25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

CASE NO. 03-CV-75106-GER-PJK
JUDGE GERALD E. ROSEN
MAGISTRATE JUDGE PAUL J. KOMIVES

v.

CORRECTIONAL MEDICAL SERVICES, INC., et al.

Defendants.
_____/

REPORT AND RECOMMENDATION REGARDING DEFENDANT CMS'S MOTION TO DISMISS (Doc. Ent. 8) and PLAINTIFF'S MOTION TO COMPEL (Doc. Ent. 20)

Table of Contents

I. **RECOMMENDATION:** The Court should grant in part and deny in part defendant CMS's motion to dismiss. (Doc. Ent. 8). Specifically, the motion to dismiss should be denied to the extent it seeks dismissal of claims against CMS to the extent they are supported by plaintiff's second grievance and to the extent it seeks dismissal of plaintiff's state law claims. The motion to dismiss should be granted in all other respects.

If the Court agrees with this recommendation, the Court should grant plaintiff's motion to compel discovery, but only to the extent it seeks documents from defendant CMS. (Doc. Ent. 20). It should be denied in all other respects.

Finally, the Court should enter an order requiring plaintiff to show cause why the complaint against the unserved defendants (Antonini, Axelson, Trimble, Bey, Mathai, Clark, and Grayson) should not be dismissed for failure to comply with Fed. R. Civ. P. 4(m).

II. **REPORT:**

A. **Procedural History**

Plaintiff is currently incarcerated at Parnall Correctional Facility (SMT) in Jackson, Michigan, where he is serving a sentence for first degree criminal sexual conduct. On December 24, 2003, plaintiff filed a complaint against defendants Patricia L. Caruso, described as the director of the Michigan Department of Corrections (MDOC); George Pramstaller, D.O., described as the MDOC's chief medical officer; Henry Grayson, described as the warden at SMT; Jan Epps, B.S.N., R.N., described as the regional health care administrator; Correctional Medical Services (CMS), described as a for-profit corporation licensed to do business in Michigan; and Audberto Antonini, M.D., Benzi Mathai, M.D., Bey, M.D., Malcolm Trimble, M.D., John Axelson, M.D., and Ray H. Clark, M.D., described as agents or employees of CMS. (Doc. Ent. 3 [Compl.] at 2-3 ¶¶ 6-16).

Plaintiff's claims include a 42 U.S.C. § 1983 Eighth Amendment claim of deliberate indifference to serious medical needs; as well as state law claims of gross negligence, reckless indifference, and willful and wanton misconduct; and negligence and medical malpractice. Comp. at 8-13 ¶¶ 91-129. Plaintiff seeks compensatory, exemplary, and punitive damages; declaratory, equitable, and injunctive relief; and costs, attorney fees, and any other relief the Court deems appropriate. Compl. at 13-14.

Defendants Caruso, Pramstaller, Grayson, and Epp filed an answer to the complaint on April 22, 2004.

B. Defendant CMS's Motion to Dismiss and Plaintiff's Motion to Compel

On February 24, 2004, defendant CMS filed a motion to dismiss. (Doc. Ent. 8 [Mtn.]). Defendant argues that "plaintiff['s] complaint must be dismissed for failure to comply with 42 U.S.C. § 1997e(a)[,]" and "the Court should decline supplemental jurisdiction over plaintiff's pendant state law claims pursuant to 28 U.S.C. § 1367(a)." Mtn. at I. On March 17, 2004, plaintiff filed a response. (Doc. Ent. 9 [Rsp.]).

On June 29, 2004, plaintiff filed a motion to compel answers to discovery requests as to defendants CMS, Antonini, Axelson, Trimble, Bey, Mathai, and Clark. (Doc. Ent. 20).

C. Applicable Law

1. 28 U.S.C. § 1915A (Screening)

The Court is required to screen prisoner civil rights complaints *sua sponte*. 28 U.S.C. § 1915A states:

> (a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which

> a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.
>
> (c) Definition.--As used in this section, 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.

28 U.S.C. § 1915A. "Section 1915A is restricted to prisoners who sue government entities, officers, or employees." *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997). "Further, § 1915A is applicable at the initial stage of the litigation...". *Id.*

2. 42 U.S.C. § 1997e ("Suits by prisoners")

Title 42 of the United States Code governs the public health and welfare. Section 1997e governs 42 U.S.C. § 1983 suits by prisoners. It states, in pertinent part, "[n]o 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, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).[1] "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general

[1]As defendant CMS points out, Michigan law also requires exhaustion. *See* Mich. Comp. Laws § 600.5503(1) ("A prisoner shall not file an action concerning prison conditions until the prisoner has exhausted all available administrative remedies.").

circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

> With regard to the dismissal of prisoner lawsuits, 42 U.S.C. § 1997e(c) provides:
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C. § 1997e(c)(1)-(2). "Federal courts should not adjudicate any such claim until after exhaustion unless the complaint satisfies § 1997e(c)(2)." *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998).

