UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAN ZHANG and CHUNMAN ZHANG, individually, and as ADMINISTRATORS of the estate of ZHIQUAN ZHANG, deceased,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF CORRECTION, RIKERS ISLAND FACILITIES, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, CORIZON HEALTH, INC., BILL DE BLAISO, individually, and as MAYOR OF THE CITY OF NEW YORK, JOSEPH PONTE, individually, and as then COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CORRECTION, RAM RAJU, individually, and as then PRESIDENT OF NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PATSY YANG, individually, and as NEW YORK CITY HEALTH AND HOSPITALS CORPORATION'S SENIOR VICE PRESIDENT FOR CORRECTIONAL HEALTH SERVICES, KAREY WITTY, individually, and as CHIEF EXECUTIVE OFFICE OF CORIZON HEALTH, INC., NEW YORK CITY CORRECTION OFFICERS, "JOHN AND JANE DOES 1-10", in their individual and official capacities, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION EMPLOYEES AND AGENTS, "JOHN AND JANE DOEES 11-20", in their individual and official capacities, CORIZON HEALTH, INC. EMPLOYEES AND AGENTS, "JOHN AND JANE DOES 21-30", in their individual and official capacities,

Defendants.

No. 17 Civ. 5415 (JFK)

OPINION & ORDER

APPEARANCES

FOR PLAINTIFFS
David Yan
LAW OFFICES OF DAVID YAN

FOR DEFENDANTS
Daniel Gerard May
Joseph Schmulewitz
Laura Anne Delvecchio
Ryan Michael Cleary
Tucker Christian Kramer
HEIDELL, PITTONI, MURPHY & BACH, LLP

JOHN F. KEENAN, United States District Judge:

Plaintiffs Man Zhang, and Chunman Zhang (both surviving sons of Mr. Zhang) and the Administrators of decedent Zhiquan Zhang's ("Mr. Zhang") estate (collectively, the "Plaintiffs") bring this action alleging that Defendants the City of New York; the New York City Department of Correction; Rikers Island Facilities; New York City Health and Hospitals Corporation ("NYCHHC"); Corizon Health, Inc. ("Corizon"); Bill de Blasio ("Mayor de Blasio"); Joseph Ponte ("Mr. Ponte"); Ram Raju ("Dr. Raju"); Patsy Yang ("Dr. Yang"); Karey Witty ("Mr. Witty"); New York City Corrections Officers John and Janes Does 1-10; New York City Health and Hospitals Corporation Employees and Agents John and Jane Does 11-20; and Corizon Health, Inc. Employees and Agents John and Jane Does 21-30 (collectively, the "Defendants") are liable for Mr. Zhang's death while he was a pretrial detainee at Rikers Island prison. Plaintiffs allege that Mr. Zhang died as a result of inadequate medical care during his

year at the prison. Defendants move to dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, Defendants' motion is GRANTED in part and DENIED in part.

I. Background

A. Factual Background

The following facts and allegations are taken from the complaint. On April 18, 2015, following his arrest on unspecified charges, Mr. Zhang was detained at Rikers Island prison to await trial. (Compl. ¶ 67.) On the same day, during a routine medical examination, employees and agents of NYCHHC found Mr. Zhang had hypertension—a condition he had suffered for years prior and for which he already took medication—and coronary heart disease. (Id. ¶¶ 68, 69.) The NYCHHC agents and employees prescribed Mr. Zhang Norvasc and Ibuprofen to treat his hypertension. (Id. ¶ 69.)

After this treatment, Mr. Zhang complained of chest pain to Defendants New York City Corrections Officers "John and Jane Does 1-10" ("NYCCO Does 1-10"), who did not respond. (Id. ¶ 70.) When New York City Health and Hospital Corporation Employees and Agents "John and Jane Does 11-20" ("NYCHHC Does 11-20") "and/or" Corizon Health Inc. Employees and Agents "John and Jane Does 21-

30" ("Corizon Does 21-30")[1] visited Rikers Island, they prescribed Mr. Zhang Norvasc again, but did not take "appropriate" medical steps to treat his chest pains. (Id.)

On June 9, 2015, Mr. Zhang complained of chest pain to NYCCO Does 1-10, who called medical emergency services. (Id. ¶ 71.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 responded to the emergency call, at which point Mr. Zhang told them he had been experiencing pain in the left side of his chest from front to back for the last four days. (Id. ¶ 71) Mr. Zhang was transferred to unspecified Defendants' clinic where he was provided with costochondritis treatment and Ibuprofen to relieve the pain. (Id.) Mr. Zhang received no other treatment. (Id.)

On June 10, 2015—the day after his initial complaint and treatment—Mr. Zhang was seen by unspecified Defendants' staff at Defendants' clinic where he was provided with Ibuprofen for lumbago, Zocor for hyperlipidemia, and Norvasc for hypertension. (Id. ¶ 72.) Mr. Zhang received no other treatment. (Id.)

[1] At the end of December 2015, Corizon's contract with the City of New York to provide health services and medical treatment for the inmates of Riker's Island expired at which time NYCHHC took over. (Id. ¶¶ 5, 7.) NYCHHC completed credential reviews and background checks of all 1,200 workers Corizon employed and rehired 85 percent. (Id. ¶ 8.)

On unspecified dates, between June 10, 2015 and July 6, 2015,[2] Mr. Zhang continued to complain to NYCCO Does 1-10 about his chest and lower back pain. (Id. ¶ 73.)

On July 6, 2015, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 visited Mr. Zhang at Rikers Island in response to his complaints of chest and lower back pain. (Id. ¶ 74.) They provided him with Naprosyn for lumbago, but administered no other "check ups" or treatment. (Id.) Mr. Zhang continued to complain to unspecified Defendants about chest pain. (Id. ¶ 75.)

