UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOES 1–12,

Plaintiffs,

v. Case No. 13-14356

MICHIGAN DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.
_____________________________________/

OPINION AND ORDER RESOLVING NOT TO APPLY IMPUTED EXHAUSTION AT THIS TIME

Before the court is Plaintiffs' "Memorandum in Support of Application of Vicarious Exhaustion of Administrative Remedies." (Dkt. #207.) Defendants have filed a response (Dkt. #212), and Plaintiffs a reply (Dkt. #214). The court has determined that a hearing is unnecessary. E.D. Mich. LR 7.1(f)(2). For the following reasons, the court will deny the requested relief.

I. BACKGROUND

The court held a telephonic status conference with counsel on April 3, 2017. The parties discussed arrangements for the most efficient method for progressing the litigation in light of this court's opinion granting summary judgment as to some Plaintiffs. (Dkt. #204.) Rather than proceed directly to a bench trial on the question of exhaustion for Plaintiffs John Doe 3 and John Doe 12, the parties concluded that another path might be more expeditious. Plaintiffs indicated that they may argue that John Doe 11, whose failure to exhaust is excused because he is no longer incarcerated, can represent the class and his satisfaction—or the excuse thereof—of the exhaustion prerequisite to Article III standing can be imputed to those purported class members who are still incarcerated. The parties believed that should the court concur with Plaintiffs' view on this question, there would be no need for a bench trial on exhaustion as to John Doe 3 or John Doe 12. Thus, the parties agreed to suspend motion practice and delay progress toward class certification or a bench trial until this question was resolved. On May 8, 2017, this court entered an order consolidating the instant case with *Does v. MDOC, et al.*, No. 16-13765, which involves nearly identical claims brought by Plaintiffs previously dismissed from this action without prejudice for failure to exhaust administrative remedies. (Dkt. #208.)

Before proceeding, the court pauses momentarily to lay out the field of this case as it currently stands. Plaintiffs initially filed this case on behalf of John Does 1–7. (Dkt. #1.) The court granted Defendants' motion for summary judgment as to all Plaintiffs except John Doe 3. (Dkt. #156.) The court determined that, with the exception of John Doe 3, none of the John Doe Plaintiffs had exhausted their administrative remedies as required by the PRLA. But there was a question of fact as to whether John Doe 3 was excused from the exhaustion requirement. The court indicated that the fact issues pertaining to John Doe 3 would be scheduled for an evidentiary hearing.

Plaintiffs then amended their complaint to add John Does 8–12. (Dkt. #163.) Following Defendants' motion for summary judgment as to John Does 8, 9, 10, and 12 for their purported failure to exhaust, the court granted the motion as to John Does 8–10 but held that issues of fact remained as to whether John Doe 12 was excused from the exhaustion requirement. (Dkt. #204.) Remaining, then, were John Does 3, 11, and 12.

John Does 3 and 12 were to be scheduled for evidentiary hearings. John Doe 11, who is no longer incarcerated, was indisputably not subject to the exhaustion requirement.

After the amended complaint was filed in this case, John Does 1, 2, 4, 5, 6, and 7 refiled their claims in a new case, No. 16-13765. Defendants filed a motion for summary judgment in that case as to all Plaintiffs except John Doe 7, who had been released from incarceration when the subsequent complaint was filed. As noted above, that case was consolidated with the present action in May 2017, and briefing on the summary judgment motion has been suspended.

This consolidated action thus has two Plaintiffs not subject to pending dispositive motions: John Doe 7 and John Doe 11. The status of John Does 3 and 12 is unresolved as they are still subject to evidentiary hearings. John Does 1, 2, 4, 5, and 6 are subject to the suspended summary judgment motion. Relatedly, Plaintiffs have also refiled the claims of John Does 8, 9, and 10 in a separate action, No. 17-11181. Those Plaintiffs are similarly subject to a pending motion for summary judgment, though that motion has not been suspended.

II. DISCUSSION

Plaintiffs argue that the court should rule that the applicable administrative exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e (“PLRA”), is deemed satisfied for all purported class members because the administrative exhaustion by one of the Plaintiffs can be imputed across the entire purported class.[1] Conceding that the Sixth Circuit has not addressed this issue,

[1] The parties are in apparent agreement that failure to exhaust does not operate as a bar for John Doe 7 and John Doe 11, who were no longer incarcerated at the time the relevant complaints were filed.

