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

MUMIA ABU-JAMAL,	:	
	:	
Plaintiff	:	Civil Action No. 16-cv-2000
	:	
v.	:	Judge Robert D. Mariani
	:	
	:	
JOHN WETZEL, *et al.*,	:	
	:	**Filed Via Electronic Case File**
Defendants	:	**Jury Trial Demanded**

DEPARTMENT DEFENDANTS' MOTION TO AMEND FINDINGS OF FACT OR, IN THE ALTERNATIVE, FOR RECONSIDERATION

AND NOW come Defendants Wetzel, Noel, Silva, BHCS Assistant Medical Director, and BHCS Infection Control Coordinator ("Department Defendants"), pursuant to Fed. R. Civ. P. 52(b) and 60, move this Court to: (1) amend the findings of fact and conclusions of law underlying the Court's January 3, 2017 Order; and (2) to deny Plaintiff's motion for preliminary injunction. The following is set forth in support of this motion:

1. On January 3, 2017, the Court issued an Order: (1) enjoining the Defendants from enforcing the Department's Hepatitis C Protocol as it pertains to Plaintiff; (2) directing the Defendants to arrange for Plaintiff to be examined by a supervising physician experienced in the treatment of Hepatitis C within 14 days; and (3) directing the Defendants to treat Plaintiff with DAA

medications within 7 days thereafter unless the Supervising Physician determines those medications to be medically contraindicated.

2. The Department Defendants have concurrently filed a motion to stay the preliminary injunction.

I. The Findings Of Fact And Conclusions Of Law Should Be Amended

3. In the Memorandum Opinion underlying the January 3, 2017 Order (doc. 23), the Court noted that a conference call was held on December 1, 2016 and "all parties agreed that a new evidentiary hearing was not necessary and that this Court could decide the present motion on the basis of the exhibits filed." Doc. 23 at p. 4.

4. In agreeing to forego an additional evidentiary hearing on Plaintiff's motion for preliminary injunction, the Department Defendants stated that they wished to proceed on the full record developed in *Mumia 1* as well as in the instant action.

5. In making its Findings of Fact, the Court did not consider the full record from *Mumia 1*, and appears to have relied only on the transcripts from the hearing and those exhibits attached in this action to Plaintiff's brief in support of his motion for preliminary injunction.

6. Accordingly, the Department Defendants request that the Court clarify its January 3, 2017 Memorandum Opinion to reflect an incorporation of the

record of *Mumia 1* into this matter, including those exhibits admitted into evidence for Defendants at the conclusion of the December 2015 hearing, the briefs and supporting exhibits filed by Defendants in opposition to Plaintiff's preliminary injunction motion, and the declarations and exhibits filed by Defendants in June 2015. Further, the Department Defendants request that the Court amend its Findings of Fact and Conclusions of Law based on the full record.

7. Additionally, the Department Defendants request that the Court amend the record to include the attached declaration of Department Bureau of Health Care Services Clinical Director Paul Noel regarding Plaintiff's current medical condition and the current status of the Department's HCV treatment.

8. The information referenced in Dr. Noel's attached declaration was not available to the Department Defendants when they filed their brief in opposition and, in the interest of justice and development of a clear and full record on this matter, the information should be incorporated into the record and the Findings of Fact and Conclusions of Law amended accordingly.

II. The Court Should Reconsider Its Order and the Underlying Findings of Fact and Conclusions of Law In Light of the Full Record and the Exhibits Offered by Department Defendants

9. The Department Defendants additionally request that the Court reconsider the January 3 Order and its Findings of Fact and Conclusions of Law on the following points:

a. The Department's Protocol Does Not Bar Certain Inmates from Treatment

10. The Department Defendants respectfully submit that the Court erred in finding that the Department's Hepatitis C Treatment Protocol, issued in November 2016, ***bars*** treatment for inmates who have not developed vast fibrosis or cirrhosis.

