**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| **CHARLES GRAHAM, *et al.*,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **No. 3:16-cv-01954** |
| | ) | **Judge Waverly D. Crenshaw, Jr.** |
| **TONY C. PARKER, *et al.*,** | ) | **Magistrate Judge Joe Brown** |
| | ) | |
| **Defendants.** | ) | **JURY TRIAL NOT DEMANDED** |

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**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS**

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Plaintiffs have brought an action challenging the Tennessee Department of Correction's Hepatitis C Protocol as unconstitutional under the Eighth Amendment. Plaintiffs seek class certification (D.E. No. 14). The Court should deny class certification because Plaintiffs cannot satisfy the requirements of Federal Rule of Civil Procedure 23 and cannot proceed efficiently as a class action.

## FACTS

The Department's current Hepatitis C Virus ("HCV") Protocol (the "Protocol") (*See* D.E. No. 1-1, Ex. A to the Complaint), sets forth a detailed procedure for screening and treatment of Hepatitis C. The screening procedure is set forth at page 4 of the Protocol:

> Screening Criteria for testing for HCV infection is recommended for:
>
> - Sentenced inmates with risk factors for HCV infection
> - All inmates with certain clinical conditions
> - Inmates who request testing.
>
> Testing for HCV infection at the prevention baseline visit is recommended for sentenced inmates who have the following risk factors:

- Ever injected illegal drugs or shared equipment (including intranasal use of illicit drugs)
- Received tattoos or body piercings while in jail or prison, or from any unregulated source
- HIV or chronic hepatitis B virus (HBV) infection
- Received a blood transfusion or an organ transplant before 1992, or received clotting factor transfusion prior to 1987
- History of percutaneous exposure to blood
- Ever received hemodialysis
- Born to a mother who had HCV infection at the time of delivery

HCV testing is recommended for all inmates with the following clinical conditions, regardless of sentencing status:

- A reported history of HCV infection without prior medical records to confirm the diagnosis
- Chronic hemodialysis—screen alanine aminotransferase (ALT) monthly and anti-HCV semiannually
- Elevated ALT levels of unknown etiology
- Evidence of extrahepatic manifestations of HCV—mixed cryoglobulinemia, membranoproliferative glomerulonephritis, porphyria cutanea tarda, vasculitis

(D.E. No. 1-1, Complaint, Ex. A at p. 4).

Thus, under the Protocol, every inmate who requests testing and every inmate with risk factors or certain clinical conditions, is tested for HCV. If an inmate tests positive for HCV, the Department provides the following initial treatment:

- A baseline history and physical examination
- Lab tests
- Calculation of the APRI score to determine fibrosis
- Assessment of the need for preventive health interventions such as vaccines and screenings for other conditions
- Counseling on information related to HCV infection

(*Id.* at p. 5). After the initial treatment, the Department provides ongoing monitoring treatment as follows:

**Periodic monitoring is recommended for all those with active infection**, including acute HCV infection, HCV treatment failures, relapse of HCV

> infection or reinfection, and those with chronic HCV infection who are not yet treated.
>
> - *For cases without advanced fibrosis, cirrhosis, or complications*, annual evaluation is appropriate. This evaluation should include a focused review of systems and patient education relevant to HCV, vital signs and a focused physical examination, and lab monitoring (CBC, PT/INR, liver panel, serum creatinine, calculated GFR, and calculation of the APRI score).
> - *For patients with cirrhosis or significant comorbidities*, evaluation is recommended at least every six months; more frequently as clinically indicated.
> - *In cases of acute HCV infection*, monitoring for spontaneous clearance of the infection with ALT and quantitative HCV RNA levels every four to eight weeks, for six to twelve months, is recommended. If viremia persists after that time, continue to monitor and manage the case as a chronic infection.
> - In most cases of acute HCV infection, treatment may be deferred to allow for spontaneous clearance of viremia. However, in some cases there may be a compelling reason to treat the acute infection in order to prevent severe complications, e.g., HCV infection superimposed on established cirrhosis or advanced fibrosis.

(*Id.* at p. 13 (emphasis in original)). The Department has set forth detailed guidance for proper management and treatment of HCV in Attachment IV to the Protocol. (*Id.* at pp. 18-20). It provides a step-by-step procedure for treating inmates with HCV.

The Department follows the Federal Bureau of Prisons protocol for HCV treatment, including its Priority Levels criteria for treatment. (*Id*. at p. 10). Medical treatment employs direct acting antiviral ("DAA") drugs, such as Harvoni and Solvaldi—the most current recommended prescription medications. (Affidavit of Dr. Williams). The current price for Harvoni and Solvaldi is approximately $55,000.00 and $75,000.00 per patient, respectively. (D.E. No. 1-1, Complaint, Ex. C at p. 15).