On September 5, 2015 at 9:45 a.m., NYCHHC Does 11-20 "and/or" Corizon Does 21-30 responded to Mr. Zhang's emergency call. (Id. ¶ 76.) Through a fellow inmate who spoke Chinese,[3] Mr. Zhang explained that he had been experiencing chest pain since the previous day, "that he would feel more pain when he was not pressing his chest wall," and "that he would not feel more pain when he pressed his chest wall." (Id.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 brought Mr. Zhang to "the clinic" where they gave him Aspirin and Nitrostat for his chest pain. (Id.) At 10:40 a.m., after the treatment had no effect, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 handed Mr. Zhang

[2] Though the complaint's timeline is at times unclear, the Court infers a date range here and at certain points elsewhere from its chronology.
[3] Plaintiffs' filings are silent as to Mr. Zhang's command of English.

over to EMS who gave him Ibuprofen despite Mr. Zhang's complaints of constant pain at level 4 of 10. (Id.) Mr. Zhang "was not allowed to be hospitalized." (Id.)

On September 7, 2015, Mr. Zhang was brought back to unspecified Defendants' clinic for a follow up regarding his chest pain. (Id. ¶ 77.) There, Mr. Zhang was provided with sarna lotion for xerosis cutis and Norvasc for hypertension. (Id.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 claimed that Mr. Zhang "denied chest pain, sob, numbness, tingling, paresthesia, or any other problem"[4] and decided that no further treatment was needed for Mr. Zhang's chest pain. (Id.) They provided him with "no other check ups or treatment." (Id.)

On September 13, 2015, Mr. Zhang complained that he felt lightheaded and dizzy. (Id. ¶ 78.) At unspecified Defendants' clinic, unspecified Defendants gave him Norvasc for hypertension and Meclizine CI and Hydrochlorothiazine for vertigo NOS. (Id.) Unspecified Defendants provided him with no other check up or treatment. (Id.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 failed to diagnose Mr. Zhang's chest pain and connect his chest pain with possible seizures and cardiac arrest. (Id.)

On October 20, 2015, Mr. Zhang underwent a routine medical examination during which NYCHHC Does 11-20 "and/or" Corizon Does

[4] The Court is uncertain what "sob" means in this context.

21-30 examined his heart. (Id. ¶ 79.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 "failed to inquire, examine, and note Mr. Zhang's chest pain," despite his medical history. (Id.)

On November 12, 2015, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 collected a sample from Mr. Zhang "for lipid screen for coronary risk." (Id. ¶ 80.) On November 13, 2015, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 reviewed the lipid screen results with Mr. Zhang but again "failed to inquire, examine, and note Mr. Zhang's chest pain." (Id. ¶ 81.) They also failed to diagnose Mr. Zhang's chest pain and connect his chest pain with possible seizures and cardiac arrest. (Id.)

Starting in December 2015, Mr. Zhang's chest pain would cause him to wake up in the middle of the night, waking other inmates with his "moaning, grunting and groaning." (Id. ¶ 82.)

On January 14, 2016, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 visited Mr. Zhang in response to a sick call. (Id. ¶ 83.) They provided him with the same prescriptions for hypertension and hyperlipidemia, but provided him with no treatment for chest pain. (Id.)

At unspecified times in February 2016, Mr. Zhang's fellow inmates noticed his chest and left shoulder pain was becoming increasingly severe compared to his pain in January. (Id. ¶ 85.)

On February 15, 2016, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 visited Mr. Zhang in response to complaints that his

left shoulder pain had lasted more than four weeks. (Id. ¶ 84.) After they found Mr. Zhang "had painful limitation in raising his left upper extremity above the left shoulder level," they provided Mr. Zhang with Ibuprofen, Motrin, and Robaxin and referred him to physical therapy. (Id.)

On February 22, 2016, NYCHHC Does 11-20 "and/or" Corizon Does 21-30 responded to Mr. Zhang's emergency call concerning his left shoulder pain. (Id. ¶ 86.) Mr. Zhang denied that he had suffered any trauma, injury, or accident which might have caused the pain. (Id.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 erroneously recorded the pain as "left hand pain." (Id.) NYCHHC Does 11-20 "and/or" Corizon Does 21-30 did not review Mr. Zhang's medical history and "erroneously" referred him to physical therapy. (Id.)

Starting sometime in March 2016, Mr. Zhang would wake up during the night screaming and yelling about his shoulder and chest pain loudly enough to wake fellow inmates. (Id. ¶ 87.) NYCCO Does 1-10 ignored Mr. Zhang's pleas to go to the emergency room to treat his pain. (Id.)

In early March 2016, Mr. Zhang's fellow inmate called "the Plaintiffs and [Mr. Zhang's] family" to inform them that Mr. Zhang had severe shoulder and chest pain that stopped him from sleeping. (Id. ¶ 88.) The inmate asked them to contact the prison to have Mr. Zhang transferred to a hospital. (Id.)

Sometime in March 2016, Mr. Zhang talked to the "Plaintiffs and [his] family" and told them that when he experienced pain, corrections officers would not let him go to see a doctor without an appointment, however, appointments had to be requested in advance and required a long waiting period. (Id. ¶ 89.) Mr. Zhang explained he was only given painkillers when he was brought to the clinic, even though he had told the staff his pain was severe. (Id. ¶ 90.) Mr. Zhang further advised his family against contacting the prison as he believed such efforts would be futile. (Id.)

On March 8, 2016, Mr. Zhang complained of shoulder pain which Plaintiffs allege was misdiagnosed "as mild degenerative disease of shoulder bursitis/tendonitis." (Id. ¶ 91.) Though Mr. Zhang was referred to physical therapy, he refused it, apparently, as he knew his pain was not related to his shoulder's physical condition. (Id.)

On March 10, 2016, Mr. Zhang was referred to Christina Pillora, PT ("Ms. Pillora")—an employee or agent of NYCHHC "and/or" Corizon—for physical therapy for his left shoulder pain. (Id. ¶ 93.) Ms. Pillora noted that Mr. Zhang had difficulty raising his left arm above his head, that the pain had started on January 20, 2016 without a known cause, and that the pain medicine he was taking had no effect. (Id.) Ms. Pillora, that day and during Mr. Zhang's visits on March 17 and

24, failed to connect Mr. Zhang's severe left shoulder pain with "the seizures and/or cardiac arrest that might have occurred to him." (Id. ¶¶ 93, 95-96)

On March 14, 2016, Mr. Zhang refused to take Zocor and Norvasc because the medicines would not relieve him from his chest severe pain during the day and night, but requested eyeglasses for blurry vision. (Id. ¶¶ 92, 94.) On March 17 and 24, 2016, Mr. Zhang saw Ms. Pillora, but refused physical therapy because he believed it would not cure the real issues which were his seizures and heart failure. (Id. ¶ 95-96.)

