

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL JACKSON,	:	Case No. 1:08-cv-203
	:	
Plaintiff,	:	
v.	:	Judge Barrett
	:	
HAMILTON COUNTY, et. al.	:	
	:	
Defendants.	:	
	:	
	:	
	:	
	:	
	:	

PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANTS’ RULE 12(b)(1)
MOTION TO DISMISS DUE TO LACK OF SUBJECT MATTER JURISDICTION AND
RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS AND TO STAY
DISCOVERY

Alphonse A. Gerhardstein (0032053)
 Trial Attorney for Plaintiffs
 GERHARDSTEIN & BRANCH
 432 Walnut Street, Suite 400
 Cincinnati, Ohio 45202
 (513) 621-9100
 Fax (513) 345-5543
agerhardstein@gbfirm.com

Table of Contents

Table of Authorities ii

I) Introduction (and Summary Pursuant to Local Rule 7.2) 1

II) Facts 1

III) Argument..... 3

 A) This court has subject matter jurisdiction over Mr. Jackson’s case because Mr. Jackson was not incarcerated at the time that this lawsuit was filed and as such the Prison Litigation Reform Act does not apply to him. 3

 B) Defendants’ motion for judgment on the pleadings should be denied because the factual allegations of Mr. Jackson’s complaint clearly state a claim under the Eighth Amendment to the United States Constitution. 5

 1) Standard for granting judgment on the pleadings..... 5

 2) This court should not dismiss Mr. Jackson’s claims of excessive force in violation of the Eighth Amendment against Defendant Moore. 6

 (a) Motion for judgment on the pleadings should be denied for Mr. Jackson’s claim of excessive force against Defendant Moore. 6

 (b) The plaintiff has presented outside materials which should convert the defendants’ motion for judgment on the pleadings into a motion for summary judgment. 10

 3) This court should not dismiss Mr. Jackson’s claims against Sheriff Leis and Hamilton County because the factual allegations of the complaint support a finding that Sheriff Leis, in his individual and official capacity, and Hamilton County violated Mr. Jackson’s rights. 12

 (a) Defendant Leis, in his individual and official capacities, and Hamilton County violated Mr. Jackson’s right to be free from excessive force because he failed to properly train Defendant Moore on the use of the pepperball gun..... 14

 (b) Defendant Leis, in his individual and official capacities, and Hamilton County violated Mr. Jackson’s Right to be free from excessive force because Defendant Leis ratified Defendant Moore’s unconstitutional conduct. 16

 4) Defendant Moore and Defendant Leis are not entitled to qualified immunity because questions of material fact still exist that prevent this court from entering judgment on this issue..... 19

 (a) Based upon the facts alleged in the complaint, and supported by the video, the case against Defendant Moore should not be dismissed on the basis of qualified immunity... 22

 (b) Based upon the facts alleged in the complaint, and supported by the video, the case against Defendant Leis should not be dismissed on the basis of qualified immunity. 23

IV) Conclusion..... 24

CERTIFICATE OF SERVICE 24

Table of Authorities**Cases**

<i>Al-Bari v. Guider</i> , 142 F.3d 431, 1998 WL 80173 (6th Cir., February 19, 1998).....	8
<i>Anderson v. Creighton</i> , 483 U.S. 635, 646 n.6 107 S.Ct. 3034 (1987).	21,22,23
<i>Bell Atlantic v. Twombly</i> , 127 S.Ct. 1955 (2007)	6
<i>Bilder v. City of Akron</i> , 7 F.3d 232 (Table), 1993 WL 394595 (6 th Cir., 1993).....	15
<i>Carlton v. Turner</i> , 2006 WL 955886 (6 th Cir., 2006)	8, 9
<i>Ciminillo v. Streicher</i> , 434 F.3d 461, 469 (6 th Cir., 2006).....	15
<i>City of Canton, Ohio v. Harris</i> , 489 U.S. 378, 109 S.Ct. 1197 (1989).....	13, 14, 23
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112, 127 108 S.Ct. 915, 926 (1988).....	16
<i>Combs v. Wilkinson</i> , 315 F.3d 548 (6th Cir., 2002)	7
<i>Concepcion v. Morton</i> , 125 F.Supp.2d 111 (D.N.J., 2000)	9
<i>Cox v. Mayer</i> , 332 F.3d 422, 424 (6th Cir., 2003).....	4
<i>Doe By and Through Doe v. Washington County</i> , 150 F.3d 920, 924 (8th Cir., 1998).....	4
<i>Erickson v. Pardus</i> , 127 S.Ct. 2197 (2007)	6
<i>Estate of Clutters v. Sexton</i> , 2007 WL 3244437 (S.D. Ohio, Nov. 2, 2007)	20
<i>Estate of Mikinah Smith v. Hamilton County Dept. of Job & Family Services</i> , 2007 WL 2572184 (S.D. Ohio, 2007).....	21
<i>Estelle v. Gamble</i> , 429 U.S. 97, 102 97 S.Ct. 285, 290 (1976).	7, 23
<i>Greig v. Goord</i> , 169 F.3d 165 (2 nd Cir., 1999).	4
<i>Hardin v. Fullenkamp</i> , 2001 WL 35816398 (S.D. Iowa, 2001)	9
<i>Harris v. Garner</i> , 216 F.3d 970, 973-80 (11th Cir.2000).....	4
<i>Hays v. Jefferson County, Ky.</i> , 668 F.2d 869 (6 th Cir., 1982).....	13
<i>Hope v. Pelzer</i> . 536 U.S. 730, 122 S.Ct. 2508 (2002).	7
<i>Hudson v. McMillian</i> , 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).....	7
<i>Johnson v. Perry</i> , 106 Fed.Appx. 467 (6 th Cir., 2004).....	20
<i>Jones v. Bock</i> , 127 S.Ct. 910 (2007).....	5
<i>JPMorgan Chase Bank, N.A. v. Winget</i> , 510 F.3d 577, 581 (6th Cir.2007).....	6
<i>Kryling v. Sealscott</i> , 188 F.3d 508 (Table), 1999 WL 644354 (6 th Cir., 1999).....	9
<i>Leach v. Shelby County Sheriff</i> , 891 F.2d 1241, 1245 (6th Cir., 1989).....	14
<i>Maiden v. North American Stainless</i> , 183 Fed.Appx. 485 (6 th Cir., 2005).....	11
<i>Marchese v. Lucas</i> , 758 F.2d 181 (6 th Cir., 1985).	13, 16, 24
<i>Max Arnold & Sons, LLC v. W.L. Hailey & Co., Inc.</i> , 452 F.3d 494, 503 (6 th Cir., 2006).....	10
<i>McKinney v. Compton</i> , 888 F.Supp. 75 (W.D.Tenn., 1995).....	9
<i>Monell v. Department of Social Services of City of New York</i> , 436 U.S. 658, 98 S.Ct. 2018 (1978).....	13
<i>Moore v. Holbrook</i> , 2 F.3d 697 (6 th Cir., 1993).....	8
<i>Petty v. County of Franklin, Ohio</i> , 478 F.3d 341, 345 (6 th Cir., 2007).....	15
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976).....	12
<i>Sage Intern., Ltd. v. Cadillac Gage Co.</i> , 556 F.Supp. 381, 383 (E.D. Mich., 1982).....	6
<i>Saucier v. Katz</i> , 533 U.S. 194, 121 S.Ct. 2151 (2001)	19, 22
<i>See Spangler v. Wenninger</i> , 2008 WL 4186318 (S.D. Ohio, Sept. 3, 2008)	20
<i>Stone v. Holzberger</i> , 807 F.Supp. 1325 (S.D. Ohio, 1992)	13
<i>Thaddeus-X v. Love</i> , 215 F.3d 1327, 2000 WL 712354 (Table) (6 th Cir., 2000).....	8