Notably, not everyone with the HCV requires treatment with medication. Between fifteen and twenty-five percent of the patient population will spontaneously resolve the infection without medication. (D.E. No. 1-1, Complaint, Ex. A at p. 3). Progression of chronic HCV infection to

fibrosis and cirrhosis may take years in some patients and decades in others—or, in some cases, may not occur at all. (*Id.* at p. 5). The risk of developing serious liver disease is small, ranging from five to twenty-five percent over a period of twenty-five to thirty years, in most cases. (*Id.* at p. 15). Most people with Hepatitis C can remain healthy, manage the disease and lead full, active lives. (*Id*. at p. 15).

## LAW AND ARGUMENT

**Plaintiffs Cannot Meet The Rule 23 Criteria For Class Designation.**

"[Federal Rule of Civil Procedure] 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). "In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 614. Plaintiffs proceed under Rule 23(b)(1) or (2). "Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing 'incompatible standards of conduct for the party opposing the class,' Fed. Rule Civ. Proc. 23(b)(1)(A), or would 'as a practical matter be dispositive of the interests' of nonparty members 'or substantially impair or impede their ability to protect their interests,' Rule 23(b)(1)(B) . . . . Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.' *Id.*

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 348 (2011)

(quotation omitted). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. *Id.* at 350 (emphasis in original). "[T]he district court should not merely presume that the plaintiffs' allegations in the complaint are true for the purposes of class motion without resolving factual and legal issues." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012).

> We recognized in *Falcon* that 'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,'. . . Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'

*Walmart*, 564 U.S. at 350-51 (internal citations omitted).

"[T]he burden of establishing the elements of a class action rests on the party seeking certification." *In Re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996). Rule 23 must not "be 'liberally construed' and read 'to favor class actions.' Recent Supreme Court cases . . . show that Rule 23 must be construed neither liberally nor grudgingly, but carefully applied in accordance with its express terms." *Rockey v. Courtesy Motors, Inc.*, 199 F.R.D. 578, 597 n. 1 (W.D. Mich. 2001) (emphasis added). "The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23." *In Re Am. Med. Sys., Inc.*, 75 F.3d at 1079. The principal purpose of class actions is to achieve efficiency and economy of litigation, with respect to both the parties and the courts. *See Gen. Tel. Co. v. Falcon*, 457 U.S.

147, 159 (1982); *see also City of Goodlettsville v. Priceline.com, Inc.*, 267 F.R.D. 523, 528 (M.D. Tenn. 2010).

**I. Numerosity.**

"[T]he numerosity requirement requires examination of the specific facts of each case." *In Re Am. Med. Sys., Inc.*, 75 F.3d at 1080 (quotation omitted). "The joinder inquiry, like that required for the entire class certification inquiry, requires a fact-specific analysis that turns on the unique circumstances of each case and not on a single factor, such as the number of potential claimants." *Mays v. Tenn. Valley Auth.*, 274 F.R.D. 614, 621 (E.D. Tenn. 2011). "Some of the factors a court may consider are class size, ease of identification of members of the proposed class, geographic distribution of class members, and the ability of the class members to pursue individual actions." *Krieger v. Gast*, 197 F.R.D. 310, 314 (W.D. Mich. 2000).

In this case, inmates can bring their own individualized actions. "[P]laintiffs have not demonstrated to the Court that . . . potential claimants could not bring suit on their own." *Mays*, 274 F.R.D. at 622. Inmates can and do bring claims *pro se* and *in forma pauperis*. Class action status is unnecessary. Further, as will be described in more detail below, each inmate's case requires an individual evaluation to determine whether there has been an Eighth Amendment deliberate indifference to serious medical need violation. This inquiry is more suitable to an individualized action and there is not any judicial economy served in creating a class action.

Further, the class definition is not sufficiently definite. "[T]he class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young*, 693 F.3d at 537-38 (quotation omitted). Plaintiffs' proposed class definition is:

> All persons currently incarcerated in any facility under the supervision or control of the Tennessee Department of Corrections or persons incarcerated in a public or

> privately owned facility for whom the Tennessee Department of Corrections has ultimate responsibility for their medical care and who have at least twelve weeks or more remaining to serve on their sentences and are either currently diagnosed with Hepatitis C infection or are determined to have Hepatitis C after an appropriate screening test has been administered by the Department of Corrections.

