PETITION APPENDIX TABLE OF CONTENTS

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0059p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE BRANDON RICHARDS,
Plaintiff-Appellant,

v.

THOMAS PERTTU, Residential Unit Manager, also named as Unknown Perta in the complaint, also known as Perttu,
Defendant-Appellee.

No. 22-1298

Appeal from the United States District Court for the Western District of Michigan at Marquette.
No. 2:20-cv-00076—Hala Y. Jarbou, District Judge.

Argued: January 18, 2024

Decided and Filed: March 19, 2024

Before: GILMAN, READLER, and MATHIS, Circuit Judges.

COUNSEL

ARGUED: Sean Gray, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for

Appellant. Joshua S. Smith, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Sean Gray, J. Scott Ballenger, Lauren McNerney, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Joseph Y. Ho, Austin C. Raines, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. Kyle Brandon Richards, Baraga, Michigan, pro se.

OPINION

RONALD LEE GILMAN, Circuit Judge. Kyle Brandon Richards, a Michigan prisoner, appeals the district court's judgment dismissing his 42 U.S.C. § 1983 civil-rights suit because Richards failed to exhaust his administrative remedies. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Richards and two fellow inmates at the Baraga Correctional Facility in Michigan (the Plaintiffs) sued Resident Unit Manager Thomas Perttu based on allegations of sexual harassment, retaliation, and destruction of property, but only Richards has appealed the adverse judgment against them. In his retaliation claim, Richards alleges that Perttu prevented him from filing grievances related to Perttu's alleged sexual abuse by ripping up the grievances or otherwise destroying them. The complaint lays out several

specific instances when Perttu allegedly destroyed grievances that Richards had intended to file. Richards also claims that Perttu threatened to kill him if he persisted in trying to file more grievances, and that he was wrongfully held in administrative segregation for doing so. The complaint seeks both injunctive relief and monetary damages.

Perttu moved for summary judgment, arguing that the Plaintiffs had failed to exhaust their administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Richards thereafter cross-moved for summary judgment, raising various First Amendment retaliation and Eighth Amendment claims. The district court denied Perttu's motion because questions of fact precluded summary judgment on the exhaustion issue. Richards's motion for summary judgment was similarly denied as premature. A magistrate judge then held an evidentiary hearing to determine whether the Plaintiffs had exhausted their administrative remedies.

The Report and Recommendation of the magistrate judge recommended that the district court find that Perttu had proved by a preponderance of the evidence that the Plaintiffs had failed to exhaust their administrative remedies, and that they had failed to prove that Perttu had prevented them from filing grievances. *See Richards v. Perttu*, No. 2:20-CV-76, 2021 WL 8055485 (W.D. Mich. Dec. 3, 2021) (Report and Recommendation). Over the Plaintiffs' objections, the district court adopted the Report and Recommendation and dismissed the case without prejudice. *See Richards v. Perttu*, No. 2:20-CV-76, 2022 WL 842654 (W.D. Mich. Mar. 22, 2022).

Richards, as the sole appellant, raises the following three issues on appeal: (1) whether the district court erred by ordering an evidentiary hearing to decide the disputed questions of fact that are intertwined with the exhaustion issue (rather than submitting the exhaustion issue to a jury), (2) whether the magistrate judge was biased in finding that Richards's witnesses were not credible, and (3) whether the district court should have provided him with a free transcript of the evidentiary hearing. He has also requested us to order the production of the evidentiary-hearing transcript, as well as for a stay and remand of proceedings until the transcript is produced.

After reviewing the arguments in the present case, we directed both parties to file supplemental briefs to address the question of whether the Seventh Amendment to the U.S. Constitution requires a jury to decide disputed questions of fact relating to exhaustion under the PLRA when the exhaustion issue is intertwined with the merits of the underlying dispute. In response, Richards reiterated his previous argument that disputed questions of fact related to exhaustion that are intertwined with the merits should be heard by a jury. Perttu, in contrast, argues that (1) the factual disputes concerning exhaustion are not intertwined with the merits in the present case, and (2) even if the factual disputes are intertwined, a jury is not required to resolve them.

II. ANALYSIS

A. Richards's First Amendment claim is intertwined with the factual disputes concerning exhaustion

Under the PLRA, a prisoner may not sue to vindicate his constitutional rights under 42 U.S.C. § 1983 unless he has first exhausted the administrative remedies available to him. 42 U.S.C. § 1997e(a). "This requirement is a strong one." *Napier v. Laurel County*, 636 F.3d 218, 222 (6th Cir. 2011). It requires "proper exhaustion," which "'means using all steps that the agency holds out, and doing so *properly*.'" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). In rare circumstances where prison officials are unable or are consistently unwilling to provide relief, administrative schemes are "so opaque that [they] become[], practically speaking, incapable of use," or "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation," the courts will consider administrative remedies unavailable and allow otherwise unexhausted claims to proceed. *Ross v. Blake*, 578 U.S. 632, 643–44 (2016).

A rule requiring exhaustion of administrative remedies "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan,* 503 U.S. 140, 145 (1992), *superseded by statute on other grounds as stated in Booth v. Churner,* 532 U.S. 731, 740–41 (2001). The PLRA thus "mandates early judicial screening of prisoner complaints," *Jones v. Bock*, 549

U.S. 199, 202 (2007), and "allows prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court," *id.* at 204.

The exhaustion requirement is mandatory, but not jurisdictional. *Lee v. Willey*, 789 F.3d 673, 677 (6th Cir. 2015) (citing *Porter v. Nussle*, 534 U.S. 516, 532 (2002)). Rather, the failure to satisfy the exhaustion requirement is an affirmative defense, which requires prison officials to plead and prove that the prisoner failed to exhaust the available administrative remedies. *Jones*, 549 U.S. at 204, 212–13. In *Lee*, this court held that "judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury." *Lee*, 789 F.3d at 677 (quoting *Small v. Camden Cnty.*, 728 F.3d 265, 271 (3d Cir. 2013)).

In the present case, Richards argues that, under the Seventh Amendment, a jury must resolve the disputed facts of exhaustion that are intertwined with his substantive claim. He notes that his second claim alleges that Perttu prevented him from filing grievances and retaliated against him for having done so.

Before addressing Richards's Seventh Amendment argument, we must first determine if the factual disputes about exhaustion in fact overlap with the merits of his First Amendment retaliation claim. If the factual disputes do not overlap, then we need not reach the Seventh Amendment question because there is no doubt that a judge may otherwise resolve factual disputes regarding exhaustion under the PLRA. *Lee*, 789 F.3d at 677. But if the exhaustion issue is in fact intertwined with the merits of Richards's claim, then we must address his Seventh Amendment

argument. The complaint specifically alleges that Perttu destroyed Richards's grievances pertaining to sexual harassment by Perttu in response to Richards's attempts to file the grievances. We therefore must ascertain whether these facts allege a prima facie case of First Amendment retaliation.

A First Amendment retaliation claim has three elements:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in the conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999).

With respect to the first element, this court has held that "[a]n inmate has an undisputed First Amendment right to file grievances against prison officials on his own behalf." *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000). The principal limitation to this constitutional right is if the grievance is "frivolous." *Hill v. Lappin*, 630 F.3d 468, 472 (6th Cir. 2010); *see also King v. Zamiara*, 680 F.3d 686, 699 (6th Cir. 2012) ("Abusive or manipulative use of a grievance system would not be protected conduct.").

In the present case, the complaint alleges that Perttu made several sexual advances toward Richards, and that Perttu repeatedly tried to coerce

Richards into having sexual relations with him. Moreover, the complaint alleges that multiple inmates witnessed Perttu's harassment. These serious and detailed allegations cannot reasonably be considered frivolous. *See Lappin*, 630 F.3d at 472 (holding that a complaint should not be dismissed when allegations of abuse by prison staff were "at least plausible"). By complaining about the alleged sexual harassment that he endured, Richards "was pursuing a grievance about prison conditions and seeking redress of that grievance. Accordingly, [Richards] was engaged in protected conduct." *See Maben v. Thelen*, 887 F.3d 252, 264 (6th Cir. 2018).

Regarding the second element, "[a]n adverse action is one that is *capable* of deterring a person of ordinary firmness from exercising the constitutional right in question." *Lappin*, 630 F.3d at 472 (emphasis in original) (citation and internal quotation marks omitted). "*Actual* deterrence need not be shown." *Harbin-Bey v. Rutter*, 420 F.3d 571, 579 (6th Cir. 2005) (emphasis in original). "[T]his element is not an overly difficult one for the plaintiff to meet." *Lappin*, 630 F.3d at 472. Consequently, "unless the claimed retaliatory action is truly inconsequential, the plaintiff's claim should go to the jury." *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002) (citation and internal quotation marks omitted).

This court has previously agreed with other circuits that "confiscating an inmate's legal papers and other property constitutes a sufficient injury to support a First Amendment retaliation claim." *Id.* at 604 (collecting cases). At issue in *Bell* was whether the inmate alleged a plausible adverse action after prison

guards, among other things, stole the plaintiff's legal and writing materials in retaliation for filing lawsuits. In holding that this act constituted an adverse action, this court explained: "The fact that defendants repeatedly stole plaintiff's legal papers certainly had the potential to directly impede his pursuit of his claim, and may have caused others to believe that any efforts they might expend in preparing legal claims would be wasted since any materials they prepared could easily be destroyed or confiscated." *Id.* And in concluding that this retaliatory act survived the "ordinary firmness" standard, the court emphasized that the standard is intended only to "weed out . . . inconsequential actions." *Id.* at 606 (citation and internal quotation marks omitted). The court ultimately deemed the plaintiff's allegations consequential, thus allowing the lawsuit to proceed as a First Amendment retaliation claim. *Id.*

The logic behind *Bell* applies in the present case. Richards alleges that he attempted to file grievances accusing Perttu of sexual harassment. But in response to Richards's attempts, Perttu allegedly destroyed the grievances. We see no meaningful difference between the alleged destruction of Richards's grievances and the alleged theft of the legal papers in *Bell*. In *Bell*, the court was concerned with even the "potential" to impede the plaintiff's ability to engage in protected speech. *Id.* at 605. Here, we have more than "potential" interference with protected speech because Perttu is alleged to have directly destroyed Richards's grievances. *See Herron*, 203 F.3d at 415 (holding that the First Amendment protects an inmate's right to file grievances against prison officials). Richards's

allegations therefore satisfy the second element of a First Amendment retaliation claim.

This leaves us with the third and final element. "Under the third element, '[u]sually the question of causation is a factual issue to be resolved by the jury, and may be satisfied by circumstantial evidence.'" *Maben*, 887 F.3d at 267 (quoting *Harris v. Bornhorst*, 513 F.3d 503, 519–20 (6th Cir. 2008)) (alteration in original). "A plaintiff must show both (1) that the adverse action was proximately caused by an individual defendant's acts, but also (2) that the individual taking those acts was motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." *King v. Zamiara*, 680 F.3d 686, 695 (6th Cir. 2012) (citation and internal quotation marks omitted). "Once the plaintiff has met his burden of establishing that his protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant." *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999).

The complaint in question asserts that Perttu's alleged destruction of the grievances proximately interfered with Richards's speech. Richards claims that after he filed grievances alleging sexual harassment by Perttu, Perttu stated that "[he was] not letting [Richards] file these grievances" and that Perttu "proceeded to rip them up in front of [Richards]." This allegation is sufficient to satisfy the causation element of a First Amendment retaliation claim. *See id.* And other prisoners allegedly witnessed the destruction of these grievances. *See Maben*, 887 F.3d at 268 (noting that causation is evidenced when other "witnesses corroborate [a plaintiff's] account of the events").

This now brings us to motive. "We have previously considered the temporal proximity between protected conduct and retaliatory acts as creating an inference of retaliatory motive." *Zamiara*, 680 F.3d at 695. In the present case, there is "a suspicious temporal proximity between [Richards's attempted] grievance and the alleged retaliatory action" because Perttu allegedly destroyed Richards's grievances "*immediately* after" Richards attempted to file his grievances. *See Maben*, 887 F.3d at 268 (emphasis in original). The complaint further alleges that Perttu told Richards to "go ahead and keep filing grievances. We[']re reading them. I choose which ones I'll let you file." Perttu also allegedly told Richards that "I'm not going to let you file any sexual assault grievances." Based upon these allegations, we conclude that Richards has sufficiently raised the issue of whether Perttu's "adverse action was motivated at least in part by [Richards's] protected conduct." *See Brown v. Crowley*, 312 F.3d 782, 790 (6th Cir. 2002).

Perttu does not directly contest whether his alleged actions were motivated by Richards's protected conduct. Accordingly, because Perttu does not rebut the complaint's allegations concerning his motive, the third element of Richards's retaliation claim is satisfied.

Perttu argues in response that a prison official's interference with the grievance process can never give rise to a First Amendment claim because such interference is not an adverse action. According to Perttu, if a prison official interferes with a prisoner's access to the grievance system, then administrative remedies would be considered unavailable, and therefore a

prisoner would not be prevented from accessing the court system. There are two problems with this argument. First, it is likely forfeited because Perttu did not make this argument in his opening brief. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("[W]e will treat an argument as forfeited when it was not raised in the opening brief" (cleaned up)). In fact, he raised it only after we asked for supplemental briefing on a separate issue.

But even setting the forfeiture issue aside, Perttu's argument lacks merit. The relevant inquiry in a First Amendment retaliation claim is whether the defendant's actions would *deter* the plaintiff from engaging in protected conduct. *Thaddeus-X*, 175 F.3d at 394. Based on Richards's allegations, such deterrence has been shown in the present case. That a prisoner can access the court system if a prison official's interference with the prison grievance process is so severe that it renders administrative remedies unavailable is thus irrelevant. The single unpublished district court opinion that Perttu cites in his supplemental brief does not convince us otherwise.

In sum, Richards makes out a prima facie case of First Amendment retaliation because Perttu allegedly destroyed Richards's grievances in response to Richards's attempted filing of those grievances. We therefore conclude that the factual disputes concerning exhaustion (i.e., whether Perttu prevented Richards from filing those grievances) are intertwined with the merits of Richards's retaliation claim. As a result, we now turn to Richards's argument that the Seventh Amendment demands that a jury decide the factual disputes in this case.

B. The district court erred in ordering an evidentiary hearing to determine if Richards failed to exhaust his claims

The Seventh Amendment provides that, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Although the Supreme Court has recognized the right to a jury trial on the merits in § 1983 actions, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999), the question of whether the right applies to other aspects of the action depends upon "the nature of the issue . . . rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

A judge, rather than a jury, can ordinarily decide disputed facts with regard to the PLRA's requirement that a prisoner must exhaust his administrative remedies before filing a § 1983 action in federal court. *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015) (holding that "disputed issues of fact regarding exhaustion under the PLRA present[] a matter of judicial administration that [can] be decided in a bench trial"). In *Lee*, the factual dispute was whether the plaintiff had exhausted his administrative remedies by filing grievances concerning a prison doctor who was alleged to have been deliberately indifferent to the plaintiff's safety. But *Lee* noted that this ordinary exhaustion requirement applies when "factual disputes [] are *not* bound up with the merits of the underlying dispute." *Id.* (emphasis added) (quoting *Messa v. Goord*, 652 F.3d 305, 309 (2d Cir. 2011)). *Lee* did not answer the question of what happens when the factual disputes *are* intertwined. Such is the situation here, which makes this case one of first impression in our circuit.

Only one federal court of appeals, to our knowledge, has directly faced this issue. That circuit is the Seventh, which in *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), noted a "possible overlap between the factual issues relating to exhaustion and those relating to the merits of the [underlying] excessive-force claim" because the plaintiff's broken arm was "an issue common to both the allegedly inexcusable failure to exhaust and the excessiveness of the force that caused the break." *Id.* at 741–42.

The *Pavey* court observed that "not every factual issue that arises in the course of a litigation is triable to a jury as a matter of right, even if it is a suit at law (rather than in equity) within the meaning of the Seventh Amendment." *Id.* at 741. According to that court, "[t]he generalization that emerges . . . is that juries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control." *Id.* So despite the "peculiarity" present when factual issues concern both exhaustion and the merits of a plaintiff's claim, the court noted that there was no Seventh Amendment violation because "any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if— and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits." *Id.* at 742; *accord Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (*en banc*) (commenting in *dicta* that the Ninth Circuit "agree[s] with the Seventh Circuit that, if a factual finding on a disputed question is relevant both to exhaustion and to the merits, a judge's finding made in the course of deciding exhaustion is not binding on a jury deciding the merits of the suit").

