**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**MUMIA ABU-JAMAL**

| | | |
|---|---|---|
| **Plaintiff,** | : | **Case No. 15-Cv-00967 (RDM)(KM)** |
| **v.** | : | **Judge Robert D. Mariani** |
| **JOHN KERESTES, Former Superintendent State Correctional Institution Mahanoy** | : | **Magistrate Judge Karoline Mehalchick** |
| **Theresa DelBalso, Superintendent State Correctional Institution Mahanoy** | | |
| **Joseph Silva, DOC Director of Bureau of Health Care Services** | | **ELECTRONICALLY FILED** |
| **Christopher Oppman, former DOC Director of Bureau of Health Services,** | | |
| **Dr. John Lisiak, SCI Mahanoy** | | |
| **Dr. Shaista Khanum, SCI Mahanoy** | | |
| **Scott Saxon, Physician's Assistant, SCI Mahanoy** | | |
| **John Steinhart, Chief Health Care Administrator, SCI Mahanoy** | | |
| **Defendants.** | | |

**REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO FILE A THIRD AMENDED COMPLAINT**

## I. Recent Procedural Background

On August 5, 2016, this Court issued orders granting in part and denying in part the motions of defendants Kerestes, Steinhart and Oppman to dismiss the complaint. Doc. 168-171. The same orders granted plaintiff leave to file a second amended complaint, directing him to be specific as possible concerning his allegations against those defendants. Doc. 169, 171.

That second amended complaint was filed on or about August 17, 2016. Doc. 178. At about the same time, plaintiff filed the instant motion to file a Third Amended Complaint. Doc. 179-81. That complaint seeks to add DOC Secretary John Wetzel and DOC Bureau of Health Services Chief of Clinical Services Paul Noel as defendants in their individual capacities for monetary damages and in their official capacities for injunctive relief. With the exception of certain specific allegations against proposed defendants Wetzel and Noel, the third amended complaint contains the same factual allegation and claims for relief as the Second Amended complaint. The requests for relief include but are not limited to a request that an injunction issue requiring that the DOC administer anti-viral medication to the plaintiff. *Cf.* Doc. 178 & 179-1 (prayer for relief in each requesting injunctive relief in the form of direct-acting anti-viral medication to treat plaintiff's hepatitis C).

On August 31, 2016, this Court issued a decision denying plaintiff's August 23, 2015 motion for preliminary injunction. That motion requested, *inter alia*, that he be provided with anti-viral medication. Although finding that DOC's failure to provide

that medication constituted deliberate indifference to a serious medical need, this Court denied preliminary injunctive relief on the ground that the proper defendants were not before it. Doc. 191 at 22. This Court opined that the DOC's Hepatitis C Treatment Committee, created subsequent to the filing of plaintiff's motion for preliminary injunction, had "the ultimate authority to determine whether or not Plaintiff will receive the DAA medications…" *Id.* at 21. This Court "[left] it to Plaintiff's Counsel to place this case in posture where the appropriate defendants are sued and such [medical] monitoring can be sought." *Id.* at 32 n.4. The defendants that plaintiff seeks to add through the instant motion, DOC Secretary John Wetzel, DOC Bureau of Health Care Services Chief of Clinical Services Paul Noel and the DOC itself are among those who can implement appropriate injunctive relief.

The defendants argue that these defendants could not be properly joined and that amendment is not warranted on the ground of undue delay. Their arguments are specious and should be rejected.

## II. Legal Argument

**Question**: In a complaint that alleges denial of medical care and requests an injunction to secure such care, should plaintiff be permitted to amend the complaint to add defendants who are among those responsible for his medical care?

