

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ROBERT HILTON and LOUIS VASQUEZ,  
on behalf of themselves and all others similarly situated,

Plaintiffs,

**FIRST AMENDED CLASS  
ACTION COMPLAINT**

–against–

LESTER N. WRIGHT, M.D., M.P.H.,  
Associate Commissioner/ Chief Medical Officer, for the  
New York State Department of Correctional Services;  
and the NEW YORK STATE DEPARTMENT OF  
CORRECTIONAL SERVICES,

**JURY TRIAL DEMANDED**

**05 Civ. 1038 (DNH) (DEP)**

Defendants.  
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Plaintiffs ROBERT HILTON and LOUIS VASQUEZ, by their attorneys KOOB &  
MAGOOLAGHAN, hereby allege as follows upon information and belief:

**PRELIMINARY STATEMENT**

1. ROBERT HILTON and LOUIS VASQUEZ, inmates who suffer from Hepatitis C and have repeatedly been identified by treating physicians as patients in need of combination antiviral therapy, commence this action on behalf of themselves and other similarly situated inmates as a result of defendants’ unlawful and abhorrent pattern and practice of refusing to provide treatment to those individuals known to be suffering from this potentially fatal disease. The action is commenced pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794, and seeks to immediately remedy defendants’ persistent violations of plaintiffs’ Eighth and Fourteenth Amendment rights and their rights to be free of arbitrary discrimination.

2. Treatment by medically indicated combination antiviral therapy has consistently been refused to those inmates confined under the care and custody of the New York State Department of Correctional Services (“DOCS”) who suffer from Hepatitis C because of a DOCS Hepatitis C Protocol that unconstitutionally and irrationally requires any prisoner who has used drugs or alcohol at any time in their life to participate in a non-medical prison-run substance abuse counseling program prior to receiving antiviral therapy.

3. Although attendance in and completion of the substance abuse program has no foundation in the generally accepted medical approach to Hepatitis C, defendants have imposed the requirement as a means of limiting the number of prisoners who receive the antiviral therapy in order to avoid the substantial expenses associated with the treatment. Thus, absent medical justification, defendants impose their unprecedented Hepatitis C Protocol on all prisoners with Hepatitis C, regardless of how far their illness has progressed and how much time has elapsed since the prisoner last used drugs or alcohol; regardless of whether the prisoner has ever abused drugs or alcohol in a clinical sense; regardless of whether the prisoner has ever been found using drugs or alcohol while in prison, and regardless of whether the prisoner has ever participated in drug and alcohol treatment programs in the past.

4. Moreover, defendants impose their Hepatitis C Protocol on all prisoners with Hepatitis C despite the fact that the substance abuse program is not available to hundreds of patients in immediate need of treatment because only a very limited number of inmates can attend the program at one time. Thus, due to the backlog in applications for the program, even Hepatitis C patients who agree to attend the program, like Mr. HILTON, must nevertheless wait an extensive period of time before they even have the opportunity to comply with DOCS’ Hepatitis C Protocol. During the waiting period, all treatment is denied.

5. Furthermore, once an inmate finally has the opportunity to enroll in the substance abuse program, defendants nevertheless deny their participation in the program if, by that time, there is a speculative possibility that the inmate might be released on parole before finishing the substance abuse program. Thus any Hepatitis C patient who has even the remotest possibility of release on parole within six months of the time they have the opportunity to enroll in the substance abuse program is categorically denied access to treatment for their Hepatitis C until such time as they are actually released from DOCS' custody.

6. Additionally, many inmates are denied Hepatitis C treatment even after they have participated in drug and alcohol counseling programs while in prison. For instance, Mr. VASQUEZ completed a three month drug and alcohol counseling program while in prison that was sanctioned by the Deputy Superintendent of Programs at Elmira Correctional Facility, yet defendant WRIGHT has declared that, because Mr. VASQUEZ participated in the program in 1991, he must participate in a new program now even though there is no evidence that Mr. VASQUEZ has used any drugs or alcohol since 1991.

7. Defendants' actions are contrary to law, contrary to sound medical practice, and contrary to the norms of a civilized society. As a result of defendants' conduct, plaintiffs have suffered and will continue to suffer permanent physical harm, emotional distress and mental anguish, and an increased risk of death. Accordingly, plaintiffs bring this action seeking compensatory and punitive damages, and declaratory and injunctive relief for defendants' violations of their Eighth and Fourteenth Amendment rights and their rights under the ADA and Section 504.

### **JURISDICTION AND VENUE**

8. This action arises under the Eighth and Fourteenth Amendments to the United States

Constitution, the ADA, Section 504, and under 42 U.S.C. §§ 1983 and 1988.