On April 18, 2016, at around 7:30 a.m., Mr. Zhang demanded "to go out to have fresh air because he could not breathe." (Id. ¶ 97.) At around 2:30 p.m. he collapsed due to heart failure. (Id.) A New York Department of Corrections officer performed chest compressions before NYCHHC Does 11-20 responded to the emergency call. (Id. ¶ 98.) Though NYCHHC Does 11-20 reportedly arrived "in a timely fashion", Plaintiffs allege that they were actually unduly delayed "due to the setting" of the part of Rikers Island where Mr. Zhang was held. (Id. ¶ 99.) NYCHHC Does 11-20 were unable to find an automatic external defibrillator. (Id.) Dr. Wachtel, a NYCHHC "employee and/or agent," pronounced Mr. Zhang dead due to cardiac arrest at 3:09 p.m. (Id.) EMS did not arrive before Mr. Zhang's death. (Id. ¶ 100.)

On April 19, 2016, a medical examiner performed an autopsy and found Mr. Zhang's cause of death was "hypertensive and atherosclerotic cardiovascular disease." (Id. ¶ 101.)

B. Procedural History

On July 17, 2017, Plaintiffs filed the complaint alleging eight causes of action against Defendants: (1) violations of the Fifth, Eighth, and Fourteenth Amendment rights of equal protection and substantive due process under 42 U.S.C. § 1983 (Id. ¶¶ 174-181); (2) wrongful death entitling Plaintiffs to recovery under New York Estate Powers and Trust Law §§ 5-4.1 and 5-4.3 (Id. ¶¶ 182-185); (3) deprivation of society, services and parental guidance of Mr. Zhang (Id. ¶¶ 186-189); (4) discrimination under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)) and Title II of the Americans with Disabilities Act (42 U.S.C. § 12131, et seq.) (Id. ¶¶ 190-193); (5) negligence and malpractice (Id. ¶¶ 194-203); (6) disregarding duty to supervise and train employees and staff (Id. ¶ 204-208); (7) infliction of intentional and negligent emotional distress (Id. ¶¶ 209-211); and (8) fraudulent concealment (Id. ¶¶ 212-220).

On October 21, 2017, Defendants filed a Motion to Dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6). Defendants moved to dismiss all federal claims and all but two state claims. (Defs.' Mem. in Support at 6-8 [hereinafter "Defs.'

Mem."], ECF. No. 64 (filed Dec. 5, 2017).) However, Defendants contend that should the Court dismiss all federal claims in this case, the Court should also decline to exercise supplemental jurisdiction over the state claims. (Defs.' Mem. at 6.)

II. Legal Standards

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court's charge in ruling on a Rule 12(b)(6) motion "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." GVA Market Neutral Master Ltd. v. Veras Capital Partners Offshore Fund, Ltd., 580 F. Supp. 2d 321, 327 (S.D.N.Y. 2008) (quoting Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004)).

The Court must construe the complaint in light most favorable to the plaintiff, "taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor." Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009). The Court, however, is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." Iqbal, 556 U.S. at 678. A complaint that offers

such "labels and conclusions" or naked assertions without "further factual enhancement" will not survive a motion to dismiss. Id. (citing Twombly, 550 U.S. at 555, 557).

III. Discussion

A. Federal Claims

1. 42 U.S.C. § 1983 Claims

Plaintiffs allege that under 42 U.S.C. § 1983 Defendants' "reckless, outrageous, willful, wanton, malicious, negligent and/or intentional" actions and omissions done while they were "acting under the color of state law" violated Mr. Zhang's Fifth Amendment right to due process, his Eighth Amendment "right to be free from cruel and unusual punishment", and his Fourteenth Amendment rights to due process and equal protection. (Compl. ¶ 180.)

Defendants make three separate arguments in response. First, Defendants argue that a pretrial detainee's "claims regarding medical treatment arise under the Due Process Clause of the Fourteenth Amendment (and not the Fifth or Eighth Amendment[s])" as Plaintiffs have alleged. (Defs.' Mem. at 9 (citing Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017)).) While such a Fourteenth Amendment due process claim is sustainable, Defendants argue that Plaintiffs have failed to adequately plead such a claim. (Id. at 10-12.) Second, Defendants argue that issues with Mr. Zhang's medical care arose

from disagreements with medical personnel and, as such, do "not rise to the level of a constitutional violation." (Id. at 12-13 (citing Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998)).) Third, Plaintiffs have failed to allege a basis for "supervisory liability" that would allow Defendants Mayor de Blasio, Mr. Ponte, Dr. Raju, Dr. Yang, and Mr. Witty to be found liable for these violations. (Id. at 13-14.) Finally, Defendants argue that Plaintiffs have failed to specify an official policy, practice or custom that would allow Defendants the City of New York, NYCHHC, or Corizon to be found liable for these violations. (Id. at 14-16.)

a. Eighth Amendment – Cruel and Unusual Punishment

In Darnell the Second Circuit states that "[a] pretrial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eighth Amendment." Darnell, 849 F.3d at 29 (citing Benjamin v. Fraser, 343 F.3d 35, 49 (2d Cir. 2003), overruled on other grounds by Caiozzo v. Koreman, 581 F.3d 63, 70 (2d Cir. 2009)); see also Silvera v. Connecticut Dep't of Corrs., 726 F. Supp. 2d 183, 190 (D. Conn. 2010) ("Although a convicted prisoner's allegations of inadequate health care are evaluated under the Eighth Amendment's prohibitions of cruel and unusual punishment, the comparable rights of a pretrial detainee . . .

are secured by the Due Process Clause of the Fourteenth Amendment.") Indeed, Plaintiffs themselves concede as much in the complaint stating that "[t]he Fourteenth Amendment's due process clause governs the right of pre-trial detainees such as [Mr. Zhang] not to be subjected to cruel or unusual punishment just as the Eighth Amendment governs the rights of convicted prisoners in this regard. The same legal standard that governs conditions-of-confinement claims under the Eighth Amendment is applicable to such claims under the Fourteenth Amendment." (Compl. ¶ 158.) Thus, Plaintiffs' Eighth Amendment claim under § 1983 is inapplicable and is dismissed.

