UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEVIT FERNANDINI,

Plaintiff,

-v-

UNITED STATES OF AMERICA, METROPOLITAN CORRECTIONAL CENTER NEW YORK, FEDERAL BUREAU OF PRISONS, CHARLES E. SAMUELS, JR., *Director of the FBOP*, CATHERINE L. LINAWEAVER, *Warden*, CHARLES IWAUGWU, *Associate Warden*; KENNETH HAAS, *Unit Manager, 11-South*, IVY JENKINS-CARDEW, *Case Manager, 11-South*, WANDA WINGATE, *Correctional Counselor,* ANDREW BUTLER, JAMAL JAMISON, & DENNIS PEREZ, *Safety Managers*, JOHN SACCO & OCTAVIO MATOS, *MCC HVAC Supervisors*, KENNETH ALVARADO & HENRY HEANEY, *Plumbing Supervisors*, PAT NICHOLSON, BRENDA DEAN & VID PARSAN, *Facilities Supervisors*, ANTHONY BUSSANICH, MD, *Medical Director*, ERWIN RAMOS & CHITO EVANGELISTA, *Medical Practitioners*,

Defendants.

1:15-cv-3843-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, District Judge:

I. INTRODUCTION

Plaintiff Levit Fernandini alleges that, while he was housed at the Metropolitan Correctional Center New York ("MCC") as a pre-trial detainee, the plumbing was not maintained and that the toilets in the facility overflowed, resulting in unbearable filth and smells. He also claims that the facility was overrun with rats and mice and covered in dust and dust mites. Plaintiff further alleges that he was bitten by one of the rats, and that the MCC medical staff forced him to wait for treatment and then failed to provide adequate treatment for his bite. Plaintiff initiated this litigation

in 2015, and over the course of multiple amendments to his complaint, has brought claims under the Federal Tort Claims Act ("FTCA") against the United States, and tort and *Bivens* claims against nineteen individually-named Federal Bureau of Prisons ("BOP") employees and officers. Defendants have moved to partially dismiss Plaintiff's Third Amended Complaint ("TAC") because, among other reasons, Plaintiff's FTCA claims are time-barred and because his allegations regarding supervisory liability are not plausible. Because the TAC relates back to an earlier complaint that was filed when the FTCA claims were timely, and because the TAC pleads direct involvement of all Defendants and the Court cannot consider the government's extrinsic evidence concerning those Defendants' roles within the BOP, those claims survive. Plaintiff's claims for deliberate indifference to serious medical needs are dismissed, however, for failure to state a claim. Defendants' motion to dismiss the TAC is GRANTED IN PART and DENIED IN PART.

II. BACKGROUND

Beginning in July 2011, Plaintiff Levit Fernandini was a pre-trial detainee at the MCC, housed in a unit referred to in the TAC as "11 South." TAC ¶ 1. He alleges that while at MCC, he suffered inhumane conditions of confinement and was given inadequate medical attention. First, Mr. Fernandini claims that at least twice during the month of December 2013, there were problems with the plumbing system at MCC such that sewage from toilets was "back[ed]-up for days on end." TAC ¶ 2. The TAC alleges that inmates were "force[d] to defecate in plastic bags," and that many inmates used the showers as toilets during this time. TAC ¶ 2. This led to repulsive conditions that gave Plaintiff headaches, caused his eyes to burn, and led to stomach pains. Mr. Fernandini also alleges that his headaches were caused by the mold, rust, and dust in his unit, all the result of a faulty ventilation system. TAC ¶ 2. Finally, Mr. Fernandini notes that the unit was infested with rats and mice. TAC ¶ 2.

Plaintiff alleges that on January 6, 2014, he was bitten by a rat on his arm. TAC ¶ 3. The area around Mr. Fernandini's rat bite became infected, his arm was swollen "for a period of time," and he experienced "a burning sensation and numbness radiating up his arm and down to his hand." TAC ¶ 3. He alleges that "he was in fact denied overall medical attention" from the date of the bite until January 9, 2014, when he was seen by MCC medical staff, and that he was denied any follow-up care until January 17, 2014. TAC ¶ 3. He also alleges that the medical staff "ignored his request for additional treatment" and denied a request "to be taken to a[ ] physician outside the facility." TAC ¶ 3.