Tucker v. Middleburg-Legacy Place, 539 F.3d 545 (6th Cir., 2008)..... 6
Walker v. Norris, 917 F.2d 1449 (6th Cir., 1990)..... 13, 14, 23
Whitley v. Albers, 475 U.S. 312, 318, 106 S.Ct. 1078 (1986) 7
Wright v. City of Canton, Ohio, 138 F.Supp.2d 955 (N.D. Ohio, 2001). 17

Statutes

42 U.S.C. § 1997e(a)..... 8

I) Introduction (and Summary Pursuant to Local Rule 7.2)

Defendants have filed a rule 12(b)(1) motion to dismiss due to lack of subject matter jurisdiction, as well as a Rule 12(c) motion for judgment on the pleadings and a motion to stay discovery. Doc. 11. There has not been an opportunity to conduct any discovery in this case. Plaintiff's counsel submitted a request for interrogatories and a request for document production on August 25, 2008. Doc. 12, Ex. 1. The defendants have not responded to this request. The defendants previously filed a motion to stay discovery, Doc. 7, but this motion was denied by the court. Doc. 10. As such, the defendants still have an obligation to comply with the plaintiff's discovery requests. Plaintiff has filed a motion to compel discovery. Doc. 12.

Additionally, the plaintiff contends that the presence of outside matters converts the defendants' motion to a Rule 56 motion for summary judgment. As there has not yet been any discovery in this case, the plaintiff has filed a Rule 56(f) motion and affidavit requesting that the court refrain from ruling on the Defendants' dispositive motion until after discovery has taken place. Doc. 13.

However, even based upon the limited facts that are available at this time, the Defendants Rule 12(c) motion should be rejected.

II) Facts

This is a civil rights action challenging the gratuitous and excessive force used against Michael Jackson while he was incarcerated at the Hamilton County Justice Center. Beginning March 22, 2007 Mr. Jackson was confined to the Justice Center on a non-violent criminal offense. Doc. 8, Ex. 2. Mr. Jackson was released from the Justice Center on September 19, 2008. Doc. 13, Ex. A-1. Mr. Jackson filed his complaint on March 24, 2008. Doc. 1. From

April 8, 2007 until August 10, 2007, Mr. Jackson was housed in administrative segregation. During this time he was locked alone in his cell 23 hours a day. Doc. 1, ¶¶9 – 10.

On August 10, 2007, Mr. Jackson was alone in his cell when the Correctional Emergency Response Team (CERT) was deployed to extract inmates, including Mr. Jackson, from their individual administrative segregation cells. Doc. 1. Mr. Jackson was a nonviolent prisoner incarcerated for a property crime. Doc. 8, Ex. 1. Mr. Jackson had a history of mental problems and was deemed suicidal in July, 2007. Doc. 8, Ex. 2. Mr. Jackson was the last of several inmates to be removed from his cell.

The entire event was captured on video. The plaintiff has previously submitted to this court a DVD copy of that video with a previous motion. Doc. 8, Ex. 3.

Prior to extracting Mr. Jackson from his cell, members of this team sprayed four rounds of pepper balls into Mr. Jackson's cell. Additional chemicals were released into Mr. Jackson's cell using an MK9 Fogger. Doc. 1. Members of the team forcibly entered Mr. Jackson's cell, and then cuffed, shackled and carried Mr. Jackson out of the cell by his arms and legs. As he was being carried from his cell Mr. Jackson stated that "niggers fight worse than all you do." Defendant Moore is an African American officer. Doc. 8, Ex. 3. .

