UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY LIPSCOMB,

Plaintiff,

-against-

FEDERAL BUREAU OF PRISONS OTISVILLE FEDERAL CORRECTIONAL INSTITUTIONS FORMER WARDEN MR. HUFFORD *in his individual and official capacity*, CURRENT WARDEN MS. RECKTENWALD *in her individual and official capacity*, ASSOCIATE WARDEN ANDREW DACHISEN *in his individual and official capacity*, and HVAC SUPERVISOR MR. DIAMOND *in his individual and official capacity*,

Defendants.

No. 14 Civ. 6562 (NSR)

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff brings this action against Defendants,[1] all of whom are associated with the Federal Bureau of Prisons and the Otisville Federal Correctional Institution, for violations of his Eighth Amendment rights. Defendants move to dismiss (*see* ECF No. 38) on procedural grounds including lack of subject matter jurisdiction, mootness of injunctive relief claims, and failure to exhaust all of the administrative remedies promulgated in 28 C.F.R. § 542.10 *et seq.* (2017). For the following reasons, Defendants' motion to dismiss is GRANTED.

[1] Plaintiff misspells, according to defense counsel, Defendant Hufford as "Hubbard" and Defendant Recktenwald as "Rectenwald" in his Amended Complaint. The case caption above reflects the correct spelling of these Defendants' names, and the Clerk of the Court is respectfully directed to correct the caption in this action, accordingly.

Copies mailed/faxed 7/28/2017
Chambers of Nelson S. Román, U.S.D.J.

BACKGROUND[2]

In August 2012, while Plaintiff Anthony Lipscomb was incarcerated at the Federal Correctional Institution ("FCI Otisville") in Otisville, New York, he discovered that the ventilation system in his cell was not working. (Am. Compl. ¶¶ 9-10, ECF No. 13.) Plaintiff alleges that the unit secretary received complaints about the ventilation system and filed a work order application for its repair with the heating and ventilation department. (*Id.* at ¶ 11.) Soon after, H.V.A.C. staff members assessed the system and determined there was an obstruction within the unit preventing airflow. (*Id.*)

A few weeks later, Plaintiff verbally informed the warden, Defendant Howard Hufford, of the low temperatures Plaintiff experienced in his cell. (*Id.* at ¶ 12.) Defendant Hufford informed Plaintiff that a piece of equipment had been ordered, but, it would take a few months to arrive. (*Id.*)[3] Plaintiff and other inmates were permitted to cover the windows in their cells with plastic to prevent airflow into their cells. (*Id.* at ¶ 13.) Plaintiff alleges that the coverings did little to remedy the situation and continued to experience low temperatures within his cell. (*Id.* at ¶¶ 13-14.) He also alleges nearly a year passed without the ventilation system being restored to working condition. (*Id.*)

During the fall of 2013, FCI Otisville experienced various supervisory changes. First, Defendant Darren Compton was assigned as the unit counselor of Plaintiff's housing unit. (*Id.* at ¶ 14.) Then, Defendant Hufford left his position as warden and Defendant Andrew Dachisen assumed the role of acting warden until Defendant Monica Recktenwald was appointed as

[2] These facts are taken from Plaintiff's amended complaint, the operative complaint in this action, and assumed to be true for the purposes of this motion.

[3] Plaintiff alleges Defendant Hufford was "indifferent to [his] plight" based on his knowledge of the broken ventilation system and his use of the excuse that a part had been ordered to "discourage[]" Plaintiff from making an administrative filing. (Am. Compl. at ¶ 29.)

warden. (*Id.* at ¶¶14-15.) Plaintiff contends that all three defendants were aware of the defective ventilation system. (*Id.*) Plaintiff personally notified Defendant Recktenwald of the issue on several occasions because of the "weather report of the coldest winter in the nation." (*Id.* at ¶ 15.)