D. Analysis

1. Plaintiff provides documentation in support of his claim that he has exhausted his administrative remedies.

The MDOC prisoner grievance policy directive sets forth a three-step grievance process. MDOC Policy Directive 03.02.130 ("Prisoner/Parolee Grievances"), effective 12/19/03, ¶¶ R-II. Attached to plaintiff's complaint are copies of four grievances and the related appeals.

On November 3, 2001, plaintiff completed a Step I grievance form "to document the situation and attempt to eliminate any further delays in [his] medical treatment." **SMT-01-11-1478-12D-1**. The Step I response memorandum is dated December 8, 2001. On December 3, 2001, plaintiff completed a Step II grievance appeal form, stating that there had not been a Step I

answer. The grievance coordinator received the appeal the following day. The Step II response memorandum from defendant Epp is dated January 24, 2002. Plaintiff completed a Step III grievance appeal on or about December 25, 2001, stating that he did not receive a Step II response and that his Step I interview was untimely. In a letter dated January 27, 2002, plaintiff sought the status of his Step III grievance appeal.

On July 12, 2002, plaintiff completed a Step I grievance form regarding "the delay in diagnosis and treatment of [his] cancer[,]" and against "the following doctors and staff . . ., and any other treating personnel, supervising personnel, and any and all other individuals or organizations involved in the diagnosis, treatment, or referral of [his] condition." **SMT-02-07-0818-12D-2**. Included in the attached list of doctors and staff are Pramstaller, Grayson, Epps, "[a]ny and all relevant CMS personnel", Antonini, Mathai, Trimble, Axelson, and Clark. Rsp. Ex. A. The Step I response memorandum is dated August 5, 2002. On August 7, 2002, plaintiff completed a Step II grievance form, stating that the Step I response was not timely. Plaintiff's appeal was received by the grievance coordinator on August 9, 2002. The Step II response memorandum from defendant Epp is dated December 5, 2002. Plaintiff completed a Step III grievance appeal, stating that he had not received a Step II response and taking issue with certain dates.

On March 7, 2003, plaintiff completed a Step I grievance form in which he mentioned an October 2002 visit with Dr. Kornak and complained of a lack of treatment and an unanswered kite for medical records. **SMT-03-03-2410-12-1.** It was received by the grievance coordinator on March 10, 2003. The Step I response memorandum is dated March 13, 2003. Plaintiff completed a Step II grievance appeal on March 27, 2003. The Step II response memorandum

from defendant Epp is dated May 2, 2003. On or about April 28, 2003, plaintiff completed a Step III grievance appeal. The Step III grievance response is dated November 7, 2003.

On April 22, 2003, plaintiff completed a Step I grievance form, mentioning Dr. Kornak, Dr. Tsein, Dr. Camann, Dr. Mathai, and alleging that his "post-treatment follow-up care, like the original failure to diagnose and failure to treat, has violated [his] constitutional rights under the Eight[h] Amendment and MDOC policy." **SMT-03-04-2627-12-1**. It was received by the grievance coordinator on April 24, 2003. The Step I grievance response memorandum is dated June 4, 2003. On May 20, 2003, plaintiff completed a Step II grievance appeal, stating that there was no timely Step I response. The Step II response memorandum from defendant Epp is dated June 10, 2003. Plaintiff completed a Step III grievance appeal, stating that he had not received a Step I response and taking issue with the Step II response. The Step III grievance response is dated November 18, 2003.

2. Notwithstanding this documentation, the Court should conclude that plaintiff has exhausted his claims as to defendant CMS but only to the extent they are supported by the second grievance.

Defendant CMS argues that "plaintiff's complaint against [it] must be dismissed for failure to comply with 42 U.S.C. § 1997e(a)." Mtn. Br. at 3, 3-5. Defendant CMS argues that "[p]laintiff has not shown exhaustion through Step III of the MDOC grievance procedure as to [d]efendant CMS. Plaintiff presents no evidence that he pursued the grievance procedure in any manner against CMS. Because [p]laintiff has failed to name CMS in his grievance, and failed to allege any complaints against CMS in the grievances provided, [p]laintiff's complaint against CMS must be dismissed pursuant to Fed. R. Civ. [P.] 12(b)(6) and 42 U.S.C. § 1997e(a)." Mtn. Br. at 5.

Plaintiff claims that he "has exhausted his administrative remedies." Mtn. Br. at 7, 7-12.

a. Plaintiff's four grievances establish exhaustion as to the issues and defendants grieved.