We are not persuaded by the Seventh Circuit's analysis in *Pavey*. *Pavey* reasons that any finding by a judge relating to exhaustion that might affect the case's merits may be reexamined by the jury. *Pavey*, 544 F.3d at 742. But the rationale that a jury may reexamine the judge's factual findings rings hollow if the prisoner's case is dismissed for failure to exhaust his or her administrative remedies. In such an instance, a jury would never be assembled to resolve the factual disputes. That is *Pavey*'s fatal flaw.

Moreover, several district-court decisions in the Second Circuit are at odds with *Pavey*. *See Sanchez v. Nassau Cnty.*, 662 F. Supp. 3d 369, 403–04 (E.D.N.Y. 2023); *Gunn v. Ayala*, No. 20-CV-840, 2023 WL 2664342, at *10 (S.D.N.Y. Mar. 28, 2023); *Stephens v. Venetozzi*, No. 13-CV-5779, 2020 WL 7629124, at *3 (S.D.N.Y. Dec. 21, 2020); *Daum v. Doe*, No. 13-CV-88, 2016 WL 3411558, at *2 (W.D.N.Y. June 22, 2016); *Rickett v. Orsino*, No. 10-CV-5152, 2013 WL 1176059, at *23 (S.D.N.Y. Feb. 20, 2013), *report and recommendation adopted*, 2013 WL 1155354 (S.D.N.Y. Mar. 21, 2013). Those courts hold that the Seventh Amendment requires a jury trial where resolution of the exhaustion question would run "perilously close" to resolving the disputed issues of material facts on a plaintiff's substantive claim. *See, e.g.*, *Daum*, 2016 WL 3411558, at *2; *Sanchez*, 662 F. Supp. 3d at 403.

The *Rickett* court, for example, reasoned that it was following the Second Circuit's guidance in *Messa v. Goord*, 652 F.3d 305 (2d Cir. 2011). In *Messa*, the Second Circuit held that juries generally need not decide exhaustion issues under the PLRA. But the *Messa* court also observed:

> Matters of judicial administration often require district judges to decide factual disputes that are not bound up with the merits of the underlying dispute. In such cases, the Seventh Amendment is not violated. Here, the factual disputes relating to exhaustion are not intertwined with the merits of [the plaintiff's] underlying excessive force claim.

Id. at 309 (internal citations omitted).

The *Rickett* court concluded that the above language "from *Messa* implies . . . [that] the factual disputes concerning exhaustion must be resolved by the jury at trial" when the disputes *are* intertwined with the merits at the grievance stage of the case. *Rickett*, 2013 WL 1176059, at *23. Every other district court in the Second Circuit that has addressed this question has followed the *Rickett* court's logic, even though one court subsequently conceded that "the Court of Appeals for the Second Circuit has not expressly held that a jury must resolve factual disputes regarding exhaustion when the underlying facts are entangled with those that underlie a plaintiff's substantive claims." *Stephens*, 2020 WL 7629124, at *3. A split in authority therefore exists between the Seventh Circuit and the district courts in the Second Circuit. We are more persuaded by the approach followed by the district courts in the Second Circuit.

Our analysis takes into account that the Supreme Court has observed that "many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979)

(collecting cases). The Supreme Court, for example, has held that a directed verdict does not violate the Seventh Amendment, *Galloway v. United States*, 319 U.S. 372, 388–93 (1943), nor does summary judgment, *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319–21 (1902). But those cases are distinguishable because none permit a judge to decide genuine disputes of material fact at a preliminary stage of the case that would normally be reserved for a jury.

That is exactly what the magistrate judge did here. And those disputed facts settled the merits of Richards's retaliation claim. As a consequence, Richards was stripped of his "right to a jury's resolution of the ultimate dispute." *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) ("[A] §1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment.").

We believe that this court's decision in *Fireman's Fund Insurance Co. v. Railway Express Agency, Inc.*, 253 F.2d 780 (6th Cir. 1958), is particularly persuasive on the question before us. At issue in that case was whether the amount in controversy pleaded by the plaintiff was sufficient to establish the district court's diversity jurisdiction. The district court dismissed the action for lack of subject-matter jurisdiction because it determined that the plaintiff did not meet the amount-in-controversy requirement. *Id.* at 781. But this court reversed, holding that a court may dismiss for lack of subject-matter jurisdiction on the basis of the amount in controversy only "if, from the face of the pleadings, it is apparent, to a legal

certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff was never entitled to recover that amount." *Id.* at 782.

As relevant here, *Fireman's Fund* refers to a circumstance where diversity jurisdiction is intertwined with the merits of the case. In that situation, the court noted: "Where the jurisdictional issue as to amount in controversy can not be decided without the ruling constituting at the same time a ruling on the merit of the case, the case should be heard and determined on its merits through regular trial procedure." *Id.* at 784 (citing *Land v. Dollar*, 330 U.S. 731, 735 (1947)); *see also Cameron v. Children's Hosp. Med. Ctr.* 131 F.3d 1167, 1170 (6th Cir. 1997)(observing that "whether a district court has subject matter jurisdiction is a question for the court . . . unless the jurisdictional issue is inextricably bound to the merits of the case.").

Although "the PLRA exhaustion requirement is not jurisdictional," *Ngo*, 548 U.S. at 101, the rationale of *Fireman's Fund* is relevant here. Just as an absence of subject-matter jurisdiction might be raised as a defense to dispose of a case, the failure to exhaust administrative remedies under the PLRA operates in the same way. We see no reason to treat exhaustion differently from a jurisdictional rule in this context because the effect of successfully raising the defenses is the same—the plaintiff may not proceed in the action.

This court in *Fireman's Fund* further noted that a case should proceed to trial even if the amount-in-controversy dispute is "decisive of the merits of the plaintiff's claim." *Fireman's Fund. Ins. Co.*, 253 F.2d at 784. And this means that a decision on the merits might be

reached even if the court later realizes that it lacks subject-matter jurisdiction. Unlike exhaustion, an absence of subject-matter jurisdiction implicates a federal court's ability to even hear the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause." (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). So if *Fireman's Fund* requires that certain cases be heard and determined on the merits even when constitutionally implicated jurisdictional disputes might procedurally terminate the proceedings, we are all the more convinced that the result should be the same when the lesser concern of an affirmative defense, such as the PLRA's requirement to exhaust administrative remedies, implicates the merits of a claim.

We therefore conclude that the Seventh Amendment requires a jury trial when the resolution of the exhaustion issue under the PLRA would also resolve a genuine dispute of material fact regarding the merits of the plaintiff's substantive case. In doing so, we emphasize that a jury trial is appropriate in these circumstances only if the district court finds that genuine disputes of material fact concerning PLRA exhaustion are "decisive of the merits of the plaintiff's claim." *See Fireman's Fund. Ins. Co.*, 253 F.2d at 784. Accordingly, we agree with Richards that the district court erred when it ordered an evidentiary hearing to settle the disputed facts in question.

C. Richards's remaining arguments

Richards also argues that the magistrate judge was biased in finding that his witnesses were not

credible. He likewise contends that the district court should have provided him with a free transcript of the evidentiary hearing before the magistrate judge. But we need not address these arguments because we have concluded that the district court erred by usurping the role of the jury by resolving the factual disputes at issue. Accordingly, these claims are mooted because they would not "make a difference to the legal interests of" Richards. *See McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (quoting *Crane v. Ind. High Sch. Athletic Ass'n*, 975 F.2d 1315, 1318 (7th Cir. 1992)).

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 22-1298

FILED
Mar 19, 2024
KELLY L. STEPHENS, Clerk

KYLE BRANDON RICHARDS,
Plaintiff - Appellant,
v.

THOMAS PERTTU, Residential Unit Manager, also named as Unknown Perta in the complaint, also known as Perttu,
Defendant - Appellee.

Before: GILMAN, READLER, and MATHIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Marquette.

THIS CASE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS, et al.,
Plaintiffs,

Case No. 2:20-cv-76

v.

Hon. Hala Y. Jarbou

UNKNOWN PERTTU,
Defendant.
_____/

ORDER

This is a prisoner civil rights action under 42 U.S.C. § 1983. The magistrate judge conducted a bench trial on the issue of exhaustion and determined that Plaintiffs failed to show that they exhausted available administrative remedies against Defendant. Before the Court are Plaintiffs' objections to the R&R (ECF No. 159).

The rules for making and resolving objections in this context are as follows:

> (2) *Objections*. . . . Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.
>
> (3) *Resolving Objections*. The district judge must determine de novo any part of the magistrate judge's disposition that has been

> properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

A. Plaintiffs' Objections

Plaintiffs raise a total of nine objections. Apparently, Plaintiffs did not make any arrangements for transcribing the record of the evidentiary hearing, as required by Rule 72(b)(2). They have not provided a transcript to the Court, and there is no indication that they attempted to have one made. Accordingly, the Court must address Plaintiffs' objections without the complete record.

1. Objection 1: Standard of Review

Plaintiffs contend that the standard of review applied by the magistrate judge, preponderance of the evidence, was improper. Plaintiffs argue that the magistrate judge should have drawn all inferences in their favor, in accordance with a summary judgment motion. Plaintiffs are mistaken. The magistrate judge did not evaluate a summary judgment motion; instead, he held an evidentiary hearing. In that context, he could weigh the witnesses' credibility and the parties' evidence to determine whether the parties met their respective burdens of proof. The proper standard for evaluating the evidence was a preponderance of the evidence.

Plaintiffs also contend that the magistrate judge drew improper inferences from the evidence, misquoted witness testimony, and did not consider facts in Plaintiffs' complaint that Richards attempted to verify with his testimony. By failing to provide a transcript of the hearing, Plaintiffs have failed to provide a record on which to review these objections. Accordingly, this objection is denied.

2. Objections 2, 3, 5 & 9

In objections 2, 3, 5, 9, Plaintiffs contend that the magistrate judge (1) failed to consider testimony by certain witnesses, (2) attempted to suppress a MDOC memorandum, (3) improperly considered testimony that was inadmissible, not credible, or not based on personal knowledge, and (4) discounted testimony that was credible. Plaintiffs have not provided a record to support these objections. Plaintiffs' summary of the evidence and testimony presented at the hearing is not sufficient. Thus, these objections will be denied.

3. Objection 4

Plaintiffs argue that there was a mistrial because the MDOC defendants "doctor[ed] portions of trial records and proceedings" and "controll[ed] communication of parties during testimony." (Pls.' Objs., PageID.798.) For instance, Plaintiffs contend that the MDOC deliberately decreased the volume of Plaintiffs' audio input and output and deliberately cut their audio and video feed during testimony. Because Plaintiffs have not provided a copy of the transcript, these objections are unsupported.

4. Objection 6

The magistrate judge determined that Grievance AMF-20-01-6-22B was not properly exhausted until *after* Plaintiffs filed their complaint. Consequently, Plaintiffs could not rely on that grievance to show exhaustion. (*See* R&R 27-29.) The magistrate judge determined that exhaustion is not complete until a prisoner has received the step III response (*id.* at 28), but Plaintiffs object that exhaustion was complete when they *filed* their step III appeal.

Plaintiffs cite MDOC Policy Directive 03.02.130, which states:

> Complaints filed by prisoners regarding grievable issues as defined in this policy serve to exhaust a prisoner's administrative remedies only when filed as a grievance through all three steps of the grievance process in compliance with this policy.

Michigan Department of Corrections (MDOC) Policy Directive 03.02.130 ¶ C. Plaintiffs apparently rely on the "when filed" language, but this paragraph does not identify the end date for exhaustion. Instead, it simply clarifies that there is a three-step process through which a prisoner must exhaust his complaint.

Furthermore, the section of the policy directive discussing step III of the grievance process suggests that the end of the process is when a step III response *is issued*, because that response "is final." *See id.* ¶ II. Indeed, the purpose of the exhaustion requirement is to give the prison "an opportunity to correct its own mistakes . . . before it is haled into federal court[.]"

Woodford v. Ngo, 581 U.S. 81, 89 (2006) (quoting marks omitted). That purpose would not be served if a prisoner could bring a lawsuit before the MDOC has had an opportunity to respond to the step III appeal.

The magistrate judge relied upon *Ross v. Duby*, No. 09-531, 2010 WL 3732234, at *1 (W.D. Mich. Sept. 17, 2010) for his conclusion that the response to the step III grievance appeal completed the grievance process. *See id.* ("Now that the MDOC has responded to Plaintiff's Step III grievance, Plaintiff's administrative remedies have been exhausted."). Other courts have held the same. *See, e.g.*, *Dulak v. Corizon Inc.*, No. 14-10193, 2014 WL 8479789, at *4 (E.D. Mich. Dec. 30, 2014), *report and recommendation adopted in relevant part,* No. 14-10193, 2015 WL 1530453 (E.D. Mich. Mar. 31, 2015); *Coleman v. Gullet*, No. CIV.A. 12-10099, 2013 WL 2634851, at *10 (E.D. Mich. June 10, 2013); *Garren v. Prisoner Health Servs.*, No. CIV.A. 11- 14650, 2012 WL 4450495, at *2 (E.D. Mich. Aug. 6, 2012), *report and recommendation adopted,* No. 11-CV-14650-DT, 2012 WL 4450491 (E.D. Mich. Sept. 25, 2012). In contrast, Plaintiffs offer no support for their position in the case law.

Plaintiffs argue that the filing date of the step III appeal should be the end date for exhaustion because the MDOC might never respond to that appeal. However, the policy directive indicates that a response will be provided "in a timely manner" and that responses are generally provided "within 60 business days." Policy Directive 03.02.130 ¶ II. Consequently, a prisoner could potentially argue that where no response has been received within 60 business days, then

exhaustion is complete. But that was not the case here,[1] and Plaintiffs do not make that argument. Accordingly, Plaintiffs' objection will be denied.

5. Objection 7

Plaintiffs argue that some grievances were improperly rejected. However, the reasons for rejection are irrelevant. The issue is whether Plaintiffs exhausted the grievance process. The magistrate judge properly concluded that Plaintiffs failed to do so. (*See* R&R 27-29.)

6. Objection 8

Finally, Plaintiffs argue that the magistrate judge should have considered Plaintiffs' claim that they were in imminent danger when they filed this lawsuit. According to Plaintiffs, Defendant threatened to kill them or subject them to physical violence if they filed grievances. Plaintiffs contend that they should be excused from the exhaustion requirement in these circumstances. However, Plaintiffs provide no record support for their contention that they testified to the magistrate judge about such threats or argued that those threats excuse them from using the grievance process. Nor do Plaintiffs identify any binding precedent that such threats would excuse them from the exhaustion requirement. And in any case, the threats

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[1] According to evidence cited in the R&R, less than 60 business days passed from the date the step II response to Grievance AMF-20-01-6-22B was received (February 10, 2020) to the date the step III response was received (April 30, 2020). (*See* R&R 28.) That being the case, the step III response must have issued less than 60 business days after the step III appeal was filed.

Plaintiffs faced did not prevent them from using the grievance process. Rather, the problem is that Plaintiffs filed this lawsuit before completing that process.

Accordingly,

IT IS ORDERED that Plaintiffs' objections to the R&R (ECF No. 159) are **OVERRULED**.

IT IS FURTHER ORDERED that the R&R (ECF No. 157) is **APPROVED** and **ADOPTED** as the Opinion of the Court.

A judgement will enter consistent with this Order.

Dated: March 22, 2022

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS, et al.,
Plaintiffs,

Case No. 2:20-cv-76

v.

Hon. Hala Y. Jarbou

UNKNOWN PERTTU,
Defendant.
_____/

JUDGMENT

In accordance with the order entered this date:

IT IS ORDERED that the case is **DISMISSED**.

Dated: March 22, 2022

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS #641715, et al.,
Case No. 2:20-cv-76
Plaintiffs,
Hon. Hala Y. Jarbou
U.S. District Judge
v.

UNKNOWN PERTTU,
Defendant.
_____/

REPORT AND RECOMMENDATION

I. Introduction

State prisoners Kyle B. Richards, Kenneth Damon Pruitt, and Robert Kissee filed this civil rights action pursuant to 42 U.S.C. § 1983 on April 23, 2020. Plaintiffs allege that while they were incarcerated at Baraga Correctional Facility (AMF) in Baraga, Michigan, Defendant Resident Unit Manager (RUM) Thomas Perttu (1) sexually harassed them, (2) retaliated against them, and (3) destroyed their property in violation of their First, Fifth, and Eighth Amendment rights. In total, they allege some 45 violations of their rights from June 2019 through mid-April 2020.