Mr. Jackson is 5'6" tall and weighs 120 pounds. Several members of the CERT team forcibly held Mr. Jackson as he was being placed in his chair. Even after he was placed in the chair, members of the team continued to hold Mr. Jackson down and he was unable to move. Defendant Moore told her colleagues to adjust Mr. Jackson's position in the chair. The other officers did not adjust him, but did continue to hold Jackson so he could not move by himself. Defendant Moore then yelled at Mr. Jackson to "sit up." The fact that Mr. Jackson was physically unable to alter his position in the chair was readily apparent. Defendant Moore

nonetheless maliciously and sadistically fired three rounds of pepper bullets into Mr. Jackson's chest at point blank range. Mr. Jackson jolted as the shots hit him directly in his chest, and he experienced severe pain. After Mr. Jackson was shot by the pepper ball bullets the other officers slammed his head back against the restraint chair. The injuries to his chest from the pepper balls are visible on the DVD. *Id.*

The officers did not de-escalate the tense and violent atmosphere even after Defendant Moore shot Mr. Jackson. Although Mr. Jackson was completely restrained and did not pose a threat to any officer, they continued to provoke Mr. Jackson, taunting him, pointing a taser at him, and threatening to tase him. Defendant Moore did nothing to protect Mr. Jackson. Supervisors recommended that Defendant Moore be disciplined but Defendant Leis refused to discipline Moore. *Id.*

On these facts, a jury could easily find that the force used on Mr. Jackson after he was in the restraint chair was unnecessary and gratuitously applied for the purposes of inflicting punishment and pain.

Defendant Leis, the policymaker for the Hamilton County Justice Center, violated Mr. Jackson's eighth amendment rights by failing to properly train CERT members in appropriate cell extraction, restraint and use of force techniques. Doc. 1, para 23. Defendant Leis also ratified Defendant Moore's conduct when he failed to discipline her for her actions. Doc. 1, para 23. As Defendant Leis is the policymaker for the Hamilton County Justice Center, his actions bind the county, and create municipal liability. Doc. 1, para. 24.

III) Argument

- A) This court has subject matter jurisdiction over Mr. Jackson's case because Mr. Jackson was not incarcerated at the time that this lawsuit was filed and as such the Prison Litigation Reform Act does not apply to him.**

The Prison Litigation Reform Act (“PLRA”) provides that,

(a) Applicability of Administrative Remedies

No action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). The Act therefore by its terms applies only to “prisoner[s] confined in any jail, prison, or other correctional facility.” *Id.* The act states that the term prisoner “means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program. 42 U.S.C.A. § 1997e(h). In determining the applicability of the PLRA, the court must first determine whether the plaintiff was confined in a jail, prison or other correctional facility at the time that the suit was filed. *Cox v. Mayer*, 332 F.3d 422, 424 (6th Cir., 2003). If not, the statute is inapplicable. *Id.* In *Cox* the PLRA applied because, “when plaintiff “brought” his case he was undisputably a prisoner.” *Id.* The Court, citing, *Harris v. Garner*, 216 F.3d 970, 973-80 (11th Cir.2000), explained that “to bring” means “to file.” *Id.* at fn. 1

The Eighth Circuit similarly rejected the applicability of the PLRA to a lawsuit filed after a former prisoner was released from prison. *Doe By and Through Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir., 1998) *see also Greig v. Goord*, 169 F.3d 165 (2nd Cir., 1999). In *Washington County*, a former juvenile pre-trial detainee filed a failure to protect lawsuit after he was released from jail. The Eighth Circuit rejected the defendants’ argument that the PLRA should apply to any lawsuit that arises from events in prison, stating “the purpose of the PLRA was to deter suits by inmates who are very quick to litigate ‘simply because they have little to

lose and everything to gain.’ *Id. citing* 141 Con. Rec. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole). The court reasoned that “Congress therefore fully intended to distinguish between those who are “prisoners” when they decide whether to file a complaint and those who are not.” *Id.*

Mr. Jackson was released from the Hamilton County Justice Center on September 19, 2007. Doc. 13, Ex. A-1. This lawsuit was filed on March 24, 2008. At the time his lawsuit was filed he was not confined to a prison, jail or other correctional facility. Doc. 1, ¶7. As such, the PLRA is inapplicable to this case. The fact that Mr. Jackson was subsequently re- incarcerated is completely irrelevant to this issue. The affidavit of Jeff Eisner does not address whether Mr. Jackson was a prisoner at the time the lawsuit was filed. Defendants ignore the fact that Plaintiff was a free citizen when the lawsuit was filed. The Supreme Court case cited by Defendants does not involve a person like plaintiff who was a free citizen when the lawsuit was filed and was later incarcerated during the pendency of the case. *Jones v. Bock*, 127 S.Ct. 910 (2007). As the PLRA does not bar this court from having subject matter jurisdiction over Mr. Jackson’s claim, the court should deny the Defendants Rule 12(b)(1) motion to dismiss.

B) Defendants’ motion for judgment on the pleadings should be denied because the factual allegations of Mr. Jackson’s complaint clearly state a claim under the Eighth Amendment to the United States Constitution.

1) Standard for granting judgment on the pleadings

A motion for judgment on the pleadings is brought under Rule 12(c) of the Federal Rules of Civil Procedure. This rule states that “after the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.” The Sixth Circuit has recently held that, “For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be

granted only if the moving party is nevertheless clearly entitled to judgment.” *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir.2007) (internal citation and quotation marks omitted). A motion brought pursuant to Rule 12(c) is appropriately granted “when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.” *Id.* at 582 (internal citation and quotation marks omitted).

In contrast to a rule 12(b) motion in which a claim may be dismissed for failure to satisfy one of the procedural prerequisites, a rule 12(c) motion for judgment on the pleadings, theoretically, is directed toward a determination of the substantive merits of the controversy, and consequently, such a motion should only be granted where it is clear that the merits of the controversy can be fairly and fully decided in this summary manner. *Sage Intern., Ltd. v. Cadillac Gage Co.*, 556 F.Supp. 381, 383 (E.D. Mich., 1982), citing 5 Wright & Miller, § 1369, p. 698.

