

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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PERRY HILL and JAMES ROGERS,  
both individually and on behalf of a class of  
others similarly situated,

**ANSWER TO  
AMENDED  
COMPLAINT**

Plaintiffs,

**Civil Action No.  
9:14-CV-00933  
(BKS/DJS)**

-vs-

*Jury Trial Demanded*

COUNTY OF MONTGOMERY,  
MICHAEL AMATO and MICHAEL  
FRANKO,

Defendants.

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Defendants, County of Montgomery, Michael Amato and Michael Franko,  
by and through their attorneys, Goldberg Segalla, LLP, as and for an Answer to Amended  
Complaint, states as follows:

1. Deny the allegations in "Introduction" and leave all questions of law for the Court to decide.
2. Deny the allegations contained in paragraphs "1" and "2" of the Answer to Amended Complaint.
3. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs "3" and "4" of the Answer to Amended Complaint.

4. Admit the allegations contained in paragraph “5” of the Answer to Amended Complaint.

5. Admit that Defendant, Michael Franko, was the Jail Administrator of the Montgomery County Jail at 200 Clark Drive, Fultonville, NY, 12072 and otherwise deny the remaining allegations in paragraph “6” of the Amended Complaint.

6. Admit that Defendant, County of Montgomery, is a municipal entity organized under the laws of the State of New York and that its place of business is 64 Broadway, Fonda, New York, 12068 and otherwise deny the remaining allegations in paragraph “7” of the Amended Complaint as questions of law are for the Court to decide.

7. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs “8” and “9” of the Amended Complaint.

8. Deny the allegations contained in paragraphs “10”, “11”, “12” “13”, “14”, and “15” of the Amended Complaint.

9. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “16” of the Amended Complaint.

10. Deny the allegations contained in paragraph “17” of the Amended Complaint.

11. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “18” of the Amended Complaint.

12. Deny the allegations contained in paragraph “19” of the Amended Complaint.

13. Deny the allegations contained in paragraph “20” of the Amended Complaint.

14. Deny the allegations contained in paragraphs “21”, “22”, “23”, “24”, “25”, “26”, and “27” of the Amended Complaint.

15. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs “28” and “29” of the Amended Complaint.

16. Deny knowledge or information sufficient to form a belief as to the truth or falsity of that part of paragraph “30” of the Amended Complaint that active adult males need to consume anywhere from 2,400 to 3,000 calories a day and deny all other allegations in paragraph “30” of the Amended Complaint.

17. Deny the allegations contained in paragraphs “31”, “32”, “33”, “34”, “35”, “36”, and “37” of the Amended Complaint.

18. Admit that part of paragraph “38” of the Amended Answer that some detainees are permitted to work in the jail’s kitchen and given extra meal portions for their service and otherwise deny the remaining allegations in paragraph “38”.

19. Deny that any inmate is starving at the Montgomery County jail and otherwise deny knowledge and information sufficient to form a belief as to the remaining allegations in paragraph “39” of the Amended Complaint.

20. Deny the allegations contained in paragraphs “40” and “41” of the Amended Complaint.

21. In response to paragraph “42” of the Answer to Amended Complaint, answering Defendants repeat, reiterate and reallege each and every allegation, claim, and statement contained in paragraphs “1” through “41” of the Answer to Amended Complaint herein, with the same force and effect as if fully set forth herein at length.

22. Deny the allegations in paragraph “43” of the “Cause of Action” section as questions of law are for the Court to decide.

23. Deny the allegations contained in paragraphs “44”, “45”, “46”, and “47” of the Amended Complaint.

24. In response to paragraph “48” of the Answer to Amended Complaint, answering Defendants repeat, reiterate and reallege each and every allegation, claim, and statement contained in paragraphs “1” through “47” of the Answer to Amended Complaint herein, with the same force and effect as if fully set forth herein at length.

25. Deny the allegations contained in paragraphs “49”, “50”, “51”, and “52” of the Amended Complaint.

26. Admit that plaintiffs do not seek punitive damages against the County of Montgomery and otherwise deny the allegations in paragraph “53” of the Amended Complaint.