**Suggested Answer**: Yes.

**Joinder Is Proper**

The defendants argue that proposed defendants Wetzel, Noel, and the DOC should not be added as defendants because the hepatitis C claims against them are "wholly unrelated" to the original complaint filed in May 2015. Def's.' Br., Doc. 197 at 5-6. That argument is not just factually untrue, it is irrelevant. The May 2015 complaint is now a legal nullity as it has been superseded by two amended complaints. A first amended complaint was filed with leave of court in November 2015. Doc. 57. It contains Eighth Amendment claims arising out of the defendants' failure to treat plaintiff's hepatitis C. In addition to money damages, the complaint requests an injunction that would require that plaintiff be treated with the anti-viral medication. *Id.* That complaint was itself amended by the filing of the second amended complaint on August on August 17, 2016. The Second Amended complaint retains the hepatitis C allegations including plaintiff's request for injunctive relief. Doc. 178.

"An amended complaint supersedes the initial complaint and becomes the operative pleading in the case." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007); *see also* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1476 (3d. ed.) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified."). It is the second amended complaint that is the operative pleading.

The Defendants do not dispute – nor can they dispute – that the hepatitis C claims plaintiff seeks to bring against defendants Wetzel, Noel and the DOC involve

common questions of law and fact to the hepatitis C claims raised in the first amended complaint and second amended complaint. *Cf.* Second Amended Complaint, ¶¶ 29-137, with Proposed Third Amended Complaint, ¶¶ 32-156. Under Fed.R.Civ.P. 20 "proper parties", in this case Secretary Wetzel, Dr. Noel and the DOC, may be joined "because of a common interest in a question of law or fact, even though they have no substantive right to compel joinder[.]" *Field v. Volkswagenwerk AG*, 626 F.2d 293, 299 (3d Cir. 1980). Given the nearly identical factual and legal claims asserted against the current defendants and proposed defendants Wetzel, Noel and the DOC in the existing complaint, joinder of them is proper.

**There Has Been No Delay**

"Delay alone is an insufficient ground to deny leave to amend." *Cureton v. National Collegiate Athletic Ass'n.* 252 F.3d 267, 273 (3d Cir. 2001). In addition,

> it is an abuse of discretion to deny leave to amend unless "plaintiff's delay in seeking amendment is undue, made in bad faith, prejudicial to the opposing party or [the amendment] fails to cure the jurisdictional defect."

*Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000), quoting *Berkshire Fashions, Inc. v. MV Haukusan, II*, 954 F.2d 874, 886 (3d Cir. 1992). In this case there has been no delay, let alone undue delay. As this court noted in its August 31, 2016 decision, this case is in an "early stage". Doc. 191 at 27. There has been no discovery, no Fed.R.Civ.P. 26(a) initial disclosures, no Fed.R.Civ.P. 26(f) conference and no Fed.R.Civ.P. 16(b) scheduling order setting deadlines for the addition of parties. The defendants'

Fed.R.Civ.P. 12(b)(6) motions were decided on August 5, 2016. They were granted in part with leave to amend and a directive that the amended complaint be filed within 14 days and contain more specific allegations against the existing defendants. Doc. 169, 171. Plaintiff complied with that order and, at about the same time, filed the instant motion to amend seeking to add defendants Wetzel, Noel and the DOC. By moving to amend plaintiff placed the proposed added defendants in the same procedural posture as the existing DOC defendants. The case can now move forward in an orderly fashion. Although the DOC defendants assert "undue delay", they fail to specify how the addition of these defendants would incur delay.

The DOC defendants have additionally failed to identify how their defense might be prejudiced by the addition of these defendants. The proposed added defendants have identical interests to the existing DOC defendants. All are current DOC employees. All have been and are represented by the same attorney, the DOC's Counsel's Office. Proposed defendant Dr. Paul Noel has played an active role in virtually all of the proceedings. At DOC Counsel's request, he executed two declarations in opposition to plaintiff's motion for a preliminary injunction. Doc. 38-3, 149-8. He then gave extensive testimony for the defendants during the December 2015 preliminary injunction hearing. Hearing Transcript, Volume 3, 87-157. The failure of the DOC defendants to argue and/or prove prejudice is fatal to their opposition to this motion to amend. *Arthur v. Maersk*, 434 F.3d 196, 206 (3d Cir. 2006) (amendment proper where government did not show that delay "impaired its

ability to defend against the suit or that it 'was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendment [] been timely.'" quoting *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989). See also *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 939 (3d Cir. 1984) (abuse of discretion to deny motion to amend where no prejudice alleged or proved).

