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Exh 1-3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

vs

Case No. 03 75106
Honorable Gerald E. Rosen

CORRECTIONAL MEDICAL SERVICES, INC., and its physician employees, namely: AUBERTRO ANTONINI, JOHN AXELSON, MALCOLM TRIMBLE, ________ BEY, BENZI MATHAI and RAY H. CLARK, and employees and medical staff of the Michigan Department of Corrections, namely: PATRICIA L. CARUSO, Director, GEORGE PRAMSTALLER, Medical Director, HENRY GRAYSON, Warden, and JAN EPPS, Regional Medical Director in their individual and official capacities,

Defendants.

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DEFENDANT CORRECTIONAL MEDICAL SERVICES, INC.'S MOTION TO DISMISS

NOW COMES the Defendant, Correctional Medical Services, Inc. ("CMS"), only, by and through their counsel, CHAPMAN AND ASSOCIATES, P.C., and for their Motion To Dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6), 42 U.S.C. §1997e(a), and 28 U.S.C. 1367(a), state as follows:

1. Plaintiff is currently a prisoner incarcerated by the Michigan Department of Corrections (MDOC).

2. Plaintiff's complaint primarily concerns allegations Defendants delayed in diagnosing and treating his throat cancer between March 2001 through April 2002, while incarcerated at the Parnell Correctional Facility.

3. Plaintiff's complaint also alleges that after April 2002, Defendants delayed in performing follow-up tests concerning his cancer treatment, and delayed in providing medical care for his "dry-mouth."

4. Plaintiff filed the present action, in part against CMS, alleging they were deliberately indifferent to Plaintiff's serious medical needs pursuant to 42 U.S.C. §1983.

5. Plaintiff also alleges pendant state claims of: medical malpractice, negligence, gross negligence, reckless indifference, and willful and wanton misconduct.

6. Plaintiff did not fully exhaust all administrative remedies available to him by the Michigan Department of Corrections' three step grievance process.

7. Plaintiff did not file a grievance against CMS concerning the any of the incidents in question.

8. Pursuant to 42 U.S.C. §1997e, Plaintiff is required to exhaust his administrative remedies against CMS before filing the present action.

9. Because Plaintiff filed the present complaint against CMS without having exhausted administrative procedures available to him concerning all claims and all persons named in his complaint, Plaintiff has failed to state a claim upon which relief may be granted and his complaint must be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(6).

10. In the event Plaintiff has stated a claim against CMS, the Court should decline supplemental jurisdiction over Plaintiff's pendant state claims, and dismiss same pursuant to 28 U.S.C. §1367(a).

11. Defendant relies on his statement of facts and arguments set forth in his supporting brief, as if more fully restated herein.

WHEREFORE, Defendant Correctional Medical Services, Inc., requests this Court dismiss Plaintiff's complaint against him pursuant to 42 U.S.C. § 1997e(a) and Fed. R. Civ. Proc. 12(b)(6) for the reasons set forth herein, or in the alternative dismiss Plaintiff's pendant state law claims, and tax reasonable costs in favor of Defendant where permitted by law.

Chapman And Associates, P.C.

BY: ______________________
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Dated: February 23, 2004

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys or parties of record herein at their respective addresses disclosed on the pleadings on February 23, 2004

By: x U.S. Mail
__ Hand Delivered
__ Facsimile

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Defendants.

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BRIEF IN SUPPORT OF DEFENDANT'S CORRECTIONAL
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ISSUES PRESENTED FOR REVIEW

WHETHER PLAINTIFF'S COMPLAINT MUST BE DISMISSED PURSUANT TO 42 U.S.C. §1997e BECAUSE PLAINTIFF FAILED TO EXHAUST ALL ADMINISTRATIVE REMEDIES AVAILABLE TO HIM CONCERNING HIS CLAIMS AGAINST DEFENDANT CMS IN THE COMPLAINT.

WHETHER PLAINTIFF'S COMPLAINT MUST BE DISMISSED PURSUANT TO RULE 12(b)(6) BECAUSE PLAINTIFF FAILED TO STATE A CLAIM AGAINST DEFENDANT UPON WHICH RELIEF MAY BE GRANTED.