Plaintiff argues that he "attached proof of exhaustion to his complaint[.]" Rsp. at 9. It is clear following examination of the aforementioned grievances and appeals that plaintiff exhausted the grievance process as to the subject matter and defendants grieved. As the Sixth Circuit has stated, plaintiff has the burden to prove that he or she has exhausted his or her administrative remedies. In *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998) (per curiam), the Sixth Circuit held that under 42 U.S.C. § 1997e(a), "prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if available, showing the administrative disposition of his complaint." *Brown*, 139 F.3d at 1103.[2] Plaintiff has provided the court with copies of his grievances, the appeals, and in most cases the disposition.

b. These grievances were exhausted prior to the instant case's filing.

Plaintiff claims he "appealed all of his grievances to the final stage[.]" Rsp. at 8-9. Although defendant maintains, with respect to grievances SMT-01-11-1478-12D-1 and SMT-02-

---

[2]The Sixth Circuit appears to be alone in placing the burden on plaintiffs to show exhaustion. The other circuit courts that have considered the question characterize lack of exhaustion as an affirmative defense. See *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999); *Jenkins v. Haubert*, 179 F.3d 19, 29 (2d Cir. 1999); *Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998). Thus, in those circuits the defendant bears the burden of establishing that the claims are not exhausted, see *Massey*, 196 F.3d at 735, and the defense is subject to waiver and forfeiture, see *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 536 (7th Cir. 1999); *Wendell*, 162 F.3d at 890.

07-0818-12D-2, that plaintiff has not shown completion of the grievance process prior to filing the instant case, Mtn. Br. at 4, the Court should disagree.

Claims based upon grievances which were not exhausted prior to bringing suit are barred by the Sixth Circuit's cases. *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999) (citing *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), *cert. denied*, 525 U.S. 833, 119 (1998)) ("The plain language of the statute makes exhaustion a precondition to filing an action in federal court[.]"). *See also Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002) (internal citation and footnote omitted) ("A plaintiff who fails to allege exhaustion of administrative remedies through 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed *sua sponte*. Our rule in *McGore* [[*v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997)[3]]] requires that a plaintiff, who fails to make a sufficient allegation of exhaustion in their initial complaint, also not be allowed to amend his complaint to cure the defect. If the plaintiff has exhausted his administrative remedies, he may always refile his complaint and plead exhaustion with sufficient detail to meet our heightened pleading requirement, assuming that the relevant statute of limitations has not run.").

---

[3]Another portion of the *McGore* decision has fallen under some criticism. *McGore* held, in part, that "[u]nder § 1915(b), the prisoner must pay the required filing fees regardless of the merits of the appeal." *McGore*, 114 F.3d at 610-611. Although the Sixth Circuit later recognized that *McGore*'s position differed from that of other circuits, the Court stated that "[t]he only fair interpretation of this language is that regardless of the 'good faith' of the appeal, a prisoner can appeal a district court decision in forma pauperis if he pays the fee pursuant to the schedule of § 1915(b)." *Starks v. Reno*, No. 98-3818, 2000 WL 353526, **3 (6th Cir. 2000) (unpublished).

The Step III grievance in SMT-01-11-1478-12D-1 was allegedly filed on or about December 25, 2001, and it is not clear when the Step III grievance in SMT-02-07-0818-12D-2 was filed. However, it is not fatal that plaintiff has not supplied Step III grievance responses. In the case at bar, plaintiff's complaint was not filed until late 2003 - well beyond the dates the Step III grievances were likely filed and, therefore, virtually eliminating the possibility that plaintiff was too impatient in filing this lawsuit.[4]

c. **Plaintiff has only exhausted his claim(s) against CMS to the extent they are supported by the second grievance. Naming an agent or employee in a grievance does not constitute exhaustion on the part of the institutional defendant. However, the second grievance indirectly mentions CMS sufficiently to provide notice and satisfy the exhaustion requirement.**

Defendant CMS contends that defendants Mathai and Antonini "were independent contractors with CMS, acting as primary care physicians to certain inmates incarcerated by the MDOC." Mtn. Br. at 1. Defendant CMS argues that plaintiff's grievances do not mention CMS. Mtn. Br. at 4. It claims that plaintiff's complaint "fails to state specific averments which demonstrate the exhaustion of [his] administrative remedies concerning the claims against [it]." Mtn. Br. at 4. Plaintiff argues that "CMS was properly named and/or identified in the grievances[.]" Rsp. at 9, 9-11.

Several Sixth Circuit cases address the need for grievances to be specific in order to properly grieve a given defendant. In *Knuckles El v. Toombs*, 215 F.3d 640 (6th Cir. 2000), the Sixth Circuit stated that "a prisoner must plead his claims with specificity and show that they

---

[4]Plaintiff claims that at least one of these two Step III grievances was sent to the wrong inmate. Rsp. at 8, Rsp. Ex. B [Affid. of Sandra Girard, Executive Director - Prison Legal Services of Michigan, Inc.]. According to plaintiff, MDOC did not answer these two Step III appeals. Rsp. at 9.

have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome. The reason for the requirement to show with specificity both the claims presented and the fact of exhaustion is so that the district court may intelligently decide if the issues raised can be decided on the merits." *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Clearly, plaintiff has attached to his complaint copies of the administrative dispositions in the four grievances except where he did not receive a Step III response, in which case plaintiff stated so.