b. Fifth Amendment – Due Process

"[A] person detained prior to conviction receives protection against mistreatment at the hands of prison officials under the Due Process Clause of the Fifth Amendment if the pretrial detainee is held in federal custody, or the Due Process Clause of the Fourteenth Amendment if held in state custody." Caiozzo, 581 F.3d at 69 (comparing Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (applying the Fifth Amendment to a federal detainee), with Liscio v. Warren, 901 F.2d 274, 275-76 (2d Cir. 1990) (applying the Fourteenth Amendment to a state detainee)), overruled on other grounds by Darnell, 849 F.3d 17. As Mr. Zhang was being held in state custody, Fifth Amendment due process is inapplicable here. This claim is dismissed.

c. Fourteenth Amendment – Equal Protection

Plaintiffs also assert a Fourteenth Amendment equal protection claim under § 1983. Where, as here, a plaintiff "does not claim to be a member of a protected class" in the complaint, a plaintiff "may bring an equal protection claim under one of two theories: selective enforcement or 'class of one.'" Rankel v. Town of Somers, 999 F. Supp. 2d 527, 544 (S.D.N.Y. 2014) (citing Missere v. Gross, 826 F. Supp. 2d 542, 560 (S.D.N.Y. 2011)).

"To state a selective-enforcement claim, a plaintiff must plead: (1) he was 'treated differently from other similarly situated' individuals and (2) 'that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Id. at 544 (quoting Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790 (2d Cir. 2007)). See also Best v. New York City Dep't of Corr., 14 F. Supp. 3d 341, 351 (S.D.N.Y. 2014). As courts in this district have explained, "plaintiffs claiming selective enforcement must compare themselves to individuals [who] are similarly situated in all material respects." Best, 14 F. Supp. 3d at 352 (quoting Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 815 F. Supp. 2d 679, 696 (S.D.N.Y. 2011)).

"Under a class-of-one theory, a plaintiff must allege that he has been 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" Rankel, 999 F. Supp. 2d at 544 (quoting Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135, 140 (2d Cir. 2010)); see also Best, 14 F. Supp. 3d at 351-52. In a class-of-one case, "the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high" as their "circumstances must be prima facie identical." Best, 14 F. Supp. 3d at 352 (quoting Mosdos Chofetz, 815 F. Supp. 2d at 693).

Plaintiffs do not allege in the complaint that Mr. Zhang was treated differently from others similarly situated. To the contrary, Plaintiffs argue that the Defendants' inability to provide Mr. Zhang with sufficient healthcare was the result of Defendants' failure to adequately train and supervise their employees, agents, and staff in a way that deprived all Rikers Island inmates of their rights. (Compl. ¶¶ 20-26, 106-110, 113-118.) Indeed, Plaintiffs argue that Defendants' acts and omissions were "so persistent and widespread as to constitute policies, customs, and/or practices" that caused not only Mr. Zhang's constitutional and other injuries, but caused the death of several other inmates for want of medical care. (Id. ¶¶ 111, 119-131.)

Thus, Plaintiffs have failed to adequately plead the "similarly situated" element required for a Fourteenth Amendment Equal Protection pleading under either a class-of-one or selective enforcement theory and thus this claim is dismissed.

d. Fourteenth Amendment – Due Process

To adequately plead a claim for violation of Fourteenth Amendment due process, a plaintiff alleging failure to provide medical treatment to a prisoner must show "deliberate indifference to serious medical needs." Ziglar v. Abbasi, 137 S. Ct. 1843, 1864 (2017) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

To show deliberate indifference to a pretrial detainee's serious medical needs under Fourteenth Amendment due process, a plaintiff must establish that (1) he suffered a sufficiently serious deprivation of medical care to constitute an objective deprivation of his right to due process (the "objective prong"), and (2) the defendant acted intentionally to impose the deprivation of medical care or recklessly failed to act with reasonable care to mitigate the risk such deprivation caused and that defendant knew, or should have known, that the deprivation of medical care posed an excessive risk to the health or safety

of the pretrial detainee (the "mens rea prong"). Darnell, 849 F.3d at 29, 33-35;[5] see also Lloyd, 246 F. Supp. 3d at 719.

To sufficiently plead the "objective prong," a plaintiff must establish that they were actually deprived of adequate medical care. Barnes v. Ross, 926 F. Supp. 2d 499, 505 (S.D.N.Y. 2013). Only "reasonable" medical care is required, and "prison officials who act reasonably [in response to an inmate-health risk] cannot be found liable." Salahuddin v. Goord, 467 F.3d 263, 279-80 (2d Cir. 2006) (quoting Farmer v. Brennan, 511 U.S. 825, 845 (1994)). Further, a plaintiff must show that the inadequacy of the medical care was sufficiently serious. Id. at 280. In cases of temporary delay or interruption of otherwise adequate medical care, "it's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant." Sledge v. Fein, No. 11 Civ. 7450 (PKC), 2013 WL 1288183, at *5 (S.D.N.Y. Mar. 28, 2013) (quoting Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003)). On the other hand, in cases where a

[5] "Although Darnell involved a challenge to conditions of confinement, the holding of the decision is broad enough to extend to medical deliberate-indifference claims." Feliciano v. Anderson, No. 15 Civ. 4106 (LTS), 2017 WL 1189747, at *13 (S.D.N.Y. Mar. 30, 2017); see also Lloyd v. City of New York, 246 F. Supp. 3d 704, 718 (S.D.N.Y. 2017) ("The reasoning of Darnell applies equally to claims of deliberate indifference to serious medical needs under the Fourteenth Amendment.")

prisoner alleges denial of adequate medical care, the courts evaluate the seriousness of the detainee's underlying medical condition. Bellotto v. Cnty. of Orange, 248 F. App'x 232, 236 (2d Cir. 2007) (citing Smith, 216 F.3d at 185). In either case, the medical need—resulting from either the delayed care or the underlying condition itself—must be "a condition of urgency, one that may produce death, degeneration, or extreme pain." Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005) (quoting Hemmings v. Gorczyk, 134 F.3d 104, 108 (2d Cir. 1998)).