(D.E. No. 15 at p. 2). One problem with plaintiffs' definition is the fluidity of the contours of the class. If a "currently incarcerated" date is fixed, it would not cover inmates coming into the prison system thereafter. If a "currently incarcerated" date is not fixed, it could not be determined which inmates have twelve or more weeks remaining on their sentences. Further, inmates' sentences can be shortened by sentence reduction credits, which are individualized and continuously calculated. Further, some inmates will have pending parole hearings and if released, will be outside the range of the Department's medical treatment. A determination of who belongs in the Class would require individualized, continuous calculation. With over 20,000 inmates in the system, such a task would be extremely taxing and not serve the essential purpose of Rule 23.

**II. Typicality.**

"In order to satisfy the typicality requirement, the class representatives' claims must have the same essential characteristics as the claims of other members of the class. [T]ypicality determines whether a sufficient relationship exists between the injury to the named plaintiff[s] and conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Rockey*, 199 F.R.D. at 584 (quotations and citations omitted). This test "limit[s] the class claims to those fairly encompassed by the named plaintiffs' claims." *In re Am. Med. Sys.*, 75 F.3d at 1082 (citing *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980)).

"[U]nder the typicality prong, a court must ask whether, despite the presence of common questions, each class member's claim involves so many *distinct* factual or legal questions as to make class certification inappropriate." *In Re Welding Fume Products Liability Litig.*, 245 F.R.D.

279, 303 (N.D. Ohio 2007) (emphasis in original); *see Spencer v. Central States, SE & SWAreas Pension Fund*, 778 F. Supp. 985, 990 (N.D.Ill 1991) ("[M]erely pointing to common issues of law is insufficient to meet the typicality requirement when the facts required to prove the claims are markedly different between class members."). "[T]oo many meaningful differences across the plaintiff class can preclude certification" because "each class member's claims involve so many distinct factual questions that class certification becomes inappropriate." *In Re Welding Fume Products Liability Litig.*, 245 F.R.D. at 303.

In this case, the typicality requirement cannot be met because each individual plaintiff's claim depends on the individual merits of his own case.

> In pursuing their own claims, the named plaintiffs could not advance the interests of the entire . . . class. Each claim, after all, depend[s] on each individual's particular [medical history] and these. . . var[y] from person to person. A named plaintiff who proved his own claim would not necessarily have proved anybody else's claim.

*Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (concluding that the district court abused its discretion in certifying a class when each claim depended on facts that varied from person to person).

The contours of an Eighth Amendment deliberate indifference to medical claim are as follows:

> To succeed on his Eighth Amendment claim, [plaintiff] must be able to prove " 'deliberate indifference' to his 'serious' medical needs." *Wilson v. Seiter*, 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991) (quoting *Estelle*, 429 U.S. at 106, 97 S.Ct. 285). An Eighth Amendment claim of denial of medical care has both objective and subjective components, the objective component requiring proof of a 'sufficiently serious' medical need, and the subjective component requiring proof of 'a sufficiently culpable state of mind in denying medical care.'" *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Estelle*, 429 U.S. at 104, 97 S.Ct. 285; and *Brown v.*

> *Bargery*, 207 F.3d 863, 867 (6th Cir. 2000)). "[A] medical need is objectively serious if it is 'one that has been diagnosed by a physician as mandating treatment *or* one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Blackmore*, 390 F.3d at 897 (quoting *Gaudreault v. Mun. of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (emphasis in original)). With regard to the subjective component:
>
> > [T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs is essential to a finding of deliberate indifference.
>
> *Blackmore*, 390 F.3d at 896 (quoting *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970); and *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994) (internal quotations omitted).
>
> An Eighth Amendment claim may be premised on deliberate indifference to exposing an inmate to an unreasonable risk of serious harm in the future. *Helling v. McKinney*, 509 U.S. 25, 36, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). A claim of deliberate indifference to future serious harm requires proof of both the objective and subjective elements of an Eighth Amendment claim. *Id.* at 35, 113 S.Ct. 2475. An alleged delay in receiving treatment requires an examination of the effects of the delay. *Napier*, 238 F.3d at 742. "[A]n inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment to succeed." *Id.* (quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1188 (11th Cir. 1994).

*Dodson v. Wilkinson*, 304 Fed. Appx. 434, 438-39 (6th Cir. 2008).

