UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JEFFREY FOWLER, PAUL WHOOTEN, MICHAEL TURNER, and MICHAEL FITZPATRICK, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THOMAS TURCO, Commissioner of Massachusetts Department of Correction, in his official capacity, and MASSACHUSETTS PARTNERSHIP FOR CORRECTIONAL HEALTHCARE, INC.,

Defendants.

C.A. NO. 1:15CV12298

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiffs Jeffrey Fowler, Paul Whooten, Michael Turner, and Michael Fitzpatrick seek certification of a class of all people who are or will be prisoners in the custody of the Massachusetts Department of Correction (ñDOCò), and who have or will have Hepatitis C while in custody and have not yet been cured. Through their policies and practices, the DOC and its medical contractor, Massachusetts Partnership for Correctional HealthCare, Inc., (ñMPCHò), are depriving prisoners with Hepatitis C of a cure for this virus that kills more people annually in the United States than the next sixty infectious diseases combined. Liver disease and its complications, up to and including death, can be avoided with timely treatment. The cost of surveilling for and treating complications from liver disease can also be avoided. Treatment with the current generation of Hepatitis C medications is simpler, shorter, and generates fewer side

effects than ever before, with near perfect cure rates. Nevertheless, Defendants deny and delay treatment, putting these prisoners at substantial risk of harm.

The acts and omissions of Defendants with respect to Hepatitis C violate the Plaintiffsô and putative class membersôrights under the Eighth Amendment to the United States Constitution. To remedy this violation, Plaintiffs seek a declaration that Defendantsôpolicies and practices with regard to Hepatitis C are unlawful, and a permanent injunction requiring Defendants to implement and adhere to a timely and effective treatment protocol for Hepatitis C. As the central issue presented by Plaintiffs is common to all putative class members, who number over 1,500, and cannot practicably be addressed through piecemeal litigation, this Court should certify a class pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), of all current and future DOC prisoners who have or will have Hepatitis C and have not yet been cured.

BACKGROUND

I. Hepatitis C in the Community.

Hepatitis C is a blood borne disease caused by a virus that brings about inflammation that damages the liver. It is a leading cause of liver disease and liver transplants. Hepatitis C is responsible for more deaths in the United States than the next sixty most common infectious diseases ***combined***.[1] In Massachusetts, Hepatitis C was once most prevalent among baby boomers. In recent years, however, a second peak has emerged with young adults.[2] This new

[1] Centers for Disease Control and Prevention, *Hepatitis C Kills More Americans Than Any Other Infectious Disease*, *available at* http://www.cdc.gov/media/releases/2016/p0504-hepc-mortality.html (last visited May 14, 2016).
[2] Bureau of Infectious Disease, Mass. Depôt of Public Health, *Hepatitis C Virus Infection 2015 Surveillance Report*, *available at* http://www.mass.gov/eohhs/docs/dph/cdc/reporting/surveillance-report-hepatitis-c.pdf (last visited May 14, 2016) at p. 13 (displaying age breakdown of new Hepatitis C cases in 2014, compared to 2007).

spike has been fueled in large part by the stateôs opioid crisis, since the virus is most commonly spread by intravenous drug use.[3]

Treatment for Hepatitis C has evolved over time. For years, the standard treatment was a combination of two drugs: Pegylated Interferon and Ribavirin. This combination therapy took 48 weeks to administer, it had the potential for serious side effects (including thrombocytopenia and depression), and it was not guaranteed to work, particularly for patients with Genotype 1, the most common genotype of Hepatitis C in the United States. *See* Ex. 1 (*MPCH Clinical Guidelines: Evaluation and Treatment of Hepatitis C and Cirrhosis* (July 1, 2013)) at 6 (combination therapy had 40-45% response rate for Genotype 1).

In 2011, the FDA approved two new protease inhibitors which, when either one was taken alongside combination therapy, produced better results ï an up to 80% cure rate for Genotype 1. *Id.* This ñtriple therapyò became the new standard of care. Moreover, triple therapy even cured many of the patients who had previously tried combination therapy and were unsuccessful. Until the advent of triple therapy, these nonresponders or relapsers had no further treatment options.[4]

In November and December 2013, the FDA approved two new direct-acting antiviral medications, Sovaldi and Olysio.[5] Either medication could be taken with combination therapy, and they could also be used together without combination therapy. The direct-acting antivirals

[3] Bureau of Infectious Disease, Mass. Depôt of Public Health, *Shifting Epidemics: HIV and Hepatitis C Infection among Injection Drug Users in Massachusetts*, *available at* http://www.mass.gov/eohhs/docs/dph/aids/shifting-epidemics-report.pdf (last visited May 14, 2016) at p. 1.