In *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), the Sixth Circuit affirmed the trial court's dismissal of plaintiff's claims against a defendant named Howard because he was not mentioned in plaintiff's grievances. *Curry*, 249 F.3d at 505. In so doing, however, the Court stated that "[t]he claim against Howard . . . is a separate claim, against a separate individual, premised on a separate and independent legal theory." *Id.* at 505.[5] "The requirement that a prisoner file a grievance against the person he ultimately seeks to sue does not impose a heightened pleading requirement upon would-be § 1983 plaintiffs. It only assures, as envisioned under the PLRA, that the prison administrative system has a chance to deal with claims against prison personnel before those complaints reach federal court." *Id.*

In *Burton v. Jones*, 321 F.3d 569 (6th Cir. Feb. 28, 2003), the Sixth Circuit stated:

> We understand [the MDOC grievance] policies to require that a prisoner seeking to administratively exhaust a claim against a prison official describe the alleged

---

[5] "Howard [was] the corrections officer who witnessed Scott's assault on them and allegedly failed to intervene." *Curry v. Scott*, 249 F.3d 493, 504 (6th Cir. 2001).

> mistreatment or misconduct at Step I of the grievance process. By negative implication, we understand these policies to preclude administrative exhaustion of a claim against a prison official if the first allegation of mistreatment or misconduct on the part of that official is made at Step II or Step III of the grievance process. We do not, however, understand these policies to preclude a prisoner from presenting additional factual detail at Step II and Step III that clarifies an allegation made at Step I as a means of justifying an appeal.

Burton, 321 F.3d at 574 (internal citation omitted). Furthermore, the Court stated:

> [F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process. In describing the alleged mistreatment or misconduct, however, we would not require a prisoner's grievance to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. Rather, *it is sufficient for a court to find that a prisoner's Step I problem statement gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.*

Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (emphasis added).

With these cases as a backdrop, the Court should consider two issues. One, whether naming an agent or employee in a grievance constitutes exhaustion on the part of the institutional employer. Two, whether indirectly mentioning CMS in one of the grievances constitutes exhaustion as to the claim within that grievance.

1. CMS claims that plaintiff has not satisfied the *Burton* requirements, as it is not named in the grievances. Mtn. Br. at 4. According to defendant CMS, "[p]laintiff's grievances attached to his complaint make absolutely no allegations against CMS at all." Mtn. Br. at 4. On the other hand, plaintiff notes that "CMS is a corporation, and a corporation can only act[] through its employees and agents. Thus, when a prisoner complains in detail about an ongoing failure of his medical care, CMS (the corporation), like MDOC itself, has sufficient notice of the

problem to meet the 'fair notice' requirement of exhaustion." Rsp. at 10. Plaintiff argues that his grievances amply notified MDOC of plaintiff's complaints against defendant CMS, as it is the sole medical care provider for MDOC patients, and MDOC and defendant CMS "must have been aware that [plaintiff] was complaining of CMS and its medical staff in his grievances." Rsp. at 10.

At least a few cases have confronted the issue of whether naming an agent in a grievance satisfies the exhaustion requirement as to the institutional defendant. In *Stevens v. Goord*, No. 99 Civ. 11669(LMM), 2003 WL 21396665 (S.D.N.Y. June 16, 2003) (unpublished), plaintiff filed a complaint based upon 42 U.S.C. § 1983 and, among others, named Correctional Physicians Services, Inc. (CPS) as a defendant. In considering "[w]hether administrative remedies were available against CPS", the court stated:

> The Court finds that CPS has not met its burden of showing that it is subject to the IGP at Green Haven. CPS merely asserts that its functions are so intertwined with those of DOCS personnel that it is not possible to develop individual grievance procedures for CPS. (CPS Reply Mem. at 5.) However, "[n]o evidence has been submitted which suggests that plaintiff's claims against [CPS] could have been handled internally within the DOCS grievance procedure or even that the prison grievance tribunal would have had any authority to take some responsive action to [Lynch's] complaints." *Borges v. Adm'r for Strong Mem'l Hosp.*, No. 99 Civ. 6351FE, 2002 WL 31194558, at *3 (W.D.N.Y. Sept.30, 2002). Therefore, CPS's motion to dismiss for failure to exhaust administrative remedies is denied.

Stevens, 2003 WL 21396665 at *5.[6]

---

[6]In the Second Circuit, "'[w]hen a defendant raises a prisoner's failure to comply with the PLRA's exhaustion requirement, the failure is properly assessed as an affirmative defense.'" *Id.* (quoting *Arnold v. Goetz*, 245 F. Supp. 2d 527, 532 (S.D.N.Y. 2003)). Because this is different from the Sixth Circuit's position, this case is only mildly persuasive.