After Defendant Hufford had left the facility, Defendant Compton ordered the removal of the plastic window coverings. (*Id.* at ¶ 16; *see also id.* at ¶ 33 ("The institution's policy regarding security regardless of the circumstances emboldened Compton to eliminate the window plastic program").) Plaintiff informally appealed to Defendant Recktenwald, who ultimately permitted coverings to be removed. (*Id.* at ¶ 17.) Subsequently, routine room temperature checks were instated and "room temperatures were below the legal standard." (*Id.* at ¶ 18.) Afterwards, Defendant Phillip Diamond, the prison's H.V.A.C. supervisor, explained to Plaintiff that there may be something obstructing the airways, however, the airways were never inspected. (*Id.* at ¶ 19.) Around February 2014, Plaintiff requested an administrative remedy application from Defendant Compton, who advised the Plaintiff to contact the H.V.A.C. department. (*Id.* at ¶ 21.)

Plaintiff did not file an administrative remedy application nor any type of formal complaint regarding the ventilation issue, because, in the past, filing such applications did not remedy the issue and often these applications went unanswered. (*Id.* at ¶¶ 22-25 (noting an instance where he was ignored in 2010 that when "coupled with the severity of the winter season" led him to "decide[] against filing the obtained BP-8").) Instead, Plaintiff sent a letter to a New York State senator, who forwarded the letter to the Office of Congressional Affairs. (*Id.* at ¶¶ 25-26.) Plaintiff transferred housing units in May 2014, and at that time, the ventilation system had still not been repaired. (*Id.* at ¶ 28; *see also id.* at ¶ 40 ("Though unconventional, the administrative process from top to bottom via the plaintiff's complaint letter to the senator had been exhausted").)

Plaintiff commenced the instant action against Federal Bureau of Prisons current and former employees Compton, Dachinsen, Diamond, Hufford, and Recktenwald, in their official and individual capacities, under the Eighth Amendment of the United States Constitution. The Court construes *pro se* Plaintiff's claims as falling under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[4]

STANDARD ON A MOTION TO DISMISS

"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*, 566 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). "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." *Iqbal*, 566 U.S. at 678. Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Stan v. Sony BMG Music Entm'l*, 592 F.3d 314, 321 (2d Cir. 2010).

A court should accept non conclusory allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Ruotolo v. City of N.Y.*, 514 F.3d 184, 188 (2d Cir. 2008). "[T]he duty of a court '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.'" *DiFolco v.*

[4] In Plaintiff's opposition, he asserts that the complaint alleges a compensable injury pursuant to 42 U.S.C. § 1983. (*See* ECF No. 37, at 1.) But Defendants, all of whom are federal officials, may not be found liable under that section, because it is limited to *state* officials. Therefore, this action must be brought pursuant to *Bivens* to pursue damages. *See Lockwood v. Federal Bureau of Prisons*, No. 13 Civ. 8104 (ALC), 2015 WL 4461597, at *2 (S.D.N.Y. July 21, 2015) (recognizing the need to "interpret[] [a] *pro se* Complaint to raise the best possible claims").

MSNBC Cable L.L.C., 622 F.3d 104, 113 (2d Cir. 2010) (quoting *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998)).

"*Pro se* complaints are held to less stringent standards than those drafted by lawyers, even following *Twombly* and *Iqbal*." *Thomas v. Westchester*, No. 12 Civ. 6718, 2013 WL 3357171, at *2 (S.D.N.Y. July 3, 2013); *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009). The court should read *pro se* complaints "to raise the strongest arguments that they suggest." *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006). Even so, "*pro se* plaintiffs . . . cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a right to relief above the speculative level." *Jackson v. N.Y.S. Dep't of Labor*, 709 F. Supp. 2d 218, 224 (S.D.N.Y. 2010) (internal quotation marks omitted). Dismissal is justified where "the complaint lacks an allegation regarding an element necessary to obtain relief," and the "duty to liberally construe a plaintiff's complaint [is not] the equivalent of a duty to re-write it." *Geldzahler v. N.Y. Med. Coll.*, 663 F. Supp. 2d 379, 387 (S.D.N.Y. 2009) (internal citations and alterations omitted).