On September 25, 2020, RUM Perttu filed a motion for summary judgment based on Plaintiffs' failure to exhaust their administrative remedies. (ECF No. 34.) Perttu asserted that Plaintiffs failed to exhaust their administrative remedies with respect to any of

their claims. (ECF No. 35, PageID.122-123.) On August 10, 2021, this Court denied Perttu's motion for summary judgment. (ECF No. 105.) Perttu then requested a bench trial on the issue of exhaustion, which the undersigned granted. The undersigned conducted a bench trial on the issue of exhaustion on November 4, 2021. The only issue before the Court in this hearing was whether Plaintiffs exhausted their administrative remedies as to each of their claims. Plaintiffs assert the following claims against RUM Perttu.[1,2]

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[1] Although all Plaintiffs signed the verified complaint, it is worth noting that all but three pages of the fifty-two-paged complaint were written by Richards.

[2] During the bench trial, Perttu stated his belief that the only Plaintiffs' Eighth Amendment claims based on sexual harassment remained. Although the Court did not include a discussion of additional claims in its July 29, 2021 Report and Recommendation (R&R) (ECF No. 97), the Court also did not dismiss these claims. Generally, the use of a claims table in an R&R expressly sets forth the claims as the Court understands them and controls the case going forward in the absence of objections. However, no such table has been utilized by the Court nor offered by the parties in this case until now. Thus, up until the issuance of this R&R, all of Plaintiffs' claims remained in the case.

Claim Number	Plaintiff	Claim	Date or Date Range of Incident(s)	Factual Allegation
1	Richards	8th Amendment	06/20/2019	RUM Perttu propositioned Richards, Richards declined, and Perttu threatened to kill him if he told anyone about the encounter. (ECF No. 1, PageID.5.)
2	Richards	8th Amendment	08/19/2019	RUM Perrtu threatened to send Richards to segregation if he did not engage in sex work and offered to help him escape from prison if he did. (*Id.*)
3	Richards	8th Amendment	08/20/2019	RUM Perttu threatened Richards in an attempt to get him to engage in sex work. (*Id.*, PageID.6.)
4	Richards	8th Amendment	01/07/2020	RUM Perttu told Richards to engage in sex work for him. When Richards said no, RUM Perrtu threatened to kill him. (*Id.*)
5	Richards	8th Amendment	01/15/2020	RUM Perttu told Richards that if he wanted out of segregation, he would have to engage in sex work. (*Id.*)
6	Richards	8th Amendment	01/22/2020	RUM Perttu told Richards that he could keep him in segregation forever unless Richards did what he wanted. (*Id.*, PageID.7.)
7	Richards	8th Amendment	01/29/2020	RUM Perttu propositioned Richards. (*Id.*)
8	Richards	8th Amendment	02/04/2020	RUM Perttu propositioned Richards. When Richards asked Perttu to stop harassing him, Perttu threatened to kill him. (*Id.*)
9	Richards	8th Amendment	02/12/2020	RUM Perttu told Richards he was going to get him to comply with his demands one way or another. (*Id.*, PageID.8.)
10	Richards	8th Amendment	02/18/2020	RUM Perttu told Richards he could engage in sex work or remain in segregation. (*Id.*)
11	Richards	8th Amendment	02/26/2020	RUM Perttu told Richards to masturbate in front of him. (*Id.*)

12	Richards	8th Amendment	03/04/2020	RUM Perttu asked whether Richards was "ready to play ball." (*Id.*)
13	Richards	8th Amendment	03/10/2020	RUM Perttu asked if Richards was masturbating, and, upon learning that Richards was urinating, refused to walk away. (*Id.*, PageID.9.)
14	Richards	8th Amendment	03/18/2020	RUM Perttu propositioned Richards. (*Id.*)
15	Richards	8th Amendment	03/26/2020	Knowing that Richards had a hearing coming up, RUM Perttu told Richards to engage in sex work if he wanted parole. (*Id.*, PageID.10.)
16	Richards	8th Amendment	04/01/2020	RUM Perttu told Richards it was only a matter of time before he gave in to Perttu's demands. (*Id.*)
17	Richards	8th Amendment	04/13/2020	RUM Perttu told Richards that if he did not engage in sex work, Perttu would find a way to place him in segregation again. (*Id.*)
18	Richards	8th Amendment	04/14/2020	While Richards showered, RUM Perttu looked at his genital area and threatened to come into the shower. (*Id.*)
19	Pruitt	8th Amendment	03/27/2020	RUM Perttu told Pruitt that policy required him to come out of the shower "half nude," and that he liked seeing Pruitt's "lovely arms and chest." (*Id.*, PageID.12.)
20	Pruitt	8th Amendment	04/01/2020	Pruitt went up to his cell door and asked RUM Perttu when he was running SCC[3] again. RUM Perttu told Pruitt to stop showing his genitals to female officers if he wanted to know. (*Id.*)
21	Pruitt	8th Amendment	04/08/2020	RUM Perttu asked Pruitt if he was done showing his body to Perttu's female officers. When Pruitt told Perttu he wasn't going to play his game, Perttu threatened to keep Pruitt in segregation for as long as possible. (*Id.*, PageID.13.)
22	Pruitt	8th Amendment	04/14/2020	During Pruitt's morning shower RUM Perttu said he would let Pruitt out of segregation if Pruitt engaged in sex work. (*Id.*, PageID.13-14.)

[3] SCC stands for Security Classification Committee. (ECF No. 153, PageID.737 (Def.'s Exh. C1).) The SCC determines whether a prisoner is ready to be moved out of administrative segregation. (*Id.*)

23	Kissee	8th Amend-ment	01/23/2020	RUM Perttu told Kissee he would never get out of segregation if he kept having sexual relations with Black inmates. (*Id.*, PageID.15.)
24	Kissee	8th Amend-ment	02/13/2020	RUM Perttu asked Kissee whether he was ready to leave Black men alone and directed him to masturbate. (*Id.*)
25	Kissee	8th Amend-ment	02/20/2020	Kissee asked RUM Perttu why he was harassing him so much. RUM Perttu told Kissee the harassment was racially motivated and told Kissee to engage in sex work for him. (*Id.*)
26	Kissee	8th Amend-ment	03/09/2020	RUM Perttu told Kissee that "white people run the world" and threatened to have Kissee killed unless he masturbated. (*Id.*, PageID.16.)
27	Kissee	8th Amend-ment	04/09/2020	RUM Perttu told Kissee to engage in sex work if he wanted to get out of segregation. (*Id.*, PageID.16-17.)
28	Richards	1st Amend-ment Retaliation	08/20/2019	RUM Perttu told Richards that, because Richards was not doing what he wanted, he would transfer Richards to a level four prison, where Richards would be more susceptible to violence. (*Id.*, PageID.28.) When Richards refused to be transferred, he was sent to administrative segregation and Perttu directed staff to write false misconduct reports against him. Perttu coordinated this transfer because of Richards attempts to file grievances. (*Id.*, PageID.25.)
29	Richards	8th Amend-ment	08/20/2019-	RUM Perttu coordinated Richards's transfer to administrative segregation despite the fact Richards suffers from various mental illnesses. (*Id.*, PageID.31.)
30	Richards	Americans with Disabilities Act	08/20/2019-	RUM Perttu coordinated Richards's transfer to administrative segregation despite the fact Richards suffers from various mental illnesses. (*Id.*)
31	Pruitt	8th Amend-ment	08/2019-01/05/2020	RUM Perttu arranged for several inmates to attack Pruitt. When Pruitt took actions to defend himself, he was put into administrative segregation by RUM Perttu, and given a misconduct. (*Id.*, PageID.29.)

32	Pruitt	1st Amendment Retaliation	08/2019-01/05/2020	RUM Perttu coordinated the attack on Pruitt and Pruitt's subsequent transfer because of Pruitt's attempts to file grievances. (*Id.*, PageID.25.)
33	Kissee	8th Amendment	06/06/2019	RUM Perttu sent a white nationalist inmate to attack Kissee. Kissee was forced to defend himself. Kissee was then found guilty of fighting/assault and was held in segregation for ten months. (*Id.*, PageID.30.)
34	Kissee	1st Amendment Retaliation	06/06/2019	Perttu coordinated the attack on Kissee and Kissee's subsequent transfer because of Kissee's attempts to file grievances. (*Id.*, PageID.25.)
35	Richards, Pruitt, Kissee	1st Amendment Retaliation	30/20/2020	RUM Perrtu denied Plaintiffs' access to their JPay accounts, JP5 players, and to the media store in retaliation for Plaintiffs filing grievances against him. (*Id.*, PageID.32.)
36	Richards, Kissee	1st Amendment Retaliation	01/01/2020	Richards and Kissee asked RUM Perttu for legal supplies. Based on the grievances and complaints they had previously filed, RUM Perttu denied their requests. (*Id.*, PageID.34-36.)
37	Richards, Pruitt	1st Amendment Retaliation	02/14/2020	Richards and Pruitt asked RUM Perttu for legal supplies. Based on the grievances and complaints they had previously filed, RUM Perttu denied their requests. (*Id.*)
38	Richards, Pruitt, Kissee	1st Amendment Retaliation	04/09/2020-04/11/2020	Plaintiffs asked RUM Perttu for legal supplies. Based on the grievances and complaints they had previously filed, RUM Perttu denied their requests. (*Id.*)
39	Richards	5th Amendment	04/04/2020	RUM Perttu entered the AMF property room and slammed Richards's KTV Television and his JP5 media player against the wall. (*Id.*, PageID.37.)
40	Richards	1st Amendment Retaliation	04/04/2020	RUM Perttu destroyed Richards's television and media player because of Richards's attempts to file grievances. (*Id.*)
41	Pruitt	5th Amendment	04/15/2020	Richards observed RUM Perttu enter Pruitt's cell and throw numerous folders of legal documents into the toilet bowl. (*Id.*, PageID.38.)
42	Pruitt	1st Amendment Retaliation	04/15/2020	RUM Perrtu destroyed Pruitt's legal property because of Pruitt's attempts to file grievances. (*Id.*, PageID.37.)

43	Kissee	5th Amend-ment	04/16/2020	Richards observed RUM Perttu enter plaintiff Kissee's cell and begin tearing up legal documents. (*Id*., PageID.38.)
44	Kissee	1st Amend-ment Retaliation	04/16/2020	RUM Perrtu destroyed Kissee's legal property because of Kissee's attempts to file grievances. (*Id*., PageID.37.)
45	Richards, Pruitt, Kissee	8th Amend-ment	04/21/2020	RUM Perttu shut off the water in Plaintiffs' cells and told Plaintiffs they would die of thirst before drinking his water. (*Id*., PageID.39.)

During the bench trial, RUM Perttu presented evidence that grievance procedures were generally available to Plaintiffs throughout their confinement. He also presented Michigan Department of Corrections (MDOC) records showing that Plaintiffs did not properly appeal any relevant grievances through Step III of the grievance process prior to filing suit. Plaintiffs argued that administrative remedies were not available to them because RUM Perttu thwarted their efforts to file grievances.

The undersigned has considered the evidence, testimony, and arguments presented during this bench trial. The undersigned finds that RUM Perttu has proven by a preponderance of the evidence that Plaintiffs failed to exhaust their administrative remedies. In addition, the undersigned finds that Plaintiffs have failed to prove that Perttu or any other MDOC official thwarted their efforts to file grievances against Perttu. Accordingly, the undersigned respectfully recommends that the Court dismiss Plaintiffs' claims without prejudice.

II.Additional Relevant Procedural History

On April 23, 2020, Plaintiffs filed this action in federal court. In their verified complaint, Plaintiffs allege that Perttu subjected them to sexual harassment and various forms of retaliation on numerous occasions between June 2019 and April 2020. (ECF No. 1, PageID.4-39.)

On September 25, 2020, Perttu filed a motion for summary judgment and supporting brief. (ECF Nos. 34, 35.) Perttu argued that Plaintiffs failed to properly exhaust their claims. Plaintiffs responded to Perttu's

motion, asserting that Perttu prevented them from utilizing the grievance process at the prison, and that administrative remedies were therefore unavailable. (ECF No. 51.) The undersigned entered an R&R that recommended the Court deny Perttu's motion for summary judgment because there was a genuine issue of material fact as to whether Perttu thwarted the Plaintiffs' attempts to exhaust. (ECF No. 97, PageID.438.) On August 10, 2021, the Court adopted the R&R. (ECF No. 105.)

During a telephone status conference on August 31, 2021, Perttu requested a bench trial on the issue of exhaustion pursuant to *Lee v. Willey*, 789 F.3d 673 (6th Cir. 2015). (ECF No. 117.) The undersigned granted this request and set the bench trial for November 4, 2021. (ECF No. 118.) On October 20, 2021, the undersigned held the final pretrial conference for the exhaustion bench trial, during which the parties indicated that they had all materials necessary to proceed. (ECF No. 138.)

III. Summary of Testimony

During the bench trial, the parties presented a total of nine non-party witnesses in addition to providing their own testimony. To establish the general availability of the grievance process at AMF, RUM Perttu presented AMF's Grievance Coordinator, the MDOC's Grievance Manager, and AMF's Prison Rape Elimination Act (PREA) Coordinator. To support their claims of thwarting, Plaintiffs presented six fellow prisoners who allegedly witnessed RUM Perttu's destruction of grievances. Upon objection, only five were permitted to testify. Richards and Kissee also testified on their own behalf. RUM Perttu then took the stand

to rebut the allegations of thwarting. Each Plaintiff was given the opportunity to examine each witness.

a. MDOC Grievance Manager Richard Russell

On direct examination, Russell testified that he has served as the Grievance Manager for the MDOC for twelve-and-a-half years. Russell walked through the grievance procedure set forth in MDOC Policy Directive (P.D.) 03.02.130, which was admitted into evidence as Defendant's Exhibit A. According to Russell, grievance forms are available in every housing unit in an MDOC facility.

Russell testified that when a prisoner appeals a grievance through Step III of the procedure, the Step III grievance form is sent directly to his office in Lansing, where technicians log the grievance information in a database for tracking purposes, and then Russell and his staff review the grievance and render a decision, completing the grievance procedure.[4]

After discussing the grievance procedure, Russell identified Richards's Step III Grievance Report ("Step III Report") and accompanying grievances, which were admitted into evidence as Defendant's Exhibit C1. Based on Richards's Step III Report, Russell explained that Richards filed 26 grievances between June 2019 and May 2020. He then turned to the particulars of the six grievances summarized below.

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[4] During his testimony, Russell asserted that the claims contained within a prisoner's grievance are exhausted upon the prisoner filing his Step III appeal. As discussed below, this assertion is incorrect.

Grievance No.	Person Named	Allegation	Date or Date Range of Incident(s)	Results at Step I	Results at Step II	Results at Step III
AMF-19-08-1760-28B (ECF No. 153, PageID.726-729 (Def.'s Exh. C1).)	None	Richards learned that he was placed on a transfer list to level four facility and was stressed due to potential racial violence at the facility.	August 18, 2019	Rejected as Vague	Rejected as Untimely	Rejection Upheld
AMF-19-09-1840-27a (ECF No. 153, PageID.730-733 (Def.'s Exh. C1).)	Hearings Officer	Richards had not received his requested misconduct appeal form, despite his 1st and 5th Amendment rights to appeal.	September 1, 2019-September 4, 2019	Rejected as Non-Grievable	Rejected as Untimely	Rejection Upheld
AMF-19-12-2546-28b (ECF No. 153, PageID.738-741 (Def.'s Exh. C1).)	Director Washington, Warden Lesatz, RUM Neimi, ARUS Deforge, RUM Pertu	Richards's anticipated transfer to a level four facility constitutes 1st Amendment retaliation, 8th Amendment cruel and unusual punishment, and violates the Equal Protection Clause.	December 23, 2019	Rejected as Vague	Rejection Upheld	Rejection Upheld

AMF-20-01-6-22B (ECF No. 153, PageID.734-737 (Def.'s Exh. C1).)	Warden Lesatz, RUM Perttu, ADW Snieder	Richards was experiencing psychosomatic symptoms as a result of his continued, and, due to his history of mental illness, unconstitutional confinement in administrative segregation.	January 3, 2020	Denied	Denied	Denied
AMF-20-01-139- 12di (ECF No. 153, PageID.721-725 (Def.'s Exh. C1).)	Warden Lesatz, RUM Perttu, ADW Snieder	Richards's medical kites were being ignored in deliberate indifference to his medical needs.	January 23, 2020	Denied	Denied	Rejected Based on Richards' Inadequate Attempt to Resolve his Issue Prior to Filing
AMF-20-04-660- 27c (ECF No. 153, PageID.717-720 (Def.'s Exh. C1).)	Warden Taskila, ADW Neimi	Richards's medical kites were being ignored in deliberate indifference to his medical needs.	April 10, 2020	Rejected as Non-Grievable	Rejection Upheld	Rejection Upheld

Russell explained that grievance identifier AMF-20-01-139-12di was rejected at Step III based on Richards's inadequate attempt to resolve the issue with staff prior to filing his grievance. Grievance identifier AMF-19-08-1760-28B was rejected as vague at Step I, and as untimely at Step II. Grievance identifier AMF-19-09-1840- 27a was rejected as non-grievable at Step I, and as untimely at Step II. Grievance identifiers AMF-20-01-6-22B and AMF-20-04-660-27c did not discuss excessive force, sexual assault, or the incitement of violence towards Richards. And, finally, grievance identifier AMF-19-12-2546-28b was rejected pursuant to MDOC policy at all steps.