However, the Court should also be guided by relevant decisions from this district. In *Alder v. Correctional Medical Services*, Case No. 02-CV-70997-DT (E. D. Mich.) (Duggan, J.), defendant CMS filed a motion for summary judgment in which it argued that plaintiff had not specifically grieved CMS. I suggested that plaintiff had exhausted his administrative remedies as to his claim(s) against defendant CMS because plaintiff's claim against defendant CMS was not separate and distinct from his claim that he was denied appropriate medical care over a nine and one-half month period. *Alder*, Case No. 02-CV-70997-DT, 9/25/02 R & R (doc. ent. 41) pp. 15-18. However, citing *Curry*, the Court opined that plaintiff's grievance against defendant Harvey could not serve to exhaust plaintiff's claims against CMS. *Id.* 11/18/02 Order (doc. ent. 46) p. 12. Later, the Sixth Circuit affirmed the district court's grant of summary judgment for CMS on the basis of non-exhaustion. *Alder*, No. 02-2496, 2003 WL 22025373, **3 (6th Cir. Aug. 27, 2003), *cert. denied*, 124 S. Ct. 1718 (2004).

In *VanDiver v. Martin*, 304 F. Supp. 2d 934 (E. D. Mich. 2004) (Cleland, J.), the Court found that plaintiff did not name CMS in his Step I in his first step grievance. *VanDiver*, 304 F. Supp. 2d at 944. The Court then stated:

> In his Step 1 grievance, Plaintiff consistently grieves the conduct of Defendants Debruyn and King throughout his description of his complaints. Plaintiff makes no mention of Correctional Medical Services in Step I of his grievance until the final paragraph where he states: "Should this matter not be resolved and I become subject to foot Amputation, Nurse King, Health Manager Susan Debruyn, Health Care and CMS will be liable in a large monetary damages." Plaintiff's mention of Defendant CMS, however, is not done "against the person or persons he ultimately seeks to sue." *Curry*, 249 F.3d at 505. Simply listing the parties that Plaintiff will sue *if* the matter is not resolved and *if* Plaintiff undergoes further injury, does not name an individual responsible for an alleged injury in the grievance procedure. Nor is it sufficient to establish what action or inaction taken by CMS is being challenged. The grievance does not indicate CMS as a party who caused his injuries and against whom Plaintiff *presently* seeks to recover.

> Therefore, the court agrees with the magistrate judge that Plaintiff has failed to show that he pursued grievances against Defendants Martin, Epp, Glaspen, and Correctional Medical Services at all levels of administrative review, or that Plaintiff was precluded from doing so.

Id. at 944.

In light of *Alder* and *VanDiver*, the court should reject plaintiff's argument, for purposes of § 1997e(a), that defendant CMS "must have been aware that [plaintiff] was complaining of CMS and its medical staff in his grievances." Rsp. at 10.

2. Plaintiff argues that defendant CMS "had 'fair notice' of [plaintiff's] complaints against it." Rsp. at 9 (citing *Burton*, 321 F.3d at 575). Plaintiff's second grievance was filed against "any other treating personnel, supervising personnel, and any and all other individuals or organizations involved in the diagnosis, treatment, or referral of my condition." Additionally, the list attached to this grievance identified "[a]ny and all relevant CMS personnel" as staff grieved. Rsp. Ex. A. Therefore, plaintiff argues, he "could not have made it clearer that his complaints of medical mismanagement were intended to run against anyone and everyone who had any connection to his diagnosis, treatment, and aftercare, including MDOC's contract medical provider, CMS." Rsp. at 10.

The Court should agree and conclude that "prison officials have [] been given fair notice of the claim being litigated" against defendant CMS to the extent it is supported by the second grievance. *Burton*, 321 F.3d at 575. Unlike plaintiff *VanDiver*, plaintiff here does not frame as contingent his grievance against the "organizations" or "CMS personnel". Furthermore, plaintiff was as descriptive as possible without using CMS's formal name. Although the meaning of plaintiff's language may be debated (i.e., CMS did not directly diagnose, treat, or refer his

condition), the lay interpretation of this language is that plaintiff intended to file the second grievance against CMS as an institution.

d. The content of the second grievance sufficiently exhausts plaintiff's claim(s) against defendant CMS.

Defendant CMS argues that the grievances do not mention the issues alleged against it in the complaint. Mtn. Br. at 4. If the Court agrees with my foregoing recommendation, then it need only consider defendant CMS's argument as it relates to the second grievance.