Plaintiffs have sufficiently pleaded that Mr. Zhang was actually deprived of adequate medical care. Plaintiffs have alleged that the medical care Mr. Zhang received was "deficient and resulted in a mismanaged health diagnosis, undiagnosed heart problems, and inadequate management of a seizure disorder." (Compl. ¶ 102.) Plaintiffs allege that on several occasions, Defendants NYCHHC Does 11-20, Corizon Does 21-30, and other medical professionals failed to take appropriate medical procedures considering his medical condition or failed to connect his symptoms with his medical history. (Compl. ¶¶ 70, 74, 76-79, 81, 83, 86-87, 93, 95-96.) They allege that Mr. Zhang's death was caused by "not being assessed by a doctor and not being considered for transfer to a hospital" despite his medical history. (Compl. ¶ 103.) Finally, they allege that but

for this want of medical care and supervision, Mr. Zhang's death may have been prevented. (Compl. ¶ 104.)

Further, Plaintiffs have pleaded that the inadequacy of the medical care was sufficiently serious. As Plaintiffs are alleging denial of adequate medical care, the Court looks to the seriousness of the detainee's underlying medical condition. Bellotto, 246 F. App'x at 236. Mr. Zhang's medical condition—hypertension and cardiovascular disease—was sufficiently serious as it may—and indeed did—cause his death. (Compl. ¶¶ 99-101.); see also Johnson, 412 F.3d at 403.

To sufficiently plead the "mens rea prong," a defendant's acts must be "more than merely negligent." Salahuddin, 467 F.3d at 280. Indeed, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner" and thus "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim." Feliciano v. Anderson, No. 15 Civ. 4106 (LTS), 2017 WL 1189747, at *13 (S.D.N.Y. Mar. 30, 2017) (quoting Estelle, 429 U.S. at 106). However, as courts in this circuit have observed, "distinguishing between negligent and reckless medical care is a difficult task, especially at the motion-to-dismiss stage where courts lack the benefit of expert opinion." Richardson v. Corr. Med. Care, Inc., No. 17 Civ. 0420 (MAD), 2018 WL 1580316, at *6 (N.D.N.Y. March 28, 2018) (citing Davis

v. McCready, 283 F. Supp. 2d 108, 121 (S.D.N.Y. 2017)). The distinction between the two "comes down to the degree of risk associated with the negligent treatment." Davis, 283 F. Supp. 2d at 122 (finding mens rea prong satisfied where medical officer failed to provide a cane to a detainee who had recently been shot eight times, despite his obvious struggles to walk and the excruciating pain he continued to suffer); Richardson, 2018 WL 1580316, at *6 (finding mens rea prong satisfied where medical officer deprived detainee of medication, did not refer him to a cardiologist or hospital, and failed to provide any other treatment despite a history of heart attacks and other health problems); Smith v. Outlaw, No. 15 Civ. 9961 (RA), 2017 WL 4417699, at *4 (S.D.N.Y. Sept. 30, 2017) (finding mens rea prong satisfied where a plaintiff with pre-existing heart condition complained of chest pain and stiffness and numbness in his left arm and a physician's assistant took no action).

For Plaintiffs to have adequately pleaded the "mens rea prong" a Defendant must have acted intentionally to deprive Mr. Zhang of medical care or recklessly failed to act with reasonable care to mitigate the risk that the deprivation caused even though the Defendant knew, or should have known, that the deprivation of medical care Mr. Zhang experienced posed an excessive risk to his health or safety. Darnell, 849 F.3d at 35. The Court will examine the allegations as to each Defendant.

i. Defendants NYCCO Does 1-10.

Plaintiffs have factually pleaded that on an unspecified number of occasions in June 2015 NYCCO Does 1-10 "did not respond" to Mr. Zhang's complaints of chest pain and that, in March 2016, they denied his requests to go to the emergency room to treat his pain. (Compl. ¶¶ 70, 87.) However, Plaintiffs have not alleged that NYCCO Does 1-10 intentionally deprived Mr. Zhang of medical care, nor do Plaintiffs allege that NYCCO 1-10 knew or should have known about Mr. Zhang's underlying medical condition. Without that knowledge, NYCCO Does 1-10 could not have known that denial of medical services posed an excessive risk to Mr. Zhang's health and safety. Accordingly, Plaintiffs have not met the "mens rea prong" as to NYCCO Does 1-10 and Defendants' motion to dismiss against those Defendants on Fourteenth Amendment due process grounds is granted.

ii. Defendants NYCHHC Does 11-20 and Corizon Does 21-30.

Plaintiffs allege that NYCHHC employees and agents discovered Mr. Zhang's hypertension and coronary heart disease during a routine medical examination at Mr. Zhang's intake and that this information was known to the Defendants. (Id. ¶¶ 69, 79, 110.) Plaintiffs allege that Mr. Zhang complained of chest and back pains starting no later than June 9, 2015 and, from at least December 2015, the pain was sufficient to deprive Mr. Zhang of sleep and cause other inmates to wake up from his cries

of pain. (Id. ¶¶ 71, 82.) In addition to back and chest pain, Mr. Zhang started experiencing pain in his left shoulder sometime in January 2016, first bringing it to Defendants' attention on February 15, 2016. (Id. ¶ 84.) By March 2016, Mr. Zhang would often wake from the shoulder and chest pains "screaming and yelling" enough to wake fellow inmates. (Id. ¶ 87.) Mr. Zhang thus experienced serious recurring chest and back pain for just over ten months, and chest, back, and left shoulder pain for at least two and a half months before his April 18, 2016 death. (Id. ¶ 67.) During this time, Plaintiffs alleged that Defendants saw him on no fewer than fifteen occasions; at least five times at his request and at least three due to medical emergencies. (Id. ¶¶ 69-72, 74, 76-81, 83, 84, 86, 91, 101.) Yet, during the ten months he complained, Mr. Zhang's symptoms did not recede—indeed, they worsened—and his pain stayed sufficiently severe to cause numerous complaints and deprive him and those around him of sleep. At no point in this ten-month period did Defendants allow Mr. Zhang to be sent to the hospital or refer him to a cardiologist or any other type of specialist. Considering the length of Mr. Zhang's condition, that he developed new symptoms over time, that he was not provided any real relief from pain, that Mr. Zhang experienced medical emergencies no fewer than three times, that Mr. Zhang repeatedly requested and was denied hospital care, and that