Defendants rely upon the Supreme Court decision in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007), to assert that factual allegations must be enough to raise a right to relief above the speculative level. Doc. 11, pg. 5. However, the Sixth Circuit has noted that two weeks after that decision was announced the Supreme Court decided *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), and reiterated that specific facts are not necessary in a complaint, and that statements need only ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545 (6th Cir., 2008). That standard is satisfied in this case.

2) This court should not dismiss Mr. Jackson’s claims of excessive force in violation of the Eighth Amendment against Defendant Moore.

(a) Motion for judgment on the pleadings should be denied for Mr. Jackson’s claim of excessive force against Defendant Moore.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment. The Supreme Court has interpreted this to mean that the Eighth Amendment prohibits punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society. *Estelle v. Gamble*, 429 U.S. 97, 102 97 S.Ct. 285, 290 (1976).

In excessive force cases, this amendment prevents prison officials from unnecessarily and wantonly inflicting pain upon prisoners. *Whitley v. Albers*, 475 U.S. 312, 318, 106 S.Ct. 1078 (1986). In these cases “the question of whether the officer’s conduct violated the Eighth Amendment turns upon whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.” *Id.* at 320; *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). A violation of the Eighth Amendment is obvious when an inmate is subjected to force after he is already subdued and restrained. *Hope v. Pelzer*. 536 U.S. 730, 122 S.Ct. 2508 (2002).

When prison officials maliciously and sadistically use force to cause harm; contemporary standards of decency always are violated. *Hudson*, 503 U.S. at 9. To determine whether the officials maliciously and sadistically used force to cause harm, courts are instructed to consider: the extent of injury suffered by an inmate, the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response.’ *Combs v. Wilkinson*, 315 F.3d 548 (6th Cir., 2002), citing *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

In *Hudson*, the plaintiff was handcuffed and shackled by prison guards, led to a lockdown cell where prison officials punched and kicked him, causing him to suffer minor bruising and

swelling on his face, mouth and lip and damaging his partial dental plate. The Fifth Circuit reversed a magistrate's decision in the plaintiff's favor, finding that there was no violation of the Eighth Amendment because the plaintiff did not suffer significant injury. The Supreme Court rejected the Fifth Circuit's finding, and held that, the Eighth Amendment is always violated when prison officials act maliciously and sadistically to cause harm, whether or not a significant injury is evident. *Hudson*, 503 U.S. at 9. The Supreme Court noted "Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today." *Id.*

Since *Hudson*, the Sixth Circuit has held that prisoners who sustain only minor injuries state a claim under the Eighth Amendment. *See Moore v. Holbrook*, 2 F.3d 697 (6th Cir., 1993) (holding that the District court correctly held that the plaintiff's claimed minor injuries, bruises to the head, face, and upper body, were not de minimus, but erred in granting summary judgment because there were material questions of fact regarding whether the injuries were inflicted maliciously and sadistically); *Carlton v. Turner*, 2006 WL 955886 (6th Cir., 2006)(plaintiff who was struck in the head stated claim, although plaintiff admitted that his injury was minor); *Thaddeus-X v. Love*, 215 F.3d 1327, 2000 WL 712354 (Table) (6th Cir., 2000) (Abrasions, pain, and swelling may be sufficient injury to support an Eighth Amendment claim where, as here, there are genuine fact issues concerning the cause of plaintiff's injury and the justification for, and the reasonableness of, any force applied by defendant).

Factual allegations of excessive force are enough to survive summary judgment. *Al-Bari v. Guider*, 142 F.3d 431, 1998 WL 80173 (6th Cir., February 19, 1998). In that case, the plaintiff alleged a prison official told him that he could not enter the courtroom to testify in another

inmate's civil rights case until he removed his prayer cap. The prisoner refused to remove his cap, and the prison official escorted the plaintiff back to his cell. At the cell, the prison official then elbowed the plaintiff in his kidney, causing him to need medical attention. *Id.* at 1. The defendants filed summary judgment. The district court denied the motion, and the Sixth Circuit affirmed, finding that that the defendant's conduct, as alleged by plaintiff in his complaint, would violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 2.

The Eighth Amendment is violated if an officer uses force on an inmate who is already fully restrained. *See Hudson*, 503 U.S. at 9 (officers used force when they beat plaintiff while he was handcuffed and shackled), *Carlton v. Turner*, 2006 WL 955886 (6th Cir., 2006) (District Court rejection of pro se plaintiff's complaint was an error when plaintiff alleges that prison officials struck him in the head while his hands were handcuffed behind him), *Kryling v. Sealscott*, 188 F.3d 508 (Table), 1999 WL 644354 (6th Cir., 1999) (district court improperly granted summary judgment where plaintiff alleged officer hurled him at a wall when he wore restraints and posed no risk of physical harm to the officer at the time of the assault), *McKinney v. Compton*, 888 F.Supp. 75 (W.D.Tenn., 1995)(holding that complaint that alleged that a prison official poked the plaintiff in the eye after he was fully restrained stated a claim under the Eighth Amendment), *Hardin v. Fullenkamp*, 2001 WL 35816398 (S.D.Iowa, 2001) (denying summary judgment on claim that officers used excessive force when they beat plaintiff who was handcuffed), *Concepcion v. Morton*, 125 F.Supp.2d 111 (D.N.J., 2000) (overruled on other grounds) (denying summary judgment and holding that the force applied up until the time that the plaintiff was restrained was reasonable, but that a jury could find that the force applied after the plaintiff was restrained was excessive and violated the Eighth Amendment).

Therefore, the Eighth Amendment is violated if a prison official uses force maliciously and sadistically on a fully restrained inmate, causing the inmate to suffer cuts, bruises and swelling.