[4] *See, e.g.*, Gara, Naveen and Marc Ghany, ñThe New Standard of HCV Therapy: Retreatment in Experienced Patients,ò *Clinical Liver Disease*, Vol. 1, No. 1 (AASLD February 2012), *available at* http://onlinelibrary.wiley.com/store/10.1002/cld.4/asset/4_ftp.pdf;jsessionid=C23561D420F9C28CAA3445886B6B9DA8.f03t04?v=1&t=io9db8xl&s=8d6299e4b407cbfea6f210f31e5ab13e886a8167) (last visited May 15, 2016), at 16-19.

[5] *See* U.S. Food and Drug Administration, ñFDA approves Sovaldi for chronic Hepatitis C,ò *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm377888.htm (last visited May 15, 2016).

improved outcomes considerably.[6] On October 10, 2014, the FDA approved Harvoni, a one-pill regimen that combined Sovaldi with another medication to create an Interferon-free regimen, one with a cure rate well over ninety percent.[7] On December 19, 2014, the FDA approved Viekira Pak, a multiple-pill regimen that was also Interferon-free and highly effective.[8]

These Interferon-free regimens[9] marked a major advance in Hepatitis C treatment. They have an outstanding cure rate for every genotype, especially Genotype 1. They work on patients who had failed previous treatments. *See* Ex. 2 (AASLD and IDSA, ñRetreatment of persons in whom prior therapy has failed,ò in *HCV Guidance: Recommendations for Testing, Managing, and Treating Hepatitis C* (last modified April 25, 2016)). They pose far less risk of significant side effects, and the standard duration of treatment has dropped from 48 weeks under combination or triple therapy, to twelve weeks with the new regimens. *Id.*

With this significant advance came significant changes in the standard of care for Hepatitis C. Previously, both patient and provider weighed the possible benefits of treatment against potential drawbacks, including the possibility of treatment failure or relapse, and the potential for bad side effects. It was standard practice for providers to try to assess patientsô fibrosis level ï the amount of scarring in their liver ï before deciding whether to recommend treatment. The assessment was typically made by liver biopsy, and the results of that biopsy, along with the patientôs other symptoms or complicating conditions, would inform the decision

[6] Centers for Disease Control and Prevention, ñWhat is the treatment for chronic Hepatitis C?ò *HCV FAQs for Health Professionals*, *available at* http://www.cdc.gov/hepatitis/hcv/hcvfaq.htm#d3 (last visited May 15, 2016) (80-95% cure rate).
[7] U.S. Food & Drug Administration, *FDA approves first combination pill to treat hepatitis C, available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm418365.htm (last visited May 15, 2016).
[8] U.S. Food & Drug Administration, *FDA approves Viekira Pak to treat hepatitis C*, *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm427530.htm (last visited May 15, 2016).
[9] They now also include Zepatier, a drug approved by the FDA in early 2016. U.S. Food & Drug Administration, *FDA approves Zepatier for treatment of chronic Hepatitis C genotypes 1 and 4*, *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm483828.htm (last visited May 15, 2016).

of whether to undergo treatment. That decision was also informed by the possibility of new medications emerging ï medications that would offer improved cure rates and fewer burdens.

Those new medications are here, with near-perfect cure rates, minimal side effects, and shorter treatment durations. The American Association for the Study of Liver Diseases (AASLD) and the Infectious Diseases Society of America (IDSA) have issued guidelines for the treatment of Hepatitis C, modifying those guidelines in real time as new information becomes available. *See* www.hcvguidelines.org. The guidelines now call for the treatment of everyone with chronic Hepatitis C. *See* Ex. 3 (AASLD and IDSA, ñWhen and in whom to initiate HCV therapy,ò in *HCV Guidance: Recommendations for Testing, Managing, and Treating Hepatitis C* (last updated February 24, 2016)) (ñTreatment is recommended for all patients with chronic HCV infection, except those with short life expectancies that cannot be remediated by treating HCV, by transplantation, or by other directed therapyò).[10]

II. Hepatitis C Treatment in the DOC

Hepatitis C is highly prevalent in prisons. As combination therapy emerged in the early 2000s, the Massachusetts Department of Correction convened a task force to address diagnosis, evaluation and treatment of Hepatitis C within the state prison system. Ultimately, the DOC and

[10] The guidelines initially distinguished between patients based on their severity of disease, but the expert panel removed that provision, writing:

> When the US Food and Drug Administration (FDA) approved the first IFN-sparing treatment for HCV infection, many patients who had previously been ñwarehousedò sought treatment, and the infrastructure (experienced practitioners, budgeted health-care dollars, etc.) did not yet exist to treat all patients immediately. Thus, the panel offered guidance for prioritizing treatment first to those with the greatest need. Since that time, there have been opportunities to treat many of the highest-risk patients and to accumulate real-world experience of the tolerability and safety of newer HCV medications. More importantly, from a medical standpoint, data continue to accumulate that demonstrate the many benefits, within the liver and extrahepatic, that accompany HCV eradication. Therefore, the panel continues to recommend treatment for all patients with chronic HCV infection, except those with short life expectancies that cannot be remediated by treating HCV, by transplantation, or by other directed therapy.