Based on the exhibits attached to the TAC, Plaintiff was seen by the MCC medical staff on three occasions: January 9, 2014, January 17, 2014, and April 30, 2014. *See* TAC Exs. E, F, and G ("Clinic Encounter" reports). At the January 9, 2014 clinic encounter, MCC staff diagnosed Plaintiff with a "lower arm insect bite, nonvenomous, infected," prescribed him a ten-day dose of amoxicillin, and gave him a tetanus shot. TAC Ex. E at 2. On January 17, 2014, he was again seen by MCC medical staff for the bite and was given a second dose of antibiotics and naproxen for his pain. TAC Ex. F at 2, 4. Three months later, Mr. Fernandini complained to MCC medical staff of a rash on his arm, expressing to the MCC staff that the rash was a result of the January bite. TAC Ex. G. at 1. The clinic encounter report from that visit indicates that the MCC medical staff explained that the rash was unrelated to the bite, prescribed a cream for the rash, and again prescribed naproxen for Mr. Fernandini's pain. TAC Ex. G at 2 ("Inmate appears to have two unrelated issues, inmate advised arm probably dermatitis.").

Mr. Fernandini also alleges that he made a complaint when he felt chest pain, including "sever[e] pain whenever he breathed, [and] a pinching pain in the area of his heart." TAC ¶ 4. Plaintiff explains that he made this complaint to a correctional officer in his housing unit and to "the

medical called down for him," but that he was merely questioned about his pain without a medical examination. TAC ¶ 4.

The TAC alleges that Mr. Fernandini filed various written forms complaining of inhumane conditions and inadequate treatment of his alleged rat bite. TAC ¶¶ 5-14. He attaches to the TAC administrative forms BP-08, BP-09, BP-10, and his Tort Claim Form. TAC Exs. A, B, C, and H.

III. PROCEDURAL POSTURE

Plaintiff filed his initial complaint on May 8, 2015, naming multiple John Doe defendants. Dkt. No. 1. After the U.S. Attorney identified some of the individual John and Jane Doe defendants, the Plaintiff amended his complaint on September 11, 2015. Dkt. No. 9. After additional John Doe defendants were identified, Plaintiff filed a second amended complaint on February 11, 2016. Dkt. No. 35 ("SAC"). Defendants then moved to dismiss the SAC or, in the alternative, for summary judgment, but the Court withdrew that motion on August 1, 2016 following Plaintiff's request to amend his complaint. On November 13, 2016, Plaintiff filed his third amended complaint, adding the United States, the BOP, and the MCC as Defendants. Dkt. No. 79 ("TAC").

On December 9, 2016, Defendants filed a partial motion to dismiss the TAC. Dkt. No. 88. Pursuant to the Court's November 7, 2016 order, Plaintiff's opposition was due on January 24, 2017. Dkt. No. 83. Plaintiff did not file a brief in opposition by that date, and on January 31, 2017, the Court extended Plaintiff's deadline to February 10, 2017. Dkt. No. 96. Plaintiff did not file any opposition by that date, and the Court informed Plaintiff that it would decide Defendants' partial motion to dismiss in the ordinary course. Dkt. No. 98. As of the date of this opinion, no opposition had been filed.

IV. LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). It is not enough for a plaintiff to allege facts that are consistent with liability; the complaint must "nudge" claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

In determining the adequacy of a claim under Rule 12(b)(6), a court is generally limited to "facts stated on the face of the complaint," "documents appended to the complaint or incorporated in the complaint by reference," and "matters of which judicial notice may be taken." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016). The court must accept all facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Burch v. Pioneer Credit Recovery, Inc.,* 551 F.3d 122, 124 (2d Cir. 2008) (per curiam). Legal conclusions, unlike facts, are not entitled to an assumption of truth. *Iqbal*, 556 U.S. at 679. A complaint that offers "labels and conclusions" or "naked assertion[s]" without "further factual enhancement" will not survive a motion to dismiss. *Id.* at 678 (citing *Twombly*, 550 U.S. at 555, 557).

Even under this plausibility standard, district courts "remain obligated to construe *pro se* complaints liberally." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009); *see Sealed Plaintiff v. Sealed Defendant # 1*, 537 F.3d 185, 191 (2d Cir. 2008); *Boykin v. KeyCorp*, 521 F.3d 202, 213-14, 216 (2d Cir.

2008). Thus, while *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, district courts should look for such allegations by reading *pro se* complaints with "special solicitude" and interpreting them to raise the "strongest [claims] that they *suggest*." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (per curiam) (emphasis in original).