After discussing Richards's Step III Report and relevant grievances, Russell identified Pruitt's Step III Report, which was entered into evidence as Defendant's Exhibit D1. As shown below, Pruitt did not appeal any grievances through Step III of the process during the relevant period.

MDOC Prisoner Step III Grievance Report

1/1/2015 to Present

Prisoner #: 708518 **Last Name:** Pruitt **First Name:** Kenneth

Step III Rec'd	Grievance Identifier	Grievance Catagory	Facility	Step I Received Date	Resolved	Partially Resolved	Denied	Rejected	Closed	Date Mailed
2/23/2021	AMF-21-01-0084-28A	28A	2	1/14/2021	☐	☐	☐	☑	☑	5/12/2021

Notes:

(ECF No. 135, PageID.628 (Def.'s Exh. D1).)

Russell then identified Kissee's Step III Report, entered into evidence as Defendant's Exhibit E1, which reflected that Kissee also did not appeal any grievances through Step III during the relevant time period.

MDOC Prisoner Step III Grievance Report

1/1/2015 to Present

Prisoner #: 575639 **Last Name:** Kissee **First Name:** Robert

Step III Rec'd	Grievance Identifier	Grievance Catagory	Facility	Step I Received Date	Resolved	Partially Resolved	Denied	Rejected	Closed	Date Mailed
10/8/2020	AMF-20-09-1549-27B	27B	2	9/17/2020	☐	☐	☐	☑	☑	12/7/2020
Notes:										
3/11/2016	AMF-16-02-0330-19a	19a	2	2/1/2016	☐	☐	☑	☐	☑	6/7/2016
Notes:										
3/9/2016	AMF-16-02-0355-17a	17a	2	2/3/2016	☐	☐	☑	☐	☑	3/22/2016
Notes:										
3/8/2016	AMF-16-02-0407-28j	28j	2	2/9/2016	☐	☐	☐	☑	☑	3/22/2016
Notes:										

(ECF No. 154, PageID.745 (Def.'s Exh. E1).)

On cross examination, Russell discussed grievance identifier AMF-20-01-6- 22B in more detail. In that grievance, Richards complained of stress-related symptoms arising out of long-term administrative segregation. (ECF No. 153, PageID.737 (Def.'s Exh. C1).) While the grievance did not touch on sexual harassment, retaliation, or the incitement of violence against Richards, Russell conceded that he was unfamiliar with the particularities of Plaintiffs complaint, and therefore whether the grievance exhausted any of Plaintiffs' claims. He did, however, acknowledge that the grievance had been denied on its merits at all steps.

When asked about the procedure for grievances rejected as non-grievable, Russell explained that a prisoner is still required to appeal such grievances through Step III of the process because the Warden at Step II, or Russell's office at Step III, may ultimately determine that the issue is in fact grievable.

Finally, Russell explained that Step III grievances are sent directly to his office via institutional mail or through the United States Postal Service. Every Step III grievance that Russell receives is delivered in a sealed envelope. According to Russell, neither his staff nor the technicians tasked with logging grievance data alter the grievances prior to review. Instead, his office maintains all grievance records in their original form.

b. AMF Grievance Coordinator Thomas Hamel

Following Russell's testimony, Perttu called the Thomas Hamel to testify. On direct examination,

Hamel testified that he has served as the grievance coordinator at AMF for nearly three years, and previously served as a grievance coordinator at another MDOC facility. Hamel explained that when he receives a Step I grievance, he assigns it an identifier, and logs it into the database. The database keeps track of the number of grievances that a prisoner files and the types of grievances that are submitted. Hamel has no discretion as to whether to process Step I grievances. If a grievance concerns sexual harassment, Hamel said that he forwards the grievance to the AMF PREA Coordinator.

In addition to discussing the grievance process, Hamel discussed the particulars of grievance collection at AMF. According to Hamel, if a prisoner wishes to file a Step I grievance, he can obtain a Step I grievance form within his unit. He can then place the grievance directly in the unit mailbox to be delivered to Hamel or ask a staff member to place the grievance in the mailbox. Later, a staff member will collect mail from the units and take it to the mailroom. Once there, mailroom staff will sort the mail, and place it in the appropriate mailboxes. Hamel then visits his mailbox, uses his key to remove his mail, places it in his briefcase, and takes it to his office, where he processes all grievances. As the Grievance Coordinator, Hamel never enters the housing units to collect the mail himself. He does not have keys to the unit mailboxes, and he only has access to the mailroom when the mailroom staff are present.

After discussing the mail retrieval process, Hamel offered additional testimony regarding the database he utilizes. According to Hamel, the database creates

a Prisoner Grievance Summary Report ("Summary Report"). The Summary Report tracks the dates that grievance forms and appeals are received, as well as the response to the grievance at each step. Importantly, Hamel explained that the columns on the Summary Report marked "I Recd" and "II Recd" indicate the date that Hamel received the grievance or appeal from the prisoner. In contrast, because prisoners send their Step III grievance appeal directly to Russel in Lansing, the column marked "III Recd" indicates the date that Hamel received the Step III decision from Russel. Per Hamel's testimony, a "d" on a Summary Report stands for "denied," an "r" stands for "resolved," an "x" stands for "rejected," and an "n" stands for "not addressed." Hamel then identified the Summary Reports generated by the database for each plaintiff. The relevant portion of Richards's Summary Report, entered as Defendant's Exhibit C2, is shown below.

Prisoner Grievance Summary Report

Grievance	Number	Name	Facility	Issue	I Recd	I Dec	II Recd	II Dec	III Recd	III Dec
20182996	641715	RICHARDS	AMF	29Z	12/19/2018	d		N		
20191760	641715	RICHARDS	AMF	28B	8/21/2019	x	1/31/2020	x	5/6/2020	x
20191778	641715	RICHARDS	AMF	22G	8/27/2019	r	2/4/2020	d	6/12/2020	d
20191840	641715	RICHARDS	AMF	27A	9/5/2019	x	2/4/2020	x	5/6/2020	x
20192011	641715	RICHARDS	AMF	28E	10/3/2019	d	1/31/2020	x	4/30/2020	d
20192422	641715	RICHARDS	AMF	28E	12/3/2019	x	2/21/2020	x	6/12/2020	d
20192546	641715	RICHARDS	AMF	28B	12/27/2019	x	1/14/2020	x	3/12/2020	x
20192547	641715	RICHARDS	AMF	27B	12/27/2019	x	1/14/2020	x	3/3/2020	x
20192548	641715	RICHARDS	AMF	27B	12/27/2019	x	1/14/2020	x	3/18/2020	x
20200006	641715	RICHARDS	AMF	22B	1/7/2020	r	2/10/2020	d	4/30/2020	d
20200029	641715	RICHARDS	AMF	28B	1/7/2020	x	1/22/2020	x	3/12/2020	x
20200138	641715	RICHARDS	AMF	14E	1/27/2020	d	2/21/2020	d	6/12/2020	d
20200139	641715	RICHARDS	AMF	28I	1/27/2020	d	2/28/2020	d	5/27/2020	x
20200188	641715	RICHARDS	AMF	15B	1/31/2020	d	2/21/2020	d	6/12/2020	d
20200288	641715	RICHARDS	AMF	17A	2/20/2020	r	3/18/2020	d	7/23/2020	d
20200383	641715	RICHARDS	AMF	27Z	3/3/2020	x	3/18/2020	x	7/27/2020	x
20200437	641715	RICHARDS	AMF	15F	3/10/2020	d	4/16/2020	d	9/1/2020	d
20200438	641715	RICHARDS	AMF	21Z	3/10/2020	r	4/16/2020	d	9/1/2020	d
20200544	641715	RICHARDS	AMF	28B	3/24/2020	x	4/16/2020	x	9/16/2020	x
20200588	641715	RICHARDS	AMF	08A	3/31/2020	r	5/5/2020	d	9/1/2020	d
20200641	641715	RICHARDS	AMF	28B	4/9/2020	x	4/28/2020	x	9/16/2020	x
20200651	641715	RICHARDS	AMF	28B	4/10/2020	x	4/28/2020	x	9/16/2020	x
20200654	641715	RICHARDS	AMF	12B1	4/14/2020	d		N		
20200655	641715	RICHARDS	AMF	09AT	4/14/2020	d	5/5/2020	d	9/1/2020	d
20200657	641715	RICHARDS	AMF	28B	4/14/2020	x	5/5/2020	x	9/16/2020	x
20200658	641715	RICHARDS	AMF	27C	4/14/2020	x	5/5/2020	x	9/16/2020	x
20200659	641715	RICHARDS	AMF	28A	4/14/2020	x	5/5/2020	x	8/12/2020	x
20200660	641715	RICHARDS	AMF	27C	4/14/2020	x	5/5/2020	x	9/16/2020	x
20200661	641715	RICHARDS	AMF	28A	4/14/2020	x	5/5/2020	x	8/12/2020	x
20200853	641715	RICHARDS	AMF	28F	5/13/2020	x		N		

(ECF No. 135-5, PageID.621 (Def.'s Exh. C2).)

Based on Richards's Summary report, Hamel testified that Richards had completed four grievances through Step III of the grievance process prior to April 2020 — all of which were rejected.

From there, Hamel moved to Pruitt's Summary Report, which was entered into evidence as Defendant's Exhibit D2, and is shown in pertinent part below.

Prisoner Grievance Summary Report

Grievance	Number	Name	Facility	Issue	I Recd	I Dec	II Recd	II Dec	III Recd	III Dec
20190425	708518	PRUITT	AMF	28B	2/20/2019	x		N		
20191168	708518	PRUITT	AMF	27Z	6/3/2019	x		N		
20191864	708518	PRUITT	AMF	28B	9/10/2019	x		N		
20192376	708518	PRUITT	AMF	01H	11/22/2019	r		N		
20200712	708518	JUNIOR	AMF	21C	4/21/2020	d		N		
20201032	708518	PRUITT	AMF	22C	6/23/2020	d		N		
20201094	708518	PRUITT	AMF	17B	7/1/2020	d		N		
20201246	708518	PRUITT	AMF	11G	7/27/2020	d		N		
20201362	708518	PRUITT	AMF	17A	8/14/2020	d		N		
20201405	708518	PRUITT	AMF	17F	8/18/2020	d		N		
20201406	708518	PRUITT	AMF	09DT	8/18/2020	d		N		
20201464	708518	PRUITT	AMF	08H	8/27/2020	d	10/1/2020	d		
20201517	708518	PRUITT	AMF	17A	9/10/2020	d		N		
20201591	708518	PRUITT	AMF	17Z	9/23/2020	d		N		

(ECF No. 135-8, PageID.635 (Def.'s Exh. D2).)

Hamel explained that from June 2019 to May 2020, Pruitt filed four grievances, none of which were appealed through Step III.

Finally, Hamel turned to Kissee's Summary Report, which was entered into evidence as Defendant's Exhibit E2, and shown below.

Prisoner Grievance Summary Report

Griev-ance	Num-ber	Name	Facil-ity	Issue	I Recd	I Dec	II Recd	II Dec	III Recd	III Dec
20182036	575639	KISSEE	AMF	28I	8/15/2018	x		N		
20182049	575639	KISSEE	AMF	17Z	8/17/2018	d		N		
20182142	575639	KISSEE	AMF	17B	8/30/2018	d		N		
20200825	575639	KISSEE	AMF	12F3	5/11/2020	d	5/20/2020	N		
20201549	575639	KISSEE	AMF	27B	9/17/2020	x	9/29/2020	x	12/14/2020	x

(ECF No. 135-11, PageID.647 (Def.'s Exh. E2).) Kissee filed only one grievance between June 2019 and May 2020, and he did not appeal that grievance through Step III of the process.

After reviewing the Summary Reports, Hamel testified that he never failed to process grievances, kites, or requests for Step II or Step III grievance forms, or prevented any prisoners from filing grievances. He also testified that he had no reason to believe that RUM Perttu ordered other prisoners to destroy Plaintiffs' grievances, nor that the Warden ordered such destruction. Based on his evaluation of Plaintiffs' reports, Hamel testified that the grievance process was available to Plaintiffs between June 2019 and May 2020.

On cross examination, Hamel explained that he receives grievances through institutional mail. When asked about his relationship with RUM Perttu, Hamel testified that he previously worked with Perttu at Ojibway Correctional Facility, but that they did not have a relationship outside of work.

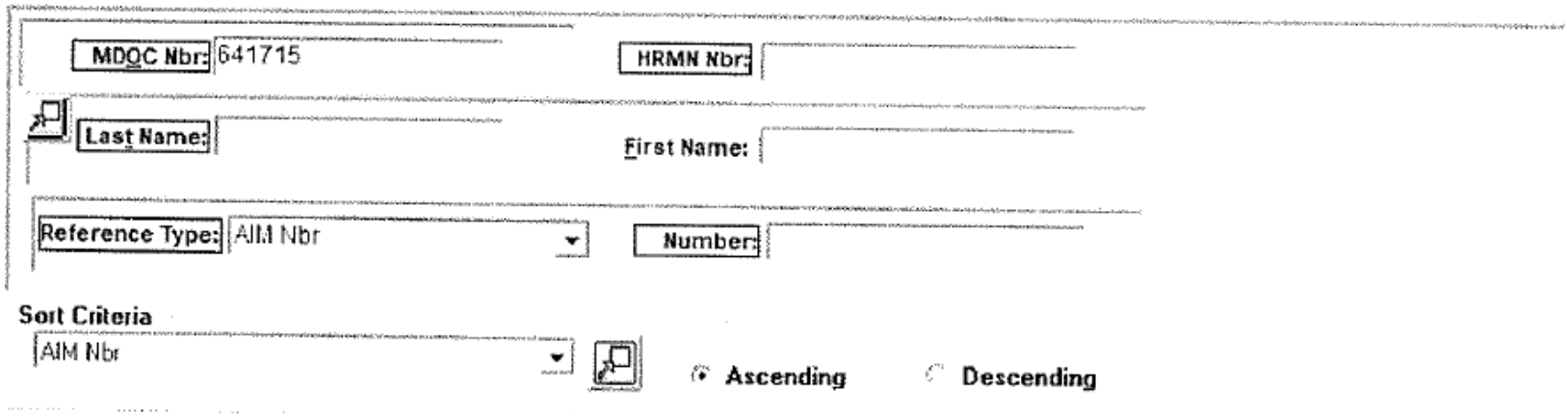
c. AMF PREA Coordinator Craig Cummings

Following Hamel's testimony, RUM Perttu called Craig Cummings. Cummings testified that he has served as the Inspector and PREA Coordinator at AMF for six years. As the Inspector and PREA Coordinator, Cummings is tasked with monitoring safety and security at the facility, as well as PREA grievances and investigations. Per Cummings, PREA grievances are those submitted by prisoners alleging sexual abuse or harassment. The PREA grievance procedure is set forth in MDOC P.D. 03.03.140, admitted as Defendant's Exhibit B.

According to Cummings, when a prisoner wants to file a PREA grievance, he must first obtain a grievance form from the facility staff. He must then place

the form in the unit mailbox or ask staff to place the form in the unit mailbox. That mail then finds its way to Cummings's mailbox in the administrative office. Cummings does not have direct access to the unit mailboxes, only has access to the mailroom when the mailroom staff are working (from 8:00am to 4:30pm), and is the only individual with access to his mailbox. After retrieving the grievances from his mailbox, Cummings processes them by making copies and assigning identifiers and investigators. He also identifies whether the grievance alleges sexual abuse or sexual harassment. From there, another staff member enters the information into the AIM database. Cummings then returns the PREA grievance to the prisoner. Cummings testified that he responds to every PREA grievance he receives — he has no discretion in processing the grievances.