Id.

its then-medical contractor implemented a protocol in which treatment was rationed. Ex. 4 (Carpenter, Kathyrn and Danielle Sorenson, *The Management of Hepatitis C Treatment in Massachusetts State Correctional Facilities* (Worcester Polytechnic Institute April 26, 2007)) at 11-12. Prisoners with Hepatitis C were deemed eligible for treatment based on their liver fibrosis stage, and other complications of the illness or other co-morbidities (such as HIV). *Id.* A prisoner deemed eligible for treatment was then placed on a wait list. The DOC and its contractor then treated prisoners with combination therapy, in batches of ten. *Id.*

The DOC set a maximum number of treatment slots, *id.*, and closely monitored spending on Hepatitis C treatment, with combination therapy having a stand-alone line item in monthly pharmacy spending reports. *See* Ex. 5 (DOC pharmacy summary reports for FY09 ï FY15). At its most recent high point there were 95 or 96 treatment slots, *see* Ex. 4 at 11, Ex. 6 (2010 DOC contract amendment) at Attachment C, though on average only 81 patients were being treated at any given time. Ex. 5 at p. 1 (FY09 average of 81 ñInmates on Rebetron/Pegintronò). The number of prisoners receiving combination therapy subsequently declined steadily, over a period of years. Ex. 5 (FY10 ï FY14 pharmacy reports); Ex. 6 at Attachment C (reducing ñtreatment capò to 70). By Fiscal Year 2014, the average number of prisoners being treated in a given month was sixteen, out of a prison population of over 10,000. Ex. 5 at 6.

Well before triple therapy supplanted combination therapy as the new standard of care, the Hepatitis C task force was reconvened. Ex. 7 (February 11, 2009 email from Patti Onorato). The imminent arrival of triple therapy, and of the direct-acting antivirals beyond that, were known and contemplated well before their FDA approval. *See* Ex. 8 (March 3, 2011 DOC Pharmacy & Therapeutics Committee minutes) at 5 (presentation made regarding medications ñin late-phase development for use in Hepatitis Cò). The then-medical contractor for DOC had

proposed a significant increase in commitment to treatment, Ex. 9 (excerpt from MGT of America, Inc., *Analysis of Health Care Costs in the DOC* (December 2011)) at 80, but when triple therapy arrived it was not made available in the DOC. *See* Ex. 10 (April 13, 2012 letter from Joel Thompson to Gov. Deval Patrick *et al.*); Ex. 11 (July 2, 2012 letter from Lawrence Weiner to Joel Thompson). It was not introduced into the DOC until 2013, *see* Ex. 12 (excerpt of June 2013 nonformulary medication report, reflecting orders for Boceprevir), by which time the DOC was treating fewer and fewer prisoners, and the direct-acting antivirals were approved by the FDA shortly thereafter, rendering triple therapy obsolete. *See* Ex. 5 at 5-6 (declining number of inmates on Hepatitis C medications through FY13 and FY14).

Treatment has remained out of reach for almost all DOC prisoners with Hepatitis C. The Pharmacy & Therapeutics Committee acknowledged the arrival of new medications, but for months it postponed any rollout. *Compare* Ex. 13 (April 2014 P&T minutes: ñguidelines are under development) *with* Ex. 14 (August 2014: ñ3 patients have been evaluated and cleared to start [Sovaldi] therapy in Augustò) *and* Ex. 15 (October 2014: five patients evaluated and cleared to begin ñonce operational processes are put into placeò). It was October 2014 when the first DOC prisoner received one of the new medicines, Sovaldi, which he took with the old combination therapy. Ex. 16 (December 2014 P&T Committee minutes) at 2. As of February 2015, only three prisoners were receiving Hepatitis C treatment. Ex. 5 at 7.

The available treatment for Hepatitis C has become almost 100% effective, requires no Interferon, can be taken orally for a much shorter duration, and involves no major side effects, but Defendants are delaying and denying treatment for virtually everyone. This practice contrasts sharply with the AASLD/IDSA guidelines, which call for the treatment of virtually everyone with Hepatitis C.