Mr. Jackson's complaint alleges that Defendant Moore shot Mr. Jackson in the chest at point blank range while he was fully restrained in a restraint chair and fully compliant with the demands of members of the Correctional Emergency Response Team (CERT). Doc. 1, para. 18. The complaint states that as a result of the excessive force applied by Defendant Moore, Mr. Jackson suffered bruises and contusions across his chest, and that his skin was burned because of the chemical irritant in the pepper bullets. *Id.* at para. 25. These factual allegations alone support the finding that Mr. Jackson's complaint states a claim under the Eighth Amendment and should not be disposed of at this early stage in the litigation, before the plaintiff has had any opportunity to conduct discovery.

(b) The plaintiff has presented outside materials which should convert the defendants' motion for judgment on the pleadings into a motion for summary judgment.

As stated in Plaintiff's Rule 56(f) motion (Doc. 13), the effect of matters outside of the pleadings is addressed in Rule 12(d). This rule states "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Acceptance of these outside materials by the court is sufficient to convert a motion for judgment on the pleadings into a motion for summary judgment. *Max Arnold & Sons, LLC v. W.L. Hailey & Co., Inc.*, 452 F.3d 494, 503 (6th Cir., 2006). In *Max Arnold*, the Sixth Circuit held that the district court should have converted a motion for judgment on the pleadings to a motion for summary

judgment because the plaintiff attached an affidavit to its response to the motion, and the court did not exclude the affidavit.

The court has discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment or to reject it and maintain the character of the motion.” *Maiden v. North American Stainless*, 183 Fed.Appx. 485 (6th Cir., 2005), citing 5C Wright & Miller § 1371 (4th ed.2005). However, given the dispositive nature of this motion, and the enormous injustice that would be done if judgment were entered without considering all of the facts, the plaintiff urges this court to use its discretion and consider the DVD that he submitted.

Mr. Jackson supplemented his complaint by submitting a DVD of the incident to the court. Doc. 8, Ex. 3. The plaintiff urges the court to consider the DVD when ruling on this motion. This would convert the motion for judgment on the pleadings to a motion for summary judgment. This video supports Mr. Jackson’s version of what happened and clearly creates a question of fact as to whether or not the force that was applied to Mr. Jackson after he was fully restrained was excessive. It shows that Mr. Jackson was fully restrained when Defendant Moore shot him at point blank range in the chest. At that time, firing the pepper ball gun was not necessary to restore discipline- it had already been restored via the restraint chair. The video clearly shows the marks on Mr. Jackson’s skin created by the pepper balls. As such, the video supports a finding that Defendant Moore acted maliciously and sadistically when she shot Mr. Jackson in the chest three times at point blank range.

The plaintiff requests that this court consider the DVD and all of the material that will be collected through discovery. See Rule 56(f) Motion, Doc. 13. If this motion is converted to one

for summary judgment, even on the limited facts that are available to the plaintiff, Defendant Moore should not be entitled to summary judgment.

To succeed on summary judgment, the moving party must prove that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Moore*, 2 F. 3d at 299, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). When ruling on a motion for summary judgment, the court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *Id.* Based upon the pleadings and the DVD that the plaintiff has submitted, there are issues of material fact that must be answered by a jury, and Defendant Moore should not be entitled to summary judgment.

Mr. Jackson contends, and video supports, that Defendant Moore maliciously shot him at point blank range with the pepper bullets while he was fully restrained. Taking these allegations as true, as the court is required to do in a motion for summary judgment, it is clear that Mr. Jackson states a claim under the Eighth Amendment. Defendant Moore will most likely argue that she shot Mr. Jackson in order to restore or maintain discipline. The jury will need to determine whether Defendant Moore acted with the intent to punish, or to restore discipline. The jury will also need to determine whether Mr. Jackson was fully restrained at the time that he was shot, or if he was resisting the officers. These questions of fact can only be answered by the jury, and as such, even on the limited facts available to Mr. Jackson at this time, this court should deny the motion.

3) This court should not dismiss Mr. Jackson's claims against Sheriff Leis and Hamilton County because the factual allegations of the complaint support a finding that Sheriff Leis, in his individual and official capacity, and Hamilton County violated Mr. Jackson's rights.

Under § 1983, supervisors cannot be held liable under the doctrine of respondeat superior. *Rizzo v. Goode*, 423 U.S. 362 (1976). Instead, to prevail on a claim against a supervisor or a

municipality, the plaintiff must show a causal connection between the acts of the individual and the supervisory defendant. *Hays v. Jefferson County, Ky.*, 668 F.2d 869 (6th Cir., 1982). This causal connection is satisfied if they exhibit deliberate indifference to the safety of the inmates by failing to properly train their subordinates, *Walker v. Norris*, 917 F.2d 1449 (6th Cir., 1990), citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), or if the supervisory defendant ratifies the conduct of the individual defendant. *Marchese v. Lucas*, 758 F.2d 181 (6th Cir., 1985).

Similar to supervisors, municipalities are not liable under the doctrine of respondeat superior. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Instead municipalities are liable when execution of a government's policy or custom inflicts the injury that the government as an entity is responsible under § 1983. Under Ohio law, the Sheriff makes the policy for the county with regard to the operation of his office and discharge of his duties. *Stone v. Holzberger*, 807 F.Supp. 1325 (S.D. Ohio, 1992), *See also Pembaur*, 475 U.S. at 484-85, 106 S.Ct. at 1300-01. Actions that give rise to supervisory liability also give rise to municipal liability. *Hays v. Jefferson County, Ky.*, 668 F.2d 869 (6th Cir., 1982). It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Id.* Thus, the actions that make Defendant Leis liable in his individual capacity also create liability for Hamilton County.

A suit against an individual “in his official capacity” has been held to be essentially a suit directly against the local government unit and can result in that unit's liability to respond to the injured party for his injuries. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1245 (6th Cir.,

1989). As such, the facts that give rise to Hamilton County's liability also give rise to Sheriff Leis's liability in his official capacity.