9. The jurisdiction of this Court is predicated upon 28 U.S.C. §§ 1331 and 1343.

10. The acts complained of occurred in the Northern District of New York and venue is properly lodged in this Court pursuant to 28 U.S.C. § 1391(b).

### **JURY DEMAND**

11. Plaintiffs demand trial by jury in this action.

### **THE PARTIES**

12. Plaintiff ROBERT HILTON has been under DOCS' care and custody since August, 2004, and is and was at all relevant times confined at either the Washington Correctional Facility ("Washington"), located in Comstock, New York, or the Altona Correctional Facility ("Altona"), located in Altona, New York. As of August 2005, Mr. HILTON was confined in Washington.

13. Plaintiff LOUIS VASQUEZ has been under DOCS' care and custody since April 1992 and is and was at all relevant times confined at Great Meadow Correctional Facility ("Great Meadow"), located in Comstock, New York and Southport Correctional Facility ("Southport"), located in Pine City, New York. As of August 2005, Mr. VASQUEZ was confined at Great Meadow.

14. Defendant LESTER N. WRIGHT, M.D., M.P.H. is and was at all relevant times herein the Associate Commissioner and Chief Medical Officer for the New York State Department of Correctional Services ("DOCS") and as such he is and was responsible for the supervision and administration of the provision of medical services at the State's correctional facilities. Defendant WRIGHT is and was responsible for the development and implementation of medical policies and practices for prisoners in the custody of DOCS, including Mr. HILTON and Mr. VASQUEZ. Defendant WRIGHT is personally responsible for the development and

implementation of the Hepatitis C treatment eligibility guidelines challenged in this case.

Defendant WRIGHT is sued in his individual and official capacity.

15. Defendant NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES is the agency created by the State of New York for the purpose of operating prison facilities within New York State and is a “public entity” as that term is used in 42 U.S.C. § 12131(1). At all relevant times herein, DOCS received federal financial assistance for the operation of prison facilities within New York State, including the Great Meadow, Southport, Washington, and Altona facilities.

16. All defendants named herein acted under color of state law at all relevant times.

### **FACTUAL ALLEGATIONS**

#### Progression and Treatment of Hepatitis C

17. Hepatitis C is a progressive viral disease that attacks the liver, often with fatal consequences.

18. About one fifth of individuals with chronic Hepatitis C eventually develop cirrhosis of the liver.

19. Because so many Hepatitis C patients develop cirrhosis of the liver, Hepatitis C is a leading cause of liver transplantation in the United States.

20. Treatment of chronic Hepatitis C in patients at risk of progression to cirrhosis is generally achieved through combination therapy (a combination of the antiviral drugs interferon and ribavirin).

21. Pegylated interferon, which is a type of interferon administered once per week, has achieved the highest response rates when combined with ribavirin and is currently recognized by a consensus of the medical community as the standard treatment for Hepatitis C.

22. The effectiveness of treatment for Hepatitis C is dependent on many factors. Where treatment is delayed, it becomes less effective because chronic Hepatitis C causes increased fibrosis, or scarring, of liver tissue and eventually cirrhosis of the liver.

23. If a patient develops liver cirrhosis, there is a substantial likelihood that antiviral therapy will be ineffective and the only alternative to a painful death will be liver transplantation.

24. In addition to making treatment ineffective, progression to cirrhosis or advanced fibrosis exposes patients to an increased risk of developing hepatocellular carcinoma, a cancer of the liver.

25. In light of the foregoing, any delay in providing treatment to individuals with chronic Hepatitis C exposes them to an elevated risk of serious physical harm, grave and substantial pain and suffering, and death.

26. In light of the foregoing, it is well-accepted within the medical community that Hepatitis C should be diagnosed as soon as possible, and treated promptly where medically indicated.

#### Defendants' Hepatitis C Protocol

27. Hepatitis C is a serious health problem for prisoners in DOCS custody, with at least 14% of men and 23% of women entering DOCS custody infected with Hepatitis C.

28. Defendants DOCS and WRIGHT have developed and implemented guidelines for deciding whether to provide treatment to Hepatitis-C-infected prisoners, and have set forth those guidelines in the Hepatitis C Primary Care Practice Guideline ("Hepatitis C Protocol").

29. Of particular relevance to this case, one of the guidelines contained in the Hepatitis C Protocol developed and applied by defendants WRIGHT and DOCS requires anyone who has ever admitted to using drugs or alcohol in the past to participate in a prison-run alcohol and

substance abuse counseling program before receiving Hepatitis C treatment.

30. There are two principal prison-run alcohol and substance abuse counseling programs: ASAT, which consists of daily classes over a period of six months; and RSAT, which is similar to ASAT but which requires participants to reside in a particular cell-block during the program.

31. Neither RSAT nor ASAT is supervised by medical staff, nor does either program require that instructors be accredited substance abuse counselors.