Plaintiff's second grievance states as follows: "Having had a medical complaint lodged in approximately March of 2001 and left in an untreated state until April of 2002, where cancer was detected in January of 2002 has caused the necessity of filing this grievance. I was hospitalized for the majority of April, and portions of May and June, due to delays in diagnosis and treatment." The grievance further states: "I am filing this grievance to complain about the delay in diagnosis and treatment of my cancer, which caused months of unnecessary pain and medical complications. I want to make sure this never happens again and want compensation for the harm I have suffered."

Plaintiff's Eighth Amendment claim is set forth at Compl. ¶¶ 91-100. Plaintiff describes defendant CMS as helping "formulate the policies, procedures, and staff training related to medical care in MDOC facilities," and implementing those protocols. Compl. ¶ 10. After alleging certain duties of Caruso, Pramstaller, Grayson, and Epps, plaintiff contends that "[d]efendants CMS and its employees have the same duty to implement policies and procedures to ensure timely and effective treatment of life-threatening disease, and to ensure that such treatment is in fact provided." Compl. ¶¶ 88-90. He also contends that "[t]he violation of

[plaintiff's] Eighth Amendment rights stemmed in part from MDOC and CMS customs and policies that allowed or facilitated care that was deliberately indifferent, wanton, oppressive, or reckless." Compl. ¶ 95.

In *Carrion v. Wilkinson*, 309 F. Supp. 2d 1007 (N. D. Ohio Mar. 10, 2004), the plaintiff filed a complaint against, among others, the Director of the Ohio Department of Rehabilitation and Correction, claiming that he "failed to implement or promulgate the proper rules and regulations regarding the diabetic diet for prisoners with diabetes[.]" *Carrion*, 309 F. Supp. 2d at 1013. Plaintiff did not raise this issue with the Institution in his grievances. *Id.* The court stated that "[w]hen filing a grievance before an administrative agency, an inmate cannot be expected nor required to formulate a legal theory in his grievance as if he was filing a complaint before a court. Neither is he required to use the precise language adopted by the courts. [Plaintiff] stated in his Notification of Grievance that 'this Institution does not conform to the ADA dietary standar[d]s and the nutrition provided to this diabetic inmate is not recom[m]ended b[y] the ADA dietary administration.'" *Id.* The court concluded that "[t]his statement can be read as raising the issue of the Institution's policy or custom on diabetic inmates' diet, which is sufficient for the purpose of exhausting administrative remedies." *Id.*

The Court should find *Carrion* persuasive. Plaintiff grieves the institutional defendant with regard to his medical treatment and brings a cause of action against that defendant with regard to relevant policy, procedures, and failure to train. The Court should deny the motion to dismiss to the extent it contends that the arguments against CMS in the second grievance differ from plaintiff's claims against it.

c. Plaintiff's case should not be dismissed on the basis that plaintiff has not fully exhausted the claims in his complaint.

Defendant CMS also argues that, "[e]ven in cases where some defendants or some claims have been exhausted in the grievance procedure, sometimes referred to as a 'mixed' case of exhausted and unexhausted claims, the case should be still dismissed for failure to fully exhaust all of the claims." Mtn. Br. at 4-5 (citing *Smeltzer v. Hook*, 235 F. Supp. 2d 736, 744-746 (W. D. Mich. 2002) (supporting total exhaustion)).

Plaintiff argues that "[t]he Sixth Circuit has rejected the total exhaustion rule[.]" Rsp. at 11. Plaintiff relies upon *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999), and *Burton v. Jones*, 321 F.3d 569, 575 n.2 (6th Cir. Feb. 28, 2003) ("the *Hartsfield* holding illustrates that a prisoner's lawsuit, which alleges multiple claims against multiple defendants, is not vulnerable to dismissal under § 1997e(a) simply because the prisoner has failed to exhaust a particular claim as to a specific defendant."). Rsp. at 11-12.

I am persuaded by *Burton*'s interpretation of *Hartsfield*. *See also Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1180 (D. Nev. 2004) ("given the split in the federal courts over the total exhaustion rule, the unclear directive of the plain language of the PLRA, and the competing policy interests, we do not believe that the "total exhaustion" rule should be applied in the instant circumstance without permitting the plaintiff to amend his complaint to delete the unexhausted claim or claims. "); *Alexander v. Davis*, 282 F. Supp. 2d 609, 612 (W.D. Mich. Sept. 22, 2003) ("the task of implementing a total exhaustion rule without express guidance from the higher courts does not serve the interests of the public in understanding the law and conforming to the law."); and *Jenkins v. Toombs*, 32 F. Supp. 2d 955, 959 (W. D. Mich. 1999) (42 U.S.C. §

1997e(a) "does not impose a total exhaustion requirement on prisoner civil rights litigation."). Therefore, the Court should conclude that complete dismissal of plaintiff's case on this basis is inappropriate.[7]

3. The Court should enter an order granting in part plaintiff's motion to compel discovery, but only to the extent it seeks documents from defendant CMS.

a. Named defendants Antonini, Axelson, Trimble, Bey, Mathai, Clark, and Grayson are not properly before this Court.