Thus, Mr. Jackson's claims against Sheriff Leis in his individual and official capacity and his claims against Hamilton County all arise from the same actions and policies.

Mr. Jackson has advanced two theories of liability against Defendant Leis and Defendant Hamilton County: 1) that Defendant Leis, as the policymaker for Hamilton County, ratified Defendant Moore's behavior, and 2) Defendant Leis, as the policymaker for Hamilton County, failed to properly train Defendant Moore.

(a) Defendant Leis, in his individual and official capacities, and Hamilton County violated Mr. Jackson's right to be free from excessive force because he failed to properly train Defendant Moore on the use of the pepperball gun.

Supervisors and municipal defendants are liable for a violation of the plaintiff's constitutional rights when the policymaker's failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), *Walker v. Norris*, 917 F.2d 1449 (6th Cir., 1990). For liability to attach in this circumstance, the identified deficiency in a city's training program must be closely related to the ultimate injury. *Id.* at 379. In *Harris*, a woman was arrested by police officers and taken to jail. While there, the woman was incoherent and fell down several times. Despite this, the officers did not seek medical attention for her. The woman brought suit, alleging that her right to medical care was violated and that the city failed to properly train its officers. The jury entered a verdict for the plaintiff with respect to the failure to train claim. The Supreme Court then created the proper test for failure to train liability, and remanded the case for a new trial consistent with the new standard. *Id.*

To succeed on a failure to train claim, the plaintiff must show: 1) the City's training program was inadequate for the tasks that officers must perform; 2) the inadequacy was the result of the City's deliberate indifference; and 3) the inadequacy was closely related to or actually caused the injury. *Ciminillo v. Streicher*, 434 F.3d 461, 469 (6th Cir., 2006). In order to succeed on a failure to train claim, the plaintiff should identify the policy or custom that is constitutionally deficient. *Petty v. County of Franklin, Ohio*, 478 F.3d 341, 345 (6th Cir., 2007).

Defendants rely upon an unpublished opinion, *Bilder v. City of Akron*, 7 F.3d 232 (Table), 1993 WL 394595 (6th Cir., 1993), to support their assertion that Mr. Jackson's claim for failure to train should be dismissed because the complaint states "conclusory allegation without specific facts to support the claim." However, *Bilder* is not applicable. In *Bilder*, the court granted a Rule 12(b)(6) motion for dismissal, which would result in a dismissal without prejudice, because of a procedural defect. In this case, the Defendants have filed a dispositive motion that would dismiss the plaintiff's case on the merits. Additionally, the complaint does not state "failure to train" in broad, conclusory terms, as the Defendants allege. Instead, the complaint point to specific areas where the plaintiff believes that training was deficient. At the pleading stage, and absent any additional discovery, this is sufficient.

In this case, Defendant Moore used a non-lethal weapon to fire pepper bullets into Michael Jackson's chest at point blank range. The complaint alleges that Sheriff Leis "failed to properly train its employees in appropriate cell extraction, restraint and use of force techniques. This is sufficient to state a claim in the complaint, and as such judgment on the pleadings is inappropriate.

Mr. Jackson needs the requested discovery in order to fully present this claim. In his first discovery request, (Doc. 12, Ex. 1) Mr. Jackson's counsel has requested:

1. “All of the policies, procedures and training relevant to the use of force by CERT teams, including but not limited to cell extractions, cell extraction technique and the use of restraint chairs;
2. All CERT Standard Operating Procedures, established by the CERT commander and the Corrections administration, pursuant to section XII of the Hamilton County Sheriff’s office Policy and Procedure Correction division, subject: CERT;
3. All training materials and policies relevant to the use of pepper ball guns, pepper spray and other non-lethal weapons.
4. The manual or any other documents published by the manufacturer of the pepper ball gun, or similar device used by Moore in connection with her employment by the City of Hamilton that describe that device and/or its proper use.”

As such, Mr. Jackson hopes that the court will grant the Motion to Compel (Doc. 12) and order the defendants to comply with their obligations under the Federal Rules of Civil Procedure. This will enable Mr. Jackson to thoroughly present his claim.¹

(b) Defendant Leis, in his individual and official capacities, and Hamilton County violated Mr. Jackson’s Right to be free from excessive force because Defendant Leis ratified Defendant Moore’s unconstitutional conduct.

The United States Supreme Court has held that a municipality can be liable for the unconstitutional acts of an employee if the authorized policymaker approves the employee’s decision and the basis for it. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 108 S.Ct. 915, 926 (1988).

The Sixth Circuit first recognized ratification as a cause of action in the 1985 case, *Marchese v. Lucas*, 758 F.2d 181 (6th Cir., 1985). In *Marchese*, the plaintiff, a heroin addict, pulled a gun on a police officer who was attempting to arrest the plaintiff. The officers were able to get the gun away from the plaintiff, and bring him to the police station. The police officers at the station were very hostile towards the plaintiff, and called him a “cop-killer.” The plaintiff claimed that

¹ It may be that defendant Moore applied the pepperball force exactly as she was trained. In that regard, she may have followed an unconstitutional policy, which would separately be a basis for relief against Hamilton County. *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1988).

after he was brought into the station, police officers beat him. The plaintiff was then placed in a cell. In the middle of the night, someone used a key to enter the plaintiff's cell and beat him again. Only police officers had access to the keys. The sheriff did not investigate these allegations, and there was no finding within the sheriff's office as to who was responsible for the beatings. The plaintiff then filed suit against the sheriff and the county, on the theory that the sheriff and the county ratified the behavior of the officers who beat the plaintiff by not conducting an investigation into the plaintiff's allegations. The jury, and the Sixth Circuit, held that this conduct was enough to establish liability against the sheriff and the county. *Id.* at 188.