In *Dotson*, a state prisoner brought a claim pursuant to 42 U.S.C. § 1983 alleging that delays in testing and treatment for the Hepatitis C Virus violated his Eighth Amendment rights. *Id.* at 436. According to the *Dotson* plaintiff, a prison doctor allegedly told him that, pursuant to prison policy, he would not receive treatment for the Hepatitis C virus until his liver showed signs of cirrhosis or failure. *Id.* Plaintiff received examinations and testing. *Id.* Plaintiff claimed he suffered from

Hepatitis C symptoms. *Id.* He alleged that his constitutional rights were violated "by intentionally delaying and denying [him and other inmates] immediate Hepatitis C testing, treatment, and education." *Id.* at 437. His demand for relief "included 'immediate first class medical treatment,' injunctive relief requiring the [Department] to test and treat all prison inmates for Hepatitis C," and damages. *Id.* The Sixth Circuit affirmed the district court's order granting summary judgment for the defendants, finding in relevant part that

> Contrary to [plaintiff's] allegations, the record demonstrates that [he] has received continuous testing and treatment since being diagnosed with Hepatitis C. . . . [He] received testing and a chronic liver disease baseline evaluation. . . which lead to his vaccination against Hepatitis A and Hepatitis B, more testing, and his enrollment at the Chronic Care Clinic. A liver biopsy was performed. . . which. . . "indicated that [he] has a Histologic Grade 1 of 4, which means that he has minimal inflammatory activity and no hepatocyte necrosis (or no liver cell death), and a Histologic Stage 1 of 4, which means that he has minimal fibrosis and no bridging fibrosis.". . . "[e]ven though his disease is expected to progress over the next 20 to 30 years it may not progress at all", the testing "results and [his] prognosis indicate that he should be continuously monitored and re-evaluated by a repeat liver biopsy every three to five years"; and "[b]ased on the results of the biopsy, it is unnecessary for [him] to receive any kind of medication at this time."
> . . . .
> On this record, [plaintiff] cannot prove that the [Department]. . . was deliberately and culpably indifferent to a need for testing and treatment after [plaintiff] was first objectively diagnosed with the Hepatitis C virus. . . .
>
> [Further, plaintiff] has failed to proffer verifying medical evidence of a 'detrimental effect' caused by a delay in treatment that exposes [him] to an unreasonable risk of serious harm in the future. See *Helling*, 509 U.S. at 25, 13 S.Ct. 2475; *Napier*, 238 F.3d at 742. . . . [Plaintiff's] disagreement with the testing and treatment he has received since being diagnosed with Hepatitis C does not rise to the level of an Eighth Amendment violation. *Estelle*, 429 U.S. at 107, 97 S.Ct. 285; *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976) (recognizing that "[w]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess

> medical judgments and to constitutionalize claims which sound in state tort law.").

*Id.* at 439-40. *See also Edmonds v. Robbins*, 67 Fed. Appx. 872, 873 (6th Cir. 2003) ("The record establishes that [the doctor] saw [plaintiff] on a monthly basis . . . [and] . . . feels that at this time, [plaintiff's] condition does not warrant medication. . . . Furthermore, the medical literature. . . establishes that medication is not always required for the treatment of hepatitis C. . . . [Plaintiff] has not established that [the doctor] is subjecting him to cruel and unusual punishment."); *Hix v. Tenn. Dept. of Corr.*, 196 Fed. Appx. 350, 357 (6th Cir. 2006) (Allegations that prison doctors did not prescribe the course of treatment for hepatitis C that prisoner desired, and opted to treat his symptoms rather than the underlying disease, "established nothing more than a mere difference of opinion with the doctors' diagnoses and prescribed treatment," and were insufficient to support a claim under § 1983 for deliberate indifference to his serious medical needs.); *Johnson v. Million*, 60 Fed. Appx. 548 (6th Cir. 2003) (Prison medical officials were not deliberately indifferent to inmate's medical condition after he contracted hepatitis C virus, where inmate was seen in prison hepatitis C clinic every three to four months, but was not provided drug treatment because his liver enzyme levels had stayed within normal range.); *Dotson v. Wilkinson*, 477 F. Supp.2d 838, 849 (N.D. Ohio 2007) ("The medical records. . . show that [plaintiff] has received the appropriate treatment for his condition within the medical protocols established for treatment of Hepatitis C, given [plaintiff's] high blood pressure and elevated creatinine levels. The delay in placing the plaintiff in the Hepatitis C treatment program does not 'constitute an unnecessary and wanton infliction of pain.'"); *White v. Secure Care Co.*, No. 09-13787, 2011 WL 900296, *4 (E.D. Mich. Jan. 21, 2011) ("The case law is clear that the mere existence of a Hepatitis C infection is not necessarily a 'serious medical need' warranting treatment such that the failure to provide treatment violates the Eighth Amendment. . . . [Plaintiff's] 'verifying medical evidence' of *merely having*

