

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

STEVEN BRODER,

Plaintiff,

Case No. 03-75106  
Hon. Marianne O. Battani

v.

CORRECTIONAL MEDICAL SERVICES,  
INC., et al.,

Defendants.

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**OPINION AND ORDER GRANTING PLAINTIFF'S MOTION  
TO REVISIT THE DISMISSAL OF THE CORPORATE  
DEFENDANT CMS IN LIGHT OF NEW CASE LAW**

Before the Court is Plaintiff's Motion to Revisit the Dismissal of the Corporate Defendant CMS in Light of New Case Law (Doc. No. 105). The Court has reviewed the pleadings and finds that oral argument would not aid in the resolution of this dispute. See E.D. Mich. LR LR 7.1(e)(2). For the reasons that follow, the Court **GRANTS** the motion.

**I. PROCEDURAL BACKGROUND**

Plaintiff Steven Broder, a prisoner in the custody of the Michigan Department of Corrections ("MDOC"), initiated this law suit alleging federal and state claims against multiple defendants arising out of the medical treatment he received for his laryngeal cancer. Defendant Correctional Medical Services, Inc. ("CMS"), provides certain medical services to inmates incarcerated by the MDOC pursuant to contract. It subsequently moved for dismissal from the lawsuit based upon Plaintiff's failure to exhaust. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court referred the motion to Magistrate Judge Komives for Report and Recommendation ("R&R").

The Magistrate Judge recommended that the motion be granted in part and denied in part based upon his review of four grievances. According to the R&R, only one grievance made sufficient reference to CMS to be deemed exhausted. Plaintiff

objected.

Upon review of the objection, the Honorable Gerald E. Rosen, to whom the case was assigned, dismissed CMS finding Plaintiff failed to exhaust any claim relative to CMS. See Order Adopting, In Part And With Modification, Magistrate Judge's Report and Recommendation of August 9, 2004, and Dismissing Plaintiff's Complaint As To Defendant CMS, In Its Entirety, With Prejudice. The issue before Judge Rosen was whether the claim ran against the corporate defendant inasmuch as Broder had never named CMS in three grievances and not named it specifically as a corporate entity in another grievance. Judge Rosen held that CMS had to be named as a separate corporate entity in each and every grievance, therefore dismissal was warranted. Judge Rosen added that Plaintiff's claim against CMS were barred by the Eleventh Amendment. Id., at 4-8.

Plaintiff asks the Court to revisit the dismissal in light of changes in the law which impact the Sixth Circuit requirement that a defendant be named at Step 1 in the grievance process. Plaintiff relies on Jones v. Bock, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910, 923 (2007) (voiding the total exhaustion pleading requirements), as a basis for reinstatement of his claims against CMS.

Defendants Mathai and Hutchinson object to reinstatement on the grounds that the motion is untimely and that Plaintiff failed to exhaust in accordance with 42 U.S.C. § 1997(e)(a). The Court addresses the arguments below.

## **II. ANALYSIS**

### **A. Timeliness**

Defendants argue that Plaintiff's motion is untimely under the Local Rules governing reconsideration, E.D. Mich. LR 7.1(g)(1), or under FED.R.CIV.P. 60(b). Because Plaintiff did not advance his motion under either procedural rule, Defendants' arguments are immaterial.

More importantly, the Court possesses authority to reconsider its prior, non-final orders pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. An order of dismissal was never entered in this case; hence, the Court is not bound by the strictures of FED.R.CIV.P. 60, and its revisory authority is essentially unfettered. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983) (“every order short of a final decree is subject to reopening at the discretion of the district judge”). Accordingly, the Court considers the merits.<sup>1</sup>

### **B. Failure to Exhaust**

Defendants contend that Plaintiff’s failure to name CMS as a potential Defendant disregards the requirement that he be as specific as possible in filing his grievance. Under Section 1997e(a) of the Prison Litigation Reform Act (PLRA), “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). There is no dispute that Plaintiff did not name CMS in any of his four grievances; however, that is no longer the standard that must be met.

Defendants acknowledge that the Jones Court held that the PLRA contained no requirement that an individual later sued be named in the initial grievance for exhaustion. The Court did hold that a prisoner must comply with prison grievance procedures. The governing Policy Directive instructs the prisoner to limit “information to the issue being grieved and “shall be as specific as possible.” Defs.’ Ex. 2. In reviewing this directive, the Jones Court did not read it to require Plaintiff to specifically name each Defendant. Defendants’ attempt to distinguish this case from Jones based on the

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<sup>1</sup>Defendants do not respond to Plaintiff’s contention that the alternate ground advanced in Judge Rosen’s Order, Eleventh Amendment immunity, is inapplicable under the circumstances of this case. Accordingly, the Court considers any objection to that argument waived.

fact that Plaintiff was represented by counsel at some point during the process is not persuasive.

Lastly, Defendants argue that Plaintiff failed to file his grievances in a timely manner. Specifically, Defendants assert that Plaintiff never complied with the requirement that he “try to verbally resolve the issue with staff within two days after becoming aware of a grievable issue” before filing a Step I Grievance. Defendants add that there is no evidence that Plaintiff attempted to resolve his issues with CMS verbally at any time. Most of the grievances were filed months after the issues arose, not within five days of an attempted verbal resolution as required by the Policy Directive. See Defendants’ Response at 11-12.

Even if Defendants are correct, in this case, MDOC reviewed and decided the grievances on the merits. It did not reject them as untimely. Consequently, Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2382 (2006) (holding that filing an “untimely or otherwise procedurally defective administrative grievance” does not constitute exhaustion), is distinguishable. Woodford is limited to those situations in which a prisoner files an action in court based on a grievance rejected by the prison officials as untimely. Here, it is undisputed that prison officials addressed Plaintiff’s grievances on the merits rather than dismissing them as untimely. See e.g. Johnson v Beardslee, No. 06-374, 2007 WL 2302378 (W.D. Mich. Aug. 8, 2007) (finding exhaustion satisfied because MDOC accepted the grievance and addressed it on the merits rather than rejecting it or denying it as untimely).

#### **IV. CONCLUSION**

For the reasons stated above, the Court **GRANTS** Plaintiff’s motion. The Court **VACATES** the Order Adopting, In Part And With Modification, Magistrate Judge’s Report and Recommendation of August 9, 2004, and Dismissing Plaintiff’s Complaint As To Defendant CMS, In Its Entirety, With Prejudice. Plaintiff may proceed with his claims

against CMS.

**IT IS SO ORDERED.**

DATED: March 14, 2008

s/Marianne O. Battani  
MARIANNE O. BATTANI  
UNITED STATES DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

Copies of this Opinion and Order were mailed to counsel of record on this date by ordinary mail and e-filing.

s/Bernadette M. Thebolt  
Deputy Clerk