Cardone complains that although he has access (even if somewhat irregular) to medical care providers, those providers are not striving to diagnosis the root causes of his symptoms as he would like.[101] Such

[99] *See supra* note 41 and accompanying text.
[100] *See supra* text following note 26 .
[101] Consequently, Cardone has failed to demonstrate a reasonable probability of success on the merits, and his application for a preliminary injunction on the basis of the Diagnostic Claims must be denied. In regard to the two other preconditions for preliminary injunctive relief, the threat of imminent, irreparable harm and a favorable balance of the equities, Cardone has similarly failed to make the requisite showing. A preliminary injunction will only issue where there is a "threat of an injury that will occur before trial which is not remediable by an award of damages or the later shaping of equitable relief." *City Capital Assocs. Ltd. P'ship v. Interco Inc.*, 551 A.2d 787, 795 (Del. Ch. 1988), *overruled on other grounds by Paramount Commc'ns, Inc. v.*

a claim is insufficient under Section 1983 and cannot support the preliminary relief sought here.

Although much of the record focuses on the colonoscopy and related follow-up procedures, Cardone's submissions also raise numerous other issues. In regard to diagnostics, he has submitted filings to the Court discussing an undiagnosed groin growth, an undiagnosed skin condition, undiagnosed and improperly treated back pains, and undiagnosed and untreated HSV. He has also mentioned irregular bowel movements, urination problems, hemorrhoids, and improperly treated Hepatitis. More generally, Cardone's submissions raise questions about the delays experienced by prisoners seeking medical treatment. To be sure, these concerns, when considered in view of reported inmate healthcare concerns in Delaware,

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Time Inc., 571 A.2d 1140, 1153 (Del. 1989). Cardone has not demonstrated that if further diagnostic procedures and treatments were ultimately found to be warranted, relief could not be accomplished after trial without materially affecting his health. Moreover, as commentators have noted, this criterion is informed by the substantive law to be applied, *see* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10-2[b], at 10-20 to 10-24 (2008 ed.), and the Court has doubt, in light of *Estelle*, that Cardone has set forth a cognizable "injury." Given this observation, it is likely that any order granting a mandatory injunction would unnecessarily harm the Respondents and interfere with the orderly administration of prisons and delivery of healthcare to inmates. *See, e.g.*, *Szambelak v. Tsipouras*, 2007 WL 4179315, at *7 (Del. Ch. Nov. 19, 2007) ("[T]he Court must be convinced that . . . enforcement . . . would [not] cause even greater harm than it would prevent." (quotation omitted and third alteration in original)).

should not be dismissed out of hand;[102] however, because they are essentially undeveloped in the record beyond their mere mention, they cannot support preliminary injunctive relief.[103]

3. The Medication Dispensation Claims

The second category of Cardone's principal allegations concerns irregular dispensation of certain medications. As developed, the record tends to show that while Cardone usually receives proper medications, dispensation gaps do occur. From a cursory examination of both Cardone's and the Respondents' filings, these gaps appear to be potentially attributable to two causes: either (i) a prescription's expiration and the concomitant gap in dispensation that occurs until a new

[102] Delaware's news media have covered the shortcomings of prisoner healthcare in this State extensively, but this letter opinion deals with Cardone's specific, individual complaints; it does not address prisoner healthcare in Delaware generally. *See, e.g.*, Lee Williams, et al., *Federal Probe to Address Prison Failures*, DELAWAREONLINE, Mar. 9, 2007, http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20060309/NEWS/603090382/1006&theme=PRISONDEATHS (reporting a federal inquiry into Delaware inmate medical care), *cited in* Cardone's Dec. 3, 2007, Letter, Ex. 8; Lee Williams & Esteban Parra, *Prison Civil Rights Cases Rarely Go to Trial*, DELAWAREONLINE, Mar. 9, 2007, http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20060309/NEWS/603090385/1006/news (reporting a "serious level of civil rights violations" in Delaware prisons due to inadequate medical care), *cited in* Cardone's Dec. 3, 2007, Letter, Ex. 9. The news source cited, *delawareonline*, is the online version of the Wilmington-based newspaper, *The News Journal*.