DISCUSSION

The Court does not address the merits of Plaintiff's allegations regarding the substandard conditions he experienced at FCI Otisville. Instead, his claims must be dismissed on procedural grounds of mootness, sovereign immunity, and exhaustion. Therefore, the Court expresses no opinion on whether his allegations would sufficiently plead violations of his Eighth Amendment rights cognizable as a *Bivens* claim.[5]

[5] The Supreme Court has recently reiterated that "a *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 1864 (2017) ("even a modest extension is still an extension" which could "present a new context for *Bivens* purposes"). For the purposes of its sovereign immunity analysis, *see infra* Part II, this Court assumes a *Bivens* cause of action is appropriate. Ultimately, the Court need not reach the question of whether a *Bivens* remedy is available to Plaintiff under the *Ziglar* approach, because Plaintiff did not exhaust his administrative remedies. *See infra* Part III.

I. PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF ARE MOOT[6]

A plaintiff must establish standing to bring suit. "[T]he 'irreducible constitutional minimum' of standing consists of three elements[:] [t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992), and citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000)). "[T]he injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete and particularized.'" *Id.* at 1545 (quoting *Friends of the Earth*, 528 U.S. at 180-81).

When seeking injunctive relief, a plaintiff's standing "depend[s] on whether [that plaintiff] [is] likely to suffer future injury" based on the alleged conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). This "likelihood of future harm" must be "real and immediate," though it need not be certain. *Shain v. Ellison*, 356 F.3d 211, 215-16 (2d Cir. 2004). Plaintiffs bear the burden of alleging facts in their complaint sufficient to establish standing. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 176-77 (2d Cir. 2011) (citing *Lujan*, 504 U.S. at 569 n.4); *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011); *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)) ("plaintiff must 'clearly . . . allege facts demonstrating' each element").

Plaintiff is seeking both injunctive relief and damages for allegedly suffering extreme discomfort from the broken ventilation system at FCI Otisville. It is undisputed that his injury is concrete and particularized as he alleges personally experiencing extreme discomfort during his

[6] The Court notes that Plaintiff conceded, in one of his opposition papers, that his injunctive claims should be dismissed. (*See* ECF No. 37, at 2.) Nevertheless, the Court explains its reasoning for the dismissal of these claims.

incarceration at FCI Otisville. It is also undisputed that there is a sufficient causal link between the Defendants' failure to remedy the ventilation system and Plaintiff's injuries. With regards to redressability, Plaintiff's claim for damages is appropriate, as damages would compensate Plaintiff for the extreme discomfort he allegedly suffered.

Defendants contest, however, Plaintiff's standing to bring suit for injunctive relief because the Plaintiff has transferred correctional facilities. (Defs. Mem. at 7-8.) It has been established in this Circuit that transfer of correctional facilities moots a plaintiff's claim for injunctive relief. *See Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006); *see, e.g.*, *Smith v. City of New York*, No. 14 Civ. 5927 (RWS), 2017 WL 2172318, at *9 (S.D.N.Y. May 16, 2017) (holding that a plaintiff's "transfer from [the correctional center on Rikers Island] to a facility outside of the New York City Department of Correction system render[ed] his claims [for injunctive relief] moot"); *Harrison v. Terrell*, No. 12 Civ. 6855 (RWS), 2013 WL 1290653, at *2 (S.D.N.Y. Mar. 29, 2013) (after the petitioner was transferred from FCI Otisville to a federal medical center, his "claims [for injunctive relief] [were] dismissed as moot because he [was] no longer housed in the facility where the alleged deprivations were taking place . . ."); *see also Johnson v. Killian*, No. 07 Civ. 6641 (NRB), 2013 WL 103166, at *3 (S.D.N.Y. Jan. 9, 2013) ("request for declaratory relief no longer present[ed] a live controversy" because the plaintiff was transferred). In short, Plaintiff's likelihood of suffering future harm from the broken ventilation system is not real and immediate since Plaintiff is no longer housed in the facility at issue. *See Shane*, 356 F.3d at 215-16; *cf. Ortiz v. Westchester Med. Ctr. Health Care Corp.*, No. 15 Civ. 5432 (NSR), 2016 WL 6901314, at *9 (S.D.N.Y. Nov. 18, 2016) (plaintiffs "failed to demonstrate the likelihood, rather than mere possibility, of a future harm").