Plaintiffs point to a number of decisions from other circuits which held that exhaustion by one plaintiff can be imputed across the entire class. According to Plaintiffs, the single instance of exhaustion put officials on notice about the need to rectify problems common to the class without the demanding administrative burden of processing identical grievances by scores of potential class plaintiffs. Plaintiffs also analogize to Title VII employment cases, where the Sixth Circuit has found imputation of exhaustion of administrative remedies to be a sensible policy so long as the claims of the class members arise at approximately the same time as the exhausted ones.

Plaintiffs note that the court denied Defendants' dispositive motions as to John Doe 3 and John Doe 12 on the basis that a question of fact remained as to whether they were excused from their failure to exhaust. They also point to John Does 1, 2, 4, 5, and 6 as possible candidates whose exhaustion may be imputed across the class. Notably, they do not argue that John Doe 7's or John Doe 11's status as exempt from the administrative exhaustion requirement can be imputed to the *entire* class. Rather, they argue that John Does 7 and 11 can represent those members of the class who were not incarcerated when the complaint was filed. John Does 3 and 12, they say, should be able to represent the remaining class plaintiffs if this court finds that John Does 3 and 12 were exempt from the exhaustion requirement. In the alternative, John Does 3 and 12 can represent plaintiffs who similarly had their ability to exhaust impeded by Defendants.

In response Defendants argue that Plaintiffs have not identified any named Plaintiff who has actually satisfied the exhaustion requirement. John Does 3 and 12, they claim, only survived dismissal because they were *possibly excused* from having to exhaust due to futility. Even if John Does 3 and 12 are found by the court to have had the administrative exhaustion requirement excused, Defendants say, their *excusal* from that requirement cannot be imputed to the entire class. John Does 1, 2, 4, 5, and 6, meanwhile, are the subject of a now-suspended motion for summary judgment arguing in part that their efforts to exhaust administrative remedies subsequent to their dismissal were still insufficient to satisfy the requirements of the PLRA. (Dkt. #211.)

The court agrees with Defendants that now is not an appropriate time to determine whether one Plaintiff's administrative exhaustion can be imputed to the entire class. As the court noted when Plaintiffs initially raised imputation over three years ago (*see* Dkt. #127 Pg. ID 2512): "This argument is premature. Plaintiffs have not yet shown that any class representative has exhausted. *Only if this showing has been made would the court consider argument on this issue*." (Dkt. #130 Pg. ID 2680.)

To date, still no Plaintiff has demonstrably met the exhaustion requirement. Whether John Does 7 and 11 can represent class plaintiffs not subject to the exhaustion requirement is inapposite. The question Plaintiffs sought to put before the court was whether John Doe 11 or some other Plaintiff could have his exhaustion imputed to the entire class. John Doe 11 (as with John Doe 7) has not exhausted because he is not required to do so. And Defendants contest whether the remaining Plaintiffs have exhausted at all. Unless and until such time as one Plaintiff has been found to have exhausted under the PLRA, the court finds that deciding the question of imputation of exhaustion of remedies is inappropriate.

Defendants, then, should proceed on their motion for summary judgment in this case as to John Does 1, 2, 4, 5, and 6. Given the amount of time that has lapsed between Defendants' motion and this order, the court will deny Defendants' currently-docketed motion without prejudice to give them time to refresh their papers as they deem appropriate. Accordingly,

IT IS ORDERED that Plaintiffs' motion to apply vicarious exhaustion of administrative remedies (Dkt. #207) is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Defendants' motion for partial summary judgment (Dkt. #211) is DENIED WITHOUT PREJUDICE. Defendants may refile their motion no later than **March 2, 2018.** Plaintiffs' response is due no later than **March 27, 2018.** Defendants' optional reply is due no later than **April 13, 2018.** Unless otherwise ordered, no hearing will be scheduled. *See* E.D. Mich. LR 7.1(f)(2).

s/Robert H. Cleland /
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: February 21, 2018

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, February 21, 2018, by electronic and/or ordinary mail.

s/Lisa Wagner /
Case Manager and Deputy Clerk
(810) 292-6522

S:\Cleland\KNP\Civil\13-14356.DOES.deny.imputed.exhaustion.KNP.docx