27. Admit the allegations contained in paragraph “54” of the Amended Complaint.

28. Any allegation not specifically addressed above is hereby denied.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

29. Whatever injuries Plaintiffs may have sustained were caused in whole or in part, or was contributed to, by the culpable conduct and/or want of care on the part of the Plaintiffs or by someone over whom the answering Defendants have not control.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

30. The causes of action alleged in the Amended Complaint fail to state a cause of action.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

31. Upon information and belief, Plaintiffs' economic loss, if any, as specified in CPLR 4545 was replaced or indemnified in whole or in part, from collateral sources, and this Defendant is entitled to have the Court consider the same in determining such damages as provided in CPLR 4545.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

32. If answering Defendants are liable at all, answering Defendants' liability is 50 percent or less of the total liability assigned to all persons liable.

33. By reason thereof, the liability of answering Defendants to the Plaintiffs' for non-economic loss shall not exceed answering Defendants' equitable share of liability determine in accordance with the relative culpability for each person causing or contributing to the total liability for non-economic loss.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

34. Plaintiffs have failed to mitigate their damages.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

35. The injuries, damages or death alleged in the Amended Complaint were proximately caused by an unforeseeable, independent, intervening and /or superseding event(s) beyond the control, and unrelated to any conduct, of Defendants. Defendants' actions or omissions, if any were superseded by the negligence, wrongful and/or criminal conduct of others.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

36. Plaintiffs are not entitled to the relief claimed.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

37. The conduct of any answering Defendants was undertaken in good faith and without malice, and therefore, is protected under the doctrines of qualified and/or absolute immunity.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

38. The Amended Complaint fails to adequately allege a custom, policy or practice of the Defendants, which they created and that caused or contributed to the deprivation of any constitutional right set forth in the Amended Complaint.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

39. The conduct of the answering Defendants, as alleged in the Amended Complaint, was undertaken, if at all, in all respects in good faith upon the reasonable belief that such conduct was lawful.

**AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

40. Plaintiffs' Amended Complaint fails to satisfy the pre-requisites of Rule 23 of the Federal Rules of Civil Procedure.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

41. The answering Defendants cannot be liable under the theory of *Respondeat Superior*.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

42. That at those times mentioned and described in the Amended Complaint, the answering Defendants were governmental officials performing discretionary functions and their conduct did not violate clearly established statutory or constitutional rights of which a reasonable man would or should have known and that by reason thereof is qualifiedly immune from liability in this action.

**AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE**

43. The answering Defendants affirmatively plead that they are not liable to Plaintiffs for any attorneys' fees and costs in this action and therefore this relief must be stricken.

**AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE**

44. Plaintiffs' Amended Complaint must be dismissed because the actions complained of by Plaintiffs fail, as Defendants' actions are privileged and justified.

**AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE**

45. The Amended Complaint against answering Defendants fails due to lack of direct involvement, no failure to remedy exists, no creation or continuation of a policy exists, no gross negligence exists, and no deliberate indifference exists.

**AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE**

46. Plaintiffs lack standing.

**AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE**

47. Defendants have not violated any rights, privileges or immunities of Plaintiffs.

**AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE**

48. Plaintiffs' claims are barred by the statute of limitations.

**AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE**

49. The Plaintiffs' claims are moot, therefore Plaintiffs may not maintain the instant action, either individually or as a representative of a class.

**AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE**

50. The Amended Complaint should be dismissed as there is no current case or controversy between Plaintiffs and Defendants.

**AS AND FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE**

51. Plaintiffs should not be permitted to bring the subject claim as a class action as class certification is not warranted under the provisions of Federal Rule 23.

**AS AND FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE**

52. Plaintiffs have failed to satisfy the prerequisites for class certification and, therefore, cannot represent the interests of others.

**AS AND FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE**

53. Defendants deny each and every material allegations of the Amended Complaint as they relate to the request for class certification, and hereby object to any such class action certification on the following grounds.

- (1) Lack of proper definition of proposed class;
- (2) Lack of commonality of questions of law;
- (3) Lack of commonality of questions of fact and law;



- (4) Lack of typicality;
- (5) Lack of adequacy of representation;
- (6) Lack of requirements for certification under Rule 23(b)(2); Rule 23(b)(3) and Rule 23(c)(4) of the applicable Rules of Civil Procedure;
- (7) Individual issues predominate over common issues;
- (8) A class action is no superior to other available methods for their fair and efficient adjudication of this controversy;
- (9) It is undesirable to concentrate the litigation of claims in Plaintiffs' chosen forum;
- (10) There are difficulties that are likely to be encountered in the management of a class action; and
- (11) Joinder is not impracticable.

**AS AND FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE**

54. The damages sought by the named Plaintiffs on behalf of the alleged class cannot be recovered without specific proof by each alleged class member that he or she has been injured.