Defendants were aware of his medical history of hypertension and coronary disease during this entire period, Defendants' failure to refer Mr. Zhang to a hospital or specialized care plausibly constituted a reckless failure to act with reasonable care. See Davis, 283 F. Supp. 3d at 122-23; Smith, 2017 WL 441699, at *5. Further, Plaintiffs have established that Defendants plausibly knew or should have known that this deprivation constituted high risk to Mr. Zhang's health and safety. Plaintiffs have thus met the standard for the mens rea prong. With respect to Defendants NYCHHC Does 11-20 and Corizon Does 21-30 Plaintiffs have adequately pleaded deliberate indifference to Mr. Zhang's Fourteenth Amendment due process rights as to these Defendants.

iii. Defendants City of New York, New York City Department of Corrections, Rikers Island Facilities, NYCHHC, and Corizon (the "Municipal Defendants")

To hold a municipality liable under § 1983 for the unconstitutional acts of its employees, "a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Wray v. City of New York, 490 F.3d 189, 195 (2d Cir. 2009) (internal quotation marks and citations omitted).[6] There are four ways a plaintiff can allege

[6] Although a private entity, Corizon is the functional equivalent of a municipality in this context as it provided medical care in prisons, a role traditionally within the exclusive prerogative of the state. See Grimmett v. Corizon Med. Assocs. of New York,

such a policy or custom: (1) "the existence of a formal policy officially endorsed by the municipality," (2) "actions taken or decisions made by municipal officials with final decision making authority, which caused the alleged violation of plaintiff's civil rights," (3) "a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials," or (4) "a failure by policymakers to properly train or supervise their subordinates, amounting to 'deliberate indifference' to the rights of those who come in contact with municipal employees." Betts v. Rodriquez, No. 15 Civ. 3836 (JPO), 2016 WL 7192088, at *5 (S.D.N.Y. Dec. 12, 2016) (quoting Guzman v. United States, No. 11 Civ. 5834 (JPO), 2013 WL 5018553, at *3 (S.D.N.Y. Sept. 13, 2013)). Further, plaintiff "must give a factual description of such a policy, not just bald allegations that such a thing existed." Bess, 2013 WL 1164919, at *2. Additionally, a Plaintiff must "sufficiently connect[] this alleged policy to his alleged deprivation of constitutional rights." Betts, 2016 WL 7192088, at *5.

Here, Plaintiffs have adequately pleaded that there was an "official policy or custom." Plaintiffs point to a 2014 New

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No. 15 Civ. 7351 (JPO) (SN), 2017 WL 2274485, at *5 (S.D.N.Y. May 24, 2017); Bess v. City of New York, No. 11 Civ. 7604 (TPG), 2013 WL 1164919, at *2 (S.D.N.Y. Mar. 19, 2013).

York State Commission of Corrections ("NYSCOC") report that detailed the inadequate medical services available to Rikers Island detainees and linked these conditions with at least two inmate deaths and point to another report detailing a third inmate's 2013 death under similar circumstances. (Compl. ¶¶ 119-121, 132, 133, 155.) Plaintiffs further allege additional reports, media coverage, and publicity regarding the "systematic general and health care deficiencies and failure" and general poor conditions at Rikers. (Compl. ¶¶ 106, 108, 118, 152.) The Plaintiffs allege that these reports and a flurry of successful lawsuits against NYCHHC and Corizon put the Municipal Defendants on notice that the types of deprivations that allegedly caused Mr. Zhang's death were happening at Rikers. (Compl. ¶¶ 12, 108, 116, 149, 152, 153.) Nevertheless, Municipal Defendants ignored these warnings and recommendations or made inadequate efforts to provide inmates with acceptable treatment. (Compl. ¶¶ 12, 107, 116, 151, 154.) As such, Plaintiffs sufficiently allege a "practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials" to adequately plead an official policy or custom on the part of the Municipal Defendants. Additionally, they have adequately pleaded a causal link between the inaction or ineffective response on the part of Municipal Defendants and the continuation of the medical

conditions that allegedly led to the violation of Mr. Zhang's Fourteenth Amendment due process rights. See Bishop v. City of New York, No. 13 Civ. 9203 (AJN), 2016 WL 4484245, at *4 (S.D.N.Y. Aug. 18, 2016) (holding that plaintiff's pleading citing statistics, the reports of whistleblowers, and a federal court finding as to NYPD's policy and practice of suspicionless stop and frisk was sufficient to plead municipal liability in a § 1983 claim); Kucharczyk v. Westchester City, 95 F. Supp. 3d 529, 544 (S.D.N.Y. 2015) (complaint accompanied by Department of Justice report identifying widespread practice was sufficient to plausibly allege a § 1983 claim). Accordingly, Defendants' motion to dismiss Plaintiffs' § 1983 claims as to the Municipal Defendants is denied.

iv. Defendants Mayor de Blasio, Mr. Ponte, Dr. Raju, Dr. Yang, and Mr. Witty

Under a § 1983 claim, an individual may be held liable only if that individual is "personally involved in the alleged deprivation." Littlejohn v. City of New York, 795 F.3d 297, 314 (2d Cir. 2015). Because vicarious liability is inapplicable in a § 1983 suit, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the constitution." Id. at 314 (quoting Iqbal, 556 U.S. at 676 (2009)). Such personal involvement may be established by showing that: (1) "the defendant participated

directly in the alleged constitutional violation," (2) "the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong," (3) "the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom," (4) "the defendant was grossly negligent in supervising subordinates who committed the wrongful acts," or (5) "the defendant exhibited deliberate indifference" by failing to act on information that unconstitutional acts were occurring. Id. at 314 (quoting Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 127 (2d Cir. 2004)).