Plaintiff's claims do not fall within the exception to this rule, for "challenged actions that are capable of repetition, yet evading review," *Lloyd v. City of New York*, 43 F. Supp. 3d 254, 269-70 (S.D.N.Y. 2014) (internal citations omitted), because the actions challenged here have not been plausibly alleged to be likely to repeat to his detriment, nor would it have been impossible to litigate the issue during his period of confinement.[7] Plaintiff's complaint stems from Defendants' failure, beginning in August 2012, to remedy the ventilation system at FCI Otisville during his incarceration there. Plaintiff was transferred to FCI Berlin in May 2014 and is now currently incarcerated at Federal Medical Center Devens.

In *Lloyd*, the court reasoned that individuals housed at Rikers Island generally are not detained in a single facility long enough for federal civil suits to be completely litigated, because the facility holds individuals only for short periods of time—when they are detained pre-trial or are serving sentences that are less than one year. *Id.* at 270. In contrast, Plaintiff spent multiple years at FCI Otisville—and certainly long enough to have seen the heating issue remedied. Therefore, it is generally possible for an inmate's federal lawsuit, such as Plaintiff's, to be completely litigated while detained at a BOP facility such as FCI Otisville.[8]

Further, the court in *Lloyd* reasoned that the specific plaintiffs in that case, having testified to their various and "considerable number" of confinements at Rikers Island, might return to the facility, thereby creating a reasonable expectation that they would be subjected to the same treatment in the future. *See Lloyd*, 43 F. Supp. 3d at 270. Here, there are no plausible allegations that support the inference that Plaintiff would be reasonably expected to return to FCI

[7] The "capable of repetition, yet evading review" exception is applied when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Lloyd*, 43 F. Supp. 3d at 269-70 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

[8] Moreover, Plaintiff did not file this action until after he had been transferred to a separate facility, so it is impossible to infer that his transfer was in response to litigation. *See infra* Part III.

Otisville in the future, especially now that he is two facilities removed from Otisville. Plaintiff's allegations are challenging the specific actions of employees of a particular facility, not a widespread practice or policy of the Federal Bureau of Prisons, as the plaintiffs did in *Lloyd* with respect to the Department of Corrections alleged failings with regard to religious accommodations.[9] *See id.* at 260-61.

On the basis of his allegations, Plaintiff's claims do not persist despite transferring housing facilities, such that the transfer would not moot his claims arising out of the original facility. *See, e.g.*, *Perez v. Arnone*, 600 F. App'x 20, 22 (2d Cir. 2015) (the plaintiff's "claims with respect to his requests for a single cell [were] not mooted by his subsequent transfer to a new facility" because he "alleged that the problem . . . persisted at his new facility"); *Davis v. New York*, 316 F.3d 93, 99 (2d Cir. 2002) ("claim for injunctive relief [was] not moot because [plaintiff] indicate[d] that his problems with second-hand smoke [were] ongoing"). Accordingly, the Plaintiff's cause of action seeking an injunction to fix the ventilation system at FCI Otisville is moot as a matter of law due to his detainment at another correctional facility. *See Harrison*, 2013 WL 1290653, at *2; *see also Prins v. Coughlin*, 76 F.3d 504, 506 (2d Cir. 1996); *Mawhinney v. Henderson*, 542 F.2d 1, 2 (2d Cir. 1976).

Since Plaintiff has "no legally cognizable interest in the final determination" of this suit in regards to injunctive relief sought, his claims for injunctive relief are dismissed. *Lloyd*, 43 F. Supp. 3d at 270 (quoting *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979)). Plaintiff's claims for damages, however, survive this mootness analysis.

[9] Plaintiff does not allege facts showing a pattern or repetition of failing to fix broken ventilation systems. The Supreme Court ruled similarly in *City of Los Angeles v. Lyons*, holding that Plaintiff did not have standing to seek an injunction against the police department because "it is no more than speculation to assert [] that [Plaintiff] . . . will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury." 461 U.S. 95, 108 (1983).