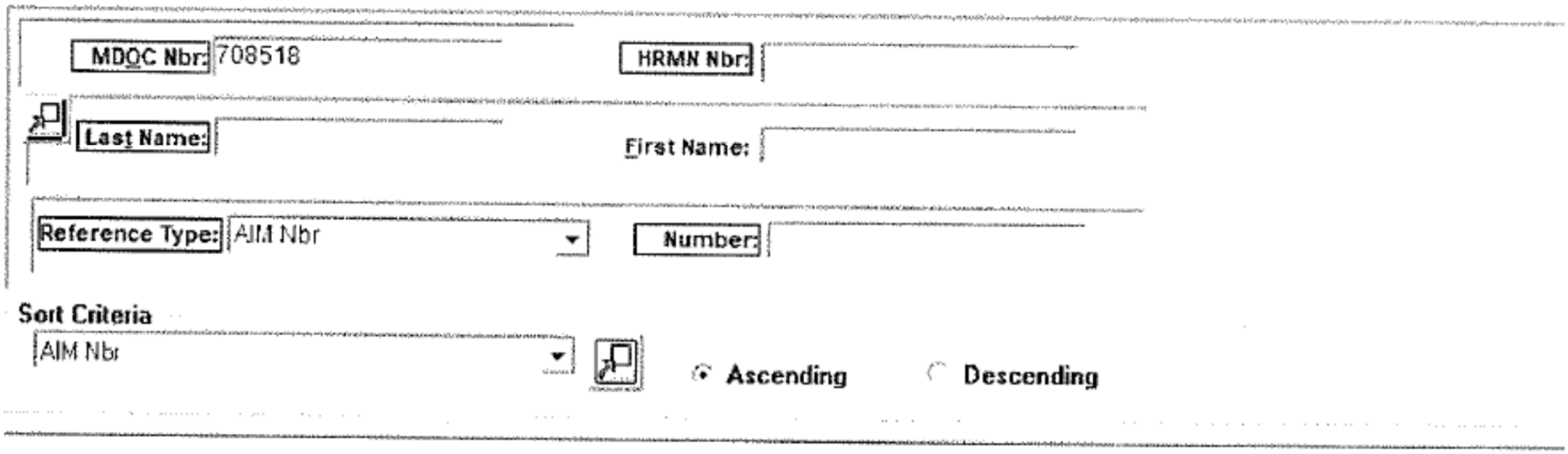
After describing the general PREA grievance process, Cummings discussed Plaintiffs' AIM records. According to Cummings, AIM records reflect all PREA investigations initiated for any given prisoner. Richards's AIM record, entered as Defendant's Exhibit C3, is shown below.



AIM Nbr	Incident Date	Complaint Date	Incident Status	Incident Location	Investigation Type
4538	10/18/2007	11/15/2007	Closed	THUMB CORRECTIONAL FACILITY	
8796	05/03/2012	05/05/2012	Closed	BELLAMY CREEK CORRECTIONAL FACILITY	Location Investigation
15321	09/04/2015	09/04/2015	Closed	ST LOUIS CORRECTIONAL FACILITY	Location Investigation
19461	12/05/2016	12/13/2016	Closed	ALGER CORRECTIONAL FACILITY	Location Investigation
19683	01/07/2017	01/11/2017	Closed	ALGER CORRECTIONAL FACILITY	Location Investigation

(ECF No. 135-6, PageID.624 (Def.'s Exh. C3).) Based on Richards's AIM record, Cummings testified that Richards did not file any PREA grievances at AMF.

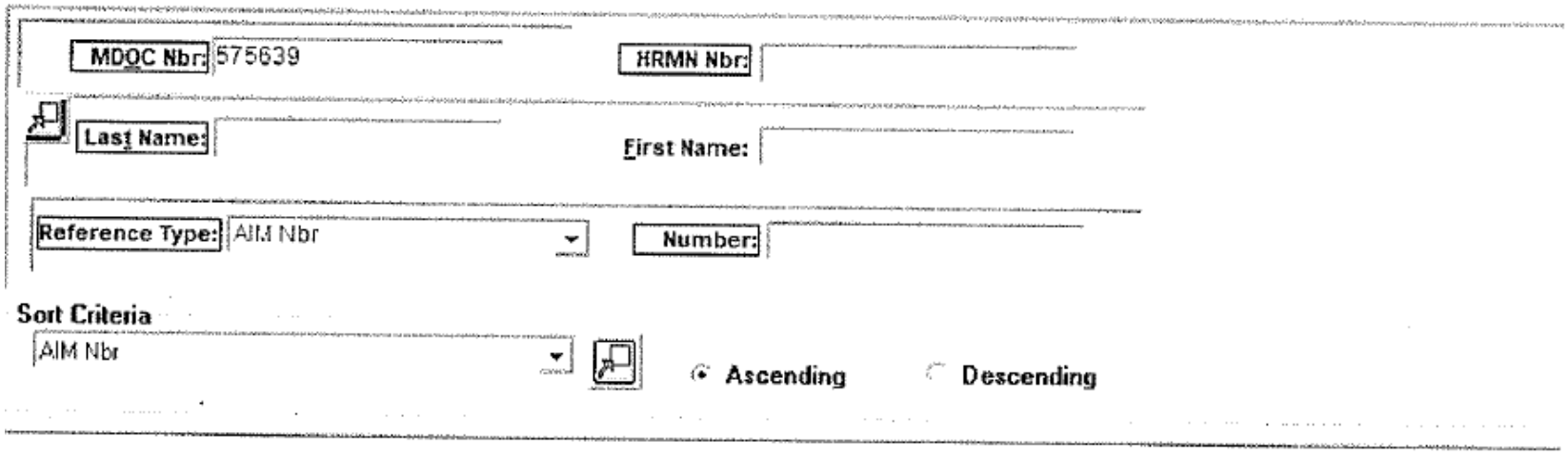
Pruitt's AIM record, entered as Defendant's Exhibit D3, is shown below.



AIM Nbr	Incident Date	Complaint Date	Incident Status	Incident Location	Investigation Type
17576	05/17/2016	05/19/2016	Closed	BARAGAR MAXIMUM FACILITY	Location Investigation
18896	10/06/2016	10/11/2016	Closed	BARAGAR MAXIMUM FACILITY	IA Monitored
19019	10/21/2015	10/25/2016	Closed	BARAGAR MAXIMUM FACILITY	Location Investigation
19744	01/12/2017	01/13/2017	Closed	BARAGAR MAXIMUM FACILITY	Location Investigation
20146	02/18/2017	02/19/2017	Closed	BARAGAR MAXIMUM FACILITY	Location Investigation
35904	01/09/2021	01/09/2021	Closed	BARAGAR MAXIMUM FACILITY	Location Investigation

(ECF No. 135-9, PageID.637 (Def.'s Exh. D3).) While Pruitt did file PREA grievances during his stay at AMF, he did not file any grievances between 2019 and 2020, the relevant period for Plaintiffs' claims.

Finally, Kissee's AIM record, entered as Defendant's Exhibit E3, is shown below.



AIM Nbr	Incident Date	Complaint Date	Incident Status	Incident Location	Investigation Type
38910	09/07/2021	10/06/2021	Pending Investigation	MACOMB CORRECTIONAL FACILITY	Location Investigation

(ECF No. 135-12, PageID.649 (Def.'s Exh. E3).) Based on this record, Cummings testified that, like Richards, Kissee did not file any PREA grievances at AMF.

After reviewing the AIM records, Cummings testified that he never failed to process PREA grievances, kites, or requests for Step II forms, or prevented any prisoners from filing grievances. He also testified that he had no reason to believe that RUM Perttu prevented Plaintiffs from filing PREA grievances, nor that the Warden ordered others to destroy Plaintiffs' grievances.

On cross examination, Cummings acknowledged that, in addition to the formal, written grievance process, a prisoner can lodge a verbal complaint with staff or call the PREA hotline. When a prisoner lodges a verbal complaint, staff are required to report that complaint to their supervisor. Cummings explained that PREA grievance forms are kept in the housing units, and the PREA hotline number is posted in all of the housing units. If a prisoner in administrative segregation wishes to file a PREA grievance, they are required to ask staff for the Step I form.

When asked whether he recalled meeting with Richards regarding a PREA complaint, Cummings denied such recollection, but said that, had it happened, it would have been recorded.

d. Plaintiffs' Non-Party Witnesses

Plaintiffs called a total of six individuals, five of whom were incarcerated with Plaintiffs at AMF during the relevant time period. The sixth, Cody Ian Simmons, was not placed in AMF until after the complaint was filed, and, upon a relevance objection from RUM Perttu, did not testify. The remaining witnesses are Deliun Kennon-Keyonte Stevenson, Larry Taylor, Michael Richard Jackson, Cleveland Spencer, and Michael D. Cornelius.

Upon questioning from Richards, several prisoners agreed that they watched RUM Perttu destroy, or that Perttu asked them to destroy, Richards's grievances during the relevant period. Specifically, when asked whether he watched Perttu throw away grievances with Richards's name on them on March 20, 2020 and March 25, 2020, Stevenson said that he did. When asked whether Perttu approached him and told him to destroy Richards's grievances on April 18, 2020 and April 20, 2020, Jackson said that he did. When asked whether he witnessed Perttu rip up some of Richards's grievances on April 6, 2020, Taylor said that he did. When asked whether he observed Perttu destroy grievances in early 2019 and late 2020, Spencer said that he did, though he could not testify that they were Richards's grievances. Cornelius said that he watched Perttu rip up Richards's grievances at some point in late 2019 or early 2020, but he was not sure when.

Stevenson further testified on direct that some of his own grievances were thrown out by AMF staff, and that he has received Richards's mail from AMF staff before. Cornelius testified that he once overheard Perttu tell Richards, "if you don't give me a blowjob, I am going to put you in the hole," while destroying Richards's grievances. Cornelius also asserted that since signing his declaration for this case, one of the AMF Corrections Officers has issued him retaliatory misconduct tickets. Jackson said that when Perttu approached him to destroy Richards's grievances, he was able to look at the contents of the grievances, which alleged that Perttu was sexually harassing Richards. Jackson also explained that instead of destroying grievances at Perttu's request, he retained them, told various Corrections Officers that Perttu had given the

grievances to him, and then ultimately returned them to Richards when he was placed in administrative segregation in November of 2020. Taylor explained that Perttu's general demeanor towards Richards was "one of anger and disgust," and that Perttu threatened Richards on multiple occasions, though he could not recall exactly when.

Many of the men testified as to how the grievance process worked in administrative segregation. Taylor, Jackson, Spencer, and Cornelius all indicated that when a prisoner is in administrative segregation, he is completely dependent upon facility staff to obtain grievance forms and to get the completed forms to the grievance coordinator. Taylor specified that there are no vantage points in administrative segregation from which a prisoner can watch the staff put his grievances in the unit mailbox.

On cross examination, the witnesses were more specific about the circumstances surrounding Perttu's alleged destruction of Richards's grievances. Stevenson admitted that the first time he saw Perttu destroy Richards's grievances, Perttu passed his cell with the grievances in hand in full walking stride. The second time Stevenson saw Perttu destroy Richards's grievances, Perttu had stopped only briefly to collect Stevenson's mail with Richards's grievances in hand. Stevenson admitted that the grievances were only in view for a matter of seconds, and he could not discern the contents of the grievances except for Richards's name. In contrast, Taylor testified that he did not see Richards's name on the grievances he watched Perttu destroy, but knew they were written by Richards because he was locked in the same wing as Richards at the time and watched Perttu pick the grievances up

from Richards's cell. According to Taylor, he overheard Perttu talking to Richards about the grievances, so he knew that the grievances concerned sexual harassment. When asked about the specifics surrounding his observations, Spencer indicated that he never saw Richards's name on the grievances Perttu destroyed, or heard Perttu talking about them.

Also on cross-examination, the witnesses acknowledged difficulty in remembering the exact dates on which they observed Perttu destroying grievances. Jackson testified on cross that he was asked to destroy Richards's grievances on March 19, 2020, but acknowledged that in his prior deposition, he did not allege he was asked to destroy grievances on that date. Spencer could not identify when or where he observed Perttu destroying grievances. Cornelius also admitted difficulty in remembering when he observed Perttu threatening Richards and destroying Richards's grievances. He further testified that he did not write the declaration that that Plaintiffs previously filed in this case. Although he said the allegations in the declaration were true, he admitted that he did not know whether the dates in the declaration were accurate, as he did not supply them.

On redirect, Cornelius asserted that he read the declaration he signed, and agreed with the contents, but not necessarily the dates.

e. Plaintiffs' Testimony

After calling their non-party witnesses, Richards and Kissee testified on their own behalf. Richards testified that, on August 20, 2019, January 1, 2020, and June 15, 2020, as well as on the dates discussed by the non-party witnesses, Perttu either destroyed his

grievances or prevented them from being processed. He testified that he never received tracking numbers for these grievances.

On cross examination, Richards testified that he could not speak to specific dates on which his grievances were obstructed or destroyed off-hand and asserted that there were specific instances of thwarting that were not discussed by the witnesses but could be found in his complaint. Richards also acknowledged that he assisted in writing most of the affidavits and declarations in the case.

Kissee then testified as to his own attempts to file grievances at AMF. Kissee said that he tried to submit regular and PREA grievances on multiple occasions. However, every time he tried to utilize the grievance process, he was told to retrieve the necessary forms from RUM Perttu. Kissee also testified to an incident in which he was assaulted by another prisoner, and that prisoner stated, "Perttu says hello." According to Kissee, Perttu had such a significant influence over staff and other prisoners that the grievance process was unavailable to him.

On cross examination, Kissee acknowledged that the assault occurred after Plaintiffs filed their complaint. Kissee also acknowledged that he attempted to file PREA grievances on January 21, 2020 but could not recall what incident the grievances addressed. Nor could he recall the exact date that he attempted to file three additional PREA grievances regarding Perttu's attempted solicitation of sexual favors.

f. RUM Perttu's Testimony

RUM Perttu was the final witness to testify in the bench trial. Perttu stated that he served as the

Resident Unit Manager for the administrative segregation housing units — Units One, Two, and Three — at AMF from 2019 to 2020. RUM Perttu's shift at AMF ran from 7:30am to 3:30pm. As the RUM, Perttu was required to complete rounds each day before 10:00am. Perttu explained that when he did rounds, he utilized wands in the units that scanned each cell door as he passes, logging the time and location of each scan. The data from these wands is downloadable, and the download is how the MDOC ensures that RUMs are completing their rounds. Perttu did not, however, provide this data.

RUM Perttu further testified that each housing unit at AMF is a separate, Vshaped building that is comprised of four wings. A-wing and B-wing are on one side of the V-shape, and C-wing and D-wing are on the other. Each unit has a trash can at the apex of the V-shaped hall. Perttu said that he does not have a usual practice with regards to where he begins his rounds.

Perttu then explained that if prisoners had mail that needed to be picked up while he was on rounds, he would pick up their mail and fold it in half while he walked. However, the mail was usually picked up by other AMF staff before his rounds, so Perttu did not do so often. Perttu stated that he never mixed mail between units or entered one unit holding mail from another unit. He also never took mail out of the unit mailboxes, as he did not have a key to access them. Nor did he have access to the mailroom in the absence of mailroom staff.

After discussing his procedure for completing rounds, RUM Perttu presented his recollection of the lock-up history of the prisoners who had testified.

Though Perttu did not admit a lock history for any of the prisoners into evidence, he testified that on March 20, 2020, Stevenson was locked in Unit One while Richards was locked in Unit Three. On March 25, Stevenson was locked in Unit Two while Richards was locked in Unit Three. Perttu also testified that Cornelius was not in administrative segregation at all during the relevant dates. Perttu stated that when Richards and Spencer were locked in the same unit, Spencer was locked in B-wing, and Richards was locked in D-wing, so they would not have been able to see each other or communicate.

Finally, RUM Perttu discussed some of his time off. According to Perttu, he was not working on April 5, 2020, because he was on a modified schedule due to covid- 19. Perttu could not recall whether he worked on April 15, 2020. On June 1, 2020, Perttu was out sick. And on January 1, 2020, Perttu was off due to the New Year's holiday.

According to Perttu, he never destroyed any grievances submitted by Plaintiffs, and the Warden never instructed him to destroy grievances.

On cross examination, Perttu testified that he always uses a wand during rounds, and that the records created by the wands cannot be altered. With regards to the grievance process for prisoners in administrative segregation, Perttu explained that inmates can request a grievance form from any staff member. Once completed, the staff place the grievance forms in the unit mailbox. It is not possible for the staff to place the forms in the wrong mailbox, as there is only one per unit. Although Perttu conceded that prisoners in administrative segregation must rely on the good faith of the facility staff to submit their grievances, Perttu

said he did not believe that accessing the grievance process was more difficult for those prisoners. RUM Perttu also testified that, during the relevant time, he was not aware of any shortages in grievance forms among his units.