III. Emilian Paszko.

Originally a Plaintiff in this action, Emilian Paszko died of complications from Hepatitis C on December 14, 2015. In late 2013, as Sovaldi and Olysio were obtaining FDA approval, Mr. Paszko was suffering from decompensated cirrhosis, portal hypertension, esophageal varices, and ascites. *See* Ex. 17 (selected medical records of Emilian Paszko). In the two years that followed, Mr. Paszko required multiple hospitalizations. The gastroenterologists who treated him discussed Hepatitis C treatment. As early as April 2014, a specialist noted that ñat this time he is not a good candidate for the antiviral therapy *that is currently available*.ò *Id.* at 6 (emphasis added). In June, another hospital provider stated that ñgiven his advanced liver disease, he is a good candidate at this time for direct-acting antivirals.ò *Id.* at 8. In November of 2014, after the arrival of Harvoni, the gastroenterology service noted that ñthe newest therapies are not approved in the DOC system at this point in time; although, the patient would certainly be a candidate for consideration of therapy once these are approved.ò *Id.* at 12. In the ensuing months, Mr. Paszko saw the gastroenterology service several more times and was hospitalized again, but there was no movement toward Hepatitis C treatment. *Id.* at 14-47. Finally, at an August 3, 2015 video appointment, a gastroenterologist concluded that Mr. Paszko was too sick for treatment and that a liver transplant was the primary treatment. *Id.* at 49.

Mr. Paszko was exceedingly well known to Defendants and to the specialists at Lemuel Shattuck Hospital who treated him. He should have been evaluated for Hepatitis C treatment as soon as the direct-acting antivirals became available; his specialist providers confirmed that he was a good candidate for such treatment. Instead, Defendants allowed 20 months to pass before having him evaluated for treatment, at which point it was thought to be too late.

IV. Jeffrey Fowler.

Plaintiff Jeffrey Fowler has had Hepatitis C, genotype 1a, for over 25 years. Ex. 18 (Fowler Affidavit) at ¶ 1. A nonresponder to combination therapy, Mr. Fowler was approved by MPCH for triple therapy in 2014. Unfortunately, he was a nonresponder to triple therapy also, and he suffered from serious side effects during the treatment. *Id.* ¶¶ 3-8. Mr. Fowler believed and was told that given his history and the previously approved attempts to treat him, he would be a high priority for treatment with one of the Interferon-free regimens. *Id.* ¶ 9. For almost two years, however, he has been waiting, with MPCH refusing to consider him for treatment based in part on a prior liver biopsy ï a biopsy that preceded his triple therapy treatment. *Id.* ¶ 10. Mr. Fowler now has abdominal pain, and lab tests suggesting that his condition has become markedly worse; he was told that he is now recommended for treatment. But Mr. Fowler has no idea whether MPCH has or will approve treatment, or when. *Id.* at ¶ 14.

V. Paul Whooten.

Plaintiff Paul Whooten has Hepatitis C and failed combination therapy treatment in the 2000s. Ex. 19 (Whooten Affidavit) at ¶¶ 2-4. He has sought to be treated again since entering DOC custody in 2011. He has been deemed ineligible for treatment first because of his pretrial status, then because he had spent less than a year as a sentenced prisoner in DOC (despite the fact that he had spent the previous two years in DOC custody as a pretrial detainee). *Id.* at ¶¶ 5-7. Mr. Whooten has now been a sentenced prisoner for more than a year, but he has not been considered for treatment nor even had a gastroenterology consult. *Id.* ¶ 8.

VI. Michael Turner.

Plaintiff Michael Turner has Hepatitis C, is in DOC custody, and will remain so until he is released in 2021 or 2022, unless he is paroled before then. Ex. 20 at ¶¶ 1-2. Mr. Turner was

treated with combination therapy while in the DOC, in 2012, but the treatment was stopped as it was not working and was causing serious side effects. *Id.* ¶ 5. Mr. Turner sought retreatment and spoke with MPCH providers about seeking triple therapy or waiting for Interferon-free regimens to arrive. He agreed to wait. *Id.* at ¶ 6.

Accordingly, in November of 2014 (after FDA approval of Harvoni) Mr. Turner sought treatment. At that point, MPCH deemed him ineligible for treatment, suggesting that his liver function was normal, notwithstanding his previous evaluation and treatment approval years before. *Id.* at ¶ 7. Mr. Turner continued to be found ineligible until September 2015, when he saw a gastroenterologist. *Id.* at ¶ 9. That specialist told Mr. Turner that he was approved for treatment and would start medications in the following week. *Id.* Nevertheless, Mr. Turner has not begun Hepatitis C treatment; MPCH has told him that he is on a waiting list and is a ñlower priorityò patient. *Id.* at ¶ 10. Blood tests taken in January 2016 suggest that Mr. Turner now has stage F4 liver fibrosis. *Id.* at ¶ 11.