WHETHER THE COURT SHOULD DENY PLAINTIFF SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S PENDANT STATE CLAIMS PURSUANT TO 28 §U.S.C. 1367(a).

CONTROLLING AUTHORITY FOR RELIEF SOUGHT

Plaintiff's claim against Defendant CMS must be dismissed for failing to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff's claim pursuant to 42 U.S.C. §1983 must be dismissed because he did not name CMS in the grievance. Further, Plaintiff did not exhaust his administrative remedies concerning all claims, against all Defendants as required by 42 U.S.C. 1997e(a). Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 992, 152 L.Ed.2d (2002), Burton v. Jones, 321 F3d 569, 574-575 (6th Cir. 2002).

Further, the court may decline to exercise jurisdiction over supplemental state law claims, where litigation of federal claims and supplemental state law claims may cause procedural and substantive problems. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

FACTS

The present motion is by Correctional Medical Services, Inc. (CMS), only. CMS provides certain health care services to inmates incarcerated by the Michigan Department of Corrections (MDOC), pursuant to a contract between CMS and the State of Michigan. During the incidents in question, Defendants Dr. Mathai and Dr. Antonini were independent contractors with CMS, acting as primary care physicians to certain inmates incarcerated by the MDOC.

Plaintiff is a prisoner currently incarcerated by the Michigan Department of Corrections (MDOC). Plaintiff alleges the incidents in question occurred between May 4, 2001 (See Exhibit 1, Complaint, para. 24) through April 17, 2003 (See Exhibit 1, Complaint, para. 84) while Plaintiff was incarcerated at the Parnell Correctional Facility.

The complaint alleges the following claims against all defendants:

1) Deliberate indifference to a serious medical need pursuant to 42 U.S.C. §1983. (Complaint, para. 92 to 100)

2) Common law torts: gross negligence, reckless indifference, and willful and wanton misconduct. (Complain, para. 101 to 105)

3) Statutory torts: Medical Malpractice, negligence. (Complaint, para. 106 to 135).

The complaint alleges no specific facts at all concerning Defendant CMS. (See Exhibit 1, Complaint, para. 23 to 84. Generally, 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. (See Exhibit 1, Complaint, para. 85 to 90).

Plaintiff attached four (4) Grievances to the Complaint. (Exhibit 2). Generally, Plaintiff's grievances allege unnamed persons delayed in diagnosing and treating his throat cancer between March 2001 through April 2002. (See Exhibit 1-2 & 1-4) The complaint further alleges that after April 2002, unnamed persons delayed in performing follow-up tests concerning his cancer treatment, and delayed in providing medical care for his "dry-mouth." (See Exhibit 1-1 & 1-3) While

grievance no. SMT 02070081812DZ (Exhibit 2-3) claims to be a grievance doctors and staff in an "attached list," no list was attached to the grievance served with the complaint. CMS is not named in any of Plaintiff's grievances.

STANDARD OF REVIEW

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

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to Plaintiff. See Zinermon v. Burch, 494 U.S. 113, 117 (1990); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 54-46 (1957). Conclusory, unsupported allegations of constitutional deprivation do not state a claim. See Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 930 (6th Cir.) **Courts have consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs.** See Ross v. Meagan, 638 F.2d 646, 650 (3d Cir. 1981)

Finally, a court may decide a motion to dismiss only on the basis of the pleadings. Song v. City of Elyria, Ohio, 985 F.2d 840, 842 (6th Cir. 1993). The court may treat the motion to dismiss as one for summary judgment, however, if "matters outside the pleading are presented to and not excluded by the court." Fed. R. Civ. P. 12(b).

2. Supplemental Jurisdiction pursuant to 28 U.S.C. §1367(a).

A court has broad discretion to exercise its supplemental jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In exercising its discretion, the Court must look to considerations of judicial economy, convenience, fairness, and comity, and avoid needless decisions of state law. Int'l Coll. of Surgeons, 522 U.S. at 173.

ARGUMENTS

ARGUMENT I: PLAINTIFF'S COMPLAINT AGAINST DEFENDANT CMS, MUST BE DISMISSED FOR FAILURE TO COMPLY WITH 42 U.S.C. §1997e(a).