Similarly, in *Leach v. Shelby County, Kentucky*, the sheriff and county were held liable when the sheriff failed to investigate and punish officers who had been mistreating a paraplegic inmate. 891 F.2d 1241 (6th Cir., 1989). The court found that the sheriff, in his official capacity, had a duty to know what was going on at the jail and a duty to act to discipline those responsible, and prohibit the events from ever occurring again, even if he was not present when the incident occurred. *Id.* at 1248.

A municipality may be liable for ratifying the unconstitutional acts of an employee, if the employee shows: 1) a final municipal policymaker approved an investigation into the allegedly unconstitutional conduct, and (2) the investigation was so inadequate as to constitute a ratification of their alleged use of excessive force. *Wright v. City of Canton, Ohio*, 138 F.Supp.2d 955 (N.D. Ohio, 2001). In *Wright*, the plaintiff alleged that police officers beat him in the police department parking garage after bringing him to the station. The plaintiff further alleged that the police chief, the main policymaker for the city, ratified that conduct by failing to conduct a proper investigation. The police chief conducted an investigation of the incident, but none of the officers involved in the incident received any discipline. The court found that,

because there was sufficient evidence for a fact finder to believe that the police chief did not conduct a proper investigation, summary judgment was inappropriate.

Mr. Jackson's complaint alleges that Defendant Leis and Hamilton County ratified Defendant Moore's unconstitutional conduct when he failed to discipline her. Doc. 1., para. 23-24.

Additionally, a local newspaper reported that Defendant Moore's supervisors recommended that she be disciplined, that Sheriff Leis overruled that decision and that Defendant Moore was never disciplined for this incident. Doc. 8, Ex. 2. If true, this would help to substantiate Mr. Jackson's claims.

As no discovery has occurred, Mr. Jackson does not yet have the evidence that he needs to support this claim. The discovery that Mr. Jackson has requested will help to further develop Mr. Jackson's claims of ratification against Defendant Leis and Hamilton County. In that request (Ex. 1) Mr. Jackson asks for:

1. Complete record of the use of force involving CERT Team and all inmates in Administrative Segregation on August 10, 2007, including but not limited to audio tapes, photos, witness statements, logs, use of force reports, investigative reports, discipline records, videotapes, emails, and other documents and things;
2. All personnel records for Michelle Moore, Christopher Black, Lawrence Mehn, William Poole, Gerald Huber, William Gaffney, Michael Jackson, Ryan Feilhauer, Sharon King, Jeff Eiser, and Dominic Pierani, including, but not limited to:
 - (a) a complete copy of the officer's personnel file(s) from the Sheriff's Department and County, including all documents considered in the hiring of the deputy, including, but not limited to, all applications forms and questionnaires, the results of the background investigation, the polygraph results, including the report of the polygrapher, and the results of any tests or examinations;
 - (b) training file(s) held by the Sheriff's Department or other County Agency;
 - (c) all psychological testing;
 - (d) all disciplinary actions including all warnings, suspensions and other discipline;
 - (e) any citizen or inmate complaints; and
 - (f) all reports regarding use of force.

These documents, when provided, will help to substantiate Mr. Jackson's assertions that Defendant Moore's conduct was ratified by Defendant Leis and, that, as the chief policymaker for the jail, Defendant Leis's conduct caused Hamilton County to be liable for this as well. As such, Mr. Jackson repeats his request for the court to order the Defendants to comply with the discovery request and granted his motion to compel (Doc. 12) and grant his Rule 56(f) (Doc. 13) and refrain from ruling on the motion until Mr. Jackson has had the opportunity to conduct discovery into this issue.

Mr. Jackson's complaint alleges that Defendant Leis, the final policymaker in the Hamilton County Justice Center, ratified Defendant Moore's conduct when he overruled a recommendation that Defendant Moore be disciplined for this incident. This allegation, which must be taken as true for the purposes of this motion, states a claim upon which relief can be obtained. Consequently, this court should deny the Defendants' motion for judgment on the pleadings.

- 4) Defendant Moore and Defendant Leis are not entitled to qualified immunity because questions of material fact still exist that prevent this court from entering judgment on this issue.

Government officials performing discretionary functions have a qualified immunity shielding them from liability for damages as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635, 637-39, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) The Supreme Court has created a two-tiered test to determine whether or not defendants are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). The first question a court must answer is whether the facts alleged show the officer's conduct violated a constitutional right. If that question is

answered affirmatively, the court must then ask whether the right alleged was clearly established when the violation was alleged to have occurred. *Id.* at 201.

Judgment for the defendants on the basis of qualified immunity is not appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights.” *Johnson v. Perry*, 106 Fed.Appx. 467 (6th Cir., 2004), *citing Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir.1988). In *Johnson*, the parties had two different stories about the events surrounding the force that was applied. The plaintiff contended that he was handcuffed and walking back to his cell when the defendants pushed him down and began to beat him. The defendants contended that the plaintiff refused to return to his cell and that they applied force in order to get him into his cell. *Id.* at 468. The Sixth Circuit reversed the district court’s grant of summary judgment, finding that the material questions of fact make it impossible to rule on the issue of qualified immunity at this time. The court held that if the factfinder determined that the defendants beat the plaintiff while he was restrained, there would be a constitutional violation, and the defendants would not be entitled to qualified immunity. *Id.* at 469.