11. The record clearly establishes that the Department's protocol does not bar any inmate with chronic Hepatitis C (HCV) from receiving treatment.[1] Rather, the Department's HCV treatment protocol prioritizes treatment based on severity of illness—those whose HCV is more advanced receive DAA treatment first. As inmates are treated with DAA medication, and as treatment methods improve and become more available, the Department moves down

[1] The Court overlooked a significant fact at the outset—most individuals with chronic Hepatitis C chose to forgo any form of treatment between approximately 2010 and 2014 because the prior medications had significant side-effects and were not very effective. As a result, there were vast populations of untreated HCV patients when the first direct-acting antiviral medication was introduced in December 2013.

the list of HCV inmates to provide DAA treatment to inmates with lower F scores. Additionally, the evidence established that inmates who have complicating medical conditions are given higher priority for treatment. The remaining inmates are monitored to ensure that they do not experience complications associated with HCV while they await treatment with DAA medications.

b. Delays Under the Department's Protocol are Not Likely to Decrease Treatment Efficacy and Increase the Risk of Cirrhosis, Cancer and Death

12. The Department Defendants also respectfully submit that the Court erred in finding that the "substantial delay in treatment that is inherent in the current protocol is likely to reduce the efficacy of the[] [direct-acting antiviral] medications and thereby prolong the suffering of those who have been diagnosed with chronic hepatitis C and allow the progression of the disease to accelerate so that it presents a greater threat of cirrhosis, hepatocellular carcinoma, and death of the inmate with such disease."

13. Initially, the Court erred in finding that delaying treatment under the protocol will "likely" reduce the efficacy of the DAA medication. On this point, the record contained treatment guidelines from the AASLD (an organization that promulgates HCV treatment guidelines) stating only that "treatment delay ***may*** decrease the benefit of SVR."

14. No evidence was presented that the delay Plaintiff has experienced under the Department's protocol is likely to decrease the efficacy of DAA medication.

15. Additionally, it is undisputed that only 20 to 30 percent of individuals with HCV will actually develop cirrhosis and it takes approximately 10 to 20 years for the disease to progress to that point. Only 2 to 7 percent of those individuals with cirrhosis will ever develop hepatocellular carcinoma (liver cancer).

16. Further, clear and undisputed evidence was offered that damage to the liver is not considered to be irreversible until an individual reaches the late stages of cirrhosis. Thus, it is clear that any impact of the delays associated with prioritizing treatment (as under the Department's protocol) on the long term progression of HCV is speculative at best; especially since the Department monitors the progression of patients and prioritizes the sickest HCV individuals for treatment with DAA medication first.

17. Additionally, no record evidence indicates that delay of treatment with DAA medication for individuals such as Plaintiff who have lower APRI scores and lower Metavir scores will result in prolonged suffering.

18. Finally, as regards Plaintiff, the record does not support a conclusion that Plaintiff is at imminent risk of irreparable harm. Plaintiff has established only

that he will continue to have fibrosis without administration of the DAA medication.

19. The clear evidence establishes that there is only a possibility that Plaintiff will ever progress to cirrhosis.

20. The clear evidence also establishes that Plaintiff will continue to be monitored for changes to his condition and prioritized for treatment with DAA medication in accordance with Department protocol.

21. Accordingly, any further injury to Plaintiff is speculative and is not supported by the record.

c. The Department's Protocol Does Not Violate the Standard of Care

22. The Court also erred in finding that the current standard of care is for treatment of all HCV individuals without the use of prioritization. The record is clear that the CDC has advised that use of direct-acting antiviral agents that include Sovaldi and Harvoni, rather than Interferon-based regiments, is the standard of care. However, the record also clearly reflects that the CDC has advised that ***guidance*** for treatment of HCV is available through the AASLD. The AASLD guidelines unequivocally state that practitioners may still need to prioritize patients for treatment. Finally, it is noteworthy that Plaintiff's own expert has advised monitoring treatment for patients who do not yet have access to DAA medications.

23. It is further submitted that, even were the protocol considered to be a deviation from the general standard of care, the Court erred in concluding that the deviation in Plaintiff's case constitutes deliberate indifference.

d. The Court Erred in Concluding that Plaintiff Will Likely Succeed in Establishing that the Department Defendants Have Been Deliberately Indifferent to Plaintiff's Serious Medical Condition

24. The Court erred in concluding that the Department Defendants were deliberately indifferent to a serious risk of harm to Plaintiff in applying the Department's protocol to deny DAA medication to Plaintiff at this time.

25. It clear that Plaintiff is an F2 ("possibly 2.5") and has an APRI score that indicates that Plaintiff does not have a high probability for cirrhosis.

26. Liver damage is not considered irreversible unless Plaintiff progresses to cirrhosis, and Plaintiff may never progress to that point even without medication.