VII. <u>Michael Fitzpatrick.</u>

Plaintiff Michael Fitzpatrick is a DOC prisoner who is due to be released in September of this year. Ex. 21 at ¶ 1. He has Hepatitis C, genotype 1a, which has brought about cirrhosis of the liver, GAVE disease, and esophageal varices. *Id.* at ¶ 3. As early as April 2012, testing indicated cirrhosis, and a specialist recommended putting Mr. Fitzpatrick ñat the top of the listò for treatment. *Id.* at ¶ 5. A year later, Mr. Fitzpatrick was started on triple therapy, but he suffered from severe side effects that forced MPCH to discontinue treatment in July 2013. *Id.* at ¶¶ 6-7.

Unsurprisingly, as early as April 2014 a specialist recommended retreatment with direct-acting antivirals. The gastroenterologist recommended treatment with Sovaldi and Olysio (the

only available Interferon-free regimen at that time, as Harvoni was not yet available). *Id.* at ¶ 8. Mr. Turner was not treated then. He was hospitalized on several occasions, where doctors found evidence of portal hypertension, splenomegaly, esophageal varices, and GAVE disease. Mr. Fitzpatrick frequently found himself coughing up blood and/or with blood in his stool. *Id.* at ¶¶ 9-10, 12-14.

MPCH declared Mr. Fitzpatrick ineligible for treatment in April 2015, for twelve months, because he had been issued a disciplinary report for possession of homebrew. *Id.* at ¶ 11. Notwithstanding the fact that he was previously recognized as a high-priority patient, and that he has suffered from serious complications of his Hepatitis C, he still awaits treatment. *Id.* at ¶ 15. Although MPCHôs period of ineligibility should have lifted, he apparently falls within MPCHôs exclusion of treatment for prisoners too close to their release date. *See* Ex. 1 at 4-5.

PROPOSED CLASS DEFINITION

All people who are or will be prisoners in the custody of the Massachusetts Department of Correction (ñDOCò), who have or will have Hepatitis C and have not yet been cured.

ARGUMENT

Federal Rule of Civil Procedure 23(a) contains four ñprerequisitesò for class certification. If those prerequisites are met, and if the case also falls within one of the ñtypesò of class actions described in Rule 23(b), then the plaintiffs ñare entitl[ed]é to pursue [their] claim as a class action.ò *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 398 (2010). In the present case, those conditions are satisfied.

I. <u>The Proposed Class Satisfies the Four Prerequisites of Fed. R. Civ. P. 23(a).</u>

The four prerequisites required under Fed. R. Civ. P. 23(a) are known as numerosity, commonality, typicality, and adequacy. First, the class must be ñso numerous that joinder of all

members is impracticable.ò Fed. R. Civ. P. 23(a)(1). Second, there must be ñquestions of law or fact common to the class.ò Fed. R. Civ. P. 23(a)(2). Third, the claims of the representative plaintiffs must be ñtypical of the claims or defenses of the class.ò Fed. R. Civ. P. 23(a)(3). Finally, the representative plaintiffs must ñfairly and adequately protect the interests of the class.ò Fed. R. Civ. P. 23(a)(4).

A. Numerosity.

The proposed class is so numerous that joinder of all members is impracticable. *See* Fed. R. Civ. P. 23(a)(1). According to information obtained via a public records request, as of January 2015, there were 1,560 prisoners in its custody known to have Hepatitis C, out of 10,379 total prisoners. Exhibit 22 (March 5, 2015 P&T Committee minutes) at 2, 1. A high enough number is itself sufficient to render joinder impracticable, and in the First Circuit, the number is generally forty. *Reid v. Donelan, 297 F. R. D. 185* (D. Mass 2014); *George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 173 (D. Mass. 2012). *See also Scott v. Clarke*, 61 F.Supp.3d 569, 584 (W.D.Va. 2014) (certifying class s of 1,200 prisoners claiming inadequate medical care). The acknowledged number of DOC prisoners with Hepatitis C more than suffices to establish numerosity.[11]

[11] Sheer numbers aside, the turnover in the DOC prison population also satisfies Rule 23(a)(1). Courts consider the transient membership in the proposed class to determine ñthe difficulty or inconvenience of joining all members of the class.ò *George*, 286 F.R.D. at 173 (quoting *Advertising Specialty Nat'l Ass'n v. Fed. Trade Comm'n*, 238 F.R.D. 108, 119 (1st Cir. 1956)). Here, the transient nature of the DOC population makes joinder impracticable: ñ[u]nforeseen members will join the class at indeterminate points in the future, making joinder impossible.ò *Reid*, 297 F.R.D. at 189. Cases involving transient commitment or incarcerated populations are particularly well-suited to class certification because ñthe inmate population é is constantly revolving.ò *Green v. Johnson*, 513 F.Supp. 965, 975 (D.Mass. 1981). *See also J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D.La. 2009) (ñ[t]he mere fact that the population of the [detention center] is constantly revolving during the pendency of litigation renders any joinder impracticableò); *Gordon v. Johnson*, 300 F.R.D. 31, 36 (D.Mass. 2014); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001); *Williams v. Conway*, No. 9:15-cv-427, 2016 WL 65064, at *3 (N.D.N.Y. Jan. 4, 2016) (ñthe class action device is particularly well-suited in actions brought by prisoners due to the ófluidô composition of the prison populationé [and] generally tend[s] to be the norm in actions such as thisò (internal quotation marks and citation omitted)) (quoting *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992)); *Scott*, 61 F.Supp.3d at 584.