Mayor de Blasio. Plaintiffs argue that they have sufficiently alleged Mayor de Blasio's liability by pleading that he "(1) allowed the continuance of such an unconstitutional policy or custom" and "(2) exhibited deliberate indifference to the rights of [Mr. Zhang] by failing to act on information indicating that unconstitutional acts were occurring." (Pls.' Mem. of L. in Opp'n to Defs.' Mot. to Dismiss at 20 [hereinafter "Pls.' Mem."]) However, Plaintiffs argue only that (1) it was "plausible" that Mayor de Blasio was advised to close down Rikers Island, but opted to let it continue to operate and (2) it is "plausible to infer" that Mayor de Blasio exhibited deliberate indifference to the need for more and better supervision to protect against constitutional violations. (Id.

at 20-21 (citing Compl. ¶¶ 114-115, 161).) Such allegations fall short of the factual specificity necessary to adequately plead the Mayor's personal involvement. As such, Plaintiffs have failed to adequately plead Mayor de Blasio's § 1983 liability and Defendants' motion to dismiss as to Defendant Mayor de Blasio is granted.

Mr. Ponte. Plaintiffs argue that Mr. Ponte "(1) allowed the continuance of" an unconstitutional policy or custom and "(2) exhibited deliberate indifference to the rights of [Mr. Zhang] by failing to act on information indicating that unconstitutional acts were occurring." (Id. at 21 (citing Compl. ¶¶ 113-137, 151-157).) Plaintiffs state that "[i]t is unclearly [sic] whether . . . [Mr. Ponte] ever fulfilled his duties" to investigate the causes of deaths of other inmates to implement changes to the medical care at Rikers Island. (Compl. ¶ 135.) However, nowhere in the complaint do Plaintiffs allege the types of factual assertions that would substantiate either of these arguments or satisfy the pleading requirement that Mr. Ponte was personally involved in the deprivation. As such, Defendants' motion to dismiss as to Defendant Mr. Ponte is granted.

Dr. Raju, Mr. Witty, and Dr. Yang. Plaintiffs allege that Dr. Raju, Mr. Witty, and Dr. Yang "(1) created a policy or custom under which unconstitutional practices occurred and allowed the continuance of such a policy or custom" and "(2)

exhibited deliberate indifference to the rights of [Mr. Zhang], the decedent, by failing to act on information indicating that the unconstitutional acts were occurring." (Id. at 23 (citing Compl. ¶¶ 14-26, 104-37, 138-49, 151-57).) However, Plaintiffs have failed to plead facts sufficient to allege Dr. Raju, Mr. Witty, or Dr. Yang's personal involvement in the deprivation. As such, Defendants' motion to dismiss as to Dr. Raju, Mr. Witty, and Dr. Yang is granted.

e. Count 4: ADA & Rehabilitation Act

Plaintiffs also bring claims for violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq. and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a). (Compl. ¶¶ 190-193.)

To state a claim under Title II of the ADA, a plaintiff must allege (1) that they are a "qualified individual" with a disability, (2) that they were "excluded from participation in a public entity's services, programs, or activities or [were] otherwise discriminated against by a public entity," and (3) "that such exclusion or discrimination was due to [their] disability." Varney v. Many, No. 13 Civ. 5285 (VB), 2015 WL 1730071, at *3 (S.D.N.Y. Apr. 14, 2015) (citing Hargrave v. Vermont, 340 F.3d 27, 34-35 (2d Cir. 2003)). "Courts routinely dismiss ADA suits by disabled inmates that allege inadequate medical treatment, but do not allege that the inmate was treated

differently because of his or her disability." Elbert v. New York State Dep't of Corr. Servs., 751 F. Supp. 2d 590, 595 (S.D.N.Y. 2010) (citing seven decisions with this holding).

Similar to the ADA standard, to plead a case under the Rehabilitation Act "a plaintiff must allege: (1) that he or she is a person with disabilities under the Rehabilitation Act, (2) who has been denied benefits of or excluded from participating in a federally funded program or special service, (3) solely because of his or her disability." Bryant v. New York State Educ. Dep't, 692 F.3d 202, 216 (2d Cir. 2012).

Plaintiffs have not alleged that Mr. Zhang received disparate medical treatment due to a disability. Thus, they have not adequately pleaded claims under the ADA or the Rehabilitation Act. Accordingly, Defendants' motion to dismiss ADA and Rehabilitation Act claims is granted.

B. State Law Claims

1. Count 1: New York Constitution

Plaintiffs allege that "Defendants intentionally, outrageously, negligently, and recklessly disregarded [Mr. Zhang's] rights afforded to him under the . . . New York State Constitution[]." (Compl. ¶ 175.) The New York State Constitution only provides a private right of action where remedies are otherwise unavailable at common law or federally through 42 U.S.C. § 1983. Allen v. Antal, 665 F. App'x 9, 13 (2d

Cir. 2016) (citing Brown v. State of New York, 89 N.Y.2d 172, 192 (1996)). As alternative remedies are available to Plaintiffs under both § 1983 and New York common law, Plaintiffs have no private right of action to such a claim. Accordingly, Defendants' motion to dismiss this New York constitutional claim is granted.

2. Counts 2 & 5: Wrongful Death & Negligence and Malpractice

Defendants concede that they are not challenging the adequacy of Plaintiffs' wrongful death and negligence and malpractice claims. (Defs.' Mem. at 6.) Thus, Defendants' motion to dismiss as to these claims is denied.

3. Count 3: Loss of Society, Service, & Parental Guidance

Plaintiffs bring claim for the "loss of society, service, and parental guidance" as either a single or separate claims under New York law. (Compl. ¶¶ 186-189.) However, no such claims exist under New York law. "Loss of services" and "loss of parental guidance" are both elements of "pecuniary loss" to which a plaintiff may be entitled in a "wrongful death" action, not claims in and of themselves. Huthmacher v. Dunlop Tire Corp., 765 N.Y.S.2d 111, 113 (4th Dep't 2003). Even if the Court were to construe this as a wrongful death claim, such a pleading would be duplicative as Plaintiffs have already pleaded a wrongful death claim.

Further, under New York law, "loss of society" is merely a part of a "loss of consortium" claim. Mann v. United States, 300 F. Supp. 3d 411, 422 (N.D.N.Y. 2018). Even if the Court were to construe this as a claim based on Mr. Zhang's sons' loss of parental consortium, New York law does not recognize a cause of action for such a claim. In re Asbestos Litigation, 986 F. Supp. 761, 771 (S.D.N.Y. 1997) (citing DeAngelis v. Lutheran Medical Center, 84 A.D.2d 17, 27 (2d Dep't 1981)).

Accordingly, Defendants' motion to dismiss as to loss of society, service, and parental guidance is granted.