32. The Hepatitis C Protocol has for several years contained the ASAT/RSAT requirement described in paragraph 29, supra.

33. Defendants DOCS and WRIGHT have demonstrated a pattern and practice of applying the ASAT/RSAT requirement in a manner indicating disregard for reasoned and universally shared medical opinion regarding the treatment of Hepatitis C. Specifically, defendants DOCS and WRIGHT have applied the ASAT/RSAT requirement, and denied treatment for Hepatitis C, to patients until they have completed the substance abuse counseling program:

- a. regardless of the stage to which the disease has progressed;
- b. regardless of whether the requirement contravenes the treatment recommendations of DOCS' own treating physicians and specialists;
- c. regardless of how much time has passed since the prisoner last used drugs, and even upon prisoners who have not used drugs for more than a decade;
- d. regardless of whether a prisoner's past use of drugs or alcohol constituted substance abuse under clinical diagnostic criteria such as those enumerated in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, also known as the DSM-IV;
- e. regardless of whether the ASAT or RSAT programming is actually available in

the correctional facility in which the prisoner is confined;

f. regardless of whether the prisoner had previously completed a substance abuse treatment program, such as Alcoholics Anonymous, Narcotics Anonymous and the like, even if the program was offered at and sanctioned by a DOCS facility;

g. regardless of whether DOCS actually has space available in its ASAT or RSAT programs to allow the prisoner to fulfill the requirement; and

h. regardless of whether the prisoner has previously satisfied the ASAT/RSAT requirement and completed an earlier course of antiviral therapy, but requires a second course of therapy in order to make a complete recovery.

34. Both plaintiffs HILTON and VASQUEZ have been denied medically necessary Hepatitis C treatment as a result of the ASAT/RSAT requirement contained in the Hepatitis C protocol.

35. Defendants' categorical denial of necessary medical treatment to prisoners infected with Hepatitis C, including plaintiffs, on the basis of the ASAT/RSAT requirement is unsupported by sound medical judgment and constitutes deliberate indifference to prisoners' serious medical needs.

Denial of Treatment to ROBERT HILTON Due to DOCS' Hepatitis C Treatment Protocol

36. Prior to Mr. HILTON's current incarceration, and in or around December, 1999, Mr. HILTON had a biopsy that revealed that he has Hepatitis C and that his liver disease had progressed to Grade 2 Stage 2 portal tract fibrosis.

37. The Grade 2 Stage 2 designation reflects the standard classification spectrum developed to grade the progress of liver deterioration, whereby incipient damage is classified as

Grade 1, Stage 1 and cirrhosis rates at Grade 4, Stage 4.

38. The degree of fibrosis and inflammation reflected in Mr. HILTON's December 1999 liver biopsy indicated a risk that his liver disease would progress to cirrhosis.

39. The December 1999 biopsy diagnosis, combined with other clinical indicators, led doctors at Bellevue Hospital, in New York City, to institute a course of antiviral treatment for Mr. HILTON in or about 2002.

40. At all times relevant to this complaint, it was universally accepted within the medical community that a continuous 48 week course of treatment combining pegylated interferon and ribavirin is necessary to effectively treat Hepatitis C virus of the Type 1 genotype (the genotype of Mr. HILTON's Hepatitis C).

41. The antiviral treatment commenced at Bellevue in 2002 was interrupted after approximately 12 weeks of treatment after Mr. HILTON became homeless.

42. Mr. HILTON entered DOCS custody on or about August 18, 2004, and after being held in reception at Downstate Correctional Facility for two or three days, was confined at Altona.

43. When Mr. HILTON entered DOCS custody, he underwent a physical examination and a battery of blood tests.

44. In the course of Mr. HILTON's physical examinations at Downstate and Altona, he reported to the medical staff that he suffered from Hepatitis C and that his earlier antiviral therapy, initiated at Bellevue Hospital, had been interrupted prior to completion.

45. Mr. HILTON additionally informed Altona medical staff that, following his interrupted treatment at Bellevue, he had consulted medical providers at Metropolitan Hospital in New York City who, prior to his incarceration, recommended that he undergo a new course of

antiviral therapy.

46. Laboratory tests conducted while Mr. HILTON was in the custody of the New York City Department of Correction revealed that, on May 8, 2004, Mr. HILTON's liver function was not within normal limits and he was positive for Hepatitis C. Records of these tests accompanied Mr. HILTON when he entered DOCS custody and provided additional evidence of the need to institute antiviral therapy.

47. Despite Mr. HILTON's presenting symptoms in August, 2004, the Altona medical staff did not begin to screen and evaluate Mr. HILTON for Hepatitis C treatment until on or about October 6, 2004. Once the screening and evaluation process was begun, it was not completed until March, 2005, seven months later, at which time Mr. HILTON was finally medically cleared for Hepatitis C treatment.