Additionally, the Court may consider "'any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference,'" as well as any document not attached or incorporated by reference if "the complaint 'relies heavily upon its terms and effect,' [rendering] the document 'integral' to the complaint." *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152 (2d Cir. 2002) (internal citations omitted) (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.,* 62 F.3d 69, 72 (2d Cir. 1995)). "The court need not accept as true an allegation that is contradicted by documents on which the complaint relies." *In re Bristol-Myers Squibb Sec. Litig.,* 312 F. Supp. 2d 549, 555 (S.D.N.Y. 2004); *see also Rapoport v. Asia Elecs. Holding Co.,* 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) ("If these documents contradict the allegations of the amended complaint, the documents control."); *Matusovsky v. Merrill Lynch,* 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) ("If a plaintiff's allegations are contradicted by [a document attached to the complaint as an exhibit], those allegations are insufficient to defeat a [Rule 12(b)(6)] motion to dismiss.").

V. DISCUSSION

A. Plaintiff's FTCA Claims Against Parties Other than the United States Are Dismissed

In the TAC, Plaintiff brings claims under the FTCA against the United States, the BOP, the MCC, and some—but not all—of the Individual Defendants (Samuels, Linaweaver, Iwaugwu, Haas, Jenkins-Cardew, Wingate, Perez, Sacco, Matos, Heaney, Alvarado, Nicholson, Dean, Parsan, Bussanich, and Evangelista).[1]

[1] On March 22, 2017, the Court dismissed Plaintiff's claims against the BOP and the MCC because the United States is the only proper party under the FTCA. Dkt. No. 102.

Section 2679(b)(1) of the FTCA provides that a plaintiff's *exclusive* remedy for tort claims against individual government employees acting within the scope of their office or employment is to bring an FTCA claim against the United States.[2] This provision of the FTCA "does not, however, deprive plaintiffs of a remedy; it merely makes suit against the United States the exclusive remedy." *Rivera v. United States*, 928 F.2d 592, 609 (2d Cir. 1991). Because "[t]he only proper defendant to a tort claim under the FTCA is the United States," Plaintiff's FTCA claims against the Individual Defendants are dismissed. *Skyers v. Sommer*, No. 12-CV-3432 (RWS), 2016 WL 4484241, at *7 (S.D.N.Y. Aug. 23, 2016).

B. Plaintiff's FTCA Claim Against the United States Relates Back to a Timely-Filed Complaint

Defendants contend that although the United States is the properly named party under the FTCA, Plaintiff's FTCA claim against the United States is untimely. FTCA claims must be brought "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b); *see also Willis v. United States*, 719 F.2d 608, 610-13 (2d Cir. 1983) (explaining the legislative history of § 2401(b)). Plaintiff alleges that he received the final denial of his administrative tort claim on November 9, 2015. TAC ¶ 14. Defendants contend that because Plaintiff did not formally add the FTCA as a claim and the United States as a party until the October 13, 2016 filing of the TAC, his FTCA claims are time-barred. The Court disagrees.

[2] As the Court explained in its memorandum opinion and order denying Plaintiff's motion for summary judgment, Dkt. No. 105, formal "scope certification" is not required to fulfill this requirement, and a brief filed by the United States on behalf of defendant employees may serve as a petition to certify that they were acting within the scope of their employment. *See Cates v. Williams*, No. 08-CV-1529, 2009 WL 723021, at *5 (S.D.N.Y. Mar. 19, 2009), *aff'd sub nom. Cates v. Potter*, 363 F. App'x 822 (2d Cir. 2010); *Zandstra v. Cross*, No. 10-CIV-5143, 2012 WL 383854, at *3 (S.D.N.Y. Feb. 6, 2012) ("A brief on behalf of the named defendants may serve as such a petition.") (citing *B & A Marine Co., Inc. v. American Foreign Shipping Co., Inc.* 23 F.3d 709, 715-16 (2d Cir. 1994)). In its opinion, the Court held that the partial motion to dismiss the TAC served as the petition certifying that the defendant employees were acting within the scope of their employment at the time Plaintiff was allegedly injured. Dkt. No. 105 at 5.

