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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Hearing Date: July 15, 2010
Time: 2:00 P.M.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Pursuant to Federal Rule of Civil Procedure 15(a), Plaintiffs submit this motion seeking leave to file a third amended complaint. The [Proposed] Third Amended Complaint, attached as Exhibit A, does not change anything in the Second Amended Complaint. Rather, it adds three new claims for relief. One claim would merely add two individuals, Tim Michael Josephs and William Blazinski, as plaintiffs seeking identical relief to that already sought by the other named plaintiffs. The other two claims for relief — by VVA and the Individual Plaintiffs — would add the Department of Veterans Affairs (the "DVA") and its Secretary, Eric K. Shinseki, as defendants based on two narrow claims for relief (the "DVA claims").

Background

Plaintiffs filed this action on January 7, 2009, asserting claims for injunctive and declaratory relief. The crux of the case arises from Defendants' actions and inactions regarding, *inter alia*, chemical and drug testing of "volunteer" veterans and deficiencies in providing notice and health care to these test subject veterans. The Court denied in part Defendants' Motion to Dismiss on January 19, 2010, and discovery began shortly thereafter. Throughout the litigation, Plaintiffs have reserved the right to "seek leave to add additional parties or claims, and . . . the right to seek leave to amend the Complaint, if appropriate, following a period of discovery." (Updated Initial Joint Case Management Statement, December 3, 2009, ECF Doc. 51 at 10.)

Joinder is Proper

Plaintiffs' request for leave is consistent with Federal Rule of Civil Procedure 20, which governs permissive joinder. The permissive party joinder rule is liberally construed by courts to permit a broad scope of litigation. *See League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977). Adding Mr. Josephs and Mr. Blazinski as plaintiffs and the DVA and its Secretary as defendants clearly meet the requirements of Rule 20. The only requirements under the rule are that the rights asserted by or against the joining party "[arise] out of the same transaction, occurrence, or series of transactions or occurrences; and [that] any question of law or fact common to [the parties] will arise in the action." Fed. R. Civ. P. 20. Rule 21 further states that "the court may, at any time, on just terms, add or drop a party" either *sua sponte* or on motion. Fed. R. Civ. P. 21.

Plaintiffs have been forced to confront the fact that several of the Plaintiffs are ill, and one of the Plaintiffs, Wray Forrest, has inoperable cancer, and is receiving hospice care for the last days of his life. Therefore, Plaintiffs proposed to add Mr. Josephs and Mr. Blazinski, both of whom are veterans who were military test subject "volunteers" at Edgewood Arsenal. (Exh. A at ¶¶ 200-231.) Thus, their rights arise out of the same series of occurrences – i.e., experimental testing and harmful exposures – as the current Plaintiffs, and common questions of law and fact exist between them and the current Plaintiffs. Plaintiffs have previously notified Defendants during the course of meet and confer discussions of the likelihood that they may add additional individual Plaintiffs, and transmitted a draft of the proposed amendment regarding Mr. Josephs and Mr. Blazinski to Defendants for their review on June 2, 2010. (Declaration of Gordon P. Erspamer ("Erspamer Decl.") at ¶ 7.)

With respect to the DVA and Secretary Shinseki, during the course of discovery, Plaintiffs ascertained important new facts regarding the DVA's role in the chemical and biological weapons testing program and its aftermath. As explained in the proposed Third Amended Complaint, the DVA supplied substances to the Army, DOD, and CIA for use in human experiments. (Exh. A at ¶ 239). Plaintiffs have also learned that the DVA has assumed responsibility for notifying veterans involved in the experiments and of the existence of several defects in and/or improprieties with respect to the DVA's program for notifying "volunteers," including the distribution of false or misleading claims calculated to discourage veterans from filing SCDDC claims or seeking VA health care. *See* Exh. A at ¶¶ 234--243. Moreover, the DVA has itself conducted a series of experiments on veterans utilizing many of the same drugs and toxic chemicals that the Defendants used on military personnel at Edgewood, Fort Detrick, and other military and other installations. Among the common chemicals/drugs tested are BZ (quinuclidinyl benzylate), Lewisite, LSD, mustard gas, phosgene, sarin, soman, tabun, and VX (nerve gas). These also include a long litany of biological agents such has botulism, anthrax, ebola virus, brucellla, and many others. Plaintiffs' claims against the DVA and the current Defendants, indeed, arise out of the same series of occurrences. Questions of law and fact related to Plaintiffs' claims are common among the DVA and the current Defendants.

Thus, Plaintiffs VVA and the Individual Plaintiffs seek declaratory relief in the new Fifth Claim for Relief that the DVA cannot act as a neutral decision-maker under the due process clause because of its self-interest, conflict of interest, and bias in the underlying events. Plaintiffs also seek an injunction forbidding defendants from continuing to mislead "volunteers" or their survivors, and from continuing to use biased decision-makers to decide their eligibility for free, priority health care and for SCDDC, including DIC. Plaintiffs also seek declaratory and injunctive relief pursuant to the Administrative Procedure Act in their new Sixth Claim for Relief. Plaintiffs seek a declaration that DVA's rating procedures and standards for deciding chemical and biological weapons claims violate the rule of reasonable doubt set forth in 38 C.F.R. § 3.102. Plaintiffs also seek an injunction compelling the DVA to apply the reasonable doubt doctrine to Plaintiffs and all "volunteers," and compelling DVA to notify Plaintiffs and all "volunteers" of the details of their participation in human experimentation programs and provide them with full documentation of the experiments done on them and all known or suspected health effects.