48. Under all accepted medical standards, it should take no longer than six weeks to evaluate an individual for Hepatitis C treatment.

49. The delay in screening Mr. HILTON for Hepatitis C treatment upon his confinement in Altona was caused by the failure of defendants DOCS and WRIGHT to establish an effective system for promptly evaluating individuals with Hepatitis C for treatment.

50. Defendants DOCS and WRIGHT have intentionally failed to provide for the prompt testing and evaluation of individuals with Hepatitis C in order to reduce the number of individuals who are treated by DOCS for Hepatitis C.

51. The delay between August, 2004, and March, 2005, in medically clearing Mr. HILTON for Hepatitis C treatment upon his transfer from the custody of the New York City Department of Correction to the New York State Department of Correctional Services constituted deliberate indifference to Mr. HILTON's serious and potentially fatal medical

condition.

52. After Mr. HILTON was medically cleared for Hepatitis C treatment, and on or before March 23, 2005, the medical staff at Altona referred Mr. HILTON for evaluation by a gastroenterologist.

53. On or about April 22, 2005, Mr. HILTON was sent to Coxsackie Correctional Facility to be examined by a gastroenterologist, who recommended that Mr. HILTON begin treatment with a combination of pegylated interferon and ribavirin. The gastroenterologist made no recommendation whatsoever that Mr. HILTON attend a substance abuse program.

54. On or about May 2, 2005, medical providers at Altona completed a "Health Services Hepatitis C Form." On the form the providers entered various notations relating to Mr. HILTON's presentation, including information relating to laboratory measures of viral infection and liver function.

55. One space on the Health Services Hepatitis C Form, which the Altona providers did not complete, referred to enrollment in or completion of a prison-run substance abuse counseling program.

56. At the time the Health Services Hepatitis C Form was completed by the Altona providers, there had been no recommendation by any medical or other staff that Mr. HILTON enroll in or complete a prison-run substance abuse counseling program as a condition of receiving the antiviral treatment recommended by the outside specialist.

57. On or about May 4, 2005, Mr. HILTON was cleared to receive Hepatitis C treatment by New York State Office of Mental Health personnel, and Mr. HILTON signed a Hepatitis C Treatment Consent Form, consenting to the initiation of combination antiviral therapy.

58. On or about May 4, 2005, all DOCS and outside medical staff who had individually

evaluated Mr. HILTON for treatment with antiviral therapy uniformly had determined that he was both eligible to receive treatment and that it was medically appropriate for him to receive treatment.

59. At the time Altona medical staff recommended treatment for Mr. HILTON, he had not used any illicit drug for at least twelve years.

60. Notwithstanding the foregoing, Mr. HILTON was denied treatment for Hepatitis C because of the Hepatitis C Protocol that was developed and promulgated for DOCS by WRIGHT. Specifically, with callous and calculated disregard for Mr. HILTON's serious medical illness, defendants, by decision rendered in May, 2005, denied Mr. HILTON treatment for Hepatitis C until such time as he completed DOCS' substance abuse counseling program.

61. Defendants' May, 2005 callous determination to deny Mr. HILTON's treatment for his Hepatitis C until such time as he completed ASAT/RSAT was without medical justification.

62. In records available to defendants DOCS and WRIGHT at the time of their callous determination to deny Mr. HILTON treatment for Hepatitis C, the only basis for attributing any history of drug use to Mr. HILTON was Mr. HILTON's own admission, upon a previous commitment to DOCS custody in 1993, that he had as a teenager smoked marijuana and sniffed cocaine.

63. Mr. HILTON has spent much of the period since 1993 either in DOCS custody or under the supervision of the New York State Division of Parole. As a result, Mr. HILTON was periodically required to submit to drug tests, which uniformly showed him to be drug free.

64. When Mr. HILTON returned to DOCS custody in August 2004, he denied any ongoing drug use or abuse, and there is no evidence to call this denial into question.

65. Nonetheless, after Mr. HILTON was informed that he must participate in a prison-

run substance abuse counseling program in order to receive Hepatitis C medication, he elected to comply with defendants' policy in an effort to expedite his treatment.

66. Mr. HILTON elected to participate in a substance abuse counseling program even though the requirement was wholly extraneous not only to the treatment indicated for his Hepatitis C but also, in light of his lengthy abstinence from drug use, to his overall health needs.

67. Mr. HILTON was placed on the wait list for participation in RSAT at Altona because of the high demand for participation in the program.

68. On or about May 10, 2005, defendant WRIGHT informed medical staff at Altona that Mr. HILTON's presence on the wait list for RSAT did not qualify him to receive medication for his Hepatitis C, because he was not actively enrolled in RSAT.

69. Thus, despite Mr. HILTON's agreement to complete the ASAT/RSAT requirement, he was denied participation in same, and remained without medical care.