Once his administrative tort claim was denied in November 2015, Plaintiff had six months—that is, until May 2016—to amend his complaint to add claims under the FTCA. On February 11, 2016—approximately three months into the six-month window—Plaintiff filed his SAC, contending on the first page that his action was brought pursuant to, among other statutes, 28 U.S.C. §§ 2671, 2674, and 2679. Those three statutes are part of the FTCA, and concern the liability of the United States and the exclusiveness of the FTCA as a remedy for tort claims against individual government employees. Further, in at least two of his claims for gross negligence and deliberate/reckless indifference in the SAC, Plaintiff alleges that "[a]t all times during the course of [a particular defendant's] employment, the United States was and is responsible for the behavior of the defendant as a federal employee, while acting within the scope of his employment." SAC ¶ 34. That language is a clear reference to the FTCA statutes. *See, e.g.*, 28 U.S.C. § 2679(b)(1) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury . . . resulting from the negligent or wrongful act or omission of any employee of the Government *while acting within the scope of his office or employment* is exclusive of any other civil action or proceeding for money damages . . . .) (emphasis added). Reading Plaintiff's SAC with the "special solicitude" required for *pro se* litigants, the Court interprets the SAC to have raised claims under the FTCA. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d at 474-75. Because the SAC was brought within six months of the denial of Plaintiff's administrative tort claim, his FTCA claims were timely.

That Plaintiff only formally added the United States and named the FTCA in his TAC does not render his claims untimely, even though the TAC was not filed within the six-month period following Plaintiff's final notice of denial. Under Federal Rule of Civil Procedure 15(c), "an amended complaint is not time barred if it 'relates back' to a timely filed complaint." *VKK Corp. v. Nat'l Football League,* 244 F.3d 114, 128 (2d Cir. 2001). "The goal of relation-back principles is to prevent parties against whom claims are made from taking unjust advantage of otherwise

inconsequential pleading errors to sustain a limitations defense." *Id.* (internal citations omitted)*; see also* Fed. R. Civ. P. 15 Advisory Committee Notes (1991).

Rule 15(c)(1) provides that an amendment will relate back when:

> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The 1966 amendments to the Federal Rules added a provision that specifically applies when a litigant seeks to add the United States as a defendant by amendment. Rule 15(c)(2) explains that when the United States is added, "the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorneys designee, to the Attorney General of the United States, or to the officer or agency." *See* Wright & Miller, *Fed. Prac. & Proc.* § 1502 (explaining that 15(c)(2) "establishes an irrebuttable presumption" that if proper service is made on the U.S. Attorney, the notice requirements of Rule 15(c)(1)(C) are met).

Here, there is no question that Plaintiff's FTCA claims "arose out of the conduct, transaction, or occurrence" set out in the tort claims in SAC. Those claims, which relate to Plaintiff's conditions of confinement and his alleged rat bite, are identical to the FTCA claims in the TAC. Finally, although there were some technical difficulties in actually initiating this litigation and with Plaintiff acquiring the appropriate forms to effectuate service, the U.S. Attorney's Office was served, and accepted service as timely as evidenced by the U.S. Attorney's active participation in this case for the last two years. Plaintiff's addition of the United States as a defendant and his formal naming of the FTCA in the TAC thus relates back to timely claims contained in the SAC, and are

not time-barred.[3]

C. Lack of Administrative Exhaustion Not Apparent on the Face of the TAC

Defendants contend that some of Plaintiff's *Bivens* claims—specifically those that relate to Defendants' alleged failure to ensure access to a workable toilet, to maintain a ventilation system that kept the facility free of dust and dust mites, and to adequately respond to Plaintiff's complaints of chest pains—must be dismissed for failure to exhaust administrative remedies.

The Prison Litigation Reform Act ("PLRA") provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a). The purpose of the administrative exhaustion requirement is to "afford [ ] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter*, 534 U.S. at 524-25. Accordingly, the Second Circuit has held that in order to exhaust his administrative remedies, an inmate must "provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures." *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004).

"[F]ailure to exhaust is an affirmative defense under the PLRA," and "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S.