Hepatitis C does not establish any 'detrimental effect of the delay in medical treatment.'); *Fetterhoff v. Kerney*, No. 07-15027, 2009 WL 612346, *7-8 (E.D. Mich. Mar. 6, 2009) ("[M]erely being diagnosed with HCV is not, by itself, a sufficiently serious medical need. . . . [P]laintiff's claim is really that his condition was not treated adequately. . . . As many courts have acknowledged, HCV does not require treatment in all cases. . . . [P]laintiff's claim and evidence establish nothing more than a mere difference of opinion with the medical providers' assessment and prescribed treatment."); *Villarreal v. Holland*, No. 14-9-DLB, 2016 WL 208310, *8 (E.D. Ky. Jan. 15, 2016) (Plaintiff failed to produce medical records showing "that he has suffered actual harm due to the denial of the requested drug therapy treatment. . . . Ultimately, [plaintiff] has not shown that he had a 'sufficiently serious' medical need.. . . [Plaintiff] was examined, tested, and monitored on numerous occasions through the Chronic Care Clinic for his Hepatitis C condition. . . . Such ongoing and responsive medical treatment is the antithesis of deliberate indifference."); *Howze v. Hickey*, No. 10-CV-094-KKC, 2011 WL 673750, *7 (E.D. Ky. Feb. 17, 2011) ("Courts have recognized that Hepatitis C may require interferon or another treatment regimen in some, but not all, situations. There is no uniform rule applicable to all cases."); *Allen v. Shawney*, No. 11-10942, 2014 WL 1089618, *11 (E.D. Mich. Mar. 18, 2014) ("A medical need is sufficiently serious if it is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Alternatively, a medical need is sufficiently serious if a plaintiff '[p]laces verifying medical evidence in the record. . . establish[ing] the detrimental effect of the delay in medical treatment. . . . [N]ot all cases of hepatitis C require treatment. . . . There is no evidence to suggest that state 2 fibrosis requires urgent treatment, and in fact, Plaintiff's expert. . . agrees that state 2 fibrosis does not require urgent treatment. . . . Plaintiff has not shown that there was a 'sufficiently serious' medical need. . .

.[Further] Plaintiff has failed to show that any of the defendants had a subjectively sufficiently culpable state of mind. . . . [T]he evidence in the record merely shows that there was a difference in medical opinion between [the doctors]. . . . [W]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize clams which sound in state tort law.") (citations omitted); *Fitts v. Burt*, No. 05-CV-73112, 2009 WL 1213075, **3-4 (E.D. Mich. April 30, 2009) (Plaintiff's "'verifying medical evidence' of merely having Hepatitis C does not establish any 'detrimental effect of the delay in medical treatment'. . . . Accordingly. . . Plaintiff has not established the objective component of his deliberate indifference claim."); *Whitington v. Moschetti*, 423 Fed. Appx. 767 (10th Cir. 2011) (Inmate was not substantially harmed by a delay in treating his Hepatitis C condition, as required to prevail on his claim of an Eighth Amendment violation. There was no evidence of substantial progression of liver disease); *Cowan v. Allen*, No. 4:11-cv-00245-JHH-TMP, 2012 WL 3042438, *5-6 (N.D. Ala. July 5, 2012) ("It is clear that the decision to administer drug therapy for Hepatitis C is an extremely complicated one which involves consideration of numerous individual factors that differ from patient to patient. . . . It is clear that the plaintiff has no right to insist on a particular course of treatment, and his disagreement with the medical professionals' decision to withhold interferon treatment does not present an Eighth Amendment claim. . . . [A]ge is one of the factors used in making a *medical* determination regarding the appropriateness of Interferon therapy. It seems clear that States have a legitimate interest in . . . avoiding unnecessary expenditures of vital resources."); *Johnson v. Frakes*, No. 8:16CV155, 2016 WL 4148231, *3 (D. Neb. Aug. 4, 2016) ("Defendants' failure to provide Plaintiff with Harvoni, his requested course of treatment, does not constitute an Eighth

Amendment violation."); *Smith v. Corizon*, No. JFM-15-743, 2015 WL 9274915, *6 (D. Md. Dec. 17, 2015) (same).