4. Count 6: Duty to Supervise & Train

Plaintiffs bring a claim for Defendants' duty to supervise and train employees. (Compl. at 46) The Court interprets this as a claim for "negligent supervision" under New York law. To state such a claim, in addition to the elements of negligence, " a plaintiff must show: (1) that the tort-feasor and the defendant were in an employee-employer relationship, (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence, and (3) that the tort was committed on the employer's premises or with the employer's chattels." Green v. City of Mount Vernon, 96 F. Supp. 3d 263, 297 (S.D.N.Y. 2015) (quoting Ehrens v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004)).

Here, Plaintiffs fail to allege any facts which would plausibly state that the Defendant employers knew or should have known of their employees'—in this case NYCCO Does 1-10, NYCHHC Does 11-20, and Corizon Does 21-30—propensity for the conduct which caused Mr. Zhang's injury prior to its occurrence. Plaintiffs merely allege general statements regarding how "an abundance of adverse media coverage and publicity" as to Rikers Island's general deficiencies in medical and health care that should have put the employers on notice. (Compl. ¶¶ 152-153.) However, this falls short of alleging facts regarding the level of awareness of these employees' propensities that the second prong of a negligent supervision claim requires. Accordingly, Defendants' motion to dismiss Plaintiffs' negligent supervision claim is granted.

5. Count 7: Intentional & Negligent Infliction of Emotional Distress

Defendants argue that, under New York state law, intentional infliction of emotional distresses and negligent infliction of emotional distress are theories of recovery that are to be invoked only where other tort remedies are not available. (Defs.' Mem. at 20-21 (citing Deronette v. City of New York, No. 05 Civ. 5275 (SJ), 2007 WL 951925, at *5 (E.D.N.Y. Mar. 27, 2007)). Indeed, "no such claims will lie where the conduct underlying the claims falls within the ambit of

traditional tort liability." Id. at 210; see also Salmon v. Blesser, 802 F.3d 249, 256 (2d Cir. 2015) ("[U]nder New York law, an intentional infliction tort may 'be invoked only as a last resort' . . . 'to provide relief in those circumstances where traditional theories of recovery do not'" (quoting Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 158 (2d Cir. 2014); Sheila C. v. Povich, 11 A.D.2d 120, 130 (1st Dep't 2004) (respectively))); Deronette, 2007 WL 951925, at *6 ("[a] claim for negligent infliction of emotional distress should be dismissed where the conduct for the underlying claim may be redressed by law of traditional tort remedies." (citing Druschke v. Banana Republic, Inc., 359 F. Supp. 2d 308, 315 (S.D.N.Y. 2005))).

Here, the conduct alleged in Plaintiffs' complaint is clearly encompassed in Plaintiffs' tort claims for wrongful death and negligence and malpractice. Therefore, other tort remedies are still available to the Plaintiffs and these claims cannot be pleaded under New York law. Accordingly, Defendants' motion to dismiss Plaintiffs' claims for intentional and negligent infliction of emotional distress claims is granted.

6. Count 8: Fraudulent Concealment

Under New York law, to state a prima facie claim for fraud, "a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer,

justifiable reliance, and resulting injury." Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc., 115 A.D.3d 128, 135 (N.Y. 2014) (citing Dembeck v. 220 Cent. Park S., LLC, 33 A.D.3d 491, 492 (1st Dep't 2006)).

Here Plaintiffs have failed to plead justifiable reliance. Plaintiffs have only alleged that Mr. Zhang's sons "justifiably relied on the Defendants' lie of omission in believing" there was a lack of untoward circumstances surrounding Mr. Zhang's death. (Compl. ¶ 219.) The complaint offers no factual details of this reliance whatsoever. As such, Plaintiffs have failed to adequately plead fraudulent concealment. Iqbal, 556 U.S. at 678 (holding a claim offering naked assertions without "further factual enhancement" will not survive a motion to dismiss).

Leave to Amend

Plaintiffs have requested leave to amend. (Pls.' Mem. at 2.) Rule 15 of the Federal Rules of Civil Procedure instructs courts to "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). However, amendment "is not warranted absent some indication as to what [a plaintiff] might add to [its] complaint in order to make it viable." Shemian v. Research In Motion Ltd., 570 F. App'x 32, 37 (2d Cir. 2014).

Accordingly, Plaintiffs' Fifth Amendment; Eighth Amendment; New York constitutional; loss of society, services, and parent guidance; and intentional and negligent infliction of emotional

distress claims are dismissed with prejudice. Plaintiffs' Fourteenth Amendment equal protection; Fourteenth Amendment due process (as to NYCCO Does 1-10, Mayor de Blasio, Mr. Ponte, Dr. Raju, Dr. Yang, and Mr. Witty); ADA; Rehabilitation Act; negligent supervision; and fraudulent concealment claims are dismissed without prejudice.

Should Plaintiffs wish to amend their complaint as to any dismissed claim, they must demonstrate how they will cure the deficiencies in their claims and that justice requires granting leave to amend. Such demonstration shall be filed within 30 days of the date of this Opinion.

Conclusion

For the reasons stated above, Defendants' motion is GRANTED in part, and DENIED in part.

Defendants' motion to dismiss Plaintiffs' Fifth Amendment; Eighth Amendment; New York constitutional; loss of society, services, and parent guidance; and intentional and negligent infliction of emotional distress claims is GRANTED with prejudice.

Defendants' motion to dismiss Plaintiffs' Fourteenth Amendment equal protection; Fourteenth Amendment due process (as to NYCCO Does 1-10, Mayor de Blasio, Mr. Ponte, Dr. Raju, Dr. Yang, and Mr. Witty); ADA; Rehabilitation Act; negligent

supervision; duty to supervise and train employees and staff claims is GRANTED without prejudice.

Defendants' motion to dismiss Fourteenth Amendment due process claims against NYCHHC Does 11-20, Corizon Does 21-30, and Municipal Defendants is DENIED.

Defendants' motion to dismiss wrongful death and negligence and malpractice claims is DENIED.

The Clerk of Court is respectfully directed to terminate the motion docketed at ECF No. 62.

SO ORDERED.

Dated: New York, New York
June 28, 2018

John F. Keenan
United States District Judge