[3] Defendants argue that Plaintiff's TAC must relate back to Plaintiff's first-filed complaint. Dkt. No. 90, Defs.' Mot. to Dismiss at 10-11. That complaint was filed on May 8, 2015. As such, the government contends that, to the extent the FTCA claims in the TAC relate back to that complaint, the Court must dismiss Plaintiff's claims because Plaintiff had not yet received his denial of his administrative tort claim by that date, and thus the Court lacks subject-matter jurisdiction over the claims. The government's arguments fail to take into account Plaintiff's SAC, which the Court construes as raising FTCA claims, and which was filed within the statutory time for bringing those claims. In light of the Second Circuit's acknowledgement that the goal of relation-back is to prevent parties from "taking unjust advantage of otherwise inconsequential pleading errors," and in particular because the Federal Rules indicate that the addition of Rule 15(c)(2) was based on the realty that once the U.S. Attorney's office receives notice, denying relation back for parties also represented by the U.S. Attorney "is to defeat unjustly the claimant's opportunity to prove his case," the Court does not conclude that Rule 15 limits the relation-back doctrine to Plaintiff's initial complaint. *See VKK Corp.*, 244 F.3d at 128; *see also* Fed. R. Civ. P. 15 Advisory Committee Notes (1966).

199, 216 (2007); *see also Porter v. Nussle,* 534 U.S. 516, 524 (2002) (discussing the application of the exhaustion requirement to *Bivens* claims). Nevertheless, a complaint may be dismissed where, "on the face of the [c]omplaint, it is clear that [a] plaintiff did not exhaust [administrative] remedies." *Williams v. Dep't of Corr.*, No. 11-cv-1515 (SAS), 2011 WL 3962596, at *5 (S.D.N.Y. Sept. 7, 2011); *see also McCoy v. Goord*, 255 F. Supp. 2d 233, 249 (S.D.N.Y. 2003) ("If failure to exhaust is apparent from the face of the complaint, however, a Rule 12(b)(6) motion is the proper vehicle.").

Plaintiff attaches numerous documents to the TAC related to his administrative grievance process at MCC.[4] *See* TAC, Ex. A (BP-08); Ex. B (BP-09), Ex. C (BP-10). Defendants argue that those grievance forms do not mention Plaintiff's complaints concerning toilets, dust, mold, rust, or Plaintiff's chest pains, and thus that those claims were not exhausted and cannot proceed in this litigation. While it is true that the forms Plaintiff attaches to the complaint are solely concerned with the rodent infestation in the housing unit and the medical response to his alleged rat bite, it is not clear on the face of the TAC that Plaintiff did not also exhaust the other claims, but did so in paperwork not attached to the TAC. The Supreme Court has made clear that it is not an inmate's burden to plead exhaustion. *Jones v. Bock*, 549 U.S. at 216. The Court cannot assume that the attachments to Plaintiff's complaint constitute the entirety of the relevant record, and will not

[4] Because the MCC is a Federal BOP facility, Plaintiff's claims must have satisfied the "Administrative Remedy Program," which requires that the inmate "(1) seek informal resolution of his grievance through an internal procedure; (2) file an Administrative Remedy Request using the BP–9 form addressed to the Warden within twenty days of the incident; (3) file a Regional Appeal of any unfavorable response on a BP–10 form to the Regional Director within twenty days of the Warden's response; and (4) further appeal any decision to the General Counsel in Washington D.C. within thirty days of a response." *Rodriguez v. Warden, Metro. Corr. Facility*, No. 13 CIV. 3643, 2015 WL 857817, at *3 (S.D.N.Y. Feb. 27, 2015); *see* 28 C.F.R. § 542.13-542.15. The regulations governing this administrative process note that an inmate may only grieve "a single complaint or a reasonable number of closely related issues" at one time. 28 C.F.R. § 542.14(c) ("If the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue."). Furthermore, in each level of the grievance process (referred to as "Appeals"), an inmate is not permitted to raise issues "not raised in the lower level filings," and is not permitted to combine separate lower level responses into one Appeal. 28 C.F.R. § 542.15(b)(2).

implicitly shift the burden on Plaintiff by drawing conclusions about what he chose to attach to the TAC. Because it is not clear on the face of the complaint that Plaintiff's claims have not been exhausted, Defendants' motion to dismiss Plaintiff's *Bivens* claims related to his conditions of confinement is denied.

D. Plaintiff Fails to State a Claim for Deliberate Indifference to His Serious Medical Needs

Plaintiff alleges that Defendants denied him medical treatment for his alleged rat bite for three days, from January 6, 2014 to January 9, 2014, and that Defendants did not provide any follow-up care after his January 9, 2014 clinic visit until January 17, 2014. TAC ¶ 3. He also alleges that the medical staff "ignored his request for additional treatment and his request to be taken to a[] physician outside the facility [was] denied." TAC ¶ 3. Plaintiff brings claims related to these allegations for deliberate indifference to his injuries in violation of the Eighth Amendment.[5] TAC at 8 (Count Four).