II. SOVEREIGN IMMUNITY

a. Claims Against Defendants in their Official Capacities (or Against Agencies)

Under the doctrine of sovereign immunity, Plaintiff cannot bring suit against the United States or its agents in their official capacities unless the United States consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). "Sovereign immunity is jurisdictional in nature," with "the 'terms of [the] consent . . . defin[ing] th[e] court's jurisdiction to entertain suit.'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Consent to be sued "cannot be implied but must be unequivocally expressed." *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (citation omitted). This long-standing doctrine extends to actions against federal agencies and federal officers acting in their official capacities since these actions are "essentially [] suit[s] against the United States." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994); *see also Meyer*, 510 U.S. at 486 (holding a *Bivens* action for damages cannot be brought against a federal agency). The doctrine of sovereign immunity thus prohibits actions against federal officers for damages in their *official* capacities. *See Robinson*, 21 F.3d at 510 (suits against officers in their official capacities "are also barred under the doctrine of sovereign immunity, unless such immunity is waived"); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals.").

The Federal Bureau of Prisons is an agency of the United States. All individually named Defendants are employees or former employees of FCI Otisville, a Federal Bureau of Prisons facility. Construing Plaintiff's claims liberally, to the extent that Plaintiff may be seeking relief against the Federal Bureau of Prisons, those claims are barred by the doctrine of sovereign immunity and must be dismissed as a matter of law. Plaintiff's claims against individual

defendants in their official capacities for *damages* are similarly dismissed. *See, e.g.*, *Paulino-Duarte v. United States*, No. 02 Civ. 9499 (RCC), 2003 WL 22533401, at *3 (S.D.N.Y. Nov. 7, 2003); *Owusu v. Fed. Bureau of Prisons*, No. 02 Civ. 0915 (NRB), 2003 WL 68031, at *1 (S.D.N.Y. Jan. 7, 2003).

For claims against federal agencies or officers that seek non-monetary relief, the Administrative Procedure Act ("APA") waives sovereign immunity. *See* 5 U.S.C. § 702.[10] And, the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Gupta v. Sec. & Exch. Comm'n*, 796 F. Supp. 2d 503, 509 (S.D.N.Y. 2011) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006)). Nevertheless, this Court need not consider whether Plaintiff has sufficiently pleaded grounds entitling him to sue any of the Defendants for injunctive relief[11] because, as discussed above, Plaintiff lacks standing to bring claims seeking an injunction. *See supra* Part I; *see also Rivera v. Fed. Bureau of Investigation*, No. 16 Civ. 0997 (NAM)(TWD), 2016 WL 6081435, at *6 (N.D.N.Y. Sept. 13, 2016), *report and recommendation adopted*, 2016 WL 6072392 (N.D.N.Y. Oct. 17, 2016) ("the waiver does not apply where monetary relief is sought in addition to equitable relief").

b. Claims Against Defendants in their Individual Capacities

Plaintiff's claims against the Defendants in their individual capacities for injunctive relief are similarly dismissed as moot. *See supra* Part I. But even if his injunctive claims were not moot, they are only properly asserted against the individual Defendants in their official

[10] The APA does not simultaneously confer subject matter jurisdiction; it only creates a right to judicial review of final agency action. *See Sharkey v. Quarantillo*, 541 F.3d 75 (2d Cir. 2013); *Califano v. Sanders*, 430 U.S. 99 (1977). Therefore, this court must rely on federal question jurisdiction. *See Sharkey*, 541 F.3d at 84 ("although the APA does not itself confer subject matter jurisdiction, the Federal Question Statute, 28 U.S.C. § 1331, confers jurisdiction over a suit that 'arises under' a 'right of action' created by the APA").

[11] The APA requires Plaintiff to "specify the Federal officer . . . and their successors in office, personally responsible for compliance" with the challenged agency action. *See* 5 U.S.C. § 702.

capacity—and not in an action where he seeks damages. *See, e.g.*, *Matthews v. Wiley*, 744 F. Supp. 2d 1159, 1167 (D. Colo. 2010) (such injunctive relief is "not within the authority of the [d]efendants in their individual capacities" and a plaintiff "cannot obtain injunctive relief in a *Bivens* action already seeking damages for past constitutional violations").

Plaintiff does bring a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Defendants in their individual capacities for damages. In *Bivens*, the Supreme Court implied a cause of action for damages against federal officers in their *individual* capacities rather than their official capacities. *See Robinson*, 21 F.3d at 510; *see also Malesko*, 534 U.S. at 70 ("the purpose of *Bivens* is to deter individual federal officers from committing constitutional violations"). *Bivens* actions against federal officers in their individual capacities are not barred by sovereign immunity because the suit is not "essentially against the United States" and, therefore, does not require express or implied consent to be sued. *See Robinson*, 21 F.3d at 510.[12]

Therefore, all claims are dismissed on the grounds of sovereign immunity, except for Plaintiff's claims for damages against individual Defendants acting in their individual capacities.

III. PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

Failure to exhaust administrative remedies is an affirmative defense properly asserted in a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Williams v. Corr. Officer Prianto*, 829 F.3d 118, 122 (2d Cir. 2016) (quoting *Jones v. Bock*, 549 U.S. 199, 216 (2007)). Accordingly, though the exhaustion requirement need not be pleaded by the Plaintiff in the complaint, "a district court [] may dismiss a complaint for failure to exhaust administrative

[12] Plaintiff cannot, however, proceed against federal officials in their individual capacities for injunctive relief under *Bivens*, as *Bivens* claims are limited to claims seeking damages. *See Bivens*, 403 U.S. at 409-10; *Davis v. Passman*, 422 U.S. 228, 245 (1979).

remedies if it is clear on the face of the complaint that the plaintiff did not satisfy the [] exhaustion requirement." *Id.*; *see, e.g.*, *Aviles v. Tucker*, No. 14 Civ. 8636 (NSR), 2016 WL 4619120, at *2-3 (S.D.N.Y. Sept. 1, 2016) ("clear from the face of the [c]omplaint that [p]laintiff did not exhaust his administrative remedies" and instead complaint "explicitly state[d] that [p]laintiff did not file a grievance"); *Dobek v. Leanaweaver*, No. 15 Civ. 7497 (LGS), 2016 WL 8711737, at *3 (S.D.N.Y. Aug. 5, 2016).

The Prisoner Litigation Reform Act (PLRA), codified in 42 U.S.C. § 1997e(a), states that "no action shall be brought with respect to prison conditions under section 1983 of this title or any other federal law by a prisoner . . . until such administrative remedies as are available are exhausted." The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). This statutory exhaustion requirement removes judicial discretion in determining what constitutes exhaustion. *See Ross v. Blake*, 136 S. Ct. 1850, 1857-58 (2016).

The Supreme Court in *Ross v. Blake* expressly stated that "courts may not engraft an unwritten 'special circumstances' exception onto the PLRA's exhaustion requirement." *Id.* at 1862. *Ross*, thus, abrogated the "special circumstances exception established in *Giano v. Goord*, 380 F.3d 670, 675-76 (2d Cir. 2004), and *Hemphill* [*v. New York*, 380 F.3d 680 (2d Cir. 2004)], permit[ting] plaintiffs to file a lawsuit in federal court without first exhausting administrative remedies that were, *in fact*, available to them." *Williams*, 829 F.3d at 123 ("*Ross* largely supplants our *Hemphill* inquiry by framing the exception issue entirely within the context of whether administrative remedies were actually available to the aggrieved inmate") (emphasis in original).[13] Exhaustion is mandatory under the statute unless the administrative proceedings

[13] Plaintiff's attempt to rely on *Hemphill* is thus unavailing. (*See* Pl. Opp'n at 2, 4-6.)

are unavailable. *See Ross*, 136 S. Ct. at 1856-57. The Court explained that administrative procedures are unavailable in three circumstances: (1) when officers are unable or consistently unwilling to provide relief to inmates, (2) when administrative procedures are incapable of being used, and (3) when prison administrators hinder inmates from utilizing grievance procedures through machination, misrepresentation, or intimidation. *See id.* at 1859-60.

It is clear from the face of the complaint that Plaintiff did not exhaust his administrative remedies. Plaintiff concedes that he chose not to file a grievance or follow procedures as set out by the Code of Federal Regulations ("the Code") in the Administrative Remedy Program ("ARP"). 28 C.F.R. § 542.10.[14] Here, Plaintiff never filed a BP-8 form, a BP-9 form, or any appeal. Plaintiff outlines his familiarity with the required procedures in the complaint and concedes that he "decided against filing the obtained BP-8." (Am. Compl. 7); *cf. Williams*, 829 F.3d at 126 (in comparison, New York State's "grievance procedures that were technically available to [an inmate] are so opaque and confusing that they were, 'practically speaking, incapable of use.'").