Plaintiff's complaint must be dismissed because he failed to completely exhaust all administrative procedures available to him concerning allegations against defendant Correctional Medical Services, Inc. (CMS), before filing the present action.

42 U.S.C. §1997e(a) of the Prison Litigation Reform Act (PLRA) provides:

> 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 are available are exhausted.

The Michigan Department of Corrections uses a three step grievance process. (See Exhibit 3). In Knuckles El v. Toombs, 215 F.3d 640, 642 (6th. Cir. 2000) the court held that 42 U.S.C. §1997e(a) requires that a plaintiff exhaust all available administrative remedies before bringing an action under 42 U.S.C. §1983.

This holding was confirmed by the United States Supreme Court in Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 992, 152 L.Ed.2d (2002) where the court held, "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." In the present case, Plaintiff's claims Defendants delayed in diagnosing and treating his throat cancer concern

Plaintiff's medical care and are the type of claims that may be grieved. *See* Mich. Dep't. Of Corr., Policy Directive 03.02.130 (Exhibit 3).

The courts have required prisoners demonstrate exhaustion of administrative remedies pursuant to 42 U.S.C. 1997e(a) by attaching to the Complaint, a copy of all relevant grievances relating to or concerning each claim in the complaint. Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.) In the present case, Plaintiff attached four (4) grievances to the Complaint. However, the grievance do not mention defendant CMS at all, or the issues alleged against CMS in the complaint. In Burton v. Jones, 321 F3d 569, 574-575 (6th Cir. 2002), the Court held, the people an inmate wishes to pursue a case against must be named in Step I of the grievance procedure. Clearly Plaintiff has failed to satisfy the requirements set forth in Burton, since CMS is not named in any of Plaintiff's grievances. Plaintiff's grievances attached to his complaint make absolutely no allegations against CMS at all. Additionally, two of Plaintiff's grievances (Exhibit 2-3 and 2-4) contain no step III response, and therefore do not demonstrate completion of the grievance process prior to filing the present Complaint.

In the absence of written documentation, a prisoner must describe with specificity, through particular averments in the complaint, the administrative proceedings and their outcome so that the court may determine what claims, if any, have been exhausted. Knuckles 249 F.3d at 642. Recently, in Baxter v. Rose, 305 F.3d 486, 488-489 (6th Cir. 2002), the Sixth Circuit held that under the Prison Litigation Reform Act, 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***. In the present case, Plaintiff's Complaint fails to state specific averments which demonstrate the exhaustion of Plaintiff's administrative remedies concerning the claims against CMS.

Even 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. Smeltzer v. Hook, 235 F.Supp. 2d 736, 744-746 (W.D.Mich 2002).

The Sixth Circuit in Curry v. Scott, 249 F.3d 493, 504-505 (6th Cir. 2001) has made it clear that 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 but only implements the requirement under PLRA that the prison administrative system has a chance to deal with claims against prison personnel before those complaints reach federal court.

Remedies must be exhausted before the complaint is filed, not during the pendency of the action. Freeman v. Francis, 196 F.3d 641, 645 (6th Cir.1999). Plaintiff has not shown exhaustion through Step III of the MDOC grievance procedure as to Defendant CMS. Plaintiff presents no evidence that he pursued the grievance procedure in any manner against CMS. Because Plaintiff has failed to name CMS in his grievance, and failed to allege any complaints against CMS in the grievances provided, Plaintiff's complaint against CMS must be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(6) and 42 U.S.C. §1997e(a).

Plaintiff's state claims must also be dismissed pursuant to MCLA 600.5507. Like 42 U.S.C. §1997a(e), MCLA 600.5507 requires exhaustion of state remedies by a prisoner before the prisoner commences a claim concerning prison conditions. Additionally, section 5507(2) requires:

> 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.

Failure to comply with subsection (2) requires dismissal. MCLA 600.5507(3)(b). Therefore, because Plaintiff did not comply with MCLA 600.5507, including but not limited to subsection (2), Plaintiff's state claims in Counts II and III must be dismissed. See Tomzek v. Department Of Corrections, 258 Mich 222, 672 NW2d 511 (2003).