70. On or about May 16, 2005 Mr. HILTON was transferred to Washington. Upon his transfer Mr. HILTON filed a prison grievance demanding immediate antiviral therapy.

71. The Washington Inmate Grievance Resolution Committee, composed of two prisoners and two staffpersons, unanimously found that Mr. HILTON's grievance was warranted and that he should be provided with the antiviral therapy recommended by Mr. HILTON's treating physicians.

72. On or about June 8, 2005, the grievance committee's recommendation was rejected by Superintendent James Plescia of Washington, whose decision was upheld by DOCS' Central Office Review Committee upon Mr. HILTON's appeal.

73. The Central Office Review Committee rejected the recommendation of the Grievance Committee because the Hepatitis C Protocol developed and applied by defendants WRIGHT and

DOCS prohibits the administration of antiviral therapy to Mr. HILTON until such time as he satisfies the ASAT/RSAT requirement set forth in the Hepatitis C Protocol.

74. While confined at Washington, counseling staff attempted to enroll Mr. HILTON in ASAT, the Washington facility's analogue to the RSAT programming for which Mr. HILTON had been wait-listed at Altona.

75. On or about July 28, Mr. HILTON was informed that his application to enroll in ASAT was rejected because his parole eligibility date of November 2, 2005 would be reached prior to the conclusion of the six months of participation usually required of enrollees. Mr. HILTON thus remained without treatment, and without access to treatment, as a direct result of defendants' Hepatitis C Protocol.

76. Mr. HILTON was denied the antiviral treatment prescribed by a consultant, and sought by his doctors at Altona and Washington, because DOCS predicated his eligibility for treatment on enrollment in unrelated, unnecessary, and, in fact, unavailable substance abuse programming.

77. As antiviral treatment was denied on the basis of this Catch 22, Mr. HILTON's liver continued to deteriorate.

78. In August 2005, in response to Mr. HILTON's filing of the initial Complaint in this action and an accompanying Order to Show Cause seeking preliminary injunctive relief, defendants authorized the commencement of antiviral therapy for Mr. HILTON.

79. Mr. HILTON continues to be subject to defendants' unconstitutional Hepatitis C Protocol. Should Mr. HILTON, upon completing a course of antiviral therapy, require retreatment in the future while in DOCS custody, he will again be subjected to the ASAT/RSAT requirement.

80. Mr. HILTON has exhausted administrative remedies, to the extent they were made available.

Denial of Treatment to LOUIS VASQUEZ Due to DOCS' Hepatitis C Protocol

81. Mr. VASQUEZ was first tested for Hepatitis C in August 2004, while he was confined at Southport Correctional Facility.

82. On or about August 31, 2004, Mr. VASQUEZ received a biopsy which confirmed his diagnosis of Hepatitis C.

83. On or about October 25, 2004, Mr. VASQUEZ was transferred from Southport to Great Meadow.

84. The medical providers at Southport assured Mr. VASQUEZ that he would receive treatment for his Hepatitis C at Great Meadow.

85. Nonetheless, Mr. VASQUEZ was not approved for Hepatitis C treatment until in or around January 2005, when he was provided with a Hepatitis C Treatment Consent Form to sign.

86. Under all accepted medical standards, it should take no longer than six weeks to evaluate an individual for Hepatitis C treatment.

87. The delay in screening Mr. VASQUEZ for Hepatitis C treatment was caused by the failure of defendants DOCS and WRIGHT to provide a prompt system for evaluating individuals with Hepatitis C for treatment.

88. Defendants DOCS and WRIGHT have intentionally failed to provide for the prompt testing and evaluation of individuals with Hepatitis C in order to reduce the number of individuals who are treated by DOCS for Hepatitis C.

89. The delay between August, 2004 and January, 2005 in medically clearing Mr. VASQUEZ for Hepatitis C treatment constituted deliberate indifference to Mr. VASQUEZ's

serious and potentially fatal medical condition.

90. Even after Mr. VASQUEZ was cleared to receive treatment for his Hepatitis C, he continued to be denied access to the antiviral medications necessary to treat his disease.

91. On or about March 6, 2005, Mr. VASQUEZ filed a grievance requesting that he start receiving his treatment as soon as possible.

92. On or about March 25, 2005, the Inmate Grievance Resolution Committee (“IGRC”) unanimously recommended that Mr. VASQUEZ’s grievance be granted and noted that he was scheduled to see a doctor on March 29, 2005. At this doctor’s appointment, Mr. VASQUEZ presented his signed copy of the Hepatitis C Treatment Consent Form to Doctor Paolano.

93. Nonetheless, Mr. VASQUEZ still was not prescribed any antiviral medication for his Hepatitis C, and he appealed the IGRC’s decision to the Superintendent.

