UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DALLAS COBBS, #164276,

Plaintiff,

File No. 07-CV-14644
Hon. Anna Diggs Taylor
Mag. Judge Charles E. Binder

vs.

GEORGE J. PRAMSTALLER, *et al.*,

Defendants.

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PLAINTIFF'S BRIEF IN OPPOSITION TO CMS DEFENDANTS' (HUTCHINSON AND MATHAI'S) MOTION TO DISMISS

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Dated: June 11, 2009

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Statement of Issues Presented

1. Should the Court deny the CMS defendants' motion to dismiss where Mr. Cobbs exhausted all grievances that were available to him, and where he did not and could not know who had made the decision to deny his medical care?

   Mr. Cobbs says yes.

2. Should the Court deny the CMS defendants' motion to dismiss because it is improperly brought under Rule 12(b)(6)?

   Mr. Cobbs says yes.

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The Legal Standard

1. Exhaustion under the Prison Litigation Reform Act (PLRA)

The PLRA says that to challenge the conditions of his confinement, a prisoner must first exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a). The exhaustion requirement applies regardless of the remedy the prisoner seeks or the type of claim filed. *Booth v. Churner*, 532 U.S. 731, 741 (2001); *Porter v. Nussle*, 534 U.S. 516, 532 (2002). While the PLRA requires exhaustion, it does not impose a duty on a prisoner to name in his original grievance every individual whom he later sues. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *Jones v. Bock*, 549 U.S. 199, 218 (2007). If a prisoner's grievance conforms to the degree of specificity required by the prison grievance policy, then the prisoner has complied with the exhaustion requirement. *Jones*, 549 U.S. at 218.

2. Dismissal under Rule 12(b)(6)

In reviewing a Rule 12(b)(6) motion to dismiss, a court must "accept all ... factual allegations as true and construe the complaint in the light most favorable to the plaintiff." *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). Additionally, a court must accept all well-pleaded factual assertions. *Id.*

Under Rule 8(a)(2), a plaintiff's initial pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2)'s pleading standard is liberal, so that "specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). A complaint can survive a 12(b)(6) motion without detailed factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008).

Statement of Facts

Plaintiff Dallas Cobbs is a prisoner in the custody of the Michigan Department of Corrections. On June 22, 2004, the Medical Services Advisory Council (MSAC) approved him for cataract surgery. Mr. Cobbs had cataracts in both eyes which were impairing his ability to see. Dr. Dastgir removed the cataract on Mr. Cobb's right eye on August 30, 2004. The following day, Dr. Dastgir told Mr. Cobbs that his left eye surgery would be scheduled shortly.

After two months of delay, the defendants denied the request for the second surgery. Upon learning of the denial, Mr. Cobbs filed a grievance on December 9, 2004. At that time he did not and could not know who had made the decision to deny the second surgery. Not until his grievance was denied at Step II (on January 28, 2005) was he told that the MSAC had denied the surgery. In his Step III appeal, Mr. Cobbs named the MSAC as one party responsible for denying his eye surgery. His Step III appeal was rejected. *See* Exh. 1, Cobbs Grievances, at 3 and 5.

As Mr. Cobbs's vision in his left eye worsened, he requested glasses, but an optometry exam revealed that glasses would be useless until he had surgery. Unable to obtain glasses or surgery, and functionally blind in his left eye despite repeated requests for surgery by his doctors, Mr. Cobbs filed another grievance on October 29, 2006, naming both the MSAC and "any party responsible" for denying his surgery. *Id.* at 7. In his Step II appeal, he complained that both the MSAC and Correctional Medical Services (CMS) had denied him medical care. *Id.* at 8. His timely appeal to Step III was again denied. *Id.* at 10-11.

On October 30, 2007, Mr. Cobbs filed his *pro se* complaint for violations of his Eighth Amendment Rights. His complaint named as defendants the MDOC's chief medical officer, Dr. George Pramstaller, and three John Doe defendants, because Mr. Cobbs still did not know who had denied the second cataract surgery. *See* R. 1, Complaint.

ARGUMENT

I. Mr. Cobbs Exhausted his Remedies under the PLRA

The Court should deny the motion to dismiss because Mr. Cobbs fully exhausted his administrative remedies prior to filing his lawsuit.