ARGUMENT II: THE COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S PENDANT STATE LAW CLAIMS PURSUANT TO 28 U.S.C. §1367(a)

Plaintiff's Complaint contains three (3) Counts. Plaintiff seeks federal question, 28 U.S.C. §1331, via the Count I only, which is a claim under 42 U.S.C. §1983. Plaintiff also requests supplemental jurisdiction, 28 U.S.C. §1367(a), for Counts II and III, which are state law claims. Count II alleges gross negligence, reckless indifference, and willful and wanton misconduct (Complaint, para. 101 to 105), and Count III claims medical malpractice and negligence (Complaint, para. 106 to 135). The Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims, and dismiss same without prejudice, for the reasons that follow.

Under the standard enunciated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Court has broad discretion to exercise its supplemental jurisdiction. As the Supreme Court recently held in City of Chicago v. Int'l Coll. of Surgeons:

> [T]o say that the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims... does not mean that the jurisdiction must be exercised in all cases. Our decisions have established that HN8pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right," Gibbs, 383 U.S. at 726, and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons, id., at 726-727. See also Cohill, 484 U.S. at 350 ("As articulated by Gibbs, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values"). Accordingly, we have indicated that HN9"district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." *Id.*, at 357.
>
> The supplemental jurisdiction statute codifies these principles. After establishing that supplemental jurisdiction encompasses "other claims" in the same case or controversy as a claim within the district courts' original jurisdiction, § 1367(a), the statute confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise:
>
> > "(c) The 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).

Depending on a host of factors, then -- including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims -- district courts may decline to exercise jurisdiction over supplemental state law claims. The statute thereby reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, "a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." Cohill, supra, at 350.

522 U.S. 156, 172-73(1997).

See also San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 478-79 (9th Cir. 1998); Rodriguez v. Doral Mortgage Corp., 57 F3d 1168, 1177 (1st Cir., 1995); Borough of West Mifflin v. Lancaster, 45 F3d 780, 788 (3rd Cir., 1995); Diven v. Amalgamated Transit Union Int'l v. Local 689, 38 F3d 598, 601 (D.C. Cir. 1994); Brazinski v. Amoco petrol. Additives Co., 6 F3d 1176, 1182 (7th Cir. 1993).

Therefore, in exercising its discretion, the Court must look to considerations of judicial economy, convenience, fairness, and comity, and avoid needless decisions of state law. See Int'l Coll of Surgeons, 522 U.S. at 173; Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350; Gibbs, 383 U.S. at 726; see also C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure §3567.1 (2d ed. 1984).

Litigation in the federal courts involving federal law claims together with supplemental state law claims has caused procedural and substantive law problems. Even if the federal and state claims in this action arose out of the same factual situation, litigating these claims together may not serve judicial economy or trial convenience.

Because federal and state law each have a different focus, and because the two bodies of law have evolved at different times and in different legislative and judicial systems, in almost every case

with supplemental state claims, the courts and counsel are unduly preoccupied with substantive and procedural problems in reconciling the two bodies of law and providing a fair and meaningful procedure.

In the present case, as in many cases, 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 judgement interest and attorney fees.

In the present case, the apparent judicial economy and convenience to the parties' interest in the entertainment of supplemental state claims is offset by the problems they create. Plaintiff's state tort claims will substantially expand the scope of this case beyond that necessary and relevant to the federal claims. Thus, judicial economy, convenience, fairness, and comity weigh heavily against exercising supplemental jurisdiction in this case. See Int'l Coll. of Surgeons, 522 U.S. at 173; Cohill, 484 U.S. at 350; Gibbs 383 U.S. at 726. Therefore, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims in Counts II and III of the Complaint.

CONCLUSION

Plaintiff did not name defendant Correctional Medical Services, Inc. (CMS) in any of the Grievances attached to Plaintiff's Complaint. Therefore, Plaintiff's Complaint against defendant CMS must be dismissed pursuant to Rule 12(b)(6) because plaintiff failed to exhaust all administrative remedies against CMS as required by 42 U.S.C. §1997e(a).