94. On or about April 6, 2005, Dr. Paolano informed Mr. VASQUEZ by memo that defendant WRIGHT had suspended Dr. Paolano’s request that Mr. VASQUEZ receive antiviral therapy because defendant WRIGHT could not confirm that Mr. VASQUEZ had completed a prison-run substance abuse counseling program.

95. On or about April 7, 2005, Superintendent Gary Greene found that Mr. VASQUEZ’s grievance had been satisfied because he was seen by a physician on March 29, 2005. Superintendent Greene indicated that a treatment plan had been recommended and that Great Meadow medical staff were awaiting approval from DOCS’ central office to proceed.

96. Mr. VASQUEZ appealed the Superintendent’s decision because he still had not received any medication for his Hepatitis C.

97. On or about May 18, 2005, the Central Office Review Committee unanimously denied Mr. VASQUEZ’s appeal, stating that Mr. VASQUEZ could not receive Hepatitis C

treatment until he is enrolled in a prison-run substance abuse counseling program.

98. In addition to filing grievances, Mr. VASQUEZ has personally appealed to defendant WRIGHT, in writing, seeking to understand why he must participate in a substance abuse program to receive medical treatment for his Hepatitis C.

99. In his letters to defendant WRIGHT, Mr. VASQUEZ explained that he completed a three month drug treatment program while in prison in 1991.

100. The drug treatment program Mr. VASQUEZ attended in 1991, called Project Renacer, was endorsed by the Deputy Superintendent of Programs at Elmira Correctional Facility.

101. Defendant WRIGHT responded to Mr. VASQUEZ via letter dated May 11, 2005, stating that the 1991 program was not sufficient and that Mr. VASQUEZ will not receive Hepatitis C treatment until he is currently enrolled in a prison-run drug counseling program.

102. Defendant WRIGHT has failed and refused to authorize the commencement of Hepatitis C treatment for Mr. VASQUEZ even though there is no evidence that Mr. VASQUEZ has ever used drugs since his participation in Project Renacer in 1991.

103. By on or about March 29, 2005, all DOCS and outside medical staff who had individually evaluated Mr. VASQUEZ for treatment with antiviral therapy uniformly had determined that he was both eligible to receive treatment and that it was medically appropriate for him to receive treatment.

104. At the time Great Meadow medical staff recommended treatment for Mr. VASQUEZ, he had not used any illicit drug in the past 25 years.

105. Despite the foregoing, Mr. VASQUEZ was denied treatment for Hepatitis C because of the Hepatitis C Protocol that was developed and promulgated for DOCS by defendant

WRIGHT. Specifically, with callous and calculated disregard for Mr. VASQUEZ's serious medical illness, Defendants DOCS and WRIGHT, by decision rendered in May 2005, denied him treatment for Hepatitis C until such time as he completed a DOCS substance abuse counseling program.

106. Mr. VASQUEZ has exhausted administrative remedies, to the extent they were made available.

Defendants' Irrational, Discriminatory and Deliberately Indifferent Application of the Hepatitis C Protocol

107. Both Mr. HILTON and Mr. VASQUEZ were denied treatment for Hepatitis C pursuant to the ASAT/RSAT requirement contained in the Hepatitis C Protocol developed and applied by defendants DOCS and WRIGHT.

108. The ASAT/RSAT requirement developed and applied by defendants WRIGHT and DOCS is irrational and has no foundation in medical science.

109. There is no medical support for denying treatment for Hepatitis C to a patient who has admitted to drug or alcohol use in the past but who is not contemporaneously participating in a drug treatment program.

110. Informed medical judgment recognizes that even active drug users may be appropriate candidates for Hepatitis C treatment, whether they participate in drug abuse counseling programs or not.

111. Defendants have applied their medically unjustified Hepatitis C Protocol despite the unavailability of ASAT or RSAT programming to many prisoners.

112. At the time plaintiffs were denied Hepatitis C treatment there were extremely long waiting lists to get into both ASAT and RSAT programs.

113. Prisoners, including those confined at Great Meadow, Altona and Washington, continue to be denied access to substance abuse programs because the ASAT and RSAT programs remain subject to long waiting lists that include many prisoners seeking to participate in the programs to comply with recommendations made by programming and counseling staff.

114. At least one correctional facility had more than one thousand (1,000) prisoners on their ASAT/RSAT waiting lists in 2004.

115. Great Meadow Correctional Facility did not begin offering a RSAT program until in or around 2002, and because of the programming needs of the population, experiences significant waiting lists for participation in the program.

116. Because of limited enrollment space, it can take several years before an inmate becomes eligible to participate in a substance abuse program at some DOCS facilities.

117. The refusal to treat Mr. HILTON and Mr. VASQUEZ is a result of defendants' policy and practice of deliberately disregarding the risk to prisoners' health caused by delays in treatment of Hepatitis C, and of defendants' deliberate disregard of the risk to categorically refusing to treat prisoners with Hepatitis C.