As the above cases show, an inmate's Eighth Amendment deliberate indifference claim requires individualized proof that under the facts of his case, his medical condition is serious and a delay in treatment will harm him. Given that in many cases, medication is not necessary because the HCV is not progressing as a disease, many inmates' cases will fail because the condition is not a "serious medical need" and the plaintiff cannot show that a delay in treatment is harmful. "[T]he likelihood that some significant proportion of class members experienced no injury at all, defeat[s] the named plaintiff's representation that [his] claims were typical of the class." *Phillips v. Phillip Morris Co., Inc.*, 298 F.R.D. 355, 363 (N.D. Ohio 2014).

Further, the Sixth Circuit requires an inmate to put medical proof in the record with his complaint, showing harm from a delay in treatment. Each class member would have to submit medical records and proof to the Court, with the complaint, for the Court's review. *See, e.g., Dotson*, 304 Fed. Appx. at 439.

Further, the Protocol has exclusionary provisions. Each case where treatment has been denied for an exclusionary reason must be individually examined. Further, some inmates have co-morbidities, and that unique circumstance must be individually evaluated.

In sum, there are "too many meaningful differences across the plaintiff class [which] preclude[s] certification. . . . [E]ach class member's claims involve so many distinct factual questions that class certification becomes inappropriate. *In re Welding Fume Products Liability Litig.*, 245 F.R.D. at 303. Also, "[a] defense which is peculiar to the named plaintiff can destroy the named plaintiff's typicality." *Ballan v. Upjohn Co.*, 159 F.R.D. 473, 480 (W.D. Mich. So. Div. 1994). "[T]he defendants' conduct. . . cannot be examined consistently across the class." *In Re*

*Welding Fume products Liability Litig.*, 245 F.R.D. at 309. The defendants' conduct will vary according to the unique contours of the different cases.

"Where numerous mini-trials are necessary to resolve individual questions. . . the benefits of a class action disappear." *Rockey*, 199 F.R.D. at 593. "[W]here plaintiffs' claims depend on individual facts, the typicality requirement is not met." *Jones v. Allercare, Inc.*, 203 F.R.D. 290 (N.D. Ohio 2001). *See also, Mays*, 274 F.R.D. at 625 ("[P]laintiff's claims are not typical because the analysis and ultimate determination of each plaintiff's claim will turn primarily on individualized inquiries.").

In *Kress v. CCA of Tennessee, LLC*, 694 F.3d 890 (7th Cir. 2012), the Seventh Circuit ruled that the district court properly denied the inmates' motion for class certification because the inmates failed to satisfy the typicality requirement since claims of inadequate medical care required individual determinations, as the level of care required to comport with constitutional standards varied depending on each inmate's circumstances. In *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006), the Court vacated the lower court's order certifying the class, because, "[t]hough plaintiffs' . . . claims focus on the institutional policies defendants adopted in their official capacities, *each* . . . claim initially requires proof that [defendants]. . . violated that class member's . . . [constitutional] right[s]. The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Id.* at 786-87 (emphasis in original).

In *Chapman v. Hardin County*, No. 3:05-CV-433-S, 2009 WL 366521 (W.D. Ky. Feb. 13, 2009), the Court denied class certification of all persons who contracted MRSA while incarcerated at a detention center and all persons who were or would be confined at the jail. Plaintiff alleged that defendant failed to implement and enforce internal policies regarding the protection of inmates

from exposure to MRSA and provide treatment during their incarceration. Because individualized inquiry was required, the question of injury would vary from class member to class member, making class certification inappropriate. The Court found that the proposed class lacked commonality and typicality:

> In this case, there is no single set of operative facts that establishes liability on Defendants, or proximate cause with respect to each proposed class member. Individualized inquiry is required to determine whether [defendant] failed to protect any one given inmate. . . . The commonality has not been met.
>
> Typicality, like commonality, "serve[s] as [a] guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).
>
> . . . .
>
> As discussed with regard to commonality, a consistent theory of liability on the [Defendant's] part is rather tenuous due to situational differences from one proposed class member to the next. All class members' claims do not arise from the same course of events. Therefore, the court cannot conclude that [plaintiff's] claims are typical of those of the proposed class. . . . The typicality requirement has not been met.

*Id.* at *7.

In this case, each class member's HCV claim is unique and requires individualized inquiry. Plaintiffs fail to meet the typicality requirement.

**III. Commonality.**

Rule 23(a)(2) requires "commonality," which is "the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" *Wal-Mart Stores, Inc.*, 564 U.S. at 349 (citing Fed. R. Civ. P. 23(a)(2)).