The DOC Defendants cite two cases, neither of which supports their position. In *Thinna v. Beard*, plaintiff had sought to amend his complaint, apparently after discovery and after expiration of the statute of limitations, to add claims against defendants who had already been dismissed from the action. 2008 WL 169659 *3 (M.D.Pa. 2008). Here, plaintiff is seeking to add additional defendants before discovery has commenced and well within the two year statute of limitations period.

Contrary to *Thinna*, this case involves an on-going constitutional violation, the failure to provide anti-viral medication. Plaintiff seeks prospective injunctive relief, a request not present in *Thinna*. The testimony adduced at the December 2015 hearing, the voluminous post-hearing briefing and this Court's August 31, 2016 findings make clear that Dr. Paul Noel is among those who could implement an injunction requiring hepatitis C treatment. He developed the hepatitis C protocol, currently sits on the hepatitis C committee, and in that capacity has recommended that plaintiff not receive treatment. It was under Secretary Wetzel's authority that the hepatitis C protocol was adopted. Thus, assuming *arguendo* that the existing defendants could be so prejudiced by the addition of Secretary Wetzel and Dr. Noel in their <u>individual</u> capacities (and

they will not be prejudiced), there would be no prejudice to their addition in their official capacities where the only relief requested is for prospective injunctive relief.

*Cureton v. National Collegiate Athletic Ass'n.*, *supra.*, also cited by the DOC defendants is even more inapposite. The plaintiff, after securing discovery, filed a motion for summary judgment that was granted by the District Court. On appeal, the Third Circuit reversed and remanded for further proceedings. It was only then that a motion to amend was filed that sought to change the theory of prosecution. The District Court denied the motion and the Third Circuit affirmed, finding no abuse of discretion. Contrary to *Cureton*, this case is at an early stage. It has not yet even proceeded to discovery. There is no change in plaintiff's theory. The claims against the proposed added defendants are identical to those asserted against the existing defendants. All have been represented by the same attorney. This motion was filed less than eight months after the preliminary injunction hearing and well within the statute of limitations. It was during the preliminary injunction hearing that the existence of the hepatitis C protocol, the hepatitis C committee, and Paul Noel's involvement in them, was revealed. It was only through Secretary Wetzel's authorization of the protocol that it has become official DOC policy.

Fed. R. Civ. P. 15(a)(1)(B) provides that a court should "freely" give leave to amend a pleading "when justice so requires." Given 1) the early stage of this case, 2) the merits of plaintiff's Eighth Amendment claims, 3) the need for injunctive relief

and 4) the complete lack of prejudice to the existing and proposed defendants, it would be "unjust" to deny this motion to amend. *Alvin,* 227 F.3d at 121

## CONCLUSION

WHEREFORE, this Court should issue an order granting plaintiff leave to file a Third Amended Complaint and granting such other and further relief as this Court deems just and proper.

Dated: September 14, 2016

Respectfully submitted,

*/s/ Bret D. Grote*
Bret D. Grote
PA I.D. No. 317273
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221
Telephone: (412) 654-9070
bretgrote@abolitionistlawcenter.org

*/s/ Robert J. Boyle*
Robert J. Boyle
277 Broadway
Suite 1501
New York, N.Y. 10007
(212) 431-0229
Rjboyle55@gmail.com
NYS ID# 1772094
*Pro Hac Vice*

*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of this Reply Brief in Support of his Motion to file a Third Amended Complaint upon each defendant in the following manner:

Service Via ECF:

For Defendants Kerestes, DelBalso, Silva, Oppman, and Steinhart:
Laura Neal, Esquire
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
lneal@pa.gov

For Defendants Lisiak, Khanum, and Saxon:
Samuel H. Foreman, Esquire
Caitlin Goodrich, Esquire
sforeman@wglaw.com
cgoodrich@wglaw.com

*s/ Bret D. Grote*
Bret D. Grote
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221

Dated: September 14, 2016