[103] *See In re Unitrin, Inc. S'holders Litig.*, 1994 WL 698483, at *7 (Del. Ch. Oct. 14, 1994) (declining to resolve difficult factual questions at the preliminary injunction stage), *rev'd on other grounds*, *Unitrim, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995). *See also supra* text accompanying note 82 (discussing the Court's discretion in deciding whether to afford injunctive relief).

prescription is issued or (ii) the failure of prison medical personnel to dispense Cardone's medications as prescribed.[104] The first cause suggests that there may be a systemic problem with the way the Respondents manage inmate prescriptions, causing some prisoners to experience gaps in the dispensation of medications that are necessary and that they have long been taking; the second cause suggests deficient supplies of medications, oversight, or misconduct.

It is premature in this action to speculate as to whether either cause or both causes would ultimately be found to be implicated. At this juncture, the record is simply too underdeveloped to support Cardone's application for preliminary relief. Cardone's filings challenge the Respondents' dispensation of Tylenol 3, HSV medication, Dilantin, Periactin, and Ultram, as well as their practice of providing him with substitute medications. He has most vociferously described gaps in the dispensation of Periactin in December of 2006 and Dilantin in November of 2006. In response, the Respondents have submitted Cardone's 2007 MARs, medical records on which the Court is disinclined to offer any conclusive interpretation. The Respondents have relied upon the 2007 MARs to demonstrate that Cardone

[104] The Court disclaims making any factual finding on this point; rather, it merely recites two theories presented in Cardone's filings.

has regularly received all of his prescribed medications in recent months, thereby defeating the irreparable harm requirement for preliminary relief; however, those records do not speak to Cardone's allegations concerning medication dispensation in late 2006 and are of little utility in assessing those claims. Although the allegation of acts or omissions in late 2006, standing alone, would be insufficient to warrant injunctive relief at present,[105] the Court's initial reading of the MARs indicates that gaps in dispensation may not constitute an unusual occurrence, whether caused by the Respondents' prescription renewal practices or otherwise. If the Court is satisfied that is the case after the parties are afforded an opportunity to develop the facts further, relief may be warranted. In ruling on Cardone's petition for a preliminary injunction, however, the Court, in view of the relatively meager and somewhat confusing record of medication dispensation, exercises its discretion to deny injunctive relief at this time.[106]

[105] In the usual case, a preliminary injunction will not issue without the applicant demonstrating a imminent threat of irreparable harm. *See, e.g.*, *Solar Cells, Inc. v. True N. P'ners, LLC*, 2002 WL 749163, at *7 (Del. Ch. Apr. 25, 2002) ("[T]he threatened harm must be imminent, unspeculative and genuine." (quotation omitted)).

[106] In other words, the record at this point does not establish that Cardone has a reasonable probability of success on the merits. While the possibility that Cardone is not currently receiving proper medications—if indeed the case, potentially a threat of imminent, irreparable harm—gives the Court pause, granting interlocutory injunctive relief on this basis would hazard exposing the Respondents to the burden of complying with a mandatory injunction where even

B. *The Respondents' Motion to Dismiss or Stay*

In addition to opposing Cardone's motion, the Respondents have also moved to stay this action in deference to the Federal Action, or, alternatively, to revoke Cardone's *in forma pauperis* status. The Respondents have also moved to dismiss for lack of subject matter jurisdiction.

1. The *McWane* Doctrine

The Respondents argue that the Court should dismiss or stay this action in favor of the Federal Action. At the time of their motions, the Federal Action was still pending; however, CMS' counsel subsequently informed the Court that it had been dismissed with prejudice. Under the first-filed rule, "a Delaware court will typically defer to a first-filed action in another forum and will stay Delaware litigation pending adjudication of the same or similar issues in the competing forum."[107] This rule has its genesis in *McWane Cast Iron Pipe Corporation v. McDowell-Wellman Engineering Company*.[108] Among other things, for a stay or dismissal to be granted under the *McWane* doctrine, there must be "a prior action

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the basic facts upon which such relief would be predicated are, at best, very confused. *See supra* note 101 (discussing the balancing of the equities).

[107] WOLFE & PITTENGER, *supra* note 101, § 5-1, at 5-1.