A claim of deliberate indifference to serious medical needs has typically been analyzed under a two-pronged standard. "The first requirement is objective: 'the alleged deprivation of adequate medical care must be 'sufficiently serious.'" *Spavone v. New York State Dep't of Correctional Servs.*, 719 F.3d 127, 139 (2d Cir. 2013) (quoting *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006)). "The second requirement is subjective: the charged officials must be subjectively reckless in their denial of medical care." *Id.* As the Second Circuit explained in its recent decision concerning this two-

[5] Although Plaintiff alleges that Defendants violated the Eighth Amendment in failing to provide him with adequate and timely medical care, when such claims are brought by pretrial detainees, they "are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). This is because "pretrial detainees have not been convicted of a crime and thus may not be punished in any manner—neither cruelly and unusually nor otherwise." *Id.* (citation and internal quotation marks omitted). Regardless, *Darnell* held that the first, objective prong of the standard for deliberate indifference —that the alleged deprivation or condition is "sufficiently serious"— is the same under both the Eighth and the Fourteenth Amendments. *Id.* at 30.

prong standard, the subjective "*mens rea* prong" of deliberate indifference to serious medical needs claims under the Fourteenth Amendment be analyzed objectively: rather than ask whether the charged official "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety," courts are to instead determine whether the official "knew, or should have known" that his or her conduct "posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 33, 35. Here, the Court need not reach the subjective prong of this standard, because Plaintiff has not pleaded facts to allege that the alleged deprivation was sufficiently serious.

To meet the objective prong of the deliberate indifference standard, "the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). As the Second Circuit explained,

> [d]etermining whether a deprivation is an objectively serious deprivation entails two inquiries. The first inquiry is whether the prisoner was actually deprived of adequate medical care. As the Supreme Court has noted, the prison official's duty is only to provide reasonable care. Thus, prison officials who act reasonably in response to an inmate-health risk cannot be found liable under the Cruel and Unusual Punishments Clause, and, conversely, failing to take reasonable measures in response to a medical condition can lead to liability. Second, the objective test asks whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner. For example, if the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is sufficiently serious. Factors relevant to the seriousness of a medical condition include whether a reasonable doctor or patient would find it important and worthy of comment, whether the condition significantly affects an individual's daily activities, and whether it causes chronic and substantial pain.

Salahuddin v. Goord, 467 F.3d at 279-280 (internal citations and quotation marks omitted).

In cases such as this one, where some treatment was given but the plaintiff alleges that that treatment was inadequate, "the seriousness inquiry focus[es] on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone." *Id.* at 280 (quoting *Smith v. Carpenter,* 316 F.3d 178, 185 (2d Cir. 2003) (internal quotation marks omitted)). "Where

temporary delays or interruptions in the provision of medical treatment have been found to satisfy the objective seriousness requirement in this Circuit, they have involved either a needlessly prolonged period of delay, or a delay which caused extreme pain or exacerbated a serious illness." *Ferguson v. Cai*, No. 11-cv-6181, 2012 WL 2865474, at *4 (S.D.N.Y. July 12, 2012); *see also Feliciano v. Anderson*, No. 15-cv-4106, 2017 WL 1189747, at *11 (S.D.N.Y. Mar. 30, 2017) ("Although a delay in providing necessary medical care may in some cases constitute deliberate indifference, [the Second Circuit] has reserved such a classification for cases in which, for example, officials deliberately delayed care as a form of punishment; ignored a 'life-threatening and fast-degenerating' condition for three days; or delayed major surgery for over two years.") (citing *Demata v. N.Y. State Corr. Dep't of Health Servs.*, 198 F.3d 233 (2d Cir. 1999) (unpublished)).