Following the precedent established by the Supreme Court and the Sixth Circuit, this court has also denied summary judgment on the grounds of qualified immunity when questions of material fact exist regarding the existence of a constitutional violation. *See Spangler v. Wenninger*, 2008 WL 4186318 (S.D. Ohio, Sept. 3, 2008) (genuine issue of material facts as to whether police acted reasonably under the Fourth Amendment when they destroyed plaintiffs property, precluding a finding that the defendants were entitled to qualified immunity), *Estate of Clutters v. Sexton*, 2007 WL 3244437 (S.D. Ohio, Nov. 2, 2007) (in an 8th Amendment excessive

force case, video submitted by plaintiff allegedly showing defendants pushing plaintiff backwards into the tank and causing him to hit his head creates a material question of fact as to whether force was excessive, precluding a finding of summary judgment) , and *Estate of Mikinah Smith v. Hamilton County Dept. of Job & Family Services*, 2007 WL 2572184 (S.D.Ohio, 2007) (summary judgment was not appropriate on the grounds of qualified immunity when a question of material fact exists as to whether social worker was deliberately indifferent to the safety of child in the state's custody).

When the officer disputes the plaintiff's account of the events, then discovery may be necessary in order to determine the existence of qualified immunity. *Anderson v. Creighton*, 483 U.S. at 646 n.6. The Defendants dispute Mr. Jackson's version of what happened at the jail on August 10, 2007. See Doc. 2, Answer, line 2. The discrepancies between the two accounts of what happened inside the Hamilton County Justice Center on August 10, 2007 create a question of fact. It is imperative that a fact finder determine what happened before the court can determine as a matter of law whether a constitutional violation occurred and whether the constitutional violation was clearly established when the incident occurred.

Mr. Jackson's complaint alleges a constitutional violation and alleges conduct that no reasonable officer would believe to be lawful. In addition, as in *Sexton*, Mr. Jackson has submitted a video of the events that occurred in the jail that day, which shows that Mr. Jackson was fully restrained at the time that Defendant Moore shot him at point blank range with the pepper gun. The existence of these material questions of fact makes it impossible for this court to find that the defendants are entitled to qualified immunity.

Since the determination of qualified immunity in this case is completely dependent upon the jury's determination of the facts, a judgment for Defendant Moore and Defendant Leis on the basis of qualified immunity is inappropriate, and the Defendants' motion should be denied.

(a) Based upon the facts alleged in the complaint, and supported by the video, the case against Defendant Moore should not be dismissed on the basis of qualified immunity.

Dismissal on the basis of qualified immunity prior to discovery is only appropriate when the conduct alleged in the complaint does not allege a constitutional violation. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 107 S.Ct. 3034 (1987). Dismissal on the grounds of qualified immunity is inappropriate for Defendant Moore when the two-prong *Saucier* test is applied. Under this test, government officials are not entitled to qualified immunity if: 1) the official's conduct violated a constitutional right, and 2) that constitutional right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). In applying this test it is clear that this case should not be dismissed on the grounds of qualified immunity.

First, the conduct alleged in the complaint clearly alleges a constitutional violation, and conduct that no officer could have believed to be rational. In his complaint, Mr. Jackson alleges that Defendant Moore maliciously and sadistically shot Mr. Jackson in the chest with pepper bullets at point blank range while he was fully restrained in compliance with the demands of the officers. Doc. 1, Complaint, line 19. Mr. Jackson alleges that the gratuitous and excessive force caused him to experience terror, severe and unnecessary pain and physical injury. *Id.* at line 25. All of these allegations are supported by the video that Mr. Jackson previously submitted to the court. Doc. 8, Ex. 3. These allegations state a constitutional violation, and as such, dismissal prior to discovery would be inappropriate.

Second, Mr. Jackson's right to not be subjected to excessive force while confined was recognized by the Supreme Court in 1976. *Estelle v. Gamble*, 429 U.S. 97, 102 S.Ct. 285, 290 (1976). Thus, at the time that Defendant Moore shot Mr. Jackson in the chest at point blank range, his right against the use of excessive force had been established for over thirty years.

(b) Based upon the facts alleged in the complaint, and supported by the video, the case against Defendant Leis should not be dismissed on the basis of qualified immunity.

As previously stated, dismissal prior to discovery is only appropriate when the conduct alleged in the complaint does not allege a constitutional violation. *Anderson v. Creighton*, 483 U.S. at 646 n.6. Applying the *Saucier* test to the facts alleged against Defendant Leis also determines that dismissal prior to discovery is appropriate.

The complaint alleges two theories upon which Defendant Leis may be liable: 1) failure to properly train his subordinates and 2) ratification of Defendant Moore's unconstitutional behavior.

Mr. Jackson alleges that Defendant Leis failed to properly train CERT members in appropriate cell extraction, restraint and use of force techniques. Doc. 1, Complaint, line 23. The Sixth Circuit has held that failure to properly train subordinates can be deliberate indifference and a violation of an inmate's 8th Amendment rights. *Walker v. Norris*, 917 F.2d 1449 (6th Cir., 1990). This right was first recognized by the U.S. Supreme Court in 1989. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). Thus, the complaint alleges a constitutional violation that has been recognized in this country for almost twenty years. As both prongs of the *Saucier* test are satisfied, Defendant Leis is not entitled to judgment on the pleadings on the basis of qualified immunity.

Mr. Jackson's complaint also alleges that Defendant Leis ratified Defendant Moore's conduct when he declined to discipline her for her unconstitutional use of force. Doc. 1, para. 23. The complaint states a valid constitutional violation, as ratification has been recognized as a legal theory for supervisory liability under §1983 since at least 1985. *Marchese v. Lucas*, 758 F.2d 181 (6th Cir., 1985). Thus, if a factfinder were to find that Defendant Leis ratified Defendant Moore's unconstitutional conduct, Defendant Leis would not be entitled to qualified immunity since this violated a right that has been clearly established for over twenty years.

IV) Conclusion

The Defendants' Rule 12(b)(1) and 12(c) motion should be denied.

Respectfully submitted,

s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein (0032053)
Trial Attorney for Plaintiffs
GERHARDSTEIN & BRANCH
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-9100
Fax (513) 345-5543
agerhardstein@gbfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2008, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Alphonse A. Gerhardstein
Attorney for Plaintiff