A. MDOC Policy Does Not Require an Inmate to Name in a Grievance Every Individual Whom He Later Sues

The PLRA does not have a "naming" requirement for a plaintiff's administrative grievances. *Jones v. Bock*, 549 U.S. at 217. Instead, courts determine exhaustion by considering whether or not the plaintiff complied with the prison's grievance system. *Id.* at 218. Consequently, "the level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim." *Id.*

Moreover, regardless of a prison's grievance system, the PLRA does not mandate that a prisoner name individuals who are unknown to him. The PLRA only requires a prisoner to exhaust administrative remedies that are "available" to him. *Brown v. Sikes*, 212 F.3d 1205, 1207 (11th Cir. 2000). Though a prisoner must give prison officials all relevant information he may have, any "grievance procedure that requires a prisoner to provide information he does not have and cannot reasonably obtain is not a remedy that is 'available' to the prisoner." *Id.* at 1207-08.

Exhaustion of remedies within a prison's grievance system must be enforced in a manner that complies with the underlying policy of exhaustion. The U.S. Supreme Court has identified two primary policies for § 1997e(a)'s exhaustion requirement: (1) "exhaustion gives an agency an opportunity to correct its own mistakes ... before it is haled into federal court;" and (2) exhaustion furthers efficiency, because claims "can be resolved much more quickly and economically in proceedings before an agency than in litigation in a federal court." *Woodford*, 548 U.S. at

89.[1] Courts have held that a prison's grievance system cannot be applied in a manner that conflicts with these underlying policies of exhaustion. *Spruill v. Gillis*, 372 F.3d 218, 232 (3rd Cir. 2004); *Sanders v. Bachus*, 2008 U.S. Dist. LEXIS 106061, at *9 (W.D. Mich. Dec. 10, 2008).

MDOC Policy Directive 03.02.130 does not impose a requirement that a prisoner name in his grievance every person whom he later sues. To the contrary, the Policy Directive instructs that a grievance "shall be stated *briefly*" and that the "information provided shall be *limited* to the facts involving the issue being grieved.... Dates, times, places and names of all those involved in the issue being grieved are to be included." *See* Policy Directive 03.02.130, ¶ T, attached as Exhibit 2 (*emphasis added*). The purpose of the Directive is to keep grievances short while including all pertinent information that the prisoner knows. If the Policy Directive were read to require a prisoner to name every individual who *might* have had a hand in the issue grieved – even if the prisoner does not know – then the grievance process would devolve into a guessing game, with prisoners including endless lists of prison administrators and staff. Such a requirement would contradict the instructions that the grievance be "brief" and "limited to the facts." *Id.*

When he filed his two grievances, Mr. Cobbs did not know who had denied his surgery, beyond that it was someone other than his treating physicians, all of whom had recommended it. *See* Letters Requesting Identification of MSAC and CMS members, attached as Exhibit 3. When he learned that bodies called the MSAC and CMS might be responsible, he duly included them in his grievances. *See* Exh. 1, at 3, 7, 8, 10. Even when Mr. Cobbs filed his lawsuit, he still did not know who had made the decision to deny his surgery, which is why he included John Doe defendants. Even after he filed his lawsuit, the defendants resisted Mr. Cobbs's efforts to discover who had made the decision. *See* R. 11, Motion to Stay Discovery. Not until Mr. Cobbs

[1] Notifying individuals whom a plaintiff may sue is only a minor interest of exhaustion. *See Jones*, 549 U.S. at 219.

had retained counsel did the defendants finally identify who had served on the MSAC. *See* Request for Identification of John Doe Defendants, and Response, attached as Exhibit 4. Because Mr. Cobbs had no information during the grievance process about who had denied the surgery, naming the current CMS defendants was not a remedy "available" to him under the PLRA. *See Sikes*, 212 F.3d at 1207-08.

Finally, requiring Mr. Cobbs to file new grievances now against the CMS defendants would serve no purpose and would undermine administrative *and* judicial efficiency. The defendants had ample notice that Mr. Cobbs was grieving the denial of his second cataract surgery and that the MDOC, MSAC, and CMS decision-makers were responsible for the denial. To require Mr. Cobbs to start over because he did not name unknown decision-makers in his grievances would only waste time without possibly changing the result. The Court should reject the defendants' interpretation of the Policy Directive because it would undercut the PLRA's policies to promote efficiency and agency self-correction. *Woodford*, 548 U.S. at 89; *Spruill v. Gillis*, 372 F.3d 218, 232 (3rd Cir. 2004).