B. Commonality.

There are clearly ñquestions of law or fact common to the class.ò Fed. R. Civ. P. 23(a)(2). Commonality exists when plaintiffs ñdemonstrate that the class claims ódepend upon a common contentionô and that determining the truth or falsity of that contention ówill resolve an issue that is central to the validity of each one of the claims in one stroke.ôò *Connor B., ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 32 (D. Mass. 2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011)). ñEven a single common questionò is sufficient to satisfy Rule 23(a)(2). *Wal-Mart*, 131 S.Ct. at 2556 (internal quotations and citations omitted).

This case presents common questions central to the validity of the putative classô claims, which include, but are not limited to:

a. whether treatment for Hepatitis C is a serious medical need;
b. whether Defendants have knowingly failed to provide the necessary staging ï the testing needed to determine the severity of the disease ï of Hepatitis C-positive prisoners;
c. whether Defendants have knowingly failed to provide the most effective and appropriate treatment for Hepatitis C;
d. whether Defendants have knowingly employed policies and practices that unjustifiably delay or deny treatment for Hepatitis C;
e. whether Defendantsô failures have placed Hepatitis C-positive prisoners at risk of suffering a deterioration in health, new ailments, worsening of existing ailments, and the prospect of premature or unnecessary disability or death; and

f. whether Defendantsô policies and practices reflect deliberate indifference to the serious medical needs of the class members, in violation of their right to be free from cruel and unusual punishment.

The central issues presented by this case are ñcapable of class-wide resolutionò in ñone stroke.ò *Wal-Mart*, 131 S.Ct. at 2551. The proposed class thus ñha[s] common interest in the disposition of the disputed questions of law,ò *Banner v. Smolenski*, 315 F.Supp. 1076, 1080 (D. Mass. 1970), and this class action will generate common answers. *See Wal-mart*, 131 S.Ct. at 2551 (citations omitted). Additionally, the central legal issues arise from facts common to all class members. Every class member has been subjected to or is at imminent risk of suffering the same rights violations by the Defendants, as a result of the same policies and practices.

Any factual differences that may exist among class members in terms of their individual medical condition cannot defeat this commonality. The key questions do not revolve around each prisonerôs particular plight, but the Defendantsô systemic deficiencies in treating Hepatitis C. ñPlaintiffs have alleged specific and overarching systemic deficienciesò on the part of the DOC and its medical contractor; ñ[t]hese systemic shortcomings provide the óglueô that unites Plaintiffsô claims.ò *Connor B.*, 278 F.R.D. at 34. Courts elsewhere have similarly found the commonality requirement satisfied in claims regarding inadequate prison health care. *See, e.g., Scott*, 61 F.Supp.3d at 584-87 (whether defendantsô policies and practices place current and future prisoners at substantial risk of serious harm, to which defendants are deliberately indifferent, implicates common questions of fact and law), 587-88 (citing other post-*Wal-Mart* decisions finding commonality in prisoner class actions challenging unconstitutional conditions of confinement); *Parsons v. Ryan*, 754 F.3d 657, 675-85 (9th Cir. 2014). Plaintiffs, therefore, satisfy the commonality requirement.

C. Typicality.

Plaintiffsô claims are typical of those of the proposed class. *See* Fed. R. Civ. P. 23(a)(3). Although the ñclaims of the entire class need not be identical,ò the class representatives ñmust generally ópossess the same interests and suffer the same injuryôas the unnamed class members.ò *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, at 156 (1982) (citations omitted). Representative plaintiffs can show typicality by ñdemonstrating that [their] injuries arise from the same course of conduct as the rest of the class, and that [their] claims are based on the same legal theory as those of the class.ò *Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, 285 F.R.D. 169, 178 (D. Mass. 2012). ñTypicality óis designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.ò *Glass Dimensions,* 285 F.R.D. at 178 (citation omitted).