On February 24, 2004, attorney Ronald W. Chapman entered an appearance on behalf of defendant CMS. On April 12, 2004, attorney Langschwager entered an appearance on behalf of defendants Caruso, Epps, and Pramstaller.

Apparently, the remaining named defendants (Antonini, Axelson, Trimble, Bey, Mathai, Clark, and Grayson) have not been served. Pursuant to Fed. R. Civ. P. 4(m), plaintiff should have served this defendant with the instant complaint by April 22, 2004. Therefore, the Court should deny plaintiff's June 29, 2004, motion to compel as to defendants Antonini, Axelson,

---

[7]MDOC PD 03.02.130 governs "Prisoner/Parolee Grievances" [effective 12/19/03]. Paragraphs E and F set forth the appropriate subject matter of grievances. The policy provides, in part, that "[a] grievant may not grieve the content of policy or procedure; such grievances shall be rejected by the grievance coordinator." MDOC PD 03.02.130, effective 12/19/03, ¶ E. Non-grievable issues include "[i]ssues not within the authority of the Department to resolve." ¶ F(3). It is possible that plaintiff's claims against CMS, to the extent they attack policy and procedure, would have been rejected as non-grievable. However, because it is not clear whether there is an available remedy as to plaintiff's claim against CMS or whether MDOC has jurisdiction to review a claim against CMS, and because plaintiff does not raise this availability argument in his response, I do not address it in this report.

Trimble, Bey, Mathai, and Clark. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."). Additionally, the Court should enter an order requiring plaintiff to show cause why the complaint against these unserved defendants should not be dismissed for failure to comply with Fed. R. Civ. P. 4(m).

b. The Court should grant plaintiff's motion to compel as to defendant CMS.

"A response to a nondispositive motion must be filed within 14 days after service of the motion." E. D. Mich. LR 7.1(d)(2)(B). Assuming three days for mail, defendants' response was due July 16, 2004. Furthermore, the local rules of this Court provide that "[a] respondent opposing a motion must file a response, including a brief and supporting documents then available." E. D. Mich. LR 7.1(b). As of this writing, defendant CMS has not filed a response to plaintiff's June 29, 2004, motion to compel. Therefore, the Court should enter an order granting plaintiff's motion to compel to the extent it seeks documents from defendant CMS.

4. The Court should exercise supplemental jurisdiction over plaintiff's state law claims.

In addition to his Eighth Amendment claim, plaintiff alleges state law claims of gross negligence, reckless indifference, and willful and wanton misconduct, Compl. at ¶¶ 101-105; as well as negligence and medical malpractice, Compl. at ¶¶ 106-135.

a. Even though dismissal based upon failure to disclose prior cases is mandated by Mich. Comp. Laws § 600.5507, procedure with regard to supplemental jurisdiction is governed by the Federal Rules of Civil Procedure.

Mich. Comp. Laws § 600.5507 ("Claim of indigency in civil actions concerning prison conditions, prohibitions") provides that "[a] prisoner who brings a civil action or appeals a judgment concerning prison conditions shall, upon commencement of the action or initiation of the appeal, disclose the number of civil actions and appeals that the prisoner has previously initiated." Mich. Comp. Laws § 600.5507(2). The statute further provides that "[t]he court shall dismiss a civil action or appeal at any time, regardless of any filing fee that may have been paid, if the court finds any of the following: . . . (b) The prisoner fails to comply with the disclosure requirements of subsection (2). Mich. Comp. Laws § 600.5507(3)(b).

Defendant contends that plaintiff's state law claims (Counts II and III) must be dismissed for failure to comply with Mich. Comp. Laws § 600.5507. Mtn. Br. at 5.[8] Plaintiff contends that his "inadvertent failure to comply with MCL 600.5507(2) should be excused where he has filed no previous cases[.]" Rsp. at 12.

Plaintiff has been a party to several other cases in this Court characterized as prisoner civil rights cases, including: (1) 93-CV-74866-ADT (*Broder, et al. v. Engler, et al.*); (2) 94-CV-72611-BAF-TAC (*Broder v. Stegall, et al.*); (3) 94-CV-74787-JAC-PJK (*Broder, et al. v. Oklnd Cnty, et al.*); (4) 99-CV-74902-DPH-SDP (*Andrew, et al. v. Martin, et al.*); (5) 00-CV-40152-

---

[8]Defendant relies upon *Tomzek v. Department of Corrections*, 258 Mich. App. 222, 225; 672 N.W.2d 511, 513 (2003) ("Because plaintiff in this case failed to file the required disclosure at the commencement of this appeal and because that failure has now been brought to our attention, the appeal is dismissed pursuant to M.C.L. § 600.5507(3)(b)."). *See also Newell v. Marshall*, No. 233742, 2002 WL 31451001, *1 (Mich. App. 2002) ("As an initial matter, we note that dismissal was proper pursuant to M.C.L. § 600.5507(3)(b); 600.5531(a). Nonetheless, we will address the merits of plaintiffs' claim of appeal.").