118. As a direct result of defendants' policy and practice, Mr. HILTON and Mr. VASQUEZ have been denied access to treatment for Hepatitis C.

119. As a direct result of defendants' policy and practice, Mr. HILTON and Mr. VASQUEZ have been denied medical treatment for a progressive, potentially fatal, liver disease.

120. Defendants' denial of medical care to Mr. HILTON and Mr. VASQUEZ has resulted in serious physical harm, as well as an increased risk of death.

121. The policy, pattern and practice of defendants DOCS and WRIGHT of delaying the diagnosis of and treatment for Hepatitis C to any prisoner who has ever admitted to using drugs

or alcohol in the past is irrational and in contravention of good and accepted medical practice.

122. Defendants' conduct in delaying and refusing treatment of Mr. HILTON and Mr. VASQUEZ's Hepatitis C evidences defendants' deliberate indifference to plaintiff's serious medical needs and defendants' cruel and unusual treatment in violation of the Eighth Amendment to the United States Constitution.

123. As a result of defendants' deliberate indifference, Mr. HILTON and Mr. VASQUEZ have experienced an increased risk of death, extreme pain and suffering, and emotional distress.

124. DOCS and WRIGHT have maintained their policy, pattern and practice regarding Hepatitis C for the purpose of avoiding the costs inherent in offering Hepatitis C treatment to prisoners in DOCS custody.

125. The refusal by defendants WRIGHT and DOCS to treat Mr. HILTON and Mr. VASQUEZ is not medically justified and evidences defendants' callous disregard to the threat presented to plaintiff's health by Hepatitis C.

126. The policy and practice of DOCS and WRIGHT bears no rational relationship to any legitimate governmental interest and/or is motivated by ill will or animus toward prisoners with a past history of drug or alcohol use, including Mr. HILTON and Mr. VASQUEZ.

127. By imposing the ASAT/RSAT requirement blindly upon all past drug users, Defendants DOCS and WRIGHT have demonstrated that they regard all persons who have ever used drugs, including Mr. HILTON and Mr. VASQUEZ, to have a physical or mental impairment that substantially limits one or more of the major life activities of such individuals.

128. By imposing the ASAT/RSAT requirement upon all prisoners who have ever admitted to using drugs, defendants have discriminated against such prisoners, including Mr. HILTON and Mr. VASQUEZ, on the basis of their perception that such prisoners have a

disability.

129. In addition, defendants' policy discriminates against prisoners on the basis of prior drug use and/or abuse, which discrimination is separately prohibited by the ADA and Section 504.

130. Defendants DOCS and WRIGHT have maintained their policy and practice of discrimination in the face of substantial risk of serious physical harm to Mr. HILTON, Mr. VASQUEZ, and other similarly situated prisoners.

### **CLASS ACTION ALLEGATIONS**

131. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(1), Rule 23(b)(2), and Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all prisoners with Hepatitis C who must now or in the future meet defendants' ASAT/RSAT requirement to obtain treatment.

- a. The exact size of the class is unknown to plaintiffs but upon information and belief more than 8,500 male inmates and more than 700 female inmates are infected with Hepatitis C. Upon information and belief, less than 2% of these prisoners receive antiviral therapy, though it is likely that between at least 6% and 12% of prisoners with Hepatitis C are medically appropriate candidates for treatment. Accordingly, plaintiffs conservatively estimate that the size of the class is larger than 500 prisoners.
- b. The conditions, practices and omissions that form the basis of this complaint are common to all members and the relief sought – voiding defendant DOCS and WRIGHT's categorical ASAT/RSAT requirement –

will apply to the entire class.

- c. The claims of plaintiffs are typical of the claims of the entire class.
- d. The prosecution of separate actions by individual members of the class would create a risk of inconsistent and varying adjudications that would establish incompatible standards of conduct for the defendants.
- e. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members which would, as a practical matter, substantially impair the ability of other members to protect their interests.
- f. Defendants have acted or refused to act on grounds generally applicable to the class, making appropriate injunctive and declaratory relief with respect to the class as a whole.
- g. There are questions of law and fact common to the members of the class, including defendants' violations of the Constitution of the United States, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, based on their failure to provide prisoners with Hepatitis C antiviral therapy necessary to treat their disease.
- h. The questions of law and fact common to the members of the class predominate over questions affecting individual class members.
- I. Proceeding as a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- j. The named plaintiffs are capable of fairly and adequately representing the class and protecting its interests. Koob & Magoolaghan, counsel for

plaintiffs, is a private civil rights law firm experienced in prisoners' civil rights litigation that, through prior litigation has secured court-ordered institutional reform within several DOCS-operated prisons. Koob & Magoolaghan also has recently secured Hepatitis C treatment for individual DOCS prisoners through federal and state court litigation.