Plaintiffs and members of the proposed class are, or will be, subjected to the same challenged policies, practices, and harms by the Defendants. Like all other members of the class, Plaintiffs have Hepatitis C. They have not been treated with the available medication that is nearly one hundred percent curative, with minimal side effects. They are being subjected to the same policies and practices surrounding Hepatitis C treatment, policies and practices that place them at risk of serious harm from untreated Hepatitis C, including cirrhosis, liver cancer, and other complications from end stage liver disease.[12]

In addition, as specified in the Complaint, Plaintiffs seek declaratory and injunctive relief based on the same legal theories that would provide relief to the rest of the proposed class.

[12] It does not matter that they may have suffered different complications or symptoms, or that they are at different stages of their disease progression. The fact that Plaintiffsô harm ñmay differ in some respects from those suffered by unnamed Plaintiffs does not undermine typicality.ò *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 296-97 (D. Mass. 2011) (citations omitted). Indeed, as with commonality, it is ñ[b]ecause Plaintiffs have identified specific systemic failures that expose the entire Plaintiff classò to rights violations and an unreasonable risk of additional harms that ñthe typicality requirement is satisfied.ò *Connor B.*, 272 F.R.D. at 297; *Williams*, 2016 WL 65064, at *5. Other courts have found likewise in cases challenging the adequacy of prison health care. *See Parsons*, 754 F.3d at 685-86; *Scott*, 61 F.Supp.3d at 589-90.

Accordingly, ñno possibility exists that an individual claim or factual difference will óconsume the meritsô of this class action.ò *Reid v. Donelan*, 297 F.R.D. 185, 191 (D. Mass. 2014). Plaintiffs, therefore, satisfy the typicality requirement.

D. <u>Adequacy.</u>

Finally, Plaintiffs will ñfairly and adequately protect the interests of the class.ò Fed. R. Civ. P. 23(a)(4). To satisfy this requirement, Plaintiffs must ñófirst show that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation.ò *Reid*, 297 F.R.D. at 191 (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). With respect to class counsel, courts must consider ñ(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counselôs experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counselôs knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.ò Fed. R. Civ. P. 23(g). Courts can also consider ñany other matter pertinent to counselôs ability to fairly and adequately represent the interests of the class.ò *Id.*

Plaintiffsô interests are consistent with, and are ñnot antagonistic to or in conflict withò the interests of the proposed class as a whole. *Connor B.*, 272 F.R.D. at 297. The requested declaratory and injunctive relief will apply equally to and benefit all class members. Plaintiffs are not seeking damages or any other limited resource that could yield conflicts. Because ñevery member is seeking the same remedyé based on an identical theoryé Plaintiffsô interests are coextensive with the class.ò *Reid*, 297 F.R.D. at 191.

Moreover, Plaintiffs have retained experienced and competent counsel who will fairly and adequately protect the interests of the proposed class. Plaintiffs are represented by PrisonersôLegal Services (ñPLSò) and the law firm Shapiro, Weissberg & Garin (ñSWGò), on behalf of the National Lawyers Guild.

PLS is a not-for-profit legal services corporation established in 1972 to promote the safe, humane and lawful treatment of Massachusetts prisoners. It has litigated numerous complex civil rights class actions, and civil rights actions addressing prison health care, and is experienced in the protection of the statutory and constitutional rights of prisoners. *See, e.g., Souza v. Sheriff of Bristol County*, 455 Mass. 573 (2010); *Haverty v. Comm'r of Correction*, 440 Mass. 1 (2003); *Nunes v. Mass. Dep't of Correction*, 766 F.3d 136 (1st Cir. 2014). SWG has substantial experience litigating class actions and civil rights actions, including prison cases. *See, e.g., Ponte v. Real*, 471 U.S. 491 (1985); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979); *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8 (1st Cir. 2004); *Jews for Jesus, Inc. v. Mass. Bay Transportation Authority*, 783 F.Supp. 1500 (D. Mass. 1991); *Bentley v. Essex County*, Essex Superior Court, Civ. No. 2011-1907.

Plaintiffsôcounsel have already invested substantial time and resources in this case. Before filing suit, Plaintiffsôcounsel communicated with, visited, reviewed records for, and advocated for multiple DOC prisoners with Hepatitis C; investigated the Defendantsôpolicies and practices around Hepatitis C treatment; and researched potential claims. For over a decade, PLS has advocated for prisoners about Hepatitis C specifically, and it has investigated the DOCôs practices in treating this disease. *See, e.g.,* Ex. 10. These efforts and others, together with the willingness of Plaintiffsôcounsel ñto fund all costs of this litigation through trial,ò

ensure that members of the proposed class will be adequately represented. *Connor B.*, 272 F.R.D. at 297.