27. It is also clear from the record that Plaintiff continues to be monitored on a quarterly basis and has not been diagnosed with any complications associated with HCV.

28. Given the low level of risk to the Plaintiff, the need to prioritize the sickest HCV individuals for treatment first, and the frequent, regular monitoring of Plaintiff's condition, the Court erred in concluding that Plaintiff would likely

succeed in establishing that the Department Defendants have been deliberately indifferent to his condition.

e. The Court Failed to Consider and Give Due Weight to Persuasive Authority in Factually Similar Cases

29. The Court erred in rejecting the persuasive authority from other jurisdictions finding no deliberate indifference in monitoring and prioritizing inmates for DAA medication rather than universally providing DAA medication. In rejecting this authority, the court notes that "the combination of an evolving standard of care and the substantial amount of evidence presented in this case has rendered the …cases unpersuasive."

30. The Court's determination that cases ruling on the standard of care related to HCV treatment with DAA medication one year ago are no longer persuasive based on an evolving standard of care is inconsistent with the Court's conclusion that the Department has been deliberately indifferent.

31. The cases cited by the Department Defendants all reflect a general acknowledgement by the judiciary that health care systems require time to put treatment protocols in place and to prioritize treatment for large populations of patients who have received no treatment for years.

32. The Court generally acknowledged this when it stated, "Simply prioritizing treatment so that those in the greatest need are treated first likely would not constitute a constitutional violation." Mem. Op. at p. 31.

33. Given this, the Court erred in concluding that the Department's prioritizing protocols, which simply prioritize treatment so that the greatest in need are treated first, and which have been issued and revised within a one-year period to reflect advancing treatment of DOC inmates and treatment advances, constitute deliberate indifference.

f. The Court Failed to Give Adequate Weight to the Impact on the Commonwealth

34. Finally, the Court failed to give adequate weight to the impact on the Commonwealth of granting the requested relief. Although the Court noted that its ruling has a budgetary impact, it is clear that the Court's ruling is an evisceration of the Department's Hepatitis C protocol and anticipates immediate treatment for all inmates with chronic HCV regardless of their Metavir score. The Court abused its discretion in giving little weight to this consideration and the resulting effect it will have on the Commonwealth's ability to provide other necessary services.

g. The Preliminary Injunction, as Crafted, Violates the PLRA

35. The preliminary injunction imposed was not properly tailored in accordance with the PLRA to afford the narrowest, least intrusive means of correcting the harm.

36. Ordering the ultimate relief in this case, DAA medication, without consideration of narrower methods for ensuring Plaintiff's medical welfare,

such as increased frequency of monitoring or fibrosis assessment, violates the clear mandate of the PLRA.

37. Further, the preliminary injunction gives the Department only 14 days to comply.

38. In so doing, the Court failed to inquire about or consider several practical issues such as the time needed to order, schedule, and review tests necessary to render a medical determination regarding DAA treatment. As a practical matter, a proper review of Plaintiff's medical status and commencing DAA treatment within the stated time period is impracticable if not impossible.

WHEREFORE, the Department Defendants respectfully request that the Court amend its findings of fact to include the attached exhibit, reconsider the referenced findings of fact and conclusions of law, and deny Plaintiff's preliminary injunction.

Respectfully submitted,

Office of General Counsel

Dated: January 12, 2017

By: /s/ Maria G. Macus

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served on the parties counsel in this matter via ECF.

By: /s/ Maria G. Macus
Maria G. Macus
Office of Chief Counsel
PA Department of Corrections

Dated: January 12, 2017

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DECLARATION OF PAUL A. NOEL, M.D., FAAFP, CCHP

I, Paul Noel, M.D., hereby state the following:

1. The Department continues to treat individuals in its custody with chronic HCV in accordance with its Hepatitis C Protocol, effective November 7, 2016.

2. Since the Interim Protocol was released in November 2015, approximately 140 patients have been treated with DAA medication through December 2016. These individuals were identified as a high priority for treatment.

3. The Department projects that it will treat another 160 inmates with DAA medication within the next 6 months.

4. It is anticipated that this will address all eligible inmates with a fibrosis score of F3 (advanced fibrosis) and F4 (cirrhosis).

5. The Department, meanwhile, continues to monitor all lower priority individuals in custody through its HCV chronic care clinic.