Here, Plaintiff alleges that he was bitten by a rat on his arm on January 6, 2014. TAC ¶ 3.[6] On January 9, 2014—three days later—Plaintiff received medical treatment for his bite from the MCC staff in the form of a tetanus shot and a ten-day dose of amoxicillin. TAC Ex. E at 2. He also had an x-ray taken of his arm. *Id.* On January 17, 2017—before his ten-day dose of amoxicillin had run its full course—Plaintiff was again seen by MCC medical staff and was given further treatment, including a new prescription for doxycycline. TAC Ex. F at 5. Plaintiff does not plead facts that suggest that this treatment was objectively unreasonable. Plaintiff was provided with antibiotics for his infection, his clinic visit involved what appears to be a comprehensive medical evaluation,

[6] As noted above, on a motion to dismiss, "[t]he court need not accept as true an allegation that is contradicted by documents on which the complaint relies." *In re Bristol-Myers Squibb Sec. Litig.,* 312 F. Supp. 2d at 555. Here, Plaintiff alleges he was bitten by a rat, and the clinic encounter reports attached to the TAC show that that is what Plaintiff complained of when he met with MCC medical staff. *See* TAC Ex. E at 1; Ex. F at 1; Ex. G at 1. However, all of the clinic encounter reports assess the injury as a "lower arm insect bite, non venomous." *Id.* Because the Court finds below that the treatment of Plaintiff's bite was reasonable, and therefore not subject to a claim for deliberate indifference of serious medical needs, it need not reach a conclusion concerning which kind of vermin bit Plaintiff.

including an x-ray, and Plaintiff was provided with follow-up treatment within two weeks of his first visit.

Even if the Court found that this treatment was unreasonable, however, the alleged deprivation of treatment was not sufficiently serious to rise to the level of a constitutional violation. The allegations in the TAC do not suggest that the three-day delay in receiving medical treatment was "needlessly prolonged." While the Court accepts as true that Plaintiff felt pain from the bite, and that he experienced "a burning sensation and numbness radiating up his arm and down to his hand," nothing in the TAC suggests that the three-day wait time caused "chronic and substantial pain" or worsened Plaintiff's condition. Plaintiff received treatment within a few days, and received follow-up treatment soon after. The pleadings do not plausibly allege that Plaintiff suffered a particular risk of harm by virtue of being required to wait three days for treatment of his bite, and thus Plaintiff has not adequately pleaded a claim for deliberate indifference to his medical needs arising from this bite.

Additionally, Plaintiff has not adequately pleaded a claim for deliberate indifference to his medical needs related to his complaints of chest pain. In February 2014, Plaintiff complained of chest pains and was questioned but not examined by MCC medical staff. Plaintiff alleges that the medical staff's failure to provide treatment after questioning him was inadequate because his pain "should have been considered by the medical staff as a serious situation." TAC ¶ 4. Courts in this district have held, however, that chest pain alone does not meet the objective standard of a sufficiently serious medical condition for purposes of a deliberate indifference claim. *See Hutchinson v. N.Y. State Corr. Officers*, No. 02-CV-2407, 2003 WL 22056997, at *5 (S.D.N.Y. Sept. 4, 2003) (holding the plaintiffs' allegation "that [the decedent] was experiencing "chest pains" . . . does not constitute a sufficiently serious condition" (citation omitted)); *Flemming v. Velardi*, No. 02-CIV-4113, 2003 WL 21756108, at *2 (S.D.N.Y. July 30, 2003) (finding allegations of "chest pains" and

"discomfort" insufficient for an Eighth Amendment claim). Plaintiff does not claim that this alleged deprivation of care resulted in any greater risk of harm, or that it had any effect on his health whatsoever. Plaintiff's claims for deliberate indifference to medical needs is dismissed. As a result of dismissing this claim, Defendants Bussanich, Evangelista, and Ramos—all members of the MCC medical staff—are dismissed from this case.

E. The Individual Defendants Are Not Dismissed

Defendants move to dismiss the Individual Defendants who they identify as having supervisory responsibilities from this case because, they assert, Plaintiff's allegations regarding those individuals' personal involvement in the alleged violations are not plausible. In order to state a claim upon which relief may be granted, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Because vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676.