PVG-VMM (*Reilly, et al. v. Gwin, et al.*); (6) 00-CV-72297-GER-PJK (*Roberts, et al. v. Martin, et al.*); and (7) 03-CV-70614-JCO-RSW (*Broder v. Overton, et al.*).[9]

Nonetheless, Mich. Comp. Laws § 600.5507 is procedural, rather than substantive, in nature. "When deciding state-created claims based on diversity jurisdiction or supplemental jurisdiction, federal courts must apply state substantive law and federal procedural law." *Blake-McIntosh v. Cadbury Beverages, Inc.*, No. 3:96-CV-2554 (EBB), 1999 WL 464529, *5 (D.Conn. 1999) (unpublished) (referencing 28 U.S.C. § 1652; *Hanna v. Plummer*, 380 U.S. 460, 465 (1965)). Therefore, the Court should not apply Mich. Comp. Laws § 600.5507.

b. The Court should exercise supplemental jurisdiction over plaintiff's state law claims.

Defendant CMS argues that "[t]he Court should decline supplemental jurisdiction over plaintiff's pend[e]nt state law claims pursuant to 28 U.S.C. § 1367(a)[.]"[10] Mtn. Br. at 6, 6-8. In support of this claim, defendant CMS relies upon *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), among other cases. Mtn. Br. at 6-8. According to defendant CMS, "the attempt to reconcile these two distinct bodies of law will dominate and prolong pre-trial practice, complicate the jury, and may very likely result in inconsistent verdicts. There may also be post-trial problems with respect to [judgment] interest and attorney fees." Mtn. Br. at 8. Defendant

---

[9]Plaintiff was also a party in two habeas cases: 95-CV-70085-GER-SDP (*Broder v. Stegall*) and 96-CV-74643-BAF-PJK (*Broder v. Stegall*).

[10]"Section 1367, part of the Judicial Improvements Act of 1990 (Pub.L. 101-650), codifies under the name of 'supplemental jurisdiction' the case law doctrines of 'pendent' and 'ancillary' jurisdiction...". See 28 U.S.C. § 1367, PRACTICE COMMENTARY.

CMS argues that "[p]laintiff's state [law] tort claims, particularly the medical malpractice claim, will substantially expand the scope of this case beyond that necessary and relevant to the federal § 1983 claims. Thus, judicial economy, convenience, fairness, and comity weigh heavily against exercising supplemental jurisdiction in this case." Mtn. Br. at 8.

Plaintiff argues that "[t]he Court should keep Mr. Broder's pend[c]nt state-law claims[.]" Rsp. at 12, 12-15. He contends that his "state law claims arise out of the same factual nexus as his federal claims, and his state law claims do not implicate any of the circumstances for which a federal district court can or should refuse to exercise supplemental jurisdiction." Rsp. at 15.

If the Court agrees with my recommendation that defendant CMS's motion to dismiss should be denied to the extent it seeks dismissal of plaintiff's claims against it that are supported by the second grievance, then the Court should exercise supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. § 1367.[11] "if there is some basis for original jurisdiction, the default assumption is that the court will exercise supplemental jurisdiction over all related

---

[11]According to defendant CMS, "[t]he complaint alleges no specific facts at all concerning [d]efendant CMS." Mtn. Br. at 1. Furthermore, defendant CMS maintains that "[g]enerally, the complaint alleges defendant CMS has a duty to implement policies and procedures to train and supervise staff and to ensure prompt and effective treatment of life-threatening disease." Mtn. Br. at 1. This report does not address this argument, because (1) it is contained within the "Facts" portion of defendant CMS's brief and (2) defendant CMS's dismissal argument is based upon 42 U.S.C. § 1997e(a). Mtn. Br. at 1, 3.

Also, defendant CMS asks the Court to "tax reasonable costs in favor of [d]efendant [CMS] where permitted by law." Mtn. at 3. The request is premature. Should the Court enter judgment in favor of defendants, they may present a bill of costs to the clerk of the Court pursuant to 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d)(1). If defendants seek attorney fees pursuant to 42 U.S.C. § 1988, they should follow the procedure set forth in Fed. R. Civ. P. 54(d)(2).

claims." *Campanella v. Commerce Exchange Bank*, 137 F.3d 885, 892 (6th Cir. 1998). Although "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c), the Court should not decline to exercise supplemental jurisdiction because CMS has failed to make a persuasive argument that any of these four factors are present.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985), *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505, 508-09 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). Filing of objections that raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall not be more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Paul J. Komives

PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated Aug. 9, 2004