**AS AND FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE**

55. Plaintiffs has unclean hands, laches, waiver and estoppel.

**AS AND FOR A TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

56. All or part of Plaintiffs' Amended Complaint is barred by the Prison Litigation Reform Act (PLRA) as he failed to exhaust his administrative remedy.

**AS AND FOR AN TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

57. Upon information and belief, any award for punitive damages based upon vague and undefined standards of liability would violate the Due Process Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, Section 1, and the Due Process Clause of the New York State Constitution, Article 1, Section 6.

**AS AND FOR A TWENTY-NINTH AFFIRMATIVE DEFENSE**

58. Upon information and belief, any award of punitive damages based upon any standard of proof less than “clear and convincing” evidence would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the Due Process Clause of the New York State Constitution, Article 1, Section 6.

**AS AND FOR A THIRTIETH AFFIRMATIVE DEFENSE**

59. Upon information and belief, any award for punitive damages would be in denial of the answering Defendants’ right to equal protection of the laws and guaranteed by the Fourteenth Amendment to the United States Constitution and the New York State Constitution, as the absence of adequate and objective standards for the assessment of punitive damages fails to ensure the equality of treatment between similarly situated civil Defendants and equality of treatment between criminal Defendants and civil Defendants.

**AS AND FOR A THIRTY-FIRST AFFIRMATIVE DEFENSE**

60. Upon information and belief, any award of punitive damages would violate the answering Defendants’ Due Process Rights embraced by the Fifth and Fourteenth Amendments to the United States Constitution and the New York Constitution, as a punitive damage award would constitute a deprivation of property without due process of law.

**AS AND FOR A THIRTY-SECOND AFFIRMATIVE DEFENSE**

61. Upon information and belief, Plaintiffs are not entitled to recover punitive damages demanded in the Plaintiffs' Amended Complaint as the awarding of same would be in violation of the answering Defendants' rights under the constitution of the United States of America and under the Constitution of New York and , more particularly, but not exclusively, in violation of these Defendants' right to substantive and procedural due process.

**AS AND FOR A THIRTY-THIRD AFFIRMATIVE DEFENSE**

62. Upon information and belief, Plaintiffs' claims for damages violate the Eighth Amendment's guarantee that excessive fines shall not be imposed.

**AS AND FOR A THIRTY-FOURTH AFFIRMATIVE DEFENSE**

63. Plaintiffs' demand for the recovery of punitive damages of the individual answering Defendants in their official capacity fail to state a claim or cause of action pursuant to *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).

**AS AND FOR A THIRTY-FIFTH AFFIRMATIVE DEFENSE**

64. Plaintiffs' demand for the recovery of punitive damages from the answering Defendants in their individual capacity fail to allege facts sufficient to state a claim or cause of action.

**AS AND FOR A THIRTY-SIXTH AFFIRMATIVE DEFENSE**

65. The Prison Litigation Reform Act §1997e limits any attorney's fees owed to Plaintiffs and requires payment of whole or part of that fee from any judgment.

**AS AND FOR A THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

66. The Amended Complaint is without merit and should be dismissed as no Monell claim exists as no unconstitutional policy exists, no official action by a policy making official exists, no custom or practice/policy exists, no failure to train exists, and no deliberate indifference exists.

**AS AND FOR A THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

67. The Court lacks subject matter jurisdiction.

**AS AND FOR A THIRTY-NINTH AFFIRMATIVE DEFENSE**

68. Plaintiffs lack standing for injunctive relief because no likelihood of future harm exists, no real or immediate injury or threat of injury exists, and no unconstitutional policy exists.

**AS AND FOR A FORTIETH AFFIRMATIVE DEFENSE**

69. The law on the case doctrine bars certain claims as well as collateral estoppel and res judicata.

WHEREFORE, answering Defendants demand judgment dismissing the Amended Complaint of the Plaintiffs herein with prejudice and on the merits, together with costs, disbursements and attorneys fees of this action.

DATED: Albany, New York  
September 11, 2018

GOLDBERG SEGALLA, LLP

By 

Jonathan M. Bernstein

Bar Roll No. 512457

*Attorneys for Defendants*

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COUNTY OF MONTGOMERY,  
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Defendants.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2018, I electronically filed the foregoing Answer to Amended Complaint, to the Clerk of the Northern District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

cc: Elmer Robert Keach, III, Esq. (Via ECF)  
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And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

N/A

GOLDBERG SEGALLA, LLP

/s/ Shakkira Piper

Shakkira Piper

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