Plaintiff's claim concerning his allegedly unconstitutional conditions of confinement has been brought against Individual Defendants Samuels, Linaweaver, Iwaugwu, Haas, Jenkins-Cardew, Wingate, Sacco, Matos, Heaney, Alvarado, Nicholson, Dean, Parsan, Jamison, and Butler.[7] Plaintiff

[7] Defendants move to dismiss the claims against Defendant Butler because the three-year statute of limitations on *Bivens* claims in New York is three years, and Mr. Butler only worked at MCC from July to November 2011. Defendants measure the three-year limitations period from the date commencement of this action, and contend that any claims made concerning conduct before May 8, 2012 should be dismissed. Defs.' Mot. to Dismiss, at 26 n.15. At the motion to dismiss stage, however, dismissal on the grounds that the statute of limitations has expired is appropriate only if the "complaint clearly shows the claim is out of time." *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 266 (S.D.N.Y. 2013) (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)); *see also Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 14 F. Supp. 3d 191, 209 (S.D.N.Y. 2014) ("Because the defendants bear the burden of establishing the expiration of the statute of limitations as an affirmative defense, a pre-answer motion to dismiss on this ground may be granted only if it is clear on the face of the complaint that the statute of limitations has run.") (citation omitted). Defendants urge the Court to rely on its response to the Court's *Valentin* order as evidence that Defendant Butler was only employed from July to November 2011. *See* Letter in Response to *Valentin* Order,

alleges that the Individual Defendants "all in fact had knowledge of the tiers . . . of 11-South being infested with mice, rats, and insects because they were required to make daily routine inspection checks of the living areas." TAC at 18. Defendants move to dismiss only Defendants Samuels, Linaweaver, Iwaugwu, Haas, and Jenkins-Cardew, contending that Plaintiff's allegations against these "high-level supervisor[s]" are implausible because these individuals "would not have had such responsibilities" by virtue of their positions within the BOP or at the MCC facility. Defs.' Mot. to Dismiss at 21. Defendants conclude—without citation to the TAC—that Plaintiff "appears to be suing [these Individual Defendants] based on their supervisory positions alone." *Id.* at 22.

The Court cannot adopt Defendants' conclusion. On a motion to dismiss, the Court may only consider facts stated on the face of the complaint or documents incorporated into the complaint by reference. *Goel v. Bunge, Ltd.*, 820 F.3d at 559. Nothing in Plaintiff's TAC suggests that these particular individuals were supervisors that would not have had the responsibilities of making daily checks of Plaintiff's housing unit. Instead, Defendants urge the Court to accept the factual statements presented in their motion to dismiss that these individuals would have only had supervisory roles and then to weigh those facts against Plaintiff's pleaded facts in the Court's assessment of the plausibility of Plaintiff's allegations. The information regarding the roles of these Individual Defendants provided in their motion to dismiss is plainly outside the four corners of the TAC. Moreover, in deciding a motion to dismiss, the Court "must accept all facts alleged in the complaint as true." *Burch,* 551 F.3d at 124. Thus the Court must accept Plaintiff's allegation that all Individual Defendants did have the responsibilities he alleges, and that they were all involved in the

Dkt. No. 25 at 1. That response, and the date range that Defendant Butler supposedly worked at the MCC, is not incorporated into Plaintiff's complaint. Nowhere in the TAC did Plaintiff adopt those dates, and thus the Court may not consider that information—yet alone accept the information as true—on a motion to dismiss. As such, it is not apparent on the face of the TAC that Plaintiff's claims against Defendant Butler are untimely, and the Court cannot dismiss that Defendant from the case.

alleged constitutional violations as set forth in the TAC.[8]

VI. CONCLUSION

For the reasons stated above, Defendants' partial motion to dismiss is GRANTED IN PART and DENIED IN PART. Plaintiff's claims for deliberate indifference to medical needs are dismissed without prejudice, as are Defendants Bussanich, Evangelista, and Ramos. Plaintiff's FTCA claim against the Individual Defendants is dismissed with prejudice. Plaintiff's FTCA claim against the United States of America, and his *Bivens* claim relating to the allegedly unconstitutional conditions of confinement at MCC, may proceed as to the remaining Individual Defendants.

In this circuit, "[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Accordingly, the Court grants Plaintiff leave to amend the complaint, solely with respect to those claims that were not dismissed with prejudice, to correct the deficiencies identified in this opinion. Any amended complaint will replace, not supplement, all prior complaints, and must be filed no later than 30 days after the date of this order

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 94.

SO ORDERED.

Dated: July 26, 2017
New York, New York

GREGORY H. WOODS
United States District Judge

[8] The Court observes that Defendants' motion does not challenge the sufficiency of Plaintiff's allegations with respect to "non-supervisor" Defendants. But there is no difference in the facts pleaded as the basis for liability for the Defendants labeled in their motion as "supervisors." The only difference between the two groups are the facts provided by Defendants in their motion, which the Court cannot consider in this context.