According to Perttu, he never received complaints from Richards regarding sexual harassment. He was also never informed that Richards had made such complaints against him to other AMF staff. Perttu acknowledged that the office in which he sorts mail is not equipped with a camera. He also acknowledged that once mail is given to the United States Postal Services, AMF staff cannot account for any lost grievances or appeals. There was no redirect of Perttu.

IV. Analysis

As stated above, the undersigned must decide whether Perttu has proven, by a preponderance of the evidence, that Plaintiffs failed to properly exhaust their claims before filing suit. *Jones v. Bock*, 549 U.S. 199, 212-16 (2007); *Lee*, 789 F.3d at 678. While Perttu bears this initial burden, once he shows that there was a generally available administrative remedy, and that the prisoner did not exhaust that remedy, the burden shifts to Plaintiffs to come forward with evidence showing that his circumstances made the existing and generally available administrative remedies effectively unavailable to him. *Alexander v. Calzetta*, No. 2:16-CV-13293, 2018 WL 8345148, at *6 (E.D. Mich. Nov. 30, 2018).

Based on the testimony, evidence, and argument presented during the hearing, the undersigned concludes that Perttu has carried his initial burden.

a. Perttu established that Plaintiffs failed to exhaust any of their claims before filing suit

To properly exhaust administrative remedies, prisoners must complete the available administrative review process in accordance with the applicable deadlines and other procedural rules. *Jones*, 549 U.S. at 218-19; *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). For MDOC prisoners with claims unrelated to sexual abuse or harassment, that administrative review process is most often the grievance procedure set forth in P.D. 03.02.130. For MDOC prisoners with sexual abuse or harassment claims, it is the grievance procedure set forth in P.D. 03.03.140.

As discussed above, grievance identifier AMF-20-01-6-22B was addressed on the merits at all three steps.5 (*See* ECF No. 135-5, PageID.621 (Def.'s Exh. C2).) In other words, Richards completed the grievance procedure in accordance with the rules set forth in P.D. 03.02.130 with respect to grievance identifier AMF-20-01-6- 22B. However, the evidence shows that it was completed ***after*** Plaintiffs filed suit. The relevant portion of Richards's Summary report is shown below.[5] Richards's Summary Report indicates that the grievance was resolved at Step I and Richards's subsequent appeals were denied. (ECF No. 153, PageID.737 (Def.'s Exh. C1).)

[5] Richards's Summary Report indicates that the grievance was resolved at Step I and Richards's subsequent appeals were denied. (ECF No. 153, PageID.737 (Def.'s Exh. C1).)

Prisoner Grievance Summary Report

Grievance	Number	Name	Facility	Issue	I Recd	I Dec	II Recd	II Dec	III Recd	III Dec
20182996	641715	RICHARDS	AMF	29Z	12/19/2018	d		N		
20191760	641715	RICHARDS	AMF	28B	8/21/2019	x	1/31/2020	x	5/6/2020	x
20191778	641715	RICHARDS	AMF	22G	8/27/2019	r	2/4/2020	d	6/12/2020	d
20191840	641715	RICHARDS	AMF	27A	9/5/2019	x	2/4/2020	x	5/6/2020	x
20192011	641715	RICHARDS	AMF	28E	10/3/2019	d	1/31/2020	x	4/30/2020	d
20192422	641715	RICHARDS	AMF	28E	12/3/2019	x	2/21/2020	x	6/12/2020	d
20192546	641715	RICHARDS	AMF	28B	12/27/2019	x	1/14/2020	x	3/12/2020	x
20192547	641715	RICHARDS	AMF	27B	12/27/2019	x	1/14/2020	x	3/3/2020	x
20192548	641715	RICHARDS	AMF	27B	12/27/2019	x	1/14/2020	x	3/18/2020	x
20200006	641715	RICHARDS	AMF	22B	1/7/2020	r	2/10/2020	d	4/30/2020	d

(ECF No. 135-5, PageID.621 (Def.'s Exh. C2).)

As explained by Hamel, the column in the Summary Report marked "III Recd" indicates when Hamel received the Step III response. Hamel received the Step III response to AMF-20-01-6-22B on April 30, 2020. Plaintiffs filed their complaint on April 23, 2020. As such, Richards could not have received the response until after Plaintiffs filed this suit. The grievance procedure outlined in P.D. 03.02.130 is not completed for exhaustion purposes until the prisoner receives the Step III response. *Ross v. Duby*, No. 1:09-CV-531, 2010 WL 3732234 (W.D. Mich. Sept. 17, 2010) (determining that the plaintiff had not exhausted his claim because the response to his Step III grievance was issued after the complaint was filed). Because exhaustion is a precondition to filing a suit, Plaintiffs cannot look to AMF-20-01-6-22B to exhaust any claims in this case. *Roberts v. Lamanna*, 45 F. App'x 515, 516 (6th Cir. 2002) (explaining that a plaintiff cannot exhaust administrative remedies "during the pendency of the action").

While grievance identifier AMF-20-01-6-22B was the only grievance to be addressed on the merits, there are additional circumstances under which a rejected grievance may nevertheless exhaust the claims therein. For example, when a grievance is rejected for the first time at Step III based on a pre-existing procedural defect, the claims in the grievance are considered exhausted. *Raper v. Controneo*, 2018 WL 2928188, at *1 (W.D. Mich., June 12, 2018); *Sedore v. Greiner*, 2020 WL 8837441, at *7 (E.D. Mich. Sept. 21, 2020). However, it is unnecessary to determine whether the remaining grievances fall within these exceptions for the purposes of this case. The Step III responses to grievance identifiers AMF-19-08-1760-28B, AMF-19- 09-1840-27a, AMF-20-01-139-12di, and AMF-20-04-660-27c were not delivered to AMF until after Plaintiffs filed this suit.

Prisoner Grievance Summary Report

Grievance	Number	Name	Facility	Issue	I Recd	I Dec	II Recd	II Dec	III Recd	III Dec
20182996	641715	RICHARDS	AMF	29Z	12/19/2018	d		N		
20191760	641715	RICHARDS	AMF	28B	8/21/2019	x	1/31/2020	x	5/6/2020	x
20191778	641715	RICHARDS	AMF	22G	8/27/2019	r	2/4/2020	d	6/12/2020	d
20191840	641715	RICHARDS	AMF	27A	9/5/2019	x	2/4/2020	x	5/6/2020	x
20192011	641715	RICHARDS	AMF	28E	10/3/2019	d	1/31/2020	x	4/30/2020	d
20192422	641715	RICHARDS	AMF	28E	12/3/2019	x	2/21/2020	x	6/12/2020	d
20192546	641715	RICHARDS	AMF	28B	12/27/2019	x	1/14/2020	x	3/12/2020	x
20192547	641715	RICHARDS	AMF	27B	12/27/2019	x	1/14/2020	x	3/3/2020	x
20192548	641715	RICHARDS	AMF	27B	12/27/2019	x	1/14/2020	x	3/18/2020	x
20200006	641715	RICHARDS	AMF	22B	1/7/2020	r	2/10/2020	d	4/30/2020	d
20200029	641715	RICHARDS	AMF	28B	1/7/2020	x	1/22/2020	x	3/12/2020	x
20200138	641715	RICHARDS	AMF	14E	1/27/2020	d	2/21/2020	d	6/12/2020	d
20200139	641715	RICHARDS	AMF	28I	1/27/2020	d	2/28/2020	d	5/27/2020	x
20200188	641715	RICHARDS	AMF	15B	1/31/2020	d	2/21/2020	d	6/12/2020	d
20200288	641715	RICHARDS	AMF	17A	2/20/2020	r	3/18/2020	d	7/23/2020	d
20200383	641715	RICHARDS	AMF	27Z	3/3/2020	x	3/18/2020	x	7/27/2020	x
20200437	641715	RICHARDS	AMF	15F	3/10/2020	d	4/16/2020	d	9/1/2020	d
20200438	641715	RICHARDS	AMF	21Z	3/10/2020	r	4/16/2020	d	9/1/2020	d
20200544	641715	RICHARDS	AMF	28B	3/24/2020	x	4/16/2020	x	9/16/2020	x
20200588	641715	RICHARDS	AMF	08A	3/31/2020	r	5/5/2020	d	9/1/2020	d
20200641	641715	RICHARDS	AMF	28B	4/9/2020	x	4/28/2020	x	9/16/2020	x
20200651	641715	RICHARDS	AMF	28B	4/10/2020	x	4/28/2020	x	9/16/2020	x
20200654	641715	RICHARDS	AMF	12B1	4/14/2020	d		N		
20200655	641715	RICHARDS	AMF	09AT	4/14/2020	d	5/5/2020	d	9/1/2020	d
20200657	641715	RICHARDS	AMF	28B	4/14/2020	x	5/5/2020	x	9/16/2020	x
20200658	641715	RICHARDS	AMF	27C	4/14/2020	x	5/5/2020	x	9/16/2020	x
20200659	641715	RICHARDS	AMF	28A	4/14/2020	x	5/5/2020	x	8/12/2020	x
20200660	641715	RICHARDS	AMF	27C	4/14/2020	x	5/5/2020	x	9/16/2020	x

(ECF No. 135-5, PageID.621 (Def.'s Exh. C2).) The only remaining grievance at issue, grievance identifier AMF-19-12-2546-28b, was rejected as vague at all steps of the process. (ECF No. 153, PageID.738-741 (Def.'s Exh. C1).) Therefore, none of the grievances through which Richards asserts he exhausted his claims did, in fact, exhaust his claims prior to Plaintiffs filing their complaint.

Richards did not submit any sexual abuse or harassment grievances in accordance with P.D. 03.03.140. (ECF No. 135-6, PageID.624 (Def.'s Exh. C3).) Plaintiff's Pruitt and Kissee did not complete any relevant grievances through either process. (ECF No. 135-8, PageID.635 (Def.'s Exh. D2); ECF No. 135-9, PageID.637 (Def.'s Exh. D3); ECF No. 135-10, PageID.641-645 (Def.'s Exh. E1); ECF No. 135-12, PageID.649 (Def's Exh. E3).). By providing the Step III Grievance Reports, relevant grievances, and AIM Reports, RUM Perttu has established that Plaintiffs failed to exhaust their administrative remedies with regards to all other claims.

b. Plaintiffs failed to show that administrative remedies were unavailable to them

Because the undersigned finds that RUM Perttu met his burden of proving, by a preponderance of the evidence, that administrative remedies were generally available, and that Plaintiffs failed to exhaust those remedies, the burden shifts to Plaintiffs to show that the grievance procedures were effectively unavailable to them. Here, Plaintiffs assert that the unavailability of the procedures was procured by RUM Perttu's destruction of grievances.

Ultimately, the testimony given by Plaintiffs' witnesses was either substantially guided by Richards's manner of questioning or wholly conclusory, and often contradicted prior statements or documentary evidence admitted throughout the bench trial. Even considering that witnesses testified to observing RUM Perttu destroying Richards's grievances, the witnesses' admissions concerning the circumstances surrounding their observations, paired with RUM Perttu's testimony regarding the layout of AMF, further undercut the credibility of Plaintiffs' witnesses. As such, the undersigned concludes that Plaintiffs' witnesses lacked credibility, and Plaintiffs failed to provide sufficient evidence that the grievance procedures were effectively unavailable to them.

1. The form of Richards's direct examinations undermined the credibility of witness testimony.

While each plaintiff was given the opportunity to examine each witness, Richards engaged in the most extensive examinations of the Plaintiffs' witnesses. While examining Plaintiffs' witnesses, Richards's relied on yes or no questions in which he provided the date and details of Perttu's alleged destruction of grievances, and the witnesses simply agreed. For example, Richards asked Jackson whether, on April 20, 2020, Perttu came to Jackson's cell and asked him to flush Richards's grievances down the toilet. Such questioning did not provide Plaintiffs' witnesses the opportunity to develop their testimony independently or demonstrate personal knowledge of the incidents.

This lack of personal knowledge first became apparent during Jackson's cross-examination, when he

was asked about his encounter with RUM Perttu on March 19, 2020. Jackson initially testified that Perttu had delivered grievances to his cell that day and asked him to rip them up. However, this testimony contradicted Jackson's prior affidavit. Later, Larry Taylor testified that he did not remember whether the dates Richards was supplying were correct. Even upon refreshing his recollection with an affidavit previously filed in this case, Taylor could not identify the dates on which he observed RUM Perttu destroying Richards's grievances. But the witnesses' lack of personal knowledge became most blatant when, upon objection, the Court directed Richards to reformulate his questions to Michael Cornelius rather than reading the dates to him. Cornelius could not recall any of the specific dates when RUM Perttu allegedly destroyed Richards's grievances, and later admitted that he had signed his prior affidavit but had not written it or supplied the dates therein. During his own testimony, Richards conceded that he "assisted" in writing most of the affidavits and declarations filed in this case.

Aside from the Plaintiffs themselves, Stevenson, Taylor, Jackson, and Cornelius were the only witnesses to testify as to the destruction of grievances with particularity. Kissee did not provide any specific dates of destruction in his testimony, and Richards had to refresh his own recollection before he could provide three additional dates of destruction outside of those offered by previous witnesses. The witnesses' overall inability to testify as to the dates and locations of RUM Perttu's alleged destruction of Plaintiffs' grievances casts significant doubt on the credibility of their testimony.

2. The circumstances surrounding the alleged observations of Perttu destroying grievances further undermines witness credibility.

Although Stevenson, Taylor, Jackson, and Cornelius testified that they personally observed Perttu destroy Richards's grievances, the circumstances under which the witnesses observed such destruction further undermines their credibility.

On cross-examination Stevenson testified that the first time he watched RUM Perttu destroy grievances, Perttu passed his cell in full walking stride and was only in his view for a matter of seconds. The second time, Perttu stopped in front of Stevenson's cell to collect his mail before continuing down the unit hallway and destroying Richard's grievances. Despite the miniscule window of time within which Stevenson observed Perttu, he testified that he could see all of the grievances in Perttu's hand and discern that they were written by Richards. Stevenson then testified that he could not read the incident date or contents of the grievance beyond Richards's name on either date.

Jackson agreed that throughout the months of February, March, and April 2020, RUM Perttu brought mail to his cell and, on some occasions, directed Jackson to destroy it. Jackson testified that he was housed in Unit Five, a general population unit, when all of this occurred, and that he retained some of the grievances, which he later gave to Richards.

On cross-examination, Taylor testified that he could not see the grievances or their contents as Perttu passed his cell, but that he was locked in the

same wing as Richards at the time and observed Perttu taking the grievances from Richards's cell door, reading them, and then talking to Richards about their contents, which allegedly focused on sexual harassment.

Cornelius testified that while he was locked up in Unit Four, a general population unit, he witnessed RUM Perttu threaten Richards and rip up grievances.

During RUM Perttu's direct examination, he explained that he managed the administrative segregation units — Units One through Three. He stated that he rarely collects mail from his units during rounds. When he does, he said that he is usually accompanied by another officer, and that he folds the mail in half to protect the prisoners' privacy. Perttu further testified that each housing unit is an independent building at AMF, and he never takes mail between units. He also never worked in the general population units during the relevant period, nor did he have access to the mailboxes therein. According to Perttu, Stevenson and Richards were locked in different housing units on March 20, 2020, and March 25, 2020.

Unfortunately, neither Plaintiffs or RUM Perttu provided documentary evidence of AMF's layout, where Plaintiffs and their witnesses were locked throughout the relevant time, or what dates and times RUM Perttu worked and did rounds. Such documents would have clarified the testimony of all of the witnesses and had the potential to bolster witness credibility. Nonetheless, Stevenson's claims that he was able to see the names written on grievances that Perttu allegedly destroyed in March 2020, despite his inability to see anything else written on the forms and

contrary to Perttu's testimony that he folds over any mail he collects as he collects it, are unconvincing. So too is Taylor's testimony that he could discern the number of grievances Richards's submitted on various occasions, as well as their contents. Further, Cornelius's testimony that he watched Perttu take and destroy grievances in Unit Four, and Jackson's testimony that Perttu delivered prisoners' mail to him in Unit Five, lack credibility both because Perttu did not work in general population units, and because prisoners in general population units have the option to submit their grievances directly to the housing unit mailbox.

3. The evidence demonstrates that RUM Perttu could not, and in fact did not, intercept and destroy all grievances filed by Plaintiffs in the relevant time.

As an initial matter, the undersigned notes that even on the dates that RUM Perttu worked, he testified that he only works from 7:00am to 3:30pm. Moreover, RUM Perttu did not work seven days a week every week from June 2019 to March 2020. Indeed, on at least one of the dates on which Richards alleges Perttu destroyed his grievances, January 1, 2020, Perttu testified that he was not working due to the New Years holiday.