Attempting to resolve the issue informally is merely the first step of many in the procedures set forth by the Code. Plaintiff claims that he did not file a grievance in this case, formally or informally, because in 2010 he did not receive a reply to a grievance he had filed and he knows of other inmates who file grievances frequently do not receive replies. The Code, however, expressly states that "the Coordinator at any level may reject and return to the inmate

[14] According to the ARP, an inmate must first informally present a grievance to facility staff. 28 C.F.R. § 542.13(a). The FCI Otisville Inmate Handbook (2012) clarifies that this informal grievance should be filed using a BP-8 form. *FCI Otisville, Inmate Handbook*, FEDERAL BUREAU OF PRISONS 1, 6 (2012), https://www.bop.gov/locations/institutions/otv/OTV_aohandbook.pdf. If the issue is not resolved, an inmate must file a formal, written Administrative Remedy Request using the BP-9 form, within "20 calendar days following the date on which the basis for the Request occurred." 28 C.F.R. § 542.14. The ARP addresses specific circumstances under which an inmate is exempt from filing with the institution, such as particularly sensitive issues, and delineates an alternative set of procedures to follow. The Court takes judicial notice of the inmate handbook, referenced in Plaintiff's complaint (Am. Compl. ¶ 38), though it is not dispositive to the exhaustion determination.

without response a Request or an Appeal that is written by an inmate in a manner that . . . does not meet any other requirement of this part." 28 C.F.R. § 542.18(a) (emphasis added).

a. Unavailability of Administrative Procedures

Plaintiff does not directly plead in his complaint that the administrative remedies were unavailable. He does, however, make reference to "[b]eing well aware of the institutions previous behavior in failing to respond to another inmates BP-8 who experienced extreme cold conditions in the SHU" and references other inapplicable reasons why he should be afforded an exception to the exhaustion requirements. (Am. Compl. ¶ 25, ¶¶ 41-45.)

i. Application of the first Ross category: whether the officers were consistently unwilling to provide relief to Plaintiff

Plaintiff thus alludes to remedies being unavailable under the first *Ross* circumstance by claiming that in the past himself and others never received responses to filed grievances. In *Ross*, both Plaintiff and Defendant filed multiple documents showing that Maryland wardens routinely dismiss ARP grievances. Here, Plaintiff alleges he and others frequently did not receive responses to filed grievances. It is well-settled in this district that failure to exhaust administrative procedures is not excused by simply a lack of response at the first stage. *See, e.g.*, *Mena v. City of New York*, No. 13 Civ. 2430 (RJS), 2016 WL 3948100, at *4 (S.D.N.Y. July 19, 2016) (holding that that "although [p]laintiff's initial grievance received no response, this alone [was] insufficient to show that [the process] acted as a mere dead end"); *Little v. Municipal Corporation et al.*, No. 12 Civ. 5851 (KMK), 2017 WL 1184326, at *12 (S.D.N.Y. Mar. 29, 2017) (holding that the plaintiff's "failure to exhaust [was not] excused by his contention that the grievance unit denied him a grievance number"). Indeed, the administrative procedures expressly state "if the inmate does not receive a response within the time allotted for reply, including

extension, the inmate may consider the absence of a response to be a denial at that level." 28 C.F.R. § 542.18(c).

It is unclear if the Plaintiff was attempting to invoke the first *Ross* circumstance again, when he claims Defendant Compton advised him to contact H.V.A.C. after he requested an administrative remedy application. Plaintiff alleges Defendant Compton "again made an attempt to informally address the matter" through his advice. (*See* Am. Compl. at 6.) This claim does not fall within the first *Ross* exception because, despite Defendant Compton's statement, Plaintiff received the application. Plaintiff does not allege any other facts to support a finding that prison officials were unwilling to provide relief if the proper procedures were followed.

ii. Application of the third Ross category: whether administrators hindered Plaintiff from utilizing grievance procedures through machination, misrepresentation, or intimidation

Plaintiff also alleges that his transfer from FCI Otisville to FCI Berlin constituted affirmative action to prevent him from availing himself of grievance procedures. (Pl. Reply at 5-6, ECF No. 37.) This allegation falls into the third *Ross* category of hindering the use of grievance procedures via machination, misrepresentation, or intimidation. *Ross*, 136 S. Ct. at 1860. Plaintiff alleges that he first experienced the issue with the ventilation system around August 2012. (*See* Am. Compl. at 4.) Plaintiff did not request an administrative grievance application until February 2014 and was not transferred to FCI Berlin until May 2014. (Am. Compl. at 6-7.) Thus, Plaintiff experienced the issue with the ventilation system almost two years prior to being transferred without ever filing a BP-8 or any other subsequent form.