In the event the Court determines Plaintiff has stated a claim against CMS upon which relief may be granted, the Court should deny supplemental jurisdiction over Plaintiff's state law claims in Counts II and III of the Complaint. Plaintiff's state 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.

WHEREFORE, Defendant Correctional Medical Services, Inc., requests this Court dismiss Plaintiff's complaint against him pursuant to 42 U.S.C. § 1997e(a) and Fed. R. Civ. Proc. 12(b)(6) for the reasons set forth herein, or in the alternative dismiss Plaintiff's pendant state law claims, and tax reasonable costs in favor of Defendant where permitted by law.

Chapman And Associates, P.C.

BY: Brian J. Richtarcik

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Bloomfield Hills, MI 48304
(248) 644-6326

Dated: February 23, 2004

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys or parties of record herein at their respective addresses disclosed on the pleadings on February 23, 2004

By: x U.S. Mail
__ Hand Delivered
__ Facsimile

Linda L. Heighley

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UNITED STATES DISTRICT COURT
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NOTICE OF HEARING

TO: CLERK OF THE COURT

PLEASE TAKE NOTICE that the attached Defendant Correctional Medical Service, Inc.'s Motion to Dismiss will be brought on for hearing before the Honorable Gerald E. Roscon, on a date

and time to be set by the court.

Respectfully submitted:

CHAPMAN AND ASSOCIATES, P.C.

By: [signature]
Ronald W. Chapman, P-37603
Kimberley A. Koester P-48967
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Dated: February 23, 2004

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys or parties of record herein at their respective addresses disclosed on the pleadings on August 20, 2003

By: x U.S. Mail
__ Hand Delivered
__ Facsimile

[signature]

FILED
'04 FEB 24 A11 :40
U.S. DIST. COURT CLERK
EAST. DIST. MICH.
DETROIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

vs

Case No. 03 75106
Honorable Gerald E. Rosen

CORRECTIONAL MEDICAL SERVICES, INC., and its physician employees, namely: AUBERTRO ANTONINI, JOHN AXELSON, MALCOLM TRIMBLE, _________ BEY, BENZI MATHAI and RAY H. CLARK, and employees and medical staff of the Michigan Department of Corrections, namely: PATRICIA L. CARUSO, Director, GEORGE PRAMSTALLER, Medical Director, HENRY GRAYSON, Warden, and JAN EPPS, Regional Medical Director in their individual and official capacities,

Defendants.

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MICHIGAN CLINICAL LAW PROGRAM
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CHAPMAN AND ASSOCIATES, P.C.
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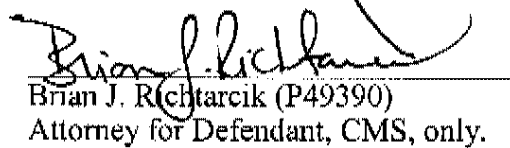
Correctional Medical Services, Inc. (CMS), only
40950 North Woodward Avenue, Suite 350
Bloomfield Hills, Michigan 48304
(248) 644-6326

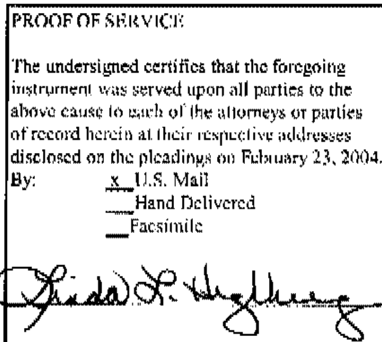
LR 7.1(a) CERTIFICATION

Brian J. Richtarcik, being first duly sworn, deposes and states pursuant to LR 7.1(a), as attorney for Defendant, Correctional Medical Services, Inc., he has in good faith attempted to confer with Plaintiff's attorney Paul D. Reingold on February 23, 2004, in an effort to secure the relief

sought in **DEFENDANT CORRECTIONAL MEDICAL SERVICES, INC.'S MOTION TO DISMISS**, and has been unsuccessful.



Brian J. Richtarcik (P49390)
Attorney for Defendant, CMS, only.



PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys or parties of record herein at their respective addresses disclosed on the pleadings on February 23, 2004.

By: x U.S. Mail
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