But even had Perttu been working every hour of every day, Richards's Step III Grievance Report demonstrates that Richards actually took advantage of the grievance procedure by filing Step I grievance forms twenty-six times between June 6, 2019, and April 23, 2020. (ECF No. 153, PageID.705 (Def's Ex.

C1).) Kissee's Step III Grievance Report similarly demonstrates that he was able to take advantage of the grievance procedure by filing a Step I grievance form during the relevant time. (ECF No. 154, PageID.745 (Def.'s Exh. E1).) Moreover, of Richards's six Step I grievance forms entered into evidence, three (grievance identifiers AMF-19-12-2546-28b, AMF-20-01-6-22b, and AMF-20-01-1391-12di) specifically grieved RUM Perttu, undermining any allegation that Perttu sorted through the grievances and discarded those directed towards him. (ECF No. 153, PageID.724,737,741 (Def.'s Exh. C1).)

Although the Plaintiffs' AIM records do not reflect that Plaintiffs accessed the PREA grievance procedure, they nevertheless undercut Plaintiffs' credibility. P.D. 03.03.140(EE) requires prisoners to use a formal, written, two-step PREA grievance process to exhaust sexual assault claims. However, consistent with the Prison Rape Elimination Act, 28 CFR § 115.252, the directive specifies that prisoners "shall not be required to submit a PREA grievance to a staff member who is the subject of the complaint. . . ." P.D. 03.03.140(JJ). Furthermore, the directive provides several options for prisoners reporting sexual harassment or abuse that, while not serving to exhaust claims, must nevertheless be documented by staff. For example, a prisoner may verbally report instances of sexual harassment to any MDOC employee, or through the Sexual Abuse Hotline. P.D. 03.03.140(Y). Plaintiffs' AIM records reflect that they never reported RUM Perttu, even after he allegedly destroyed numerous PREA grievances over the course of several months. They did not tell Corrections Officers working in their units that RUM Perttu was harassing them

or retaliating against them. They did not inform healthcare staff. They did not call the sexual abuse hotline posted in every unit.

In all, Richards's successful use of the grievance procedure outlined in P.D. 03.02.130 directly contradicts Plaintiffs' claim that administrative remedies were effectively unavailable, and Plaintiffs' failure use any of the alternative reporting methods set forth in P.D. 03.03.140(Y) casts doubt on their alleged attempts to file PREA grievances.

4. Plaintiffs' assertion that Corrections Officers were unwilling to process their grievances under the direction of RUM Perttu was wholly conclusory.

Perhaps in acknowledgement of the far-fetched nature of asserting that RUM Perttu single-handedly intercepted every grievance written by all Plaintiffs over the course of ten months, Plaintiff Kissee testified that none of the Corrections Officers would process his grievances either because Perttu was their superior. However, beyond this allegation, Plaintiffs provided no evidence that RUM Perttu so influenced the Corrections Officers who worked under him. Aside from Kissee, none of the witnesses testified that Plaintiffs even tried to submit their grievances to Corrections Officers in their units, let alone that the Corrections Officers refused or destroyed such grievances at the direction of RUM Perttu.

Overall, the credibility of Plaintiffs' witnesses was undermined by their inability to independently recollect the time or location of RUM Perttu's alleged destruction of Plaintiff's grievances, as well as the

unlikely circumstances under which they claimed they observed such destruction. Plaintiffs' claim that RUM Perttu thwarted their attempts to exhaust is further undermined by Richards's Step III Report and attached grievances, demonstrating that the grievance procedure was not effectively unavailable. It is also undermined by the common sense understanding that RUM Perttu was not present to intercept every grievance, and the dearth of evidence that Corrections Officers at AMF assisted RUM Perttu in refusing to submit Plaintiffs' grievances. As such, Plaintiffs have not carried their burden of showing that administrative remedies were effectively unavailable to them.

V. Recommendation

The undersigned finds that RUM Perttu has proven by a preponderance of the evidence that Plaintiffs failed to exhaust their administrative remedies. In addition, the undersigned finds that Plaintiffs have failed to prove that Perttu or any other MDOC official thwarted their efforts to file grievances against Perttu. Accordingly, the undersigned respectfully recommends that the Court dismiss Plaintiffs' claims without prejudice.

Dated: December 3, 2021 */s/ Maarten Vermaat*
MAARTEN VERMAAT
U. S. MAGISTRATE
JUDGE

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS, et al.,
Plaintiffs,

Case No. 2:20-cv-76

v.

Hon. Hala Y. Jarbou

UNKNOWN PERTTU,
Defendant.
_____/

ORDER

This is a prisoner civil rights action under 42 U.S.C. § 1983. Defendant filed a motion for summary judgment (ECF No. 34), arguing that Plaintiffs failed to exhaust their available administrative remedies. Plaintiffs filed a motion for a preliminary injunction (ECF No. 24), a motion to change venue and/or disqualify the presiding judges (ECF No. 25), and two motions for a protective order and requests for a federal investigation (ECF Nos. 38, 47). The magistrate judge issued a report and recommendation (R&R) that the Court deny the motions (ECF No. 97). Before the Court are Plaintiffs' objections to the R&R (ECF No. 99) and Defendant's objections to the R&R (ECF No. 102).

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence;

> or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

A. Defendant's Objections

In the R&R, the magistrate judge determined that Defendants had not shown that they were entitled to summary judgment on the affirmative defense of exhaustion because there was a question of fact as to whether an administrative remedy was available to Plaintiffs. According to Plaintiffs, Defendant repeatedly destroyed their grievances, rendering the grievance process unavailable to them. In response, Defendant presented an affidavit from the Grievance Coordinator, who avers that grievance forms are widely available throughout the housing units and that prisoners can file them in kite boxes located in every housing unit and in the mess hall. (*See* R&R 10, ECF No. 97.) The R&R then states:

> Logic dictates that it would be extremely difficult for RUM Perttu to singlehandedly identify and intercept every single PREA grievance the Plaintiffs claimed to have written over a period of many months. Nevertheless, those are the allegations made by Plaintiffs. Obviously, RUM Perttu does not work 24 hours per day, seven days per week. And it seems logical that Plaintiffs would have opportunities to file or deliver PREA grievance forms when Perttu was not in the housing unit. Furthermore, it seems logical that Plaintiffs would routinely encounter other prison officials who could have received PREA grievance forms. But Defendant does not make

> these arguments. He simply says grievance forms are available and kite boxes are located throughout the housing units. The Court cannot base its decisions on speculation or arguments a defendant has failed to make.

(R&R 10-11.)

Defendant quotes this portion of the R&R and urges the Court to accept this new argument. However, the Court typically does not consider arguments raised for the first time in objections and sees no compelling reason to do so here. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000).

Furthermore, if in fact Perttu destroyed Plaintiffs' grievances, it may not matter that Plaintiffs had opportunities to file others. Prisoners are not required to "utilize every conceivable channel to grieve their case[.]" *Napier v. Laurel Cnty.*, 636 F.3d 218, 224 (6th Cir. 2011). Thus, when attempting to exhaust their administrative remedies, prisoners are not necessarily obligated to go beyond the scope of the MDOC's requirements by filing multiple grievances in order to prevent prison officials from thwarting their efforts. If prisoners must follow the MDOC's rules regarding the *exhaustion* of grievances, there is "no reason to exempt the agency from similar compliance with its own rules" regarding the *processing* of grievances. *Risher v. Lappin*, 639 F.3d 236, 240-41 (6th Cir. 2011).

Defendant also contends that the R&R "improperly shifts the summary judgment standard to ask that MDOC Defendant Perttu . . . disprove the logically impossible." (Def.'s Objs. 2, ECF No. 99.) The R&R does no such thing. Instead, it simply notes an

argument that Defendant failed to raise and concludes that a question of fact remains on the question of exhaustion. Furthermore, it is not impossible to prove that Defendant did not destroy Plaintiffs' grievances or otherwise prevent them from exhausting their remedies. Among other things, Defendant can testify as to what he did or did not do with Plaintiffs' grievances. Thus, Defendant's objections are meritless.

B. Plaintiffs' Objections

1. Bench Trial / Evidentiary Hearing

The magistrate judge concluded that "the exhaustion issue in this case is appropriate for resolution at an evidentiary hearing conducted pursuant to this Court's authority under *Lee v. Willey*." (R&R 11.) In *Lee v. Willey*, 789 F.3d 673 (6th Cir. 2015), the Court of Appeals held that disputed issues of fact regarding exhaustion under the PLRA could be decided in a bench trial. *Id.* at 678. Among other things, that court noted that the Seventh Amendment right to a jury trial did not extend to the exhaustion question because it involved a "threshold issue[] of judicial administration" rather than an issue regarding the merits of the underlying case. *Id.*

Plaintiffs object to the magistrate judge's statement, contending that they have a right to a jury trial on exhaustion. As discussed in *Willey*, however, Plaintiffs do not have such a right, and neither does Defendant.

Plaintiffs also contend that *Willey* does not apply because the parties in that case consented to a bench trial, whereas the parties in this case have not

consented. Plaintiffs are mistaken. There is no indication that the parties in *Willey* consented to a bench trial. Indeed, if they had, there would have been no need for the Court of Appeals to address the issue in its opinion. Thus, the Court agrees with the R&R that it can hold an evidentiary hearing or bench trial on the issue.

2. Fair Trial

Next Plaintiffs contend that they will not receive a fair trial because they do not "trust" the judges assigned to this case. Plaintiffs contend that the section of the R&R discussing the argument Defendant failed to raise is tantamount to providing legal advice to Defendant. However, the magistrate judge raised this issue when *denying* Defendant's motion. That result *benefits* Plaintiffs. Moreover, Plaintiffs' distrust is not adequate to disqualify the judges assigned to this case.

3. Claims 3 - 7

Plaintiffs argue that the R&R does not address claims "3-7" in the complaint, which are Plaintiffs' retaliation claims. (Pls.' Objs., ECF No. 102, PageID.457.) In response to Defendant's motion for summary judgment, Plaintiffs argued that these claims are exhausted. It is not clear why Plaintiffs raise this objection because the R&R recommends that the Court *deny* Defendant's motion for summary judgment regarding exhaustion as to all claims. The Court will adopt that recommendation. Thus, the objection is moot.

4. FBI Investigation

Plaintiffs assert that the R&R wrongly denies their request for an FBI investigation. According to Plaintiffs, they are not asking the Court to *compel* an investigation, they are simply asking the Court to *request* an FBI investigation or to *forward* Plaintiffs' request to the FBI. Those requests are beyond the scope of the Court's authority, so the R&R correctly denied them.

In short, the Court discerns no merit to Plaintiffs' or Defendant's properly raised objections to the R&R. Accordingly,

IT IS ORDERED that Plaintiffs' and Defendant's objections to the R&R (ECF Nos. 99, 102) are **OVERRULED**.

IT IS FURTHER ORDERED that the R&R (ECF No. 97) is **APPROVED** and **ADOPTED** as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (ECF No. 34) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' motions for a preliminary injunction, for a change of venue, for disqualification of the judges assigned to this case, for protective orders, and for a federal investigation (ECF Nos. 24, 25, 38, 47) are **DENIED**.

Dated: August 10, 2021

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS,
#641715, et al.,
Plaintiffs,

Case No. 2:20-cv-00076

Hon. Hala Y. Jarbou
U.S. District Judge

v.

THOMAS PERTTU,
Defendant.
_____/

REPORT AND RECOMMENDATION

I. Introduction

This Report and Recommendation (R&R) addresses the following:

- Defendant's motion for summary judgment (ECF No. 34),
- Plaintiffs' motion for a preliminary injunction and request to freeze federal aid to the State of Michigan (ECF No. 24),
- Plaintiffs' motion for a change of venue and request to disqualify the U.S. District Judge (ECF No. 25), and
- Plaintiffs' motions for protective orders and requests for federal investigation and monitoring (ECF No. 38, 47).

State prisoners Kyle Richards, Kenneth Pruitt, and Robert Kissee filed this civil rights action, pursuant to 42 U.S.C. § 1983, on April 23, 2020. (ECF No. 1.) In Plaintiffs' verified complaint, they alleged numerous claims against Residential Unit Manager (RUM) Thomas Perttu. (ECF No. 1.) According to Plaintiffs, while they were imprisoned at Baraga Correctional Facility (AMF), RUM Perttu made numerous improper sexual advances towards them, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. By undersigned's count, Plaintiffs have alleged approximately 34 Eighth Amendment claims. These claims allege violation by RUM Perttu from June 2019 through April 2020. In addition, Plaintiffs allege approximately 26 acts by RUM Perttu in which Perttu supposedly interfered with Plaintiffs' ability to file grievances or otherwise pursue remedies against him. These acts of interference allegedly began in August 2019 and continued through April 2020.

In his motion for summary judgment, RUM Perttu contends that Plaintiffs failed to properly exhaust their claims against him because their prison records show that no grievances were filed by them in 2019 and 2020. (ECF Nos. 34, 35.) In response, Plaintiffs claim that Perttu thwarted their efforts to exhaust their claims by intercepting and destroying their Prison Rape Elimination Act (PREA) grievances. (ECF No. 51.) In reply, RUM Perttu argues that PREA grievances are widely available to prisoners and that Plaintiffs' grievance records do not show that they filed any PREA grievances while at AMF. (ECF No. 58.)

The undersigned concludes that there is a genuine issue of fact as to whether Plaintiffs were excused from properly exhausting their claims due to interference by Perttu. The undersigned also concludes that this issue is appropriate for resolution during an evidentiary hearing conducted pursuant to *Lee v. Willey*, 789 F.3d 673, 677 (6th Cir. 2015).[1]

The undersigned also concludes that Plaintiffs' motions – ECF Nos. 24, 25, 38 and 47 – are meritless.

Accordingly, the undersigned respectfully recommends that the Court deny RUM Perttu's motion for summary judgment. For the reasons below, the

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[1] The Eastern District of Michigan has explained that, in cases where a plaintiff claims that his efforts to exhaust his claims were thwarted, the defendant must first show that the grievance process was generally available to the plaintiff. *Alexander v. Calzetta*, No. 2:16-CV-13293, 2018 WL 8345148, at *8 (E.D. Mich. Nov. 30, 2018), report and recommendation adopted, No. 16-CV-13293, 2019 WL 1011106 (E.D. Mich. Mar. 4, 2019). Then, once this showing has been made, the burden of production shifts to the defendant to produce evidence showing that he was thwarted in his attempts to use the grievance procedures. *Id*. The District Court for the Eastern District of Michigan outlined the process as follows:

> once a defendant carries the burden of showing that there was a generally available administrative remedy, and that the prisoner did not exhaust that remedy, the prisoner has the burden of production. That is, the burden shifts to the prisoner to come forward, with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him.

Id. at *6 (internal quotation marks and citation omitted).

undersigned also recommends that the Court deny all of Richard's motions.

II. Additional Relevant Procedural History

On April 23, 2020, Plaintiffs filed this action in the U.S. District Court for the Eastern District of Michigan. (ECF No. 1.) On June 4, 2020, the case was transferred to this Court. (ECF No. 6.)

The case was stayed and entered early mediation. (ECF Nos. 11, 12.) The case failed to settle. (ECF Nos. 13, 15, and 16.)

III. Defendants' Summary Judgment Motion (ECF No. 35)

a. Standard Judgment Standard

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Kocak v. Comty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 468 (6th Cir. 2005). The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury[2] or whether it is so one-sided that one party must prevail as a matter of law." *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433, 436 (6th Cir. 2005) (quoting *Anderson v.*

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[2] Disputed issues of fact regarding exhaustion under the Prison Litigation Reform Act (PLRA) may be decided in a bench trial and need not be submitted to a jury. *Lee v. Willey*, 789 F.3d at 678.

Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 296 (6th Cir. 2005).

b. Applicable Law: Exhausting Administrative Remedies

A prisoner's failure to exhaust his administrative remedies is an affirmative defense, which Defendants have the burden to plead and prove. *Jones v. Bock*, 549 U.S. 199, 212-16 (2007). "[W]here the moving party has the burden -- the plaintiff on a claim for relief or the defendant on an affirmative defense -- his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). The Sixth Circuit has repeatedly emphasized that the party with the burden of proof "must show the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001). Accordingly, summary judgment in favor of the party with the burden of persuasion "is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

Pursuant to the applicable portion of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust his

available administrative remedies. *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth v. Churner*, 532 U.S. 731, 733 (2001). A prisoner must first exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *Porter*, 534 U.S. at 520; *Booth*, 532 U.S. at 741; *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000); *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). In order to properly exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the deadlines and other applicable procedural rules. *Jones*, 549 U.S. at 218-19; *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). In rare circumstances, an administrative remedy will be considered unavailable where officers are unable or consistently unwilling to provide relief, where the exhaustion procedures may provide relief, but no ordinary prisoner can navigate it, or "where prison administrators thwart inmates from taking advantage of a grievance [or other administrative] process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 578 U.S. 1174, 136 S.Ct. 1850, 1859-60 (2016).