[108] 263 A.2d 281 (Del. 1970).

pending elsewhere[.]"[109] Because the Federal Action on which the Respondents rely has been dismissed and is no longer pending, their motion to dismiss or stay based upon the first-filed rule must be denied.[110]

2. Cardone's Status as an *In Forma Pauperis* Litigant

In their motion to dismiss or stay, the Respondents have also moved to remove Cardone's status as an *in forma pauperis* litigant because he has had three or more actions dismissed by the United States District Court for the District of Delaware as either frivolous, malicious, or failing to state a claim. A prisoner's entitlement to proceed *in forma pauperis* may be limited under certain circumstances by 10 *Del. C.* § 8804(f), which provides in pertinent part:

> (f) In no event shall a prisoner file a complaint . . . brought in forma pauperis if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or an appeal in a federal court or constitutional or statutory court of the State that was dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon which relief may be granted unless the prisoner is under imminent danger of serious physical injury at the time that the complaint is filed.

[109] *Id.*
[110] The Respondents have not raised issued or claim preclusion as a defense to this action.

An inmate bears the burden of demonstrating eligibility for *in forma pauperis* status.[111] Moreover, although the Court may grant an inmate's request to file an action *in forma pauperis* if it considers the request appropriate, it may not waive the requirements imposed by 10 *Del. C.* § 8804(f).[112] The Respondents have demonstrated that Cardone has had three actions dismissed as frivolous—*Cardone v. Williams*,[113] *Cardone v. Ryan*,[114] and *Cardone v. Carroll*[115]—and for the same reasons as recited above in the Court's discussion of Cardone's application for preliminary injunctive relief, Cardone has not shown that he was facing "imminent danger of serious physical injury at the time that the complaint [was] filed." Accordingly, the Court must grant the Respondents' motion to revoke Cardone's *in forma pauperis* status pursuant to 10 *Del. C.* § 8804(f).[116]

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[111] *See Major v. Carroll*, 2002 WL 31667896, at *2 (Del. Super. Aug. 19, 2002); *Davis v. Dep't of Corr.*, 2005 WL 906636, at * 1 (Del. C.C.P. Mar. 24, 2005).

[112] 10 *Del. C.* § 8802 ("Nothing in this chapter shall be interpreted to preclude an individual from filing an action in forma pauperis if determined to be appropriate by the court, subject to the limitations set forth in § 8804(f).").

[113] DOC's Mot. to Dismiss or Stay, Ex. C.

[114] *Id.*, Ex. D.

[115] *Id.*, Ex. E.

[116] The Respondents have sought their attorneys' fees and costs incurred in defending this action. The Court declines to award the Respondents attorneys' fees. Under the "American Rule," a party bears its own legal fees in the absence of certain conduct justifying fee shifting. In light of Cardone's status as a *pro se* litigant, the Respondents have not identified the conduct necessary for fee shifting. *See, e.g.*, *Estate of Carpenter v. Dinneen*, 2008 WL 859309, at *17 (Del. Ch. Mar. 26, 2008).

3. Subject Matter Jurisdiction

Finally, the Respondents have argued to dismiss this action based on the Court's lack of subject matter jurisdiction. Specifically, they assert that because Cardone is seeking compensatory and punitive damages, this Court lacks jurisdiction to award full relief. Although the Court may award compensatory damages,[117] the Respondents correctly observe that this Court does not award punitive damages.[118] Therefore, the Court grants the Respondents' motion to dismiss in part, dismissing that portion of the Petition seeking punitive damages.

* * *

For the foregoing reasons, (i) Cardone's Petition for a preliminary injunction or a temporary restraining order is denied; (ii) the Respondents' motion to dismiss or stay is granted in part as to punitive damages; (iii) the Court's order of December 14, 2007, allowing Cardone to proceed *in forma pauperis* is vacated;

[117] *Fontana v. Julian*, 1978 WL 4980, at *3 (Del. Ch. Oct. 4, 1978).
[118] *E.g., RHIS, Inc. v. Boyce*, 2001 WL 1192203, at *3 n.1 (Del. Ch. Sept. 26, 2001) ("Of course, as is well known, this court lacks jurisdiction to make an award of punitive damages."); *Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, (Del. Ch. 1978) ("Traditionally and historically the Court of Chancery as the Equity Court is a court of conscience and will permit only what is just and right with no element of vengeance and therefore will not enforce penalties or forfeitures.").

(iv) this action will be dismissed in thirty days if Cardone has not paid the necessary costs; and (v) otherwise, the Respondents' motions are denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K