> That language is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'. . . . Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' *Falcon, supra,* at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. . . . their claims must depend upon a common contention. . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. . . . . What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers . . . . We consider dissimilarities [in individual cases] not in order to determine (as Rule 23(b) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there is '[e]ven a single [common] question.

*Wal-Mart Stores, Inc.*, 564 U.S. at 349-59. *See also Sprague*, 133 F.3d at 397 ("It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.").

In this case, Plaintiffs appear to claim that the common issue is the constitutionality of the Department's Protocol under the Eighth Amendment. However, as shown in Section II, the constitutionality of the Protocol as applied depends on the specific facts of each individual case. As to the constitutionality of the Protocol on its face, plaintiffs fail to state a claim. "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976). "The fact that [plaintiffs] disagree[] with the criteria set forth in [the] Protocol. . . and would have

preferred to have been treated with antiviral therapy from the onset of his diagnosis does not constitute cruel and unusual punishment." *Collins v. Wilkerson*, No. 2:05-cv-0367, 2008 WL 1844320, *4 (S.D. Ohio Apr. 22, 2008). "Plaintiff has stated no claim under the Eighth Amendment based on deliberate indifference to serious medical needs because he has not been denied medical treatment but rather merely disputes the adequacy of the treatment provided." *Loukas v. Michigan Dept. of Corrections*, No. 2:07-cv-142, 2008 WL 544639, *1 (W.D. Mich. Feb. 27, 2008). "The question whether. . . additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment." *Estelle v. Gamble*, 429 U.S. 97, 107 (1976). "A medical decision not to [take certain] measures, does not represent cruel and unusual punishment. *Id.*

Here, pursuant to the Protocol, all inmates who request HCV screening or have clinical indications or risk factors, are screened for HCV. Those who have HCV are monitored. When an inmate is "continuously monitored[; h]e has received medical attention and merely disputes the adequacy of the treatment." *Loukas*, 2008 WL 544639 at *3.

> Because [plaintiff's] allegations simply constitute a difference of opinion between himself and medical personnel regarding his medical condition, he has failed to allege facts that, if proven, would rise to the level of deliberate indifference in order to support an Eighth Amendment claim. *See [Hix]* at *6 (where complaint alleged only that doctors prescribed treatment for symptoms rather than treatment prisoner requested, allegations 'established nothing more than a mere difference of opinion with the doctors' diagnoses and prescribed treatment' and failed to state a claim for deliberate indifference to prisoner's serious medical needs).

*Id.* at *3 (citation omitted).

When inmates with hepatitis C are medically monitored, pursuant to Department Protocol, they are receiving medical treatment. *Edmonds v. Rees*, No. 3:06-CV-P301-H, 2008 WL 754727, *10 (W.D. Ky. Mar. 19, 2008). That they do not receive the antiviral therapy on demand does not

state an Eighth Amendment deliberate indifference claim. *Id.* "Plaintiff has only stated a disagreement with his treatment, which does not give rise to a constitutional claim." *Id.* at *8. *See also Outlaw v. Turner*, 54 Fed. Appx. 229 (7th Cir. 2002) (State prison officials' implementation of directive establishing procedures for treating hepatitis C did not demonstrate deliberate indifference to inmate's medical needs under Eighth Amendment claim); *Black v. Alabama Dept. of Corr.*, 578 Fed. Appx. 794 (11th Cir. 2014) (same); *Taylor v. Ortiz*, 410 Fed. Appx. 76, 77 (10th Cir. 2010) (Protocol excluded persons over age 65 from drug treatment for Hepatitis C because "for the majority of patients, Hepatitis C causes only mild liver damage. The primary danger of Hepatitis C is the increased risk of developing liver cirrhosis or liver cancer, which generally takes decades to occur." Plaintiff received periodic blood labs which monitored his liver condition and not antiviral drug therapy. Court found no Eighth Amendment violation.); *Carlson v. Weber*, No. CIV. 08-4101-KES, 2010 WL 3701359, *6 (D. S. D. Sept. 14, 2010) (Where inmate challenged failure to provide drug treatment because he did not meet the eligibility criteria for the Department's Protocol on treating hepatitis C, he failed to state an Eighth Amendment claim, as "[I]nmates have no constitutional right to receive a particular or requested course of treatment and prison doctors remain free to exercise their independent medical judgment."); *Briley v. Weber*, No. Civ. 12-4169-KES, 2014 WL 2592590 (D. S. D. June 10, 2014) (same); *Mulkey v. Schweitzer*, No. CV 08-75-DWM-RKS, 2009 WL 1451694 (D. Mont. May 20, 2009) (Monitoring liver constituted treatment; plaintiff was not a candidate for therapy treatment under protocol; Court found no Eighth Amendment violation); *Baumann v. Buttarazzi*, No. 9:05-CV-0690, 2008 WL 4000412, *25 n.31 (N.D. N.Y. Aug. 22, 2008) (collecting cases showing that monitoring Hepatitis C constitutes treatment); *Runkle v. Penn. Dept. of Corr.*, No. 13-137, 2013 WL 6485344, *8 (W.D.