"Beyond doubt, Congress enacted [Section] 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. In the Court's view, this objective was achieved in three ways. First, the exhaustion requirement "afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 525. Second, "the internal review might 'filter out some frivolous claims.'" *Id.* (quoting *Booth*, 532 U.S. at 737*)*. And third, "adjudication could be facilitated by an administrative record that

clarifies the contours of the controversy." *Id*. When institutions are provided adequate notice as required under the PLRA, the opportunity to address the claims internally furthers the additional goals of limiting judicial interference with prison administration. *Baker v. Vanderark*, 2007 U.S. Dist. LEXIS 81101 at *12.

The most common procedure through which a prisoner in MDOC custody exhausts his administrative remedies is the grievance procedure set forth in Michigan Dept. of Corrections (MDOC) Policy Directive 03.02.130 (effective on March 18, 2019), sets forth the applicable grievance procedures for prisoners in MDOC custody at the time relevant to this complaint. Inmates must first attempt to resolve a problem orally within two business days of becoming aware of the grievable issue, unless prevented by circumstances beyond his or her control. *Id.* at ¶ Q. If oral resolution is unsuccessful, the inmate may proceed to Step I of the grievance process and submit a completed grievance form within five business days of the attempted oral resolution. *Id.* at ¶¶ Q, W. The inmate submits the grievance to a designated grievance coordinator, who assigns it to a respondent. *Id.* at ¶ Y. The Policy Directive also provides the following directions for completing grievance forms: "The issues should be stated briefly but concisely. Information provided is to be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places and names of all those involved in the issue being grieved are to be included." *Id.* at ¶ S (emphasis in original).

If the inmate is dissatisfied with the Step I response, or does not receive a timely response, he may appeal to Step II by obtaining an appeal form within ten business days of the response, or if no response was received, within ten days after the response was due. MDOC Policy Directive 03.02.130 at ¶ DD. The respondent at Step II is designated by the policy. *Id.* at ¶ FF.

If the inmate is still dissatisfied with the Step II response, or does not receive a timely Step II response, he may appeal to Step III using the same appeal form. *Id.* at ¶¶ HH. The Step III form shall be sent within ten business days after receiving the Step II response, or if no Step II response was received, within ten business days after the date the Step II response was due. *Id.* The Grievance and Appeals Section is the respondent for Step III grievances on behalf of the MDOC director. *Id.* at ¶ II.

In addition, the grievance policy provides that, where the grievance alleges conduct that falls under the jurisdiction of the Internal Affairs Division pursuant to Policy Directive 01.01.140, the prisoner may file his Step I grievance directly with the inspector of the institution in which the prisoner is housed, instead of with the grievance coordinator, as set forth in ¶ W of Policy Directive 03.02.130. *Id.* at ¶ R. In such instances, the grievance must be filed within the time limits prescribed for filing grievances at Step I. *Id.* Regardless of whether the grievance is filed with the grievance coordinator or the inspector, the grievance will be referred to the Internal Affairs Division for review and will be investigated in accordance with MDOC Policy Directive 01.01.140. The prisoner will

be promptly notified that an extension of time is needed to investigate the grievance. *Id.*

When prison officials waive enforcement of these procedural rules and instead consider a non-exhausted claim on its merits, a prisoner's failure to comply with those rules will not bar that prisoner's subsequent federal lawsuit. *Reed-Bey v. Pramstaller*, 603 F.3d 322, 325 (6th Cir. 2010). The Sixth Circuit has explained:

> [A] prisoner ordinarily does not comply with MDOCPD 130—and therefore does not exhaust his administrative remedies under the PLRA—when he does not specify the names of each person from whom he seeks relief. *See Reed-Bey v. Pramstaller*, 603 F.3d 322, 324-25 (6th Cir. 2010) ("Requiring inmates to exhaust prison remedies in the manner the State provides—by, say, identifying *all* relevant defendants—not only furthers [the PLRA's] objectives, but it also prevents inmates from undermining these goals by intentionally defaulting their claims at each step of the grievance process, prompting unnecessary and wasteful federal litigation process."). An exception to this rule is that prison officials waive any procedural irregularities in a grievance when they nonetheless address the grievance on the merits. *See id*. at 325. We have also explained that the purpose of the PLRA's exhaustion requirement "is to allow prison officials 'a fair opportunity' to address grievances on the merits to correct prison errors that can and should be corrected to create an

> administrative record for those disputes that eventually end up in court." *Id*. at 324.

Mattox v. Edelman, 851 F.3d 583, 590-91 (6th Cir. 2017).[3]

c. Analysis

As noted in the Introduction, the question presented is whether there is a genuine issue of fact as to whether prison officials thwarted Plaintiffs' attempts to exhaust their claims. As explained below, the undersigned concludes that genuine issues of fact remain.

The Supreme Court held that the grievance process will be considered unavailable to prisoners whenever prison officials thwart the prisoners' attempts to exhaust "through machination, misrepresentation, or intimidation." *Ross*, 136 S.Ct. at 1859-60. In Plaintiffs' verified complaint, they allege that RUM Perttu actively prevented Plaintiffs from being able to exhaust their claims against him. Plaintiffs repeatedly claim that Perttu intercepted and destroyed PREA grievance forms that they wished to file. For example, they allege that, on August 19, 2019, RUM Perttu went to Richards' cell, displayed four PREA grievances that Richards says he had attempted to file, and tore the grievances up in front of Richards. (ECF No. 1,

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[3] In *Mattox*, the Sixth Circuit held that a prisoner may only exhaust a claim "where he notifies the relevant prison . . . staff" regarding the specific factual claim "giving the prison staff a fair chance to remedy a prisoner's complaints." *Id*. at 596. For example, grieving a doctor about his failure to give cardiac catheterization failed to grieve the claim that the doctor erred by not prescribing Ranexa.

PageID.19.) Richards claims that he was able to file other grievances but that all of his grievances relating to sexual abuse were thwarted. (*Id*.) In another example, the complaint alleges that, on February 4, 2020, RUM Perttu went to Pruitt's cell, took two PREA grievances, crumpled them, and told Pruitt that the grievances were going into the trash. (*Id*., PageID.22.) The complaint also alleges that the final instance of RUM Perttu thwarting Plaintiffs' efforts to exhaust took place on April 15, 2020. (ECF No. 1, PageID.22.)

In reply to Plaintiffs' argument, RUM Perttu asserts that Plaintiffs' grievance records do not show that Plaintiffs filed a grievance or PREA grievance against him at AMF in 2019 or 2020. (ECF No. 58.) Perttu submitted an affidavit by AMF Grievance Coordinator Thomas Hamel (ECF No. 58-2) and the applicable grievance policy (ECF No. 58-3). Hamel states that grievance forms are widely available throughout the AMF housing units and that prisoners may file grievances in kite boxes, "which are located in every housing unit and in the mess hall." (ECF No. 58- 2, PageID.272-73.) Coordinator Hamel also attests that he did not fail to process a grievance from Plaintiffs. (*Id*.)

Logic dictates that it would be extremely difficult for RUM Perttu to singlehandedly identify and intercept every single PREA grievance the Plaintiffs claimed to have written over a period of many months. Nevertheless, those are the allegations made by Plaintiffs. Obviously, RUM Perttu does not work 24 hours per day, seven days per week. And it seems logical that Plaintiffs would have opportunities to file or deliver PREA grievance forms when Perttu was not in

the housing unit. Furthermore, it seems logical that Plaintiffs would routinely encounter other prison officials who could have received PREA grievance forms. But Defendant does not make these arguments. He simply says grievance forms are available and kite boxes are located throughout the housing units. The Court cannot base its decisions on speculation or arguments a defendant has failed to make.

Accordingly, the undersigned concludes (1) that there is a genuine issue of fact as to whether Plaintiffs were thwarted from being able to properly exhaust their sexual abuse claims, and (2) that the exhaustion issue in this case is appropriate for resolution at an evidentiary hearing conducted pursuant to this Court's authority under *Lee v. Willey*.

IV. Plaintiffs' Motion for a Preliminary Injunction and Request to Freeze Federal Aid to the State of Michigan (ECF No. 24)

Plaintiffs in this case filed a very similar motion in another case pending in this district. In *Richards, et al. v. Washington, et al.*, W.D. Mich. Case No. 2:20-cv- 194 (hereinafter "Case 2"), Plaintiffs also filed a motion for preliminary injunction and request for freezing of federal aid to Michigan. (Case 2, ECF No. 18.) In fact, if that motion is compared, side-by-side, with ECF No. 24 in this case, one can see that the motion in this case is simply a copy of the other motion. The only differences are hand-written notations. U.S. District Judge Maloney denied Plaintiffs' motion. (Case 2, ECF No. 27, PageID.187.)

Plaintiffs also supplemented their motion in this case. (ECF No. 27.) RUM Perttu responded. (ECF No. 50.)

Preliminary injunctions are "one of the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (quoting *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986)). The issuance of preliminary injunctive relief is committed to the discretion of the district court. *Ne. Ohio Coal. v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006); *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000). In exercising that discretion, a court must consider whether plaintiff has established the following elements: (1) a strong or substantial likelihood of success on the merits; (2) the likelihood of irreparable injury if the preliminary injunction does not issue; (3) the absence of harm to other parties; and (4) the protection of the public interest by issuance of the injunction. *Id*. These factors are not prerequisites to the grant or denial of injunctive relief, but factors that must be "carefully balanced" by the district court in exercising its equitable powers. *Frisch's Rest., Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); *Ne. Ohio Coal.*, 467 F.3d at 1009. Moreover, where a prison inmate seeks an order enjoining state prison officials, the court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. *Glover v. Johnson*, 855 F.2d 277, 284 (6th Cir. 1988); *Kendrick v. Bland*, 740 F.2d 432, 438 n.3 (6th Cir. 1984). The party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566,

573 (6th Cir. 2002); *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978).

First, as an initial matter, Plaintiffs' requested injunction is farfetched and unrealistic. This Court obviously cannot alter federal appropriations in the context of this case. In addition, all four factors outlined above weigh in favor of denying Defendants' request. First, Plaintiffs fail to articulate how they are likely to win on the merits. (ECF No. 24, PageID.74.) Second, Plaintiffs did not explain what irreparable harm would occur but for an injunction being issued. Third, Plaintiffs' request as is would cause incalculable harm to people unrelated to this matter. And fourth, issuing a preliminary injunction is not in the public's best interest. The injunction would deny the State of Michigan accessing federal funds to help care for its 10 million residents.[4]

Accordingly, the undersigned respectfully recommends that the Court deny Plaintiffs' motion (ECF No. 24).

V. Plaintiffs' Motion for a Change of Venue and to Disqualify the U.S. District Judge (ECF No. 25)

Plaintiffs filed a motion to disqualify Judge Maloney and to change venue. Although Judge Maloney is no longer the assigned U.S. District Judge, Plaintiffs' assertions extend to other judges in this district.

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[4] According to June 2019 United States Census estimate, the State of Michigan has about 10 million residents. United States Census, *Quick Facts: Michigan*, https://www.census.gov/quickfacts/MI (last visited July 22, 2021).

Plaintiffs claim that Judge Maloney and other judges of this district are partnered with the MDOC and biased against them, and they allege that Defendant Perttu claims to personally know every judge of the district. (ECF No. 25.) Plaintiffs also filed a motion requesting judicial disqualification and seeking a change of venue in Case 2. (Case 2, ECF No. 16.) As before, if that motion is compared, side-by-side, with the motion pending in this case (ECF No. 25), one can see that the motion in this case is simply a copy of the other motion. Again, the only differences are handwritten notations.

In Case 2, U.S. District Judge Maloney denied Plaintiffs' motion for disqualification and change of venue. Judge Maloney reasoned as follows:

> Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The provision requires a judge to *sua sponte* recuse himself if he knows of facts that would undermine the appearance of impartiality. *Youn v. Track, Inc.*, 324 F.3d 409, 422–23 (6th Cir. 2003); *Liteky v. United States*, 510 U.S. 540, 547–48, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). In addition, 28 U.S.C. § 144 requires that "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge

shall be assigned to hear such proceeding." *Id.* An affidavit filed under § 144 must "allege[ ] facts which a reasonable person would believe would indicate a judge has a personal bias against the moving party." *Gen. Aviation, Inc. v. Cessna Aircraft, Co.*, 915 F.2d 1038, 1043 (6th Cir. 1990). The alleged bias must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Extrajudicial conduct encompasses only "personal bias as distinguished from a judicial one, arising out of the judge's background and association and not from the judge's view of the law." *Youn*, 324 F.3d at 423 (internal quotation marks omitted). "Personal" bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases. *Id.* (citing *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251–52 (6th Cir. 1989)); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985)).

Plaintiff complains that the judges of this court have ruled against him and are partnered with the MDOC to rule against all prisoners. To the extent that Plaintiff argues that the undersigned and Magistrate Judge Vermaat have previously ruled against him, Plaintiff Richards alleges bias that arises strictly from a judicial source, which is not a basis for disqualification. *Youn*, 324 F.3d at

> 423. To the extent that Plaintiff alleges that the Court has partnered with the MDOC to rule against prisoners or that the undersigned has a personal relationship with any Defendant, his allegations are both untrue and wholly conclusory. The undersigned has no personal relationship with any Defendant. The mere fact that Defendant Perttu or any other Defendant claimed to know the undersigned is not evidence of such a relationship.
>
> With respect to Plaintiff Richards' request to transfer venue to the Eastern District of Michigan, the request will be denied. The action was transferred from the Eastern District to this Court on September 30, 2020 (ECF No. 7), because venue was proper only in this district. *See* 28 U.S.C. § 1406(a). All Defendants reside in this district and the facts underlying the complaint occurred in this district. As a consequence, venue properly lies in this and no other district.
>
> Plaintiff Richards' motion (ECF No. 16) therefore will be denied.

On September 28, 2020, this case was reassigned to the U.S. District Judge Hala Y. Jarbou. (ECF No. 37.) Plaintiffs have made no claims with respect to Judge Jarbou's involvement in this case. Nevertheless, the reasoning that Judge Maloney applied in addressing Plaintiffs' motion in *Richards, et al. v. Washington, et al.*, applies in this case. Accordingly, the undersigned respectfully recommends that the Court deny Plaintiffs' motion (ECF No. 25).

VI. Plaintiffs' Motions for Protective Orders and Requests for Federal Investigation and Monitory (ECF Nos. 38, 47)

In both of Plaintiffs' motions, they assert that RUM Perttu and others at AMF are interfering with their mail. They request that the Court direct various federal law enforcement agencies to conduct investigations to ensure that Plaintiffs receive their legal mail. (ECF No. 38, PageID.171-172; ECF No. 47, PageID.202.)

Plaintiffs made the same allegations in Case 2. (Case 2, ECF No. 17.) In Case 2, Judge Maloney found that "Plaintiff's allegations of interference with his mail are wholly conclusory" and that his motion was "wholly unsupported and without merit." (Case 2, ECF No. 27, PageID.185.) In addition, Judge Maloney noted that "Plaintiff has no right to demand a criminal investigation of any claim." (*Id.*) The undersigned concludes that the same reasoning and same conclusion apply here.

In addition, Rule 26 of the Federal Rules of Civil Procedure affords the Court broad discretion to grant or deny protective orders. *Procter & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). The orders are designed to resolve issues involving discovery. Fed. R. Civ. P. 26. Plaintiffs' request is wholly unrelated to the discovery process.

As a result, the undersigned respectfully recommends that the Court deny Plaintiffs' motions for protective orders and federal investigations. Plaintiffs may, of course, communicate with the FBI and request an investigation.

VII. Recommendation

Accordingly, the undersigned respectfully recommends that the Court deny RUM Perttu's motion for summary judgment (ECF No. 34). The undersigned also respectfully recommends that the Court deny all of Plaintiffs' motions (ECF Nos. 24, 25, 38 and 47.) If this recommendation is accepted, all of Plaintiffs' claims will remain.

Dated: July 29, 2021

/s/ Maarten Vermaat
MAARTEN VERMAAT
U. S. MAGISTRATE
JUDGE

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).