132. Plaintiffs have exhausted their administrative remedies, to the extent they were made available.

### **FIRST CAUSE OF ACTION**

133. Plaintiffs repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 132.

134. Defendant WRIGHT's past and continuing failure to provide plaintiffs ROBERT HILTON and LOUIS VASQUEZ with adequate treatment for Hepatitis C during plaintiffs' period of confinement in DOCS custody demonstrates deliberate indifference to and/or willful neglect of plaintiffs' serious medical needs constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

135. As a result of defendants' violation of plaintiffs' constitutional rights, plaintiffs have suffered severe pain and suffering, including unnecessary pain and discomfort, a deterioration of health, loss of future earnings, permanent disability, mental and emotional distress, and an increased risk of death, and accordingly plaintiffs are entitled to compensatory damages against defendant WRIGHT in an amount to be determined at trial, punitive damages in an amount to be determined at trial, and appropriate injunctive and declaratory relief against defendant WRIGHT, including but not limited to the provision of treatment with pegylated interferon combination therapy.

## **SECOND CAUSE OF ACTION**

136. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 135.

137. Under the policy imposed and applied by Defendants DOCS and WRIGHT, all past drug or alcohol users, including Mr. HILTON and Mr. VASQUEZ, are regarded by defendants as having a disability under the Americans With Disabilities Act. See 42 U.S.C. § 12102 (2)(C).

138. Defendants WRIGHT and DOCS's past and continuing failure to provide plaintiffs ROBERT HILTON and LOUIS VASQUEZ with adequate treatment for Hepatitis C during their period of confinement in DOCS custody discriminates against qualified individuals with disabilities, including plaintiffs, in violation of the Americans With Disabilities Act, 42 U.S.C. § 12132.

139. As a result of defendants' violation of plaintiffs' statutory rights, plaintiffs have suffered severe pain and suffering, including unnecessary pain and discomfort, a deterioration of health, loss of future earnings, permanent disability, mental and emotional distress, and an increased risk of death, and accordingly plaintiffs are entitled to compensatory damages against Defendants WRIGHT and DOCS in an amount to be determined at trial, punitive damages in an amount to be determined at trial, and appropriate injunctive and declaratory relief against Defendants WRIGHT and DOCS, including but not limited to the provision of treatment with pegylated interferon combination therapy.

## **THIRD CAUSE OF ACTION**

140. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 139.

141. Under the policy imposed and applied by Defendants DOCS and WRIGHT, all past

drug or alcohol users, including Mr. HILTON and Mr. VASQUEZ, are regarded by defendants as having a disability under Section 504 of the Rehabilitation Act. See 29 U.S.C. § 705(20)(B)(iii).

142. Defendants WRIGHT and DOCS's past and continuing failure to provide plaintiffs ROBERT HILTON and LOUIS VASQUEZ with adequate treatment for Hepatitis C during their period of confinement in DOCS custody discriminates against qualified individuals with disabilities, including plaintiffs, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

143. As a result of defendants' violation of plaintiffs' statutory rights, plaintiffs have suffered severe pain and suffering, including unnecessary pain and discomfort, a deterioration of health, loss of future earnings, permanent disability, mental and emotional distress, and an increased risk of death, and accordingly plaintiffs are entitled to compensatory damages against Defendants WRIGHT and DOCS in an amount to be determined at trial, punitive damages in an amount to be determined at trial, and appropriate injunctive and declaratory relief against defendants WRIGHT and DOCS, including but not limited to the provision of treatment with pegylated interferon combination therapy.

**WHEREFORE**, plaintiffs respectfully request judgment be entered against defendants and that this Court enter an Order:

- (A) granting plaintiffs' request for certification of this action as a class action;
- (B) awarding compensatory damages in an amount to be determined at trial;
- (C) awarding punitive damages against defendants in an amount to be determined at trial;
- (D) awarding appropriate injunctive relief, including that defendants WRIGHT and DOCS treat plaintiffs with pegylated interferon and ribavirin;
- (E) declaring unconstitutional the policy and practice of denying Mr. HILTON and Mr.

VASQUEZ access to treatment for his Hepatitis C;

(F) declaring unconstitutional defendants' policy and practice of predicating eligibility for Hepatitis C treatment on enrollment in substance abuse programming;

(G) awarding reasonable attorneys' fees, costs, and disbursements under 29 U.S.C. § 794a, 42 U.S.C. § 12205; and 42 U.S.C. § 1988; and

(H) directing such other and further relief as the Court may deem just and proper, together with attorneys' fees, interest, costs and disbursements of this action.

Dated: New York, New York  
September 2, 2005

**KOOB & MAGOOLAGHAN**

/s/ Alexander A. Reinert

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