II. The Proposed Class Meets the Requirements of Fed. R. Civ. P. 23(b).

Plaintiffs also meet at least one of the requirements of Fed. R. Civ. P. 23(b). Specifically, Plaintiffs meet the requirements of Rule 23(b)(2), which permits class certification when the adverse party ñhas acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.ò

ñThe key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted ï the notion that the conduct is such that it can be enjoined or declared unlawful as to all of the class members or as to none of them.ò *Wal-Mart*, 131 S.Ct. at 2557 (internal quotations omitted); *see also Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). This feature of Rule 23(b)(2) certification makes it ñuniquely suited to civil rights actions,ò *Connor B.*, 272 F.R.D. at 297 (quoting *Yaffe*, 454 F.2d at 1366). ñ[C]lass actions certified pursuant to Rule 23(b)(2) are particularly important in cases involving civil rights actions, specifically those related to hospital or prison reform,ò as class certification in such cases is ñcrucial to ensure that the granted relief benefits all members of the class.ò *Rolland v. Patrick*, 2008 WL 4104488, at *6 (D. Mass. Aug. 19, 2008) (citations omitted). Courts routinely certify Rule 23(b)(2) class actions within these contexts, including claims for inadequate prison health care. *See Smith v. Ashe*, 106 F.R.D. 353, 354-55 (D. Mass. 1985) (certifying a 23(b)(2) class challenging conditions of confinement and medical treatment for prisoners segregated from general population); *Parsons*, 754 F.3d at 686-87 (certifying 23(b)(2) class challenging adequacy of all health care in state prison system); *Scott*, 61 F.Supp.3d 569 (certifying 23(b)(2) class

challenging adequacy of all health care in womenôs prison); *id.* at 583 (citing other similar cases).

Rule 23(b)(2) certification is appropriate in this matter. Defendants have acted on grounds that generally apply to the entire class. The unlawful policies and practices of the Defendants, as well as the constitutional rights violations suffered by Plaintiffs as a result of Defendantsô policies and practices, are substantially similar, if not identical, among members of the class. Furthermore, Plaintiffs seek declaratory and injunctive relief that ñwould benefit the entire class.ò *Connor B.*, 272 F.R.D. at 297; *see Gordon*, 300 F.R.D. at 38.

Additionally, cases brought by prisoners, like Plaintiffs, are well-suited to class action treatment, ñdue to the ófluid compositionô of the prison population.ò *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (quoting *Dean v. Coughlin,* 107 F.R.D. 331, 332 (S.D.N.Y. 1985)). Prisoners are released or transferred and new prisoners arrive every day, while the underlying claims tend to remain. *Dean*, 107 F.R.D. at 323-33; *see also Henderson v. Thomas*, 289 F.R.D. 506 (M.D. Ala. 2012) (certifying class of HIV-positive prisoners who alleged discrimination based on disability); *Hernandez v. County of Monterey*, 305 F.R.D. 132 (N.D. Cal. 2015) (certifying class of jail inmates who challenged health care and disability policies and practices).

Here, there is a danger of mootness based on the nature of the prison population and the risk that the Defendants may provide treatment to the named Plaintiffs in order to seek to resolve their individual issues, which will fail to resolve the systemic problems alleged. Similarly, there is a risk that a declaration of the rights of each named Plaintiff would not resolve the problems of the other class members because requiring the Defendants to fulfill their statutory and

constitutional obligations as to several individuals will not provide a resolution for the alleged systemic problems. Accordingly, Rule 23(b)(2) certification is proper.

III. In the Alternative, the Court Should Order Class Discovery.

If, despite the above showing regarding the appropriateness of class certification, the Court finds that the present record is not adequate to determine whether a class should be certified, Plaintiffs respectfully request that the Court order class discovery. *See Yaffe*, 454 F.2d at 1367. Defendants are in possession of extensive information about members of the proposed class, limited discovery of which would further demonstrate that class certification is proper.

CONCLUSION

The proposed class satisfies the prerequisites of Fed. R. Civ. P. 23(a) and (b). Plaintiffs respectfully request that this Court certify the proposed class of DOC prisoners with Hepatitis C and appoint the undersigned counsel as class counsel under Fed. R. Civ. P. 23(g). If the Court does not now certify a class, Plaintiffs request that it order class discovery.

Plaintiffs, by their attorneys,

/s/ Joel H. Thompson

Jonathan Shapiro, BBO #454220
jshapiro@swglegal.com
David Kelston, BBO #267310
dkelston@swglegal.com
Shapiro Weissberg & Garin
90 Canal Street
Boston, MA 02114
(617) 742-5800, ext. 115

Joel H. Thompson, BBO #662164
jthompson@plsma.org
PrisonersôLegal Services
10 Winthrop Square, 3rd Flr.
Boston, MA 02110
(617) 482-2773, ext. 102

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 16, 2016.

/s/ Joel H. Thompson
Joel H. Thompson