6. Additionally, the Department will continue to move down the priority list set forth in its Hepatitis C protocol and expects to begin evaluating patients in the next priority, F2, for DAA medication in the latter part of this year.

7. As regards Mr. Abu-Jamal, he continues to be monitored through the HCV chronic care clinic. He has been seen in the HCV clinic quarterly. His most recent chronic care clinic notes are attached as Exhibit A.

8. His current APRI score is 0.433 and indicates no medically significant change from his prior APRI scores. His latest lab reports from December 2016 (attached as Exhibit B) indicate that his liver condition is medically stable.

9. Based on the foregoing, it remains my opinion that Mr. Abu- Jamal does not have a high probability of cirrhosis.

10. I have been informed of the January 3, 2017 Order directing that Mr. Abu-Jamal be examined by a supervising physician within 14 days and started on DAA medications within 7 days thereafter absent medical contraindications.

11. From a medical standpoint, this is impracticable.

12. Prior to commencing a patient on DAA medication, a supervising physician will need to review updated labs and tests, including an abdominal sonogram and blood tests.

13. Abdominal sonograms must be scheduled with outside providers whose schedules are not directed by the Department. It often takes

at least two weeks to schedule a sonogram with an outside provider. Following the sonogram, additional time (approximately 2-3 days) is needed for the reviewing physician to prepare and submit the report to the Department's medical staff.

14. The supervising physician would necessarily require at least one, and possibly several, days to review Mr. Abu-Jamal's medical record, review the lab and sonogram reports, synthesize this information, and determine an appropriate treatment regimen.

15. Given the considerations above, the time frame set forth in the Court's January 3 Order is not a practical timeframe to appropriately begin treatment with DAA medication.

The foregoing is rendered within a reasonable degree of medical certainty and is made subject to 28 U.S.C. § 1746.

Dated: 1.12.2017

Paul A. Noel, MD
Chief, Clinical Services
Bureau of Healthcare Services
Pennsylvania Department of Corrections

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DEPARTMENT DEFENDANTS' MOTION TO STAY

AND NOW come Defendants Wetzel, Noel, Silva, BHCS Assistant Medical Director, and BHCS Infection Control Coordinator ("Department Defendants") and, pursuant to Fed. R. Civ. P. 62(b) and (c), move this Court to stay the preliminary injunction entered January 3, 2017 pending disposition of the Department Defendants' motion to amend or, in the alternative, for reconsideration. The following is set forth in support of this motion:

1. On January 3, 2017, the Court issued a Memorandum and Order: (1) enjoining the Defendants from enforcing the Department's Hepatitis C Protocol as it pertains to Plaintiff; (2) directing the Defendants to arrange for Plaintiff to be examined by a supervising physician experienced in the treatment of Hepatitis C within 14 days; and (3) directing the Defendants to treat Plaintiff with DAA

medications within 7 days thereafter unless the Supervising Physician determines those medications to be medically contraindicated

2. The Department Defendants have concurrently filed a motion to amend the findings of fact under Fed. R. Civ. P. 52 or, in the alternative, for reconsideration under Fed. R. Civ. P. 60 (doc. 29).

3. Additionally, due to the time constraints associated with complying with the Court's January 3, 2017 preliminary injunction, the Defendants have also filed a Notice of Appeal.

4. The Department Defendants have a strong likelihood of success on the merits on reconsideration or on appeal.

5. The Department Defendants will suffer substantially greater harm than Plaintiff if a stay is not entered.

6. Granting a stay strongly favors a public interest.

7. Additionally, granting a stay furthers the interests of fairness to the parties and judicial administration because the Department Defendants most likely will not be able to render an appropriate medical opinion and commence DAA medication within the timeframe outlined by the Court in its January 3 Order due to additional lab work and testing that must be performed before Plaintiff could be reviewed and started on DAA medication.

8. Counsel for the Medical Defendants concurs in this Motion.

9. Counsel for Plaintiff does not concur.

WHEREFORE, the Department Defendants respectfully request that the Court stay the January 3, 2017 preliminary injunction pending disposition of their motion to amend or in the alternative for reconsideration; further, to the extent the Court denies said motion, the Department Defendants request that the Court stay the January 3, 2017 pending their appeal.

Respectfully submitted,

Office of General Counsel

Dated: January 12, 2017

By: /s/ Maria G. Macus

Maria G. Macus
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