B. Mr. Cobbs Exhausted His Administrative Remedies by Naming the MSAC and CMS in His Grievances

Even if a plaintiff must identify the parties involved in a grievance to comply with a prison's grievance requirements, the plaintiff can do so by identifying those parties generally. "A grievance can sufficiently identify a person even if it does not provide an actual name; functional descriptions and the like ... suffice." *Johnson v. Johnson*, 385 F.3d 503, 523 (5th Cir. 2004). The *Johnson* court held that naming a committee in a grievance was sufficient to provide notice to prison administrators that members of the committee were connected to the prisoner's problem. *Id.* The court also differentiated between a grievance claiming improper behavior of a specific known guard and a grievance based on an ongoing problem in the prison for which the

responsible party is not immediately obvious. *Id.* at 517. In the latter case, a prisoner could exhaust his remedies through a general description of the problem or committee. *Id.*

Mr. Cobbs properly identified the officials responsible for denying his claim by naming "any party responsible" and identifying both the MSAC and CMS in his grievances. The prison plainly had sufficient information to review Mr. Cobbs' claims. Unlike Mr. Cobbs, the prison officials would have known or could have easily ascertained who denied his health care requests. Thus, Mr. Cobbs followed MDOC procedures by naming the MSAC and CMS. *Id.* at 523.[2]

C. Mr. Cobbs Complied with the Policy Directive Because the MDOC Considered His Grievances on the Merits

The prison responded to Mr. Cobbs' grievances and appeals on the merits without requesting additional names. Where a prison considers and rejects an inmate's grievances on the merits, the defendants cannot later contend that the plaintiff failed to exhaust his administrative remedies. "If the state wishes to reject a grievance for failure to properly comply with available administrative procedures then it should do so." *Grear v. Gelabert*, 2008 U.S. Dist. LEXIS 11669, *4 (W.D. Mich. Feb. 15, 2008), attached as Exhibit 5. "When a state resolves a grievance on its merits 'the federal judiciary will not second-guess that action, for the grievance has served its function of alerting the state and inviting corrective action.'" *Id.* (quoting *Ricardo v. Rausch*, 359 F.3d 510, 13 (7th Cir. 2004)); *see also Johnson*, 385 F.3d at 520 (PLRA was satisfied where prison officials responded to a grievance even though it was untimely filed). Here, prison officials did not reject Mr. Cobbs' grievances for not naming the defendants, but instead, considered both grievances on their merits.

[2] The CMS defendants cite only one case for the proposition that a Michigan prisoner must name a defendant specifically before suing. *See Sullivan v. Kasajaru*, 2009 U.S. App. LEXIS 5362 (6th Cir. March 13, 2009). *Sullivan* is an unpublished, three-paragraph opinion with no precedential value. Moreover, the prisoner-plaintiff was *in pro per* in the district court and in the Sixth Circuit, and from the bare facts described it appears that there is no reason why the plaintiff would not have been able to identify his treating doctor and name him in the grievance.

II. The Court Should Deny the Motion Because It Is Improper under Rule 12(b)(6)

Under the PLRA, a prisoner-plaintiff need not plead exhaustion. *See Jones*, 549 U.S. at 216. A defense motion to dismiss under Rule 12(b)(6) will succeed only if it shows that the plaintiff has not sufficiently pled the elements of his claim. In *Jones*, the U.S. Supreme Court held that failure to exhaust is an affirmative defense. *Id.* at 216. The Court reaffirmed that a plaintiff need provide only "a short and plain statement of the claim" for which he seeks relief. *Id.* at 212. *Jones* overturned Sixth Circuit precedent holding that the PLRA required the plaintiff to plead exhaustion as part of the claim. *See e.g., Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (*overruled*).

The CMS defendants' Rule 12(b)(6) motion is therefore improper. Mr. Cobbs pled all elements of deliberate indifference. *See* R. 38, Amended Complaint, ¶¶ 87-88. The defendants cannot assert that Mr. Cobbs failed to state a claim. Rather they argue that they have an affirmative defense. *Jones*, 549 U.S. at 216. But exhaustion is an affirmative defense that the defendants must raise and prove separately. *Kramer v. Wilkinson*, 226 Fed. Appx. 461, 462 (6th Cir. 2007). The defendants can only raise such a defense by motion under Rule 56 (summary judgment), not under Rule 12(b)(6) for failure to state a claim.

CONCLUSION

For the above reasons, Mr. Cobbs respectfully requests that the Court deny the CMS defendants (Hutchinson and Mathai's) Rule 12(b)(6) motion to dismiss.

Respectfully submitted,

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Dated: June 11, 2009

Index of Exhibits

Exhibit 1:	Dallas Cobbs' Grievances and Responses
Exhibit 2:	MDOC Policy Directive 03.02.130
Exhibit 3:	Dallas Cobbs' Letters Requesting Identification of MSAC and CMS Members, and Responses
Exhibit 4:	Request for Identification of John Doe Defendants, and Response
Exhibit 5:	*Grear v. Gelabert* (W.D. Mich. Feb. 15, 2008)

Proof of Service

The above brief in opposition to the CMS defendants' motion to dismiss was filed using the Court's ECF system, which will send same-day e-mail notice to all counsel of record.

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Dated: June 11, 2009