Therefore, joining Mr. Josephs and Mr. Blazinski as plaintiffs and the DVA and its Secretary as defendants on two new claims is proper.

Leave to Amend Is Liberally Granted

Federal Rule of Civil Procedure 15(a) requires that the "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citations omitted). The Supreme Court has held that leave to amend should be "freely given" in the absence of four factors: (1) bad faith, (2) undue delay, (3) undue prejudice to the opposing party, and (4) futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). As explained below, none of these factors exist in this case. Furthermore, a party opposing a motion to amend must shoulder a substantial burden to demonstrate that the motion should not be granted. *Lucasarts Entm't Co. v. Humongous Entm't Co.*, 870 F. Supp. 285, 288 (N.D. Cal. 1993); *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989).

First, Plaintiffs are not acting in bad faith by seeking to add Mr. Josephs and Mr. Blazinski as plaintiffs and the DVA and Secretary Shinseki as defendants. All four additional parties clearly satisfy the permissive joinder rule, as explained above. With respect to the new claims, a party may act in bad faith when "seeking to prolong the litigation by adding new but baseless legal theories." S*ee Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 881 (9th Cir. 1999). Here, that is certainly not the case. Plaintiffs' request to amend is made in good faith and on the grounds that additional information has been discovered that supports the DVA claims and the claims brought by Mr. Josephs and Mr. Blazinski. (Erspamer Decl. at ¶¶ 2,3,4.)

Second, while "[u]ndue delay by itself . . . is insufficient to justify denying a motion to amend," *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999), there has been no undue delay here. As mentioned above, one of the current Plaintiffs, Wray Forrest, is in very poor health and not expected to live much longer. Given the expected duration of litigation remaining, it has become necessary to add new plaintiffs in order to fill that anticipated void. Moreover, Plaintiffs intend to file a motion for class certification in due course, and intend to propose Mr. Josephs and Mr. Blazinski as class representatives. In order to avoid delays in the adjudication of class certification issues, it is therefore necessary to add Mr. Josephs and Mr. Blazinski at this stage.

With respect to the DVA claims, only through the course of discovery have Plaintiffs learned the extent of the DVA's involvement, giving rise to the two new narrow claims. Plaintiffs note that a further settlement conference in this action is scheduled for June 16, 2010, the success of which may depend on Plaintiffs' ability to obtain binding commitments from the DVA. Amending the complaint to add the DVA and Secretary Shinseki as parties is therefore a matter of significant urgency.

Third, adding the new parties and claims will not cause Defendants any undue prejudice. The party opposing a motion to amend bears the burden of showing prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). The new claims being proposed relate to the same factual subject matter as the current claims pending, of which Defendants have had notice for some time. Defendants have also been well aware that Plaintiffs might add further parties and claims throughout the litigation. Plaintiffs expressly reserved the right to seek leave to amend

"following a period of discovery" in the December 3, 2009 Updated Initial Joint Case Management Statement. (ECF Doc. 51 at 10 (emphasis added).) During a meet and confer call on May 19, 2010, Defendants asked whether Plaintiffs intended to amend the complaint in the near future, and Plaintiffs responded that they would be seeking leave to amend shortly. (Erspamer Decl. at ¶ 6.) Furthermore, on June 2, 2010, Plaintiffs gave Defendants the proposed sections for Mr. Josephs and Mr. Blazinski and asked them to stipulate, even in part, to Plaintiffs' amendments. (Erspamer Decl. at ¶ 7.) Trial in this action is not set until March 26, 2012, and the pre-trial schedule will be unaffected by these amendments. Moreover, the DVA is represented by the same counsel as the existing Defendants, and discovery has only recently begun. Defendants will be unable to meet their heavy burden to show undue prejudice.

Finally, the amendment would not be futile. The Ninth Circuit has held that leave to amend should be granted "unless it appears beyond doubt" that the amendment would be futile. *DCD Programs*, 833 F.2d at 188. Plaintiffs' additional claims clearly meet this low standard.

Conclusion

It was almost inevitable, considering the sheer size of the case, number of "volunteers" and parties involved, and quantities of documents only recently being unearthed, that the complaint would need to be amended further. Given the liberality with which courts grant leave to amend and the absence of bad faith, undue delay, undue prejudice, or futility of the proposed claims, the Court should grant Plaintiffs' motion. Judicial efficiency further favors granting leave to amend.

Accordingly, for the reasons explained above, Plaintiffs respectfully request that the Court issue an Order granting them leave to file a Third Amended Complaint.

Dated: June 7, 2010

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