Penn. Dec. 10, 2013) (Inclusion of inmate with Hepatitis C in chronic care clinic for monitoring of blood and vital signs constituted treatment).

The Tennessee Department of Corrections' Protocol provides for treatment of inmates with HCV. The Department provides screening and monitoring treatment of inmates with the virus, and the provision of direct acting antiviral drugs when medically indicated. That plaintiffs may disagree with the Department's Protocol is a medical difference of opinion. A difference of medical opinion regarding proper diagnosis and treatment does not state an Eighth Amendment claim. Thus, plaintiff's proposed common question: whether the Protocol is unconstitutional on its face under the Eighth Amendment does not advance the litigation of the case. Instead, it warrants dismissal of the case.

**IV. The Class Representative Requirement.**

There are two prongs to the adequacy of representation inquiry: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. Gen. Motors Corp.*, 532 F.2d 51, 525 (6th Cir. 1976) (citation omitted).

"The bedrock requirement of adequacy is that the named representative be a member of the class. . . . The adequacy of class representatives in this regard is primarily a factual issue for determination by the trial court." *Rockey*, 199 F.R.D. at 585.

> A claim of deliberate indifference to future serious harm requires proof of both the objective and subjective elements of an Eighth Amendment claim. *Id.* at 35, 113 S.Ct. 2475. An alleged delay in receiving treatment requires an examination of the effects of the delay. *Napier*, 238 F.3d at 742. "[A]n inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment to succeed." *Id.* (quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1188 (11th Cir. 1994).

*Dodson v. Wilkinson*, 304 Fed. Appx. 434, 438-39 (6th Cir. 2008) (emphasis added).

Plaintiffs have failed to show that they are members of the class, with legitimate claims, because Plaintiffs have failed to submit medical records showing that their Hepatitis C condition is serious and that an alleged delay in their medical treatment is causing harm. "The plaintiffs have no basis for complaining of a refusal to certify a proposed class where the representatives of the class [has not shown he can] prevail on the merits." *Sprague*, 133 F.3d at 397.

**V. Rule 23(b)(1).**

"Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of 'establish[ing] incompatible standards of conduct for the party opposing the class,' Rule 23(b)(1)(A), such as 'where the party is obliged by law to treat the members alike,' or where individual adjudications 'as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests,' Rule 23(b)(1)(B), such as ' "limited fund" cases, . . . in which numerous persons make claims against a fund insufficient to satisfy all claims.'" *Wal-Mart Stores, Inc.*, 564 U.S. at 361 n.11 (internal citations omitted). "Classes certified under (b)(1) . . . [apply where] individual adjudications would be impossible or unworkable." *Id.* at 361.

Rule 23(b)(1) does not apply to this case. Under Eighth Amendment deliberate indifference to serious medical needs law, each class member's claim is grounded upon its own individual facts. Further, defendants do not treat all plaintiffs alike, but according to the needs of each individual case. Individual adjudications are not impossible; indeed, individual adjudications are required. No adjudication in one case will have res judicata effect on another.

## VI. Rule 23(b)(2).

"The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Wal-Mart Stores, Inc.*, 564 U.S. at 360. "The relief sought must perforce affect the entire class at once." *Id.* at 361-62. "A rule 23(b)(2) action cannot resolve individualized issues of fact, nor provide different types of relief required to redress individual injuries." *In re Welding Fume Products Liability Litig.*, 245 F.R.D. at 313.

Rule 23(b)(2) does not apply to this case. Plaintiffs appear to seek a single injunctive order that all inmates with HCV receive Harvoni or Solvaldi direct acting anti-viral drugs immediately upon their diagnosis. Such an order would be wholly inappropriate, given that many persons with Hepatitis C require no drug treatment at all, but only monitoring, because in most cases, the illness progresses slowly over the course of many years and in many cases, will resolve itself without any drug treatment whatsoever. The only proper disposition of the inmates' cases is by individualized inquiry to determine whether specific injunctive relief is warranted at all.

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for class certification.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on October 11, 2016. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, including:

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