A BP-9 form is supposed to be filed within twenty days of the incident giving rise to the complaint. *See* 28 C.F.R. § 542.14. While inmates are required to file an informal request (often referred to as a BP-8) before filing a BP-9 form, Plaintiff waited almost two years before requesting a grievance application. Further, the Code sets forth procedures for an application for

a filing extension. *See* 28 C.F.R. § 542.14(b). Moreover, if Plaintiff felt his grievance concerned a sensitive issue or suspected he may be subject to intimidation, the Code sets forth procedures for filing sensitive issues. *See* 28 C.F.R. § 542.14(d)(1). Plaintiff took neither of these steps to file any type of grievance at any time. Instead, Plaintiff mailed a letter to a New York Senator and subsequently filed this action *after* he transferred facilities.

Plaintiff's claim under the third *Ross* circumstance, as alleged, thus has no merit because Plaintiff's transfer took place approximately three months after he requested, received, and *chose* not to file an application for administrative remedy.

* * *

Lacking any applicable exceptions, Plaintiff failed to exhaust his administrative remedies as required by the PLRA, and his remaining claims for damages against individual Defendants in their personal capacities must also be dismissed. Plaintiff requests leave to amend his complaint to detail why the transfer from FCI Otisville was designed "to prevent an administrative filing[.]" (Pl. Reply at 44.) Courts generally afford *pro se* litigants significant leniency with regard to amending their complaints. *In re Sims*, 534 F.3d 117, 133 (2d Cir. 2008). Though it may be futile to grant leave to amend where Plaintiff has already indicated that he 1) requested and received a grievance form, 2) voluntarily decided to pursue an alternative complaint strategy rather than simultaneously engaging in the grievance process, and 3) was transferred prior to his initiation of the instant litigation and months after he received the grievance form and sent the letter to the senator, *see Peterec v. Hilliard*, No. 12 Civ. 3944 (CS), 2013 WL 5178328, at *15 (S.D.N.Y. Sept. 16, 2013) ("Plaintiff has not indicated that he is in possession of facts that could cure the deficiencies identified in this Opinion"), the Court will allow Plaintiff to amend his complaint to demonstrate why a *Ross* exception applies—keeping in mind his Rule 11(b) obligations.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED, and Plaintiff's Amended Complaint is DISMISSED in accordance with this Opinion.

Plaintiff's damages claims against Defendants in their official capacities are barred by sovereign immunity and DISMISSED with prejudice. Plaintiff's claims for injunctive relief against the Federal Bureau of Prisons, Howard Hufford, Monica Recktenwald, Andrew Dachisen, Darren Compton, and Phillip Diamond are moot due to Plaintiff's transfer from FCI Otisville, where his injury occurred, to FCI Berlin. Lacking any plausible allegations that he may be subjected to the conditions at FCI Otisville in the immediate future, his claims for injunctive relief are DISMISSED without prejudice. Plaintiff's damages claims against Defendants in their individual capacities must be DISMISSED without prejudice because Plaintiff failed to exhaust his administrative remedies as required by the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e, or to plausibly allege the administrative remedies were unavailable—rather, he simply chose not to engage in the grievance process.

Since the Court has granted Plaintiff leave to amend his complaint, such an amended complaint must be filed on or before August 28, 2017 and not reassert causes of action that were dismissed with prejudice, *i.e.* the damages claims against the Defendants in their official capacities. Defendants are to respond to any amended complaint, if one is filed, on or before September 29, 2017. The Clerk of the Court is directed to terminate the motion at ECF No. 38.

Dated: July 28, 2017
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge